REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1841.

By RICHARD PETERS,

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

VOL. XV.

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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OBITUARY.

HON. FELIX GRUNDY.

At the opening of the court, Mr. Gilpin, the Attorney-General of the United States, addressed the court as follows:

"I have been requested, by a meeting of the gentlemen of this bar, and the officers of this court, to submit the proceedings lately adopted by them in which they express their feelings at the loss sustained by the profession, and the whole country, in the death of Mr. Grundy, of Tennessee. They respectfully solicit the permission of the court, that they may be inserted among its records. If a long life, largely passed in the practice, and illustrated by the honors of a profession which he ever pursued with an honorable and elevated spirit; if a bland, cheerful and generous intercourse towards those with whom he was called upon to act; if the exercise of an excellent judgment, which guided all his actions, and was tempered with a simplicity and a modesty that gave but the more force to the quickness of his intelligence, and the extent of his learning; if these, and the many qualities which secured an affectionate respect and remembrance from all who knew him, afford a reason for soliciting from the court that favor which is now sought by the bar, I well know that it will be promptly granted; for to none better than to those who here preside, were these qualities known; by none were they more justly appreciated. I respectfully move the court, that the resolutions which I now submit may be entered on its minutes."

To which Mr. Chief Justice Taney made the following reply: "The members of the court have sincerely deplored the death of Mr. Grundy, and unite with the bar in expressing their respect and esteem for his character. The office of Attorney-General of the United States, which he recently held, connected him for a time, closely, with the business of this court; and we willingly bear testimony to his kind and amiable character as a man, as well as to his learning and ability as an officer. And concurring, as we cordially do, in the resolutions adopted by the bar, they will be entered on the records of the court."

Whereupon, it is ordered by the court, that the following proceedings be entered upon the minutes, viz:

At a meeting of the gentlemen of the Bar of the Supreme Court of the United States, at the court-room in the Capitol, on the 20th day of Jan-

uary, A. D. 1841. The Hon. Samuel L. Southard was appointed chairman, and Mathew Birchard, Esq., appointed secretary. The following resolutions were submitted by Richard Peters, Esquire, and unanimously adopted, viz:

Resolved, that the members of this bar, and the officers of this court, feel, with deep sensibility, the loss which the profession and the country have sustained in the death of the Hon. Felix Grundy, late Attorney-General of the United States, and a member of this bar.

Resolved, that we cherish the highest respect for the professional learning of the deceased; for the purity and uprightness of his professional life; and for the amiable and excellent qualities which belonged to him as a man.

Resolved, that to testify these sentiments, we will wear the usual badge of mourning for the residue of the term.

Resolved, that Mr. Gilpin, the Attorney-General of the United States, do move the court that these resolutions be entered upon the minutes of their proceedings.

MR. JUSTICE BARBOUR.

On the opening of the court, Mr. Gilpin, the Attorney-General of the United States, made the following remarks:

"Since the adjournment, caused by the sudden and most afflicting event which deprived this court, and his country, of the services of Mr. Justice Barbour, the members of the bar, and the officers of the court, have assembled to express the feelings which the relations with him, that it was their pride and happiness to enjoy, could not but make peculiarly poignant. They have requested me, respectfully, to lay before the court this, the last offering of respect which they are able to pay, and to solicit the favor of having inserted among the records of the court, resolutions whose sincerity must compensate for the feeble manner in which they convey their deep sense of the loss they have sustained. To those whom I am thus, in the name of my professional brethren, called upon to address, and who were the daily and more intimate witnesses of the learning, the genius and the many admirable traits by which Judge Barbour was distinguished, any testimony of mine, to these high qualities, would appear truly inadequate; but I may be permitted to say, that no judge had ever more completely gained the confidence and respect of those who were called upon to appear before him; the decisions of no one were ever listened to with more certainty that they were the emanations of an enlightened intellect, and excellent judgment, the purest intentions, and the kindest heart. When to these motives for esteem, were added that bland, frank and unaffected deportment, which is fresh in the recollection of us all, it is needless to say, that the tie that has been severed is felt by us to have been closer than that of mere official intercourse; and we cannot forget, that while the chair of the

judge is made vacant, a blank, too, is left in the circle of our friends. In compliance with the instructions of the meeting, on whose behalf I appear, I respectfully request that the following proceedings may be entered of record : "

At a meeting of the members of the Bar of the Supreme Court of the United States, and the officers of the court, at the court-room in the Capitol, on Friday, the 26th of February 1841, the Honorable Thomas Clayton was appointed chairman, and the Honorable Silas Wright, Jr., was appointed secretary. The following resolutions were submitted by General Walter Jones, and unanimously adopted :

Resolved, That the members of this bar, and the officers of this court, have heard with deep regret of the sudden death of the Honorable PHILIP P. BARBOUR, one of the Associate Justices of this Court.

Resolved, That we entertain the highest veneration for his memory, a grateful admiration of the ability and integrity with which he devoted himself to the performance of his distinguished trust, and a recollection that will long continue of the virtue, the urbanity, and the genius by which his personal character was adorned.

Resolved, That we will attend the removal of his remains this day, and wear the customary badge of mourning for the residue of the term.

Resolved, That Mr. Gilpin, the Attorney-General of the United States, communicate these proceedings to the supreme court, and respectfully request, in the name of this meeting, that they may be inserted among its records.

Resolved, That the chairman and secretary also transmit a copy to the family of the deceased ; and assure them of our sincere condolence on account of the great loss they have sustained.

T. CLAYTON, Chairman.

SILAS WRIGHT, JR., Secretary.

To which Mr. Chief Justice TANEY made the following reply : "I speak in the name of the court, and by its authority, when I say, that we have scarcely yet recovered from the unexpected blow which has fallen upon us ; our deceased brother, for weeks past, has been daily with us in the hall, listening to the animated and earnest discussions which the great subjects in controversy here naturally produce ; and he has been with us, also, in the calmer scenes of the conference-room, taking a full share in the deliberations of the court, and always listened to with the most respectful attention. It was from one of these meetings, which had been protracted to a late hour of the night, that we all last parted from him, apparently in his usual health ; and in the morning, we found that the associate whom we all so highly respected, and the friend we so greatly esteemed, had been called away from us, and had passed to another, and we trust to a better world. The suddenness of the bereavement, the character of the judge we have lost, and his worth as a man, made it proper to suspend the business of the court until

to-day. The time was necessary, not only to pay the honors due to his memory, but to recollect and fit ourselves for renewed labors.

"Judge BARBOUR was a member of this court but a few years; yet he has been long enough here, to leave behind him, in the published proceedings of the court, striking proofs of the clearness and vigor of his mind, and of his eminent learning and industry. But those only who have been intimately associated with him, as members of the same tribunal, can fully appreciate the frankness of his character, and the singleness and purity of purpose with which he endeavored to discharge his arduous duties. By those who have thus known him, his memory will always be cherished with the most affectionate remembrance; and we will cordially unite with the bar in the honors they propose to pay to his memory.

"The court, therefore, order that the resolutions of the bar be entered on the records of the court; and the judges will wear the customary badges of mourning, during the residue of the term."

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. Roger B. Taney, Chief Justice.

" Joseph Story,
" Smith Thompson,
" John McLean,
" Henry Baldwin,
" James M. Wayne,
" Philip P. Barbour,
" John Catron.
" John McKinley.

} Associate Justices.

Henry D. Gilpin, Esq., Attorney-General.

William T. Carroll, Clerk.

Richard Peters, Reporter.

Alexander Hunter, Marshal.

ORDER OF COURT.

There having been an Associate Justice of this court appointed during the present term: It is ordered that the following allotment be made of the Chief Justice and the Associate Justices of said court among the circuits, agreeable to the act of congress in such case made and provided; and that such allotment be entered of record, viz:

For the	first Circuit,	Hon.	Joseph Story.
"	second Circuit,	"	Smith Thompson.
"	third Circuit,	"	Henry Baldwin.
"	fourth Circuit,	"	Roger B. Taney, Ch. J.
"	fifth Circuit,	"	Peter V. Daniel.
"	sixth Circuit,	"	James M. Wayne.
"	seventh Circuit,	"	John McLean.
"	eighth Circuit,	"	John Catron.
"	ninth Circuit,	"	John McKinley.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1841.

*James Moody Vaughan and others, Appellants, *v.* Henry Northup, Administrator of James Moody, deceased, and others.

Suits against administrators.—Local assets.

An administrator, appointed and deriving his authority from another state, is not liable to be sued in the district of Columbia, in his official character, for assets lawfully received by him in the district, under and in virtue of his original letters of administration.

Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased, in any other state; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions, and the interests of its own citizens.

The administrator is exclusively bound to account for all the assets which he receives under, and by virtue of, his administration, to the proper tribunals of the government under which he derives his authority; the tribunals of other states have no right to interfere with, or control the application of those assets, according to the *lex loci*. Hence, it has become an established doctrine, that an administrator cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debt due there by his intestate.

The debts due from the government of the United States have no locality at the seat of government; the United States, in their sovereign capacity, have no particular place of domicil; but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicil.[1]

The administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it; whether it be at the seat of government, or at any other place where the funds are deposited.

*The act of congress of June 1822, authorizes any person to whom letters-testamentary or of administration have been granted, in the states of the United States, to prosecute claims by suit, in the courts of the district of Columbia, in the same manner as if the same had been granted to such persons by the proper authority in the district of Columbia. The [*2

[1] United States *v.* Coxe, 18 How. 100; Wyman *v.* Halstead, 109 U. S. 654.

power is limited by its terms to the institution of suits, and does not authorize suits against an executor or administrator. The effect of this law was, to make all debts due by persons in the district, not local assets, for which the administrator was bound to account in the courts of the district; but general assets, which he had full authority to receive, and for which he was bound to account in the courts of the state from which he derived his letters of administration. Kane *v.* Paul, 14 Pet. 33, cited.

Vaughan *v.* Northop, 5 Cr. C. C. 496, affirmed.

Appeal from the Circuit Court of the District of Columbia, and county of Washington. A bill was filed on the equity side of the circuit court of the district of Columbia, stating, that the complainants were the next of kin and distributees of James Moody, deceased, who resided in Kentucky, at the time of his death: that the defendant, Northup, took out letters of administration on the estate of said Moody, in the proper court in Kentucky, and by virtue of said letters, claimed and received from the government of the United States, a large sum of money, to wit, $5200. The bill further stated, that the complainants resided in Virginia; that Northup was in the district of Columbia, at the time of filing the bill (and Northup was actually found in the district, as appeared by the marshal's return of the *subpœna*), and that the other defendants resided in Kentucky, and pretended to be the next of kin and distributees of said Moody. The bill prayed an account of said estate against said Northup, and distribution of the assets received from the United States, &c.

Northup answered, and pleaded to the jurisdiction of the court, on the ground, that he was only responsible to the court in Kentucky, in which he had obtained letters of administration: he then went on and answered the bill at large, denying all its material allegations. The other defendants also came in and answered the bill. The complainants ordered the plea of Northup, to the jurisdiction of the court, to be set down for argument; and upon the argument, the court below ordered the bill of complaint to be dismissed. The complainants appealed to the supreme court.

*3] *The case was argued by *Brent*, for the appellants; and by *Coxe*, for the appellee.

Brent stated, that the question was, whether a foreign administrator, one who had taken out letters of administration in another state, can come into the district of Columbia, and receive money in the district, and was not answerable for the amount so received, in the district. The appellee, Henry Northup, was in the district when the suit was brought.

It is admitted, that at common law, an administrator is only liable to account where the administration is granted. But this rule should not be applied to cases in the district of Columbia. There would be a peculiar hardship in the rule, if it is applied here. A small amount of security might be taken on the granting letters of administration; and on those letters, a large amount of assets might be received, out of the state granting the same. The creditors and next of kin would have no relief against the sureties of such an administrator.

An act of congress of the 24th of June 1812 authorizes administrators from other states of the Union, to collect money and institute suits in the district of Columbia. This places the foreign administrator on the same footing as if letters had been granted to him in the district of Columbia, and places him under the same responsibilities. The court is bound to take

notice of foreign administrators coming into the district. *Kane* v. *Paul*, 14 Pet. 33. Thus, no administration to the effects of Moody could be obtained in this district, after the granting of the letters to Northup in Kentucky; but the funds were all received here by the administrator; and the court will administer the assets, at the place where they have been received, and at the place of suit. 11 Mass. 264. A legatee can sue the administrator, where he obtains the assets. 4 Mass. 344; 3 Pet. 144. Story's Conflict of Laws (1st ed.) 425, declares, that non-resident claimants are to be regarded in the same manner as residents. Cited, 1 Mason 381; 1 Story's Conflict of Laws, § 534, 531, 588.

The act of congress of 1821 gives jurisdiction to the courts of the district of Columbia, in all cases in law or equity, where *both or either of [*4
the parties are residents within the district of Columbia. The probate courts of Kentucky have not exclusive jurisdiction over the distribution of assets. 1 A. K. Marsh. 459. As to the pleadings, cited, *Livingston* v. *Story*, 11 Pet. 393; Mitf. Plead. 305, 309.

Coxe, for the appellees.—In the case of *Livingston* v. *Story*, there was a plea to the disability of the plaintiff. The objection in this case is to the jurisdiction of the circuit court of the district of Columbia, in the matter of this administrator, and the distribution of the assets, which must be made, as a great portion of them has already been made, in the state of Kentucky.

The act of congress of 1812 does no more than authorize administrators of other states to sue in the district of Columbia; this was necessary, in consequence of the large claims in the district, from every part of the Union. The act goes no further than this; and not to abrogate all the laws prevailing on the subject. The law never intended to oblige a foreign administrator to stand a suit here; it would be vastly injurious, if such should be the law. The act giving jurisdiction to the courts of the United States, in the district of Columbia, cannot receive the construction given to it by the counsel for the appellants; the jurisdiction is given in cases properly cognisable in the courts, when one of the parties is in the district. Cited, Story's Conflict of Laws, § 422, 513, 515. The argument for the appellants is, that as the money was received in the district of Columbia, it is to be distributed and administered according to the laws of the district. It is important, that this question shall be settled. This was a claim, in the hands of administrator in Kentucky, of a debt due to a citizen of Virginia, by the state of Virginia, for military services, for which the United States had agreed to pay. Is this to bring the fund, because it was received in the district, subject to the laws of the district?

STORY, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the district of Columbia, sitting for the county of Washington, *dismissing a bill in equity, brought by the [*5
appellants against the appellees. The facts, so far as they are necessary to be stated upon the present occasion, are: that one James Moody, an inhabitant of Kentucky, died in that state, about the year 1802, intestate, without leaving any children; that in May or June 1833, the defendant, Northup, obtained letters of administration upon his estate, from the proper court of Jefferson county, in Kentucky; and afterwards, under and in virtue of those letters of administration, he received from the treasury of the

United States the sum of $5215.56, for money due to the intestate, or his representatives, for military services rendered during the revolutionary war. The present bill was brought by the appellants, claiming to be the next of kin and heirs of the intestate, for their distributive shares of the said money, against Northup, as administrator; and the other defendants, who are made parties, are asserted to be adverse claimants, as next of kin and distributees. At the hearing of the cause in the court below, the same having been set down for argument upon the plea of Northup, denying the jurisdiction of the court; the bill was ordered to be dismissed for want of jurisdiction; and from that decree, the present appeal has been taken.

Under these circumstances, the question is broadly presented, whether an administrator, appointed and deriving his authority from another state, is liable to be sued here, in his official character, for assets lawfully received by him, under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased, in any other state; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other
*6] hand, the administrator is exclusively bound to account for all *the assets which he receives, under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets, according to the *lex loci*. Hence, it has become an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; but it seems to us unnecessary, in the present state of the law, to do more than to refer to the leading principle as recognised by this court, in *Fenwick* v. *Sears*, 1 Cranch 259; *Dixon's Executors* v. *Ramsay's Executors*, 3 Ibid. 319; and *Kerr* v. *Moon*, 9 Wheat. 565.

But it has been suggested, that the present case is distinguishable, because the assets sought to be distributed were not collected in Kentucky, but were received as a debt due from the government, at the treasury department at Washington, and so constituted local assets within this district. We cannot yield our assent to the correctness of this argument. The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicil, but possess, in contemplation of law, a ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicil. On the contrary, the administrator of a creditor of the government, duly appointed in the state where he was domiciled at his

death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it; whether it be at the seat of government, or at any other place where the public funds are deposited. If any other doctrine were to be recognised, the consequence would be, that before the personal representative of any deceased creditor, belonging to any state in the Union, would be entitled to receive payment of any debt due by the government, he would be compellable to take out letters of administration in this district *for the due administration of such assets. Such a doctrine has never yet been sanctioned by any practice of the government; and [*7 would be full of public as well as private inconvenience. It has not, in our judgment, any just foundation in the principles of law. We think, that Northup, under the letters of administration taken out in Kentucky, was fully authorized to receive the debt due from the government to his intestate; but the moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals in Kentucky; and that distribution thereof might have been, and should have been, sought there, in the same manner as of any other debts due to the intestate in Kentucky.

It has also been supposed, that the act of congress of the 24th of June 1812 may well entitle the appellants to maintain the present suit; since it places a foreign administrator upon the footing of a domestic administrator, in the district of Columbia. That act provides, that it shall be lawful for any person to whom letters-testamentary, or of administration, have been or may hereafter be granted by the proper authority, in any of the United States or the territories thereof, to maintain any suit or action, or to prosecute and recover any claim, in the district of Columbia, in the same manner as if the letters-testamentary, or of administration, had been granted to such person by the proper authority in the said district. It is observable, that this provision is limited by its terms to the maintenance of suits, and the prosecution and recovery of claims in the district, by any executor or administrator appointed under the authority of any state. It does not authorize any suits or actions in the district, against any such executor or administrator. Its obvious design was, therefore, to enable foreign executors and administrators to maintain suits, and to prosecute and recover claims in the district, not against the government alone, but against any persons whatever, resident within the district, who were indebted to the deceased, and to discharge the debtor therefrom, without the grant of any local letters of administration. In effect, it made all debts due from persons within the district, not local assets, for which a personal representative would be liable to account in the courts of the district; but general assets, which he had full authority to receive, and for which he was bound to account in *the courts of the state from which he derived his original [*8 letters of administration. Indeed, the very silence of the act as to any liability of the personal representative to be sued in the courts of the district, for such assets, so received, would seem equivalent to a declaration, that he was not to be subjected to any such liability. It fortifies, therefore, rather than weakens, the conclusion which is derivable from the general principles of law upon this subject. The same view of the purport and

objects of the act was taken by this court, at the last term, in the case of *Kane* v. *Paul*, 14 Pet. 33.

Upon the whole, we are of opinion, that the circuit court was right in dismissing the bill, for the want of jurisdiction; and therefore, the decree is affirmed, with costs.

THIS case 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 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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*9] *EDMUND P. GAINES and MIRA CLARKE, late WHITNEY, Complainants, *v.* RICHARD RELF, BEVERLY CHEW and others, Defendants.

Louisiana practice.

In the case of Livingston *v.* Story, which came before this court in 1835 (9 Pet. 655), the court took occasion to examine the various laws of the United States, establishing and organizing the district court of Louisiana, and to decide whether that court had equity powers; and if so, what should be the mode of proceeding in the exercise of such powers. The various cases which had been before the court, involving, substantially, the same question in relation to the states where there were no equity state courts, or laws regulating the practice in equity causes, were referred to; and the uniform decisions of the court have been, that there being no equity state courts, did not prevent the exercise of equity jurisdiction in the courts of the United States; and it was, accordingly, decided, that the district court of Louisiana was bound to proceed in equity causes, according to the principles, rules and usages which belong to the courts of equity, as contradistinguished from courts of common law. Livingston *v.* Story, 9 Pet. 655; 13 Ibid. 368; Poultney *v.* City of La Fayette, 13 Ibid. 474; Ex parte Whitney, Ibid. 404, cited; and the principles of these cases affirmed.

The supreme court has no power to compel the circuit court to proceed according to established rules in chancery cases; all that the court can do, is to prevent proceedings otherwise, by reversing them, when brought here on appeal.

It is a matter of extreme regret, that it appears to be the settled determination of the district judge of Louisiana, not to suffer chancery practice to prevail in the circuit court of Louisiana, in equity causes, in total disregard of the repeated decisions of this court, and the rules of practice established by the supreme court, to be observed in chancery cases.

CERTIFICATE of Division from the Circuit Court for the Eastern District of Louisiana. A bill of complaint was originally filed in the district court of the United States for the eastern district of Louisiana; and was afterwards transferred to the circuit court for the same district. *Subpœnas* were issued, on the 1st of August 1836, with a copy of the bill, to each and all the defendants, about fifty in number. Service of this process was made by the marshal, on twenty-seven of the defendants, and amongst them, on Richard Relf. W. W. Whitney, one of the plaintiffs, having died, the proceeding was continued in the name of Mira Clarke Whitney,
*10] *his widow. The bill claimed the estate left by Daniel Clarke, at the time of his death; alleging that Mira Clarke Whitney was his only child and heir-at-law, and his devisee.

The bill charged Beverly Chew and Richard Relf with having fraudulently concealed and suppressed Daniel Clarke's true and last will, in which the complainant, his daughter and heir-at-law, was his only devisee, and was his general legatee; with having set up another will, in which they

were named executors, and with having taken and appropriated all the estate, real and personal, of Daniel Clarke. The other defendants were charged with confederating with the executors; and with having obtained, and still holding, large portions of the estate, through the executors, or under them. The bill contained an inventory of the estate of Daniel Clarke, so far as could be made out. For these frauds and breaches of trust, the bill claimed restitution, &c.

On the 20th February 1837 (about two months after *subpœnas* were returned served), the two executors, with twenty-five of their co-defendants, appeared by their respective solicitors, and filed a petition; wherein, styling themselves respondents, eleven of them say, French is their "mother tongue" (not that they do not understand English as well), and pray, as a precedent condition to their being held to plead, answer or demur to the bill, that a copy in their "maternal language," be served on each and every of them, severally, over and above the English copies already served. Then, "all the aforesaid respondents (including, of course, the two executors), here appearing separately by their respective solicitors, crave *oyer*" of all the instruments and papers of every sort mentioned in the bill; but "if it be not possible for said complainants to afford these respondents *oyer* of the originals of said supposed instruments, they then pray that copies of the same, duly certified according to the laws of the state of Louisiana, may, by order of this honorable court to said complainants, be filed herein, and served on these respondents, that they may be enabled to take proper cognisance thereof." The respondents more especially crave *oyer* of twenty-three of these instruments, enumereated and specified in a list referring to the several clauses of the bill where they are respectively mentioned.

No answer having been put in by the twenty-five respondents, *a motion was made for an attachment, which was refused by Judge [*11
Lawrence, the district judge, sitting as a judge of the circuit court, to which the proceedings were transferred after the establishment of a circuit court in the eastern district of Louisiana. At the same time, Judge Lawrence, sitting alone in the circuit court, prescribed rules of practice for that court; among which, was a general one, that "the mode of proceeding in all civil cases, those of admiralty alone excepted, shall be conformable to the code of practice of Louisiana, and to the acts of the legislature of that state, heretofore passed, amendatory thereto."

The complainant applied to the supreme court, at January term 1839, for a *mandamus* to Judge Lawrence, in order to compel him to proceed in the case. (13 Pet. 408.) The *mandamus* so applied for was denied, for reasons appearing in the court's opinion; but the court, at the same time, expressly declared, though the remedy by *mandamus* was inadmissible, that it was the duty of the circuit court to proceed in this suit, according to the rules prescribed by the supreme court, at the February term 1822, could admit of no doubt; and that the proceedings of the district judge, and the orders made by him in the cause, which were complained of, were not in conformity with those rules of chancery practice, could admit of as little doubt. (13 Pet. 408.)

Since then, the present complainants (having intermarried) filed a petition for rehearing the before-stated order, by a bill filed in the circuit court

on the 1st of June 1839. The petition stated, that the complainants were much aggrieved by the interlocutory decree made in the case by the former district judge for the eastern district of Louisiana; whereby it was ordered that the application of the defendants for *oyer* of documents, and for copies of the bill of complaint should be allowed; and further, that all further proceedings in the case should be in conformity with the existing practice of the court.

On June 1st, 1839, in the circuit court, before the honorable Judges McKinley and Lawrence, the counsel for the complainants moved the court, 1st. To set aside and vacate said decretal order. 2d. To remand the said
*12] cause to the rule-docket, and order *that the complainants should be permitted to proceed therein according to chancery practice. The defendants appeared by their counsel, and resisted said application and motion, upon the ground, that chancery practice could not be had in this court, and they relied upon the treaty of cession of Louisiana to the United States from France, in 1803; the acts of congress of 29th September 1789; 26th May 1824; the 19th May 1824; and 20th May 1830; and the first rule adopted by this court, of 20th November 1837.

The judges of the circuit court having differed in opinion on the hearing of the motion, it was ordered to be certified to the supreme court for its decision, upon the following questions: 1st. Does chancery practice prevail, and should it be extended to litigants in this court, and in this cause? 2d. Should or not the said order, of the date of 9th March 1837, be annulled and vacated? 3. Should or not the cause be placed upon a rule-docket, and the complainants be permitted to proceed according to chancery practice, and the defendants be required to answer without *oyer* of the documents prayed for, or a service of the bill in French, as prayed for? And the cause coming on to be heard, by consent of parties, upon the demurrer, and upon the adjudication thereof, the judges were opposed in their opinions, and the foregoing questions were ordered to be certified to the supreme court of the United States for its decision and adjudication.

The case was argued by *Key* and *Jones*, for the plaintiffs; and by *Coxe*, for the defendant.

The counsel for the *plaintiffs* contended, that the single question in the case was, whether the circuit court of Louisiana had chancery jurisdiction. The argument that the case is not one for chancery jurisdiction, does not apply. The question whether the case of the complainants is, or is not, one of chancery cognisance, is not before the court on the certificate of division. No provision of the code of Louisiana gives chancery jurisdiction to the courts of that state. Chancery law, as administered in the courts of the
*13] United States, is a fixed code of *laws; and depends on established rules and decided cases. The courts of equity are of a peculiar form. The code of Louisiana gives a judge, in certain cases, a right to proceed according to the principles of natural justice; but this gives no chancery powers.

They contended, that the case exhibited in the complainants' bill, was one peculiarly of chancery jurisdiction. It is a beneficial bill, and should have the protection of the court. Cited, Bro. P. C. 550; Dick. 26; 2 Ves. & B. 259. But the chancery jurisdiction of the circuit court has been

fully recognised in case of *Livingston* v. *Story*, 9 Pet. 655; 12 Ibid. 474; 13 Ibid. 368, 404. The rules of court regulating the practice of the circuit court show that the call for papers as made by the defendant, is not allowed. 10th Rule of Court; 3 Dall. 335, 339. The rules of practice in the civil code of Louisiana, do not sanction such a call for papers.

Coxe argued, that the case exhibited in the bill was not one of chancery jurisdiction; nor was a proceeding to vacate a will, in the power of a chancery court. Cases cited, 13 Pet. 369; 9 Ibid. 657; 12 Wheat. 169, 175; 1 Williams on Executors 157; Coop. Eq. Plead. 268; 2 Story's Equity 670. Coxe referred to the Louisiana code, to show that the probate court was the proper tribunal to set aside the will. So, too, the code authorizes proceedings in the established courts of Louisiana to recover legacies. It was not his intention to controvert the decisions of the court; but such a case as this had not yet been decided.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the United States for the eastern district of Louisiana, upon a certificate of division of opinion upon the following points: 1. Does chancery practice prevail, and should it be extended to litigants in this court, and in this cause? 2. Should or not the said order of the 9th of March 1837, be annulled and vacated? 3. Should or not the cause be placed upon a rule-docket, and the complainants be permitted to proceed according to the chancery *practice; and the defendants be required to answer, without *oyer* of the documents prayed for, or a service of the bill in French, as prayed for? [*14

This was a bill filed in the district court of the United States, for that district, on the 28th of July 1836, according to the course of practice in the courts of the United States, upon the equity side of the court; and in the course of proceeding, the district judge, on the 9th of March 1837, entered the following order: "W. W. Whitney and wife v. Richard Relf and others. In this case, having maturely considered the prayer for *oyer*, and for copies of bill in French, the court this day delivered its written opinion thereon, whereby it is ordered, adjudged and decreed, that the application for *oyer* of documents, and for copies of the bill of complaint, in the manner prayed for (in French), be granted; and further, that all future proceedings in this case shall be in conformity with the existing practice of this court." At the June term of the circuit court, in the year 1839, a motion was made to set aside and vacate that order; and that the complainants might be permitted to proceed in the cause, according to the course of chancery practice. And upon this motion, the division of opinion upon the points above stated arose.

These points present the same question that has been repeatedly before this court, and received its most deliberate consideration and judgment, viz., whether the proceedings in suits in equity, in the courts of the United States, in the district of Louisiana, are required to be according to the course of chancery practice, and in conformity to that which is adopted and established in the other states. It is not intended to go into an examination of this question as one that is new and undecided, but barely to refer to the cases which have been heretofored ecided by this court. In the case of *Livingston* v. *Story*, which came before this court, in the year 1835 (9 Pet. 655), the

court took occasion to examine the various laws of the United States establishing and organizing the district court in Louisiana, and to decide whether that court had equity powers, and if so, what should be the mode of proceeding in the exercise of such powers. The various cases which had been before the court, involving substantially the same question, in relation to
*15] the states where *there were no equity state courts, or laws regulating the practice in equity causes, were referred to; and the uniform decisions of this court have been, that there being no equity state courts did not prevent the exercise of equity jurisdiction in the courts of the United States. And it was accordingly decided, that the district court of Louisiana was bound to proceed in equity causes, according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; that the acts of congress have distinguished between remedies at common law and in equity; and that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law, or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derived our knowledge of those principles; subject, of course, to such alterations as congress might think proper to make; but that no act of congress had been passed affecting this question. That the act of congress of 1824 could have no application to the case, because there were no courts of equity or state laws in Louisiana, regulating the practice in equity cases. And again, in the same case of *Livingston* v. *Story*, which came before the court in 1839 (13 Pet. 368), one of the exceptions taken to the master's report was, that by a rule of the district court, chancery practice had been abolished, and that such a proceeding was unknown to the practice of the court. This court says, no such rule appears on the record. But we think the occasion a proper one to remark, that if any such rule has been made by the district court of Louisiana, it is in violation of those rules which the supreme court of the United States has passed to regulate the practice in the courts of equity of the United States; that those rules are as obligatory upon the courts of the United States in Louisiana, as upon on all other United States courts; and that the only modifications or additions that can be made in them, by the circuit or district courts, are such as shall not be inconsistent with the rules thus prescribed; and that where such rules do not apply, the practice of the circuit and district courts must be regulated by the practice of the court of chancery in England. That parties to suits in Louisiana have a right to the benefit of these rules; nor can they be denied, by any
*16] rule or order, without *causing delays, producing unnecessary and oppressive expenses; and in the greater number of cases, an entire denial of equitable rights. That this court has said, upon more than one occasion, after mature deliberation, that the courts of the United States in Louisiana possess equity powers, under the constitution and laws of the United States. That if there are any laws in Louisiana directing the mode of proceeding in equity causes, they are adopted by the act of the 26th of May 1824, and will govern the practice of the courts of the United States. But as has been already said, there are no such laws in Louisiana, and, of course, the act cannot apply.

And in the case of *Poultney* v. *City of La Fayette*, 12 Pet. 474, this

court said, the rules of chancery practice, in Louisiana, mean the rules prescribed by this court for the government of the courts of the United States, under the authority given by the act of the 8th of May 1792. And again, in the year 1839, in the case *Ex parte Whitney*, 13 Pet. 404, application was made to this court for a *mandamus* to compel the district judge to proceed in this case according to the course of chancery practice, upon a petition to the court representing that he had refused so to do, but had entered an order that all further proceedings should be conformable to the provisions of the code of practice in Louisiana, and the acts of the legislature of that state. Upon this application, this court again declared, that it is the duty of the court to proceed in the suit according to the rules prescribed by the supreme court for proceedings in equity causes, at the February term 1822. That the proceedings of the district judge, and the orders made by him in this cause (the very order now in question), were not in conformity with those rules, and with chancery practice; but that it was not a case in which a *mandamus* ought to issue, because the district judge was proceeding in the cause; and however irregular that proceeding might be, the appropriate redress, if any was to be obtained by an appeal, after a final decree shall be made in the cause. That a writ of *mandamus* was not the appropriate remedy for any orders which may be made in a cause by a judge, in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party.

*Such are the views which have been heretofore taken by this court upon the questions raised by the points which have been certified in the record before us; and which leave no doubt, that they must all be answered in the affirmative. These questions have been so repeatedly decided by this court, and the grounds upon which they rest so fully stated and published in the reports, that it is unnecessary, if not unfit, now to treat this as an open question. It is matter of extreme regret, that it appears to be the settled determination of the district judge, not to suffer chancery practice to prevail in the circuit court in Louisiana, in equity causes; in total disregard of the repeated decisions of this court, and the rules of practice established by the supreme court to be observed in chancery cases. This court, as has been heretofore decided, has not the power to compel that court to proceed according to those established rules; all that we can do is, to prevent proceedings otherwise, by reversing them when brought here on appeal. [*17

All the questions presented by the record are accordingly answered in the affirmative.

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 Louisiana, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were 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, 1st. That chancery practice does prevail, and should be extended to litigants in the said circuit court, and in this cause. 2d. That the order of the said court, of the date of 9th March 1837, should be annulled and vacated. And lastly, that this clause should be placed upon a rule-docket,

and the complainants be permitted to proceed according to chancery practice; and the defendants be required to answer, without *oyer* of the documents prayed for, or a service of the bill in French, as prayed for. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said circuit court, with directions to proceed accordingly.

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*18] *The Lessee of Effie Coons and others, Plaintiff in error, *v.* Charles P. Gallaher, Defendant in error.

Error to state courts.

It is not sufficient to give the supreme court jurisdiction in the case of a writ of error to the supreme court of a state, that the question as to the construction of an act of congress, might have been raised and might have been decided, and was involved in the case; it must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court, and decided by it. Crowell *v.* Randell, 10 Pet. 398, cited.[1]

Error to the Supreme Court of the State of Ohio. The original action of ejectment was brought in the court of common pleas of Clinton county, and taken thence by appeal to the supreme court; where it was tried, and a verdict and judgment given for the plaintiffs, at May term 1833. Afterwards, a new trial was ordered; and on a case stated, a judgment was rendered by the court in favor of the defendant. The plaintiff prosecuted this writ of error.

The case was argued, on the merits, by *Leonard*, for the plaintiffs; and by *Buck*, for the defendant. The decision of the court having been given on the question of jurisdiction, those arguments are omitted.

Taney, Ch. J., delivered the opinion of the court.—This case arises upon an action of ejectment, which was decided in the supreme court of the state of Ohio, for the county of Clinton; and being brought here from a state court, we have no authority to revise the judgment, unless jurisdiction is given by the 25th section of the act of 1789.

The land is situated in what is usually called the Virginia military district, and at the trial, both parties derived title under the act of congress of March 2d, 1807, which was passed for the purpose of extending the time for locating Virginia military land-warrants, between the Little Miami and Sciota rivers. The plaintiffs made title as heirs-at-law of Thomas J. McArthur, *who obtained a patent for the lands in question, in 1823, upon an entry and survey made for him in that year, as assignee of part of a military land-warrant granted to John Trezuant. The defendant, who was in possession of the land, claiming it as his own, in order to

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[1] Bolling *v.* Lersner, 91 U. S. 594; Brown *v.* Atwell, 92 Id. 327; Boughton *v.* Exchange Bank, 104 Id. 427. The court has no jurisdiction, if the federal question was not, in fact, passed upon, in consequence of the view which the state court took of other points in the same. McManus *v.* O'Sullivan, 91 Id. 578; Crossley *v.* New Orleans, 108 Id. 105. If the record shows that a federal question was not necessarily involved, the court has no jurisdiction. Citizens' Bank *v.* Board of Liquidation, 98 Id. 140; Brown *v.* Colorado, 106 Id. 95. And it is not sufficient, that the federal question was raised after judgment, on a motion for a rehearing, if not raised at the trial. Susquehanna Boom Co. *v.* West Branch Boom Co., 110 Id. 57.

show title out of the plaintiffs, offered in evidence an entry in the name of John Tench, assignee of part of the aforesaid warrant, to Trezuant, made on the 8th of August 1787; and a survey pursuant to the said entry, on the 7th of March 1794, which was recorded June 24th, 1796.

The plaintiffs having produced a complete legal title, as above stated, the prior survey of Tench was no bar to their recovery, unless it was made so by the act of 1807, before referred to. The first section of that act contains the following proviso: "That no locations as aforesaid, within the above-mentioned tract, shall, after the passing of this act, be made on tracts of land, for which patents had been previously issued, or which had been previously *surveyed;* and any patent which may nevertheless be obtained for land located contrary to the provision of this section, shall be considered as null and void." It seems to have been admitted in the state court, that this act of congress intended to protect those surveys only that were made by lawful authority; and that the survey of Tench was no defence, unless it appeared, that he was, in truth, the assignee of a portion of Trezuant's warrant. No assignment was produced at the trial, but evidence was offered by the defendant, from which the court may have presumed an assignment; and testimony was also introduced, on the part of the plaintiffs, to rebut that presumption. The controversy in the state court turned, it would seem, mainly on this point, which was decided in favor of the defendant; and the decision of that question certainly did not involve the construction of the act of 1807; and furnishes no ground for a writ of error to this court.

Another point has been raised in the argument here, on the part of the plaintiffs in error. It is contended, that the proviso in the act of 1807 applies only to conflicting patents and surveys, made under different warrants from the state of Virginia; and that it does not extend to a case like the present, where the controversy arises upon assignments made by the same individual, upon the same warrant. *Undoubtedly, such a point might have been raised and decided in the state court, upon [*20
the case presented by the record; and if it had appeared, that such a question, upon the construction of the act of congress, had been raised, and had been decided against the plaintiff, it is very clear, that the judgment could have been revised in this court. But the record does not show, that this point was raised by the plaintiff, or decided by the court. It is not sufficient, that the point was involved in the case, and might have been raised, and might have been decided. It must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court and decided by it. This is the rule settled in the case of *Crowell* v. *Randell*, 10 Pet. 398; in which all of the former cases upon the subject were reviewed and considered.

In the aspect in which the case comes before us, there was no controversy in the Ohio court, in relation to the construction of the act of 1807; and it would seem, from the record, to have been conceded on all hands, that Tench's survey was a good defence, if the assignment from Trezuant could be established. Indeed, if there was any point raised, and decided upon the construction of the act of congress, the decision appears to have been in favor of the right claimed, and not against it. The plaintiffs in error, at the trial in the state court, produced a complete legal title; and the survey

of Tench, as we have already said, would have been no defence to the action, unless it was made so by the act of 1807. It was the defendant, therefore, and not the plaintiff, who invoked the aid of the statute, and claimed the right under it. The decision was in his favor, and by that means, a mere equitable title, which, upon general principles of law, would have been no defence against the legal title produced by the plaintiffs, was adjudged to be a good and valid defence, under and by virtue of this act of congress. The decision, therefore, was in favor of the right claimed, and not against it; and if the construction of the statute is, upon this account, to be regarded as drawn in question, the judgment given would afford no ground for the jurisdiction of this court.

In either view of the subject, therefore, the writ of error must be dismissed, for want of jurisdiction.

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*21] *Susan Mayburry, Appellant, *v.* John McPherson Brien and other, Appellees.

Dower.—Delivery of deed.

Dower is a legal right; and whether it be claimed by suit at law or in equity, the principle is the same.

On a joint-tenancy, at common law, dower does not attach. No title to dower attaches on a joint seisin of real estate; the mere possibility of the estate being defeated by survivorship, prevents dower.

If the husband, being a joint tenant, convey his interest to another, and thus at once destroy the right of survivorship, and deprive himself of the property, his wife will not be entitled to dower.

The time of the delivery of a deed may be proved by parol.

By the common law, dower does not attach to an equity of redemption; the fee is vested in the mortgagee, and the wife is not dowable of an equitable seisin.

When the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part, dower cannot be claimed as against rights under the mortgage; the husband is not deemed sufficiently or beneficially seised, by an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgage. It is the well-established doctrine, that of a seisin, for an instant, a woman shall not be endowed.

Appeal from the Circuit Court of Maryland.

The case was presented to the court, on a printed statement, and a printed argument, by *Mayer*, for the appellant; and was argued by *Meredith* and *Nelson*, for the appellees.

A bill was filed in this cause, by the appellant, as widow of Willoughby Mayburry, claiming dower from John Brien, purchaser of the estate, in real estate, in Frederick county, designated as "The Catoctin Furnace, and all the lands" (described by the names of tracts) "annexed or appropriated to it," and also claiming rents and profits from the death of Willoughby Mayburry. The real estate in question was conveyed by Catharine Johnson, Baker Johnson and William Ross, as executors of Baker Johnson, to Willoughby Mayburry and Thomas Mayburry, by deed, dated 5th March
*22] 1812. By deed, *dated 9th May 1813, Thomas Mayburry conveyed to Willoughby his undivided moiety in the estate; and by deed of the same date, Willoughby mortgaged to Thomas, all his (Willoughby's)

interest in the Catoctin Furnace, and the lands attached to it, to secure payment of certain obligations from Willoughby to Thomas.

The answer admitted the marriage of the appellant, and the death of Willoughby; and that she was married to him, when the deed to Willoughby and Thomas was executed; but it insisted, that, simultaneously with the delivery of the deed, a mortgage was executed by Willoughby and Thomas to the grantors in the deed, to secure a part of the purchase-money, payable by them for the estate. The answer further stated, that the mortgage was foreclosed; and that, under the decree, the respondent, John Brien, became purchaser of the estate; and the answer insisted that the plaintiff was not entitled to dower in the property.

The mortgage, which the answer referred to, was dated the 19th March 1812, fourteen days after the date of the deed to Willoughby and Thomas. The only testimony taken in the case was William Ross's; which was taken subject to all exceptions to its admissibility and effect. His testimony was, in substance, that the estate was sold by him and his co-executors, to the Mayburrys, for $32,000; that part was paid in hand, and that, for the residue, a credit was stipulated, to be secured by mortgage; that the deed to the Mayburrys was prepared and executed, and acknowledged on the 5th March 1812, by himself and the other executors; and that he then retained it, to be delivered on receiving payment of the cash part of the purchase-money, and receiving from the Mayburrys their mortgage; that the mort gage was executed by them on 19th March 1812, and that when executed the deed was delivered to them, and the mortgage was received from them; and that, as witness said, "the delivery of the deed and the mortgage were simultaneous acts." The deposition also stated, that the deed of Thomas to Willoughby, and the mortgage from Willoughby to Thomas, were simultaneous acts. The transcript of record of the foreclosure of the mortgage, was exhibited in evidence, subject to all exceptions.

During the cause, the original defendant, John Brien, died, and his heirs were made parties by bill of revivor. A decree (*pro *forma*) was passed, dismissing the bill. The mortgage of the Mayburrys to the [*23 executors of Baker Johnson, had a covenant on the part of the Mayburrys, that after default in payment of the mortgage-debt, the property should remain to the mortgagees, free and clear of all mortgages, judgments, charges or incumbrances whatsoever; and also a covenant of the mortgagees, that until default in payment of the mortgage-debt, the Mayburrys "are to continue in full possession of the premises aforesaid, enjoying all the rents and profits thereof, to their own particular use and benefit."

The counsel for the appellant contended:

1. That the deed of the executors of Johnson to the Mayburrys, when the subject-matter of the conveyance is regarded, must be construed to create a tenancy in common, and not a joint-tenancy.

2. That the rule which denies dower in case of joint-tenancy, applies only in behalf of the surviving joint-tenant, and to prevent interference with his enjoyment of the estate as survivor: and that, therefore, if the deed created in the Mayburrys a joint-tenancy, the plaintiff here may call in aid the release to her husband of the other joint-tenant's interest in the property.

3. That no evidence was admissible to show that the deed to the Mayburrys was not delivered when it bears date, for the purpose of contradicting the terms of the deed which vests in the Mayburrys the beneficial interest in the property.

4. That the principle which excludes dower in a case of merely instantaneous seisin, applies only where the grantor acts in carrying out a naked trust, and a simply instrumental part, and not where any interest, immediate or contingent, attaches to the grantee under the conveyance. That it cannot apply to a case of a purchaser who mortgages, and especially, when part of the purchase-money, as in this instance, is paid when the mortgage is given ; the proper view in such case being, that legal assurances being adopted, their strictly legal and intrinsic import is to prevail, without blending them together by any equitable construction.

5. That there is no evidence of any contract whatsoever, making the delivery of the deed of the executors dependent on a mortgage being delivered at the same time ; and that, according to the true understanding of all that transpired, the deed of the *executors remained in Mr. Ross's hands, as a deed, and not as an escrow, and was left by his co-executors with him, as if a stranger, and had relation, when actually delivered, to the date when it was handed to Mr. Ross to be retained.

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6. That in the absence, especially, of all contract for a simultaneous delivery, the conveyance to the Mayburrys must be regarded as vesting in them the beneficial use of the estate, although for an instant, and if so, there was a seisin which gave rise to dower ; and that this must be the result, even independently of the covenant with the Mayburrys, for their use and enjoyment of the estate until default, as contained in the mortgage ; and that the covenant characterizes the seisin, not only as beneficial, but as virtually continuing.

Mayer, in a printed argument, stated :—The terms of the deed to the Mayburrys, from the executors of Johnson, import joint-tenancy in the Mayburrys ; but if the peculiarity of the property conveyed is considered, it is believed, that there will be no difficulty in concluding that only a tenancy in common was created. The property conveyed was a furnace establishment, and the land is given as virtually incident to that manufactory, and subservient to the business. It is settled, that real estate conveyed to several parties, for partnership purposes, or which is useful only for some business, is held by the parties as tenants in common, and not as joint-tenants. The nature of the subject conveyed is enough to show why it was acquired, and it is unnecessary to prove any actual use for a joint enterprise; in the absence of such direct proof, the law inferring the intended appropriation, from the character and capacity of the property. In none of the cases, has proof of an agreement to purchase for partnership purposes been required. In the cases, in fact, now cited here, no such agreement did appear. *Lake* v. *Craddock*, 3 P. Wms. 158 ; 15 Johns. 159 ; 9 Ves. jr. 500. A manufactory was here conveyed to two. In the absence of contrary proof, it is to be understood to have been acquired to be used—and if used by the two parties, for its natural purposes, the use of it would make them partners in its business. It is the principle of the common law which, in favor of trade, excludes survivorship, where property owned by two is used

or useful only for *trade or business; and to no instance could it apply more forcibly than to the instance of a furnace. Thus, too, where two persons hold a ship together, although not general partners, nor even shown to have used it, the control of a surviving partner to sell is not permitted to the survivor of the owners—the property being deemed a tenancy in common. Even that ordinary control of a surviving partner is only given as a matter of necessity, in the instance of the merchandise of the partnership and the partnership claims—and in such case he is allowed to act in reference to the interest of the deceased, as a trustee. If the estate here was a tenancy in common, dower, of course, attached; unless the seisin was not of a character to allow it. In this country, every construction should oppose joint-tenancy, and particularly in Maryland, which has abolished it by act of 1822, ch. 262.

In this case, the interest of the other party was released to the husband of the appellant. It might be contended, that dower is denied in joint-tenancy only in behalf of the surviving tenant; and that, subject only to his supervening right, there is an incipient dower interest in the wife, in cases of joint-tenancy, as in tenancies in common. If that were so, the release here would establish the dower claim. There is no case that has been found, which fixes, in terms, the law, that the exclusion of dower in joint-tenancies is general as to all, and not of limited reference only to the *paramount* right of the survivor. Park, in his Treatise of Dower, page 40, adverts to the subject, in the same view now taken. The absolute position that where joint-tenants convey, no dower accrues, is traceable to Fitz. N. B. 150, which refers to 34 Edw. I.; but the treatises do not give the particulars of the latter case. They will, no doubt, appear to have presented only the question of the survivor's rights; and not to decide that the estate of joint-tenancy is incompatible with an incipient dower interest, while the joint-tenancy lasts. Where elementary writers have attempted to give reasons for the rule, as an unqualified position, that an estate conveyed by joint-tenants excludes dower, they do not comprehend any interest in their rationale, except that of the surviving joint-tenant. Gilb. Uses, 404; Perk. § 500.

But whatever might be the understanding of the rule in question, properly considered, was there, in this instance, by the mortgage, so consummate a transfer *of the estate, as to leave no interest upon which the subsequent release of Thomas to Willoughby Mayburry might operate, [*26 to the effect of assuring the appellant dower in the land, paramount to the estate or claim of the mortgagees? In determining this point, it should be borne in mind, that dower is *ex provisione legis*, and not an interest under the husband. 8 Co. 71; 6 Ibid. 41. What divestiture of estate did the mortgage effect? It is now settled, even at common law, that the mortgagor is deemed the continuing owner of the estate, and in seisin of it; and that, as to all the world, except in respect of the remedy of the mortgagee who has the estate (especially in Maryland, where foreclosure is not allowed, but only a sale), only to be enabled to transfer it. *Norton* v. *Willard*, 4 Johns. 41, and the English authorities there cited; *Hitchcock* v. *Harrington*, 6 Johns. 290; *Collins* v. *Torry*, 7 Ibid. 278; *Titus* v. *Neilson*, 5 Ibid. 452. In other words, the mortgagee's estate is virtually only a power coupled with a conditional interest; the accrual of the interest being

dependent on the default in payment of the mortgage-debt. That is especially the true version in such a case as this, where the mortgagors have expressly reserved an estate in the land, until default of payment. They are, until the default, "to continue in full possession;" in other words, to retain the possession they had, which was of a fee-simple seisin.

The mortgage deed in this case is, in effect (looking to the covenant, or limitation in form of covenant, for a continuing seisin), only a covenant to stand seised to uses, on part of the mortgagors; the first use limited being to the mortgagors and their heirs, until default of payment; and according to our Maryland decisions, so thoroughly would the mortgagors be deemed to be in of their original estate, that, even at law, the mere fact of payment, without any conveyance or release, would suffice to make their estate absolute against the mortgagors. 3 Har. & McHen. 399. Thus interpreting the mortgage in this case, what is there to prevent Thomas's release to Willoughby, of his undivided interest, operating so as to attract dower to Willoughby's enlarged estate, even admitting the rule, in its most absolute extent, which excludes dower from estates in joint-tenancy. It is only *27] necessary to keep in view, that dower is the gift of the law, *to see that such may be the consequence of the release. Suppose, in a covenant to stand seised to uses, first limiting a defeasible estate to the grantor in fee, that there was but a sole grantor, would dower attach to the first estate so limited, although defeasible in the event of money not being paid, or any other act not being performed? Except where the determinable state is strictly on condition, the decisions would sustain the claim of dower, as an estate tacitly granted by law, and an extension of the inheritable character of the determined estate—to use the explanation given in 8 Co. 71, of the grant of dower in such instances. Dower in such cases accrues, whether the first estate to which it is thus given determines by limitation generally, or by a conditional limitation. If such be the law, where there is a sole grantor, what more is necessary, in case of a limitation, as here, by two, than that one should release to the other, and so lay a foundation of dower; it being only the interest of survivorship which shuts out dower? 1 Leon. 167; 1 And. 184; 8 Co. 67; 3 Bos. & Pul. 652; Co. Litt. 216 · Sugd. Pow. 331; 4 Taunt. 334; 1 Roper, Husb. and Wife, 37–40.

Our proposition is, that, regarding the continuing right of a mortgagor, as now recognised at law, as well as in equity, and especially the reserved precedent estate of the mortgagors in this case, the release of his co-tenant to Willoughby availed for the benefit of the wife, to give her dower; and such, we may maintain, must be the result, even if to estates ending by conditional limitation, dower does not attach. There was no entire divestiture of the joint estate, and as the law gives the dower, and supposes land, even in joint-tenancy, to be susceptible of dower interest by a simple action between the joint-tenants, the remaining, though qualified, fee in the mortgagors, here, was a basis upon which the law would make the co-tenant's release effectual for a dower interest to the wife of the releasee. This case is not, then, like that where an absolute conveyance is made by joint-tenants, of their entire estate; and this construction should be favored in Maryland, where our statute law allows dower in an equity of redemption. Act of 1818, ch. 193, § 10. If, therefore, a joint-tenancy

was created, and not, as we insist, only a tenancy in common, still dower attached, by force of the joint-tenant's release to Willoughby.

*Proceeding to the objection that here was only an instantaneous seisin, which did not give rise to dower, we deny, that the deed being not only dated, but acknowledged, at a considerable interval, it is competent for the appellees to adduce testimony contradicting that purport of the instruments, and that the inquiry is open on which the objection is to be entertained. The acknowledgment precludes the plea of *non est factum*, and shows, by estoppel, that, when acknowledged, the deed of the executors to the Mayburrys was the deed of the former, it being acknowledged as their deed. 1 Cranch 239, remark of CHASE, J., p. 248. The acknowledgment seals all question as to the period of the instrument becoming the complete deed of the grantors. It was, in intendment of law, certainly so, at the date of the acknowledgment. That date being thus established, the difference of dates between the deed of the executors and the mortgage, banishes all question as to simultaneous completion of the instruments as deeds of the parties ; for no case attempts to exclude dower, where the deeds are not delivered literally at the same time. No testimony will be allowed to contradict the tenor of the acknowledgment. 3 Har. & McHen. 321. Apart from the consideration of the acknowledgment, it is insisted, that the effect of the testimony as to simultaneous delivery being contradictory to the varying dates, and tending to contravene the terms of the deed (inasmuch as the deed of the executors would, by that testimony, operate only as a conditional conveyance, instead of being absolute, as its words declare), the testimony is inadmissible. *Dixon* v. *Swigge*, 1 Har. & Johns. 252. ; *Schermerhorn* v. *Vanderheyden*, 1 Johns. 139 ; *Howes* v. *Barker*, 3 Ibid. 506. [*28

But assuming even that the face of the two instruments would argue a simultaneous delivery ; it is insisted, that a beneficial interest, although enjoyed for an instant, vested in the vendees, and dower was accorded by law immediately. The cases that favor the pretention of the appellees, all admit, that a beneficial seisin, for an instant even, creates dower : but the case of a deed and a mortgage back, has been, strangely, in the view of some judges, confounded with the case where an instantaneous seisin is had by a party whose only connection, immediate or ultimate, with the estate, is to transfer it to another ; and *where the deed to him in fact is a mere ceremony ; and his agency is that of a mere instrument for another ulterior object. Thus, the seisin of a trustee, who discharges his function by an immediate conveyance to another, is no foundation for dower. But had the mortgagors here no beneficial interest ? The very mortgage implied an interest in them ; especially, according to the import now assigned to a mortgage. It is difficult to conceive, how the vendee, in such a case, can have all his interest construed away, upon the fancied analogy of a defeasance being indicated by the mortgage. 1 Thomas' Co. Litt. 576, 577, note ; 2 Bac. Abr. 371, tit. Dower ; 2 Bl. Com. 132. The opinion of Mr. Justice THOMPSON, in *Stow* v. *Tift*, 15 Johns. 458, fully exhibits the true limits and principle of the rule of instantaneous seisin excluding dower. Our only Maryland decision is *McCauley* v. *Grimes*, 2 Gill & Johns. 318. That decision very carefully excludes the idea, that instantaneousness of seisin is, *per se*, inconsistent with dower, and estab- [*29

lishes that the slightest and most fleeting beneficial interest will fix the dower; denying it, however, in that case, because the grantee there was performing the part of a mere trustee, and was the mere medium of an interest for others. He was not a mortgagor whose mortgage implied an abiding interest, and at least a resulting use. The case of *Nash* v. *Preston*, referred to in Mr. Justice THOMPSON's decision, in 15 Johns. (Cro. Car. 190), clearly marks the principle by which every case of instantaneous seisin, in its bearing on dower claims, is to be tested. There, land was conveyed, under an agreement that it was to be re-demised to the grantor; which was done. The court determined, that dower attached, because an estate vested in the husband; without which, the re-demise would have been unmeaning and inoperative. And so here, how can the mortgage avail, unless the estate has vested which it proposes to convey? And to show the beneficial interest assured to the vendees here, even by the mortgage, let one recur to the covenant for the mortgagees "to continue in full possession," until default of payment.

The parties here adopted legal conveyances. The first imports an interest vested in the vendee. The second, assuming such an interest to continue in the vendee, transfers it in mortgage. *Being legal assurances, why is not the law to attach all its incidents, and affect the parties by all the implications which spring from the contents of the instruments, which, in their legal purport, profess to operate distinctly, and as successive assurances? If, according to that distinctive import and operation, dower incidentally accrues, will not that consequence be understood to be within the view and agreement of the parties? Will not the law infer, that result to be their wish, from their having chosen such forms of assurances? The maxim of law is, that what arises by implication, is as forcible and binding as what is expressed. Why, then, we ask, is not the intrinsic import of the instruments, respectively, to prevail? How, as legal assurances, in due deference to their respective terms, can they be blended into one instrument? The law will understand, that dower was meant to be conferred, when that form of assurance is not adopted which would have excluded it. If to be excluded, a mere bond of conveyance might have been chosen; or a deed of trust, appointing a trustee to convey on payment of the purchase-money. A case like this is not to be assimilated to a defeasance made at the same time with a conveyance, though by a distinct instrument; for a defeasance in terms qualifies the original estate conveyed, while the mortgage here assumes that the land, according to the estate expressed in the conveyance to the mortgagors, was passed to them fully, and then appropriates that certain estate to the benefit of the mortgagee, in a certain event. If the mortgage provisions are supposed to be embraced in the actual original conveyance to the mortgagor, the compound instrument would, as a legal instrument, be utterly inoperative; because one portion would be repugnant to the other. It would, in one part, be a deed for the vendor, and yet, in another, be a deed for the vendee, and yet is required to operate as but one conveyance, and for one aim; and the deed must, therefore, on this supposition of a single conveyance, by its very terms, import that there is no estate conveyed by the mortgagor; and the vendor, therefore, remains owner as he was before, and no effect is produced whatsoever; and the nugatory instrument contradicts itself. Such is not the case with the operation of a defeasance, properly so called.

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In all the inquiries on this head, where the effect of instantaneous seisin has, as we think, been misunderstood, there is one *error committed ; and that is, that the wife is treated as a party to the supposed agree- [*31 ment for a supposed defeasance, and as coming in under all equities, latent or otherwise, of the husband ; while the truth is, that she is to be regarded as a stranger, so far as the law takes care of her interest and endows her ; and as utterly independent of the husband. 8 Co. 71. And besides that, an equity is assumed for the parties, and it is taken for granted, that they meant what the legal import of the conveyances does not show. For, suppose an agreement even be proved, for a mortgage to be simultaneously delivered, if, *ex vi acti*, the dower attaches, dower would not, as part of the equities, be deemed to be excluded ; and to establish the equity, an agreement for the exclusion must explicitly appear. That certainly should be so, where, as in this instance, an important portion of the purchase-money is paid, and a large equitable interest is thus secured to the purchaser. Of so independent and permanent a character is the wife's claim for dower, that no provision in a deed to the husband for excluding it, where a heritable estate is conveyed, is valid ; however conditional even the provision may be. 6 Co. 41 ; Dyer 343 *b ;* Shep. T. 128 ; Co. Litt. 224.

We should bear in mind, that a part of the purchase-money was paid at once, and that an interest in the estate thus immediately accrued to the Mayburrys. When thus connected with the property, and so far owners of it, is it not assuming too much, to construe these parties into mere trustees, who have only lent their names to let an estate pass that medium, without leaving a beneficial trace behind ? It is only the instantaneous seisin of such uninterested agents, which excludes dower claim ; and any contrary decisions have proceeded upon misapprehension of the true principle.

Whenever, however, the decisions which have so confounded this principle have denied dower, there has been evidence of a contract of simultaneous delivery of conveyance from vendor, and of mortgage ; if we except only the case of *Stow* v. *Tift*, 15 Johns. 458. There is, on this head, a total absence of testimony in the present case. Without such contract appearing clearly, what ground can there be for the constructive defeasance which the mortgage is supposed to operate ? At all events, however, there is no evidence that the deed was delivered as an escrow. *If, in [*32 terms, a deed be not so delivered, it may have its operation suspended, while retained to abide some event ; but when it does operate, it has effect, by relation, from its date. This is the distinction between the effect of the suspended operation of an instrument reserved as a deed, and of one held as an escrow. 2 Mass. 447 ; 9 Ibid. 307 ; 13 Johns. 285 ; 1 Johns. Ch. 288 ; 18 Johns. 544 ; 4 Day 66. Here was the acknowledged deed of all the parties, left, after being thus perfected, in the hands of one, with no stipulation to make it an escrow, but parted with by them, as their deed, and Mr. Ross thus made only their agent to deliver it. We may, therefore, justly insist, that though reserved for a while, yet, when literally delivered, the instrument operated from its date, according to the decisions now referred to. If such be the legal import of what transpired, the dower claim is to be regarded here as if there were an express provision in the deed of mortgage, that the operation of the deed to the Mayburrys was

to be deemed to begin from its date. In that event, there can be no doubt of the validity of the present demand.

Meredith and *Nelson*, with whom was *Schley*, contended, that the decree of the circuit court ought to be affirmed: 1. Because the complainant was not dowable of the lands described in the conveyances exhibited in the record—her husband, Willoughby Mayburry, never having been sole seised of the legal title therein. 2. And because the seisin of her said husband, if sole, under said conveyances, was instantaneous.

For the *appellees*, it was argued:—The deed of the 5th of March 1812, from the executor of Johnson to Thomas and Willoughby Mayburry, created either a joint-tenancy or a tenancy in common. Upon either construction, the appellant is not entitled to dower. 1. The grantees under this deed took as joint-tenants. If the appellant had sought her remedy in a court of law, there can be no question, that such would have been the construction. A
*33] grant to two or more, and their heirs, without any *restrictive, exclusive or explanatory words, constitutes the grantees joint-tenants. 2 Bl. Com. 179, 191–2; Watk. on Conv. 86. The same rule of construction prevailed in Maryland, until the year 1822; when a law was passed, declaring that no deed or will should be construed to create an estate in joint-tenancy, unless by express words. If a court of equity would, in ordinary cases, give a different construction to this deed, it would still adhere to the legal construction, in a case of dower. Dower is a mere legal right; and courts of equity, in assuming a concurrent jurisdiction, professedly act upon the legal right, and proceed in analogy to the law. 1 Story's Equity 585. But, independently of this distinction, courts of equity invariably hold legacies, gifts, grants, &c., to be joint, unless from the nature of the contract, or from the words, some intention of severance appears. 3 Ves. jr. 630. There are no words of severance in this deed. Nor is there anything in the character of the property, from which an intention may be deduced to create a tenancy in common. The object of the purchase is not explained. There is nothing in the deed, from which it may be intended, that the parties meant to carry on the furnace as partners. There is no proof, out of the deed, that they were partners, either before or after the purchase; or that the furnace was put into operation at all. The court cannot infer the fact, from the mere circumstance that the property sold consisted in part of a furnace. The authorities cited by the appellant's counsel, have no application to this case.

2. If the deed created a joint-tenancy, then no title to dower attached during its continuance. Park on Dower 18; Watk. on Conv. 15; 4 Kent's Com. 37; 1 Roper, Husb. and Wife 362. The seisin of the husband must be sole. The mere possibility of survivorship absolutely excludes an incipient title in the wife. In case of survivorship, the survivor claims paramount the widow's title, viz: by the original conveyance. And even where one joint-tenant aliens his share, his wife is not dowable; although the possibility of the survivorship of the other joint-tenant is destroyed by the severance; the seisin of the husband being but for an instant.

*3. The joint-tenancy in this case was not severed by the mort-
*34] gage of the 14th March 1812. The Mayburry's then parted with their whole legal interest, and retained the equity of redemption merely.

Of this, they were joint-tenants. If they had redeemed the mortgage, their joint legal seisin would have revived. They would have been in, as of their former estate. If either had died, before redeeming, the survivor would have been entitled by the *jus accrescendi*, to the whole equity of redemption. And if he had afterwards redeemed, he would have become solely seised of the legal estate.

4. The deed of the 9th of March 1813, from Thomas to Willoughby Mayburry, passed only the equity of redemption in one undivided half. The whole equity of redemption, therefore, was vested in Willoughby Mayburry. And if he had redeemed, he would have had the sole legal seisin, in which, undoubtedly, dower would have attached. But he did not redeem. The mortgage was foreclosed in his lifetime, and his equitable estate was extinguished. Upon this equitable estate, no dower attached. For, though by the act of the Maryland legislature, passed in 1818, widows are dowable of equitable estates, their right does not operate to the prejudice of any claim for the purchase-money of the lands, or other lien on the same. In this case, besides the mortgage for the purchase-money, there were other liens, which exhausted the whole proceeds of sale, and left a large deficiency. As between mortgagor and mortgagee, and those claiming under him, the former is to be regarded as the equitable, the latter as the legal owner of the mortgaged property; and as to him, no title of dower can attach. The proviso in the mortgage to the executors of Johnson, that, until default, the grantors should hold the land, and receive the profits, gave them no continuing seisin in fee, but constituted them only tenants for years, to the mortgagees. Coote on Mortg. 325–7.

5. If the deed of the 5th of March 1812 created a tenancy in common, still the appellant is not entitled to dower, because the seisin of the husband was an instantaneous transitory seisin, on which dower does not attach. Co. Litt. 31 *b*; Park on Dower 20–1; 4 Kent's Com. 38; Cro. Car. 190; 1 Atk. 442. The same doctrine applies, when the husband takes a conveyance *in fee, and at the same time, mortgages the land back to the grantor, to secure the purchase-money in whole or in part. 4 Kent's [*35
Com. 39. This application of the doctrine of instantaneous seisin, is sustained by all the American cases. 4 Mass. 566; 14 Ibid. 351; 15 Johns. 458; 1 Bay 312; 1 McCord 279; 4 Ibid. 346; 2 Gill & Johns. 318. In this case, although there is an interval betweed the dates of the two deeds, the proof is, they were both delivered at the same time. They were simultaneous acts. They both took legal effect from the 14th of March 1812, and not before. The deed was executed and acknowledged on the 5th of March, and retained by Mr. Ross, ready to be delivered, when the mortgage was delivered. Leaving it in his hands, did not amount to a delivery. That is a question of intention, to be collected frem all the circumstances. 2 Barn. & Cres. 82; 1 Johns. Cas. 114. The whole transaction shows that the executors looked to the mortgage, as their only security for the unpaid part of the purchase-money. Besides, the inference from the evidence is, that by agreement of the parties, the delivery of the two deeds was to be simultaneous. This evidence is clearly admissible; because it does not contradict, but tends to confirm and establish the deed. *Goddard's Case*, 2 Co. 4 *b*; *Stone* v. *Ball*, 3 Lev. 348; *Hall* v. *Cazenove*, 4 East 477.

McLEAN, Justice, delivered the opinion of the court.—This is a suit in chancery, which is brought before this court, by an appeal from the decree of the circuit court of Maryland. The complainant is the widow of Willoughby Mayburry, and claims dower from John Brien, who purchased an estate, designated the Catoctin Furnace, and all the lands annexed or appropriated to it. She also claims rents and profits from the death of her husband. This estate was conveyed by Catharine Johnson, Baker Johnson and William Ross, as executors of Baker Johnson, to Willoughby and Thomas Mayburry, by deed dated the 5th March 1812; and they executed a mortgage on the same, to secure the principal part of the purchase-money. The 9th March 1813, Thomas Mayburry conveyed to Willoughby his
*36] undivided moiety in the estate; and at the same *time, the grantee executed a mortgage on the estate, to secure the payment of the purchase-money. The answer admits the marriage of the complainant, prior to the execution of the conveyance and mortgage, in 1812; and the death of the husband, which occurred subsequently. Brien having died, his heirs were made parties to the suit.

The circuit court dismissed the bill, and the counsel for the defendants ask the affirmance of that decree on two grounds. 1. Because the estate vested in Willoughby and Thomas Mayburry was a joint-tenancy, and not subject to dower. 2. That the mortgage was executed by Willoughby Mayburry to Thomas, stimultaneously with the delivery of the deed from Thomas to Willoughby, and that dower does not attach to a momentary seisin. The counsel for the complainant insists, that the deed of the executors of Johnson to the Mayburrys created a tenancy in common, and not a joint-tenancy.

It is admitted, that the terms of this deed import a joint-tenancy; but it is insisted, that the nature of the property, and the circumstances of the parties, show a tenancy in common. That real estate conveyed for partnership purposes constitutes an estate in common; and that the conveyance of this furnace, and the land incident to it, was for manufacturing purposes, and comes within this definition. No evidence being given on the subject, the counsel relies upon the above considerations, as fixing the character of the estate. In the case of *Lake* v. *Craddock*, 3 P. Wms. 159, the court held, that survivorship did not take place, where several individuals had purchased an estate, which was necessary to the accomplishment of an enterprise in which they were engaged. That the payment of the money created a trust for the parties advancing it, and that as the undertaking was upon the hazard of profit or loss, it was in the nature of merchandizing, when the *jus accrescendi* is never allowed. And in the case of *Coles' Administratrix* v. *Coles*, 15 Johns. 159, it was decided, that when real estate is held by partners, for the purposes of the partnership, they hold it as tenants in common; and that on a sale of the land, one of the partners
*37] receiving the consideration *money, was liable to the action of the other for his moiety. *Thornton* v. *Dixon*, 3 Bro. C. C. 199; *Balmain* v. *Shore*, 9 Ves. 500. By a statute of Maryland, in 1822, ch. 262, joint-tenancy is abolished; and it is contended, that this being the settled policy of the state, the courts should give a liberal construction to conveyances prior to that time, to guard against the inconvenience and hardship, if not injustice, of that tenancy, Whether this estate was purchased by

the Mayburrys, for the purpose of manufacturing iron, for speculation, or for some other object, is not shown by the evidence; and it would be dangerous for the court, without evidence, to give a construction to this deed different from its legal import. We must consider the property as conveyed in joint-tenancy; and the question arises, whether dower may be claimed in such an estate?

Dower is a legal right, and whether it be claimed by suit at law, or in equity, the principle is the same. On a joint-tenancy, at common law, dower does not attach. Co. Litt. lib. 1, ch. 5, § 45. "It is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth jointly with another, at the time of his death; and the reason of this diversity is, for that the joint-tenant which surviveth, claimeth the land by the feoffment and by survivorship, which is above the title of dower, and may plead the feoffment made to himself, without naming of his companion that died." In 3 Kent's Com. 37, it is laid down, that the husband must have had seisin of the land, in severalty, as some time during the marriage, to entitle the wife to dower. No title to dower attaches on a joint seisin. The mere possibility of the estate being defeated by survivorship, prevents dower. The same principle is in 1 Roll. Abr. 676; Fitz. N. B. 147; Park on Dower 37; 3 Prest. Abs. 367. If the husband, being a joint-tenant, convey his interest to another, and thus at once destroy the right of survivorship, and deprive himself of the property, his wife will not be entitled to dower. Burton on Real Property 53; Co. Litt. 31*b*. But it is insisted, that the rule which denies dower in an estate of joint-tenancy, applies only in behalf of the survivor; and that, *if, in this case, the deed created a joint estate, the plaintiff may claim, after the deed of release to her husband. [*38

At the time the deed to the Mayburrys, for this property, was executed by the executors, a mortgage on the property was given by the Mayburrys, to secure the payment of a large part of the purchase-money. The deed bears a date prior to that of the mortgage; but the proof is clear, that both instruments were delivered, and consequently, took effect, at the same instant of time. The time of delivery may be proved by parol. And it also appears, that the deed to Willoughby Mayburry, and the mortgage from Thomas to him, were delivered at the same time.

And here two questions arise—1st. Whether dower attaches where there has been only a momentary seisin in the husband? 2d. Whether, in Maryland, dower may be claimed in an equity of redemption?

By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowable of an equitable seisin. *Dixon* v. *Saville*, 1 Bro. C. C. 326; Co. Litt. 3 *b*; *Stelle* v. *Carroll*, 12 Pet. 205. This rule has been changed, in Maryland, by the tenth section of the act of 1818, ch. 193, which gives dower in an equitable title, under certain restrictions; and in many of the states, a different rule obtains by statutory provision, or by a judicial modification of the common law. As the right of the complainant depends on conveyances prior to 1818, the above statute can have no effect upon it.

As before stated, the mortgage was delivered by Willoughby Mayburry, at the same instant he received the deed from Thomas; and the question is, whether dower can be claimed by the wife on such a seisin of the husband?

In his Commentaries, Chancellor KENT says, vol. 4, p. 38–9, that "a transitory seisin, for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower; the same doctrine applies, when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, *or to a third person, to secure the purchase-
*39] money, in whole or in part, dower cannot be claimed as against rights under that mortgage; the husband is not deemed sufficiently or beneficially seised, by an instantaneous passage of the fee, in and out of him, to entitle his wife to dower as against the mortgagee." Of a seisin for an instant, a women shall not be endowed. Co. Litt. ch. 5, § 36. This is the well-established doctrine on the subject. *Holbrook* v. *Finney*, 4 Mass. 566; *Clark* v. *Munroe*, 14 Ibid. 352; *Stow* v. *Tift*, 15 Johns. 485.

The plaintiff insists, that the principle which excludes dower, in a case of a momentary seisin, applies only where the grantor acts in carrying out a naked trust. This position is not sustained by the authorities. In the case of *McCauley* v. *Grimes*, 2 Gill & Johns. 324, the court say, "Perhaps, there is no general rule, in strictness, that in cases of instantaneous seisin, the widow shall or shall not be entitled to dower." And they say, "where a man has the seisin of an estate beneficially for his own use, the widow shall be endowed." What may be a beneficial seisin in the husband, so as to entitle his widow to dower, may be a matter of controversy, and must lead to some uncertainty. But, in the language of Chancellor KENT, where a mortgage is given by the grantee, at the same time the conveyance of the land is executed to him, there is no such beneficial seisin in him as to give a right to dower. The incumbrances in this case exceed, it is believed, the value of the estate; and this being the case, the grantees could in no sense be said to be beneficially seised, so as to sustain the claim of the complainant. Upon the whole, the decree of the circuit court is 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 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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*40] *The NORTH CAROLINA.

JACOB HOUSEMAN, Claimant, &c., Appellant, *v.* The cargo of the Schooner NORTH CAROLINA: OLIVER O'HARA, Agent, &c., Libellant.

Salvage.

The schooner North Carolina, bound from Appalachicola to Charleston, with a cargo of cotton, part on account of the consignees, and part the property of the shipper, struck on a reef, about ninety-five miles from Key West; and the next morning, 110 bales of cotton were taken from her by the wrecking schooner Hyder Ally, when she floated; she sailed with the Hyder Ally to Indian Key, and arrived there the same evening. The Hyder Ally was one of those wrecking-schooners in the profits of which Houseman was a participator; he became the consignee of the North Carolina; and salvage being claimed by the master of the Hyder Ally, a reference was made by the master of the North Carolina, and the master of the wrecker, and by an award, thirty-five per cent. was allowed as salvage; 102 bales of cotton were put into the stores of Houseman, in part payment of the salvage; $100 was paid in cash, and a draft

for $600 was given by the master of the North Carolina, in further satisfaction of the salvage and the commissions of Houseman, with the vessel's expenses. Afterwards, the consignees of the cotton sent an agent to Key West, who proceeded, by a libel in his name, as agent, in the superior court of the United States, of Monroe county, in Florida, alleging the facts; and by process issued by the court, 72 bales of cotton of the North Carolina were attached in the hands of Houseman; the court decreed, that the libellant should recover the 72 bales of cotton, and Houseman appealed to the court of appeals; in that court, a supplemental libel was filed by the appellee, claiming damages for the taking and the detention of 50 other bales of cotton, making the whole number of 122 bales, which had gone into the possession of Houseman, the court of appeals gave a decree in favor of the appellee, for the value of 122 bales. The supreme court affirmed the decree as to the 72 bales, and set aside that part of the decree which allowed the value of the 50 bales; leaving the consignees or owners of the 50 bales to proceed in the superior court of East Florida, by a new libel, for the recovery of the same or the value thereof.

There are many cases in which the contract of the master, in relation to the amount of salvage to be paid to the salvors, or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster, it is always his duty to exercise his best judgment, and to us his best exertions for the benefit of both the vessel and cargo; and when, from his situation, he is unable to consult them or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage; he is not bound in all cases to wait for the decision of a court of admiralty.

So too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners, that the amount *should be settled at once by the master; and the vessel proceed on her voyage, without waiting [*41 even a day for the purpose of consulting them. But in all such cases, unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the court; and his contracts will not be regarded as binding on the parties concerned, unless they appear to have been *bonâ fide*, and such as a discreet owner, placed in the same circumstances, would probably have made. If he settles the amount by agreement, those who claim under it must show that the salvage allowed was reasonable and just; if he refers it to arbitrators, those who claim the benefit of the award, must show that the proceedings were fair, and the referees worthy of the trust.

The case is within the jurisdiction of a court of admiralty; it is a question of salvage of a vessel which had been stranded on a reef in the ocean; the points in controversy are, whether salvage is due; and if due, how much? The admiralty is the only court in which such questions can be tried.

It is well settled, in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the names of his principals, as he thinks best; that a power of attorney given subsequent to the libel, is a sufficient ratification of what he had before done in their behalf; and that the consignees of a cargo have a sufficient interest in the cargo, that they may proceed in the admiralty for the recovery not only of their own property, but for that part of it which may be consigned to them.[1]

An amendment, in a case in the admiralty, before the court of appeals, cannot introduce a new subject of controversy; although the most liberal principles prevail in such cases.

Appeal from the Court of Appeals of Florida.

This case was argued by *Coxe*, for the appellant; and by *Downing*, for the owners of the schooner and cargo. The facts are fully stated in the opinion of the court.

Taney, Ch. J., delivered the opinion of the court.—This case arises upon a proceeding in admiralty, originally instituted in the superior court of Monroe county, in the southern district of Florida, and afterwards carried to the court of appeals for that territory. It is brought here by appeal from the decision of the last-mentioned court.

Several questions have been raised in the argument, upon the form and

[1] McKinlay *v.* Morrish, 21 How. 343; The Thames, 14 Wall. 109; The Vaughan, Id. 266.

manner of proceeding in the territorial courts, as well as upon the merits of the controversy; and it becomes necessary to state fully the facts in the record, in order to show the points in dispute, and the principles on which they are decided.

*42] The schooner North Carolina, George McIntyre, master, sailed *from Appalachicola, about the 9th of March 1833, laden with cotton, and bound for Charleston, in South Carolina. The cargo was shipped by William G. Porter, of Appalachicola, and consigned to J. & C. Lawton, of Charleston, part of it being shipped on account of the consignees, and part on account of Porter, with directions from him to sell his portion, as soon as the consignees thought it for his interest; and to credit the proceeds in his account. Upon the night of the 14th of March, being five days out, the vessel struck upon the Pickles reef, which is about ninety-five miles from Key West. She was discovered, on the next morning, by the wrecking schooner, Hyder Ally, Joshua B. Smith, master, who took from her deck 110 bales of cotton, when she floated; and both vessels sailed for the Indian Key, where they arrived the same evening. The North Carolina had grounded about twelve o'clock at night, and was gotten off at four o'clock in the afternoon of the following day. She sustained very little injury; not enough to have prevented her from proceeding immediately on her voyage. The weather was moderate, while she was on the reef; and the Hyder Ally ran no risk, and encountered no hardship, in assisting her, beyond the mere labor of taking off the portion of her deck-load above mentioned, and carrying it to the Indian Key. It is stated, however, that the Pickles reef is considered a dangerous one; that it came on to blow fresh, about two hours after the North Carolina was relieved; and that she would probably have been lost, if she had remained on the reef the ensuing night. The Indian Key is a small island, of a few acres of land; about ten or twelve hours' sail from Key West, where there is a port of entry, and a court of the United States having admiralty jurisdiction.

It appears, by the testimony, that Houseman, the appellant, was the only man at the Indian Key, who could have advanced money to McIntyre to pay the salvage. He had a warehouse there, and owned a schooner which was employed in the wrecking business; and this vessel of Houseman's, in the language of the wreckers, consorted with the Hyder Ally, and with a sloop commanded by a man by the name of Packer; that is to say, these three vessels shared equally in the gains made by either of them. House-

*43] man was therefore entitled to a proportion *of whatever could be obtained for salvage from the North Carolina; and had a direct interest in making it as large as he could. It does not appear, that he was engaged in any other business except that of wrecking, on the Florida coast. Notwithstanding this interest of Houseman, he was appointed by McIntyre consignee of his vessel and cargo, as soon as he arrived at the Indian Key; and he charged and received commission to the amount of $156.45 for his services in arranging the question of salvage, on behalf of the owners. The evidence does not show whether McIntyre was apprised of Houseman's connection with the salvors; and in so far as this case is concerned, it is not necessary to inquire, whether he was, or was not, aware of Houseman's interest. McIntyre's conduct leads strongly to the conclusion, that he was not deceived, and that he knowingly betrayed the interest of the owners

But he is no party to this dispute ; the question is between the owners and Houseman ; and certainly, his claim would not be strengthened by showing that he concealed his interest from McIntyre, and obtained his confidence, by leading him to believe that he had no interest in the question of salvage. However this may be, McIntyre was induced, by some means or other, to refer the matter to the arbitrament of two men, by the name of Otis and Johnson, who are described in the survey held on the North Carolina, as shipmasters. But we have no account of the characters or standing of these men ; nor of the nature of their business and pursuits at the Indian Key ; nor have we anything in the record, to show how far their judgment and impartiality could be relied upon in the matter referred. The referees thus chosen awarded thirty-five per cent. on the vessel and cargo ; and thereupon, the cotton brought by the Hyder Ally, together with so much in addition, from the North Carolina, as made up the number of 122 bales, was immediately landed and put into the warehouse of Houseman, in payment of the salvage on the cargo, and McIntyre gave Smith $100 in cash, and a draft on his consignees for $600 in payment of the salvage on the vessel ; and it is said in the testimony, that Houseman gave Smith the money for the draft. As soon as the affair of the salvage was *settled, McIntyre proceeded with the North Carolina, on the voyage to Charleston. Upon his arrival there, however, it would seem, that his consignees were not satisfied with what he had done ; and on the 18th of May following, Oliver O'Hara, the present appellee, as agent for J. & C. Lawton, the consignees of the vessel, filed his libel on the admiralty side of the superior court for the southern judicial district of Florida, stating, generally, that a part of the cotton composing the cargo of the North Carolina had been taken from her, while lying on the Florida reef, by the wrecking schooner Hyder Ally, Joshua B. Smith, master ; which, together with the North Carolina, was carried into the harbor of Indian Key, where a large portion of the said cotton was still kept, and illegally detained from the libellant ; and he prayed process against the cotton, in order that it might be delivered to him. We do not profess to give the words of the libel, and state its substance, in order to show that it was altogether a proceeding *in rem ;* it did not allege that any particular person was in possession of the cotton or claimed it, but merely that it was unlawful detained. Process was issued accordingly, and 72 bales of cotton attached under it. Houseman appeared as claimant, and upon his application, it was delivered to him upon stipulation, being valued, by agreement of parties, at the sum of $2376, and the security entered for that sum. [*44

It is not necessary to state at large the further proceedings which took place in the superior court ; nor the amendments and alterations which were afterwards made by both parties in the territorial court of appeals. The pleadings and proceedings are imperfect and irregular in both courts. The particular defects which have been supposed to be material will hereafter be noticed. The superior court of the territory, upon the final hearing, decreed restitution of the 72 bales above mentioned ; and Houseman appealed from this decree to the court of appeals of the territory, where new pleadings were filed on both sides, and where the libellant proceeded for the 122 bales taken in salvage, and charged that it was forcibly and wrongfully taken, and claimed damages for the marine tort. The court

of appeals sustained his claim for the *whole amount of the cotton, with interest and costs; increasing, in its decree, the valuation of the 72 bales beyond the sum for which the stipulation was taken in the superior court; and from this decree Houseman has appealed to this court.

Three questions have been raised here in the argument. 1. Was the transaction in relation to the salvage an honest and fair one; and are the acts of the master of the North Carolina binding upon the owners of the vessel and cargo? 2. Was the matter in controversy within the jurisdiction of the court of admiralty? 3. Assuming those two points to be in favor of the libellants, is there anything in the form of the proceedings and pleadings, which will bar him of his right to recover?

Upon the first question, we have no doubt, that there may be cases in which the contract of the master in relation to the amount of salvage to be paid to the salvors, or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster, it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo; and when, from his situation, he is unable to consult them, or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage; and he is not bound in all cases to wait for the decision of a court of admiralty. So too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners, that the amount should be settled at once by the master, and the vessel proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases, unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the court, and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been *bonâ fide*, and such as a discreet owner, placed in the like circumstances, would probably have made. If he settles the amount by agreement, those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair, and the referees worthy of the trust.

*46] *But in this case, the conduct of the master is without excuse. The salvage demanded was exorbitant. The danger of the North Carolina was by no means imminent, when she was discovered by the Hyder Ally; nor did the latter incur any hazard in going to her relief. The weather was moderate, and she floated in a few hours, as soon as 110 bales of cotton were taken from her. She had sustained but very little injury, and was found to be in a condition to proceed with safety on her voyage, without any repairs. And if the 110 bales, instead of being delivered to the wrecking schooner, had been thrown overboard, the North Carolina would have floated, and might have proceeded directly on her voyage. But if these agreements and this award are to be carried into execution, the owners of the cargo lose 122 bales, instead of 110. The vessel is also charged with $700; and the commissions and expenses paid to Houseman, amount to nearly $200 more; so that according to this arrangement at Indian Key, the owners would actually lose between $1200 and $1300, by the interference of the Hyder Ally; and they would have saved that much money, if

their vessel had been let alone, and had been compelled to relieve herself from the reef, by throwing the 110 bales into the ocean.

Where a demand so unreasonable was made upon the master of the North Corolina, it was his duty to have proceeded to a port of entry, and to have brought the subject before the proper tribunal; at the same time, advising the owners or consignees of the vessel of what had happened, in order that they might have an opportunity of attending to their own interests. He could, in a very few days, have communicated from Key West, with either Charleston or Appalachicola; and no reason whatever is assigned for this hurried and extraordinary settlement at the Indian Key. The fact that the settlement was made at such a place, under such circumstances, without proceeding to Key West, or some other port of entry, and without communicating with the persons interested, would of itself have been a badge of fraud; and if the amount allowed to the salvors had been far less, it would yet have required clear and satisfactory proof that *it was reasonable and moderate, and for the interest of the owners, before it would be sanctioned in a court of admiralty. [*47

But the transactions at the Indian Key were evidently in bad faith. In the first place, Houseman, the present claimant of the cotton, becomes the consignee of the vessel and cargo, and takes upon himself to represent the interest of the owners, when he himself is a partner with the salvors, and has a direct interest in pushing the salvage to the highest possible amount. And then, as if to give the appearance of fairness to the transaction, on his part, and as if conscious that it would need all the support that would be given to it, he endeavors to account for making the settlement at Indian Key, by showing that he and Smith, the master of the Hyder Ally, both advised McIntyre to go to Key West, and that he positively refused; and so sensible are the parties concerned of the suspicions which such a settlement, made at such a place, would bring upon them, that a certificate is taken from McIntyre, declaring that he had submitted to the arbitration, of his own free will, and was satisfied with the award. Now, if any good reason had been assigned to the salvors, by McIntyre, for his refusal to go elsewhere to settle the salvage, the court might give some weight to their advice, and his refusal. But how does his refusal, without any sufficient reason, strengthen the cause of the claimant. McIntyre himself is strongly implicated in this transaction; and his acts and declarations cannot be received to prove the innocence of those with whom he was associated. This advice, and this refusal to follow it, without any apparent reason on the part of McIntyre, together with the certificate given to Smith, look very much like contrivances to give the color of fairness and frank-dealing to a transaction, which, in truth, was one of an opposite character. The mode of settlement also is exceedingly suspicious. McIntyre exercises no judgment upon the value of the salvage service, but it is referred. Yet, he does not appear to have known anything about the referrees, nor have we any account of their characters, or of their fitness for such a trust. They are called shipmasters, in the survey held on the North Carolina; but we do not learn from the testimony, what kind of vessels they commanded, nor what was their business at that time, at Indian Key. If McIntyre meant to deal justly with his owners, how could *he refer so grave a matter to men of whom he knew nothing, and whose situation obviously placed all [*48

their feelings and partialities on the other side. If Houseman, his consignee, made the selection for him, then both of the arbitrators were, in fact, selected by the salvors, and in that case, we ought not to be surprised at the extravagance of the award.

Upon the whole, it is clear: 1st, That McIntyre had no authority to bind his owners, by the settlement at Indian Key. 2d, That the settlement relied on by the claimant was fraudulently made. 3d, That the salvors, by their conduct, have forfeited all claim to compensation, even for the service actually rendered; and the owners are entitled to recover the value of all the cotton delivered for salvage, at Indian Key.

This brings us to the second inquiry, was the matter in controversy within the jurisdiction of the court of admiralty? Now, the matter in dispute is merely a question of salvage. A vessel stranded on a reef, extending into the ocean, and in order to relieve her, another vessel came alongside, and took off a part of her cargo, which has been detained, together with a further portion of the cargo, for salvage. The points in controversy are, whether salvage is due, and if due, how much? Upon such questions, there can be no doubt of the jurisdiction of a court of admiralty; nor of its authority to proceed *in rem*, and attach the property detained. The admiralty is the only court where such a question can be tried; for what other court, but a court of admiralty, has jurisdiction to try a question of salvage? The claimant in this case was a partner with those actually engaged in the salvage service. The 72 bales of cotton attached, were still in his hands; and the residue had been sold by him; and whether his purchase from his partners, mentioned in the testimony, was real or colorable, he must be regarded as one of the original wrongdoers, who detains, on land, property taken at sea, upon a claim of salvage, to which he has no title. In the case of *Peisch* v. *Ware*, 4 Cranch 347, which, in principle, is perfectly analogous to this (so far as the point of jurisdiction is concerned), the power of the court of admiralty does not appear to have been questioned, either by the court, or at the bar.

*49] The third and last point remains to be considered—whether *there is anything in the form of proceedings, or in the pleadings, sufficient to bar the recovery of the libellant. An objection has been taken to the right of the appellee to sue in his own name, as agent for the consignees, or to sue at all; as his power of attorney from them bears date after the libel was filed; and it has also been objected, that J. & C. Lawton, the consignees, had no right to institute proceedings to recover anything more than their proportion of the cargo shipped on their own account. No authority has been produced in support of these objections; and we consider it as well settled, in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best; that the power of attorney, subsequent to the libel, is a sufficient ratification of what he had before done in their behalf; and that the consignees had such an interest in the whole cargo, that they may lawfully proceed in this case, not only for what belonged to them, and was shipped on their account, but for that portion also which was shipped by Porter, as his own, and consigned to them.

We have already said, that the pleadings are exceedingly irregular. The goods were lawfully taken from the North Carolina, in order to relieve

her from distress; and there is no room for supposing, that either force or fraud was used by the Hyder Ally in order to obtain them; salvage had undoubtedly been earned; and when these proceedings were instituted, the real dispute was, whether the fraudulent conduct of the salvors had forfeited their claim to salvage; and if it had not, how much was justly due. It is singular enough, that neither the libel nor the claim put in by Houseman, make the slightest mention of the real controversy; and it is not until the case is in the appellate court, that the pleadings disclose the matter in dispute. And it is proper here to say, that if the court, upon the testimony of the witnesses, had entertained any doubt as to the true character of the transactions at the Indian Key, that doubt would have been removed by the evasive answers of Houseman. They indicate, in a way too plain to be mistaken, his unwillingness to disclose the manner in which he obtained the cotton which had been attached by the marshal; and his desire to conceal his *partnership concern with the Hyder Ally, and his interest in the salvage obtained from the North Carolina. [*50

It is not necessary to remark upon the defects in the pleadings in the superior court of the territory, where the proceedings were originally instituted; because the party had a right to make any amendments in the appellate court that were required to bring forward the merits of the case: and the remaining question is, whether the amendments allowed exceeded these limits; and whether a new case was not presented there, different from that which was carried up by appeal. There were 72 bales of cotton condemned by the decree of the superior court. The libel claimed an indefinite number, but only 72 were attached; and as the proceeding was altogether *in rem*, and the libellant did not claim the value of the cotton sold, nor allege that any had been sold, the only relief he was entitled to, was the condemnation of these 72 bales. The claimant appealed from this decree; the libellant did not appeal. The case, therefore, carried up, was the controversy about the 72 bales; the libellant resting satisfied with the decree which condemned them, and the claimant seeking to reverse it. This was the *res* in controversy; and in so far as these 72 bales were concerned, either party was authorized to make amendments, or to introduce new evidence, in order to support his title in the appellate court. But the libellant could not introduce a new subject of controversy; and the amendment which brought into the case the additional 50 bales, was the introduction of a new *res*, which did not go up by the appeal; and could not be originally instituted in an appellate court. We think, that this amendment is not justified by admiralty practice; although it is well known, that the most liberal principles prevail in admiralty courts, in relation to amendments. The same may be said of that part of the libel in the court of appeals, which is against the claimant *in personam*, in order to recover damages for a marine tort, in addition to the value of the property withheld. There was no such charge made by the libellant in the superior court, nor any decree made there, in relation to such damages; and no such question could, therefore, be carried up by the appeal of the *claimant. It was a new claim, and originated in the court of appeals. Neither was the appellate court authorized to fix a higher value upon the 72 bales than that for which the stipulation was taken. It was a substitute for the cotton delivered to the complainant; and upon the appeal, stood in the place of it, [*51

and represented it in the appellate court. It could not, therefore, be put aside, and a new valuation substituted in its place.

It follows, from these principles, that the decree of the appellate court was erroneous. But there was certainly enough in the pleadings to authorize the court to affirm the decree of the superior court, for the 72 bales; and the evidence would most abundantly justify such a decree. And as we have no doubt, that the value of the remaining 50 bales is justly due from the claimant, the decree will be reversed, without prejudice to the rights of the parties interested in these 50 bales; and the right reserved to them to proceed, by a new libel in the proper court, to assert their claims.

THE decree of the court of appeals for the territory of Florida must, therefore, be reversed, and the case remanded to the said court, with directions to enter a decree for the value of the 72 bales of cotton, as fixed by the stipulation, with interest from the date of that instrument, and costs; reserving to the owners, or others interested in the cargo of the North Carolina, the right to institute proceedings in the proper court of admiralty, to recover the value of the remaining fifty bales, with interest and costs.

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*52] *COLIN MITCHEL and others, Appellants, *v.* UNITED STATES, Appellees.

Florida land-claims.

Construction of the decree and mandate of the supreme court, at January term 1835, in the case of Mitchel *v.* United States, 9 Pet. 711. A claim to the land, up to the walls of the fort of St. Marks, in Florida, and to the land covered by the fort, rejected.

The superior court of Middle Florida, having, in obedience to the mandate of the court, proceeded to make the inquiries directed thereby, decided that the extent of lands adjacent to forts in Florida, where such were usually attached to such forts, was determined by a radius of 1500 Castilian varas for the salient angles of the covered way, all around the walls; and on there being no covered way, from the extreme line of the ditch. The superior court decreed the extent of the land reserved for the United States, round the fort of St. Marks, in conformity with this opinion; the decree was confirmed, on the appeal of the claimants.

The case of Sibbald, 12 Pet. 493, and the case in 10 Wheat. 451, cited; and the principles decided and applied, in reference to the construction and execution of the mandate of the supreme court, affirmed. "To ascertain the true intention of the decree and mandate of this court, the decree of the court below, and of this court, must be taken into consideration." "The proceedings in the original suit, are always before the court, so far as to determine any new points between the parties."

According to the principles settled by the supreme court, in numerous cases arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, the grant is good so far as it interfered with no prior right of others, as to whatever land was within the line established between the state and the Indian territory. Danforth *v.* Wear, 9 Wheat. 673; Patterson *v.* Jenckes, 2 Pet. 216, cited.

APPEAL from the Superior Court of the Middle District of Florida. In the supreme court, at January term 1835 (9 Pet. 711), the case of Colin Mitchell and others, appellants, against the United States, was argued and determined, on an appeal from the superior court of East Florida. It was a claim to lands in East Florida, the title to which was derived from grants from the Creek and Seminole Indians, ratified by the authorities of Spain, before the cession of Florida to the United States. The claim was confirmed by the court, with the exception of so much of the tract surveyed

between the rivers Wakulla and St. Marks, conveyed to John Forbes & *Company, in 1811, as included the fortress of St. Marks, and the territory directly and immediately adjacent and appurtenant thereto; [*53 which was reserved to the United States.

On the 30th day of January 1836, Collin Mitchel and others, the appellants in the supreme court, filed in the superior court of Middle Florida, the decree and mandate of the supreme court, as follows:

"This cause came on to be heard, on the transcript of the record from the superior court for the middle district of Florida, and was argued by counsel; on full consideration whereof, this court is unanimously of opinion, that the title of the petitioners to so much of the lands in controversy, as is embraced within the lines and boundaries of the tract granted by the deeds, grants and acts of confirmation, to Panton, Leslie & Co., in 1804 and 1806; also to the island in the river Appalachicola, ceded, granted and confirmed to John Forbes, in 1811; also the lands and islands at and west of the mouth of said river, which were ceded, granted and confirmed to John Forbes & Co., in 1811, is valid, by the law of nations, the treaty between the United States and Spain, by which the territory of the Floridas were ceded to the former, the laws and ordinances of Spain, under whose government the title originated, the proceedings under said treaty and the acts of congress relating thereto; and do finally order, decree and determine and adjudge accordingly. And this court doth, in like manner, order, adjudge, determine and decree, that the title of the petitioner to so much of the tract of land which lies east of the first-mentioned tract, between the rivers Wakulla and St. Marks, which was conveyed to John Forbes & Co., in 1811, as shall not be included in the exception hereinafter made, is valid by the laws, treaty and proceedings as aforesaid; with the exception of so much of the last-mentioned tract as includes the fortress St. Marks, and the territory directly and immediately adjacent and appurtenant thereto, which are hereby reserved for the use of the United States. And it is further ordered and decreed, that the territory thus described, shall be that which was ceded by the Indian proprietors to the crown of Spain, for the purpose of erecting the said fort, provided the boundaries of the said cession can be ascertained. If the boundaries *of the said cession cannot now be ascertained, then the adjacent lands which [*54 were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress for military purposes, shall be still considered as annexed to it, and reserved with it, for the use of the United States. If no evidence can now be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Marks as aforesaid; then so much land shall be comprehended in this exception, as according to military usage, was attached generally to forts in Florida, or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed, that a line shall be extended from the point of junction between the rivers St. Marks and Wakulla, to the middle of the river St. Marks, below the junction, thence extending up the middle of each river three miles in a direct line, without computing the courses thereof; and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river; and the two lines to be run as aforesaid, shall be

and the same are hereby declared to be the territory reserved as adjacent and appurtenant to the fortress of St. Marks, and as such reserved for the use of the United States ; to which the claim of the petitioner is rejected ; and as to which, this court decree that the same is a part of the public lands of the United States. The decree of the court below is, therefore, reversed and annulled in all matters and things therein contained, with the exception aforesaid ; and this court, proceeding to render such decree as said court ought to have rendered, do order, adjudge and decree, that the claim of the petitioner is valid, and ought to be confirmed, and is and remains confirmed by the treaty, laws and proceedings aforesaid, to all the lands embraced therein, except such part as is herein above excepted. And this court does further order, adjudge and decree, that the clerk of this court certify the same to the surveyor-general of Florida, pursuant to law, with directions to survey and lay off the land described in the petition of the claimants, according to the lines, boundaries and description thereof in the several deeds of cession, grant and confirmation by the Indians, or gov-
*55] ernor of West Florida, filed as exhibits in this cause, or referred to in the *record thereof, excepting, nevertheless, such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806, as is hereby declared to be the territory of the United States, pursuant to the exception hereinbefore mentioned ; and to make return thereof according to law, as to all the lands comprehended in the three first herein-mentioned tracts. And as to the tract last herein mentioned, to survey in like manner, lay off the same, so soon as the extent of land herein excepted and reserved for the use of the United States, shall be ascertained in the manner hereinbefore directed. And this court doth further order, adjudge and direct, that the extent and boundaries of the land thus excepted and reserved, shall be ascertained and determined by the superior court of the middle district of Florida, in such manner, and by such process, as is prescribed by the acts of congress relating to the claims of lands in Florida, and to render thereupon such judgment or decree, as to law shall appertain."

Subsequently, Colin Mitchel and others filed a bill in the said court, wherein they claimed the lands to the walls of the fort of St. Marks, on all sides ; and prayed confirmation thereof to the said walls of the fort as aforesaid, to be held, as it was, under the dominion of Spain, according to the treaty of cession, and the proceedings under it in other cases. On the 14th of February 1838, they filed an amended petition in the same court, in which they asserted the fee in the land on which the fort of St. Marks was erected, to have been and still to be in themselves, whilst they admitted the right of the government of the United States, for the purposes of a fort ; and they, therefore, prayed that the fee of the land covered by the fort, as well as that adjoining and appurtenant, should be decreed to them, whilst the use thereof, for the purposes of a fort, might be reserved, by a decree of that court, to the government of the United States.

On the 14th of February 1838, the attorney of the United States for the district of Middle Florida, filed his answer to the bill and amended petition ; in which, although he denied the facts and allegations therein set forth, he alleged, on the part of the United States, that the matters which were to be ascertained and decided by the court, did not arise out of said petition and amended petition, and that it should not be governed or regulated

*in the investigations to be made thereby ; that the power and authority of the court to hold cognisance of the case, after their former final decree therein, was not in anywise founded upon the filing of said petition, but entirely and exclusively derived from, and founded upon, the decree of the supreme court of the United States, at January term 1835 ; by and in which the court were directed to ascertain certain questions of fact ; and the said petition and amended petition being, therefore, supererogatory, it was not necessary for the said United States of America to finally answer the same, or create any issues of law or fact thereupon. The attorney of the United States, therefore, prayed that the said petition and amended petition might be dismissed ; and that the court would proceed to decide the questions referred to it by the supreme court, according to, and in pursuance of, the four alternative rules prescribed in the same, without reference to the petition and amended petition.

On the 30th of June 1838, the superior court for the middle district of Florida decreed, on the proofs taken, and after argument, that the boundaries of the territory ceded by the Indians to Spain, for the purpose of erecting the fortress of St. Marks, could not now be ascertained ; that no evidence could now be obtained to designate the extent of the adjacent lands, which were considered as annexed to said fortress, by the crown of Spain, or the commandant of said post. But that there was sufficient evidence of the military usage of Spain, to determine the extent of land adjacent to forts in Florida, which were usually attached to said forts ; that the extent of such reservations was determined by a radius of 1500 Castilian varas from the salient angles of the covered way, all round the works, or, there being no covered way, from the salient angles of the exterior line of the ditch. The court, therefore, decreed, that the lands adjacent to the fortress of St. Marks, to be reserved to the use of the United States, and as part of the public land of the same, should be ascertained, described and determined, as follows, viz : from the eastern point of that part of the exterior line of the ditch which is in advance of, and parallel with, the northern face of the bastion, and opposite the shoulder of the same, a line will be drawn, at right angles with that face of the bastion, 1500 *Castilian varas from the same point of beginning ; two other lines, of 1500 varas in length, will be drawn and extended to points on the [*57 margin of the two rivers, St. Marks and Wakulla, respectively ; from the central one of these three points, lines shall be extended, connecting the terminations or these three *radii ;* and thence, extending in the same lines, to the centre of the two rivers, St. Marks and Wakulla ; and all the land comprehended within these lines, and the middle of each river, from their termination to the confluence of the two rivers below the fort of St. Marks, shall be the land reserved to the use of the United States. The "*vara*" to be used in this survey to be the "Castilian," or "judicial *vara* of Spain," 5000 of which make a league, and are equal in length to 4635 English yards. And they further ordered, that the clerk should certify the decree of the surveyor-general of Florida, pursuant to law, with directions to survey and lay off the lands thus reserved to the United States, according to the lines, boundaries and description thereof, in the decree.

From this decree, the present appeal to the supreme court was prosecuted by Colin Mitchel and others.

The case was argued by *Ogden* and *Webster*, for the appellants; and by *Gilpin*, Attorney-General, for the United States. A printed argument, by the late *Joseph M. White*, for the appellants, was also submitted to the court.

Ogden, after referring to the case of Colin Mitchel and others, in 9 Pet. 761, and reading the decree and mandate of the court in that case, stated, that the question which was referred to the superior court of Middle Florida, was, what was the extent of the fort of St. Marks, and the ground around the same; to which, under the decree and mandate of the supreme court, the United States were entitled?

It is contended, that all the United States are entitled to is the ground covered by the fort St. Marks, and the ditch surrounding the same, if entitled to any land there. The whole territory was originally held by the Indians, whose grant to those under whom the appellants claimed, was the whole land, without any *reservation of the fort of St. Marks; no men- *58] tion of the fort is made in the first grant. Afterwards, the fort was recognised in the negotiations with the Indians; and this court considered that a grant of the fort had been made by the Indians, or was reserved by the government of Spain out of the grant to John Forbes & Company. The government of the United States are bound by the limits of the exception, as they claim under the exception. It was under this view of the rights of the United States, and of the parties claiming under John Forbes & Company, that the decree of this court proceeded. The court of Florida was to ascertain the extent of the fort of St. Marks; for this purpose, the testimony of persons who were professionally acquainted with the subject under inquiry was taken. The evidence of Mr. Murat, and of Mr. Morris, was procured. This evidence circumscribes and limits the right of the United States to the ground on which the fort is placed, and to the ground for the ditch around the fort. The adjacent and surrounding lands are not to be occupied by buildings, so as to prevent the full use of the cannon of the fort; but this does not give the right of property in the land so adjacent, to the sovereign or government holding the fort. For the purposes of cultivation, an ownership may exist in the lands about a fort, and does constantly exist. This is the law of Spain. It has been the practice of Spain, to grant lands up to the Spanish forts standing upon them. This was the case at Pensacola and at New Orleans. By the laws of Spain, houses cannot be built near the walls of forts, but if buildings are greater distance than three hundred paces from a fort are destroyed by the fort, they shall be paid for by the king. Recopilacion de las Indias (Madrid, 1755), Book 3, title 7, law 1.

The printed argument of Mr. *White* was as follows:—This is a part of the same controversy litigated between the same parties several years ago, and relates to that portion only of the case remanded for further investigation by the district court. The original sale, by the aboriginal Indians, as a compensation for debts contracted, and indemnity for depredations committed upon the house of Forbes & Company, and the ratification of *the Spanish government, called for the St. Marks river as the east- *59] ern boundary of the cession and grant. This court have decided, that the sale and ratification constituted a full and absolute title in the house

of Forbes & Company, which was regularly transferred by deed to the appellants, Colin Mitchel and others. There is, therefore, no question arising under these pleadings as to the legality of that sale and the confirmation of it. At the junction of the St. Marks and Wakulla rivers, there was an old Spanish fortification, built of soft limestone and mud, as a defence of the Spanish garrison against the Indians. It does not enter into, nor form any part of the system of maritime defence projected by the United States engineers for the seaboard. The nature of the harbor, the small depth of water on the bar, and the impossibility of any armed vessel passing up to or above it, renders its abandonment for all military purposes unavoidable. The garrison has long since been removed, and its few rooms occupied as storehouses. It appears from some official correspondence in the large record, that, in 1787, after the treaties between the Spanish government and the Lower Creek and Tallapuchee Indians, some of the officers of his Catholic Majesty obtained the assent of the Indians to construct a fort. The title had been admitted by those treaties to be in the Indians; the government reserving only a pre-emptive right to the ultimate fee in the soil, and also the right of assenting to or rejecting any sales made by the Indians. No formal cession, transfer, deed or treaty is to be found in the archives. The assent of the Indians was probably obtained in council, in the same manner that the Spaniards obtained permission to erect a fortification at the Walnut Hills and Chickasaw Bluffs, on the Mississippi. However this may be, the fort, such as it is, was erected prior to the title given by the conjoint act of the Indians and Spanish government to Forbes & Company. The only question, then, presented by this record is, whether there is, in fact, any and what reservation, either by Spanish law or usage, appurtenant to such a fortification, which annihilates or controls the title thus given.

The appellants show a sale and confirmation of the land, without reservation, which, to all the remaining tract, has been admitted to be unimpeachable. This cession and ratification, in *the absence of all proof, upon well-established principles of law, recognised by the court in [*60 numerous other cases, creates a presumption in favor of the appellants, and imposes upon the United States the *onus probandi* of showing whether any and what reservation was made. The United States, by their agents, have nowhere attempted to show that the laws of Spain created such a reservation as to control and destroy the grant. The only law produced by them proves incontestably that no such law existed. It appears, that (by law 1, tit. 7, b. 3, of the *Recopilacion de las Indias*) it was directed, that the ground about fortresses should be unoccupied, and gave power to demolish buildings within three hundred paces, by "paying from our royal treasury to the owner the amount of the loss he may sustain." It follows from this law, that the Spanish government recognised the ownership of lands to the walls of forts, with what might be called a servitude, by which the government could so far control individual property, as to prevent the erection of buildings which might be prejudicial to defence. It is clear, that this servitude can only exist as long as the fortification is occupied for the purposes of national defence. No proof has been made, that any portion of land was ceded by the Indian proprietors, for the construction of the fort. The presumption is, from the very imperfect information in the record, that if any were ceded, it was the site only; and this is confirmed and strength-

ened by the fact, that the Indians sold the land, without reservation, to the house of Forbes & Company, and the Spanish authorities acquiesced in and ratified the sale to this land, without reservation, which was approved by the captain-general, the highest judicial and administrative functionary of the crown of Spain having jurisdiction over the Floridas. This concession and approval must be regarded as *res adjudicata*, so far as the rights of Spain are involved; and, as the United States only succeed to the rights of Spain, by a cession of the vacant land, it follows, that it is equally conclusive upon them.

This court have directed, that if the boundaries of the cession cannot be ascertained, "then the adjacent lands, considered and held by the Spanish government as annexed to a fortress for military purposes, shall be reserved." The United States hold the affirmative of the proposition, that there was, by law or usage, *such a reservation of soil, but they have utterly failed to prove it by anything in this record. Can such a mere allegation, without proof, stand against an Indian sale for the land in question, recognised and approved by the Spanish government? It has been shown, that the only law quoted or relied upon, gives to the government simply the right to demolish houses when they may be prejudicial to defence. (See White's Compilation, p. 36, 96.) So far, therefore, as a question of law is involved, it is against the pretensions of the United States.

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The next question is, as to the military usage in Florida and the adjacent colonies. Upon this branch of the subject, the question is even clearer in favor of the appellants, than upon the laws of Spain. Beginning at Pensacola, where there is the largest fortification in the two Floridas, commonly known as that of St. Carlos de Barrancas, grants were made up to the walls of the fortification, and confirmed by the United States commissioners, whose reports ware approved by an act of congress. (See the claim of Don Fernando and Francisco Morino, whose title was confirmed and afterwards purchased by the United States, for military purposes; see also, the title of Don Vincento Pintado, No. 10, recognised and purchased by the United States for the same purpose.) This proves that the executive and legislative branches of the government have admitted, conformed and purchased of individuals such titles; and it will be seen by the act of congress, as well as the decision of this court in the case of *Arredondo*, that one of the rules of decision by the judiciary, will be the extent to which the legislature have gone in the admission of such titles; and it was further decided, in the case of *Garcia* v. *Lee*, that the opinions of the executive upon the construction of treaties would be regarded by the court as conclusive. This, too, was a case in which every member of the court must have been satisfied, by the perusal of the documents, that if the had been at liberty to consider the question, upon the proofs in the record, the United States had no just or legal title to the territory in dispute, before the Florida treaty of 1819.

But to proceed with the military usage. A fortification was erected upon the high grounds above Pensacola, called the fort of St. Michael, and regularly garrisoned, up to the period of the negotiation of the Florida treaty. There were granted, *immediately adjacent to the fort, lands confirmed to William King, Rowland Clapp, Pawline Rivers and others. It appears also, that various grants were made and confirmed adjacent to the fortification of St. Augustine, and that of Mobile, the site of which was

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also granted by the Spanish government. These concurrent acts of both governments, in regard to all the fortifications in the Floridas, are conclusive as to the military usage in the provinces. There was, neither by law nor custom, any other than a reserved right to the servitude, which ceased with the abandonment of the fortification. The title, therefore, of Forbes & Company, transmitted to Colin Mitchel and others, was as perfect as that to any other portion of the grant; with the single exception, that they could not build within the range of the shot, so as to be prejudicial to defence. There is nothing in the laws or usages of Spain to prevent their cultivation up to the walls. It will be seen also, that in all the other Spanish provinces Forts Chartres, Kaskaskia, St. Louis, New Orleans, New Madrid, and Baton Rouge, similar grants were made, confirmed by commissioners, and ratified by congress.

As the Indian sale, and Spanish ratification, run to the forks of the river, the appellants took the whole title absolutely, except at that point, and *sub modo* as to that. The abandonment of the fort must give them the same title which they had to other portions of the grant. The question appears to be too plain and obvious for further argument or illustration.

Gilpin, the Attorney-General of the United States, contended:—1st. That the decree of the supreme court, at January term 1835, ascertained, absolutely, the title and right of the United States to a tract of land embracing the fortress of St. Marks, and a certain extent of territory around it; that their title to the whole of this is as perfect and complete as that by which they hold any part of the public domain; and that the appellants had and have no right to any portion of it. 2d. That, for the purpose of ascertaining that extent of territory around the fortress, they directed the boundaries thereof should be determined by the superior court of Middle Florida, in the *manner prescribed by that decree; but that they conferred by their mandate no other authority on that court. 3d. That the decree of that court is warranted by law, and the facts proved; and is a complete and faithful execution of the mandate of the supreme court; and ought, therefore, to be affirmed. [*63

Elaborate as have been many of the discussions, and anxiously contested as have been many of the cases that have received their final award from this court, it may be doubted, whether any one has surpassed, in these respects, that which is now to receive its conclusive decision. The vast extent of territory that has been involved, gives a magnitude to the controversy, before which the ordinary discussions about land titles dwindle into insignificance. It far exceeds, in extent, one of the sovereign states of this Union; and it equals, if it does not also exceed, another. It embraces within its limits a fertile land, and a climate of unsurpassed salubrity—the very spot where the cavaliers of Spain sought for the fountains of perpetual health. But, besides these, it has also fine rivers, a sea-coast, harbors and islands, everything that was wanting to constitute a princely domain. The contest to secure it has been proportioned to its magnitude. Eight years of uninterrupted legal controversy brought it, at last, to this tribunal. Five of the present judges know the result. The great ability of the counsel; the laborious researches into the Spanish laws; the despatch of special agents by the government of the United States to Cuba; the thorough ran-

sacking of the Spanish archives; the deferred and prolonged arguments; all presented the subject to this court with a fulness and perfect acquaintance with law and fact that have no equal, perhaps, in its judicial history.

The opinion delivered at January term 1835, shows the minuteness with which every point of the case was considered; and the decree is drawn up with a care and a determination to leave no point doubtful, which it might be thought would have been successful. It declared (9 Pet. 761) the grant to the claimants to be valid; and that their title embraced the whole tract claimed by them, "except so much of the tract as included the fortress of
*64] St. Marks, and the territory directly and immediately *adjacent and appurtenant thereto;" and that, they expressly reserve, as being the property of the United States. To that they reject the claim of the petitioner; and decree that it is a part of the public lands of the United States. They then order their decree to be certified to the superior court of Middle Florida; and they direct that court to have the two tracts surveyed, viz: 1. That decreed to the claimants: 2. That decreed to the United States. They direct that, as to the first, the lines in the deeds of cession, from the Indians to the claimants, shall be followed. As to the second, they also direct that the lines of the cession to the Spanish government shall be followed, if they can be ascertained; but if not, then, in the first place, the boundaries of the lands held at that fortress, by the Spaniards, as annexed to it. If these cannot be ascertained, then the boundaries of so much land as, according to military usage, was generally attached to forts in Florida, or in the adjacent colonies are to be taken. In default of proof of any of these, they decree to the United States, a tract extending from the point of junction of the St. Marks and Wakulla rivers, three miles up each river, and bounded by a straight line there drawn from one to the other. It is this decree which the superior court of Middle Florida has proceeded to execute. It has declared: 1st, That the lines of the Indian session for the fortress cannot be ascertained. 2d, That the boundaries of the territory, held by the Spainards, as annexed to it, cannot be ascertained. 3d. That the extent of territory held by military usage, in Florida, as annexed to a fortress, can be ascertained; and that it is, that within a line drawn at the distance of 1500 Castilian *varas*, from the salient angles of the fortress. The court, therefore, directed the surveyor-general of Florida to lay off that boundary.

At this stage, the claimants interpose, declaring that this decree of the court is wrong, that there is no military usage in Florida, which annexes any land to a fortress, beyond its walls, and that if any land at St. Marks belonged to the United States, it was confined within a line running along the walls of the fortress; but that, in fact, they were entitled to no land there, whatever, as they had abandoned it as a fortress; and it was
*65] *contended, that such ought to have been the decree of the superior court of Middle Florida, in obeying the mandate of this court. It is thus evident, that two questions present themselves: 1. What was the extent and meaning of that portion of the judgment of this court, at January term 1835, which was in favor of the United States? 2. Is the decree made by the superior court of Middle Florida a faithful execution of the mandate of this court; or would its order have been truly performed by a decree such as the claimants required?

I. In proceeding to examine the first question, it is proper to advert to

the principles by which we are to be guided, in considering how far an inferior court has properly executed the mandate of the court above. "To ascertain," say this court, in *Ex parte Sibbald*, 12 Pet. 493, "the true intention of the decree and mandate of this court, the decree of the court below, and of this court, and the petitioner's title, must be taken into consideration." In the case of *The Santa Maria*, they say, "the proceedings in the original suit are always before the court, so far as to determine any new poitns between the parties." 10 Wheat. 431. Adverting then to the original decree, and the proceedings on which it was founded, it is contended on the part of the United States, that the supreme court ascertained absolutely the title and right of the United States, to a tract of land embracing the fortress, and a certain extent of land around it; that their title to the whole of this territory was as perfect and complete as that by which they hold any portion of the public domain; and that the claimants had and have no right whatever to any portion of it.

The original proceedings in the case, were instituted by the claimants, to recover the whole of the vast territory in question. They filed their petition under the sixth section of the act of the 23d of May 1828. In that petition, they claimed to hold the entire 1,200,000 acres, under deeds from the Indians, confirmed by the Spanish authorities. The United States, in reply, denied, first, that they had any valid title from the Indians and Spanish authorities, to any part of the land; but secondly, if they had to a part, they had not *to that portion of it which embraced, and was appurtenant to, the fortress of St. Marks. The correctness of the first [*66 position, is not now a matter of discussion. The validity of the title of the claimants to the large body of land ceded to them by the Indians, was affirmed by this court; and forms, at present, no subject of controversy. But as to the second, the right of the claimants to the fortress, and its appurtenant territory, the whole series of evidence adduced on the original trial, in the superior court of Middle Florida, is conclusive against them.

The Attorney-General then reviewed, in detail, all the facts connected with the privileges and cessions granted to Panton and his successors, from the 3rd of September 1783, when the Floridas were retroceded to Spain, by England, until the 25th of August 1825, when Forbes presented his petition to the governor-general of Cuba, for a certificate of the cessions. From this review, he regarded it as clear, that the first title of the claimants to any portion of this land, was acquired only in 1806; that all which was then acquired lay on the west side of the Wakulla; that in 1811, they bought from the Indians such right only as they then had to the land between the Wakulla and St. Marks; that in 1825, when they made their application to the governor-general, they did not regard their own claim, derived under this last purchase, as embracing the fortress of St. Marks; and that the claim thereto was first set up in 1828.

The Attorney-General then examined, in the same detail, the evidence adduced on the original trial, which proved the acquisition and establishment by the Spanish government, of a fortress, at St. Marks, even before the transfer of Florida to England, in 1763; the early and express recognition by the Indians of their undisputed possession and sovereignty; the severance from the Indian domain, not only of the post itself, but of the quantity of land around, necessary for its protection, and the "circle of the jurisdic-

tion of a fortified place ;" the construction of the present military work, in 1787 ; the subsequent maintenance of it, at a great cost ; and its distinct and special delivery to the United States, on the cession of the Floridas to them.

Thus, then, stood the case, on the evidence before the superior court of Middle Florida. A clear title in the government of *Spain, and
*67] derived from them to the United States, to this fort, and the circle of necessary jurisdiction, founded on conquest, direct grant, forty if not sixty years' possession, and legal prescription. A title in the claimants, admitted to commence less than ten years before the cession of Florida to the United States ; in its terms excluding the fortress and its appurtenances ; but, if it did not, being totally inconsistent with the previous right of the opposite party. Is it surprising, that the judge, in alluding to the pretence, that the Indian grant to Forbes should cover this, spoke of it as " manifestly extravagant and unjustifiable ? ' The decree of that court, however, being adverse to the whole claim of Forbes, came entirely, on the appeal, before the supreme court. But it does not appear, that the claimants ventured, before this tribunal, to set up a title to this part of their original claim. On the contrary, the counsel for the claimants admitted, in his argument, that " the Indian title for the site of the fort of St. Marks, had been extinguished by a negotiation made by the governor of West Florida." When, therefore, the court came to pass on the validity of the claim, they scarcely adverted to the original pretension set up to this portion of the land, considering it as unequivocally abandoned. " As to the land," say they, 9 Pet. 733, " covered by the fort and appurtenances to some distance around it, it becomes unnecessary to inquire into the effect of the deeds, as the counsel for the petitioners have in open court disclaimed any pretensions to it." The court, however, were satisfied of the validity of the Indian grants, and of the title of the claimants, to all the land that they derived under them ; as much as they were of the title of the United States to all that was held by the Spanish government. Their decree was, therefore, carefully made. It declared, that the title of the petitioners to the land claimed, was valid and complete, except to so much of it " as includes the fortress of St. Marks, and the territory directly and immediately adjacent and appurtenant thereto ;" and they declared, that the claim of the petitioners to this latter tract " was rejected, and that the same is a part of the public lands of the United States." They then proceeded (9 Pet. 763) to declare the mode in which their decree should be executed. They ordered the surveyor-general of Florida to survey and lay off the lands decreed to belong to the peti-
*68] tioner, " excepting, *nevertheless, the part declared to be the territory of the United States." To fix the boundaries of this excepted territory, they ordered the superior court of Middle Florida to ascertain : 1. The territory which was ceded by the Indians to the crown of Spain, for the purpose of erecting the fort. 2. If the boundaries of this could not now be ascertained, then to ascertain the extent of the adjacent lands which were considered and held by the Spanish government or the commandant of the fort, as annexed to the fortress for military purposes. 3. If this could not be done, then to ascertain the extent of land generally attached to forts in Florida, or the adjacent colonies, according to military usage. 4. If this could not be done, then to extend a straight line across from the St. Marks

to the Wakulla, at the distance of three miles above their point of junction, embracing within it the territory which was to be considered as adjacent and appurtenant to the fortress. Finally, they directed the surveyor-general to survey and lay off for the United States, the land thus declared to belong to them.

It will be seen, from the careful manner in which this decree was framed, that the supreme court left no question of title unsettled ; that they explicitly decreed what belonged to the two parties who were claimants—what belonged to Forbes, and what belonged to the United States ; that they absolutely and totally rejected the claims of the one party or the other to certain portions of the soil ; that no title, perfect or imperfect, past, present or future, was recognised as existing in either party to any other portion of the land in controversy, than that which was assigned to him by the decree. To Forbes was given all he claimed, except a tract previously granted to the Spanish crown. To that tract, they declared he possessed no right whatever, perfect or imperfect ; but that it belonged, in absolute title, to the United States. If its boundaries were known, the survey was to be made according to them ; if its boundaries were unknown, they were then to be a line embracing all the territory that military usages or military purposes ever considered as appurtenant to a Spanish fort. The nature of the title was not left to depend on these usages; but merely the extent of boundary. The title was declared in terms to be absolute ; wherever the boundary *was, the land was public land up to that boundary ; the claim of Forbes, of every sort and to every inch of it, was absolutely rejected, [* 69 as completely as if he had never held any grant whatever. The only reason for failing to direct the surveyor-general to lay off the boundary line of the tract decreed to the United States, was the ignorance of the court on a single point of fact ; and that fact they directed the court below to ascertain. This that court has done. They have, by a formal judgment, declared that there is no evidence either of the boundary fixed by the Indians, at the time of conveyance ; or of that claimed by the Spanish government or commandant at St. Marks ; but that it was a well-settled military usage, to extend the appurtenances of a fort to the distance of 1500 Castilian *varas* from its salient angles ; and they decree, therefore, that the boundary of the territory of the United States shall be a line so drawn, between the rivers Wakulla and St. Marks. It is from this decree, that the present appeal is taken. It is alleged to be erroneous, and this court is called to set it aside.

Two inquiries present themselves : 1. Is the fact found by the court correct ; and was it a well-settled military usage, to extend the appurtenance of a fort to a distance of 1500 *varas* from its salient angle. 2. If so, was the decree of the court, that the same should be surveyed as the boundary of the public land belonging to the United States, also correct.

I. By the law of Spain, as well as by that of most nations (Merlin, *Repertorie*, 2, 309, Fortifications), a space is reserved around all fortified places ; and by the established military usage of that country, the reserved space around a fort certainly extended to 1500 *varas*, or 1390 English yards. In the *Recopilacion* (b. 3, tit. 7, law 1), it is declared, that the ground about castles and fortresses shall be clear and unoccupied ; and if a house be erected within three hundred paces (which is equal to 280 English

yards), it shall be demolished. In the same work (b. 4, tit. 7, law 12), no houses are to be built within three hundred paces of the walls of new towns. Similar to this is the evidence taken in the present case. At the instance of the claimants, the testimony of the director of engineers at Havana was taken, by order of Tacon, the governor-general. This officer
*70] states, that "when castles, forts *or fortifications are established, a radius is determined from the salient angles of the covered way, of 1500 *varas* all around the fortification, in which space is prohibited the construction of dwellings." This is the opinion of a director of engineers in the Spanish army, as to the distance of the line from the fortress—the point of fact to be ascertained. Again, a concession of Governor White is produced, where a person applies for three acres of land at Macariz. The chief engineer reports them to be within 1500 *varas* of the fort, and therefore, a mere right of temporary cultivation was granted. There were several witnesses examined at the trial, who, although unacquainted with the military usage of Spain in particular, and differing as to the exact extent of ground thus reserved around forts, concur in a reservation being necessary, to an extent sufficient to permit the use of artillery. Colonel Achille Murat states, that the distance kept free from permanent structures, on the glacis or esplanade of a fortress, is determined by a radius from the salient angles of the covered way of 1700 *toises*, about 3400 yards. Colonel Gadsden says, that he does not know the military usage of Spain on the subject, but that, when General Jackson took possession of the Spanish forts in Florida, he directed that the adjoining grounds should also be taken possession of, to the extent of point-blank range of heavy ordnance—such being the usage of the Spanish government; he adds, that no fortress is defensible, unless it has command of the ground around, to the extent of point-blank range. Major Vinton says, the point-blank range of a thirty-two pounder is 850 yards. To complete the testimony on this point, we have that of Colonel Butler, who says expressly, that the woods had been cleared away by the authorities at St. Marks, to a distance of a mile and a half from its walls; and that of Mr. Crane, one of the claimant's witnesses, who says no buildings were erected outside of the fort, before 1827, and then by permission of the United States. This point then is clearly established, that the extent of soil, for fifteen hundred *varas* from the fort, was appurtenant to it.

II. This fact being established, the remaining inquiry is, whether the
*71] court erred in decreeing, that "the surveyor-general *should lay off the land up to this line, as being reserved to the United States, and forming part of the public lands." This is the main point of the case, on the part of the appellants, in their present proceeding. They deny that this part of the decree is right, upon two grounds, which were elaborately set forth in what are termed their petition and amended petition, filed in the court below. The first of these grounds was taken on the 30th January 1836, when, in the shape of a petition to the court below, they asserted, that they were the original proprietors of the soil, as grantees of the Indians; and that, by the law of the Indies and the usage of Spain and her colonies, they possessed the absolute and useful dominion of it, up to the walls of the fortress, and were only limited and restrained therein, so far as to be prevented from erecting any permanent buildings that might interfere with the defence of the place; and they, therefore, contended, that the decree of the

court below should make the walls of the fort the boundary of their claim. The second ground was taken on the 14th February 1838, when, in what was called an amended petition, they asserted a still broader right; they alleged, that the ground on which the fort itself stood, being originally granted by the Indians for the purposes of a fort alone, a mere use and occupance passed to Spain for military purposes, leaving the fee in the Indians and their assignees; that such use or right of possession only passed to the United States; that they had abandoned the place as a military possession; that all their title thereto had ceased from such abandonment; and that the whole place, within the walls of the fort as well as without, now belonged absolutely to them, as the grantees of the Indians. They, therefore, contended, that the decree of the court below should declare, that "the fee of the land covered by the fort" was vested in them.

To the grounds thus boldly taken, it is answered, that there are no such laws or Spanish usages as the appellants allege, which are applicable to this case; but that, on the contrary, they vest the absolute title in the United States, as far as the line ascertained by the court; that if there were any such law or usage, it is controlled in this case by a prior and absolute grant from the Indians to the crown of Spain; that had it not been so expressly granted, it has been so held by an undisputed possession *of more than half a century; that, besides this, the right of the United States to the extent claimed by them, was solemnly admitted, without qualification, by the appellants; and that if it were not so, the question now raised has been finally and irrevocably settled by the decree of this court, and could not be mooted or acted upon by the court below, as the appellants demand. [*72

1. By the law and usages of Spain, where a fortress was erected in a country conquered from the Indians, the absolute dominion and title to the soil remained vested in the Spanish crown, not merely of the fortress itself, but of the land necessarily appurtenant thereto. This results directly and incontestibly from the whole system of Spain, in regard to countries discovered by her, or conquered from the Indians. Spain denied, absolutely, all right of the Indians to the conquered soil, except such as was allotted to them; to that only did she admit any right or title whatever. No nation ever framed so full and complete a system in regard to her discovered or conquered territory. 1 Robertson's America 52, 102; 2 Ibid. 208, 230, note 69. The "*Recopilacion de Leyes de los reynas de las Indias*" contains this system in a digested and written form. It includes the Floridas, not merely by its general terms, but by its express language. B. 2, tit. 15, law 2; B. 5, tit. 2, law 1; 2 White's New Rec. 57. Every part of this work shows that the king of Spain claimed the absolute title in all lands within the American dominions, and did not recognise any right of the Indians, except in regard to such tracts as were expressly left in their possession. He asserted (B. 3, tit. 1, law 1; B. 4, tit. 1, law 1; B. 4, tit. 2, law 1; B. 4, tit. 12, law 14; 2 White's New Rec. 32, 48, 52) his absolute dominion to the soil of the Indies, by donation of the Holy See. Unlike the Anglo-Americans, Spain never made a single treaty to acquire the soil. Their own settlements, with lands for grazing and hunting, were left to the Indians. These they were permitted to alienate and devise, under certain regulations, as Spanish subjects were permitted to do, with lands granted to them; but if they occupied lands

beyond this, or refused to relinquish those granted to the Spaniards, they were removed. B. 4, tit. 7, law 23; 2 White's New Rec. 48, 50. They were not permitted to change their settlement or residence, without leave of the Spanish authorities. B. 6, tit. 1, law 27; tit. 3, law 1, 13, 18, 19, 20.

*73] *In the treaty of 1784, with the Florida Indians (10 Waite's Am. St. Pap. 123), which was made after the long war, and when it was most desirable to attach them to Spain, and dissolve their growing connection with the colonies, by means of the promise of certain commercial intercourse, they were yet expressly subjected to these Spanish laws; and even as regards their own settlements, nothing was guarantied to them beyond their actual possessions, to the extent to which they were recognised by the laws of the Indies. These doctrines—the right of absolute dominion, which conquest gives over an Indian territory—have been so often recognised by our courts, that they are no longer open to discussion; and they have been applied as well to the American as to the Spanish intercourse with the original inhabitants of this continent. As early as 1805, the executive department of our government, in its official correspondence, laid down these principles (12 Waite Am. St. Pap. 311); and in the case of *Johnson* v. *McIntosh*, 8 Wheat. 54, the whole question was elaborately argued and thoroughly examined in this, the highest branch of our judicial department. In delivering the opinion of the court, the chief justice went at large into the subject. He clearly showed, that discovery was the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were made here; that the European governments asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy, which those governments were exclusively to extinguish; that the same principle was recognised in the wars, negotiations and treaties between the different European powers; and that, since the revolution, it had been adopted by the American states —the exclusive right of the British government, over lands occupied by the Indians, having passed to the governments of the states or of the Union, as the case may be. The supreme court of New York, in the case of *Goodell* v. *Jackson*, 20 Johns. 693, examined, after an elaborate discussion, the same general question, and, without any knowledge of the case pending in this court, came to the same result. So far, then, as the general question is concerned, in regard to the right of the government of a nation, by whom the

*74] conquest or discovery is made, to take possession *of Indian lands, we need look no further, to ascertain the principles which have governed, not only Spain, but other European nations, as well as ourselves. Even in the particular case out of which the present appeal arose, this court (9 Pet. 745), having reference especially to the rights of the Spanish crown in Florida, has declared, that, subject to a possessory right under which the Indians might enjoy their actual settlements, "the ultimate fee was in the crown and its grantees." If this view of the law, as applicable to the rights of sovereignty enjoyed by conquerors or discoverers, be correct, who can doubt, that they might appropriate to their use the territory they desired for public works? To deny it, would be in the face of every principle thus established; and it may well excite surprise, at this day, that the right, either of the British, the French, or the Spanish settlers of Amer-

ica, to hold land sufficient for a fortress, in the country they had acquired, should be questioned.

If a doubt could exist, it will be removed, by examining the attempt made by the appellants to sustain their doctrine. After a search the most laborious, they rest it upon the opinions of two or three military officers, and a few grants in Florida and Louisiana, supposed to be somewhat analogous. The first of these opinions is not that of a Spanish lawyer, or a person acquainted with the public land system. It is from "a director of engineers," whose name even is not given. After describing the distance of 1500 *varas* to be that which is attached to a fort, for military purposes, he says, "Within this, it is prohibited to build houses, or rebuild those already in existence, but leaving the owners in full possession of their direct and useful domain of said lands; permitting only the construction of such edifices of wood as are necessary for their cultivation, and, of course, easily destroyed in case of a siege. This," he remarks, "is done, for the purpose of showing due respect to the sacred rights of property, and to save the government from the immense expense that would otherwise be necessary for the indemnification of the proprietors whose lands were thus taken." He then concludes, by saying, "from what he has exposed, and from the evidence under his eye, it results, that St. Marks has not occupied, and ought not to occupy, more than the land within the line of the ditch." Now of this opinion, beyond the part which gives the *distance of the line of reservation according to military usage, it may be remarked, [*75 that it is entirely gratuitous—no opinion on any other point was asked. But is it surprising, that it should have been thus volunteered by an *ex parte* and anonymous witness, when it was evidently introduced to his notice as an important part of the claimant's case? The evidence on which he founded it was, as he remarks, under his eye; that evidence could only be such as related to the claimant's title; it could not come officially before the "director of engineers;" it could only be brought by them specially to his notice.

But admitting the "exposition," though not the "result" of the "director of engineers," yet it does not establish a position it is necessary to deny. It establishes only this, that a resulting fee, or a right to the usufruct of the soil, in and around forts, existed when, on the establishment of a fortress, the existing title of the owners, for purposes of economy, was only partially condemned, or a partial use, not interfering with that for which it was taken, was allowed; or when, after the establishment of a fortress, qualified grants were made around it, which became strengthened by a prescription, that, on the abandonment of the fortress, grew into an absolute right. Admit these principles, and in what respect do they sustain the ground, that the government cannot take the absolute property; much more, it may be asked, how can they be construed to prevail against the absolute right to the soil and domain acquired by conquest, and always explicitly declared? In no case could this latent and resulting interest exist, without the agreement of the crown; and in the case of a fortress built on Indian land, the idea of such an agreement is preposterous. These views are applicable to every case cited in the record, of grants made up to the walls of fortresses. The case of *Labatut* v. *Schmidt*, Spear 421, was one where, after the fortification was erected, lands were taken from a per-

son to whom they had been granted, on some change in the works. The cases of confirmed claims are the same; no one can doubt but that the government might, if it saw fit, grant lands, under conditions more or less rigid, in such situations. The present case has no principle in common with these.

If it be said, that the right of the king was limited to the fort, and did not extend to the appurtenances, the answer is, that he *would not take and occupy less than was necessary for the purposes contemplated; his right was the same to one as the other; excluding the Indians from it, all would be set apart that the public service required. It is shown to be as necessary to the fort as the land within the walls; it is an appurtenance, which, in a general grant, would pass with it.

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2. But had there been such a law or usage existing in any territory, acquired by Spain from the Indians, it would not avail the claimants in this case, because the Indians, under whom they claim, recognised the absolute title of the Spanish government, at least five-and-twenty years before the purchase from which the claimants derive their title. This has been already adverted to. It is apparent, in the evidence of Governor Folch, on whose confirmation of their title the claimants depend. His evidence is adduced by themselves. He says, that in 1787, "all the lands necessary for the establishment of the fort" were reserved, in the presence of the Indians, "with great ceremony." Calderon, an officer there at the time, says, that the quantity of land needed to preserve the fort, and all within "the circle of jurisdiction of a fortified place, was taken." Evidence stronger than this, from the lips of the witnesses of the claimants, could not be adduced, to establish the nature and extent of the Spanish title. This is corroborated by the terms of the second deed of the Indians, which includes the land between the Wakulla and St. Marks, where they speak of the grant as conveying "all the right" they had "retained in the land to that time."

3. The governments of Spain and of the United States have had uniform and uninterrupted possession, for at least fifty years, probably, for seventy. This is in direct proof, in the evidence of Caro, Calderon and Doyle, agents of the Spanish government and of the claimants, as to the period from 1787 to 1821. It was taken possession of in 1821, by General Jackson, for the United States, in pursuance of the second article of the treaty with Spain; which expressly and separately cedes "all public edifices, fortifications, barracks and other buildings which are not private property." The possession thus taken, extended, at the time, to the territory around the fort, as well as within the walls. The forest was cleared away, from the earliest times; no building, however trifling, was erected there till 1827; General *Jackson took possession as far as the point-blank range of a thirty-two pounder. Under the well-recognised Spanish law, this possession would give a prescriptive title. That title, by the Spanish law, was absolutely vested and accrued, long before the Indian deed to Forbes. Institutes of Azo, 4, 2, 21; 1 White's New Rec. 347.

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4. But supposing that the title of the United States, thus derived, were not perfectly clear, it is made so by the express and explicit disclaimer of the appellants to this fortress and its appurtenances. This disclaimer was distinctly made, in argument, in this court, by their counsel. It was so understood by the court, and so stands recorded in their opinion. In that

opinion (9 Pet. 733), it is said: "As to the land covered by the fort, and the appurtenances to some distance around it, it becomes unnecessary to inquire into the effect of the deed, as the counsel of the petitioners have in open court disclaimed any pretensions to it." It might be thought, that a relinquishment of even a pretension to this land, so explicit, would have precluded the present claim. Far from this, however, the appellants now seek to disclaim their disclaimer. They seek to represent it as a sacrifice of part to secure the residue; as a compromise. But it was no compromise. How could they compromise with this court? It was an admission of a fact that could not be denied; and one which, if persisted in, would have injuriously affected their entire claim. Throughout the whole proceedings in that case, there is not a "pretension" set up to the land now in controversy; and the evidence which shows its fallacy, if any were wanting, proceeds, uncontradicted and unexplained, from their own witnesses.

5. Supposing, however, all these views to be erroneous; and supposing this court does not sustain the correctness of one of these positions; does this afford ground for setting aside this decree? It does not. If the judgment of the court were wrong, in assigning to the United States this property as "public land," that is an error of the supreme court; the court below could not inquire into it; it could not grant any part of the prayer of the petitioners; it had the limited duty to perform of executing the decree of the court, not of examining questions connected with the merits of that decree. It is an answer to *every ground of objection to say, that it is one with which the court below had nothing to do. *Ex parte Sibbald*, 12 Pet. 492. The decision of the supreme court, in 1835, was final on every point now sought to be raised, in regard to the title to the fort of St. Marks and its appurtenances; the sole question, then left open, was the extent of those appurtenances. By what authority could the court below have decided, as the claimants require, that there was no land appurtenant to the fort; when the supreme court had expressly said, that the "territory adjacent and appurtenant to the fortress is reserved for the use of the United States?" By what authority could the court below have declared, that the fort and its appurtenances had been abandoned by the United States, and had reverted to the claimants; when the supreme court, after having before it the same evidence of abandonment which the court below had, declared, that, so far from reverting to the claimants, it was still a part of "the public land" of the United States? The object of the supreme court, in remitting the proceedings to the court below, was merely to carry into effect its decree; and to inquire into a single fact necessary to the proper execution of that decree. It was not to review what the supreme court had done; to examine rights already examined by this tribunal; to ascertain facts already set forth in the record they had before them; to decide upon conflicting and intricate questions of title. Had the court below done any of these things, as the appellants demanded it should do, then indeed it would have erred. The duty of a court below, to whom a decree of this court is sent, is limited solely to the duty of executing that decree. [*78

It is submitted, therefore, that unless it has been shown (as it certainly has not) that a distance of 1500 *varas* is incorrectly stated to be the extent of the appurtenances of a Spanish fort; then the decree of the court below,

directing the surveyor-general to lay off the land to that extent, was correct; and there is no ground for this appeal.

Webster, for the appellants.—The writers on public law declare, that the range of a cannon shot from a fort shall be the territory appurtenant to a fort, so as to prevent the erection of buildings, or any obstacles to the
*79] *uses of the fort. The court below were therefore wrong, when they gave the right to the soil within the range of a cannon shot; unless the mandate of this court gave to the United States the right to the soil, instead of the ordinary uses of it, connected with the fortification; the eminent domain of the United States was in the land on which the fort was placed; this was essential to the property in the fort, but no more than this; and the court did not intend to go any further than to secure to the United States the full use of the fort of St. Marks. Why should the court give a right to the soil of the surrounding land, when the servitude of it was all that is necessary; and it is all that in similar cases has been claimed and used by the Spanish government, and all that the government of the United States have required?

It is contended, that the whole object of the decree was to have ascertained what was necessary for the common and convenient use of the fort. The court, in the first instance, intended to secure the fort to the United States; other than the right of soil in the fort, the court did not propose to determine. The construction now contended for by the attorney-general, would give to the United States jurisdiction over all lands around a fort, within the range of a cannon-shot, near the forts of the United States. Thus, the cities of New York, of Philadelphia and Baltimore would be under the jurisdiction of the United States. This has not been the understanding or practice. Jurisdiction over the forts has only been exercised or asserted.

The mandate to the superior court of Middle Florida, directed that court, in the first place, if there had been any grant from the Indians, or any proceeding of the Spanish government, which definitely and accurately fixed the extent of the fort, and of the reservation of the adjacent ground, to ascertain and determine the same. No grant, and no such proceedings were found. It was authorized, secondly, to ascertain the extent of the use of the ground round the fort, by the Spanish authorities. This could have been ascertained; evidence to this, was taken by the order of the court, and it is abundant on the record. That evidence fully sustains the claim of the appellants; and the court should have decided the boundaries of Fort St. Marks, and the extent of "adjacent lands, which were considered held by
*80] the Spanish government, or the commandant of the fort, *as annexed to the fortress for military purposes," according to that evidence. When the Spanish government confirmed the grant to John Forbes & Company, no reservation was made of Fort St. Marks. This is conclusive on the United States, and should induce this court to decide this case in favor of the appellants. The evidence of the commandant of the fort, while it was under the Spanish government, is, that the land belonged to John Forbes & Company. What are the laws of nations on this subject. Cited, Burlemaqui, part 3, § 25–9; Puffendorf, b. 8, ch. 5, § 7.

The true position of this case is this: When the confirmation was made

of the Indian grant, no reservation of the fort was made, and the appellants stand on the original grant; and the grantees having acquired the whole of the land, they rest on their rights thus acquired. It is admitted, that after the grant by the Indians, Spain had a right to establish on the lands, and did establish, the fort of St. Marks, on the same. Spain is, therefore, bound to show the extent of her invasion of the land of the grantees of the Indians; and now, the United States, having come in under Spain, is bound to the same.

The reference to the superior court of Florida, by the supreme court did not impose on that court the duty of ascertaining to whom the land circumjacent to the fort belonged. The command was to determine how much adjacent land was required for the use of the fort. As has been said, the use of the ground around the fortress was all that was required for the fortress; and this did not necessarily carry with it the right in the soil.

Wayne, Justice, delivered the opinion of the court.—This case arises upon the mandate of this court on the case of *Mitchel* v. *United States*, reported in 9 Pet. 711. In that case, it will be seen, that the lands claimed by the plaintiffs were in different tracts, and that this court, in confirming the title of the plaintiffs, excepted from one of them the fortress of St. Marks, and "the territory directly and immediately adjacent and appurtenant thereto," which were reserved for the United States. The court further decreed, that the territory *thus described, shall be that which was [*81
ceded by the Indian proprietors to the crown of Spain, for the purpose of erecting the said fort; provided the boundaries of said cession can be ascertained. If the boundaries of the said cession cannot now be ascertained, then the adjacent lands, which were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress, for military purposes, shall be still considered as annexed and reserved with it, for the use of the United States. If no evidence can be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Marks, as aforesaid, then so much land shall be comprehended in this exception, as, according to military usage, was attached generally to forts in Florida, or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed, that a line shall be extended from the point of junction between the rivers St. Marks and Wakulla, to the middle of the river St. Marks, below the junction, thence extending up the middle of each river, three miles, in a direct line, without computing the courses thereof; and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river; and the two lines to be run as aforesaid, shall be, and the same are hereby declared to be the territory reserved, "as adjacent and appurtenant to the fortress of St. Marks;" and as such reserved for the use of the United States. To which, the claim of the petitioner is rejected; and as to which, this court decree, that "the same is a part of the public lands of the United States. The court then reverses the decree of the court below, declaring it to be reversed and annulled in all matters therein contained, with the exception aforesaid; and proceeding to render such decree as the court below ought to have rendered, decreed the claim of the petitioners valid, to all the

land claimed, except to such part as it had expected. The clerk of this court was directed to certify its decree to the surveyor-general of Florida, with directions to survey and lay off the lands described in the petition of the claimant, according to the lines, boundaries and description thereof in the several deeds of cession, grant and confirmation by the Indians or
*82] governor of West Florida, filed *as exhibits in the cause, or referred to in the record thereof; excepting, nevertheless, such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806, as was hereby declared to be the territory of the United States, pursuant to the exception thereinbefore mentioned, and to make return thereof, according to law, as to all the lands comprehended in the three first therein mentioned tracts; and as to the tracts last mentioned, to survey, and in like manner to lay off, the same, as soon as the extent of the land excepted and reserved for the use of the United States should be ascertained in the manner directed. And the court directed that the land excepted and reserved should be ascertained and determined by the superior court of the middle district of Florida, in such manner and by such process as is prescribed by the acts of congress, relating to the claims of lands in Florida; the court rendering thereupon such judgment or decree as to law shall appertain.

This mandate was filed by the plaintiffs in the superior court of Middle Florida. They afterwards filed a bill, claiming from the court a confirmation of their title to the land excepted, up to the walls of the fort of St. Marks; assert this claim, upon the ground of the laws, usages and military practice, in the various colonies of Spain; and then, in an amended bill, they ask the court to decree to them, the fee in the land covered by the fort, as well as that adjoining and appurtenant, because they say, the land on which the fort is erected was originally obtained from the Indians, for the purpose of erecting a fortification, to be occupied and used as such, for that express purpose and no other. The attorney of the United States filed exceptions and an answer to the bills of the plaintiffs, alleging, among other things, that all the points in dispute between the United States and the plaintiffs, concerning the land they claimed, had been settled by the decision and mandate in the original case; and that the only object of this court, in referring the mandate to the court below, was, that it might ascertain the extent and boundaries of the tract of land which included the fortress of St. Marks, and the territory adjacent; to which the claim of the petitioner had been rejected, and which had been reserved for the use of the United States.

On these pleadings, and the evidence taken in it, the cause was tried.
*83] The court expressed the opinion, that the boundaries *of the territory ceded by the Indians to Spain, for the purpose of erecting the fortress of St. Marks, could not now be ascertained; that no evidence could now be obtained to designate the extent of the adjacent lands which were considered as annexed to the fort, by the crown of Spain, or the commandant of the post; but declared there was sufficient evidence of the military usage of Spain to determine the extent of land adjacent to forts in Florida, which were usually attached to said forts. The court proceeded to say, the extent of such reservations was determined by a radius of 1500 Castilian *varas*, from the salient angles of the covered way, all round the works; or, there being no covered way, from the salient angles of the exterior line of the ditch. A

decree was made by the court, conformable with this opinion, from which the plaintiffs appeal.

It is urged for the appellants, that as the sale from the Indians to Forbes & Company calls for the St. Marks river as the eastern boundary of the cession and grant; and as the title to the land was in the Indians, with only a pre-emptive right to the ultimate fee in the soil, in the King of Spain, with the additional right of assenting to, or rejecting sales by the Indians; that if no formal cession, or transfer of the land, upon which the fort is erected, can be found from the Indians to Spain, before the sale to Forbes & Company, confirmed, as it was, by the authorities of Spain, without any exception of the site of the fort, or land appurtenant to it, that the adjacent land up to the walls of the fort belongs to the claimants, and the site of the fort also, in the event of its abandonment as a fortification; that the right to the site would have been consummated in the claimants, in virtue of the sale by the Indians, if it had been disused as a fortress by Spain, before Florida was ceded to the United States; and that the latter could only hold it, for the same use, or as Spain held it; and now having been discontinued by the United States as a fortress, that the claimants were entitled to it in fee. It was also said, that the Spanish government recognised by its laws the ownership of lands to the walls of forts; and that military usage, in Florida, and the adjacent colonies, permitted it.

The case before us does not require any discussion upon the nature and extent of the property held by the Florida Indians in these lands, under Spain. That was satisfactorily done in the *decision given by this court in the original case. 9 Pet. 711. It was then shown, that the [*84 Indians "held under Great Britain and Spain, a right of property in these lands, which could not be impaired, without a violation of the laws of both, and the sancity of repeated treaties." Ibid. 755. "That Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under a guarantee of treaties; which were so highly respected, that in the establishment of a military post, by a royal order, the site thereof was either purchased from the Indians, or occupied with their permission, as that of St. Marks." Ibid. 752. These extracts present the claim of the appellants, under their Indian title, and confirmation of it by Spain, in its strongest light. The last of them is particularly applicable to the point in controversy.

It is then to be determined, whether the court below, in its judgment, has rightly apprehended and executed the mandate of this court. The meaning of the mandate may be ascertained from the instrument itself; but the reasons which induced the court to make it, are to be found in the evidence contained in the original record. The court will now do what it did in the case of *Sibbald.* 12 Pet. 493. It said, "to ascertain the true intention of the decree and mandate of this court, the decree of the court below, and of this court, and the petitioners' title, must be taken into consideration." In 10 Wheat. 431, this court says, "the proceedings in the original suit are always before the court, so far as to determine any new points between the parties."

From the evidence then adduced by the claimants, in the original case, it appeared, that when the Floridas were retroceded to Spain, by England, September 1793, Panton, an English merchant, resided at St. Augustine,

and traded with the Indians in East Florida. In 1784, Governor Mero, finding it necessary to cultivate trade with the Indians, gave permission to one Mather to bring two vessels from London, direct to Pensacola and Mobile, laden with goods of British manufacture, to supply the Indians. In July 1784, Panton applied to Governor Zespedes for leave to remain in the
*85] province, with permission to *import from Great Britain such articles as the Indian trade required, and to export peltries received in payment. A royal order was passed on the 8th May 1786, allowing Panton and his partners to remain in Florida, on their taking the oath of allegiance, and permitting them to trade with the Indians. They were allowed to send a ship, annually, to Pensacola, with British goods, and to take back peltries. In 1787 or 1788, they were allowed to erect a storehouse on the river St. Marks, to collect their peltries; and the vessel from Pensacola was permitted to go there to load them. In 1789, Panton was intrusted with the exclusive trade, and in 1791, received a special royal license. The year after, an attack was made by the Indians, under Bowles, on Panton's store, on the river St. Marks, and much property taken away. The same kind of outrage was repeated in 1800, with heavy loss to Panton and his associates. The Indians also owed them a large sum for goods. Forbes succeeded Panton in the trade which the latter began with the Indians, and was the assignee of his claim upon the Indians. In January 1801, he informs the Marquis Casa Calvo, that he had been negotiating with the Indians to cede lands in payment of the debt, and in satisfaction for the outrages committed by them on the store at St. Marks. The governor countenanced the negotiation. In 1804, Inverarity, an agent of Forbes, informed Governor Folch that the Indians had agreed to sell the land, and asks his consent to complete the purchase. The consent was given. On the 25th May, a deed was made, and in August, in a full Indian council, held at St. Marks, the governor being present, the sale was ratified. This was Forbes's first purchase. It embraced the land between the Appalachicola and Wakulla, extending several miles up the rivers. The boundaries of this first purchase were run and fixed by the Indians, in 1806. All the surveys being completed within that year, Governor Folch confirmed the grant, and gave the grantees possession. In January 1811, a new negotiation was made with the Indians, and they agreed to sell additional strips of land on the western, northern and eastern sides of the first purchase; but the cession was of "all the right the Indians had retained in the land until that time." The eastern addition
*86] embraced *the land from the Wakulla to the St. Marks, and down the latter to the sea; thus including the point between the two rivers. This second cession was also confirmed by governor Folch, in June 1811. Thus matters stood, the cession being known as Forbes's land; and the fort of St. Marks continuing to be garrisoned by Spain, until it was surrendered to the United States, under the treaty. The history of the grants to the claimants having been traced, it is here necessary to give that of the fortress of St. Marks, as it is to be collected from the evidence in the original case.

In the record, a despatch from the Marquis of Casa Calvo shows, that during the possession of Florida by the English, the fort of St. Marks had been a military post; though it had been abandoned, and suffered to go to decay. Shortly after its retrocession to Spain, the latter extended the jurisdiction of West Florida, so as to include the site of the fort. In May 1785,

Count Galvas issued an order to repair the old fort at St. Marks, and a detachment of troops was ordered to it from Pensacola. This detachment was cut off, or driven away, by the Indians. But in the spring of 1787, a royal order was issued, directing the permanent establishment of the fort. "It is notorious and public," says Governor Folch, the principal witness of the claimants, and the person who gave them possession of their whole purchase, "that at the establishment of the fort of St. Marks, at Appalachia, in the year 1787, all the solemnity and requisites were observed to obtain from the Indians, in sale, the lands necessary to that object." Benigno de Calderon, who was then an officer of the Spanish government, twice refers to the fact, that not merely a military post itself, "but the quantity of land needed to preserve it;" and what he calls "the circle of jurisdiction of a fortified place;" was severed from the Indian land, and vested in the government of Spain.

Immediately after the sale of which Governor Folch speaks, the fort was constructed by Spain, at a heavy expense. So were the public stores. The evidence of the claimants shows at least $200,000 were expended upon these works. Calderon says, there was a regular Spanish garrison there from 1787 to 1818. Caro says, they exercised *both civil and military jurisdiction. When Florida was ceded to the United States, St. Marks [*87 was given up as a military fortress of the King of Spain. Such is the history of the fortress of St. Marks, taken from the testimony and the witnesses of the claimants in the original case. Is it surprising, then, that the court, in its mandate, should have excepted the fort and land directly adjacent to it, from its confirmation of the claimant's title to the lands bought by them from the Indians? The King's royal order to establish a fort at St. Marks, the occupancy of the fortress for more than twenty years, before any grant was made to Forbes, twenty-five years before the grant was made, which includes it, and forty years occupation of it with the use of the land adjacent; seemed to the court to be inconsistent with the idea that it was intended to be included in the sale by the Indians, or by the confirmation of that sale by Governor Folch. It must be remembered also, that when Governor Folch gave possession of the land to the grantees, the fort was retained, and the land, to the extent at least of what is termed the circle of military jurisdiction, had been cleared, and that the grantees, though living by permission for protection of themselves and their trade, within that circle, never exercised, by cultivation or otherwise, any acts of ownership over any part of it. Besides, the court was advised, when the decision in the original case was made, that by the laws of the Indies, reservations of lands were made appurtenant to forts, though the extent of such reservations was not known. It was then, however, a subject of inquiry, and would no doubt, have been fully investigated; if the counsel for the claimant had not admitted in his argument, that the Indian title for the sale of the fort of St. Marks, had been extinguished by a negotiation made by the governor of West Florida.

In the opinion of the court, given by Mr. Justice Baldwin, is found the following paragraph: "It is objected, that the grant of 1811 is invalid, because it comprehends the fort of St. Marks, then actually occupied by the troops of the king. It is in full proof, that the site of St. Marks and the adjacent country was within the territory claimed by the Seminole Indians.

It is not certain, from the evidence, whether it was purchased from the Indians, or merely occupied by their permission; there seems to be no written evidence *of the purchase, but no witness asserts that possession was taken adversely to the Indian claim, and it is clearly proved to have been amicably done. Whether the Indians had a right to grant this particular spot, then, or not, cannot affect the validity of the deeds to the residue of the lands conveyed in 1811. The grant is good, so far as it interfered with no prior right of the crown, according to the principles settled by this court, in numerous cases, arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, which have uniformly been held good, as to whatever land was within the line established between the state and the Indian territory. *Danforth* v. *Wear*, 9 Wheat. 673; *Patterson* v. *Jenks*, 2 Pet. 216; and *Winn* v. *Patterson*, 9 Ibid. 663. As to the land covered by the fort and appurtenances, to some distance around it, it became unnecessary to inquiry into the effect of the deeds, as the counsel of the petitioners have in open court disclaimed any pretensions to it."

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It is not, however, upon this disclaimer of the claimants' counsel, that the court relies to sustain the judgment of the court below upon the mandate. It is cited only to show that the subject-matter of the present controversy was considered by the court. That the court, not knowing at that time what should be the reservation appurtenant to the fort of St. Marks, directed it to be ascertained, and excepted it absolutely from the grant of the claimants; declaring it to be a part of the public lands of the United States. The object of the court was, to put these claimants, in respect to the lands which they claimed, in the condition they would have been, if Florida had not been ceded to the United States. It was the intention of the court, in the language of the treaty, to put them in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty. Can it be supposed for a moment, when the king, by his royal order, directed the intendant-general of Cuba, to inquire into the subject of the indemnity which should be made to the house of Panton, Leslie & Company, for services to the crown and for Indian depredations, that he would have sanctioned, or that the intendant-general would have ventured to propose a cession of land, including public stores and a fortress, *which had been built at a great expense, at an important point on the coast, which was essential to control and keep the Indians in subjection, and all-important to resist external attack. Does any one believe, when Governor Folch sanctioned the purchases, confirmed and gave possession of the lands to Forbes & Company, that he would have done either, if he had thought he was giving to them a title to the fort of St. Marks, and its circle of military jurisdiction, against the king; or that the captain-general of Cuba, to whom Governor Folch reported his proceedings in this matter, would have approved and declared that the king would confirm them, if he had supposed, that he was permitting the Indians to sell a fortress, then garrisoned by the troops of Spain, and which had been so for more than twenty years? Is it not certain, nothing of the kind was intended, when it is remembered, that Governor Folch, who superintended the sale of the land, marked out its boundaries, and gave possession of it to the original grantees, says;

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"It is notorious and public, that at the establishment of the fort of St. Marks, at Appalachia, in the year 1787, all the solemnities and requisites were observed, to obtain from the Indians, in sale, the lands necessary to that object?"

We will not enter into the question, how far the appropriation of the land for a fortress, by order of the government, extinguished the Indian title. It might be done successfully, upon the positions taken by this court in respect to the rights of European monarchs to Indian lands in North America, in *Johnson* v. *McIntosh*, 8 Wheat. 543. We are inclined to put this case upon facts disclosed by the claimants' evidence in the former cause, and the inferences and arguments which may be drawn from them, because the court did not do so, in its decision, in consequence of the admission of counsel, "that the land covered by the fort and appurtenances, to some distance around it," were not contended for.

In addition to what has been said, however, in respect to St. Marks, and the appurtenant land, not being within the grant from the Indians to the claimants, we remark, that the subject may be satisfactorily disposed of, by a reference to the second article of the treaty with Spain. "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories *which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida; the [*90 adjacent islands dependent on said provinces; all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings, which are not private property." In the construction of this article, it will be admitted, that the last member of the sentence cannot refer to any of the enumerated cessions, notorious as public property, or that it must be confined to the terms, "other buildings in connection with it." The treaty, then, secures to the United States the fort of St. Marks, and so much land appurtenant to it as, according to military usage, was attached generally to forts in Florida, or the adjacent colonies. Was there any such usage, and has it been established by sufficient testimony to sustain the judgment of the court below? We think there was, and that the proofs are sufficient. At the instance of the claimants, the testimony of the director of engineers was taken by order of the Governor-General Tacon. His evidence on the record before us, is that, "a radius of 1500 Castilian *varas*, is measured from the salient angles of the covered way, all around the fortification." That such was the rule, is confirmed by a document introduced by the claimants, as evidence in this case. In 1801, a petition was presented to Governor White, for a grant of land at Macariz. He referred it to the chief engineer. The engineer reported it to be within 1500 yards of the castle, "that it cannot be cultivated in corn, nor can ditches, or thorn fences be allowed; that plants of a low growth, and vegetables may be permitted to be cultivated, and it may be allowed for the security of the produce, to erect simple post and rail fences, which may be sufficient to prevent animals from breaking in." Under these restrictions, it was granted; so that it could only be used in such a way, as could not interfere with the defensive and offensive power of the castle. Several witnesses were examined on this point; all of them concur in saying, a fortress cannot be defended, unless it has the command of the ground around it, to a considerable extent. Colonel Murat gives as the usage of the European armies, that from the

salient angles of the covered way, a radius of 3400 yards is marked, in which it is not permitted to erect any permanent buildings, or embankments,
*91] or stone fences, or *ditches. We know it also to be the usage of all civilized nations, to assert such rights over the ground adjacent to fortifications, in a time of war. It is reasonable, then, to conclude, that European monarchs, in the construction of permanent fortifications, in the new world, upon Indian lands, before it had been granted by the sovereign, or permitted to be alienated by the Indian, intended to appropriate so much of the land adjacent to a fortification as was necessary to defend it. That it was so intended, in the instance of St. Marks, is strongly corroborated by the testimony of Col. Butler, who says the woods had been cleared away by the authorities at St. Marks, to the distance of a mile and a half from the walls. Another witness says, no buildings were erected outside of the fort, before 1827, and then, by permission of the United States. It is hard to resist the conclusion, that such a clearing, before the sale by the Indians, without the cultivation or occupancy of any part of it, by the grantees, from the time of the Indian sale, to the surrender of the fort to the United States, does not indicate an intention upon the part of the authorities of Spain, to reserve some land adjacent to the fort for military purposes ; and the acquiescence of the purchasers, that though within the boundaries of the grant, the fort and land attached to it by military usage was not intended to be conveyed. Nor can we admit, as it was argued by the counsel of the appellants, that the instances cited in the record of grants of land, up to the walls of fortifications, by the Spanish authorities in Florida and Louisiana, disprove the existence of a military usage to reserve land adjacent to forts in them. Those instances are exceptions out of the military laws of Spain, as contained in the royal ordinances ; which declare that "a radius of 1500 *varas* is measured from the salient angles of the covered way." We do not think it necessary to remark further upon the opinion given by the chief engineer, in respect to the manner in which such titles were acquired to land adjacent to fortifications, or the extent of the military jurisdiction over them, than to observe the fact of certain reservation being declared by him, as a fact ; we require something more than his conclusion or inference, that there was no reservation according to the military usage
*92] and ordinances of Spain, in the instance of St. Marks. *Our opinion is, that the court below has fully apprehended and executed the judgment of this court ; and its judgment is accordingly affirmed.

This case came on to be heard, on the transcript of the record from the superior court of the middle district of Florida, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed.

*Henry Brush, Appellant, *v.* John H. Ware and others, Appellees.

Land-law of Ohio.—Military reserve.—Powers of executors.—Purchasers with notice.

The executor of an officer in the Virginia line on the continental establishment, obtained a certificate from the executive council of Virginia, as executor, for 4000 acres of land in the Virginia reserve, in the state of Ohio, and afterwards sold and assigned the same; entries were made, and warrants issued in favor of the assignees, and a survey was made under one of the warrants, in favor of one of the assignees, a *bonâ fide* purchaser, who obtained a patent from the United States for the land. It appeared, that the executor had no right, under the will, to sell the land to which the testator was entitled. The patent was granted in 1818, and the patentee had been in possession of the land from 1808. The heirs of the officer entitled to the land for military services, in 1839, some of them being minors, filed a bill to compel the patentee to convey the land held byhim to them: *Held*, that the patentee was a purchaser with notice of the prior title of the heirs, and that he was bound to make the conveyance asked from him.

Whatever doubts, on common-law principles, might have existed, on the question, whether the court can go behind a patent for lands, and examine the equity asserted in a bill claiming the land against the patent, in Ohio and Kentucky, this question has been long judicially settled; and this court, following the decisions of those states, have also decided it. The cases of Bodley *v.* Taylor, 5 Cranch 196; Polk's Lessee *v.* Wendall, 9 Ibid. 93; 5 Wheat. 293; Miller *v.* Kerr, 7 Ibid. 1; Hoofnagle *v.* Anderson, Ibid. 212, cited.

A patent appropriates the land called for, and is conclusive against rights subsequently acquired; but when an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined.

A patent for land, under the Virginia land-law, as modified by usage and judicial construction in Kentucky and Ohio, conveys the legal title, but leaves all equities open.

To make a valid entry, some object of notoriety must be called for; and unless this object be proved to have been generally known in the neighborhood of the land, at the time of the entry, the holder of a warrant, who enters the same land, with full notice of the first entry, will have the better title; and so, if an entry be not specific as to the land intended to be appropriated, it conveys no notice to the subsequent locator, nor can it be made good by a subsequent purchase without notice. But with those exceptions, the doctrine of constructive notice has been considered applicable to military titles, as in other cases; and no reason is perceived, why this rule should not prevail. From the nature of these titles, and the force of circumstances, an artificial system has been created, unlike any other, which has long formed the basis of title to real estate in a large and fertile district of country; the peculiarities of this system having for half a century received judicial sanctions, must be preserved; but to extend them would be unwise and impolitic.

No principle is better established, than that a purchaser must look to every part of the title which is essential to its validity.

*An executor has not, ordinarily, any power over the real estate; his powers are derived from the will, and he can do no valid act beyond his authority; where a will contains no special provision on the subject, the land of the decedent descends to his heirs; and this right cannot be divested or impaired by the unauthorized acts of the executor. [*94

The law requires reasonable diligence in a purchaser to ascertain any defect of title; but when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny; he is a voluntary purchaser, and having notice of a fact which casts doubt on the validity of his title, the rights of innocent persons are not to be prejudiced, through his negligence.

Ware's Heirs *v.* Brush, 1 McLean 533, affirmed.

Appeal from the Circuit Court of Ohio. The appellees, John H. Ware and others, heirs of John Hockaday, an officer in the Virginia line on the continental establishment, filed their bill in the circuit court of Ohio, against the appellant, Henry Brush, and against others, for the recovery of certain lands in the state of Ohio, in the military reservation. John Hockaday was

entitled, under the acts and resolutions of congress, to 4000 acres, in the Virginia military reserve. Afterwards, on the motion of the complainants, the bill was dismissed as to all the defendants except Henry Brush; and a decree having been entered in the circuit court in favor of the complainants, Henry Brush prosecuted this appeal.

As the heirs of John Hockaday, the complainants claimed title to the land in question. John Hockaday made his will, disposing of his personal property only; and Ware, one of the executors, proved the will. As executor of Hockaday, he made a fraudulent sale of the military right of the testator to one Joseph Ladd, and having obtained from the executive council of Virginia a certificate of the right of John Hockaday for the land to which he was entitled, he assigned the same to John Ladd. On this certificate, Ladd obtained, as the assignee of Ware, executor of John Hockaday, four warrants, each for 1000 acres. Part of the land, under one of these warrants, through assignments to George Hoffman and others, became the property of Henry Brush; who, under an entry made by George Hoffman, obtained a patent for the land held by him, from the United States, on the 23d of January 1818.

The bill of the appellees asserted, that Henry Brush was a purchaser with notice of the superior title of the heirs of John Hockaday, *and prayed that he might, by a decree of the court, be directed to convey the land to them, they having the prior equity.

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In the answer of Brush, he said, the land in controversy was granted to him, by patents, dated January 23d, 1818; that he had no recollection or belief that he ever saw the warrant, entry or survey, or copies of either; that he was an innocent purchaser for a valuable consideration: he denied all notice of complainant's claim, at or before the emanation of the patents, and all knowledge of any fraud; he said, he believed that the purchase by Ladd was fair, and for a valuable consideration; that he had no knowledge what the will of Hockaday contained: he said, he has been in possession, under claim of title, since 1808, and had made lasting and valuable improvements; and insisted, that complainants ought to be barred by the statute of limitations; and that at any rate, he ought to be paid for all improvements. And by his amended answer, he claimed compensation for taxes paid, and for an allowance for a locator's share; for expenses in perfecting the title; and claimed all the surplus land in the survey.

The case was argued by *Mason*, for the appellant; no counsel appeared for the appellees.

Mason:—The appellant is a purchaser for valuable consideration, without actual notice, and holds the land in controversy by patent from the United States. The heirs of John Hockaday, deceased, are proceeding by bill in chancery, to recover the land, on the alleged ground that the assignment of the claim of their ancestor to bounty-land was made by his executor, without authority, and consequently, that their rights are not divested or impaired by that transfer.

Having acquired the legal title, without notice of any adversary claim, the appellant is entitled to the aid and protection of the court; "and upon this principle, that all men who stand on equal ground, shall have equal equity; because the court cannot do anything for one, without injuring the

other." No title can be better than the title of such a purchaser. If he has a legal title, the court cannot interpose. *Lord Drogheda* v. *Malone*, cited in note to Mitf. Ch. (3d. Am. ed.) 340.

*Is the appellant affected by constructive notice? Presumptive notice is, where the law imputes to a purchaser the knowledge of a [*96 fact, of which the exercise of common prudence and ordinary diligence must have apprised him. As, where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof. Constructive notice is, in its nature, no more than evidence of notice, the presumptions of which are so violent, that the court will not allow of its being controverted. 2 Sugd. Vend. 292; Newl. Cont. 511. In *Dexter* v. *Harris*, 2 Mason 536, Mr. Justice STORY, says: "There is no such principle of law, as that what is matter of record shall be constructive notice to a purchaser The doctrine upon this subject, as to purchasers, is this, that they are affected with constructive notice of all that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved." In *Flagg* v. *Mann*, 2 Sumn. 556, the same learned judge, after stating that constructive notice could not be rebutted, thought that the cases he had referred to, ought to "admonish courts of equity in this country, where the registration of deeds, as matters of title, was universally provided for, not to enlarge the doctrine of constructive notice, or to follow all of the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws." Chancellor Kent (4 Com. 172, old ed.) declared, "It was, indeed, difficult to define, with precision, the rules which regulate implied or constructive notice, for it depended upon the infinitely varied circumstances of each case."

I shall contend, that the doctrine of constructive notice is not applicable to grants for land issued by public authority; nor does it apply to the purchaser of a military land-warrant, issued by the state of Virginia; nor to the *purchaser of an entry or survey in the state of Ohio, made in virtue [*97 of such warrant. 1. Because there is a legal presumption, that the acts of the public agents employed to superintend and conduct the proceedings from the commencement of an inceptive title to its consummation in a grant, have been in conformity with law. 2. Because the purchaser, though put upon inquiry by facts already known, cannot, by the exercise of ordinary diligence and prudence, arrive at the knowledge of other facts necessary to be known. 3. Because, in the case of military warrants, they are issued by the authority of a sovereign state, in pursuance of law; and the legal presumption is, that its officers have performed their duty in executing the trusts confided to them. 4. Because, lastly, such warrants are transferrible by assignment; and ought to pass, like commercial paper, into the hands of a *bonâ fide* purchaser, discharged from all equities, of which he had not actual notice. These propositions he hoped to maintain, both upon reason and authority.

The doctrine of constructive notice has been too long established, to be

now called in question. Therefore, it is not denied to be law, as applied by courts of equity to deeds and other instruments of writing for the transmission of real estate from one individual to another. Public grants are supposed to rest upon a different foundation from that of private conveyances. They emanate from the sovereign power of the country, according to certain rules and forms of proceeding, prescribed by itself, for the regulation of its own action. And when so issued, no matter what recitals the patent may contain, "every man has a right to draw from the existence of the grant itself," the "inference that every pre-requisite has been performed," and that these rules have been complied with on the part of the grantor. The legal presumption is in favor of the validity of every grant issued in the forms prescribed by law." These presumptions are not understood to exist in favor of deeds and other transactions between private citizens; on the contrary, such deeds are not of themselves proof of title, and can be made so only by the aid of extrinsic evidence. *A deed or will is merely a link in the chain of title, of which a patent is the beginning. The former transmits a legal title already in existence—the latter creates the legal title, and brings it into existence.

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A public grant is not only an appropriation of the land, but is itself a perfect title. *Green* v. *Liter*, 8 Cranch 247–8. Officers are appointed and commissioned by the government for the express purpose of conducting and supervising all the preliminary proceedings, from the origin to the consummation of the title; and when these incipient measures are completed, and the grant issued, the law presumes, that the government agents have performed their duty, and that the grant is valid. In one word, it is a legal presumption, in favor of a patent, that there are no defects behind it, by which it can be invalidated or avoided. But notwithstanding this presumption, it is admitted, that defects may, in fact, exist. And hence, it is contended on the other side, that if the patent contains recitals which would fairly conduct an honest inquirer to the discovery of these defects, a purchaser is justly chargeable with notice of them, whether he made inquiry or not; and this, upon the principle, that he is guilty of *crassa negligentia*, in not examining the nature and extent of a danger of which he had thus received notice. Will the law impute gross negligence to a purchaser, for omitting to search for defects in the origin of his title, in a case where the law, at the same time, presumes that no defects exist? Is not one presumption inconsistent with the other? Can they both exist together in the same case? And if they cannot, which ought to yield? Can it be tolerated, as just, in any system of jurisprudence, that the law should first invite the confidence of the purchaser; and then turn against him, and treat that very confidence as criminal?

The executive of the United States has authority to issue patents to purchasers of the public lands. Indeed, it is one of the duties imposed upon him by the laws of congress; and to see that the laws are faithfully executed, is as imperative on him in this branch of the public service, as it is in any other. In the discharge of that duty, the exercise of a wider latitude of discretion and judgment than is permitted in most other cases, *is necessarily confided to that officer. He must be the judge of the sufficiency and regularity of the various preliminary steps required to be taken toward the completion of a legal title, and see that these pre-requisites

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have all been complied with. The nature and extent of this discretion could not be better illustrated, than by referring to the duties required to be performed by the executive, under our system of pre-emption laws, daily becoming more complicated. From the number of public agents employed, and from the character and variety of their duties, in the disposal of the public lands, the inference is irresistible, that errors must be committed. If, under such a state of things, the purchaser is to be affected with notice of these irregularities, and that, too, after the emanation of the patent, there can be no security in land titles, no confidence in the action of the government.

But ought not the acts of the highest officer in the republic, when performed in the execution of a function prescribed by law, and requiring the exercise of judgment and discretion, to be regarded by the citizen, as valid and conclusive? A contrary presumption, or the absence of any presumption in favor of the acts of a public officer, when performed within the sphere of his duty, would make it necessary for the private citizen, if he would avoid the consequences of constructive notice, to visit the land-office and examine the records there; and at Washington city, to satisfy himself that the officers had fulfilled their duty, before he could venture to become a purchaser. Upon this theory, he must re-judge, and at his own peril, what had already been adjudicated by a competent officer, charged with that particular duty. In such a case, he might differ from the officer; and the court from both.

The executive of the United States, in issuing patents for land, is required to perform, and does perform, certain acts of a judicial nature. And when an executive officer acts judicially, as he often must (for the idea of a perfect separation of the powers of government, is a mere abstraction, and wholly unattainable in practice), his decisions are as valid, and have the same effect as judgments pronounced by courts of justice; and are, ordinarily, far more difficult to revise, if erroneous, than the latter. *Judicial power, by whomsoever exercised, is judicial power still, and its determination, whether announced from the bench, or at the counsel-table, have all the authority of adjudications made in conformity with law, and are entitled to be respected as such. The president prescribes the form of the grant, and decides from the evidence before him, whether a patent ought to issue; and whether the applicant, or which of the applicants, if more than one, is entitled to have the grant. The presumption of law is, that he has decided these questions correctly; and therefore, the purchaser is not obliged, in order to protect himself, to examine the grounds of the decision. [*100

This is a contest between parties claiming under the same title. In this case, the patent is valid upon its face; it was not issued without authority; it was not protected by statute; the United States had title to the thing granted; and hence the patent cannot be impeached collaterally in a court of law. In support of the foregoing principles the court are referred to the following cases, viz: *Polk's Lessee* v. *Wendall*, 9 Cranch 87; *Patterson* v. *Winn*, 2 Pet. 233; *Patterson* v. *Jenks*, Ibid. 216; *Stringer* v. *Young*, 3 Ibid. 320; *Boardman* v. *Reed*, 6 Ibid. 328; *United States* v. *Arredondo*, Ibid. 727–32; *Miller* v. *Kerr*, 7 Wheat. 1; *Hoofnagle* v. *Anderson*, Ibid. 212; *Bouldin* v. *Massie*, Ibid. 122.

It is a presumption of law, that public agents and officers, appointed by government, have properly executed their office, and complied with the law, in discharging the duties imposed on them. *Jackson* v. *Marsh*, 6 Cow. 281 ; 4 Cranch 431 ; *Taylor* v. *Brown*, 5 Ibid. 242 ; 9 Cow. 110 ; 19 Johns. 347 ; Bull. N. P. 298 ; *Williams* v. *East India Company*, 3 East 192 ; *Strother* v. *Lucas*, 12 Pet. 437. Every act required to be done, from the commencement to the completion of a military title, derived from the laws of Virginia, is either performed by, or submitted to the cognisance of, an officer appointed for that particular purpose. Now, as there is a legal presumption in favor of the acts of these officers, I maintain, that there is no place for the application of the doctrine of implied notice to this class of titles. The idea *of presumptive notice is met and repelled by an antagonistic presumption. *101]

Again, the distinction between a patent issued by the sovereign authority, and deeds from one citizen to another, is well illustrated by the fact, that the former, unless it is void upon its face, or has issued without authority, or is prohibited by statute, can only be set aside by a regular course of pleading, in which the fraud, irregularity or mistake is directly put in issue. And the state only can take advantage of an improvident or mistaken grant. 3 Bl. Com. 261 ; 1 Munf. 134 ; 2 Wash. 55 ; 4 Monr. 51 ; 4 Bibb 329 ; 5 Monr. 213 ; 12 Johns. 77 ; 10 Ibid. 23 ; 1 Mason 153 ; 1 Hen. & Munf. 306 ; 4 Johns. 143 ; 2 Bibb 628, 487. The statute of frauds and perjuries has no application to public grants. Neither fraud, nor the want of consideration, can be averred, as grounds to impeach a patent, on the application of a creditor.

But the doctrine of constructive notice does not apply to the purchaser of a military warrant, an entry or a survey. Without intending to say, that a warrant is not necessary to the validity of an entry, or that a survey would be good, without an entry, I contend, that a warrant is to be presumed from the existence of an entry ; on the principle, that as it would be a violation of duty on the part of the principal surveyor, to make or record an entry, without the authority of a warrant ; and as the law will presume that the officer has duly executed his office, it follows, therefore, that an entry is proof, till the contrary appears, of the existence of a warrant. For the same reason, a survey is presumptive evidence of the existence of an entry duly made. These are official acts, performed by officers appointed by public authority, and sworn to perform these duties. And the law gives them credit for fidelity, till the contrary is shown ; and nothing, surely, can be more just and reasonable.

Besides, as the law does not direct the warrant to be recorded in the surveyor's office, and as it is not, in practice, recorded there, it may not be accessible to the purchaser ; and therefore, it would be unreasonable to charge him, by implication, with a *knowledge of its contents. It may have been lost or destroyed, after the entry was made. The state of Virginia, and afterwards the congress of the United states, early made provision for these casualties, by making "a certified duplicate of the warrant" equivalent to the original, for the purpose ef obtaining a patent. Ohio L. Laws, 115, 133. And for another reason, the warrant may be beyond the reach of the purchaser. It may, at the time, be in the hands of a deputy-surveyor, for the purpose of executing a survey of that *201]

part of it which had not been surveyed before. Ibid. 122. It is submitted, therefore, that the fact that the warrant may not at all times be within reach of the purchaser, affords a reason why he ought not to be affected with constructive notice of its contents.

But again, no more than ordinary diligence and prudence are required of a purchaser, in the cases where the doctrine of implied notice is admitted to be applicable. For, if a higher degree of diligence and attention than ordinary becomes necessary, the rule itself ceases. What are the facts of the case? The lands lie in the state of Ohio, where the office of the principal surveyor for the district is established. The tribunal that receives the evidence and adjudicates the right of the original claimant to bounty land, and which gives the certificate, and also the office which issues the warrant, are all established in the state of Virginia, distant not less than 600 miles from the land. If the claim was assigned, before the warrant was issued, the evidence of the power of the assignor to transfer the claim will not be found in the office of the principal surveyor in Ohio. It may or may not be found in the office of the register at Richmond, for I know of no law requiring it to be filed or recorded there. Suppose, then, a citizen of Ohio, or of some other state, wishes to purchase a tract of land in the Virginia military reserve, in Ohio, what are the means within his reach, by which he may, in exercising ordinary diligence, shield himself against the consequences of constructive notice? The purchaser goes to the office of the principal surveyor for the district, and by the courtesy of that officer obtains permission to examine the records and *files of the office. And what does he find there? The warrant may be found [*103 there, or it may not, for reasons already stated. But constructive notice, if applicable at all, must be applied without regard to whether the warrant can, by any diligence, be found or not. If it is in the office, the purchaser will see from the face of it, that it was issued to the soldier himself, or to heirs, or to an executor, or to a purchaser. But in either case, the law presumes it properly issued; and therefore, the law will not charge the purchaser with knowledge that it was improperly issued to the warrantee. Neither the entry nor the survey give any notice by which the purchaser is put upon inquiry for the rights of others; nor do they furnish any clew by which such rights can be ascertained. The warrant may have been assigned, before or after its location; in either case, the paper containing the assignment may, or may not, be filed in the surveyor's office.

If the requisite information cannot be obtained in the state where the land lies, will the court say, that ordinary diligence requires the purchaser to visit the land-office at Richmond, to examine for defects prior to the date of the warrant? To do this, a citizen of Ohio must travel a distance, in going and returning, of 1200 miles. The expenses of such a journey would exceed the value of the land, in many instances; and the effect would be, to exclude from the privilege of purchasing these lands, all except a few wealthy speculators who might afford to incur the expense. I need make no remarks on the justice or wisdom of such a policy. Nor will I do more than ask the court to reflect on the consequences that must flow from establishing the doctrine of the court below; consequences, which, could they be limited to future transactions, would be less disastrous; but we know they must operate on the past, and affect titles already acquired, thereby produc-

ing an aggregate of injury and suffering that no sagacity can foresee or calculate. The case of *Reeder* v. *Barr*, 4 Ohio 446, affords the first and only instance, so far as I know, in which the doctrine of implied notice has been applied to the recitals in a patent issued by the United States for a portion of the public domain. And the decree from which we have appealed seems to affirm the doctrine of that case, and to apply it, for the first time, I *believe, to the military titles derived from the laws of Virginia. During the period of fifty years that these titles have been the subject of litigation, in every form known to the law, it is impossible to doubt, that many cases must have occurred in which the principle of presumptive notice would have been asserted, if it had been supposed by the courts, or bar, that such a principle was applicable to a purchaser of these titles. The absence of any adjudication in favor of the doctrine as now applied, is an argument of some force against it.

*104]

McLean, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of Ohio. In their bill, the complainants represent, that they are the only heirs and legal representatives of John Hockaday, late of the county of New Kent, in the commonwealth of Virginia. That Hockaday, in the revolution, was a captain in the Virginia line, on continental establishment, which, under the acts and resolutions of congress, entitled him to 4000 acres of land in the Virginia reservation, within the state of Ohio. That in 1799, Hockaday died, leaving as his only child and heir, Hannah C. Ware, who had intermarried with Robert S. Ware, and who was the mother of a part of the complainants, and the grandmother of the others. That Hockaday left a will, in which he disposed of his personal estate only, and appointed Ware, with two other persons, his executors. Ware proved the will, the others declining to act; and that he wholly neglected his duties as executor, and never settled the estate. That their mother died in 1805, and Robert S. Ware, their father, also died some years afterwards. That in the year 1808, one Joseph Ladd, who has since died insolvent and without heirs, fraudulently made a contract with the executor for the sale of the above military right; and having obtained the certificate of such right from the executive council of Virginia, the same was assigned to Ladd, for the consideration of forty dollars and a pair of boots. That on this certificate and assignment, Ladd obtained four warrants of 1000 acres each, as the assignee of Ware, the executor of Hockaday. One of these warrants was assigned to George Hoffman by *Ladd, and through certain other assignments, to Brush. By a part of this warrant, the two tracts of land in controversy were entered, and for which Brush obtained patents from the United States, dated the 23d January 1818. And the complainants allege, that Brush was a purchaser with notice of their equity; and they pray that he may be decreed to convey to them the title, &c.

*105]

In his answer, the defendant states that he was a *bonâ fide* purchaser, for a valuable consideration, and without notice of the complainants' equity. And he insists, if the court shall decree for the complainants, that he is entitled to the part usually given to the locator, for making the entry and obtaining the title for the land. And also, that he is entitled to moneys paid

for taxes, &c., on the land. This cause has been ably argued on the part of Brush, the appellant.

The question which lies at the foundation of this controversy, and which, in its order, should be first considered, is, whether the court can go behind the patent, and examine the equity asserted in the bill. Whatever doubt might arise on this question, on common-law principles, there can be none, when the peculiar system under which this title originated is considered. In Ohio and Kentucky, this question has been long settled judicially; and this court, following the decisions of those states, have also decided it. *Bodley* v. *Taylor*, 5 Cranch 196. In the case of *Polk's Lessee* v. *Wendall*, 9 Ibid. 98, the court say, "that every pre-requisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant, in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title, from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined." And the court, after showing *that a court of equity was the proper [*106 tribunal to make this examination, remark, "but there are cases in which a grant is absolutely void, as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law." The same case was again brought before the court by a writ of error, and is reported in 5 Wheat. 293, in which the court held, that the system under which land titles originated in Tennessee, being peculiar, constituted, with the adjudication of its courts, a rule of decision for this court.

In the case of *Miller* v. *Kerr*, 7 Wheat. 1, it was held, that an equity arising from an entry of land made on a warrant which had been issued by mistake, could not be sustained against a patent issued on a junior entry. The court say, "the great difficulty in this case consists in the admission of any testimony whatever which calls into question the validity of a warrant issued by the officer to whom that duty is assigned by law. In examining this question, the distinction between an act which is judicial and one which is merely ministerial, must be regarded. The register of the land-office is not at liberty to examine testimony, and to exercise his own judgment respecting the right of an applicant for a military land-warrant." And in the case of *Hoofnagle* v. *Anderson*, 7 Wheat. 212, another question was raised on an entry made by virtue of the same warrant. The mistake in the warrant consisted in this. Thomas Powell having performed military services in the Virginia state line, a certificate by the executive counsel of Virginia was obtained by his heir, which entitled him to a certain amount of land. On this certificate, the register of the land-office at Richmond, Virginia, issued a warrant, which, instead of reciting that the services were performed in the state line, stated that they were performed in the state line on continental establishment. This mistake was important, as the tract of country in Ohio in which the warrant was located, was reserved, in the cession by Virginia, for the satisfaction only of warrants issued for military services

in the state line on continental establishment; and consequently, was not
*107] subject to the right of Powell. And the court remark, *how far the patent ought to be affected by this error, is the question on which the cause depends. They say, there was no ground to suspect fraud; that the warrant was assignable, and carried with it no evidence of the mistake which had been committed in the office; that it had been assigned for a valuable consideration, and the purchaser had obtained a patent for the land, without actual notice of any defect in the origin of his title; and they held, that the patent gave a good title as against any one whose entry was subsequent to its date.

A patent appropriates the land called for, and is conclusive against rights subsequently acquired. But where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined. The patent, under the Virginia land law, as modified by usage and judicial construction, in Kentucky and Ohio, conveys the legal title, but leaves all equities open. *Bouldin* v. *Massie's Heirs*, 7 Wheat. 149. The controversy in this case does not arise from adverse entries, but between claimants under the same warrant. And it is admitted, that Ware, as executor, had no power to assign the military right, which, on the decease of Hockaday, descended to his heirs. It is too clear to admit of doubt, that Ladd, by circumvention and fraud, obtained the assignment from the executor, which enabled him to procure the warrant from the register. As between Ladd and the complainants, can there be any doubt, that this case would be examinable in equity? Could the issuing of the warrant, by the register, interpose any objection to such an investigation?

It is insisted, that the register, of necessity, before he issues the warrant, must determine the right of the applicant, and that in doing so, he acts judicially; that presumptions not only arise in favor of such acts, but unless fraud be shown, they are not open to examination. The executive council of Virginia, in determining the right of Hockaday's heirs, may be said to have acted judicially; but the register, in the language of the court, in one of the cases above cited, acted ministerially. The court say, he was not authorized to examine witnesses in the case, but was bound to act upon
*108] the face of the certificate. The parties interested were not *before him, and he had no means of ascertaining their names, giving them notice, or taking evidence. And under such circumstances, would it not be a most extraordinary rule, which should give a judicial character and effect to his proceeding? He acts, and must necessarily act, from the face of the paper, both as regards the certificate of the executive council, and the assignment of such certificate. His acts, in their nature, are strictly ministerial; they have neither the form nor effect of a judicial proceeding.

It may be admitted, that presumptions arise in favor of the act of a ministerial officer, if apparently fair and legal, until they shall be impeached by evidence. But in this case, there is no impeachment of the acts of the register. The evidence on which he acted is stated on the face of the warrant, which enables the proper tribunal, as between the parties interested, to determine the question of right, which the register had neither the means nor the power to do. The complainants do not deny the genuineness of the certificate, the assignment, or the warrant, but they say, that the executor

had no right to make the assignment ; and that the issuing of the warrant by the register does not preclude them from raising that question.

Until the patents were obtained, this warrant, though assigned, and entered in part on the land in controversy, conveyed only an equitable interest. Hoffman, to whom Ladd assigned it, and the other assignees, took it subject to all equities. In their hands, unless affected by the statute of limitations or lapse of time, any equity arising from the face of the instrument could be asserted against them, the same as against Ladd. Brush, being the last assignee, obtained the patents in his own name, as assignee, and these vested in him the legal estate. But this, on the principles which have been long established, in relation to these titles, does not bar a prior equity. The complainants are proved to be the heirs of Hockaday, and a part of them were minors at the commencement of this suit. All of them, in age, were of tender years, when the warrant was assigned, and it appears that none of them came to a knowledge of their rights, until a short time before the bill was filed. And this is an answer both to the statute of limitations and the lapse *of time. The statute of Ohio does not run against non-residents of the state ; nor can lapse of time operate against infants, under the circumstances of this case. [*109

The great question in this controversy is, whether Brush is chargeable with notice. The certificate of the executive counsel of Virginia stated, that, "the representatives of John Hockaday were entitled to the proportion of land allowed a captain of the continental line, for three years' service." To this was appended a request to the register of the land-office to issue a warrant, in the name of Joseph Ladd, his heirs or assigns, signed by Ware, executor of Hockaday, he having received, as stated, full value for the same. Four military warrants, of 1000 acres each, were issued by the register, "the 9th of August 1808, to Joseph Ladd, assignee of Robert S. Ware, executor of John Hockaday, deceased." By virtue of one of these warrants, 400 acres of the land in dispute were entered, the 8th of June 1809, in the name of George Hoffman, assignee, and 200 acres, in the same name, the 18th of August 1810. These entries were surveyed in May 1810, and on the 20th of January 1818, patents were issued to "Brush, assignee of John Hoffman, who was assignee of Joseph Hoffman *et al.*, assignees of George Hoffman, who was assignee of Joseph Ladd, assignee of Robert S. Ware, executor of Hockaday," &c.

It is insisted, that the general doctrine of notice does not apply to titles of this description. And this position is true, so far as regards the original entry. To make a valid entry, some object of notoriety must be called for ; and unless this object be proved to have been generally known in the neighborhood of the land, at the time of the entry, the holder of a warrant who enters the same land, with full notice of the first entry, will have the better title. And so, if an entry be not specific as to the land intended to be appropriated, or in any respect be defective, it conveys no notice to a subsequent locator, nor can it be made good by a subsequent purchaser without notice. *Kerr* v. *Watts*, 6 Wheat. 560. But with these exceptions, the doctrine of notice has been considered applicable to these military titles, as in other cases. And no reason is perceived, why this rule should not prevail. *From the nature of these titles, and the force of circumstances, an artificial system has been created, unlike any other ; which has [*110

long formed the basis of title to real estate, in a large and fertile district of country. The peculiarities of this system, having for half a century received judicial sanctions, must be preserved; but to extend them, would be unwise and impolitic.

Brush, it is insisted, was a *bonâ fide* purchaser for a valuable consideration, without notice. The answer under which this defence is set up, is neither in substance nor in form free from objection. It does not state the amount of consideration paid, the time of payment, nor does it deny the circumstances from which notice can be inferred. *Boone* v. *Chiles*, 10 Pet. 211–12. But passing over the considerations which arise out of the answer, we will inquire, whether the defendant is not chargeable with notice, from the facts which appear upon the face of his title. The entry on the books of the surveyor, kept at the time in the state of Kentucky, was the incipient step in the acquisition of the title. This entry could only be made by producing to the surveyor, and filing in his office, the original warrant, or a certified copy of it. The survey was then made, and a plat of the land, by a deputy, who returned the same to the principal surveyor's office. This survey is called the plat and certificate, and is assignable by law; but, without an entry founded upon a warrant, it is of no validity. On the transmission of this survey, under the hand and seal of the principal surveyor, accompanied by the original warrant, or a copy, to the general land-office, a patent is issued to the person apparently entitled to it. In issuing the patent, the commissioner of the land-office performs a ministerial duty. He examines no witnesses, but acts from the face of the papers, and exercises no judgment on the subject, except so far as regards matters of form. The patent, therefore, conveys the legal title only, leaving prior equities open to investigation.

This is the history of this title, and of every other in the same district of country. And the question arises, whether the respondent, under the circumstances, was a *bonâ fide* purchaser for a valuable consideration, without notice. In his answer, he says, that he never saw the warrant, the *111] *entries, nor the surveys on which the patents were founded; and that he had no information as to the derivation of the title, except that which the patents contain. The question is not, whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation, by the exercise of that diligence which the law imposes. Such purchasers are not protected.

It is insisted, that the plats and certificates being assignable, the defendant might well purchase them, without a knowledge of the facts contained on the face of the warrant. But was he not bound to look to the warrant as the foundation of his title? The surveys were of no value, without the warrant. No principle is better established, than that a purchaser must look to every part of the title which is essential to its validity. The warrant was in the land-office of the principal surveyor; and although this, at the time, was kept in Kentucky, the defendant was bound to examine it. In this office, his entries were made, and to it his surveys were returned; and from this office was the evidence transmitted, on which the patents were issued. Can it be contended, that the defendant, who purchased an inchoate title, a mere equity, was not bound to look into the origin of that

equity? As a prudent man, would he not examine whether that which he bought was of any value? The records of the land-office, and the papers there on file, showed the origin of the title, and the steps which had been taken to perfect it. By the exercise of ordinary prudence, he would have been led to make this examination; and, in law, he must be considered as having made it.

And here the question arises, whether the statements of the warrant, which were afterwards copied into the patents, that the right originally belonged to Hockaday, descended to his heirs, on his decease, and had been assigned to Ladd, by his executor, were not sufficient to put the defendant on inquiry? Now, an executor has not, ordinarily, any power over the real estate; his powers are derived from the will, and he can do no valid act beyond his authority, Where a will contains no special provision on the subject, the land of the deceased descends to his *heirs; and their rights cannot be divested or impaired by the unauthorized acts of [*112 the executor. The warrant, then, showed the purchaser, that this right, which pertained to the realty, and which, on the death of Hockaday, descended to his heirs, had been assigned by the executor. Was not this notice? Was it not a fact, essentially connected with the title purchased by the defendant, which should have put him upon inquiry? If it would do this, it was notice; for whatever shall put a prudent man on inquiry, is sufficient. And this rule is founded on sound reason, as well as law. How can an individual claim as an innocent purchaser, under such a circumstance?

But it is argued, that it would impose on the defendant an unreasonable duty, to hold that he was bound not only to examine the warrant in the land-office in Kentucky, but to hunt up the will of Hockaday, and see what powers it conferred on the executor. The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence? The will of Hockaday was proved the 11th day of July 1799, before the county court of New Kent, in Virginia, and recorded in the proper records of that county. When the defendant purchased the title, he knew that it originated in Virgnia, had been sanctioned by the executive council of that state, and that the warrant had been issued by the register at Richmond. These are matters of public law, and are consequently known to all. But independently of this, every purchaser of a military title cannot but have a general knowledge of its history.

Why was not the defendant bound to search for the will? The answer given is, the distance was too great, and the place where the will could be found was not stated on the warrant, nor on any of the other papers. That mere distance shall excuse inquiry in such a case, would be a new principle in the law of notice. The certificate of the original right, and the warrant, were obtained *in Richmond, Virginia. And in the office-records [*113 and papers of the executive council, or in those of the register in Richmond, a copy of the will, probably, could have been found. And if such a search had been fruitless, it is certain, that it could have been found

on the public record of wills of New Kent county. A search short of this, would not lay the foundation for parol evidence of the contents of a written instrument. And shall a purchaser make a bad title good, by neglecting or refusing to use the same amount of vigilance?

In the case of *Reeder* v. *Barr*, 4 Ohio 458, the supreme court of Ohio held, that where a patent was issued to Newell, as assignee of the administrator of Henson Reeder, deceased, it was sufficient to charge a subsequent purchaser with notice of the equitable rights of the heirs of Reeder. It is difficult to draw a distinction, in principle, between that case and the one under consideration. An administrator, in Ohio, has no power, unless authorized by the court of common pleas, to sell or convey an interest in land; nor has an executor, in Virginia, any power over the realty, unless it be given to him in the will. In this case, therefore, the purchaser was as much bound to look into the will for the authority of the executor, as the Ohio purchaser was bound to look into the proceedings of the court for the authority of the administrator.

The case of the lessee of *Burkart* v. *Bucher*, 2 Binn. 455, is also in point. The defendant derived his title from William Willis, to whom a patent had issued, reciting that the title was derived under the will of Henry Willis. This will did not authorize the sale of the premises, and the court held, that this was notice to the defendant. So, in the cases of *Jackson ex dem. Livingston* v. *Neely*, 10 Johns. 374, where a deed recited a letter of attorney, by virtue of which the conveyance was made, which was duly deposited with the clerk of Albany, according to the act of the 8th January 1794, it was held to be sufficient notice of the power, by means of the recital, to a subsequent purchaser, who was equally affected by it, as if the power itself had been deposited.

An agent receiving notes from an executor, payable to him as executor, as security for advances by the principal to the executor *on his pri-
*114] vate account, and not as executor, affects his principal with notice that it is a dealing of an executor with the assets, for a purpose foreign to the trusts he was to discharge. 2 Ball & Beat. 491. When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact. *Mertins* v. *Jolliffe*, Ambl. 311. A. made a conveyance to B., with a power of revocation by will, and limited other uses. If A. dispose to a purchaser, by will, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; and this is a notice in law. And so in all cases where a purchaser cannot make out a title, but by deed which leads to another fact, notice of which a purchaser shall be presumed cognisant; for it is *crassa negligentia*, that he sought not after it. *Moore* v. *Bennett*, 2 Chan. Cas. 246. Notice of letters-patent, in which there was a trust for creditors, is sufficient notice of the trust. *Dunch* v. *Kent*, 1 Vern. 319. That which shall be sufficient to put the party upon inquiry, is notice. 13 Ves. 120. On a full consideration of this part of the case, we think, that the defendant must be held to be a purchaser with notice.

The circuit court considered the defendant as vested with a right to such part of the land as is usually given to a locator, and directed one-fourth of the two tracts to be laid off to him so as to include his improvements; and they also decreed to the defendant three-fourths of the taxes paid by him, with

interest. This part of the decree is equitable; and as we coincide with the views of the circuit court on all the points of the case, the decree is affirmed.

Decree affirmed.

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*John B. Gorman and others, Plaintiffs in error, *v.* Peter Lenox's Executors, Defendants in error. [*115

Demurrer.—Action on replevin bond.—Evidence.—Set-off.

On a demurrer being filed, the rule is, that the party who has committed the first fault shall have judgment against him.

Where a declaration is on a bond given to prosecute with effect a writ of replevin, and the breach assigned is, "that the suit was not prosecuted with effect," it is sufficient.

A *certiorari* had been issued by the supreme court to the circuit court, on an allegation of diminution, and the judgment in the replevin suit certified to the supreme court, under the *certiorari*, substantially differed from the judgment described in the declaration on the replevin bond, in a suit in the circuit court, brought after the judgment was rendered; in the circuit court, in the suit on the replevin bond, the judgment was used in evidence without objection: *Held*, that the judgment was properly given in evidence, to show the amount of damages which the plaintiffs in the replevin suit had sustained; and the defendants in the suit on the replevin bond had no right to go into any inquiry as to the evidence on which the verdict was rendered.

Evidence of set-off between the plaintiffs and the defendants, in a suit on a replevin bond, the set-off not having any application to the demand on the replevin bond, which was given after a distress for rent, and in which judgment for the rent had been given for the avowant, is inadmissible. The evidence was not offered to show that judgment had been satisfied, but that it ought never to have been given.[1]

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

This case was argued, at January term 1840, by *Hoban* and *Coxe*, for the plaintiffs in error; and by *Brent*, for the defendants: at this term—

McLean, Justice, delivered the opinion of the court.—This case comes before this court from the circuit court of the district of Columbia, on a writ of error. An action was brought in the circuit court, by the executors of Lenox, against the plaintiffs in error, on a bond given by them in the penalty of $3400; with the condition, "that the said John B. Gorman should well and truly prosecute a certain writ of replevin with effect;" and also, "should return the goods and chattels replevied, if the same be adjudged, and in all things stand to and abide by, perform and fulfil, the judgment of the court in the premises."

*To the declaration the defendants filed a plea of performance, to which the plaintiffs demurred. The defendants also put in a plea of [*116 set-off, that the testator was indebted unto the said Gorman, in the sum of $1238.96, for so much money, &c., and for a like sum for goods, wares and merchandise. To this plea the plaintiff replied the general issue of *non assumpsit*. The statute of limitations was also replied to this plea of set-off, on which issue was joined. The cause on these issues was submitted to a jury, who returned a verdict for the plaintiffs, for the sum of $1088.25, as

[1] In replevin, on a distress for rent, the tenant cannot set off an independent demand against his landlord. Beyer *v.* Fenstermacher, 2 Whart. 95; Peterson *v.* Haight, 3 Id. 150; s. c. 1 Miles 250.

the amount of damages on the bond. After the verdict, the demurrer filed to the plea of performance was argued and sustained; and thereupon, a judgment was entered for the penalty in the bond, to be released on the payment of the sum found by the jury.

On the trial, the plaintiffs, by their counsel, offered in evidence to the jury, the record and minutes of proceeding in the case of *Gorman* v. *Lenox's executors*, and claimed the verdict of the jury for the amount of the rent in arrear found by the jury in that case. And the defendants then "offered to prove the set-off filed in this cause, for the purpose of showing that no rent in arrear was actually due, as found by said verdict, from Mrs. Arguelis, as charged in the said avowry; and that, therefore, the plaintiffs were not damaged to that amount. But the court were of opinion, that such evidence, so offered by the defendants, was inadmissible; to which decision defendants excepted." And the defendants further prayed the court to instruct the jury, that the plaintiffs were not entitled to recover for the rent in arrear, as aforesaid found by the jury, in the record aforesaid, above given in evidence; which the court refused to give.

This record is most loosely and informally made up. But little attention seems to have been paid to the issues made, or to the order in which they were tried. To the plea of set-off, the plaintiffs below replied the general issue of *non assumpsit*, and also the statute of limitations; when the more regular mode of testing the validity of the plea would have been by a demurrer. Indeed, it is a matter of surprise, that *so obvious a course *117] was not taken. But this irregularity seems not to be important, as on the trial of these issues, the defendants offered evidence under the plea of set-off; which was overruled by the court. This, in effect, determined the matter of the plea.

The demurrer to the plea of general performance, seems not to have been decided until after the verdict was rendered. As this plea was clearly bad, the demurrer was very properly sustained by the court. A demurrer being filed, the rule is, that the party who has committed the first fault shall have judgment against him. And on this demurrer, a question is raised as to the sufficiency of the declaration. The breach assigned in the declaration is, that the said Gorman did not prosecute the writ of replevin with effect, nor return the goods and chattels replevied, nor pay to the plaintiffs the damages and costs recovered. The breaches are not assigned with care, and the judgment recovered in the replevin suit is inartificially stated in the declaration. But it seems, where the declaration is on a bond, given to prosecute with effect a writ of replevin, a breach assigned as in this declaration, "that the suit was not prosecuted with effect," is sufficient. 11 Eng. C. L. 236; 6 Har. & Johns. 139; 2 Gill & Johns. 441–443.

The record of the judgment in the replevin suit, as certified in obedience to the writ of *certiorari*, substantially differs from the judgment described in the declaration; but the record of this judgment was only used as evidence in the circuit court; and no objection was made to it. The variance, not having been excepted to in that court, it cannot now be noticed. The objection, as stated in the second bill of exceptions, was, that the amount of the rent in arrear found by the jury could not be received in evidence in this suit. The action being brought on a penal bond, under the Maryland practice, it was the province of the jury to assess the damages which the

plaintiffs had a right to recover; and the judgment in the replevin suit was given in evidence, to show the amount of damages which the plaintiffs had sustained. This was undoubtedly correct; and it is equally clear, that the defendants had no right to go into any inquiry as to the evidence on which the verdict was rendered. The jury found, in the replevin suit, the amount *of rent in arrear, on which the distress was made; and this was the proper criterion of damages in that case. There was no error in the circuit court, therefore, in overruling this objection. [*118

It is equally clear, that the court properly rejected all evidence under the plea of set-off. This was, substantially, an attempt to prove that there was no ground for the verdict and judgment for damages in the replevin suit. The offer was not to show that such judgment had been satisfied, but that it ought never to have been given. This evidence of set-off was also inadmissible, on the ground, that it relates to different parties from those in the present suit. Upon the whole, 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 in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

Ex parte Anderson Crenshaw. [*119

Practice.

An appeal was prosecuted by the complainants in the circuit court of Alabama, to the supreme court, and the citation required by the act of congress had not been served on the appellee, and he had no notice of the appeal; in printing the copy of the record of the circuit court, the return of the marshal of the district, stating that the citation to the appellee had not been served, was accidentally omitted. The court, on motion by the counsel for the appellee, declared the decree in the case, made at January term 1840, null and void; revoked the mandate issued by the circuit court of Alabama, and dismissed the appeal.

Appeal from the Circuit Court of Alabama. At January term 1840, the case of Jefferson L. Edmonds *et al.*, appellants, *v.* Anderson Crenshaw was brought before the court, on appeal from the decree of the circuit court of Alabama, which had been given in favor of the appellee; in which court, the bill of the complainants, the appellants, was ordered to be dismissed. The supreme court had proceeded to hear and adjudge the case, after argument for the appellants by their counsel, Mr. Key, no counsel appearing for Crenshaw (14 Pet. 166), and had reversed the decree of the circuit court. It was afterwards discovered, that a citation on the appeal had never been served on the appellee, and that the court was, by an accidental circumstance, in the printing of the transcript of the record for the use of the supreme court, led to the belief that the appellee had been cited to appear, in the manner required by the judiciary law. Under this belief, the court had proceeded to a decision of the case.

Sergeant, for Crenshaw, on notice to *Key*, the counsel for Jefferson L. Edmonds and others, moved the court, on the first day of the term, to set

aside and annul the judgment and decree of this court, in the case, on the ground, that no citation had been served upon the appellee, nor other notice given to him of the appeal; and that the same was heard *ex parte*. He also moved to dismiss the case, on the ground, that it was brought up by writ of error, instead of appeal; and whether by appeal or writ of error, it was not in time; and also on other grounds.

*120] *The motion was argued by *Sergeant*, for Crenshaw; and by *Key*, for Edmonds and others.

Sergeant, in support of the motion, first exhibited the printed copy of the record, showing, that owing to some mistake, a material part of the record had been omitted in the printing; and thus it had happened, that this court were not informed that there had been no notice of the appeal. The omitted part purported to be a return to the citation, and was as follows: "Rec'd. Dec. 29, 1838; not found, Jan. 1839, R. L. Crawford, U. S. M., by C. Cuyler, D. M." This could not have been in time, if served immediately on coming to the officer's hands. The return-day was the second Monday of January 1839, less than thirty days. Where the citation had been, from the time it was issued, 15th May 1838, did not appear. He next read the affidavits of Anderson Crenshaw, of Robert G. Gordon, one of his counsel below, of David Files, clerk of the circuit court of the Alabama district, and of Robert L. Crawford, marshal, to prove that there was no notice or knowledge of the removal of the case here; and also that Judge Crenshaw, the appellee, was a known resident of the district, who could be found.

He next proceeded to show from the printed record, the following facts: That the decree below, which was on the equity side of the court, was made and rendered on the second Monday of December 1829. That a petition for an appeal was filed in the clerk's office (but not presented to the court), on the 13th August 1836. This appeal was not allowed, nor security given; nor does it appear to have been prosecuted. On the same day, 13th August 1836, a writ of error was issued, and security given by bond, dated 5th September 1836; the only security that ever was given. This bond was, in express terms, for prosecuting the writ of error. Upon this writ, and not otherwise, the case came here. There could not be both error and appeal. That whether it was error or appeal, it was out of time. There were more

*121] than five years from the decree (December 1829) to *the petition for appeal, and suing out the writ of error (13th August 1836); still longer, to the giving the bond in error (5th September 1836); and the citation was not till 1838. This being the general rule, if the appellants rely upon any exception, it is for them to prove it. They have not done so.

The bill, in the court below, was filed on the 22d March 1827; the complainants were a man of full age, and his wife, a lady of full age. But the question is, how they stood at the time of the decree, and till within five years of the writ of error. Upon this point of fact, there is no proof whatever. There is not even a formal allegation, in support of which evidence could be received, or upon which an issue could be tendered. In the petition for the appeal, there is an averment that one of the parties remained a minor. In the writ of error, by an improper license in the use of the writ, which has its own appropriate form, and ought not to be exposed to alterations by a party, there is a like averment. These are, at

best, only *ex parte* suggestions, out of place, and not in a shape to be traversed or denied. The party against whom they are made, has no knowledge of them, nor opportunity to controvert them. The averment, however, if admitted, is insufficient. The disability alleged is infancy. The infancy is alleged only as to one of several complainants; the others were of full age. It is settled, as will be seen presently, that this will not do.

On these facts, the law is quite clear. The case was never regularly before this court. The court had no jurisdiction; and the whole proceeding here is a nullity.

1. The case was brought here by writ of error. A writ of error in such a case is not authorized by law. *The San Pedro*, 2 Wheat. 152.

2. If brought by appeal, it must have been dismissed, as unwarranted by law. For—1. No security was given upon appeal; it was upon the writ of error. Without security, there can be no appeal. The act of 1803 requires it as well as upon a writ of error. 2 Wheat. 132. 2. No citation was served, nor notice given, which are expressly required by act of 1789 upon writs of error (1 U. S. Stat. 84), § 22; and in appeals, by act of 1803 (2 Ibid. 244), § 2. *The only exception is, where the appeal is as at the same term when the decree is given. Here, the decree was not [*122 at the same term, nor in term time; the want of it makes the proceeding void. If service of process or notice be necessary to enable a court to exercise jurisdiction in a case, without it, the proceeding is a nullity. *Walden* v. *Craig*, 14 Pet. 147. 3. The appeal was never allowed; this is necessary. *The Dos Hermanos*, 10 Wheat. 363. If applied for, there would have been opportunity to give notice and settle facts; no opportunity was afforded. 4. The appeal (if any) was not in time. The gratuitous and irregular allegation in the writ of error and petition, if admitted, will not avail. The disability of one of the complainants will not prevent the bar. The whole will be barred, unless the whole be under disability. *Marsteller* v. *McClean*, 7 Cranch 156; *Perry* v. *Jackson*, 4 T. R. 516; 3 Murph. 577.

In reply to the argument, that the application was too late, after the term when the decree was made, Mr. Sergeant referred to *Bank of Commonwealth* v. *Wister*, 3 Pet. 431; *Sibbald* v. *United States*, 12 Ibid. 488.

The present case, he argued, was far stronger than either of those just cited; for he had shown that the court had no jurisdiction, and that the decree was a nullity. The court was led into an error, by the omission to print a material part of the record, and thus to give an *ex parte* hearing in a case never before them. The appellee was left in ignorance that anything which concerned him was pending here; and came, at the first opportunity afforded him, to ask that the error may be corrected.

Key, against the motion.—The appellee cannot justly complain of the proceedings of this court at January term 1840. The whole matter which could be alleged in defence was before the court, in the answer to the bill of the complainants in the circuit court of Alabama. The case exhibited was of an executor accepting the trusts declared by the will, receiving a large amount of the estate of the testator, and leaving to his co-executor to appropriate the money he had received, on his personal responsibility for the conduct *of the co-executor. If, by the failure of the co-executor to perform the duties imposed on him, the *cestuis qui trust* are [*123

injured, the loss must be sustained by the person who confided in him. No appearance of the appellee before the court can change this position of the case; and where, by the decree of the court, full justice has been done, according to law, the court will not interfere.

Nor can the matters presented in support of the motion be inquired into. The case has passed into judgment; and is no longer before the court, or in the power of the court. Cited, *Jackson* v. *Ashton*, 10 Pet. 480.

As to the bar of the claims of the appellants, interposed by the statute of limitations; Mr. Key argued, that, as in this case, there was a minority, the statute would not affect all the parties. The true construction would be, as the statute did not operate on all, it should operate on none.

Taney, Ch. J., delivered the opinion of the court.—This case was brought here by an appeal from the decree of the circuit court for the Southern District of Alabama. It was argued at the last term, on the part of the appellants; and the decree of the circuit court reversed. The argument and decision are reported in 14 Pet. 166. Anderson Crenshaw, against whom the judgment of this court was given, never appeared to the appeal; but the argument was heard in behalf of the appellants, and the decree of the circuit court reversed, under the belief that a citation had been regularly issued, and served upon him. It now appears, that an accidental circumstance led the court into error, in this respect; and that Crenshaw was not cited to appear, in the manner required by the act of congress.

A motion has been made, at the present term, on behalf of Crenshaw, to set aside and annul the judgment and decree of this court; and also to dismiss the appeal. As there is no case now pending here, between these parties, there is nothing upon which an order to dismiss would operate. But upon the facts above stated, it is very clear, that the case was not legally
*124] before us at the last term; and the decree then pronounced *must, therefore, be declared null and void, and the mandate directed to the circuit court must be revoked. An order will accordingly be issued from this court.

On consideration of the motion made by Mr. Sergeant, on a prior day of the present term of this court, to wit, on Monday, the 11th ultimo, and of the arguments of counsel thereupon had, as well against as in support of said motion: It is now here ordered, adjudged and decreed, that the judgment and decree of this court, rendered in the above-entitled cause, on Wednesday, the 26th day of February, A. D. 1840, be and the same is hereby declared utterly null and void; and that the mandate of this court directed to the judges of the said circuit court, in this cause, be and the same is hereby revoked. And it is also now here further ordered, that the clerk of this court do forthwith send to the judges of the circuit court of the United States for the southern district of Alabama, a copy of this order of the court, under the seal of this court, together with a copy of the opinion of this court, pronounced this day.

*Archibald K. Smith, Plaintiff in error, *v.* Alfred Clapp, Defendant in error.

Law of Alabama as to promissory notes.

By a statute of Alabama, it is enacted, that every joint promissory note shall be deemed and construed to have the same effect in law as a joint and several promissory note; and whenever a writ shall issue against any two or more joint and several drawers of a promissory note, it shall be lawful, at any time after the return of the writ, to discontinue such action against any one or more of the defendants, on whom the writ shall not have been executed, and to proceed to judgment against the others. This statute converts a joint into a several promise; and enables the holder to maintain an action against any one of the makers.

A defendant having appeared and pleaded to the action, and at the trial, having withdrawn his plea, the supreme court cannot take notice of any matter of abatement in the writ or declaration. Where the writ had stated both of the defendants to be citizens of another state than that of which the plaintiff was a citizen, and one of the defendants had been returned not found by the marshal, under the laws of Alabama, it is not necessary, in the declaration, to aver the citizenship of the absent defendant.

By the statutes of Alabama, promissory notes may be assigned by indorsement; and the assignee may maintain an action in his own name on such notes; by the act of 1833, the same rights are given to the holder of notes given to a certain person or bearer, to a fictitious person, or to bearer only; and the assignment of such notes by delivery only, authorizes a suit by the holder in his own name. The holder of a note payable to A. B. or bearer, may, to avail himself of these provisions of the law, call himself an assignee of the note from A. B.; but the holder of such a note payable to the bearer, is not an assignee, within the provisions of the judiciary act of 1789.[1]

If any error exists in the calculation of interest in a judgment on a note, on which suit has been brought, the court before whom the suit was brought, may, by the laws of Alabama, correct the error.

Error to the Circuit Court for the Southern Distrtct of Alabama. This suit was instituted in the circuit court, by the defendant in error, against Archibald K. Smith, the plaintiff, and Neil Munn, as the makers of a promissory note, payable to John Barge, or bearer. The note was signed by A. K. Smith and Neil Munn. The writ of *capias*, by which the action was brought, stated Archibald K. Smith and Neil Munn to be citizens of the state of Alabama; and that Alfred Clapp was a citizen of the state of New York.

The marshal returned, "executed the writ on A. K. Clapp—*Neil Munn not found." The declaration was filed against A. K. Smith, [*126 and stated that Neil Munn was not found. A judgment was rendered against A. K. Smith, by the circuit court, and this writ of error was prosecuted by him.

The case was argued by *Key*, for the plaintiff; and by *Test*, for the defendant.

For the plaintiff, it was contended—1. That Barge, the payee (through whom, as assignee, the plaintiff below claimed), not being shown competent to sue in the circuit court, the 11th section of the judiciary act prohibited the plaintiff from suing in that court. 2. The judgment is for more than the amount of the note and interest.

Key contended, that it was necessary to aver that John Barge, to whom the note was given, was not a citizen of Alabama. If this is not done, the

[1] Varner *v.* West, 1 Woods 493.

circuit court had no jurisdiction of the cause. Cited, 3 Dall. 382 ; 4 Ibid. 8 ; 4 Cranch 46 ; 9 Wheat. 537. The plaintiff must show that he claims through John Barge, a citizen of another state, or he cannot sue. The note is drawn to John Barge, or bearer. The suit is brought as the assignee of Barge.

There is another objection. It should have been averred, that Neil Munn, who was not taken by the marshal, was not a citizen of Alabama. It is not sufficient, that the citizenship is stated in the writ ; it should be averred in the declaration, so that it could have been denied in the pleadings. 8 Pet. 148.

It is insisted, that the judgment is for more than the amount of the note and interest ; and this is error.

Test, for the defendant in error, said, as to the first error assigned, that the note was payable to Barge, or bearer, and was assigned to Clapp, who appears to be competent to sue in the circuit court ; and it was not necessary to show that Barge was competent. See *Bullard* v. *Bell*, 1 Mason 251 ; *Bank of Kentucky* v. *Wister*, 2 Pet. 318.

As to the second error. It is a matter of fact, and a mere clerical error, which the defendant ought to have moved the *court below to cor-
*127] rect. It is not admitted, that the error exists. The interest in Alabama, as allowed by statute, is eight per cent.

This case was brought merely for the purpose of delay ; and defendant prays to be allowed the ten per cent. damages.

McKinley, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the southern district of Alabama. The defendant in error, who was plaintiff in the court below, sued out a *capias ad respondendum* against the plaintiff in error, and one Neil Munn, directed to the marshal of the district ; who returned, that he had executed it upon Smith, and that Munn was not found. Whereupon, the plaintiff discontinued the suit against Munn, and filed his declaration, and proceeded to judgment against Smith. When the cause was called for trial, Smith withdrew his plea, previously filed, and suffered judgment to pass against him by *nil dicit.*

To reverse this judgment, the plaintiff in error relies upon the following grounds : 1st. There is no averment in the declaration that Munn was a citizen of Alabama. 2d. It is not shown, that John Barge, to whom the note was payable, was competent, under the 11th section of the judiciary act of 1789, to maintain a suit in his own name. 3d. The judgment is for more than the amount of the note and interest.

The first objection proceeds on the ground, that the note and action being joint, the court could not entertain jurisdiction of one defendant unless it were shown that the other was also a citizen of Alabama. By a statute of Alabama, it is enacted, that every joint promissory note shall be deemed and construed to have the same effect, in law, as a joint and several promissory note. And whenever a writ shall issue against any two or more joint, or joint and several, drawers of a promissory note, it shall be lawful, at any time after the return of the writ, to discontinue such action against any one or more of the defendants on whom the writ shall not have been executed ; and to proceed to judgment against the others. Aikin's Digest 267–8. This

statute converts a joint into a several promissory note; and enables the holder to maintain an action against any one or more of the makers. No doubt can be entertained, therefore, of the right of the plaintiff to have maintained the suit against *Smith alone. And the joint action having been severed, according to the statute, by the return of the marshal, [*128 there can be as little doubt of his right to proceed against Smith, as though Munn had not been named in the writ. In the writ, it was stated, that both Smith and Munn were citizens of Alabama, and had the writ been served on both, the plaintiff might have declared against both, without averring their citizenship; and unless the defendants had pleaded the variance between the writ and declaration, in abatement, he could not afterwards take advantage of it, in arrest of judgment; nor assign it for error. The defendant, Smith, having appeared, and pleaded to the action, and at the trial having withdrawn his plea, this court can take no notice of any matter of abatement in the writ or declaration. And therefore, if it had been necessary to aver the citizenship of Munn, who could no longer be considered a party to the suit, the fact of his being a citizen of the state of Alabama, appearing in the writ, is sufficient for all purposes of jurisdiction in this court. *Bradstreet* v. *Thomas*, 12 Pet. 60.

The only question arising under the second ground of objection is, whether the assignment of the note was by indorsement, or by delivery; and this depends entirely upon the statute law of Alabama. By the act of 1812, all bonds, obligations, bills single, and promissory notes, may be assigned by indorsement; and the assignee may maintain a suit thereon in his own name. Aikin's Digest, 828, § 6. This section contains other provisions which are not material to this case. By the act of 1833, all the provisions of the above-recited section are extended to promissory notes made payable to a certain person or bearer, to a fictitious person or bearer, or to a bearer only; but it is provided, that nothing therein contained shall prevent the assignment of such note by delivery merely, so as to authorize the assignee to sue in his own name. Aikin's Digest 330, § 18.

The averment in the declaration is, that the said John Barge, to whom, or to the bearer of said promissory note, payment of the said sum of money therein specified, was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the 1st day of December 1836, at the southern district of Alabama aforesaid, duly assigned over and delivered the said promissory *note to the said plaintiff, who, then and there, became bearer, and was [*129 and still is, the bearer thereof, and entitled to demand and receive said sum of money, &c. It is obvious, that this assignment was by delivery merely, and not by indorsement, which must be in writing. The intention of the averment is, to show that the plaintiff was within the proviso of the act, and had a right to sue in his own name. It is clear, that he sues in the character of bearer of the note; and consequently, he is not an assignee within the meaning of the 11th section of the judiciary act of 1789. *Bank of the Commonwealth of Kentucky* v. *Wister*, 2 Pet. 318.

If any mistake occurred in the court below, in calculating the interest due on the note, that is a proper subject of correction in that court. By a statute of Alabama, the court of original jurisdiction may correct any clerical error or misprision in the calculation of interest, or other mistake of

the clerk, at any time within three years from the rendition of the judgment. Aikin's Digest 266. The note in this case is no part of the record; this court cannot judicially know, therefore, when the interest commenced running: the third ground relied on by the plaintiff here, ought, therefore, to have been brought before the court below, and may yet be brought before it; and if it shall there appear that any mistake has been made, it can be corrected. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

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*130] *United States, Appellants, *v.* John Rodman, Assignee of Robert McHardy, Appellee.

Florida land-claims.

A claim to land in East Florida, founded on a grant by Governor Kindelan, to Robert McHardy, dated November 8th, 1814, confirmed by the supreme court.

The supreme court, in the case of the United States *v.* Clarke, 8 Pet. 448, say "that if the validity of the grant depends upon its being in conformity with the royal order of Spain of 1790, it cannot be supported;" but immediately proceeds to show, "though the royal order is recited in the grant, that it was, in fact, founded on the meritorious consideration of the petitioner having constructed a machine of great value for sawing timber; the recital of the royal order of 1790, in this grant, is entirely immaterial, and does not affect the instrument:" *Held*, the recital of the royal order, in this case, is quite immaterial.

The case of the United States *v.* Wiggins, 14 Pet. 325, which decided that certain proof of the certificate of Aguilar, secretary of East Florida, was sufficient, cited; and the decision on that point affirmed.

The Spanish governors of Florida had, by the laws of the Indies, power to make large grants to the subjects of the crown of Spain; the royal order of Spain of 1790, applied to grants to foreigners. These large grants, before the cession of Florida to the United States, had been sanctioned for many years by the king of Spain, and the authorities representing him in Cuba, the Floridas and Louisiana; this authority has been frequently affirmed by the supreme court.

An application was made to the governor of Florida, in 1814, stating services performed by the petitioner for the government of Spain, and the intention of the petitioner to invest his means in the erection of a water saw-mill; and marking the place where the lands were situated, which were asked for; the governor granted the land, referring to the merits and services of the applicant, and in consideration of the advantages which would result to the home and foreign trade, by the use proposed to be made of the land: *Held*, that this was not a conditional grant; and that no evidence of the erection of a water saw-mill was required to be given, to maintain its validity, or induce its confirmation.

Appeal from the Superior Court of East Florida. The appellee, as assignee of Robert McHardy, presented a petition to the judge of the superior court for the eastern district of Florida, claiming a tract of land containing 16,000 acres, situated in that district, on the west-side of the river St. Johns, at a place where there is a spring and stream of fresh water, formerly known by the name of "Old Stores." The claim was alleged to
*131] be founded on a grant, dated *November 8th, 1814, by Governor Kindelan, the Spanish governor of East Florida. The claim was opposed by the United States.

The superior court of East Florida decided in favor of the claimant, and the United States prosecuted this appeal. The case is fully stated in the opinion of the court.

It was argued by *Gilpin*, Attorney-General, for the United States; *Downing* appeared as counsel for the appellee.

Gilpin contended, that the decision of the court below should be reversed, on the following grounds: 1. That the evidence in the case is insufficient to prove that the alleged grant or concession was ever made. 2. That if it be proved or admitted, that the alleged grant or concession was ever made, still, that the same was not in conformity to the royal order of 29th October 1790, by virtue of which it is declared that the concession was made. 3. That if it be proved or admitted, that the alleged grant or concession was ever made, and that it was in conformity to the royal order of 29th October 1790, still, that the same was granted or conceded, on the condition that the claimant should build a water saw-mill on the land so conceded, which condition never has been complied with. 4. That the concession, if ever made, being conditional, and the conditions unperformed, it was incumbent on the claimant to assign reasons sufficient for the non-performance; which he has not done.

Gilpin:—This is a claim for 16,000 acres of land, on the west side of the river St. Johns; founded on an alleged concession to Robert McHardy, by Governor Kindelan, dated 8th November 1814. The superior court of East Florida adjudged the claim to be valid. The correctness of this decree is contested by the United States, because there is not, as they allege, competent evidence to establish the concession to McHardy; and because, if the concession ever was made, a legal title to the land conceded never accrued to the grantee.

I. The original concession of Governor Kindelan never has been produced. The sole evidence of it is an alleged copy, certified *by Aguilar, the governor's secretary. The circumstances under which [*132 copies, thus certified, will be admitted as evidence of a grant, have been declared by this court, in the cases of *United States* v. *Percheman*, 7 Pet. 84; *United States* v. *Delespine*, 12 Ibid. 656; and *United States* v. *Wiggins*, 14 Ibid. 348. In the first, the court held, that the original must be produced, if either party suggested its necessity; and in the second, there was direct evidence of the existence of the original. In the last case, the court admitted the copy, without any direct evidence to that effect; but on the express ground, that the presumptive testimony of the existence of the original was very strong: and also, that there was a survey proved in conformity with, and referring to, the original grant. It is admitted, that if the evidence brings the present case within the rules established in the case of the *United States* v. *Wiggins*, the concession is proved. But is such the fact? There was no survey made until 1819, nearly five years after the grant; and it was then made by a person other than the surveyor designated in the order of survey, and at a place different from that named in the grant. The proof that the order of survey was signed by Governor Kindelan, is far from direct; the signature is identified by a single witness only, and by him with some expressions of doubt.

II. But if the making of the concessions in 1814, by Governor Kindelan is established, had a title under it, valid by the Spanish law, accrued to McHardy, on the 24th January 1818; so as to be ratified and confirmed by the eighth article of the treaty? (8 U. S. Stat. 258.) 2 White's New Rec. 210. The concession is "a square of five miles" granted, as it states, "in consideration," first, "of the advantages which will result in favor of the

home and foreign trade of the province;" and secondly, "in conformity to the provisions of the royal order of 29th October 1790, in relation to the distribution of lands to the new inhabitants." The first consideration, evidently, has allusion to the statement of McHardy, in his memorial, that "he intended to invest his means in the erection of a water saw-mill, in consideration of the great scarcity of lumber in the province, both in regard to the home consumption and to the purposes of commerce;" the second consideration refers, undoubtedly, to the claim to remuneration arising from his merits and services, also *stated in his memorial; that is, *133] his fidelity to the government during the rebellious invasion of the province in 1812, and his loss of a crop in that year. It is admitted, that the saw-mill never was commenced; and that the land never was taken possession of, occupied or cultivated. This grant is a mere concession; it is not a complete and absolute grant; to make it so, further acts were necessary on the part of the Spanish government and of the grantee; these were, a compliance with the provisions of the royal order of 1790, and with the promise to erect a saw-mill; both of these were conditions annexed to the grant; and neither having been complied with, the grant is not valid.

1. The royal order of 1790 (2 White's New Rec. 365) did not authorize the governor of East Florida to make such a grant as the claimant contends for. That order was issued, as it declares, for the purpose of inviting foreigners into the province; but McHardy was not a foreigner. It limited the quantity of land that might be granted, to a fixed number of acres, proportioned to the number of workers actually employed; McHardy employed no workers. An absolute grant of 16,000 acres to a Spanish subject, who made no settlement, could not, therefore, be valid, under the authority of the royal order of 1790. This point is distinctly adjudged by this court, in the case of the *United States* v. *Clarke*, 8 Pet. 448. There, the grant recited the royal order of 1790, and also that Clarke "had constructed, from his own ingenuity, a certain machine" of great value. This court, passing upon the grant, said that "it was too plain for argument, that, if its validity depended on its being in conformity with the royal order of 1790, it could not be supported;" and they held it to be valid only because it did not depend upon that order, but on the other motives expressed in the grant. If the same rule be applied, as it must be, to the present case, then the claim of McHardy to 16,000 acres cannot be valid, under the royal order, but must depend on the other considerations stated by Governor Kindelan. But it is submitted, that the recital, in this grant, by Governor Kindelan, of the royal order of 1790, was not superfluous or incorrect. It is the inference drawn from that recital, by the claimant, which is erroneous. The grant does not purport to be *made "by virtue of" the royal order of 1790, which *134] was applicable especially, if not exclusively, to foreigners; but it was made to a Spanish subject, "in conformity to the provisions" of that order; that is, according to the regulations which required settlement and cultivation by a certain number of workers. Under the power which the governor possessed of making grants for services, he made this concession to McHardy, for those to which he had, in his memorial, called his attention; but as the grant was large, the governor required that he should either comply with the provisions of the royal order, which were recited in the concession, or erect a mill which would be "favorable to the home and foreign trade of

the province." Had the claimant settled the tract, and placed upon it the proper number of workers, then he would have acted in conformity to the royal order of 1790—then the grant would have been valid, because one of its conditions would have been complied with.

2. It is, however, valid, although the provisions of the royal order of 1790 were not complied with, if the other condition was executed—if the water saw-mill was erected. Was this done? It is admitted, that it was not —and to obviate the want of all evidence to that effect, it is argued, that the terms of the grant do not imply that such erection as a necessary condition; and that, under the decisions of this court, such a grant is perfect, without any such proof. That the terms of the grant imply such a condition, is apparent from its face. It is stated to be made, "in consideration" of the advantages that are to result from such an establishment; the allusion to the petitioner's merits is not adduced as one of "the considerations" of the grant; they are not of a character to warrant any donation, much less one of such unusual magnitude; they are more than compensated by making him the grant, subject to the provisions of the royal order of 1790, in regard to settlement and cultivation; any other grant—any possession of the land, unattended with a compliance with these provisions—was intended to be coupled with this condition of building the saw-mill, which he proposed himself. In the cases of the *United States* v. *Kingsley*, 12 Pet. 476, and of the *United States* v. *Burgevin*, 13 Ibid. 85, it was distinctly held, that, where there was a condition in the grant, that a saw-mill should be erected, no title accrued, without proof of its having been built. *It is true, that, [*135
in those cases, the condition was stated in the grant, in terms more explicit than in the present case; but this cannot affect the principle established by the court. If there be a condition in the grant itself, ascertained from its language, and evincing the intent of both parties, at the time the grant was made, the particular language in which the condition is couched is immaterial. The cases of the *United States* v. *Clarke*, 8 Pet. 448, and of the *United States* v. *Segui*, 10 Ibid. 306, do not conflict with these positions. In the former, the grant was not in consideration of a saw-mill to be erected; but in consideration of the applicant having already constructed, from his own ingenuity, a peculiar mill, of great value. In the case of the *United States* v. *Segui*, this court did, indeed, hold, that where a grant was made, in absolute property, they would not attach a condition, from the mere fact that the erection of a saw-mill had been stated as an inducement in the memorial; but it is evident, from the report of that case, that this statement was merely in the memorial, and not repeated as "a consideration," by the governor, in the grant itself. In the present case, it is otherwise; this consideration appears, not merely in the memorial, but in the grant; and besides, it is not, as Segui's was, a grant "in absolute property."

It is therefore submitted, that the concession, if ever made, was conditional; that the conditions are unperformed, and therefore, that the grant is not valid.

WAYNE, Justice, delivered the opinion of the court.—The decree of the court below confirms the title of the appellees to a square of five miles of land, situated in the place known under the denomination of Appreciele Spring, opposite the old store of the house of Messrs. Panton & Leslie,

called Hamlet. The claim is founded upon a concession to Robert McHardy, dated the 8th November 1814. The memorial for the grant, and the grant are as follows :

"His Excellency the Governor :

"Don Roberto McHardy, an inhabitant of this province, with due respect, represents to your excellency, that since the month *of July 1803, when he came to it and was admitted under the protection of his Catholic Majesty (whom may God preserve !), he flatters himself with having the honor of having been selected and preferred to others of his class for holding commissions of the government, the truth of which is well known to your excellency ; and moreover, for the same reason of his fidelity in the year 1812, when said province was invaded by some rebellious inhabitants thereof, your petitioner was arrested by them and detained prisoner for the space of twenty-nine days, in consequence of which violence, he suffered the loss of all his crop, and other damages and losses to a great amount, which he does not mention, as they are well known to your excellency. In consideration of which, and your petitioner wishing to repair in some measure his said losses, he intends to invest his means in the erection of a water saw-mill, in consideration of the great scarcity of lumber in this province, both in regard to the home consumption and to the purposes of commerce ; and as it is necessary for that purpose, to obtain a suitable position, as is the place known under the denomination of Apprecile Spring, opposite the old store of the house of Messrs. Panton & Leslie, called Hamlet : therefore, your petitioner supplicates your excellency be pleased, in consideration of the merits he has obtained, and of other circumstances in his favor, to grant him, in absolute property, a square of five miles, in the location designated, and which is vacant ; which favor he hopes to receive from the justice of your excellency. St. Augustine of Florida, on the eighth day of November 1814. ROBERT MCHARDY."

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DECREE. "St. Augustine of Florida, eighth of November 1814. Whereas, the merits, services and other circumstances which the interested party exposes in this representation, are well known to me, in consideration of the advantages which will result in favor of the home and foreign trade of this province, and also in conformity to the provisions of the royal order of the *29th of October 1790, communicated to this government by the captain-general of the Island of Cuba and of the two Floridas, in relation to the distribution of lands to the new inhabitants, I have come to the determination of granting to the petitioner, in absolute property, the square of five miles of land, in the designated place, without prejudice to a better owner, and for the attainment of which, let the secretary's office issue to him a certified copy of this *expediente* and decree, which, in all events, will serve to him as a title in form.

KINDELAN."

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It is contended, on the part of the United States, that the decree should be reversed upon three grounds :

1. That the evidence in the case is insufficient to prove that the alleged grant or concession was ever made. The evidence is a certificate from Aguilar, secretary of the government of East Florida, the same as that to

be found in *United States* v. *Wiggins*, 14 Pet. 345, which the court held to be sufficient proof of the grant.

2. The second objection is, that if it be proved or admitted, that the grant was made, still it is void ; because it is not in conformity to the royal order of the 29th October 1790, by virtue of which, it declared the concession was made. That royal order will be found in 2 White's New Rec. 365. It is contended, that under the order, grants can only be made to foreigners, and that the number of acres granted must be in proportion to workers. The argument is, professing to be made under the royal order, if the grant is not in accordance with it, it is void ; and the *United States* v. *Clarke*, 8 Pet. 448, is cited to sustain the objection. The authority has been mistaken. The court do say, in that case, "if the validity of the grant depends upon its being in conformity with the royal order of 1790, it cannot be supported." But it immediately proceeds to show, though the royal order is recited in the grant, that it was in fact founded upon a meritorious consideration of the petitioner having constructed a machine of great value, for sawing lumber. The court say : "We cannot think that the recital of a fact, entirely immaterial, on which fact the grant does profess to be founded, can vitiate an instrument reciting other considerations *on which it does [*138
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 question is, whether Governor Coppenger had power to make it." And so it must be said, that the recital of the royal order in this case is quite immaterial. The petitioner for the grant, asks for it, reciting services and fidelity to the government in time of a rebellion ; his imprisonment and loss of property to a great amount, in consequence of it ; "all of which," he says, "are well known to your excellency." In consideration of which, he further states, that, to repair his losses, he intends to invest his means in the erection of a water saw-mill ; and then asks his excellency, in consideration of his merits, and other circumstances in his favor, to grant him, in absolute property, a square of five miles, in the place designated in his petition The governor's decree, upon that petition, first recites the merits and services of the petitioner, which he says are well known to him ; and then says, in conformity with the royal order of October 1790, he grants him, in absolute property, the square of five miles. Now, if it be the fact, that the governor had the power to make a larger grant than the quantity recited in the royal order, which was applicable to a particular class of persons, foreigners ; it will not be contended, because he says "in conformity to the royal order," that these words shall control a larger grant, made to one who was not a foreigner, but a subject of his Catholic Majesty ; particularly, when it is stated, the considerations of the grant, are the merits and losses of the grantee. That the governor had the power to make the larger grant, cannot be denied. It is to be found in the Laws of the Indies, in the various regulations under which they granted lands in Florida, for more than forty years ; sanctioned by the king of Spain, and the authorities representing him in Cuba, the Floridas and Louisiana. The power of the governor, in this respect, has been frequently affirmed by the decisions of the court, in cases growing out of claims to land under the eighth article of the treaty with Spain.

3. The third objection against affirming the decree is, that the *grant was made upon condition that the grantee should build a water saw-mill on the land granted, which condition has never been complied with; and that it was incumbent on the claimants to assign reason why this condition was not performed. A careful perusal of the memorial will show, it certainly was not the intension of the memorialist to make the building a mill the inducement to the grant, but his merits, services, imprisonment and loss of property. When, too, the governor, in the grant, proceeds his declaration to the advantages which will result in favor of the home and foreign trade, by an acknowledgment of the petitioner's merits and services; it certainly cannot be inferred from the first, that it was the sole consideration which induced the governor to make it. If it be not so, then it cannot be said, that the grant would only be perfect upon the performance of a condition precedent; because another consideration or inducement for making it, is given, requiring nothing to be done by the petitioner. Indeed, from these expressions of the governor, in the grant, no condition can be inferred. They are a mere recital; and if a condition could be implied, it would be so inconsistent with an absolute grant in terms, that it could not for a moment have any weight against it. But the objection is not new in this court, The point has been directly decided in the *United States* v. *Segui*, 10 Pet. 306. The claim in that case was founded upon a grant of 16,000 acres, in consideration of services to the Spanish government, and for erecting machinery for sawing timber. The court say, "It has been suggested by the attorney-general, that though there was no express condition in the grant, one was implied from the consideration in part being the erection of a saw-mill. But we cannot attach any consideration to a grant of absolute property in the whole quantity. It was exclusively for the governor to judge of the conditions to be imposed on his grant. He appears to have considered the services of the appellee a sufficient consideration, and made the grant absolute.

The decree of the court below is affirmed. But as the court rejected the survey given in evidence in this case, as it should have done; this court will direct a survey to be made at the place designated in the decree, for the number of acres decreed, without prejudice to the rights of third parties.

*140] *This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said superior court, in this cause, so far as it declares the claim of the petitioners to be valid, be and the same is hereby affirmed in all respects; and that a survey be made of the lands contained in the said concession, according to the terms thereof, for the number of acres, and at the place therein designated; provided it does not interfere with the rights of third parties. And it is further ordered by the court, that a mandate be issued to the surveyor of public lands, directing him to do and cause to be done, all the acts and things enjoined on him by law, and as required by the opinion and decree of this court in this case; and that this case be remanded to the said superior court, for further proceedings to be had therein, in conformity to this decree, and the opinion of this court, which must be annexed to the mandate.

*United States, Plaintiffs in error, *v.* Samuel W. Dickson and others, Defendants in error.

Compensation of receivers.

Samuel W. Dickson was appointed a receiver of public money for the Choctaw district, Mississippi, and entered on the duties of his office, on the 22d November 1833, and continued to hold the office until the 26th July 1836, when he resigned it; he received more than $250,000 of public money, in each year, during the two years of his continuance in office; and also, more than $250,000 during the portion of the year commencing on the 22d November 1835, and ending on the 26th July 1836; he claimed, under the act of congress relating to the compensation and salaries of receivers, a compensation of one per cent. on the sum of $250,000 in each year; and also a commission of one per cent. on the money recived during the fraction of the year, not exceeding, with the salary of $500, three thousand dollars, in the fraction of the last year; the United States claimed to limit the commissions and salary to the fiscal year, from January 1st, to December 31st, annually; and denied his right to more than a portion of the commissions on the money received by him, limiting the same to the proportion of the year he was in office: *Held*, that the receiver was entitled to charge his commissions on the whole sum received by him in the part of the year he was in office; the same not exceeding, with his salary, the amount of $3000.

The receiver was entitled to calculate his yearly commission on the amount of public money received by him during a year, commencing from the date of his appointment, instead of calculating it by the fiscal year, which commences with the calendar year; on the first day of January in every year. He had a right to charge the whole yearly maximum of commissions, for the fractional portion of the year in which he resigned.[1]

Error to the Circuit Court for the Southern District of Mississippi. Samuel W. Dickson, the defendant, was appointed by the president of the United States, receiver of public money for the Choctaw district, in the state of Mississippi, and entered on the duties of his office on the 22d November 1833, and retained the office, performing the duties thereof, until the 26th July 1836, having on that day resigned the same. The United States claimed a large balance as due to them, and the defendant paid, in Natchez, the whole sum alleged to be due by him, with the exception of the items charged to him in the *treasury transcript, which were the subject of controversy in this case. [*142

A suit was instituted by the United States on the official bond of Samuel W. Dickson and his sureties, in May 1839, in the district court of the United States for the southern district of Mississippi, in which the United States claimed certain sums of money received by Samuel W. Dickson, as receiver, and not paid over to the United States. These sums were claimed by the defendant, and had been retained by him, as his official compensation, for the annual period of his service in the office, from the 22d November 1833, and for the fraction of the last year in which he was in office, commencing on the 22d November 1835, and ending on the 26th July 1836; during which latter period he had received public money exceeding in amount $250,000.

On the trial of the cause, the court charged the jury, that the defendant, Dickson, was entitled to credit for $3000 as compensation, including his salary of $500 for the year commencing November 22d, 1833, and ending November 22d, 1834; that he was entitled to the same compensation for the year commencing November 22d, 1834, and ending November 22d, 1835,

[1] And see United States *v.* McCarty, 1 McLean 306; United States *v.* Edwards, Id. 467.

and for the fraction of the year between the 22d November 1835, and the 26th July 1836, he was entitled to $2500 commissions. To this charge of the court, the United States excepted, and prosecuted this writ of error; a verdict and judgment for the defendants having been given, conformable to the opinion of this court.

The case was argued by *Birchard* and *Gilpin*, Attorney-General, for the United States. No counsel appeared for the defendants.

Birchard, for the United States, contended that the court erred—1. In allowing the receiver to calculate his yearly commission on the amount of public money received in a calendar year, commencing with the date of his *143] appointment, instead of the fiscal year fixed by law. *2. In allowing the receiver the whole yearly maximum of $2500 of commissions for the fractional portion of the year in which he resigned.

1. In this case, the accounting officers settled the accounts, as is required by law, quarterly. The last quarter of each year terminating on the 31st day of December, annually. The instruction given to the jury by the court below, makes his first year commence on the 22d day of November 1833, and end twelve months thereafter; and so of the succeeding years. The fractional period, which it treats as a full year, begins November 22d, 1835, and ends July 26th, 1836. It treats the terms used in the statute, "any one year," as any period of time, equal to twelve calendar months, whether it consists of portions of any two fiscal or calendar years. It disregards the beginning of quarters, weeks or months, and has no reference to the accounting days by quarters, or the fiscal year established by law, and recognised by congress, and the department, from the first establishment of the treasury to the present time.

It is respectfully submitted, that the entire legislation of congress shows, that the terms "any one year," when used in reference to the subject of accounting, import that portion of time intervening between the 1st day of January and 31st day of December; and that to give the phrase, as used in the act of 20th April 1818 (3 U. S. Stat. 466), any other meaning, or such a meaning as will make it embrace any twelve consecutive months, composing parts of any two years, will subvert the design of congress, introduce perplexity in accounts, and occasion great inconvenience, if it does not produce absurdities. The act of 1818 is not an isolated piece of legislation, to be construed without reference to any other law. There are other statutes, so directly connected with the subject-matter, that they should be considered, if doubts may reasonably be entertained as to its true construction. It is but part and parcel of a code, and must be examined in reference to the system of laws of which it forms a part, in order that from the whole a construction may be given to it, which will lead to no inconvenient results, or defeat the legislative will.

In *Pennington* v. *Coxe*, 2 Cranch 35, it was held, that the details of one *144] part of a law or code may contain regulations *restricting or modifying the extent of a general expression used in another part of the same act, and that the whole should be taken into view for the purpose of discovering the mind ef the legislature. And in *United States* v. *Fisher*, 2 Cranch 399–400, Mr. Justice Washington (in a dissenting opinion, but on this point agreeing with every member of the court) said, "that if, from a

view of the whole law, or from other laws *in pari materiâ*, the evident intention is different from the literal import of the terms employed to express it, in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature." "So, if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid those consequences, if, from the purview of the law, and giving effect to the words used, it may fairly be done."

It is by these rules that I propose to test the correctness of the opinion of the court below. By reference to the act of 10th May 1800, § 6 (2 U. S. Stat. 75), it will be seen, that receivers were required to render quarterly accounts to the secretary of the treasury. That they were appointed, not for a term of years, but during good behavior, or the pleasure of the president for the time being, and that they were entitled to a commission of one per cent. on the moneys received. The act of March 26th, 1804, § 14 (Ibid. 282), gave them a salary of $500, and a half of one per cent. in addition. The law of compensation thus stood until 1818, when the act in question was passed. At this period, all the operations of the government were well understood. The departments were formed, the days of rendering and settling accounts were established and known. The act of 1817, § 13 (3 Ibid. 368), was in force, making it the duty of the secretary of the treasury to cause all the accounts of his department to be settled within the year. The accounting days had been established for more than a quarter of a century, dividing each year into four quarters, and commencing and terminating the fiscal year on the first day of January, and the 31st of December. There has been no innovation on the part of the executive or congress, in this respect, since the formation of the government.

Looking at the object to be accomplished by the act of 1818, *can it be supposed, that the term "any one year" was ever intended to be so understood as to embrace any other period than that established by usage and recognised by all the laws—any other than the well-known days —the four fixed quarters constituting a year? At each of which the receiver was required to render complete accounts, with the vouchers necessary to a prompt settlement. Especially, when we reflect, that these settlements were to pass at the close of the year from the auditor and comptroller to the register of the treasury, there, with the vouchers, for ever to remain as a finished piece of business. That the balances were to be certified to the secretary of the treasury as the basis of the future action of himself and congress; and that certified copies from the register were made evidence in all legal proceedings. The laws, evidently, as well as the law-makers, contemplated, at that date, that the four quarters of any one year would constitute the entire account of that year, and that the accounts of any two years could not be blended together, without a violation of the legislative will. Such a thing as beginning or terminating an annual or quarterly account in the middle of a quarter, a month or a week (except at the commencement or termination of office, when it arose *ex necessitate*), was then, as now, alike unknown to the department and the laws, and would effectually break in upon that simplicity and order of keeping accounts, which has been, wisely, and for necessary purposes, established for more than half a century. [*145

If, then, the terms of the act of 1818 were of doubtful import, might it not be claimed, that an exposition contemporaneous with the law itself, and always uniform, is strong, if not conclusive, evidence of its own correctness? May it not be claimed, with propriety, that in all their enactments touching the subject of accounts, congress have legislated in express reference to the existence of this principle, as a fundamental one? If so, the rule is conclusive. It seems to me, there is no doubt upon the point. Yet I will not press it further than to observe, that it behooves us to be cautious in the inquiry, whether, inadvertently or intentionally, a special innovation has been introduced by this act.

It is contended, that the act may receive such a construction as will harmonize with the laws and usages upon the subject of accounts, fully effect the object of its framers, and give to each and *every sentence
*146] its appropriate meaning, without the least violence to the language employed. To do this, it must be examined here, as it has been by the several eminent lawyers who, at various periods, have presided in the general land-office and treasury department, all of whom adopted the rule which was applied in settling this account, and all of whose settlements are erroneous, if the court below was not in error. In 1818, no such thing as a term of years for the office of a receiver of public money was known to the law. The 1st section of the act of May 15th, 1820 (3 U. S. Stat. 582), first limited the office to the term of four years, and the same act, in the second section, employs words limiting and defining the word year, as there used, so as to clearly distinguish it from the accounting year. No aid in construing the act of 1818 can be derived from this posterior law. We must look to the state of things existing at the time of its passage, for what it meant then, it means now. It is evident, that the amount of one and a half per cent. had become exorbitant at some offices, owing to the increase and irregularity of land-sales, and that the object was to limit the expenses of each office to a fixed sum per annum. It is manifest, that congress considered $6000 a year, an adequate compensation to both register and receiver; that let the business be more or less at any office, in any one year, this sum out of the public treasury was considered enough to pay for all the services which the two officers would be able to bestow upon one set of plats and books. And that, if little business was to be done, a less sum would be ample pay for it. Hence, a salary of $500 per annum was appropriated for each office, and $5000 limited as the maximum commissions for both offices. This sum is all that the law designed to appropriate, and this is not given absolutely, but only upon condition that the receipts of the office should be such as to entitle the officers to the sum of $3000 each. Nothing can be found in the old mischief or the new remedy; nothing in the title or text of the act, to induce the belief, that any change in the time, the manner and form of rendering and closing accounts was designed. The terms of the law are such, that they could have been literally complied with, without preventing
*147] the final adjustments required to be made yearly by the *act of 1817, § 13, and the then existing treasury regulation. "Any one year" naturally imports the fiscal and calendar year. It is tortured into an unnatural meaning, unknown to the common acceptation of the words, if made to embrace parts of different years.

But for argument sake, let it be admitted, that the construction, which

stood unshaken till 1837, is erroneous; that according to the judicial term, "any one year" does not, as in the common acceptation, import the fiscal and calendar year, known to the laws and the almanacs; that an entire thing may be composed of different portions of entirely different things, and still retain its identity, and let us trace the consequences which must follow. If the path remains plain, free from perplexity and confusion, then, construction may prevail, without public detriment, and without resulting in embarrassment or absurdity. There are seventy land-offices, each having a register and receiver, who are bound to return their accounts quarterly, on the last days of March, June, September and December, annually, with the vouchers necessary to a prompt settlement. These accounts, the commissioner of the general land-office is obliged to settle and pass over to the first comptroller, who revises and approves them; reports the result to the secretary of the treasury; and then files them with the register of the treasury. At this stage of the business, the law supposes the work to be finished. In making the settlement, the accounting officer is required to ascertain the money brought into the treasury during the year, and to allow the register and receiver each a commission of one per cent. thereon, if the sum does not exceed $2500. With four accounting days, at stated periods, the work is simple and produces no difficulty. Will it be equally so, if the accounting days per annum are doubled? But doubling the number will not effect the object, for of the whole 140 officers, scarce any two will be found who entered upon duty on the same day. It must be trebled, giving twelve accounting days for each officer, four for the quarterly fiscal accounts required by law, four to give the *data* on which the register's commission is to be computed, and four for that of the receiver; and as to these last accounts, those of one officer will be no check upon those of the *other, because from the nature of the case, both accounts will not cover the same period of time. [*148
Again, the result will often give to one officer commissions on the sales of a calendar year to the amount of $5000, while the other, on the same sales, will be entitled to but $2500, a thing which is manifestly against the spirit of the law. It is notorious, that in years past, repeated sales within a year have been held at a newly opened land-office, and that in the following year, the sales have been nominal only. The annual reports of the department show frequent cases, where one quarter's receipts amount to near $1,000,000, and the receipts of the preceding year fall short of $20,000; while a third year has net to the treasury over $250,000.

Try the rule of the court below, by the operations of such an office, suppose the register to enter upon duty the 1st of January, and the receiver on the 1st of May, for the year 1834; and that during the year 1834, no sales are had; that in March 1835, a sale brings over $300,000, and in December 1835, a second sale brings other $300,000; that in 1836, no sales are had, and the office is discontinued on the last day of December. In this case, the register will have held office just three years, and under the rule of the court, he could receive as commissions but $2500; it being the maximum upon the sales from 1st of January to 31st of December 1835. The receiver, however, who held office three months less, and performed only equal labor, would be allowed the maximum of $2500 on the sales in March 1835, as it would be within his first year;

and also the maximum on the sale of December 1835, as that would fall in his second year from his entrance upon duty. I submit, that congress never contemplated such a result; and yet under the rule of the court, such cases would be of daily occurrence. It is doubted, if a single officer can be found whose accounts have been settled, since the year 1818, without varying greatly, possibly thousands, from what this rule would give.

Here an account, settled by Justice McLean, was read, showing
*149] *the rule of adjustment in 1820, when he was commissioner of the general land-office, to be as contended for now.

But the unequal results as to the officer is not the only objection. In the case put, and in all that can happen, it compels the accountant to blend the operations of different years together. Instead of an account being closed, at the end of a year, as the law contemplates, the officer is compelled to keep it open, and often to overhaul a business which, in legal contemplation, is already settled. Thus, in the case put, the account of the receiver, which the law looks upon as closed on the 31st of December 1834, must be re-opened, and three-fourths of a year's commissions allowed in the first quarter of 1835. And the account for the year 1835 could not be closed, at the end of that year, because, out of the sums received, an allowance must be made to the receiver for the year 1836, during which no sales were had. Instead of being provided with given *data* upon which to make his annual estimates, the secretary of the treasury, under such a plan of doing business, must ever act upon conjecture, and can never inform congress, at the opening of, or during, a session, of the actual state of the treasury; for he can never possess accurate *data*, until near a year has elapsed from the day of the date of the officer's last appointment.

Could the department, with this rule in operation, ever form, at the close of the year, an estimate of the annual net receipts of such offices as New York, Philadelphia, Boston, Baltimore and New Orleans, which would approximate accuracy by from ten to fifty thousand dollars? The list of officers is from ten to two hundred at each of those places, each of whose salary, or pay, is in like manner limited. It would be difficult, if not impossible. It would seem, that the inconveniences which flow from the rule, and the apparent effect it will have in defeating the legislative intent to regulate and equalize the pay of registers and receivers, prove its unsoundness. More especially, as, by considering the words "quarter," "yearly," of the act of 1800, to mean fourth parts of the "any one year," mentioned in the act of 1818; and the phrase "any one year," to import simply the said four quarters, an easy and natural sense and meaning is allowed to each phrase; all vexation, confusion and apparent inequality of emoluments
*150] is avoided, and perfect harmony *is found to exist between this law and all others upon the subject of accounting.

Have the United States been prejudiced by the supposed error in this case? A *pro rata* allowance of commissions, from November 22d, 1833, to December 31st, as will be seen, has been allowed by the jury, although it does not appear, that any sale was made, or money paid into the treasury, during that time. This error, if it be one, is carried through the whole term of the receiver, and deducts from the receipts of 1834 over $2700.

2. The court erred in treating the fraction of two quarters and twenty-six days as a full year, and allowing therefor $2500, instead of $1423, the *pro rata* allowance. The receipts of this fractional year were $285,959. The receipts of the residue of the year were $249,937. The accounting officers allowed Dickson $1428, and to his successor, for the residue of the year, $1072. The decision of the court below gives all to Dickson, and leaves nothing for his successor, without taking double commissions out of the collections of that year.

Dickson resigned, after serving half a year. Can he have all that congress provided for keeping the office open for the year 1836; and shall his successor have nothing? We must suppose, that in 1818, congress knew that land-sales occurred at irregular periods; that money from this source was collected in unequal quantities; and that the accounts of each year would be settled separately. All this was notorious. It was well known, that the footing of accounts on the 31st of December, would enable the accountant to adjust the commissions upon principles of equity, as between different officers and the government. Can it be inferred, that an innovation upon the fundamental principles of settling accounts was designed? Can we presume, that by implication, a door was meant to be opened, out of which public money was to flow, in the shape of land-office emoluments, at a greater rate for each office than $6000 per annum? The law does not, in direct terms, appropriate more; and the *constitution prohibits the payment of what an act has not appropriated. The [*151
money received for lands is public money. The sole title of any officer to any part of it must be derived from the act. That only gives him title, by prescribing to the accountant the duty of making him an allowance, when he closes his yearly account. If Mr. Dickson's fraction of a year will draw full pay, by what rule can any other man's fractional year be deprived of full pay? The cases have been frequent, in times past, and may be expected to be so in future, where a new office has realized to the amount of say $3,000,000 in a year, one per cent. of which, to each officer, makes an aggregate of $60,000.

Suppose, a public land-sale, at some such office, to take place each month in twelve, and each sale to amount to $250,000, and a new set of officers to be given for each month; will each month not be a fractional year? and will not each fraction be as well entitled to the maximum of $250,000 as Mr. Dickson's fraction? When any one year is thus multiplied into twelve years, the cost of the office per annum will be $61,000 instead of $6000; and the manifest intention of the legislature will be defeated. It will not do to say, that this is an extreme case, for the substantial facts as supposed have often occurred in practice. Let the rule of the court below be forced upon the department, and it is powerless, and cannot prevent hereafter the results supposed. The president must keep land-offices supplied with officers. He cannot force these officers to continue in service, after they choose to resign. He cannot refuse to sell lands, when the laws direct a sale. He is bound by oath to see all laws executed, and must employ the means given for that purpose. Will it be wise, to suppose, that men having adverse pecuniary interests to be subserved by a contrary course, will hold themselves long to the guidance of a rule of conscience more fair than the one which this court is to pronounce lawful? It is far more likely, that public

officers will square their consciences to the morality of the rules judicially established.

Is there any difficulty to prevent the application of a rule which will accomplish the object of congress, in requiring annual settlements? Does not the whole of "any one year," as *well as the whole of any other object, comprise all its parts? Does not the law contemplate that each land-office has one receiver always, and never but one? Can it be doubted, that the object of the act of 1818 was, to limit the whole expenses of an office to $6000 per year? If there is no difficulty in discovering the answers, then why shall not practice give efficacy to the law, and make it mean what its makers meant? The general land-office and the comptroller have done this. They found that Dickson had received and paid into the treasury, in 1826, money sufficient to entitle him to the maximum of commissions, and that his successor had also done the same thing, and they allowed each his due proportion. They gave to each what he earned, and broke down no rule in so doing, and opened no door through which the nation may be plundered, or the treasury pillaged. In what was their error? Did they a wrong?

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It has been supposed, that the case of an officer, who should be discontinued after three months' service, he having, in that time, paid $250,000 into the treasury, would be a case of hardship, and it has been asked, if the government would not be a gainer, under the rule contended for, if the successor, in the last three quarters, should make no sales, and of consequence, earn no commissions; or whether, to avoid the supposed evil, the government would give to the latter the earnings of the former? To all this, I have to observe, that in examining the accounts, as settled by the department, ever since 1818, I have never found any case of hardship of the kind. In the case supposed, it would be easy to avoid all injustice, by allowing to each man what he earned. The incumbent of the first quarter of the year earned full commissions, therefore, give it to him. The incumbent for the last three qnarters earned none, and would, of course, neither claim nor receive any. Each would have his own, and the United States would retain nothing which the law designed to bestow upon others. Thus in Dickson's case, if, for the half of the year 1836, he would claim the compensation of the full year, and reverse the settlement of the department, he should prove his case fully, by showing to the court that no other officer earned any commissions during the same period. This he did not do, and could not have done. Without this proof, the *presumption of law is, that the accounts were properly and equitable adjusted. Such also is the fact.

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Gilpin, Attorney-General, for the United States.—The very full examination of the questions connected with this case, by Mr. Birchard, the solicitor of the treasury, leaves little room for further remark. It may not, however, be useless to advert to the long-settled system which has prevailed, with manifest advantage of the public interest, and with no injustice, taking the whole system together, to individuals; and also to notice the unbroken series of laws which seem to establish its accordance with legislative intention. The points at issue do not, in the present instance, involve any considerable sum of money, but their settlement is extremely important in

the keeping of the accounts at the treasury. It is very desirable, that all doubt in regard to them should be removed, and that a system, uniform in itself, and in accordance with the judicial interpretation of the law, should be, at once, and generally, introduced into the treasury department, if that now existing be incorrect.

1. The compensation of all officers charged with the collection of the revenue, whether derived from the customs or the public lands, depends, not on a fixed salary, but on their receipts. It is graduated, either by a commission on moneys collected, or by the amount of fees received. It depends, therefore, on their own accounts. These accounts must be examined and adjusted, to fix their compensation. The mode, therefore, of keeping and rendering them, should be such as to exibit, with entire uniformity, and accordance of parts, the two things; the correct discharge of duty in collecting the public money, and the exact amount of compensation due therefor. For each of these objects, are the accounts required. They should be so framed as to exhibit each, whenever they are adjusted. The rule adopted to effect this, and practised, from the beginning of the government, has been to adjust the accounts of these officers on the first days of January, April, July and October. If their term of office commenced on an intervening day, the first account was required to be adjusted, when the first of these days arrived; if it terminated between them, the account was settled for the fraction that elapsed between the last of those *days, and the end of the official term. For these regular periods, the [*154 accounts were renderd; the commissions, fees and emoluments, during these, were returned and calculated; the compensation was adjusted and allowed according to them. In carrying out the system on these principles, the fiscal year has been invariably regarded as coincident with the calendar year, commencing on the first of January, and ending on the 31st of December.

In the case now before the court, the receiver was appointed to office on the 22d November 1833, and held it until the 26th July 1836. During his first year, according to the mode of settling his accounts at the treasury, his official term was, for the fraction intervening between the 22d November and the 31st December. It then extended through the years 1834 and 1885. It embraced the two quarters of 1836, to the 1st July, and the fractional period of the third quarter, up to the 26th of that month. The district judge of Mississippi has declared this adjustment to be at variance with the law, and has decided, that the first year of the receiver's official term was for twelve months, ending on the 22d November 1834; the second ending on the same day of 1835; and that the interval between that day and the following 26th of July, is to be regarded as the fraction of his third official year.

It is obvious, that the annual compensation, derived from commissions on moneys, or fees received during the year, may differ considerably, as it is calculated by one of these modes, or the other. It may differ in favor, or against, the officer, according to the period of the year, at which the moneys or fees are received. Neither the one mode, nor the other, however, will operate uniformly for, or against, the officer; that depends on the amount and period of the receipts, taken in connection with the time his official term began. The propriety, therefore, of the regulation of the

treasury department, as compared with that now established by the district judge, is not to be tested by its effect to increase or diminish the amount of an officer's compensation. Whatever mode this court shall direct henceforth to be pursued, it will not, by so doing, augment or diminish the average compensation. It may lessen or increase it, in a particular case, accordingly as greater or less sums of money happen to be *received at a particular period, but the general result of either plan, will not be, to give, on the average, either greater or less compensation.

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Is it a matter of equal indifference, as regards the fiscal operations of the treasury? "Will the public accounts be kept with the same uniformity, simplicity and accordance with the views of the legislature, if the annual term (the "year" of the officer) is made to commence and end with the day of his appointment, in each successive year." Such a regulation will be attended with manifest public inconvenience, and it is contrary to the whole scope of legislative enactments.

1. The invariable practice of the government has been, to make the compensation of its officers, annual; to allow them a certain sum "for the year." Not less invariable has been its practice, to require that their accounts of the moneys they collect, shall be rendered "quarterly;" that is, for every three months. When the amount of annual compensation is made to depend on the amount of money collected, it must be ascertained from these accounts. Hence, it follows, as a necessary consequence, that the accounts must be for periods corresponding with the periods of compensation. If the period of compensation be irregular, and governed by each particular case, the accounts must be equally irregular; they must be made up for the period of compensation, since the compensation depends upon them. It will thus be seen, that if the year is to be such as is designated by the district judge, there must be a settlement of the accounts, when it expires; and this at the end of each year throughout the term of the officer. If the quarterly accounts are to agree with this year, then are they equally irregular; but if not, then must there be a division in the account of that quarter, in every year when the annual term expires; or there must be kept two sets of accounts, embracing exactly the same items of moneys collected, but closing at different days, by one of which, the commissions are to be ascertained, and by the other, the general fiscal duties. Could anything lead to greater confusion and irregularity, than such a system as this? Yet it cannot be obviated, if the fiscal year is to be made to vary with the appointment of the officer.

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*It cannot be said, that the accounts may be kept, according to the usual system, throughout the term of office, and then adjusted for the fraction of the closing quarter. This plan will not accord with the law. The law says, the officer is to receive a commission for collections "during the year;" that year is either the one beginning with the date of his appointment, or it is the fiscal year heretofore adopted at the treasury. They cannot be blended during the term. Take the case of the defendant. He is entitled to all the commissions he receives in each year, provided they do not exceed $2500. Suppose, that the commissions up to the 22d November 1834, amount to that sum; will he not require that the account should be then adjusted and closed? Must it not be so; or, if not, does it not become necessary to dissect informally one of the quarterly accounts of

every year? At the end of his term, he will demand that the amount of his commissions shall be made apparent in each year of his term; and this can only be done by a revision of the whole series of accounts, and a re-adjustment of what has been once settled; a revision and re-adjustment, not only fraught with inconvenience, but directly contrary to that provision of law which requires the settlement of accounts quarterly, and their deposit with the register, so as to constitute an unalterable and permanent record.

But the inconvenience does not end here. It is well known, that the compensation of different officers may depend on commissions upon the same sums of money collected. Thus, the register and the receiver are entitled to commissions on the same sums of money collected at the land-offices; the collectors, naval-officers, and surveyors are entitled to fees on the same entries at the custom-houses. The accounts, therefore, of the moneys so received should correspond; they are thus a check upon each other, and they obviate a multiplicity of accounts. Yet how can this be accomplished, if the annual terms of each of these officers are made to differ entirely from those of the others, by commencing with the day of their appointment?

To such inconveniences shall we be led, if we change the settled system, adopted at the treasury, immediately after the organization of the government, and followed, without deviation, for fifty years. It is true, that an argument *ab inconvenienti* is *not to be pressed against the clearly-ascertained rights of individuals, nor is a construction made by the [*157 executive officers, to be presented as a controlling authority or precedent to a judicial tribunal. But in this case, it is to be remembered, that the end to be attained is not the interest of an individual, but the best mode of effecting a great public object; that besides, in point of fact, the interest of the individuals is not, as a general rule, affected injuriously by one system more than the other; and that the whole subject is one to which the test of public convenience, or the reverse, may be applied, with peculiar propriety. The construction adopted by the treasury department may not have in itself any controlling weight, but it is to be recollected, that its adoption, at an early period, fixed a rule for the settlement of accounts and compensation, well known to the country and the legislature; numerous laws upon these subjects have since been passed; and it is not, therefore, an unjust inference, that congress had intended its legislation to be applicable to that construction.

2. If the series of acts of congress is examined, it will not be less apparent, that, from the beginning of the government, they have contemplated annual salaries as the compensation of these officers, and quarterly settlements of their accounts; and this, not for arbitrary and uncertain periods, but for distinct and ascertained fiscal terms. This is the case as well with officers of the customs as with those connected with the public lands. The regular days of quarterly settlement, as adopted at the treasury, are also recognised by these acts. 1 Story's Laws 17, 26, 129, 150, 157, 228, 592, 665, 782, 786; 2 Ibid. 868, 932, 933, 950, 1309; 3 Ibid. 1632, 1710, 1790, 1792, 1853, 1857, 1876, 1916. It seems impossible to construe these various provisions as fixing a different rule or period for accounting and for making compensation. The compensation is "for the year;" for the duties performed "during the year;" for the duties embraced in the accounts

as rendered and settled "for the year." Fixed annual compensation is that which is almost universally established for all offices. The exceptions are comparatively few; and those few congress are constantly removing, as they grow up from some incidental circumstance. The fund from which this compensation is paid does not affect its character or amount. Whether it is paid by a commission out of the accruing *158] *revenue, before it goes into the treasury, or whether it is drawn from the treasury afterwards, is immaterial, if the sum fixed be so much "for the year." If the sum and the term are both fixed, the compensation is in reality a salary, and the payment of it is to be allowed and accounted for, exactly as if it were a salary, payable by annual appropriation out of the treasury. The mere fact that the compensation is for the collection of money, cannot warrant an increase in proportion to the amount collected. From the treasurer of the United States down to the collector of the smallest port, there are numerous officers charged with the management of the public moneys, yet such a general rule has never been adopted.

It would seem, then, that whether we take the system established by public convenience, and by the construction early given to the regulations made for the settlement of accounts and the payment of compensation depending on those accounts; or whether we follow the general scope of the long series of legislative enactments, we are equally authorized to adhere to the existing practice, in preference to that which the decision of the district judge of Mississippi will introduce in lieu of it.

Story, Justice, delivered the opinion of the court.—This is a case of a writ of error to the circuit court for the southern district of Mississippi. The defendant in error, Samuel W. Dickson, was duly appointed a receiver of public moneys, for the Choctaw district, in Mississippi, and entered upon the duties of his office, on the 22d of November 1833. He continued to hold the office until the 26th of July 1836, when he resigned it. In May 1839, a suit was instituted upon his official bond, against him and his sureties, to recover certain sums of public moneys received by him, and not paid over. At the trial of the cause, Dickson insisted upon certain credits to be allowed to him, and proved the receipt by him, while receiver, into his office, as receiver of public money, amounting to more than $250,000, in each year, during the two years of his continuance in office: and also of more than $250,000 for the fraction of a year, commencing on the 22d of November *159] 1835, and ending on the 26th of July 1836, when he resigned *his office; and he also proved the depositing of sufficient amounts in Natchez, to entitle him to credit for the disputed items of his account. Upon this evidence, the court below charged the jury, that Dickson was entitled to credit for $3000, as compensation, including his salary of $500, for the year commencing on the 22d of November 1853, and ending on the 22d of November 1834; and to the like compensation for the year commencing on the 22d of November 1834, and ending on the 22d of November 1835; and that for the fraction of a year between the 22d of November 1835, and the 26th of July 1836, he was entitled to $2500 for commissions. To this opinion, and charge of the court, a bill of exceptions was taken by the United States; and a verdict having been found accordingly, by the jury,

and judgment rendered thereon ; the present writ of error has been brought to revise that judgment.

Upon the argument in this court, two points have been made, on behalf of the United States : 1st. That the charge of the court below was erroneous, in allowing the receiver to calculate his yearly commission on the amount of public moneys received by him, during a year, commencing from the date of his appointment ; instead of calculating it by the fiscal year, which commences with the calendar year, or on the first day of January of every year. 2d. That the charge of the court below was erroneous, in allowing the receiver to charge the whole yearly maximum of commissions for the fractional portion of the year in which he resigned.

The validity of these objections to the charge of the circuit court, must essentially depend upon the true interpretation of the act of the 20th of April 1818, ch. 118. Originally, the receivers of public moneys in the land-offices, were paid a commission of one per cent. on the moneys received by them, as a compensation for clerk-hire, receiving and keeping, and transmitting the public moneys to the treasury of the United States. This was originally provided by the act of the 10th of May 1800, ch. 55, § 6. By the act of the 26th of March 1804, ch. 35, § 14, the compensation was increased by an addition of one-half per cent. to the former commission, and also of an annual salary of $500, with the exception of the land-office *of Marietta, where the annual salary was $200, only. Then came [*160 the act of the 20th of April 1818, ch. 118, which provided, "that instead of the compensation now allowed by law to the receivers of the public moneys, for the lands of the United States, they shall receive an annual salary of $500 each, and a commission of one per cent. on the moneys received, as a compensation for clerk-hire, receiving, safe-keeping, and transmitting such moneys to the treasury of the United States ; provided always, that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed for any one year, the sum of $3000."

The main controversy in the present case, turns upon the meaning of the phrase, "any one year," in the foregoing section. Does it mean "any one year," calculated from the date of the commission of the receiver? or does mean "any one year," commencing with the calendar year, that is, with the 1st of January of each year ; which is commonly called, in matters connected with the treasury department, the fiscal year?

The argument addressed to us one behalf of the government, is, that it means the latter. It is said, that all accounting officers (with some unimportant exceptions) are required by law, and the regulations of the treasury department, to render quarterly accounts of the moneys received by them, and of the disbursements made by them, at the end of each quarter of the calendar year (see act of 10th of May 1800, ch. 55) ; and that all the accounts kept at the treasury department are governed by this mode of proceeding ; and that if any other mode of keeping the accounts were adopted, it would introduce endless embarrassment and confusion into the department, and take away the only adequate means of ascertaining, from time to time, the exact financial state thereof, as to debts and credits, and disbursements, which is so essential to the public security, and regular operations of the government. And hence, in order to give full effect to this system, it is

contended, that it is necessary, in all laws of this character, to construe the year to mean the fiscal year.

Admitting the argument in its full force (and we are not disposed to controvert the propriety of the present mode of keeping the public accounts, as being founded as well in law, as in public *convenience), still it *161] does not appear to us, to justify the conclusion attempted to be drawn from it. In short, we do not perceive what connection the mode of keeping the accounts in the treasury department, has with the compensation allowed by law to any public officer. That compensation is to be ascertained from the terms of the law allowing it; and whenever the amount is once ascertained, according to those terms, it is to be allowed and credited to the officer, whatever may be the form in which the public accounts are kept, or the particular times at which they are required to be rendered and settled. Nor are we able to understand, why the accounts of any public officer may not be made up regularly, at the end of every fiscal quarter, allowing such compensation as he has then earned and is entitled to by law, where his precedent term of service has been less than a full quarter, in consequence of an intermediate appointment to office. The allowance for the fraction of a quarter may just as readily be made at the commencement of his term of service, by reason of such an intermediate appointment, as it may be where his office terminates in the midst of a quarter; in which case (as is admitted), from necessity, the fraction is brought into his closing official account.

It has been also argued, that the uniform construction given to the act of 1818, ever since its passage, by the treasury department, has been, that the act has reference to the fiscal year. The construction so given by the treasury department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the laws, by any department of the executive government, is necessarily *ex parte*, without the benefit of an opposing argument, in a suit where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers, deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance, that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity, when *there is no choice but obedi- *162] ence, as a matter of policy or duty. But it is not to be forgotten, that ours is a government of laws, and not of men; and that the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.

The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws; by the intention of the legislature, as it is to be deduced from the language and the apparent object of the enactment. The object of the act of 1818 manifestly is, to provide a suitable compensation for the receivers and registers of public

moneys for the public lands. The compensation is for services to be rendered by them, officially, during their continuance in office; and up to a certain point, at least, it is in exact proportion to the extent and duration of those services, and the responsibility incurred thereby. The compensation is measured by years. It is to be by an annual salary, and by a commission not exceeding an annual amount. The words are, that "they shall receive an annual salary of $500 each." The natural interpretation of these words, certainly is, that the salary is to commence at the time when the service is to commence; and that they are to be contemporaneous with each other. We believe this to be the uniform interpretation of all laws of this sort; and that when any person takes office in an intermediate time between one quarter and another, the practice is, to pay him a proportion of the quarter's salary, accordingly; and if he leaves office before the end of his official year, to pay him for the like proportion of the last quarter. Indeed, it was admitted at the argument, that this is the rule adopted at the treasury department itsself, in relation to the salaries of officers, viz: that it is begun and ended with the official year, and not with the fiscal year. Nor was it suggested, that, in this particular, any difficulty arose, as to the mode of keeping and settling the official accounts at the treasury, at the end of each quarter, or of the fiscal year.

If, then, the natural interpretation of the words of the act, as *to the salary, has reference to the official year, and not to the fiscal year; [*163 what ground is there to presume, that congress, in the subsequent words regulating the commission, did not use the word year in the like sense? There is nothing in the language, nor in the nature of the compensation, which leads us to the conclusion, that congress had in view the fiscal year or the mode of keeping the accounts in the treasury department, as guides to fix the interpretation of the word year. For aught that appears, it was used in its ordinary sense. The words are, "and a commission of one per cent. on the moneys received, as a compensation for clerk-hire, receiving, safe-keeping, and transmitting such moneys of the United States; provided always, that the whole amount which any receiver of public moneys shall receive under the provisions of this act, shall not exceed, for any one year, the sum of $3000." The commission is on the moneys received by any one officer, not by one or more officers, during any one year of his services; not during any one calendar year, for the service of one of more officers in that year. It is his compensation for clerk-hire, paid by him, and for his responsibilities in receiving, keeping and transmitting the public moneys; and not for his services and responsibility in connection with other officers. The commission is a compensation attached to the particular officer, for his yearly service, and not to the office itself for a fiscal year. If the intention of the legislature had been, what the argument for the United States supposes, the language of the proviso would have been different; it would have been, provided that the United States shall not, in any one calendar year, pay more than one per centum upon all the moneys received during that year; and that the commission for any one year, to whomsoever paid, shall not, in the whole, exceed the sum of $2500. It need not be said, how entirely different in its scope and legal intendment such language is from that of the present proviso; and yet the argument is, that the court should give them precisely the same interpretation. We

cannot but think, that this is to call upon the court, not to expound the act as it is, but to frame its provisions anew, upon a conjecture of what might have been the original intention and object of congress.

*164] It is further urged, that unless we interpret the words to refer *to the fiscal year, great inconveniences may arise; and the government may, by there being several receivers in office during one and the same fiscal year, each of whom may have received more public moneys than would entitle him to the maximum of commissions, be compellable to pay more than $2500 in one year; nay, may actually pay twice or thrice that amount. Suppose it might be so, it would be a case of very rare occurrence; and to put an extreme case is not a good test of the fair and just interpretation of any statute. In such a case, each successive receiver would only receive his just proportion of the year's salary, and no more commission than congress itself had established to be a reasonable compensation for his expenditures and responsibilities in receiving, safe-keeping and transmitting the public moneys. There is nothing in the reason of the case, why each successive officer, who has incurred the full responsibility, by the receipt of $250,000, should not receive the whole commission up to that extent. The argument *ab inconvenienti*, therefore, under such circumstances, does not address itself to this court with the force which it has been supposed to possess. It amounts merely to this, that the act is defective in some of its details; and does not reach all the cases which ought to be provided for.

But there would be inconveniences, not to say apparent hardships, upon the receivers, in adopting the construction contended for on behalf of the government. Thus, suppose, a receiver should die, or be removed from office, without any default on his own part, during the fiscal year, and after he had received and become responsible for public moneys exceeding $250,000; in such a case, the extent of the act would seem fairly to entitle him to the full commission of $2500; and yet, according to the argument, he would be compelled to submit to an apportionment, which might reduce it to a quarter part thereof.

There is another consideration, not unimportant in the construction of the act; it is, that the limitation of the compensation which any receiver is to receive for any one year, is not, including his salary, to exceed the sum of $3000. So that here we have both salary and commissions united together in the ascertainment of the amount; and, of course, the year

*165] *with reference to each, must have the same period of commencement and termination. If, therefore, the salary is to be ascertained by the official year, as has been already suggested, it would seem to be an irresistible conclusion, that the same period must be assigned for the commissions.

Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below; we are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms.[1] In short, a proviso carves special exceptions only out of the

[1] Ryan *v.* Carter, 93 U. S. 83.

enacting clause ; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof. Applying this rule to the circumstances of the present case, how does it stand ? The enacting clause gives to each receiver a commission of one per cent. upon all the public moneys received by him. This was precisely in conformity to the antecedent laws. The proviso limits that per-centage to an amount not exceeding $2500 for one year. Until, then, the per-centage of the particular receiver has reached that amount, in whatever period of the year it may arrive, the proviso, according to its very terms, has no operation ; and when that maximum is reached, the per-centage ceases, whether any more public moneys are received by that officer or not. The case, then, of the present receiver falls directly within the enacting clause. He seeks only the maximum commissions upon the moneys actually received by him, during his continuance in office ; and the proviso either does not touch his case, or it only operates to cut off all subsequent commissions from him, for other moneys received during his continuance in office. The proviso contains no limitations of his per-centage, by connecting it with, or making it dependent upon, the commissions, or the receipt of public moneys by his successor in office. The proviso is, that he shall receive no more for any one year ; not that any other receiver may not receive a like compensation accruing from his subsequent appointment and *receipts in office, for the portion of any year which is then unexpired. [*166

Upon the whole, we are of opinion, that there is no error in the charge and opinion of the court below ; and therefore, the judgment is affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Mississippi, 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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*Barnett and Eliza Levy, Plaintiffs in error, *v.* Edmund and David Fitzpatrick, Defendants in error. [*167

Error.—Final judgment.—Jurisdiction of the circuit court.

Mortgagees, in Louisiana, filed in the circuit court, their petition, stating the non-payment of the debt due on their mortgage, and that, by the laws of Louisiana, the mortgage imported a confession of judgment, and entitled them to executory process, which they prayed for. Without any process requiring the appearance of the mortgagors, one of whom resided out of the state, the judge ordered the executory process to issue ; two of the defendants, who were residents in the state, prosecuted a writ of error on this order, to the supreme court of the United States : *Held*, that the order for executory process was not a final judgment of the circuit court, on which a writ of error could issue.

By the 11th section of the judiciary act of 1789, no civil suit shall be brought before the courts of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The construction given to these provisions, by this court, is, that no judgment can be rendered by a circuit court against any defendant, who has not been served with process issued against his person, in the manner pointed out ; unless the defendant waive the necessity of such process, by entering his appearance to the suit. Toland *v.* Sprague, 12 Pet. 300, cited.

Levy v. Fitzpatrick.

As the debtors were not before the judge, in the circuit court, when he granted, in this case, the order for process, the order for the process cannot be regarded as a final judgment, from which a writ of error could be prosecuted, under the 22d section of the judiciary act of 1789. By the laws of Louisiana, three days' notice of a sale under such process are required to be given to the debtors, or the sale will be utterly void; upon that notice, the debtors have a right to come into court and file their petition, and set up, as matter of defence, everything that could be assigned for error in a court of errors; and they can pray for an injunction in the circuit court, to stay the executory process, till the matter of petition shall be heard and determined. In the proceeding on the petition and answer, the whole merits of the case between the parties, including the necessary questions of jurisdiction, will be heard, and a final judgment rendered. Art. 738-9, of the Louisiana Code of Practice.[1]

Error to the Circuit Court for the Eastern District of Louisiana. In the circuit court, Edmund and David Fitzpatrick, citizens of the state of Virginia, filed a petition, stating that the plaintiffs in error, Barnett and Eliza Levy, citizens of Louisiana, and resident in the eastern district of Louisiana,
*168] were indebted to them, **in solido*, in the sum of $12,100, with interest, at the rate of ten per cent., until paid, from the second day of February 1838. That on the 26th of March 1838, Barnett Levy, Eliza Levy and one Moses E. Levy (the latter being then a resident in the state of Mississippi, and not within the district of Louisiana) gave their obligation, duly executed by them, to the said Edmund and David Fitzpatrick, binding themselves and each of them, *in solido*, to pay to them the said sum of $12,100, on the 2d of February 1839, with interest, &c., "negotiable and payable at the residence of the said Barnett Levy, in the state of Louisiana." The petition alleged, that a demand of payment of the said obligation had been duly made, at the residence of Barnett Levy, but the obligors had wholly failed to pay the same. The petition stated, that a public act of hypothecation and mortgage, at the time the obligation was given, was executed by M. A. Levy, Barnett Levy and Eliza Levy, by which certain real estate and slaves were given in pledge for the security of the said debt; which was duly recorded in the proper office, in the parish of Madison, in the state of Louisiana. The mortgage was joint, not joint and several. The petition asked that executory process might issue in the premises; and that, after due proceedings, the land and slaves might be sold, to pay the debt and interest due the petitioners, under executory process. The petition also alleged, that the act of hypothecation imported a confession of judgment, and entitled the petitioners to executory process. The bond, and a certified copy of the act of mortgage, were annexed to the petition.

The mortgage, executed by Eliza Levy and Barnett Levy, in their proper persons, and by Barnett Levy, under a power of attorney from M. A. Levy, which was not annexed to nor filed with the mortgage, stipulated, that one third of the debt should be paid on the 2d of February 1839; one-third on the 2d of February 1840; and the residue on the 2d of February 1841; "and on failure to pay the said note, in the three several instalments, as aforesaid, or any one thereof, at its maturity, they hereby empower and authorize the said Edmund Fitzpatrick and David Fitzpatrick, or either of
*169] them, to avail themselves of *all the advantages of this special mortgage, and to proceed to seizure and sale of the said lands and slaves hereby mortgaged, by executory process, according to law, for the whole sum of $12,100."

[1] See Marin *v.* Lalley, 17 Wall. 14, 18.

The Honorable P. K. Lawrence, judge of the circuit court, gave an order for process on the petition, "as prayed for." Two of the mortgagors, the defendants in the circuit court, prosecuted this writ of error to the supreme court. The errors assigned in the petition for the writ of error, in the circuit court, were the following: 1st. No oath or affidavit has been made by the creditors, or either of them, that the debt is due upon which the order of seizure and sale has been obtained. See Civil Code of Louisiana, art. 3361. 2d. The power of attorney, if any exists, of Moses A. Levy, one of the defendants, is not attached to the papers, nor filed in this suit, and there is no authentic evidence of it; there is a mere recital of it in the act. 3d. The certified copy of the act of mortgage is not completed, inasmuch as a certified copy of said power of attorney does not accompany it; though said act declares that said power of attorney was attached to it, and is of course an important part of the record. 4th. Though the written obligation may be joint and several, yet the act of mortgage is only joint, and it is indivisible; therefore, it is illegal to proceed by executory process against any one or two of the joint obligators, to the exclusion of the other one or two. 5th. The proceedings generally are irregular and illegal, and cannot be sustained. Lastly, that no presentment or demand of payment of the note or obligation sued upon was made before the commencement of this suit, at the place where the same was made payable, and that no protest or other evidence of such demand is exhibited.

The case was submitted on the part of the plaintiffs in error, by *Garland*, on a printed argument; and was argued at the bar, by *Coxe*, for the defendant. *The decision of the court having been given on a point not presented by the assignment of errors, or in the arguments of the counsel, the arguments are omitted. [*170

McKinley, Justice, delivered the opinion of the court.—The defendants in error addressed a petition to the circuit court for the eastern district of Louisiana, stating, that the plaintiffs in error were indebted to them, *in solido*, in the sum of $12,100, with interest at the rate of ten per cent. per annum, by their certain writing obligatory, executed by them and one Moses A. Levy, who was then out of the jurisdiction of the court. To secure the payment of which sum of money, the said Barnett Levy, for himself, and as attorney in fact for the said Moses A. Levy, together with the said Eliza Levy, by a public act, hypothecated and mortgaged to the petitioners, a certain tract of land and several slaves therein mentioned, which public act, they alleged, imports a confession of judgment, and entitled them to executory process; which they prayed the court to grant. Without any process requiring the appearance of the debtors, one of the judges signed an order directing the executory process to issue. To reverse this order, they sued out this writ of error.

Had this proceeding taken place before a judge of competent authority, in Louisiana, the debtors might have appealed from the order of the judge to the supreme court of that state; and that court might, according to the laws of Louisiana, have examined and decided upon the errors which have been assigned here. But there is a marked and radical difference between the jurisdiction of the courts of Louisiana, and those of the United States. By the former, no regard is paid to the citizenship of the parties; and in

such a case as this, no process is necessary to bring the debtors before the court. They having signed and acknowledged the authentic act, according to the forms of the law of Louisiana, are, for all the purposes of obtaining executory process, presumed to be before the judge. Louisiana Code of Practice, art. 733–4. An appeal will lie to the supreme court of Louisiana, from any interlocutory or incidental order, made in the progress of the cause, which might produce irreparable injury. *State* v. *Lewis*, 9 Mart. 301–2 ; **Broussard* v. *Trahan's Heirs*, 4 Ibid. 497 ; *Gurlie* v. *Coquet*, 3 Mart. (N. S.) 498 ; *Seghus* v. *Antheman*, 1 Ibid. 73 ; *State* v. *Pitot*, 12 Mart. 485.

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The jurisdiction of the courts of the United States is limited by law, and can only be exercised in specified cases. By the 11th section of the judiciary act of 1789, it is enacted, "that the circuit courts shall have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And no civil suit shall be brought before said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The construction given by this court to these provisions is, that no judgment can be rendered by a circuit court, against any defendant who has not been served with process issued against his person, in the manner here pointed out ; unless the defendant waive the necessity of such process by entering his appearance to the suit. *Toland* v. *Sprague*, 12 Pet. 300. And by the 22d section of the same act, final judgments in civil actions, commenced in the circuit courts, by original process, may be re-examined, and reversed or affirmed, upon a writ of error. It is obvious, that the debtors were not before the judge, in this case, by the service of process, or by voluntary appearance, when he granted the executory process. In that aspect of the case, then, the order could not be regarded as a final judgment, within the meaning of the 22d section of the statute.

But was the order a final judgment, according to the laws of Louisiana? The fact of its being subject to appeal does not prove that it was, as has already been shown. Nor could it, *per se*, give to the execution of the process, ordered by the judge, the dignity of a judicial sale. Unless at least three days previous notice were given to the debtors, the sale would be utterly void. *Grant* v. *Walden*, 5 La. 631. This proves that some other act was necessary, on the part of *the plaintiffs, to entitle them to the fruits of their judgment by confession. And in that act is involved the merits of the whole case ; because, upon that notice, the debtors had a right to come into court and file their petition, which is technically called an opposition, and set up, as matter of defence, everything that could be assigned for error here, and pray for an injunction to stay the executory process, till the matter of the petition could be heard and determined. And upon an answer to the petition coming in, the whole merits of the case between the parties, including the necessary questions af jurisdiction, might have been tried, and final judgment rendered. Art. 738–9, of the Code of Practice. From this view of the case, we think, the order granting executory

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process cannot be regarded as anything more than a judgment *nisi*. To such a judgment, a writ of error would not lie. The writ of error, in this case, must, therefore, be dismissed.

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 Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, with costs.

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*United States, Appellants, *v.* Heirs of John Forbes, Appellees. [*173

Florida land-claims.

John Forbes, by memorial to Governor Kindelan, the governor of East Florida, set forth, that, in 1799, there had been granted to Pandon, Leslie & Company, for the purpose of pastorage 15,000 acres of land, which they were obliged to abandon, as being of inferior quality; Forbes as the successor to these grantees, asked to be permitted to abandon these 15,000 acres, and in lieu, to have granted to him 10,000 acres, as an equivalent, on Nassau river; the petition averred, that the object was to establish a rice plantation. The petition was referred to "the comptroller," who gave as his opinion, that the culture of rice should be promoted; Governor Kindelan permitted the abandonment of the 15,000 acres granted before, and in lieu thereof, granted to John Forbes, for the object of cultivating rice, 10,000 acres in the district or banks of the river Nassau. Surveys of 7000 acres of land, at the head of the river "Little St. Marys," or "St. Mary," and 3000 acres in "Cabbage Swamp," were made under this grant; no description of the locality of the land, other than that in the certificate of the survey, was given; nor did the surveys show, that the land surveyed lay in the district of the river Nassau; no evidence was given of the situation of "Cabbage Swamp:" *Held*, that these surveys were not made on the land granted by Governor Kindelan; and, according to the decisions of this court, on all occasions, the surveys, to give them validity, must be in conformity with the grants on which they are founded; and to make them the origin of title, they must be of the land described in the grant of the Spanish government. United States *v.* Clarke, 8 Pet. 486, and United States *v.* Huertas, 9 Ibid. 171, cited.

Courts of justice can only adjudge what has been granted, and declare that the lands granted by the lawful authorities of Spain are separated from the public domain; but where the land is expressly granted at one place, they have no power, by a decree, to grant an equivalent at another place, and thereby sanction an abandonment of the grant made by the Spanish authorities. The courts of the United States have no authority to divest the title of the United States in the public lands, and vest it in claimants; however just the claim may be to an equivalent for land, the previous grant of which has failed. United States *v.* Arredondo, 6 Pet. 691, cited.

The decree of the supreme court of East Florida, which had confirmed the grant to John Forbes, reversed.

Appeal from the Superior Court of East Florida. The executor of John Forbes, on the 20th of May 1829, presented a petition to the superior court for the eastern district *of Florida, claiming 10,000 acres of land, 7000 [*174 of which were surveyed on the waters of "Little St. Marys river," in the then district of Nassau, in East Florida; the other tract, being 3000 acres, was alleged to be situated on "Cabbage Swamp," also in East Florida.

The petition stated, that the grant for the land was made by Governor Kindelan, in lieu of 15,000 acres which had been surrendered by John Forbes to the king of Spain. The petition contained the "memorial for grant," which was presented, on the 27th July 1814, to Governor Kindelan, by John Forbes. It was, with the proceedings, as follows:

"His Excellency the Governor: I, Don Juan Forbes, partner of the firm of Juan Forbes & Company, successors of Panton, Leslie & Company, merchant, of this province, with the greatest respect, appears before your excellency, and says, that the said firm of Panton, Leslie & Company obtained, in the year 1799, a grant of 15,000 acres of vacant lands in the district of St. John, in order to employ their slaves in the agriculture and for grazing their cattle, as is seen by the certificate annexed; but after a short time, they were under the necessity to abandon them, as being of an inferior quality, the same thing happened to which, which frequently happens in this province, where the planter does not every time succeed in his choice of land, which he perceives only when a sorrowful experience shows him his error; and as it has been, for many preceding years, that the government, in attention to similar misfortunes, and to the expenditures and losses which have been incurred, has had the goodness to permit the taking up other vacant lands, provided the prior grant be abandoned. Finding myself situated in the same case, and wishing to establish a rice plantation, which production we have been, until the present time, under the necessity to import from foreign parts; I, from this moment, abandon the said 15,000 acres of land in behalf of his majesty (whom may God have in his holy keeping!) supplicating him to admit it, and in lieu thereof, to grant me an equivalent in the district of Nassau river. Therefore, I supplicate your excellency, *175] be pleased to order that my former abandonment be *received, and, in consequence, that 10,000 acres be granted to me, in said district of Nassau river; the survey of which I will produce, as soon as the tranquillity of the province enables me to execute it. Which favor, &c. JUAN FORBES."

On the 27th July 1814, Governor Kindelan ordered, on the petition, "let the comptroller inform on the subject."

The comptroller reported, on the 28th July 1814, that—"Whereas, in this province, lands are distributed *gratis*, no record has been entered in the comptroller's office, of lands so given, nor to whom given, for which reason it is not known what lands have been given, and what remain vacant. Therefore, nothing can be said on the subject about which information is required: it appears, however, that it is useful to promote the culture of rice, to which, as the interested party alleges, the lands granted to him the 7th of August, 1799, for the express purpose of pasturage, as appears by the annexed certificate of the then notary of government, Juan de Pierra, are not adapted."

On the same day, Governor Kindelan made the following "grant," by—

"DECREE: St. Augustine, on the 28th of July 1814. It is permitted to this interested party to give his formal abandonment of the 15,000 acres of land, comprehended in the document annexed to the petition, and in lieu of them the 10,000 are granted to him, without prejudice to a third party, for the objects solicited, in the district or bank of the river Nassau; and in consequence, let the corresponding certificate be issued in his behalf, from the secretary's office, in order that it may serve him as a title in form, and it will be the duty of the party to produce the plat and demarcations in the proper time, and let the *expediente* be registered in the secretary's office.

KINDELAN."

On the 23d October 1816, George J. F. Clarke, "the surveyor-general," certified that he had made "a survey" of 7000 *acres at the head of the river Little St. Mary's or St. Mary's river, and annexed "a plat" [*176 of the same to his certificate of survey, which, the certificate stated, he "keeps in the register of surveys under his charge." On the 20th October 1816, George J. F. Clarke certified, that he had made a survey of 3000 acres "in Cabbage Swamp, in part of 10,000" granted to John Forbes in absolute property, and annexed "a plat" of the same to his certificate, as surveyor-general, and stated, "that he keeps the same in the register of surveys under his charge."

After evidence had been taken on behalf of the petitioner and of the Unted States, the court confirmed the claim of the petitioner to the extent for the number of acres, and at the place, as in the memorial of the said John Forbes, and the decree of the governor thereon, is set forth, to wit: "Ten thousand acres of land in the district or bank of the river Nassau." The United States prosecuted this appeal.

The case was argued by *Gilpin*, Attorney-General, for the appellants; and by *Downing*, for the appellees.

Gilpin, Attorney-General, for the United States.—In this case, the superior court of East Florida made a decree in favor of the defendants in error, declaring their title to "ten thousand acres of land in the district or bank of Nassau river," to be valid, under the eighth article of the treaty between Spain and the United States, ratified on the 22d February 1821. That title is founded on an alleged grant to Juan Forbes, by Governor Kindelan, dated 28th July 1814, of "ten thousand acres in the district or bank of the river Nassau, for the objects solicited" in the memorial of the applicant; it being, says the grant, "the duty of the party to produce the plat and demarcations in the proper time." The memorial states the wish of Forbes to be permitted to abandon a previous grant of 15,000 acres of vacant land, in the district of St. John, on account of its bad quality, and to receive, in lieu of it, as he is desirous "to establish a rice plantation," "these 10,000 acres in the district of Nassau river," the survey of which he promises to produce, as soon as the tranquillity of the province enables him to execute it."

*The evidence of the claimants was a certificate of Aguilar, the [*177 governor's secretary, that a copy of the "*expediente*," or record of the memorial and grant, had been given to the interested party; a certificate, dated 20th October 1816, by Clarke, the surveyor-general, that he had surveyed "for Don Juan Forbes, 3000 acres in Cabbage Swamp, in part of 10,000 acres granted to him by the government;" another certificate, dated 23d October 1816, by Clarke, that he had surveyed for him "7000 acres at the head of the river Little St. Mary's being the complement of 10,000 acres granted to him by the government; and a deposition of Sophia Fleming, in which she says, she "has heard that Nassau river and the Little St. Mary's are near to each other; that she does not know what district was called Nassau; and that she does not know the distance from Nassau river to Little St. Mary's."

It does not appear, that the district-attorney excepted, in the court below, to the evidence of the grant; but judging from the case as now pre-

sented in the record, it may be doubted, whether the certificate of the governor's secretary was such a one, or was sustained by such corroborative testimony, as would make it sufficient evidence of title, according to the decisions of this court, in the case of the *United States* v. *Wiggins*, 14 Pet. 348. In that case, the secretary certified, on the day of the grant, that "the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge;" in the present certificate, there is no date, and no averment either that the particular record is a true copy, or that the original does or ever did exist in the secretary's office. In that case, the corroborative testimony, on which the court chiefly relied, was a survey in strict conformity to the grant, and referring to its date; in the present, the two surveys agree with the grant in nothing but the quantity; they differ as to the location, and they make no reference to the date.

It is submitted, however, that even if the grant was made by Governor Kindelan, yet Forbes derived no valid title under it, which the court below was authorized to confirm. He solicited, in his memorial, a grant of 10,000 acres in the district of Nassau river, of which he was to produce a survey; and it was for the purpose of establishing a rice plantation. The grant was *made "for the objects solicited," and under the duty imposed upon him "to produce the plat and demarcations in the proper time." There is no proof either that the land was surveyed, marked out and located according to the grant; or that the conditions of cultivation and settlement were complied with.

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I. The grant was made by the governor, in general terms, as to the district in which the petitioner was to locate the tract conceded to him. The quantity was prescribed, and the district; the particular locality was to be ascertained by the survey, which was to be made "within the proper time;" until that should be done, it was, in fact, but a mere order of survey. The eighth section of the regulations of Governor White (2 White's New Rec. 278), which were then in existence, establishes the necessity of an immediate and definite survey; the fourth section requires that possession should be taken within six months: of course, the survey must have been made and returned within that period. Ibid. 286. What the general provisions of the Spanish laws thus required, this grant made more imperative, by expressly imposing the same duty. Has it been performed? No evidence of any survey, agreeing in any respect with the grant, has been produced. The only evidence of a survey is the two certificates of Clarke. Of these, it might be sufficient to say, that they do not purport to have been made under the authority of this grant, or to have reference thereto. But supposing that they were intended so to be, they give the claimant no title. They do not accord with the grant. They are not an execution of the order of the governor. In the first place, the grant authorizes the location of a single tract; these surveys call for two distinct tracts, at different places. In the next place, the location is to be "on the bank of Nassau river," yet one tract is in Cabbage Swamp, about the locality of which there is no testimony whatever; and the other is on Little St. Mary's river, about which there is some slight testimony, to the effect, that the witness "has heard it is near Nassau river." This is no location in accordance with the grant. To establish a title to these tracts, the claimant must show that a certificate of survey is equivalent to a grant. He has no better title to

them. It is clear, then, that by the Spanish law, the claimant had not perfected his title.

*But it is argued that, under the eighth article of the treaty (8 U. S. Stat. 258; 2 White's New Rec. 210), the grant is not void, but may be still perfected by a survey. To this it is replied, that the provision referred to does not apply to a grant totally void at the date of the treaty; that such was the case in regard to this grant, because the rules of the Spanish law, by force of which alone this land could be severed from the royal domain, never were complied with. At the date of the treaty, there was no valid grant to the claimant, in existence. But if there had been subsequent neglect to comply with the same rules, would have made it void. The treaty, if applicable to such a case, could have extended no further than to authorize the claimant to perfect his title by a survey, within six months after its date, which he never did. [*179

These positions are fully warranted by previous decisions of this court. In the case of the *United States* v. *Clarke*, 8 Pet. 468, there was a grant of 16,000 acres at a place described therein. One survey of 8000 acres was made within the bounds of the grant; two others for the residue, were made elsewhere. "The grant," say the court, "conveyed the land described in the instrument, and no other." In the case of the *United States* v. *Huertas*, 8 Pet. 491, there were similar surveys, in different parcels, of the number of acres granted; and this court held, "the claim to be valid to the extent, and agreeably to the boundaries as in the surveys," which were conformable to the grant, but invalid as to the rest. In the cases of the *United States* v. *Levi*, 8 Pet. 482, and of the *United States* v. *Seton*, 10 Ibid. 311, the same principle was again affirmed. In the case of the *United States* v. *Sibbald*, Ibid. 321, the petition contained a clause soliciting permission to locate the quantity asked for, at a different place from that designated, "in the event that this situation will not permit the said form," and the grant accorded to the claimant, "the permission he solicited;" on this ground, the objection, which was taken, that the terms of the grant did not authorize a survey at the place where the party made his location, was not sustained by this court. In the case of the *United States* v. *Arredondo*, 13 Pet. 133, this court said, that the land must be taken as near as might be to where it was granted; that it could not be taken *elsewhere; and that the grant gave no right to any equivalent or another location. [*180 In that case, too, the court held, that where "the description, in the petition, of the locality of the concession, was too indefinite to enable a survey to be made," the claimants could "take nothing under the concession."

II. Supposing, however, that the petition, concession and surveys are sufficient to give locality to the grant, was the title perfected by the claimant? It was not. The grant was founded on his petition for land, "to establish a rice plantation;" it was given "for the objects solicited;" they were never accomplished nor attempted. Independent of this condition, in terms, that arising from the Spanish law was equally imperative. This was not an absolute grant, in consideration of past or future services; it was conferred for purposes of actual cultivation and settlement; the conditions of occupation and improvement, of which the performance is necessary, in such cases, to make the title complete, have heen heretofore fully discussed (*United States* v. *Wiggins*, 14 Pet. 340), and the declaration of Saavedra,

formally confirmed by Governor Coppinger (2 White's New Rec. 284), that concessions made either to foreigners, or natives, with certificates from the governor's secretary, were of no value or effect, if the lands granted were abandoned, or not cultivated, has been deliberately recognised by this court. 14 Pet. 351.

Downing, for the appellees, contended, that the grants of 7000 acres, and 3000 acres, had been made unconditional, by the Spanish government, on the surrender of 15,000 acres which had been granted in another place. The land was surveyed on the 23d of October 1816. He claimed, that by the Florida treaty, by the laws of congress, and by the decisions of this court, in similar cases, the grants should be confirmed, and the decision of the superior court of Florida should be approved by the court.

Catron, Justice, delivered the opinion of the court.—John Forbes, by his memorial to Governor Kindelan (without date), sets forth, that in 1799, there had been granted to Panton, Leslie & Co., for the purpose of agri-
*181] culture, and for grazing *their cattle, 15,000 acres of land, in the district of St. Johns, which they were under the necessity of abandoning, as being of an inferior quality; that said John Forbes is one of the firm of John Forbes & Co., successor to Panton, Leslie & Co. And said John Forbes prays to be admitted to abandon the 15,000 acres to the king's domain; aud in lieu thereof, to have granted to him an equivalent in the district of Nassau river, to wit: That 10,000 acres be granted to him in said district of Nassau river, the survey of which he will produce as soon as the tranquillity of the province enables him to execute it. The petition avers the object was to establish a rice plantation.

The petition was referred to the comptroller, Lopez, for a report thereon, to Governor Kindelan; the comptroller reports, that records of such grants were not made in his office, and of course, he could give no information on the subject; but gives it as his opinion, that the culture of rice should be promoted. On the 28th of July 1814, Governor Kindelan permitted the abandonment of the 15,000 acres granted in 1799; and in lieu thereof granted to John Forbes, for the object of cultivating rice, 10,000 acres, in the district or bank of the river Nassau, and ordered a certificate to issue in the ordinary form, from the secretary's office, to serve the party as a title in form; making the duty of said Forbes to produce the plat and demarcation in proper time. On the 23d of October 1816, George F. Clarke, the surveyor, returned, that he had, as surveyor-general of East Florida, surveyed and delineated for Don Juan Forbes, 7000 acres of land, at the head of the river Little St. Mary's, or St. Mary river; said land being the complement of 10,000 acres, which were granted to him in absolute property, conformable to the annexed plat. Previously, on the 20th of October 1816, said Clarke had surveyed for Forbes, 3000 acres in part of the 10,000 acres granted to him, conformable to the annexed plat. This survey was in Cabbage Swamp. But no other description of locality appears, either from the certificate or plat; nor is there any evidence appearing on the surveys, or by proof, that the lands surveyed lie in the district of the river Nassau, or on
*182] the *bank of said river; on the contrary, the 7000 acre survey is on the river Little St. Mary's, which a woman, Mrs. Fleming, proves

she had heard, was near to the Nassau. The situation of Cabbage Swamp does not appear from the record.

The decree of Governor Kindelan contemplated that the tract should be included in one survey; as did the petition of Forbes. Neither of the surveys corresponding with the concession, in regard to the district where the survey could alone be made; and being on lands not granted by the governor of Florida, the surveys, if confirmed, would be recognised as of themselves appropriations of the lands, independently of the concession on which they profess to be founded; making them the origin of title, and assuming that the surveyor had the power to grant. This court has, on all occasions, holden, when the question has been presented, that the survey must be for the land granted by the proper authority. *United States* v. *Clarke*, 8 Pet. 468; *United States* v. *Huertas*, 9 Ibid. 171.

The courts of justice can only adjudge what has been granted, and declare that the lands granted by the lawful authorities of Spain, are separated from the public domain; but where the land is expressly granted at one place, they have no power, by a decree, to grant an equivalent at another place, and thereby sanction an abandonment of the grant made by the Spanish authorities. All the public domain of Spain was ceded to this government, by the treaty of cession, and the title in fee to the same vested in the United States; from the lands thus acquired, was excepted individual property. First, the paper title to such private property it is our duty to investigate and ascertain, and by our decisions to establish; and secondly, it is our duty to ascertain, and cause to be surveyed and marked by definite boundaries, the lands granted; and here the duties of the courts end. They have no authority to divest the title of the United States, and vest in a claimant, however just his claim may be, an equivalent. These principles seem to be self-evident; and their assertion not called for, because of their undoubted character; yet the consequences flowing from them will be found to govern a class of cases of large magnitude, now in the course of adjudication. The one before us is of that class. The concession or grant (for the terms are synonymous, in regard to the *Spanish titles of Florida) to Juan Forbes, was for 10,000 acres in the district or bank of the river [*183 Nassau, with an order, that the concession should serve him as a title in form; "and it will be the duty of the party to produce the plat and demarcations, in the proper time," says the decree of the Spanish governor. That this concession is founded on a past consideration; that is, on the surrender of other 15,000 acres previously granted to Panton, Leslie & Company, admits of no doubt; still, the question recurs, what spot of land was granted? Of the district of Nassau, we know nothing, as there is no proof of the existence of such a section of country, in the record; unless we infer that it is in the range of country through which the river Nassau runs. But the description is more precise, and authorizes the grantee to take the land on the bank of this river. That there is such a river as the Nassau, in East Florida, lying south of the St. Mary's river, we know from the general geography of the country; it is, however, a river of considerable length; the land might have been located on either bank, from its commencement as a river, to its mouth at the ocean. No survey of the land granted was ever made; the duty imposed upon the grantee to produce the plat and demarcations, in the proper time, was never performed. This was a condi

tion he assumed upon himself; the execution and return of the survey to the proper office, in such case, could only sever the land granted from the public domain. Before, the grantee had an equal right to any lands on either bank of the river Nassau. The concession was made in 1814; and how long the party had the right to survey and make the demarcation, it is needless to inquire, as it has never been done. We apprehend, however, within six months after the ratification of the treaty, by the contracting parties, respectively, was the latest date at which the condition to survey could have been complied with; on this point, however, no definite and conclusive opinion is called for, and none is given.

Thus situated, the claim was presented to the superior court of Florida for confirmation. The court pronounced the claim valid, that is, that the concession had been made by the lawful authorities of Spain; and it was decreed, that the lands "be confirmed at the place, as in the memorial of the said John Forbes, and the decree of the governor thereon *set
*184] forth, to wit, 10,000 acres of land in the district or bank of the river Nassau." From this decree, the United States appealed; and in the review of which decree, we are compelled to find the land granted, or to reject the claim, because we cannot identify the land. If this cannot be done, we have no power to decree an equivalent out of the lands of the United States; for the reason, that the courts have no authority to divest the title of the government, and to vest it in Forbes's heirs. No particular land having been severed from the public domain by John Forbes, his was the familiar case of one having a claim on a large section of country, unlocated; in its nature and effect, as it regards the government, not differing from the holder of a land-warrant in the American states, which might be located by survey at any spot that was not appropriated by an individual title, in a certain district of country. In such a case, the government has ever been deemed to hold the fee, unaffected by a vested equitable interest, until the location was made according to the laws of the particular country. So, here, Forbes acquired no title to any land that can be recognised by a court of justice, and his claim must be pronounced void for want of identity; and because it is impossible to settle the identity, and locate the land by a judicial decree.

Although this question has not been directly presented to the court for decision, yet it did arise, and received our careful consideration, in the case of the *United States* v. *Arredondo*, 13 Pet. 88. In that case, 30,000 acres had been granted to Arredondo, in 1817, designated to lie on Alligator creek, a branch of the Suwanee, to begin about seven miles west of Alligatortown; situated about forty miles north-westwardly from Paynestown, and about eighty miles from Buena Vista; which parts of the country are known under the name of Alachua. The court say—"the land must be taken, as near as may be, as it was granted, and cannot be taken elsewhere. It (the grant) gives no right to an equivalent or another location, if it cannot be found at, or near, the place designated; an equivalent is not secured by the concession, in terms, nor is it by the customs or usages of Spain, nor by any law or ordinance of Spain. And it is proper here to remark, that the acts of congress for ascertaining claims and titles to land
*185] *in Florida, whilst they recognise the patents, grants, concessions or orders of survey, as evidence of title, when lawfully made, do not

permit, in case of a deficiency in the quantity from any cause whatever, the survey to be extended on other lands." Detailed and careful instructions are then given how the court below shall proceed to identify the land; and how it shall be surveyed when the identity is established: and then the court declare, "if, however, neither Alligator creek can be found, nor any creek to the west of Alligatortown, entering into the Suwanee, within seven miles distance from the town, or a reasonable distance therefrom; and if Alligatortown cannot be found; then, it is the opinion of this court, that the remaining description in the petition, of the locality of the concession, is too indefinite to enable a survey to be made; and that the appellees can take nothing under the concession." Subject to this opinion, and a mandate in conformity to it, the cause was remanded to the superior court of East Florida, for further proceedings, in execution of the decree and instructions of this court; and where it is probably now pending. We think the principle adopted unquestionably correct, and which rules this case.

The petition of Juan Forbes, and the concession of Governor Kindelan, are authenticated and were read in evidence by the following certificate:

"On the date, a copy of this *expediente* was given to the interested party above. AGUILAR."

We feel strongly impressed with the deficiency and unsatisfactory character of the foregoing certificate; but as no objection was made to the introduction of the title papers in the court below, on behalf of the United States, on the hearing; and as the cause has presented no difficulty on its merits; this preliminary point has been passed over, with this indication; so that in future, the objection may be taken below, should it be deemed desirable to present the question on part of the government, whether such authentication is sufficient to authorize the evidences of title to be read. We order, the decree of the superior court to be reversed, and that the petition be dismissed.

*THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was [*186 argued by counsel: On consideration whereof, it is the opinion of this court, that the grant or concession is void for the want of identity; that it appropriates no land; that the said petitioner has acquired no right or title to any specific land. Whereupon, it is now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said superior court, with directions to enter a decree in conformity to the opinion of this court.

*United States, Plaintiffs in error, *v.* Gordon D. Boyd and others, Defendants in error.

Receiver's bond.—Responsibility of sureties.—Pleading.

The United States proceeded on the official bond of Boyd, a receiver of public moneys for the district of lands subject of sale at Columbus, Mississippi; Boyd had been appointed receiver for four years, from the 27th December 1836; the bond was for the faithful performance of the duties of his office, and was executed on the 15th of June 1837. The breaches assigned by the United States were: 1st. That after the 27th day of December 1836, Boyd received, in his official capacity, $59,622.60, which he failed to pay over to the United States, as he was bound to do by law: 2d. That Boyd, on the 27th day of December 1836, and at divers days between that and the 30th of September 1837, received $59,622.60, as receiver, which sum remained in his hands on the 30th day of September 1837; and that he failed to pay the same, pursuant to his instructions from the secretary of the treasury, and the duties of his office, &c. Farrar *v.* United States, 5 Pet. 374, cited and affirmed. It matters not at what time the moneys had been received by the officer, if received after his appointment; they were held in trust for the United States, and so continued to be held, at and after the date of the bond; and the sureties are liable to the United States.[1]

The liability of a surety is not to extend, by implication, beyond the terms of his contract; this undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms.

By the revised code of Mississippi, 614, any number of breaches may be assigned; and when a demurrer shall be joined in any action, no defect in the pleadings shall be regarded by the court, unless specially alleged as causes of demurrer. A case having come to the supreme court, by writ of error from the district of Mississippi, the modes of proceeding in that state govern the pleadings.

The case having been brought up from the circuit court of Mississippi, on a writ of error, and the judgment of the circuit court, on the demurrer, in favor of the defendant, and against the United States, having been reversed by the supreme court, the case will be in the circuit court as if the demurrer had been overruled; and will be subject to additional pleadings, or an amendment of the present pleadings, according to the rules and practice of the circuit court, and on such terms as it may impose.

Error to the Circuit Court for the Southern District of Mississippi. Gordon D. Boyd was duly appointed a receiver of public moneys for the
*188] district of lands subject to sale at Columbus, in *the state of Mississippi, for the term of four years from the 27th day of December 1836. On the 15th of June 1837, he gave a bond in the penal sum of $200,000, jointly and severally, with Samuel Rossdale and others, the defendants in error in the present suit. The condition of the bond was, that, whereas, the president of the United States had, pursuant to law, appointed him, the said Boyd, receiver as aforesaid, for the term of four years from the 27th of December 1836, that therefore, "if the said Boyd shall faithfully execute and discharge the duties of his office, then the above obligation to be void, and of none effect, otherwise, it shall abide and remain in full force and virtue."

At May term 1838, a suit was instituted on this bond, by the United States, in the circuit court for the southern district of Mississippi, against the obligors, being the present defendants in error, to recover the penalty thereof. The defendants craved *oyer* of the bond, and afterwards of the condition, and subsequently, pleaded that the plaintiffs ought not to maintain their action, because "the said Boyd did, from time to time, and at all

[1] See note to the case of United States *v.* Kirkpatrick, 9 Wheat. 720.

times after making of the said bond, and the condition thereof, well and truly observe, perform, fulfil and keep the condition of said bond, by faithfully executing and discharging the duties of his office, according to the tenor and effect, true intent and meaning of the said condition."

At November term 1839, the United States filed an amended replication, in which they said, that they ought not to be barred from maintaining their action, because the said Boyd had not performed the condition of the said bond; and two breaches thereof were assigned.

1. That "the said Boyd, after the 27th of December 1836, and while he was receiver, and as such receiver, received of the public moneys, large sums, viz., $59,622.60, which said sum he, then and there, wholly failed, neglected and refused to pay over to the said plaintiffs, pursuant to his instruction from the secretary of the treasury, as he was bound to do by law, and the duty of his said office of receiver."

2. That "the said Boyd, after the 27th of December 1836, and on divers days and times, between that day and the 30th of *September 1837, while he was receiver, and as such receiver, received divers sums of [*189 the public moneys, amounting in the whole to $59,622.60, and that the said sum remained in the hands of the said Boyd, as receiver, on the 30th of September 1837; and the said Boyd, then and there, wholly failed, neglected and refused to pay the same over to the United States, pursuant to his instructions from the secretary of the treasury, as he was bound to do by law, and the duty of his office."

To this replication, the defendants demurred, for the following causes: 1. The first breach does not state the time at which Boyd, as receiver, received the said money, after his appointment, whether before or after the date of the bond. 2. The first breach does not state that Boyd neglected to pay over any moneys received by him, as receiver, after the date of the bond. 3. The second breach does not state any time at which Boyd, as receiver, received the said money. 4. The second breach does not state that Boyd, as receiver, neglected to pay over any moneys received by him, as receiver, after the date of the bond. 5. That the replication is otherwise insufficient.

The United States joined in the demurrer, and the same was sustained by the court, and judgment thereupon entered for the defendants. The United States prosecuted this writ of error.

The case was argued by *Gilpin*, Attorney-General, for the United States. *Davis*, in behalf of *Cocke*, submitted a printed argument for the defendants.

For the United States, it was contended, that the breaches of the condition of the bond, by the principal obligor, were well and sufficiently set forth in the replication; and that the demurrer ought not to have been sustained.

Gilpin, Attorney-General, for the United States.—On the 27th of December 1836, the defendant, Boyd, was appointed a receiver of public moneys, at Columbus, in Mississippi, for four years. On the 15th of June [*190 1837, and while his *term of office was unexpired, the bond on which the present suit was brought was given by him and the other defendants

in error, in the penal sum of $200,000, with the condition that he "should faithfully discharge the duties of his office" of receiver of public moneys, and stating the term to be "four years from the 27th of December 1836."

On the first establishment of the government, in 1789, the general duty of "superintending the collection of the revenue," and of "executing such services relating to the sale of the public lands, as might be required by law" (1 U. S. Stat. 65), was devolved on the secretary of the treasury. The earliest general provision (Ibid. 464), regulating, especially, the payment of moneys on the purchase of public lands, was that on the 18th of May 1796, and by that it was provided, that the purchaser was to pay one-half of the purchase-money, within thirty days, to the treasurer of the United States directly, or "to a person appointed by the president to attend at the place of sale and receive it;" the residue was to be paid directly to the treasurer. On the 10th of May 1800 (2 Ibid. 73), land-offices were created at four places, Cincinnati, Chilicothe, Marietta and Steubenville; and it was directed, that a receiver of public moneys should be appointed at each of them, by the president, whose duties were, to receive the purchase-money from purchasers; give receipts therefor; transmit, at designated periods, accounts of the moneys received, to the secretary of the treasury; and "within three months transmit to the treasurer of the United States, the moneys by them received." By the same law, the secretary of the treasury was authorized to prescribe such further regulations as to the manner of keeping the books, and the accounts, as he might think proper. On the 25th of April 1812 (Ibid. 716), the general land-office was established, and all the powers and duties of the secretary of the treasury, relative to the public lands, were devolved upon the commissioner; to whom also, all returns from the land-offices were directed to be made, and by whom all accounts from them were to be settled. On the 24th of April 1820 (3 Ibid. 566), the law was passed, requiring the whole purchase-money to be paid on the day of sale, to the receiver, or to the treasurer of the United States. On the 2d *of March 1833 (4 Ibid. 653), a law was passed which formed a certain portion of the lands in the state of Mississippi, purchased not long before from the Choctaws, into a land-district called the North-eastern district; and the president was directed to establish a land-office at some convenient place therein, which he might designate; and to appoint a receiver of public moneys for that office, who was to give bond according to law, and who was to perform similar duties, and be in all respects governed by the laws of the United States, providing for the sale of the public lands. This office was established at Columbus, and went into operation on the 1st of May 1833. On the 4th of July 1836 (5 Ibid. 107), the general land-office was re-organized; and it was provided, that the receivers should make to the secretary of the treasury monthly returns of the moneys received by them, and should pay over such money, pursuant to his instructions.

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The various instructions that had been, from time to time, issued in regard to the various duties of the officers of the land-office, were condensed, in the year 1831, into a circular issued by the secretary of the treasury; which, so far as it relates to the payment of public moneys collected by the receivers, is as follows (2 Birchard's Land Documents 443): "When the public money in the hands of a receiver, at the end of any month, exceeds the sum of $10,000, it should be deposited without delay. But it must not

be retained, under any circumstances, in contravention of the provisions of the act of 10th May 1800, which require that the moneys received by the receivers shall be transmitted, within three months, to the treasurer of the United States, as they will thereby render themselves and their sureties liable under their official bonds. It is essential, that the public moneys in the possession of the receivers, should be deposited at the above intervals." These instructions, which were issued by the secretary of the treasury, through the commissioner of the general land-office, have formed, ever since, the well-known guide of receivers of public moneys throughout the United States.

It will thus be seen, that, for a receiver of public moneys "faithfully to execute and discharge the duties of his office," he must pay over "the public money in his hands, exceeding $10,000, *once a month," and deposit "all the public monies in his possession" once in three months. [*192
It is not possible, that the duties required for the faithful execution and discharge of an office can be more exactly defined.

On the 30th of September 1837, the defendant, Boyd, resigned his office, having at that time in his hands, not paid over, or deposited as required by the above regulation, the sum of $59,622.60, received during the term designated in the bond. This balance, though repeatedly called upon, he has ever since refused to pay over or deposit; and at May term 1838, a suit was instituted against him and his sureties, on their official bond, to recover it. The defendants pleaded performance, and alleged that Boyd had, at all times, after the making of the bond, faithfully executed and discharged the duties of his office. The United States, in an amended replication, filed at November term, 1839, replied that he had not performed the condition of his bond, and assigned as breaches of it: 1. That while he was receiver, that is, during the term stated in the bond, and up to the 30th September 1837, he had received this amount of public money, and had then and there refused to pay it over to the United States. 2. That between the time of his appointment and the 30th of September, he had received this amount of public money; and that it remained in his hands on the 30th of September, and that he had, then and there, refused to pay it over to the United States. To this replication, the defendants have demurred, substantially, but on a single ground. It is, that it does not appear that the public money, which he has not paid over, was received by him, after the date of the bond; and it is alleged, that if the money in question was collected by him, before that period, the sureties are not answerable for it; even though it was collected during the term for which the bond prescribed his official duties; and though it was "in his hands," and remained "in his possession," up to the 30th of September, when he retired from office.

It will scarcely be denied, that, so far as the receiver himself was concerned, it was his duty to pay over and deposit this money, at whatever time it was received, as completely after the *15th of June, as it was [*193
before. It is his duty, from the nature of his office, which requires him to pay over and deposit all moneys, whenever received, during his term. It is his duty, from the express words of the law, and the regulations of the treasuty department; they make no distinction in regard to the money received; all is to be paid over; if it was so received, as to have made it a breach of duty, not to pay it over before the 15th of June, this does not

make it less so, to continue to withhold it after that time. It is too plain for argument, that Boyd did not faithfully perform his duty, if he neglected to pay over these moneys, after the 15th of June, whenever they first came there.

If, then, this was a duty of the principal; if a neglect of it was a breach of the condition of the bond on his part; is there anything which exempts the sureties from liability on account of it? What are the sureties bound for? They are bound to answer for their principal performing every duty whatever, which belonged to his office, at the time they executed the bond. This was his chief and well-known duty. They knew he had been in office for five months; they knew he must have received public moneys; they knew that the bond they gave was dated in the middle of a quarter; they knew, therefore, that the public moneys, thus received, must be remaining in his hands, undeposited. It was, therefore, a duty which, when they signed the bond, they knew he had to perform. They could ascertain the amount of their liability at that time; they were not in any way taken by surprise; they executed the bond with a full knowledge that their principal was bound to pay over and deposit the moneys then in his hands. It is true, that a surety may not be bound always to see new duties performed, which are imposed on their principal after the date of the bond; but these are not of that character. Let us suppose, that this bond, executed on the 15th of June, had contained, in terms, this condition: "that the said Boyd shall faithfully perform his duty as a receiver, by paying over and depositing all public money now in his hands;" will it be contended, that the sureties would not then have been answerable? And is not this the case, where such a condition is contained, in substance—when there is a condition that he shall perform every duty, and this is a well-known and prescribed
*194] *duty? The designation of a general duty, necessarily embraces the particular duty. It seems clear, then, that to pay over the moneys remaining in his hands, when the bond was signed, was a duty of the principal, and one which the sureties knew he was bound to perform. They are, therefore, answerable for a breach of it.

But it may be said, that the duty was one which should have been performed, before the bond was executed; that the money received before the 15th of June, should have been paid over before that day. To that, it may be answered, in the first place, that such is not necessarily the fact. It does not by any means follow, that there was a default in not paying over, even though the money had been received before the date of the bond. If the sum in question was received in the last preceding month, there was nothing in the law which required it to be paid over before the date of the bond; and the demurrer admits the fact to be so, by objecting only to the want of certainty as to the receipt of the money at the day of the date of the bond. We have a right, under this demurrer, to assume, that this money was all received, within thirty days preceding the date of the bond; we can have no knowledge that such was not actually the fact; if it was so, the duty of the receiver was to pay it over, after the date of the bond, though it was received before. Or, suppose, that a receiver should collect $9000 before the date of the bond, and $1000 after; the law requires him to deposit only when he has $10,000; is not the surety liable, if, when the period of deposit arrives, after the date of the bond, he fails to make it?

But in the second place, if we admit, that the money was received before the date of the bond, and that it ought to have been then paid over, does that make it less a duty to pay it over afterwards? The real and great default is in the permanent refusal to pay; a neglect to account, a failure to make report, a refusal to deposit the money at a prescribed day, may each be great improprieties and violations of official duty; but it is the final neglect to pay over the money which constitutes the great breach; and this does not become less a breach, because there have been other and previous neglects.

But in the third place, if we admit, that the money was received *before the date of the bond, and ought to have been paid over before the date, the terms of the bond expressly provide for a default [*195 in this payment. Whether the proper deposit had been made was unknown to the public officers, when the bond was taken; they, therefore, required that it should embrace the duties of Boyd during his whole term—that is from the 23d of December, for four years. Such are the words of the bond—such are its voluntary obligations on the part of the sureties. There is nothing, as I have said, in the assignment of these breaches, which conflicts with the fact, that the money was collected within a period that did not require its payment to be made to the United States before the date of the bond; but if there were—if it be admitted, that the money was all received on the 1st of January 1837, is not that within the term of four years from the 23d of December 1836; during all of which, previous to the date of the bond, as well as subsequent, these sureties stipulate the receiver's duties shall be faithfully performed? That a bond, voluntarily entered into, to guaranty the performance of all duties, from a day expressly stipulated in the bond, though anterior to its date, to another day also stipulated (if the principal so long remains in office) is a legal and binding instrument, cannot be denied. And such was the case here, and such is the condition that is broken, if we take the facts of the case to be more favorable to the sureties than necessarily results from the assignment of breaches to which they demur.

If, then, it be alleged, that this payment ought to have been made before the date of the bond, we say: 1st. That such is not necessarily the fact; the money may have been received within a month of that date. 2d. That if it ought, it is not less an obligation on the sureties to see it subsequently paid. 3d. That the sureties, by the terms of the bond, stipulated to meet such a contingency.

Nor can the sureties relieve themselves, by the allegation that there was a neglect on the part of the obligees. To say nothing of the well-recognised principle that the rights of the public cannot be impaired by the neglect of its officers to require the proper settlements, or to institute suits against the principal (*United States* v. *Kirkpatrick*, 9 Wheat. 720; *United* *States v. *Vanzandt*, 11 Ibid. 184; *United States* v. *Nicholl*, 12 Ibid. 509); [*196 yet, as the case presents itself by this demurrer, it is quite evident, that there was no neglect whatever; that, at the time the bond was signed, the money may have been received, and yet the period to account for it or to deposit had not arrived. It is, indeed, probable, that the state of his account could not have been known. He was appointed in Washington, on the 27th of December; he could scarcely have commenced his official duties in Mis

sissippi, before the middle of January ; his first quarterly account was to be made up to the 1st of April, and necessarily requires some time after that date, for its transmission, with the vouchers ; the bond, sent from Washington to Mississippi, was executed there in June. It may well be doubted, therefore, even if these moneys were received before the 1st of April, whether this default could have been known, before the bond was sent for execution. But it is far more probable, that these moneys were received after the first of April ; if so, there had been no account rendered of the receipts ; none had been required by law ; the sureties knew there could have been none ; of course, no neglect, to their prejudice, is chargeable against the United States, or their officers.

If these views are correct, the following position is established : that where a receiver is bound by his bond to deposit moneys in his hands, received during a specified official term, it is a breach of that bond, if he neglects to deposit what was received during the time prescribed, but previous to its date ; and this is especially the case, if the bond is dated after the receipt of the money, but before the time of deposit prescribed by law or regulation ; or if the money received actually remains in his hands at that date.

The judicial decisions of the courts of common law, as well as of this court, seem to establish the same position. There is nothing in the condition of this bond that the obligor cannot perform ; and it is a well-settled principle, that if a condition can be performed, without breach of the law, it is good. *Mitchell* v. *Reynolds*, 10 Mod. 134. In the case of *Arlington* v. *Meinch*, 2 Saund. 414, it was held, that the recital was the part of the bond which governed its construction, and that the condition must be construed by it. In the case of *Newman* v. **Newman*, 4 Maule & Selw. 66, it was held, that if there were some things required in the condition which were void, this did not release the obligors from the performance of the other conditions. The principle is well established, that the sureties are bound, by terms of the agreement, as recited in the bond, unless some parts are illegal, and then their responsibility remains for the residue. It is their agreement that controls, and this is a matter for the court and jury to judge of. In the case of *Hassell* v. *Long*, 2 Maule & Selw. 363, the obligor was a churchwarden, holding from year to year, commencing in the month of April ; on the 5th December 1796, he gave his official bond for the faithful performance of his duties then imposed, or that might thereafter be imposed ; the plaintiffs sought to charge him for duties after April 1797, to which the surety objected, and was sustained by the court. It was admitted, that he was bound for the whole year or term, during which the bond was given ; the only question was, whether a fair construction of the words of the bond extended his liability further.

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In the case of *Nares* v. *Roules*, 14 East 510, a collector was appointed under an act of parliament, to perform certain duties, which were to be designated by another act "to be" subsequently passed, the title of which was given ; it so happened, that the act thus referred to was actually passed before the date of the bond, or the law which required it, and the collector acted under it, and became a defaulter ; it was held, that his sureties were liable, it being evident, from the whole tenor of the bond, that it referred to the act previously passed, notwithstanding the prospective words. In the course of argument, it was said, as a thing not doubted, that the commis-

sioners of revenue "might well take such a security that the duties that were actually collected should not be lost."

In the case of *Curling* v. *Chalkden*, 3 Maule & Selw. 508, a collector of poor rates gave bond, "that he should render to the churchwardens at, &c., and as often thereafter as required, a true account of the moneys so collected, &c., and of all moneys rated and not received; and pay over the moneys so by him collected and received and remaining in his hands." The collector was appointed in 1806; the bond was dated 21st July 1810; and the appointment expired in 1814. Lord ELLENBOROUGH said, "I think it is clear, from the act of parliament, *and the condition of this bond, that it [*198 was intended to be given as a security for the faithful accounting of the principal for the time prior to that when the bond was executed, and also for the whole period of time, after the execution of the bond, during which he should continue in the office of collector."

In the case of *Peppin* v. *Cooper*, 2 B. & Ald. 431, the collector of rates was appointed, 22d August 1812; he gave bond, dated 18th December 1812, that he should, from time to time, and at all times thereafter, faithfully collect, &c. ABBOTT, C. J., said, "I am of opinion, that the condition of the bond is satisfied by the faithful collection of the rates for one year. The office of collector must be annual. I think, therefore, it was the intention of the parties that this bond should only be co-extensive with the duties to be performed." In the case of *Dawes* v. *Edes*, 13 Mass. 177, an administrator gave bond to render, &c., of the goods, &c., which have or shall come to his hands. It was objected by the surety, that these words did not imply a retrospective meaning, but the court said, that the bond clearly covered what came into the administrator's hands, before as well as after its date. In *Roth* v. *Miller*, 15 Serg. & Rawle 107, Judge DUNCAN said, "although it may be admitted, that bonds are not to be construed strictly against sureties, yet sureties are as much bound, according to the true meaning of the obligation, as principals."

In 4 Yeates 340, and 4 Dall. 79, Judge SMITH has laid down the true principle of construction to be, that the surety is not liable further than the true intention and meaning of the parties, expressed in the instrument, and the legal construction of the words used, make him liable; but so far he is liable, and the legal construction of the words make him answerable. All who bind themselves in a bond, are equally obligors; and there are many cases, in the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties. And it is a rule in the construction of all deeds, that they are to be construed most strictly against those who make them, and most favorably for those for whose benefit they are made, as every contract is. In the case of the *Dedham Bank* v. *Chickering*, 3 Pick. 341, the same principle is sustained. It was held there, that where the terms of the bond were general, so as to embrace the whole *period of a person being in office, they could not [*199 be restrained to a single year, although it had been customary to re-elect him from time to time.

Turning to the decisions of this court, we find in the case of *Sthreshley* v. *United States*, 4 Cranch 169, the chief justice laying down the duties of a collector of revenue, for which his sureties are answerable, to be, first, a liability to pay over what he has collected; and second, to answer for any

neglect in collecting it. While the court in that case refused to make the sureties answerable for outstanding duties at the time his office ceased ; they held them to be answerable for the payment of all that had been collected before that time. The case of the *United States* v. *Giles*, 9 Cranch 212, was that of a marshal, who gave bond, dated the 9th of January 1801, well and faithfully to perform the duties of his office, but without any limitation whatever, as to the period when the obligation of the sureties was to begin. It appeared, that previous to the date of his bond, the marshal had collected a sum of public money, which he had not paid over, as directed by the treasury regulations to do ; but it did not appear that any demand was made upon him, by the United States, to pay it over. The sureties contended, that as the money had been collected before the date of their bond, which, by its terms, had no relation to any duties previous to its date, it was not a breach of duty for which they were answerable. Two of the judges agreed with this view of the case ; two others differed with them, and held that the sureties were liable, because the money, though received before the date of the bond, was then in the marshal's hands, and not paid over ; and the other two appear to have concurred on this point, though they considered the want of evidence of any demand having been made of the marshal, as sufficient to relieve him from the charge of having converted it. This case wants the essential feature of the present one ; an express stipulation in the bond, of the time when the receiver's liability is to begin ; yet even there, the payment of the money, independent of the time of receipt, is regarded as a substantial duty, which, if violated, involves a breach of the condition.

In the case of *Walton* v. *United States*, 9 Wheat. 651, the court, in speaking of the official bond of a receiver, say, that it is not an instrument given for a particular balance of money ; but that it is a *security merely for the officer performing his duties in good faith. In the case of *Miller* v. *Stewart*, 9 Wheat. 680, the defendant was surety in a bond, conditioned that Ustick "had faithfully discharged, and should continue to discharge, the duties of his appointment," as a collector of internal revenue ; and it was sought to charge him with duties arising under a subsequent appointment. This the court refused to sanction ; and thus laid down the obligations of a surety : " To the extent, and in the manner, and under the circumstances pointed out in his obligation, the surety is liable, but no further ; he has a right to stand upon the very terms of his contract." It is evident, from the terms of the bond, that it was dated after the appointment, yet the surety voluntarily made himself liable during the whole of that appointment ; and, as in the case of *Hassell* v. *Long*, the court, though they would not extend his liability further, asserted its existence fully to that extent. In the case of the *United States* v. *Kirkpatrick*, 9 Wheat. 720, the defendant was surety in a bond, dated 4th of December 1813 ; the principal obligor was commissioned on the 13th of November ; the court said, " the bond in question was given with express reference to this commission, and its obligatory force was, of course, confined to acts done while that commission had a legal continuance." In the case of the *United States* v. *Nicholl*, 12 Wheat. 505, the defendant was surety in a bond, dated 22d of February 1819, for the faithful performance by Robert Swartwout, of the duties of his office of navy agent, which commenced on the 30th of Novem-

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ber 1818, and continued for four years. The court below had charged the jury, that the defendant was not liable for a deficiency of public money reported on by the accounting officers, subsequent to the expiration of his office. On this, the supreme court say, that if, by this, "it was intended to convey the idea, that he was not responsible for money that came into Swartwout's hands while in office, but which he afterwards failed to account for and pay over, it was clearly incorrect."

In the case of *Farrar* v. *United States*, 5 Pet. 373, the plaintiff was the surety of Rector, the surveyor-general, in a bond, dated 17th of August 1823, conditioned, that he "shall faithfully discharge the duties of his office. He was appointed on the 13th of June 1823, and received certain public money, before the date of his *bond, and some even before the date of his commission. This money he failed to pay over, [*201 and the sureties denied their liability for such failure. The supreme court said, "that for any sums paid to Rector, prior to the execution of his bond, there is but one ground on which the sureties could be held answerable, and that is, on the assumption that he still held the money in bank, or otherwise. If still in his hands, he was, up to that time, a bailee of the government; but upon the contrary hypothesis, he had become a defaulter, and his offence was already consummated." They go on to say, referring to the latter state of the case, that then, "if intended to cover past dereliction, the bond should have been made retrospective in its language." In the case of the *United States* v. *Tingey*, 5 Pet. 128, the question arose whether or not, a bond voluntarily entered into, might not be made by the sureties with the United States, as fully as it might be with an individual; and this court expressly recognised the binding authority of such a contract on the sureties.

From these decided cases, it clearly results, that where a surety voluntarily enters into a bond, he is bound by its conditions as they are to be deduced from the recitals of the instrument itself; that these conditions may be retrospective in their character, and apply to a series of transactions commencing before the date of the bond, if such is the agreement therein; that the agreement to pay over public moneys applies equally to those received before, as after the date of the bond (even without a retrospective clause), where they remain in hand at the date of the bond. In the present case, the record establishes the facts necessary to bring it within these principles. The bond is voluntary; it embraces in terms all acts of the principal as far back as the 23d of December; the money was in his hands at the date of the bond.

An objection of a different character was taken by the counsel for the defendant in error, but not pressed in the argument. It is to the form of the replication, which, it is alleged, "does not fairly respond to the plea;" but is "evasive and uncertain." An examination of the pleadings will show, that this objection cannot be sustained; but this is unnecessary; for if it were valid, it was not assigned as s special cause of demurrer, without which, by the *law and practice of Mississippi, it could not be [*202 noticed by the court. Revised Code of Miss. 614. On the whole case, therefore, it is submitted, that the court below erred in sustaining the demurrer, and that the liability of the sureties ought to have been enforced.

Cocke, for the defendant.—This was an action of debt, brought by the plaintiffs in error against the defendants, in the circuit court of the United States for the district of Mississippi. It is founded on the official bond given by Gordon D. Boyd, as receiver of public moneys of the United States, for the district of lands subject to sale at Columbus, in the state of Mississippi. By an inspection of the bond, it appears that the said Gordon D. Boyd was appointed receiver on the 27th day of December 1836; but that he and his sureties did not execute the bond sued on, until the 15th day of June 1837, and that the bond was not approved at the treasury department of the United States until the 9th day of October 1837.

The sureties, the present defendants, craved *oyer* of the bond and the condition; and the condition being read to them in these words: "The condition of the foregoing obligation is such, that whereas, the president of the United States hath, pursuant to law, appointed the said Gordon D. Boyd, receiver of public moneys for the district of lands subject to sale at Columbus, in the state of Mississippi, for the term of four years from the 27th day of December 1836: Now, therefore, if the said Gordon D. Boyd shall faithfully execute and discharge the duties of his office, then the above obligation to be void and of none effect; otherwise, it shall abide and remain in full force and virtue." The defendants pleaded that the said Gordon D. Boyd did, from time to time, and at all times, after the making of the said bond and condition thereof, well and truly observe, perform, fulfil and keep the condition of the said bond, by faithfully executing and discharging the duties of his office, according to the tenor and effect, true intent and meaning of the condition of the said bond.

To this plea, the plaintiffs replied, and assigned two breaches of the condition to the said bond, to wit: 1. That the said Gordon D. Boyd did not *203] well and truly *keep and perform the condition of the said bond declared on, but broke the same in this, to wit, that the said Gordon D. Boyd, after the said 27th day of December 1836, and while he was receiver of public moneys for the district of lands subject to sale at Columbus, in the state of Mississippi, and as such receiver, received of the public moneys of the United States divers large sums of money, amounting in the whole to a large sum of money, to wit, to the sum of $59,622.60, at the district aforesaid; which said sum of $59,622.60, the said Gordon D. Boyd, then and there, wholly failed, neglected and refused to pay over to the plaintiffs, pursuant to his instructions from the secretary of the treasury of the United States, as he was bound to do by law, and the duties of his said office of receiver. 2. That the said Gordon D. Boyd, after the 27th day of December 1836, and on divers days and times between that day and the 30th of September 1837, and while he was receiver of public moneys for the district of land subject to sale at Columbus, in the state of Mississippi, and as such receiver, received divers large sums of the public money of the United States, amounting in the whole to a large sum of money, to wit, to the sum of $59,622.60, at the district aforesaid; and that the said sum of $59,622.60, remained in the hands of the said Gordon D. Boyd, as receiver as aforesaid, on the 30th day of September 1837, to wit, at the district aforesaid, and that the said Gordon D. Boyd, then and there, wholly failed, neglected and refused to pay the same over to the plaintiffs, pursuant to

his instructions from the secretary of the treasury of the United States, as he was bound to do by law, and the duties of his office.

To this replication, the defendants demurred; and for causes of demurrer, stated the following, to wit: 1. The first breach does not state or show the time at which the sum of money mentioned was received by the said Gordon D. Boyd, as receiver; whether the same was received before or after the day of the date of the said bond. 2. The first breach does not state or show that the said Gordon *D. Boyd hath failed, neglected or refused to pay over to the plaintiffs, any moneys collected by him, [*204 at any time after the day of the date of the said bond. 3. The second breach assigned does not state or show any time at which the said Gordon D. Boyd received the said sum of money mentioned in the said second breach. 4. The said second breach does not state or show that the said Gordon D. Boyd neglected, failed or refused to pay over any moneys collected by him as such receiver, at any time after the day of the date of said bond.

To this there was joinder in demurrer; on which the circuit court, after argument, gave judgment for the defendants. To reverse this judgment, the plaintiffs have prosecuted their writ of error to the supreme court of the United States. To sustain the judgment of the court below, on the part of the defendants, it is insisted:

1. That it is the duty of the court to look into the contract itself; the construction of it is a question of law, and the court will construe it with a view to the real intention of the parties to it. It will be found, that the contract was entered into on the 15th of June 1837, and approved on the 9th of October 1837; that it is prospective in its terms. It is an executory contract, both in its terms and legal effect. Its object was to secure the faithful discharge of duties thereafter to be performed. If, at the time of the execution of the bond, on the 15th of June 1837, the sureties had been told, that Boyd had already become defaulter to the government, to the amount of $59,622.60, and they had then been asked to become responsible for that defalcation; it would have involved very different considerations than those of an undertaking that he should thereafter execute and discharge the duties of his office.

In the matter of Rector, in the case of *Farrar* v. *United States*, 5 Pet. 373, this court well say, "If the contract is intended to cover a past dereliction, the bond should have been made retrospective in its language; the sureties have not undertaken against his past misconduct." In the case of the *United States* v. *Giles*, 9 Cranch 212, the court say, "If the marshal, before the date of his *official bond, receive money upon an execution [*205 due to the United States, with orders from the comptroller to pay it into the Bank of the United States, which he neglects to do; the sureties in his official bond, executed afterwards, are not liable therefor upon the bond, although the money remained in the marshal's hands after the execution of the bond." This case, on principle, covers all the grounds upon which Boyd's sureties are attempted to be inculpated.

So far as the proceedings in this action upon the bond are concerned, there is, perhaps, no difference, in point of law, between the liability of Boyd and the liability of the sureties. It may be said, that it is the contract of both, and binds both or neither. *United States* v. *Jones*, 8 Pet. 399. The United States are, however, not without remedy; for there can be no

doubt but that an action in another form would lie against Boyd for the amount received, however or whensoever received. Ibid.

The supreme court may now be informed, that for the amount of his defalcation, Boyd, in an action of *assumpsit*, at the suit of the United States against him, for so much money had and received to the use of the United States, has confessed a judgment in the court below. But be this as it may, it cannot be true, that the sureties can be inculpated for any defalcation that may have occurred prior to their having become sureties. The contract of a surety is to be construed strictly, both in law and in equity; and his liability is not to be extended by implication beyond the terms of his contract. *Miller* v. *Stuart*, 9 Wheat. 680. To the extent, and in the manner pointed out in his obligation, is the surety bound, and no further; and he has the right to stand upon the very terms of his contract. Ibid.

2. In a case like the present, the pleading justly commands our attention. The replication holds the important position of the declaration, and should state the facts upon which the plaintiffs rely for a recovery, with the same certainty as would be required in a declaration; a certainty at least equal to the legal effect of the contract declared on. It should show the matter of right, in point of law, on which the plaintiffs seek a recovery. It
*206] should support the declaration, and be at the same time *responsive to the plea. It should either confess and avoid the plea, stating distinctly the matter of avoidance; or it should deny the plea, so that the defendants could take issue on the matter of fact on which the plaintiffs' legal right for a recovery depends. Based upon the position that the defendants' liabilities were, by the terms and legal effects of their contract, limited to the execution and discharge of the official duties from and after the 15th June 1837, they tendered to the plaintiffs the issue that Boyd had, from time to time, and at all times after the giving of the bond, well and truly kept and performed the condition of it.

It is manifest, that the plaintiffs, in their replication, have attempted to dodge this question. They have failed, and refused fairly to respond to the plea; and from anything appearing in the replication, it is as reasonable to suppose, that the money mentioned was received between the 27th day of December 1836, and the 15th of June 1837, as it is to suppose that the money was received after the 15th of June 1837. The replication is, therefore, obviously evasive and uncertain: and fails to set forth such facts under the contract as, in point of law, entitle the plaintiffs to recover. The court below was assuredly right in sustaining the demurrer, and this court will affirm that decision.

Catron, Justice, delivered the opinion of the court.—This was an action of debt brought upon a bond with the following recital and condition, dated June 15th, 1837: "The condition of the foregoing obligation is such, that whereas, the president of the United States hath, pursuant to law, appointed the said Gordon D. Boyd, receiver of public moneys for the district of lands subject to sale at Columbus, in the state of Mississippi, for the term of four years from the 27th day of December 1836. Now, therefore, if the said Gordon D. Boyd shall faithfully execute and discharge the duties of his
*207] office, then the above obligation to be void and of none effect; otherwise, it shall abide and remain in full force and virtue." *The de-

fendants craved *oyer* of the bond, condition, &c.; and pleaded performance of the condition.

By a replication, the defendants assigned two breaches. 1. That said Boyd, after the 27th day of December 1836, received, in his official capacity, $59,622.60, which he failed to pay over to the United States, as he was bound to do by law. 2. That said Boyd, on the 27th day of December 1836, and at divers days between that day and the 30th day of September 1837, received $59,622.60, as receiver, which sum remained in his hands on the 30th day of September 1837; and that he failed to pay the same pursuant to his instructions from the secretary of the treasury, as he was bound to do by law, and the duties of his office. To this replication the defendants demurred; and the court below sustained the demurrer.

The first question arising on the pleadings is, whether the sureties of Boyd are bound for defalcations between the 27th of December 1836, the date of the appointment, and the 15th day of June 1837, the date of the bond. The condition of the bond is prospective, and in its last clause does not differ in effect from that passed on in the case of *Farrar* v. *United States*, 5 Pet. 374, 389. In that case, William Rector had been appointed surveyor of public lands, and given bond with sureties, conditioned, "if the said William Rector shall faithfully execute and discharge the duties of his office, then said bond to be void," &c. Rector had been appointed and commissioned as surveyor, on the 20th February 1823. The bond bore date the 7th day of August 1823. The prominent question presented on the trial was, whether the sureties of Rector were liable for moneys received by him as surveyor, and appropriated to his own use, after his appointment, and before the execution of the bond; on which the court held, that the sureties could only be made answerable for moneys in Rector's hands at the date of the bond; which were held by him in his official capacity, in trust for the government, and not for moneys previously appropriated to his own use. Say the court, "If intended to cover past dereliction, *the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct." [*208

But the failure of the receiver to account, and pay quarterly, as prescribed by the rules of the treasury department; or monthly, if the sum of $10,000 had been received during any one month, was no legal defalcation of which the securities can avail themselves. *Laches* are not imputable to the government. The regulations requiring settlements to be made by its officers at short periods, are designed for the protection of the government, and merely directory to the officers, and form no part of the contract. Such is the settled doctrine of this court, as holden in the *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 Ibid. 184; and *United States* v. *Nicholl*, 12 Ibid. 509. It follows, the averment in the replication, that Boyd, from the 27th of December 1836, to the 30th of September 1837, had received on behalf of the United States, the sum of $59,622.60, which sum, at the last date, remained in his hands, and for which he then failed to account, as bound to do by law, and the duties of his office, is a good breach of the condition, and well assigned; it matters not at what time the moneys had been received, if, after the appointment, they were held by the officer in trust for the United States, and so continued to be held, at and after the date of the bond. That they were

so holden at the end of the third quarter of 1837, is admitted by the demurrer.

It is insisted on behalf of the United States, that aside from the foregoing considerations, the sureties are bound equally with the principal in the bond, on the ground, that the condition, on settled legal principles, and by implication, is retrospective, and covers all defaults of the officer, from the date of the commission; because it is recited, and part of the obligation, that Boyd had been appointed receiver for four years from the 27th day of December 1836. We have with much care considered this position, and think it cannot be sustained. This court held, in *Miller* v. *Stuart*, 9 Wheat. 702, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation; *and not to extend beyond the fair scope of its terms; *209] and that the whole series of authorities proceeded on this ground. The principal ones relied on in that case have been relied on in the present; and we think the principles settled by them preclude the court from maintaining that the sureties are liable by implication, contrary to the plain prospective obligation of the bond; "that the said Boyd shall faithfully execute and discharge the duties of his office." In the language of the court, in *Farrar* v. *United States*, "if intended to cover past dereliction, the bond should have been made retrospective in its language."

Some difficulty has been presented in regard to the form of the replication, testing it by the common-law principles of pleading. It avers several breaches. The cause, however, comes by writ of error from the district of Mississippi; and the modes of proceeding of that state govern the pleadings. By the act of 1822, § 2, found in the Revised Code of Mississippi, 614, any number of breaches may be assigned; and by § 6, when a demurrer shall be joined, in any action, no defect in the pleadings shall be regarded by the court, unless specially alleged in the demurrer, as causes thereof. That several breaches had been assigned, is not alleged as a special cause of demurrer, and therefore, could not have been noticed by the court, had no provision existed justifying more breaches than one; even had such replication been contrary to the strict rules of pleading by the common law.

It is proper to remark, that when this cause is remanded to the circuit court for further proceedings to be had therein, it will be in the condition it would have been, had that court overruled the demurrer; and subject to additional pleadings, or an amendment of the present ones, according to the rules and practice of the circuit court; and on such terms as it may impose.

We order that the judgment be reversed, the demurrer overruled; and that judgment be entered by the circuit court, for the penalty of the bond, in favor of the United States, against the defendants, to be discharged by the assessment of damages on the second breach in the replication, unless the pleadings, on leave granted, be amended, in prevention of such judgment, and assessment of damages.

*This cause came on to be heard, on the transcript of the record *210] from the circuit court of the United States for the southern district of Mississippi, 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 overrule the demurrer, and to enter judgment for the penalty of the bond, in favor of the plaintiff, against the defendants, to be discharged by the assessment and payment of damages on the second breach in the replication, unless the pleadings, on leave granted, be amended, in prevention of such judgment and assessment of damages.[1]

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*Amis *v.* Pearle. [*211

Practice.

Motion by the counsel of the defendant, to docket and dismiss a case in which a writ of error had been sued out of the circuit court, the plaintiff in error having failed to file the writ of error in the supreme court, and to prosecute the same; the counsel for the defendant in error produced the original writ of error, signed by the clerk of the circuit court, and a citation signed by the judges of the circuit court: *Held*, that the substance of the 43d rule of the court was complied with; and the case was docketed and dismissed. The production of the writ of error has been duly sued out and allowed; the certificate of the clerk of the circuit court required by the trule, is but *primâ facie* evidence.

Motion on behalf of the defendant in error, to docket and dismiss the suit, under the forty-third rule of the court.

Story, Justice, delivered the opinion of the court.—In this case, a motion has been made on behalf of the defendant in error, to docket and dismiss this suit, under the 43d rule of the court. That rule allows the suit to be docketed and dismissed, upon the production of a certificate from the clerk of the court below, certifying that the writ of error had been duly sued out and allowed. In the present case, no such certificate is produced. But the original writ of error (signed by the clerk of the court below) and also a citation signed by the judge of the court, is produced by the defendant in error, and is now before us. Under these circumstances, we are of opinion, that the substance of the rule is complied with. The certificate of the clerk is but *primâ facie* evidence of the issuing and allowance of the writ of error; whereas, the production of the writ of error, with the citation, is the highest evidence of the fact, that the writ of error has been duly sued out and allowed. Under these circumstances, the court are of opinion that the motion ought to be granted. In point of fact, this same question came before this court, in the case of *Ward and others* v. *Commonwealth Bank of Kentucky*, at January *term 1838, under circumstances less cogent; and the same decision was then made. In that case, certified copies [*212 of the writ and citation, were filed, and not the originals; and the court ordered the case to be docketed and dismissed.

Motion granted.

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[1] For a further decision in this case resulting in another reversal, after a jury trial, see 5 How. 29.

*Martin A. Lea, Monroe Rabetaille and Charles G. Langdon, Appellants, *v.* Enoch S. Kelly, Appellee.

Appeal.—Final decree.

A judgment was entered on a promissory note, drawn by Kelly and others in favor of Lea and others, in the circuit court of Alabama; afterwards, Kelly, the appellee, filed a bill on the equity side of the court, for the purpose of being relieved of the judgment at law obtained against him and two other persons, on the promissory note; the bill alleged fraud in the plaintiffs in the suit, and that the complainant had no notice of the suit, and had not authorized an appearance, nor filed any plea in the same; the bill prayed for a perpetual injunction of proceedings on the judgment, and for general relief. The injunction was granted; and afterwards, on the appearance of two of the plaintiffs in the suit at law, the circuit court decreed, that, on the condition that the complainant, Kelly, appear and plead to the merits of the case, waiving the question of jurisdiction, and pay costs of the suit at law, and the proceedings in equity, a new trial be awarded to the complainant; two of the plaintiffs in the suit at law, who had appeared to the bill, appealed to the supreme court, seeking to reverse this decree: *Held*, that the decree of the circuit court was merely interlocutory; and was not a final decree from which an appeal could be taken.[1]

Appeal from the Circuit Court for the Southern District of Alabama.

Key, for the appellees, moved to dismiss the appeal. He alleged, that the decree of the court, from which the appeal was prosecuted, was not a final decree.

Taney, Ch. J., delivered the opinion of the court.—A motion has been made by the appellee to dismiss this case, upon the ground, that the decree of the circuit court, from which the appeal has been taken, is not a final decree, within the meaning of the act of 1803, ch. 93.

It appears, that a bill was filed against the appellants, in the circuit court of the United States for the southern district of Alabama, by Enoch S. Kelly, the present appellee; for the purpose of being relieved from a judgment at law in the said court, obtained by the appellants against him and two other persons named in the proceedings, upon a promissory note signed by them, and purporting to be for the sum of $5000, upon which judgment and execution had issued. *The complainant charges in
*214] his bill, that the claim of the appellants against him is fraudulent, and he sets out fully the particular facts upon which he relies to prove the fraud; and avers that no process, save the execution, was served upon him in the suit at law, and that he had no notice that the suit was brought against him, until the execution was issued; that he entered no appearance to the suit, nor filed any plea in it, nor authorized any one to do it for him; and that if any attorney had done so, it was without the complainant's knowledge or consent; and prays that the appellants (who were made defendants in the bill) might be perpetually enjoined from proceeding against the complainant on said judgment; and also for general relief.

The injunction was accordingly granted by the court; and afterwards,

[1] A decree cannot be said to be final, until the court has completed its adjudication of the cause. Green *v.* Fisk, 103 U. S. 518–19. A decree is not final, within the meaning the act conferring appellate jurisdiction, unless, upon its affirmance, nothing remains but to execute it. Grant *v.* Phœnix Ins. Co., 106 Id. 429. And see Railroad Co. *v.* Express Co., 108 Id. 24; Ex parte Norton, Id. 237.

Lea and Langdon, two of the appellants, appeared and answered, denying all fraud, and alleging that their claim against the appellee was fair and just. It does not appear that Rabetaille, the other defendant, answered the bill; and in this state of the proceedings, the circuit court, at April term 1839, passed the following decree: "This day came the parties, by their solicitors, and this cause coming on to be heard, upon the bill, answer and exhibits, it is ordered, adjudged and decreed, that, upon condition that the said Enoch S. Kelly, complainant, appear, plead to the merits of the case, and go to trial on the same, at the next term of this court, waiving the question of jurisdiction, and pay costs of the suit at law, and the proceedings in equity, a new trial be awarded to the said complainant."

It is from this order or decree that the present appeal has been taken; and it is evident, that the order is merely interlocutory, and no final decree has been passed in the case. The bill has not been dismissed, nor has the injunction been made perpetual. The new trial at law appears to have been directed to inform the conscience of the court; and the bill retained, and the injunction continued, until the finding of the jury should be known. The suit in equity is, therefore, yet pending, and has not been disposed of by final decree; and the appeal to this court must be dismissed.

Appeal dismissed.

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*Ann Buyck, Widow of Don Augustin Buyck, deceased, and the unknown Heirs of said Buyck, Appellants, *v.* United States, Appellees. [*215

Florida land-claims.

The decree of the superior court of East Florida, by which a grant for 50,000 acres of land, made by Governor White, the Spanish governor of East Florida, dated July 29th, 1802, was rejected, affirmed.

The land had been granted by governor White, on a petition from the grantee, stating his intention to occupy and improve the same with Bozale negroes, and native citizens of the United States; and stating that other grants of the same lands had been made, on condition of settlement, which conditions had not been performed, and such grants were, therefore, void; the petitioner promised to make the settlement within an early period after the grant. The governor granted the land, referring to the petition; also, with the condition, that the grantee should not cede any part of the land, without the consent of the government; no improvement or settlement was at any time made on the land by the grantee: *Held*, that the government of the United States were not bound, under the Florida treaty, to confirm the grant.

The description of the portion of land asked for from the Spanish governor, "lands at Musquito, 50,000 acres, south and north of said place," is not sufficiently definite; and from such a description, no exception could be made from the public lands acquired by the United States, under the Florida treaty. The regulations for granting lands in Florida, by the Spanish authorities, required that grants should be made in a certain place; there were no floating rights of survey out of the place designated in the grant, unless where the land granted could not be gotten there in its exact quantity, and an equivalent was provided for.

The laws and ordinances of the government of Spain, in relation to grants of lands by the Spanish government, must be of universal application in the construction of grants; it is essential to the validity of such grants, that the land granted shall be described, so as to be capable of being distinguished from other things of the same kind, or capable of being ascertained by extraneous testimony. The cases of Sibbald, 12 Pet. 488; Arredondo, 6 Ibid. 691; Fleming, 8 Ibid. 478; Huertas, 9 Ibid. 488; and Arredondo, 13 Ibid. 133, cited.

Appeal from the Superior Court of East Florida. On the 23d of May 1829, Ann Buyck, the appellant, presented a petition to the superior court

for the eastern district of Florida, claiming title to a tract of land containing 50,000 acres, south and north of the Musquito river. The title on which the claim was founded, was a Spanish *grant from Governor White.
*216] The proceedings on which the grant was made, and the grant, were as follows:

His Excellency, the Governor: Don Augustin Buyck, a resident of this place, with the greatest respect, appears before your excellency, and says: That having a large number of new negroes (*negroes bozales*), and there being also some white persons, native citizens of the United States of America, who wish to join him for the settlement and cultivation of the lands at Musquito, he solicits that this government will grant him fifty thousand acres of land, south and north of said place, with the privilege of, and asking for more, in proper time, as he may need it; within which lands it is not the intention of your petitioner, that the tract which your excellency granted to Don Ambrosio Hull should be embraced; who, at this time, has abandoned the possession of his settlement, owing to Indian hostilities, but who is determined to return to said settlement, in consequence of the protection that a large number of settlers in that neighborhood may afford; and that the right to the grant I pray for shall not be interrupted by the right that some individuals of this place, or foreigners may have, or pretend to have, to whom part of said lands may have been granted by order of your excellency; and because the first of these persons have suffered a long time to elapse without taking any steps for the pretended cultivation of said land, which makes it appear that their right has, in some degree, become diminished, and there being others who offer to cultivate said land, in accordance with the wishes of the king, who is desirous of having the whole province settled; and as regards the latter, the same reasons apply in consequence of their not having complied with what they promised. Your petitioner promises, positively, to carry into effect said settlement, between the period embraced from this time and the month of December next; after which period, it will remain discretionary with your excellency to grant the said tract to any other person who may ask for it. The considerable number of settlers whom your petitioner offers to carry to that point, will open a vast field towards fulfilling his majesty's will, and to refrain the savages from committing robberies and hostilities, who have, by their incursions, until now, *troubled the plantations situated north of the capital; and
*217] your petitioner, not doubting that such considerations will have their due weight on your excellency's mind, who is always disposed to do what seems best for the service of the king and of the country, your petitioner respectfully reiterates his prayer for this favor from the accustomed bounty of your excellency. (Signed) A. Buyck.

St. Augustine of Florida, 22d July 1802.

Order for Report. St. Augustine, July 22d, 1802. Let the engineer-commandant report. (Signed) White.

Report of Engineer. Being informed of the premises, and in compliance with the foregoing decree, I report to your excellency, that the settlement and cultivation of the lands at Musquito, presents no obstacle either to the general or particular defence of the province; and so far as this

department is concerned, there may be granted to the petitioner, for the purposes he mentions, the number of acres which your excellency may deem proper. This is all which I have to report to your excellency, who will act in the matter at your pleasure. (Signed) NICHOLAS BARCELO.

GRANT TO BUYCK. St. Augustine, 29th July 1802. The land which the party solicits is granted to him, in manner as he proposes ; and with the condition that he shall not cede any part thereof to any person whatever, without the knowledge and approbation of the government.

(Signed) WHITE.

A certificate was issued. (Signed) PIERRA.

*I certify that the foregoing is a correct translation of the annexed document, written in the Spanish language. [*218

JOHN M. FONTANE,
Translator and Interpreter S. C., D. E. F.

St. Augustine, July 16th, 1838.

The decree of the superior court of Florida was against the claim of the petitioner, and this appeal was prosecuted by him.

The case was argued by *Downing*, for the appellant ; and by *Gilpin*, Attorney-General, for the United States.

Downing contended :—1. That the grant was made without conditions precedent, and vested a title in the grantee. 2. The grantee never sold any portion of the land ; and the title of the appellant is complete.

Gilpin, Attorney-General, for the United States.—The principles involved in this case, are essentially the same as those discussed in that of the *United States* v. *Heirs of Forbes* (*ante*, p. 173). The evidence of the alleged grant is insufficient ; the locality of the tract is not ascertained, either by the terms of the concession itself, or by a subsequent survey ; and the conditions, express and implied, have not been performed.

1. The evidence of the grant consists of a copy of the memorial and concession thereto annexed, which copy is certified by a person named Pierra, in the following words : "a certificate issued." This is clearly not within the rule laid down by this court, in the case of the *United States* v. *Wiggins*, 14 Pet. 348. Not only is there no evidence, even indirect, of the existence of the original concession, or of its being deposited in the archives, or of the truth of the copy ; but the presumptive evidence is certainly strongly against its genuineness. There is no petition, order or certificate of survey produced, or even alleged to have been issued. There is no corroborative evidence to supply this deficiency, or adequate to sustain the alleged grant. The only evidence of this sort, is a translation of an alleged assessment *of thirty dollars, made by Governor White, in 1802, just after the date of the alleged grant, on "Don Augustin Buyck, for himself, and his settlers on the fifty thousand acres of land south ;" and an alleged receipt, dated about a year after, of Bernardo Segui, to the attorney of Buyck, for the thirty dollars. From that time to 1823, there is no evidence, even of a claim to any land, founded on such a grant. These papers were objected to in the court below, and were supported by no proof what- [*219

ever of the existence of the originals, the signatures of the governor, or Segui, or the correctness of the copy; but had they been duly authenticated in these respects, it is yet clear, that they are not such corroborative evidence of the grant as will be required; there is no ground but mere conjecture, to suppose they referred to the lands said to have been granted. Add to this the well-known fact, that Governor White was remarkable for his uniform refusal to make large grants, on slight causes; and it must be admitted, that no copy of a concession has ever been adduced, which is less entitled to credit in the absence of the original.

2. But if granted, the tract never was, and never can be, located according to the grant; "the description in the petition," to use the words of this court, in the case of the *United States* v. *Arredondo*, 13 Pet. 133, "of the locality of the concession, is too indefinite to enable a survey to be made," and the claimant, therefore, can "take nothing under the concession." The concession is of 50,000 acres, "south and north of lands at Musquito;" there is no authority, as in the case of the *United States* v. *Sibbald*, 10 Pet. 321, to make the location at any other place; the inlets or interior bays which open into the coast of Florida, at Musquito, extend for more than fifty miles; how is it possible to locate a tract by means of a description so indefinite?

3. If there is proof of the grant, and if a sufficient location was made; have the prescribed conditions been complied with, so as to vest a valid title in the claimant? The alleged concession bears date in 1802, nineteen years before the surrender of Florida to the United States. The petitioner does not assert the performance of any services; the grant is not given to him as a reward. He "promises positively to carry into effect his settlement, *220] *between the period embraced from the date of the grant and the month of December following;" he engages "to restrain the savages from committing robberies and hostilities, who had by their incursions troubled the plantations;" and he says, that he has "a large number of new negroes, and that there are some white persons, native citizens of the United States, who wish to join him in the settlement" he proposed. These are substantial inducements; a large force capable of cultivating the land, and affording protection to the neighborhood, to be placed upon the tract, within six months. A grant founded on such inducements, and subject to their fulfilment, was altogether in accordance with the regulations of the Spanish land law, as it existed in Florida. 2 White's New Rec. 288. If they were not fulfilled, neither by the intention of the parties, nor by the Spanish law, did any title accrue to the grantee; the tract in question was never separated from the royal domain. In the petition, the claimant himself said, that if the settlement was not carried into effect within the period promised, it would remain discretionary with the governor to "grant the said tract to any other person, who might ask for it." "Those who having obtained a concession of lands, have not cultivated them from the time they were granted," says Saavedra, confirmed by Governor Coppinger, "can have no right to them;" and he afterwards adds, that "the certificates (issued by the secretary of the government) are of no value nor effect, unless the prescribed conditions have been complied with; otherwise, such papers deserve no regard, nor can tho grantees, by means of them, claim any right to the lands granted, which should now be considered vacant." 2 White's New Rec.

283. The alleged concession in this case is a certificate of the kind thus referred to.

WAYNE, Justice, delivered the opinion of the court.—Appeal from the superior court of East Florida. The land in controversy in this case is claimed by virtue of an alleged concession or grant, for 50,000 acres, dated July 29th, 1802. In the court below, the claim was adjudged not to be valid. The evidence offered and read on the trial is—

1. A memorial from Don Augustin Buyck, 22d July 1802, *with an order annexed, by Governor White, to the engineer-commandant, [*221 to report; and the report of the engineer.

2. The decree of Governor White, as follows:—"The land which the party solicits is granted to him in manner as he proposes; and with the condition that he shall not cede any part thereof, to any person whatever, without the knowledge and approbation of the government." 3. An assessment, by order of Governor White, dated 30th October 1802, upon Buyck, and others, for building a bridge. The assessment upon Buyck being thirty dollars, "for himself and his settlers of the fifty thousand acres of land, south;" attached to which is the return of one Bernando Segui, of the names of the persons assessed; such of them as had paid, others who had not, with Segui's receipt, dated a year after, for thirty dollars, paid by one Robira, as attorney for Buyck, said to be "his proportion of the tax," in consequence of a grant of $50,000 acres of land, and others which he possesses in this province.

The paper purporting to be a grant was received in evidence, without any certificate that it was the copy of a grant, from an original in the office in which grants are required to be deposited; without proof of the handwriting of the governor, or of Pierra, who says a certificate was issued; indeed, without any official attestation of authenticity, or proof of any kind, that such a paper was ever issued, or on file in the proper office. The same may be said of the other papers. One Fontane certifies that he has translated them correctly from Spanish originals. That is all that is said of them. No proof is given that the originals were to be found in the "office of the archives." It is not alleged, that they were lost or destroyed, by any mutilation of the records, or other accident. The other proof relied upon to sustain the claim, is Segui's receipt, and the papers in connection with it, already mentioned. Where that paper came from, the record does not show. The authenticity of the governor's order, assessing the tax; the signature of the person, signing himself government notary; the appointment of Segui to collect the tax; all rest upon the receipt of Segui for Buyck's assessment, and upon the paper purporting to be a report to the governor of those who had not paid, and of the sum of money which he had in *hand from those who had paid assessments. We do not intend, [*222 however, as the attorney for the United States in the court below did not object to the memorial and grant as evidence, though he did so as to the papers connected with the assessments, to allow any formal objection to the proof of a grant to weigh with us in this decision; the opinion of the court rests upon grounds connected with the merits.

The memorialist asks for the land, first stating that he has a large number of new negroes, and that some white persons, native citizens of the United

States of America, wish to join him in the settlement and cultivation of the lands "at Musquito." He prays that his right to the grant may not be denied by the right which others may claim, or pretend to have, on account of former grants to them; because they had suffered a long time to pass, without taking any steps to cultivate the lands, and as others are ready to cultivate them; and he promises to carry into effect his settlement by the month of December after the date of his memorial, after which time, if he does not do so, he says, it will remain discretionary with the governor to grant the land to any other person who may ask for it. The governor replies, the land which the party solicits is granted to him in manner as he proposes, and restrains his alienation of it, without the consent of government. The undertakings of the memorialist were voluntary, and were the inducement held out by him to obtain the grant. None of them were complied with. The forfeiture then of the land results from the conditions not having been performed, which the memorialist himself proposed as the terms upon which he was to hold it, and which were recognised by the governor as the terms upon which he should have what he asked for. The memorial, report of the engineer, and decree, are all parts of the same instrument, each having a distinct reference to the other. If, therefore, for the purpose of determining the quantity of the land intended to be granted, and where it was granted, we must go out of the decree, into the memorial, we must do the like to ascertain the conditions annexed to the grant. Besides, the forfeiture is only in accordance with what the memorialist states had been incurred by others, to whom grants had been made, who had neglected to settle them, and which he says will be his own case, if he does not make his
*223] settlement *within the time stated in his petition. In this view of the case, then, the grant is without merits; and the judgment of the court below should be affirmed.

But further, supposing proof of the grant to be made, and that it was free from the conditions, which, not having been complied with, has forfeited it; still it could convey no land, from the want of identify or ascertainable locality. The memorialist says, wishing to make the settlement and cultivation of the lands at Musquito, he solicits a grant of 50,000 acres, south and north of said place. Musquito is an inlet on the eastern coast of the peninsula made by Halifax river, or lagoon, which extends from Musquito bar, northward, more than twenty miles, and by the southern, or what is known as Hillsborough lagoon, which extends from Cape Caraverel to Musquito inlet, a distance of forty miles. Both lagoons are navigable for about the same distance by vessels of such draught as can cross the bar. Creeks run into the first from the mainland, and Smyrna is on the western bank of the south lagoon, four or five miles from Musquito bar. Where then shall the land claimed by the appellant be surveyed? Shall it border on the ocean, north and south of the inlet, 25,000 acres on either side to make up the quantity; or on the inner shore of the lagoon in the same way; or shall it be on the mainland, west of the inlet; or on some of the creeks emptying into Halifax river. The description of the grant is "south and north" of the lands "at Musquito." Musquito is not a designation of a land district, fixed and known by the Spanish authorities; nor do we know from any usage, the limits of the lands at Musquito. If it be the application of the name of an inlet to lands without and within it; still, how shall

boundaries be fixed, within which surveys shall be made, without other specific call than "north and south of lands at Musquito?" The regulations for granting lands in Florida, by the Spanish authorities, required that grants should be made in a certain place, and there were no floating rights of survey out of the place designated in the grant, unless the land granted could not be gotten there in its entire quantity, and an equivalent was provided for; as in *Sibbald's Case*, reported in 10 and 12 Pet. 313, 488; one of the surveys of which was at Turnbull's swamp, at Musquito.

*In all of the decisions of this court upon grants in Florida, it has gone as far as the most liberal equity can go, in adopting some natural, [*224 or artificial point, in the description of the grants, however subordinate or minor they may have been, to give locality to grants. Such was the fact in the leading case upon Florida grants. *Arredondo*, 6 Pet. 691. So, in *Percheman's Case*, 7 Ibid. 91. Also, in the cases of *Fleming* and *Huertas*, 8 Ibid. 478, 9 Ibid. 488. *Arredondo's Case*, in 13 Pet. 133, was upon most indefinite calls. No survey had been made, whilst Florida was a province of Spain, nor had the grant been surveyed, when the case was brought by appeal to this court. The court said, "we do not consider the want of a survey, as interfering with the right of a party to the land granted; it must be taken, as near as may be, as it is described in the petition, where it was asked for, and cannot be taken elsewhere." The court then declares, if the points indicated in that case for a survey cannot be found, then, that the description was too indefinite for a survey to be made; and that the claimants could take nothing under the concession. And so, in this case, the description "south and north of the lands at Musquito," is too indefinite for a survey to be made; for there is nothing in it, which can be aided by relation to something certain. The claimants, then, can take nothing under the concession.

We know from the eighth regulation of Governor White, October 12th, 1803 (White's New Rec. 278), that this want of certainty in the description of grants, had been productive of disputes and mistakes. When he declared that those, for the future, who ask for lands, must indicate a fixed spot; he only re-enforced a neglected law in Florida. Indeed, with a few exceptions, grants in Florida, which have been before this court, have been particular, in respect to the object from which the survey was to be made.

It is proper for us to remark, that in coming to our conclusion upon this point, we have not been influenced by any of the English common-law rules, which make grants void for uncertainty. Such as, for instance, if the king grants land in a peat waste, without ascertaining what part, or the special name of the land, or how bounded, it is void for uncertainty; for there can be no election in that case. (4 Bac. Abr. tit. *Grant, 81); and yet, [*225 if an individual so grant, it would be good. We apply to the case, the laws and ordinances of the government under which the claim originated; and that rule which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony. The decree of the court below is affirmed.

Decree affirmed.

*United States, Appellants, *v.* Heirs of Joseph Delespine and others, Appellees.

Florida land-claims.

A claim for a square of four miles of land, under a grant from Don Jose Coppinger, Spanish governor of East Florida, situated at the north head of Indian river, confirmed.

The certificate of Don Tomas de Aguilar, secretary of the government and province, of the copy of the grant of the governor, stating the same "to be faithfully drawn from the original in the secretary's office under his charge," was legal evidence of the grant; and was properly admitted as such, in support of the same. United States *v.* Wiggins, 14 Pet. 334; United States *v.* Rodman, *ante*, p. 130.

A grant of 10,240 acres of land, by the Spanish governor of Florida, which recited, among other things, that it was made under a royal order of the king of Spain, of 29th March 1815, and which was not in conformity with the grant; but which was made in the exercise of other powers to grant lands, which had been vested in the governor; was not made invalid by the recital of the royal order as the authority for the grant. The grant recited also, that it was made in consideration of military services, and was also in consideration of the surrender of another grant, previously made, which surrender had been accepted by the governor: these were sufficient inducements to the grant. United States *v.* Percheman, 7 Pet. 96, cited.

Appeal from the Superior Court of East Florida. Joseph Delespine and others presented a petition to the superior court of East Florida, claiming 10,240 acres of land, at the north head of Indian river, by virtue of a concession from Governor Coppinger, the Spanish governor of East Florida, to Pablo Fontane, dated November 10th, 1817. The grant, and circumstances of the case, are full stated in the opinion of the court. The superior court of East Florida decreed a confirmation of the grant; and the United States prosecuted this appeal.

The case was argued by *Gilpin*, for the United States; *Downing* appeared as counsel for the appellees.

*227] *Gilpin*, for the United States, relied on the following grounds: 1. That the evidence in the case is insufficient to prove that the alleged grant or concession was ever made. 2. That if it be proved or admitted, that the alleged grant or concession was ever made, still, that the same was not in conformity to the royal order of 29th March 1815, by virtue of which, it is declared that the concession was made.

I. This is an alleged concession of Governor Coppinger. The evidence to support it is a copy of the concession, certified by Tomas de Aguilar, and it is accompanied by an order and certificate of survey. The only point to be considered in regard to this evidence is, whether or not the facts bring the case within the rule established in that of the *United States* v. *Wiggins*, 14 Pet. 348. This court certainly will not extend the scope of that rule, so as to give any weight to these secondary evidences of title which it does not indisputably recognise. It is not denied, that the production of the order of survey, and the plat and certificate made in pursuance thereof, go far to bring it within that decision; but it may not be improper to ask the particular consideration of the court to the depositions annexed to the record, which would seem to show, that the existence of the original concession was a matter of doubt at a very early period; that in March 1822, very shortly after the cession of Florida, before the alleged losses of papers are supposed to have occurred, and when the grantee was yet living, and sold part of his

interest to Delespine, it appears not to have been in existence; and that the particular fact of its actual existence, at any time, is not proved by a single witness.

II. This grant purports to be founded on the royal order of 29th of March 1815. 2 White's New Rec. 279. That order authorizes the governor to grant land to the soldiers in the militia; the quantity being the same "as established by regulation in the province, agreeably to the number of persons composing each family;" and it also contemplates special rewards to certain officers mentioned in it. If Fontane, the grantee, was, as it is presumed he was, one of the militia authorized to take under this order, yet he was entitled only to the quantity "established by regulation," which was much less than that included *in the alleged concession. It may then be said, in the language of this court, in the case of the *United States* v. *Clarke*, 8 Pet. 448, that "if the validity of the grant depends on its being in conformity with the royal order, it cannot be supported." It is true, that this court, in the case of the *United States* v. *Percheman*, 7 Pet. 96, in examining the effect of a recital of the royal order of 29th March 1815, on a grant of a large body of land, declared, "that the reference to it was to be regarded no further than as showing that the favorable attention of the king had been directed to the petitioner." If the facts of the present case are similar to those which led the court in that case, so to regard the effect of the royal order, it is admitted, that the grant, if made, was valid. But are they similar? In the first place, Percheman was a distinguished officer of dragoons, who had rendered important military services; and this court said, that the governor made the grant, as a reward for these services, which he had full authority to do, under the laws of the Indies. But, in the second place, it happened, that Percheman was himself one of the officers individually mentioned in the royal order of 1815, as entitled to a special reward; and therefore, the order was naturally and properly recited in the grant. These considerations evidently made a large grant, in that case, perfectly consistent with a reference to the royal order of 1815. But neither of them is applicable to the present case. Neither the petition nor the grant refers directly or indirectly to any military services; nor was the grantee, Fontane, one of those specially named in it. How, then, can such a grant, solicited and made, as this purports to be, "in virtue of the said royal order," be valid? [*228

III. The grant is for a tract of land "on a creek which, issuing from the north head of Indian river, westwardly, runs to the northwest." The certificate of the survey is for a tract "in the territory of Musquito, north-westwardly of Indian river." The petition of the claimant is for a tract "at the north head of the river Ys, or Indian river, on the west side thereof." This discrepancy is fatal to the validity of the claimant's title. The land surveyed and claimed is not identical with that granted; the title to the latter has never been perfected, even by a survey; it is too late for this now to be done; and therefore, the decree of the superior court of East Florida, made pursuant to the description *in the grant, cannot cure the defect resulting from the negligence of the claimant himself. It falls within the principles which have already been before the court at this term, in the case of the *United States* v. *Heirs of Forbes*. [*229

WAYNE, Justice, delivered the opinion of the court.—Appeal from the superior court of East Florida. The decree of the court declares the claim to be valid, to a square of four miles of land on a creek, issuing from the north head of Indian river, westwardly, and running to the north-west. The following is the memorial and grant offered by the appellees, to maintain the claim :

His Excellency, the Governor. Don Pablo Fontane, an inhabitant and merchant of this place, with due respect, represents your excellency, that in consequence of the orders of his majesty of the 29th of March 1815, in which he has been pleased to grant, gratuitously, to his faithful subjects of this province, lands in proportion to the services rendered by them, and as your petitioner considers himself included in the said royal favor, this government granted to him, under date of the 25th of June, of the present year, in absolute property, as it appears by the document duly annexed, a quantity of land comprehended in a square of four miles, on Trout creek, of the river St. John ; and as it happened, that when he went to take possession of the said land, he found it in the possession of Dona Beig Bagely, widow, and this he represents to your excellency, in order that you be pleased to withdraw the said document of ownership which is annexed, and to grant him another in lieu thereof, for the same quantity of land on another creek, which, issuing from the north head of Indian river westwardly, runs to the north-west. Therefore, your petitioner supplicates your excellency to consider as returned the mentioned document for concession, and, in virtue of the said royal order, to grant him, in absolute property, the square of four miles of land, at the place which he has just designated, as the same is vacant, which favor he hopes to receive from the justice of your excellency.

*230] *St. Augustine of Florida, tenth of November 1817.

PABLO FONTANE.

St. Augustine, 10th of November 1817 : I accept the retrocession which this party offers, of the land which was granted to him on the 26th of June last past, for the reasons which he exhibits in this petition, and in lieu thereof, I grant him in lawful property, in conformity to the royal order to which he refers, and as he is entitled thereto, the square of four miles of land on the north head of Indian river, which he designates, and to this effect let the secretary's office issue to him a copy conforming to this decree, to which will be annexed the copy of this petition, on which the decree was rendered. In testimony thereof, and in order that at all times it may serve as a title in form to the interested party. COPPINGER.

CERTIFICATES OF AGUILAR.

I, Don Tomas de Aguilar, sub-lieutenant of the army, and secretary of the government of this place, and of the province thereof, for his majesty, do certify that the preceding copy is faithfully drawn from the original, which exists in the secretary's office in my charge, and in obedience to order, I give the present, in St. Augustine of Florida, on the 11th of November, 1817. TOMAS DE AGUILAR.

We, Don Francisco Fatio and Don Juan Huertas, members of this illustrious council constitutional, do certify, that the signatures affixed in this

expediente, are the same which the signers use, and in testimony thereof, we sign this, in St. Augustine, on the 13th of June 1821.

Francisco J. Fatio,
Juan Huertas.

St. Augustine, 16th May 1832.—I certify that the preceding is a correct translation of the Spanish document annexed.

A. Gay, Translator and Interpreter of the Sup'r Court.

*It is contended, that the decree should be reversed, because the evidence is insufficient to prove that the grant was made. The proof [*231 is a certificate of Aguilar, the secretary of the government, which has been ruled to be sufficient, in the case of the *United States* v. *Wiggins*, 14 Pet. 334; and again, at this term, in the case of the *United States* v. *Rodman* (*ante*, p. 130).

The second objection is, that if the grant is proved, it is not in conformity to the royal order of the 29th March 1815, by virtue of which it is declared the grant was made. That royal order has been under the consideration of this court in *Percheman's Case*, 7 Pet. 96. In that case, it will be seen, that the petitioner refers in his memorial to the order of the 29th March 1815; and that the governor, in the grant for the land, says: "In consideration of the provisions of the royal order, under date of 29th March last, which is referred to, I do grant to him in absolute property," &c.; but the court (referring to certificates which were annexed to the memorial for the grant, which the grant refers to as certificates annexed) said, "military service is the foundation of the grant, and the royal order is referred to only as showing that the favorable attention of the king had been directed to the petitioner." 7 Pet. 96. The court sustained the grant in that case; notwithstanding it was said to have been made in consideration of the royal order of 1815, which limits grants to one hundred acres, and to persons of a particular regiment. The power in the governor to make a larger grant of land, was not thought to be restrained in making a grant to one, who was not of the regiment designated in the order, and who applied for it on the ground of services. The reasoning in that decision cannot be shaken. It applies with full force to the grant now under consideration; the decree of the governor being alike in both cases. But this has an additional consideration, recited in the memorial. The surrender of another grant previously made for services; recognised by the governor in his acceptance of the retrocession offered by the memorialist. This is a grant in absolute property. Though it recites the order of the 29th March 1815, the inducements for making it are considerations which plainly show it was not intended by the governor to be restrained to the number of acres limited by that order.

*The judgment of the court below will be affirmed; but as the survey given in evidence in this case was rejected by the court, as it [*231 should have been, this court will direct a survey to be made at the place designated in the decree of the court below, for the number of acres decreed, without prejudice to the rights of third parties.

This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel

On consideration whereof, it is adjudged and decreed by this court, that the decree of the said superior court in this cause, so far as it declares the claim of the petitioners to be valid, be and the same is hereby affirmed in all respects; and that a survey be made of the lands contained in the said concession, according to the terms thereof, for the number of acres, and at the place therein designated; provided, it does not interfere with the rights of third parties: And it is further ordered by the court, that a mandate be issued to the surveyor of public lands, directing him to do, and cause to be done, all the acts and things enjoined on him by law, and as required by the decree and opinion of this court in this case; and that this case be remanded to the said superior court for further proceedings to be had therein, in conformity to this decree, and the opinion of this court, which must be annexed to the mandate.

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*233] *The State of Rhode Island and Providence Plantations, Complainants, *v.* The Commonwealth of Massachusetts.

Boundaries of states.—Mistake.—Statutes of limitation.

The state of Rhode Island filed a bill against the commonwealth of Massachusetts, claiming that the boundary between the two states should be settled by the supreme court, according to the provisions of the original charters of the states, respectively; stating that the line which had been agreed upon by the commissioners acting for the states while colonies, had been agreed to by the commissioners of Rhode Island, under a mistake, and setting forth the charters of both the states, the proceedings of the commissioners, the acts of the legislatures respectively, and many other matters connected with the subject in controversy; to this bill, the state of Massachusetts entered a general demurrer; the demurrer was overruled

It is one of the most familiar duties of a court of chancery, to relieve against mistake; especially where it has been produced by the misrepresentations of the adverse party.

The demurrer of the state of Massachusetts to the bill of Rhode Island, admits the charter lines of both the states to have been three miles south of Charles river; that the place marked, and from which the line was agreed to be run, was seven miles south of the river, instead of three miles, and was fixed on by mistake; and that the commissioners of Rhode Island were led into this error, by confiding in the misrepresentations of the commissioners of Massachusetts. Now, if this mistake had been discovered a few days after the agreement was made, and Rhode Island had immediately gone before a tribunal having competent jurisdiction to relieve against a mistake committed by such parties, can there be any doubt, that the agreement would have been set aside, and Rhode Island restored to the true charter line? Agreements thus obtained, cannot deprive the complainant of territory which belonged to her, unless she has forfeited her title to relief, by acquiescence or unreasonable delay.

In the bill of Rhode Island, claiming to have an adjustment of the boundary between her and the state of Massachusetts, allegations are made of the interference of certain causes which prevented her resorting to measures for relief against a mistake as to the boundary line alleged to have been established by the commissioners of Rhode Island and Massachusetts. The state of Massachusetts, by the demurrer, admits these facts as stated; and the facts asserted in the bill of Rhode Island must be taken as true; it is, therefore, not necessary to decide whether they are sufficient to excuse the delay. But when it is admitted by the demurrer, that Rhode Island never acquiesced, but has, from time to time, made efforts to regain the territory, by negotiations with Massachusetts, and was prevented by the circumstances she mentions, from appealing to the proper tribunals to grant her redress, the court cannot undertake to say, the possession of Massachusetts has been such as to give her a title by prescription; or that the *laches* of Rhode Island has been such as to forfeit her right to the interposition of a court of equity.

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a court of equity; and when the fact appears on the face of the bill, and no circumstances are stated which take the case *out of the opera-

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tion of the act, the defendant may, undoubtedly, take advantage of it by demurrer; and is not bound to plead or answer.

The time necessary to operate as a bar in equity, is fixed at twenty years, by analogy to the statute of limitations.

It would be impossible to adopt the same rule of limitations in the case before the court, on these pleadings. Here, two political communities are concerned, who cannot act with the same promptness as individuals; other circumstances in the case interpose objections; the boundary in question was in a wild unsettled country, and the error in fixing the line not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve, after the mistake was discovered in 1740, was on the other side of the Atlantic, and was not bound to hear the cause and to proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident, that a possession so obtained and held by Massachusetts, under such circumstances, cannot give a title by prescription.

This case was before the court, at January term 1838 (12 Pet. 657); and again, at January term 1840 (14 Ibid. 210).

A bill was filed in the supreme court, on the 16th of March 1832, by the state of Rhode Island and Providence Plantations, asking the court to settle the boundary between that state and the commonwealth of Massachusetts. Mr. Webster appeared for the commonwealth of Massachusetts.

After various proceedings in the case, a plea and answer to the bill of the state of Rhode Island were filed by commonwealth of Massachusetts; and, at January term 1838, *Webster*, counsel for the commonwealth of Massachusetts, "moved to dismiss the bill, on the ground that the supreme court had no jurisdiction in the cause." A full report of the matters contained in the bill, and in the plea and answer, will be found in 12 Pet. 659–69. The question of jurisdiction was argued by *Austin*, Attorney-General of Massachusetts, and *Webster*, on the part of the commonwealth of Massachusetts; and by *Hazard* and *Southard*, for the state of Rhode Island. The court ordered that the motion to dismiss the bill of the complainants should be overruled.

Afterwards, at the same term, 12 Pet. 755, *Webster*, in behalf of the state of Massachusetts, as her counsel and attorney in court, moved for leave to withdraw the plea filed in the case *on the part of the state of Massachusetts, and also the appearance which had been entered for the [*235 state. The court, after argument, on the 24th February 1838 (12 Pet. 761), ordered, "That if the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, that leave for the same be and was given; and the state of Rhode Island may proceed *ex parte*. But that, if the appearance be not withdrawn, that then, as no testimony had been taken, the parties be allowed to withdraw or amend the pleadings, under such order as the court should thereafter make in the premises. The appearance of the state of Massachusetts was not withdrawn; and the case was argued, on the sufficiency of the plea, at January term 1840; the bill of the complainants having been amended. 14 Pet. 210.

On the 8th of January 1841, the state of Massachusetts, by *Austin*, Attorney-General of the commonwealth, and *Webster*, "for himself," filed the following demurrer to the complainant's bill:

The defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true, doth demur to the said bill, and for cause of demurrer, showeth: That no case

is stated by the bill authorizing this court to grant the relief sought, or any other relief: That no such mistake or fraud is averred in the bill, as is sufficient to set aside the awards and agreements between the parties, therein stated, nor any other cause or reason sufficient for that purpose; and that these awards and agreements conclude the question: That the bill states nothing which can do away the effect of the possession by Massachusetts up to the line asserted by her to be the true line, which possession the bill itself admits to have been continued for more than a century, and which possession is itself conclusive on the title: That the bill states no case for the interference of this court, with the line of division actually existing between two independent states, fixed by treaty, compact, or agreement between them, and acquiesced in for a century, as is true of this case, according to the bill itself: *That this court has no power or jurisdiction to dis- *236] turb or interfere with a boundary line actually existing beween two states, well known and defined, and resting on early compact and long-continued acquiescence and possession, upon any allegation of fraud or mistake in the original transaction. Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and asks the judgment of the court, whether said defendant ought to be ordered to make any further or other answer to said bill; and prays to be hence dismissed with costs.

The demurrer was argued by *Austin* and *Webster*, for the state of Massachusetts; and by *Randolph* and *Whipple*, for the state of Rhode Island and Providence Plantations.

Austin, for the respondents, in support of the demurrer.—The object of the plaintiff is, by a decree of this court, to be confirmed and established in the title, jurisdiction and sovereignty which she sets up to a portion of territory, now and ever heretofore, in the possession, jurisdiction and sovereignty of the respondent. The bill describes this disputed territory with reasonable accuracy, so that it is seen to be included between the present actual southern boundary of Massachesetts, and a line nearly parallel thereto, drawn between nearly three and four miles due north from it, along the whole border of Rhode Island, comprising an area of about one hundred square miles. The bill does not state that this territory is densely inhabited, and under a high state of improvement; but if the court could judicially understand, that it is occupied by seven thousand people, all of whom, as did their ancestors to remotest time, deem themeslves to be citizens, and most of them native citizens of Massachusetts; and that there is upon it not less than a million of dollars of taxable property; the importance of the controversy could not be doubted.

The bill sets forth the alleged title of Rhode Island to the territory in dispute, and claims it as included in the charter of Charles II. It describes accurately the title of Massachusetts to the territory secured to her by her colonial and provincial charters, the one granted in 1629, and the other in 1691; and alleges *that her southern boundary is by a line, "three *237] English myles on the south parte of the rivir called Charles rivir, or of any or every parte thereof;" and further alleges that the southern boundary of Massachusetts, and the northern boundary of Rhode Island, is by the same line; the one being contiguous to the other. All this is true. The

bill avers that the actual line of possession on the part of Massachusetts, is more than three miles, viz., several miles south of Charles river, and of any and every part thereof. On this allegation, it is obvious, the whole assumed merits of the plaintiff's case depend. If it be not true, there is no pretence of right to disturb the ancient and existing possession of the respondent.

Whether it be true or not, in point of fact, must depend on a legal construction of the words of the charter. As illustrative of that question, and not, in the present aspect of the case, for any purpose of deciding it, the maps and plans of the territory heretofore used, and now before the court, may be referred to. By universal admission, the Charles river has one main or principal stream, which is supplied by other streams or branches. If these latter streams, which have also local names, are any part of Charles river, within the meaning of the charter, then the actual line of Massachusetts, which is within three miles of the principal branch (sometimes locally called Mill river, at others, Jack's Pasture brook), is the true boundary by her charter. If the main stream, and not the head-waters, is alone entitled to be termed "Charles river, or any and every part thereof," then, unquestionably, the actual line of Massachusetts is not in conformity with the charter; because, in ancient times, it was assumed, and now is believed to be true, that the true point of off-set for the protraction, southwardly, of the line of three miles from any part of Charles river, is from the most southerly stream, branch of head-waters or the river, and it was accordingly so drawn. It is believed, that such is, and ever was, the universal acceptance of the terms; and that wherever a different construction was put on the like phraseology, it was the construction made by power in violation of right.

But the case now stands before the court on demurrer; and in this form of pleading, the counsel for Massachusetts very well understand, that this question of fact is not open to discussion. *They are bound by the allegations of the bill, and must proceed to a hearing with this fact, *pro hâc vice*, against them; and with an admission that the line of actual possession is not the true line of the charter. It is with full confidence in the opinion that the bill (even admitting this great and fundamental error on the part of Rhode Island, to be received as she has stated it) does not set forth a sufficient cause for the interposition of this court, that Massachusetts has ventured to waive this consideration for the present; and to deny that even on this presumption, Rhode Island has any title, by her own showing, to the territorial jurisdiction which she demands by her bill. We suppose, indeed, this is already settled by this court in effect, though not in form. The bill incorporates the defence of Massachusetts, on two other points; which, independent of the original accuracy of the boundary, are each, by itself, fatal to the plaintiff's demand. It admits the fact of an amicable settlement in 1710 and 1718, and the further fact of an actual possession on the part of Massachusetts, under and by virtue of such agreements, for now nearly a century and a half. [*238

It is again obvious, that the question of right between these parties depends—1. On the original correct location of the boundary line. 2. On the effect of the agreements in establishing a boundary. 3. On the undisturbed possession for more than one hundred years.

On the former hearing in this case, the respondent had filed a plea in

bar, setting out, more fully than the plaintiff had done, the agreements of 1710, 1718; and relying upon them as fair and perfect contracts, made fairly, with full and equal knowledge, and accompanied and followed by an undisturbed possession from the time they were made. We understood the court to overrule that plea, because it contained two defences instead of one; upon a strict application of the severest rules of chancery practice, which, with great respect, we had contended could not apply to a case like the present, and were in no case applicable to the plea, in the form in which it was presented.

*239] *In pronouncing the opinion of the court, the chief justice said, "The defence set up by the plea is twofold: 1. That there was an accord and compromise of a disputed right. 2. Prescription, or an unmolested possession for more than one hundred years. These two defences are entirely distinct, and depend upon different principles." And after considering them separately, the chief justice further remarks, "here, then, are two defences in the same plea, contrary to the established rules of pleading." And again, upon the form of pleading, the opinion of the court is to the following effect: "A plea, in general, supposes that the bill contains equitable matter, which the defendant, by his plea, seeks to displace. It is according to this principle of equity pleading that we have treated the case before us. If a defendant supposes that there is no equity in the bill, his appropriate answer to it is a demurrer; which brings forward at once the whole case for argument. The case of *Milligan* v. *Mitchell*, 3 Cranch 220, 228, illustrates this rule, and shows that the defence here taken was more proper for an answer or demurrer than a plea." "If the defendant supposes that the bill does not disclose a case which entitles Rhode Island to the relief she seeks, the whole subject can be brought to a hearing by a demurrer to the bill." "The whole case is open, and upon the rule to answer which the court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her interests."

It seemed to us, that the court, having thus decided, not, indeed, that we had the two valid defences set forth in our plea, but that, if in truth we did possess them, either was in itself a bar, though both could not be joined in the then present form, permitted, if they did not invite, us to present them under such form as would authorize a joinder of both, and a consideration of either, independent of the other. We had hope, therefore, that the plain-

*240] tiff, having, as we think, admitted both in his own *declaration, would have been satisfied, that whenever they were considered, they would of necessity prevail.

The demurrer now joined presents these defences, with all others growing out of the plaintiff's own statement of the case. It is a familiar and well-established principle, that if, taking the allegations to be true, the bill would be dismissed at the hearing, it may be dismissed on demurrer. *Utterson* v. *Mair*, 2 Ves. jr. 95. The object of a hearing is only to inquire whether the allegations are proved, and the effect of them. When, therefore, if proved or confessed, a decree must be had for defendant, the defendant may safely admit them, and may, therefore, as safely demur to the whole bill. *Kemp* v. *Pryor*, 7 Ves. 245; *Brooke* v. *Hewitt*, 3 Ibid. 253; *Verplank* v. *Caines*, 1 Johns. Ch. 59. Unquestionably, the legal effect of the facts admitted by demurrer or proof, may by a subject difficult to settle; but in

a clear case of want of title, or equity, the result of a demurrer must be in favor of the defendant. If, therefore, it shall now appear to the court, by the fair import of the plaintiff's admissions in his bill, that notwithstanding any departure from the charter boundary, for good and sufficient cause, the colonies of Massachusetts and Rhode Island, by their authorized agents, settled the location of boundary on this frontier, such settlement is valid; and the court must dismiss the bill.

Again, it appears to the counsel of Massachusetts, that if, without any regard to the unascertained line described on paper in the charter of King Charles I., or any regard to any claim or any settlement with her neighbors, Massachusetts, in ancient times, entered on the disputed territory, more than 130 years ago, and has always possessed it, and exercised jurisdiction over it; that a title has been acquired by that possession, independent of all other title by grant or agreement, which this court will not disturb. If the supposed agreement and the possession, or either of them, are admitted by the bill, it is then apparent on the face of the bill, that the plaintiff has no cause of complaint, and on demurrer, the bill may be dismissed.

But in addition to these points of defence, the defendant has yet another on the face of the bill. The plaintiff, to recover, must depend on the strength of his own title, not on the weakness *of the defendant's. [*241
The plaintiff's title is set forth in the bill. It mainly depends on the charter granted to Rhode Island by Charles II., on 8th July 1663. Now, if, under the circumstances of the case set out in the bill, at the time this charter was granted, the disputed territory was not in law created a part of the colony of Rhode Island then established, the plaintiff must fail on demurrer. That it never passed by such charter to the then new colony of Rhode Island, we think could be made very clear by other records and proceedings, which history has preserved; but the question for this court to settle on the present state of the pleadings will be, how does the title of the plaintiff appear on her own allegation in her bill?

It is proposed, therefore, to sustain the following propositions. 1. That, on the face of the bill, it sufficiently appears that the colony of Rhode Island and Providence Plantations never had any charter title to the territory demanded. 2. That this territory never was any part of the state of Rhode Island. 3. That by the bill, it sufficiently appears, that if her title, as now claimed, ever vested by charter, still it is lost by force of the agreements of January 1710, and October 1718, and the proceedings of May 1719, set forth therein. 4. That there has been an adverse possession of more than one hundred years, apparent by the bill, which is conclusive against any other claim of title.

In considering the bill with reference to these propositions, two rules of law have an important bearing. 1. That although a demurrer admits all the facts well pleaded; it admits facts only, and not the conclusions of law. *Ford* v. *Peering*, 1 Ves. jr. 76. 78; 2 Madd. Chan. 224. 2. The plaintiff can have no better case on proof; and no remedy for any other case, than is stated in her bill. This principle, however familiar, is in its exact application exceedingly important in this case. It has recently received the attention of this court. *Boone* v. *Chiles*, 10 Pet. 209. See also 4 Madd. 21, 29; 3 Wheat. 527; 6 Ibid. 418; 2 Ibid. 380; 2 Pet. 612; 11 Wheat. 103; 6 Johns. 559, 563; 7 Pet. 274

I. *To the first point, then. How does Rhode Island claim the premises? Her title to anything rests on her charter from Charles II., dated 8th July 1663. In this charter, she has no northern boundary, by natural objects or line of latitude. She is bounded on the southerly line of the Massachusetts colony or plantation. Where that line was, must be ascertained by examining the colony and plantation of Massachusetts; and in this position of the cause, it is admitted, that the bill furnishes the only evidence. But it is well enough there stated. The colony of Massachusetts is the elder by thirty-five years. All the charters are set out in the bill. First, is the grant of King James to the council of Plymouth, in 1621, in which the southern boundary is described as "lying within the space of three English miles on the south part of the said Charles river, or of any, or of every part thereof." Next, is the deed of the council of Plymouth, to Sir Hentry Rosewell and others, 19th of March 1628, with the same boundary. Again follows, the confirmation deed of Charles I., dated 4th of March 1629, with the same description. Boston was settled in 1630, and the mouth of Charles river is on the west side of the city. Three miles south of it, would extend to Brookline, about thirty miles more northerly than the present claim of Rhode Island. It is not from the mouth of the river, then, that the off-set of three miles is to be drawn. At that period, and for many years after, the river was unexplored. The ancient maps, if it was proper to examine them, are all marvellously inaccurate.

In 1646, two persons called Woodward and Saffrey, and denominated "skilful approved artists," with or without authority, went into the interior to explore the country, make a map of it (the map is before us, and has been lithographically copied by the council of plaintiff), find the south branch of Charles river, measure three miles, and erect a monument in perpetual remembrance of the thing. All this they did. The bill shows it. They established the boundary, to begin in latitude 41° 55′. The monument, the supposed boundary, the line thence to be drawn, became known and notorious. Governor Dudley, of Massachusetts, on a solemn occasion, sixty-
*243] eight years after, proclaimed it. Governor Jenckes, of Rhode *Island, on the same occasion, admitted it. All this is apparent on the bill. This demarcation, and the notoriety of it, at that ancient time, in the wilderness, when it was important to draw a line, but of no importance where it should be drawn, was a practical construction of the charter, conclusive against all the world, unless indeed, the king of England might be an exception. He never objected, and his silence was consent.

Massachusetts, as the bill shows, being thus, for twenty-one years, without a neighbor, settled up to, and in the language of that day, planted towards the line. Then the charter of Rhode Island was granted by Charles II., bounding the colony of Rhode Island on the southerly line of the "Massachusetts colony or plantation," making no mention of the Massachusetts charter; but assuming, by this new word "plantation," for the first time applied to Massachusetts, that her actual occupation was her charter limits. The colony of Massachusetts was established by the royal charter, the plantation, by the act of the people. The charter of Rhode Island recognises the existence of Massachusetts as, at that time, she existed in fact. If the grant to Rhode Island was intended to include the space north of Woodward and Saffrey's station, which is nowhere so declared in

the bill, and cannot be supposed, it would not convey any title from a grantor out of possession, and could, therefore, give, in this disputed territory, no claim to the colony. It is fairly to be inferred, that when a new colony was to be erected at the south of Massachusetts, and was bounded on the said colony or plantation, all the facts of the case were known ; and that the boundary was intended to conform to an existing state of things, which had so long been possessed under a demand of right. For forty-three years, the colony of Rhode Island submitted and acquiesced in this location. Now, although the title by possession forms a distinct subject of inquiry ; yet, here it may be invoked, to show that Rhode Island took no part of this territory by her colonial charter. A charter, without possession under it, can form no evidence of title, after the revocation of that charter, on the 4th of July 1776. It is believed, that the great respect paid *by this court, in repeated cases, to the validity of crown grants, has not [*244 extended to give validity to any grant of which actual possession was not taken in a reasonable time ; and that an adverse possession submitted to for forty-three years, is conclusive evidence that the territory in such adverse possession was not included in the terms of any other grant.

II. If this territory never passed to the colony, the state never had title to it ; the claim of the state being only as successor to the colony.

III. It appears on the face of the bill, that a dispute arose between the two colonies in 1710, in regard to this line ; and was settled by agreements or treaties of compromise, in 1710, 1718, 1719. The bill distinctly alleges : 1st. A dispute or controversy. 2d. A commission to settle the controversy, commonly called the Roxbury commission. 3d. An unlimited authority to the commissioners of each colony, by the legislature of each colony, to ascertain and settle the line. 4th. An actual settlement, by an agreement, signed and sealed by the commissioners, so far as to fix a point of beginning ; and to establish Woodward and Saffrey's monument as such point. 5th. That this settlement was a compromise ; Massachusetts yielding one mile of soil in fee, and Rhode Island withdrawing all claim to jurisdiction over the disputed territory. And the bill further admits a second commission, arbitrament and award, or more properly, a treaty ; commonly called the Rehoboth agreement, by which other commissioners were appointed, with unlimited powers, to agree and settle the line " in the best manner they could ;" and an agreement, as before, under seal, varying in some degree from the former, but precise, exact and particular, and a subsequent running of the line accordingly, upon the earth's surface, being the line which, from that time to this, has been the actual dividing line between the two parties ; and which the plaintiff now seeks to disturb. Having thus introduced the defendant's title into her bill, the plaintiff seeks to avoid it by several allegations. It is suggested not to have been within the legitimate power of the colonies to make an agreement of boundary. To this, the case of *Penn* v. *Lord Baltimore*, 1 Ves. 444, is a sufficient answer.

*The most material allegation is, that the agreement or treaty [*245 was the effect of a mistake. This mistake is thus stated. The Massachusetts commissioners represented to the Rhode Island commisioners, that Woodward and Saffrey were skilful and approved artists, and in 1642, had ascertained the point or place three miles south of Charles river, or of any and every part thereof ; and had there set up a stake ; and the Rhode

Island commissioners, relying on said representations, and believing them to be true, and verily believing the said point or place to have been correctly ascertained, and the said place where the said stake was alleged to have been set up as aforesaid, to have been three English miles from Charles river and no more ; the commissioners signed and sealed the agreement, which established the line of boundary. To this, the respondent replies, that it is the true character of this transaction, and not the name given to it in the plaintiff's bill, that is to lay the foundation for annulling an agreement otherwise binding upon the contracting parties.

The facts alleged are admitted by the demurrer ; but whether they are to be called, or whether they amount to, a mistake, is a conclusion of law, to be determined by the court. Now, it is certain, that to settle the boundary according to those charters, the commissioners must first have decided whether the head-waters were a part of Charles river. It is apparent also, that Woodward and Saffrey had, in their proceedings, determined that the head-waters were part of the river ; they had set up their stake accordingly, and when the Massachusetts commissioners affirmed that it was in the right place, they only affirmed that the head-waters were part of the river ; and when the Rhode Island commissioners relied on said affirmation, and believed it to be true, they believed the same fact. It is observable, that the bill nowhere declares that the representation so made by the Massachusetts commissioners was wilfully false, or was intended to deceive, or that the Rhode Island commissioners acted or believed in consequence of such representation. These material allegations are carefully avoided.

It does not appear, that the Rhode Island colony intended to settle the line according to the charter, without variation ; but on the contrary, that the commission was to "revise and compromise." *It is not averred, that the Rhode Island commissioners intended to conform to the charter ; but on the contrary, it appears, they were disposed to make an amicable settlement, and to take, in fee-simple, an equivalent for territorial jurisdiction. It is thus plain, on the averments of the bill, that what the plaintiff has been pleased to term mistake, was knowledge, compromise, reasonable concession and judicious settlement. All the subsequent proceedings having reference to this, depend on the same facts, and are not materially varied by the form of the bill.

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But if this was a mistake by these commissioners, what is its equitable effect ? "It must not be understood, that in equity every kind of mistake is relievable, for though equity will relieve against a plain mistake, or misapprehension, or ignorance of title, yet equity will not interpose, if the fact is doubtful, or, at the time of the contract, equally unknown to both parties ; or if there has been a long acquiescence under the mistake, and neither party aware of it." Fonbl. vol. 1, p. 116, note to book 1, ch. 2, § 7. It appears by the bill, that Rhode Island reposed under this mistake for forty years, without discovering her wrongs.

But this agreement and the subsequent ones are treaties. Ward's Law of Nations, ch. 15, p. 139 ; Vattel ch. 12, p. 192, 154. "They are of a class of contracts which are never void for the mistake of the negotiators." Ibid. 193, § 157–8. See cases cited to this point, when this case was last before the court, 14 Pet. 210. There can be found few cases where the negotiators of a treaty of boundary are supposed to have made a mistake ;

and none, it is believed, where, for any such cause, the provisions of a treaty were ever deemed to be, or ever were suggested by diplomatists to be, void. It is part of the law of nations, that a treaty, once made, is irremediably conclusive. And the reason is, that it can be inquired about and explained only by itself. The peace of the world demands that it be an eternal estoppel between the parties. The boundary of the United States, by the treaty of Paris, *of 1783 ; the designation of the River St. Croix, by commissioners under the treaty of London, commonly called Jay's treaty; and [*247 the results of the commission under the 4th article of the treaty of Ghent, are all suspected, with more reason than the ancient treaty line of these colonies, to have been settled by mistake; but who ever was guilty of the gigantic heresy of maintaining that a mistake could be inquired about in these national compacts, or that the discovery of the ignorance of the negotiators would nullify the contract?

IV. The bill shows an undisturbed possession by Massachusetts for 113 years, under claim of title. The controlling power of time is a part of the law of this case, and reference is made to the authorities cited at the former hearing. In addition to these, there is now presented to this court the written autographic opinion of Lord Mansfield, when attorney-general of England, in the year 1754, on the subject of this very boundary ; in which that eminent jurist declares, that "if the king approves the agreement, it is now too late for the parties to dispute it." 4th vol. Trumbull's MS. papers, Mass. His. Soc. Library. Possession alone, it is respectfully contended, in a case of this kind, uninterrupted and exclusive for more than a century, is not only a good title, but the best of all possible titles. No other title gives, or was ever pretended to give, any right to the British crown to make conveyance of land or empire, jurisdiction or sovereignty, in this new world. By discovery or by conquest, possession was obtained, and hence possession became ultimate right. When this possession was parted with, the right was lost, at least, in effect, against all the rest of mankind but the royal authority. Now, this possession was lost to the crown, and was gained by Massachusetts, before the colony of Rhode Island was planted, or her charter drawn upon parchment. It is against, therefore, her own possession, or the possession of her grantor, for ever, that the plaintiff demands title.

It has been suggested, that it is not against claim of possession. To this it is submitted, that no claim of possession can ever be admitted or considered in a court of equity, but that claim that is made in conformity to judicial proceedings. While this principle *is universally true, it [*248 derives additional force from the fact, that there always was a paramount power capable of redressing the injuries of the plaintiff, if, at any time, such injuries have been made known. From 1740 to 1776, there was a regular appeal allowed to the king in council. From the adoption of the confederation, until the existence of the constitution of the United States, authority to redress such injury vested in congress. From that time to the present, this high court has been the arbiter of international controversies between the states of the Union. The bill admits, that no judicial effort has been made to bring the dispute to an issue. Occasionally, indeed, Rhode Island has complained. Once in about every thirty-five or forty years ; that is, once in every generation of statesmen, of which her soil has been prolific, she moaned over the loss of a right which she never pos-

sessed; but her murmurs never reached the temple of the law, and never were serious enough, or loud enough, for that purpose. She was too weak, or too feeble, or too poor, it may seem by the bill; and although we would not hear her enemy say this; yet, if it be admitted by demurrer, it is mere admission of form; for she never wanted the intellectual or moral qualities which such an exigency demanded. But the admission of her distress may be safely made. It is as inoperative in law, as it is incredible in fact. Distress and embarrassment are no bars to the operation of time. *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 632.

It remains only to inquire, if the objections thus fatal on the face of the bill, may be taken advantage of by demurrer. To this point the court is referred to the following cases: Mitf. Plead. 99, 100, 102, 144, of the English edition; *Kuypers* v. *Reformed Dutch Church*, 6 Paige 570; *Humbert* v. *Trinity Church*, 7 Ibid. 195; *Utterson* v. *Mair*, 2 Ves. jr. 95; *Brooke* v. *Hewitt*, 3 Ibid. 253; *Hardy* v. *Reeves*, 4 Ibid. 476 (this case was reviewed and confirmed in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 632, and the opinion of the lord chancellor, p. 637, especially noticed); *Hodle* v. *Healey*, 1 Ves. & B. 536; *Brooks* v. *Gibbons*, 4 Paige 374; 1 Jac. & Walk. 195.

*249] * *Whipple*, for the complainants; with whom was *Randolph*.—The object of the plaintiff's bill is to obtain possession of jurisdiction over a territory about four and a half miles wide, north and south, by about twenty miles long, east and west. This territory constitutes, we say, the northern border of Rhode Island, and is included in the charter granted to Rhode Island, by the crown of England. On the contrary, it is contended by Masssachusetts, that this territory constitutes her southern border, and is included in her charter. The object of the controversy, therefore, is to settle the dividing line between two conterminous states, so far as it involves the rights of the parties to jurisdiction. The right to the soil is not in dispute.

Massachusetts has demurred to the whole of the plaintiff's bill; and the question is, whether, taking the case as it is presented by that bill, Rhode Island is entitled to relief. The first and most obvious inquiry, therefore, is, what are the facts set forth in the bill?

The leading and prominent facts are: 1st, The charters of the crown to the two states of Massachusetts and Rhode Island. By the Massachusetts charter, her southern line or boundary, is declared to be "within the space of three English myles on the south parte of the saide river called Charles river, or of any, or every, parte thereof." The northern boundary or line of Rhode Island, is declared by her charter to be, "and from thence by a straight line, drawn due north until it meets the south line of the Massachusetts colony; and on the north, or northerly, by the aforesaid south, or southerly, line of Massachusetts."

By the Massachusetts charter, dated in 1629, the said Henry Rosewell *et al.* are created "a corporation by the name of the Governor and Company of Massachusetts Bay;" which said officers shall apply themselves to take care for the best disposing and ordering of the general business and affairs of, for and concerning the said lands and premises hereby mentioned to be granted, and the plantation thereof, and the government of the people thereof." It then provides for four meetings of the general court, each year,

and authorizes them "to make laws and ordinances for the good and welfare of said company, and for *the government and ordering of the said lands and plantations, and the people inhabiting, and to inhabit, [*250 the same." The same emphatic language is used in the Rhode Island charter. It creates the freemen of Rhode Island a corporation, with perpetual succession; prescribes the times and mode of choosing the governor and members of the legislative assembly; and authorizes the assembly, "from time to time, to make, ordain, &c., such laws, &c., for the government of the lands hereinafter granted, and for the government of the people who now inhabit, or may hereafter inhabit, the same." "To establish courts to settle all matters within said colony."

Both charters, in their grants of legislative, executive and judicial powers, closely and cautiously limit the exercise of those powers "to the said lands hereby granted." The powers themselves differ very materially as to their extent. The powers granted to Massachusetts, and none other, by the very terms of the Massachusetts charter, are to be exercised within "the said lands," described in the Massachusetts charter, and by officers chosen by the freemen of Massachusetts. The powers granted to Rhode Island and none other, by the very terms of the Rhode Island charter, are to be exercised within "the said lands hereinafter mentioned," and by officers chosen by the freemen of Rhode Island. "And further, our will and pleasure is, that in all matters of public controversy which may fall out between our colony of Providence Plantations, and the rest of our colonies in New England, it shall and may be lawful to and for our said colony of Providence Plantations to make their appeals therein to us, our heirs and successors, for the redress of their grievances, in England." By these charters, the following important facts are established:

1st. That the first settlers of Massachusetts and Rhode Island were not independent individuals, tribes or communities, who took possession by conquest or otherwise, for themselves, over their respective territories, claiming and acquiring an original and inherent power of legislation therein; a power which they could consequently transfer to each other, or to any third person or community.

2d. They took possession, as subjects of the crown of England, of a portion of a country claimed to have been discovered by *England; they [*251 took possession for, and under, the crown of England; that all the powers of legislation which they ever claimed or exercised, was by express grants from the crown; that by accepting these grants, they acknowledged the power of legislation to be in the crown; that to Massachusetts was granted the power to legislate over lands as far south as "three miles south of Charles river, and of any and every part thereof;" that to Rhode Island was granted the power to legislate as far north as the southernmost line of Massachusetts; that the power to legislate north of that line, was delegated by the Massachusetts charter to Massachusetts officers, who were to be chosen by Massachusetts freemen in a certain mode; that the power to legislate south of that line was delegated by the Rhode Island charter, to Rhode Island officers to be chosen by Rhode Island freemen in a different mode; that both these powers were entire powers, to be exercised by each, in the mode, by the officers chosen, and at the time specified in the respective charters; that Massachusetts must exercise the powers over the lands, and all

the lands specified in her charter; that Rhode Island was subject to the same rule; that, consequently, it was not competent for either Massachusetts or Rhode Island, by any agreement (not ratified by the crown) to vary those powers, or to enlarge or lessen the territory over which they were to be exercised; that in this respect they were like all other corporations, and like most other colonial governments; that the right to legislate was in the crown, the temporary exercise of it, alone, was in the colonies; and this exercise might be terminated at the pleasure of the crown.

There was not only no authority in the charters of either of these colonies to delegate any portion of their derivative powers; but there is an implied, if not a positive, prohibition against it, for in "all matters of public controversy which may fall out between our colony of Providence Plantations, and the rest of our colonies in New England, it shall and may be lawful to make their appeal to us, in England." No subject can be considered of "public controversy" with more propriety than a dispute between two colonies in regard to their boundaries. Indeed, it is impossible to reconcile the studied and cautious limitation of the powers granted, even down *to *252] those almost of a police nature, with the supposition of a power to cede any portion of their territories. There was a double incapacity. Rhode Island was incompetent to sell, and Massachusetts incompetent to purchase, territory, the jurisdiction over which was exclusively in the crown. It would be a startling proposition, that Jamaica could cede to Bermuda this jurisdiction over a part of her island. Even the compromise of a disputed line, would derive all its validity from the express or implied ratification of the crown.

From these charters, then, we arm ourselves with the following facts to start with: 1st. That Massachusetts and Rhode Island, from the date of their charters, 1628 and 1663, down to 1775, were not sovereign independent states, but political corporations, possessed, as trustees for the people, and by grant from the crown of England, of jurisdiction over certain specified limits. 2d. That neither of the charters contained any authority to delegate this jurisdiction, or any portion of it, nor any authority to acquire jurisdiction over any other lands than those specified in their charters. 3d. That as these charters limit the south line of Massachusetts to "three miles south of Charles river, and of any and every part thereof," and grant to Rhode Island jurisdiction up to that line; that Rhode Island is still entitled to that line, unless it appears upon the face of this bill, that it has been expressly ceded to Massachusetts, by the crown of England, or by Rhode Island, with the express or implied assent of the crown.

With this preparation, we will approach the years 1710 and 1718, when the agreements, upon which Massachusetts relies, were made. Those agreements are copied into the bill, and were made by commissioners, with full authority from the two states. After they were concluded by the commissioners, and the line run in 1718, to which Massachusetts has ever since claimed, they were accepted by the legislatures of both states; but never formally ratified. All the allegations in the bill, in relation to those agreements, whether true or untrue in point of fact, must be taken for truth, for all the purposes of this trial; because they are admitted by the demurrer. One material allegation is, "that a short time previous to the year *253] 1709, the inhabitants of said *colony of Rhode Island, entered upon

certain parts of said lands adjoining the northern boundary of said colony, and made improvements thereon, and grants thereof." The bill then states the existence of disputes between the inhabitants of the two states, in relation to the boundary line; and that, in consequence of said disputes between said inhabitants, the two colonial governments appointed commissioners to ascertain and settle the northern boundary line of said colony of Rhode Island; that these commissioners met at Roxbury, on the 19th January 1711.

"That the Massachusetts commissioners then and there represented to the Rhode Island commissioners, that Woodward and Saffrey, skilful and approved artists, in 1642, had ascertained the point or place three English miles south of the river called Charles river, or of any and every part thereof, and had there set up a stake; and that the said Rhode Island commissioners, relying on said representations, and verily believing the said point or place to have been correctly ascertained, and the said place, where said stake was alleged to have been set up as aforesaid, to be three English miles, and no more, south of said Charles river, signed and sealed a certain writing, called an agreement in the words following."

The agreement itself sets forth the authority of the two governments conferred upon the commissioners, and a statement of the inducements to settle the dispute in an amicable manner, and then proceeds to state, "That they have mutually agreed, that the stake set up by Woodward and Saffrey, skilful approved artists, in 1642, and since often renewed, in lat. 41° 55′, being three English miles distant southward from the southernmost part of the river, called Charles river, agreeable to the letters-patent for the Massachusetts province, be accompted and allowed on both sides, the commencement of the line between Massachusetts and Rhode Island, and to be continued between the governments, in such manner as that, after it has proceeded between the two governments, it may pass over Connecticut river, at or near Bissel's house, as is decyphered in the plan and tract of the line by Woodward and Saffrey, now shown forth to us, and is remaining upon record in the Massachusetts government."

The bill then states, that disputes still continued to exist between the inhabitants; that the boundary line still remained unsettled, *as said pretended agreement was never in any manner ratified or confirmed [*254 by said colony of Rhode Island; that new commissioners were appointed in 1717, with full powers to settle all disputes; that these commissioners met at Rehoboth, in October 1718; that the Massachusetts commissioners made the same representations in regard to the Woodward and Saffrey stations, being but three English miles south of Charles river, as were made by the former commissioners from Massachusetts; that the Rhode Island commissioners, fully confiding in these representations, signed the second agreement, commonly known as the Rehoboth agreement. The agreement then states, "That the stake set up by Woodward and Saffrey, in 1642, upon Wrentham Plain, be the station or commencement to begin the line which shall divide between the two governments aforesaid; from which said stake, the line shall run, so as it may, at Connecticut river, be two and a half miles southward of a due west line, allowing the variation of the compass to be nine degrees; which said line shall for ever remain," &c.

The bill repeatedly states, that the commissioners did not go upon the

ground, nor cause the distance from Charles river to be measured, so as to ascertain whether the Woodward and Saffrey station was but three miles from the river or not. It also states, that neither of these agreements were ever ratified by the legislatures of either of the colonies; that both said agreements, and all the proceedings of the Rhode Island legislature thereon, were founded on the belief that the Woodward and Saffrey station had been ascertained, by competent and skilful surveyors, to be but three miles from Charles river, and no more;" that such mistaken belief continued to exist until 1749, when commissioners were again appointed by both colonies. The act appointing the Rhode Island commissioners is set out in the bill. Its preamble is as follows: "Whereas, the northern line of this colony has never been settled according to the royal charter: and whereas, divers persons have made application to this assembly, and have set forth their just right to be under the jurisdiction of this government, as dwelling within
*255] the bounds thereof; and that the province of *Massachusetts Bay have and do unjustly exercise jurisdiction over them: In order, therefore," &c.

The Rhode Island commissioners met at Wrentham, after giving the Massachusetts commissioners notice of the time and place; and after waiting for them two days, they commenced measuring the distance from the most southerly part of Charles river to the Woodward and Saffrey station, the starting point of the line agreed upon by the commissioners in 1710 and 1718, and instead of three miles from Charles river, as had been stated by the Massachusetts commissioners, and as was laid down upon the Woodward and Saffrey map, they found it to be over seven miles. These commissioners measured three miles due south from the most southerly part of Charles river, and from the point extended a line due west, until it reached the Connecticut line. Upon this east and west line, only three miles south of Charles river, they erected various monuments. The Massachusetts commissioners refused any participation in the measurement of the distance of three milles south of Charles river, but adhered to the line established four miles farther south, by the agreements of 1710 and 1718.

Three lines, then, have been run between these two states. The first in 1720, by agreement of the commissioners of both parties, beginning at the Woodward and Saffrey station, "being three miles south of Charles river, agreeable to the letters-patent for the Massachusetts province, and to be continued between the two governments in such manner that it may pass over Connecticut river at or near Bissel's house." The second line was by the agreement of the commissioners of the two states, in 1718, and starting from the same point, the Woodward and Saffrey station, "from which said stake the dividing line shall run, so as it may, at Connecticut river, be two miles and a half to the southward of a due west line." These two agreements differ materially in the course of the line, the first terminating at the west end, several miles farther south than the second. The third line was run by the Rhode Island commissioners alone (the Massachusetts commissioners having declined any agency in it), in 1750, and not only its termination at the west end, but its commencement at the east end, was between four
*256] *and five miles farther north than the two former lines. It is alleged in the bill, that Rhode Island first discovered that the Woodward and Saffrey station was over seven miles south of Charles river, in 1749 or

1750, when this last line was run. It is also alleged, in the bill, that Massachusetts took possession as far south as the line established in 1719, immediately after that period; and has been in the possession of the territory between that and the line run by the Rhode Island commissioners, in 1750, ever since 1791. It is also stated, as a fact, "that the place from which said line was run (the line of 1719) was and is more than seven miles south of the river called Charles river, and of any and every part thereof."

Upon the whole facts, as stated in the bill, and admitted by the demurrer, the defendant contends, that she is entitled to continue her possession of the disputed territory: 1st. Beeause jurisdiction over that territory, was ceded to her, by force of the agreements of 1710 and 1718. 2d. Because, having been in the actual possession of that jurisdiction, as the bill itself states, from 1719, down to the filing the bill in 1832, she has gained a title to jurisdiction, by possession and prescription. All the material and important facts in relation to the first point; the legal effect of the agreements, standing by themselves, have been stated; except the allegation distinctly made, that these agreements were never ratified by the crown. We will now consider briefly the question, do these agreements, by themselves, infer any right to jurisdiction, over the territory in dispute? A recapitulation of the facts bearing upon the validity of these agreements, may aid us in estimating the force of the opposite argument.

1. Massachusetts admits, that her chartered line on the south, is an east and west line, three miles south of Charles river; and that the north line of Rhode Island, by her charter, is the south line of Massachusetts. Consequently, she admits, that, by the express terms of the two charters, the territory in dispute belonged to Rhode Island, anterior to 1710, being all that territory lying more than three miles south of Charles river; and the south line of it, as claimed and occupied by Massachusetts, *"more than seven miles from Charles river, and from any and every part thereof." [*257

2. She admits, that the two agreements of 1710 and 1718, establishing the Woodward and Saffrey station, were entered into, under the representation by the Massachusetts commissioners, that the station had been fixed and established by skilful surveyors, and was but three miles from Charles river; that the map of these artists was produced by the Massachusetts commissioners, in confirmation of this representation; and that the Rhode Island commissioners, confiding in this false representation, entered into these agreements, under the full belief that said station was but three miles from Charles river, and no more. Massachusetts now admits, that said station, and said line run from it, were more than seven miles from Charles river, and from any and every part thereof.

3. She admits, that these agreements were never ratified by the crown of England; that the mistake was not discovered by Rhode Island, until 1749 or 1750, when her commissioners ran a line three miles south of Charles river, its course due east and west; and that Rhode Island has claimed to that line ever since.

These are the facts admitted by the pleadings, upon which the validity and binding effect of the agreements depend. In the argument of that question, it has not been pretended, that such agreements between two individuals, would be binding either in law or in justice. The misrepresentation of one party, and the mistake of the other, would render them a mere nullity.

The only ground upon which it is attempted to support them is, that they amount to a treaty between two sovereign states; and that it is a principle of the laws of nations, that all treaties are binding, whatever may have been the mistake of either party.

We do not admit the existence of any such rule among nations. A practical difficulty in annulling treaties between sovereign states, founded on mistake, may arise from the absence of any common arbiter between them. But suppose, a common arbiter, by the agreement of parties, fully authorized to settle any question of boundary between two nations of sovereign and independent power, and one of them should rely upon a
*258] treaty, *which it admitted was founded in a mistake of the other party, caused by its own misrepresentations; is there any tribunal in the civilized world that would sanction such a treaty? This court is a tribunal established by the constitution, to decide all such questions between the states, that have become parties to that constitution. Was it the intention and design of the constitution, that this court should decide without regard to any fixed principles of law or justice? If a treaty between two states, founded in admitted mistake, is binding, why not a treaty founded in fraud? If fraud or mistake will not vitiate a treaty between states, will it vitiate any other contract? Without entering into this subject, we merely express our dissent to the whole doctrine. Our main answer to it is, that in 1710 and 1718, Massachusetts and Rhode Island were not sovereign and independent states, but colonial governments, with powers of an extremely limited character. They were trustees of legislative powers, under a grant from another nation, made for the benefit of the people. No agreement in relation to their jurisdiction, even though made fairly and understandingly, could bind the crown, until ratified by the crown. How then could an agreement made under an admitted mistake, be allowed a more binding efficacy, than an agreement made understandingly? Besides, it is expressly averred in the bill, that neither of these agreements were ever ratified by the crown; and the demurrer admits that fact. We have not merely the admission of Massachusetts, that these agreements were founded in mistake, but the mistake is apparent on the face of the agreements themselves. The agreement of 1810 states, expressly, that they were to begin the line from the Woodward and Saffrey station, "being three English miles distant from the southernmost part of Charles river, agreeable to the letters-patent." There was never any dispute between the parties, but that the line was to be three miles south of the river, and no more. That was the agreed basis of the contract. The only dispute was, what course that line should run; Rhode Island contending for a due west course, and Massachusetts for a course south of west.

The question, therefore, resolves itself into this: can an agreement,
*259] founded in an admitted mistake, or a mistake apparent *upon the face of the instrument, be supported, either in law or equity? For a much stronger reason, can such an agreement between parties, having no power to contract in relation to the subject-matter, be supported? An omission in an agreement by mistake, stands on the same ground as an omission by fraud. *Ramsbottom* v. *Gosden*, 1 Ves. & B. 168; 3 Atk. 338; 6 Ves. 344, note c. "The general rule is, that an act done, or contract made, under a mistake, or ignorance of a material fact, is voidable and relievable in equity."

Story's Equity Jurisprudence, 155 ; 9 Ves. 275 ; *Bingham* v. *Bingham*, 1 Ves. sen. 126; *Gee* v. *Spencer*, 1 Vern. 32. *Cocking* v. *Pratt*, 1 Ves. sen., 400, is a strong case, resembling the present in many of its features. *Honour* v. *Honour*, 1 P. Wms. 123, is also applicable to the present case. Articles, and a settlement in pursuance thereof, were both made before marriage, but the settlement varied from the uses of the articles. Decreed to set the settlement aside. Chancellor—"It is a plain mistake in varying the settlement from the articles, and this appearing upon the face of the papers, and the plain reason of the thing, length of time is immaterial." In the case before the court, the mistake is admitted ; it also appears upon the face of the agreements. The case of *Leonard* v. *Leonard*, 2 Ball & Beat. 183, was a case of compromise. Lord MANNERS said, that "the plaintiff acted under an evident mistake. The defendant cannot be permitted to hold an estate which manifestly belongs to the plaintiff ; and which the defendant has obtained either by the mistake or misrepresentation of the agent."

We shall dismiss this part of the case, and very briefly consider the question, whether length of time affords any defence to Massachusetts. We have various answers to the argument from time. In the first place, time is no objection to relief, where the mistake is admitted ; if the case arises between the original parties to the contract ; and if the plaintiff has not misled the defendant, by concealing the mistake an undue time, after it was discovered. In the present case, it is admitted, that Rhode Island disclosed the mistake as soon as it was discovered. It comes within the principle of *Honour* v. *Honour*, 1 P. Wms. 123 ; *the mistake "being apparent on the face of the papers, length of time is immaterial." In the [*260
second place, length of time, though a bar in some cases to a claim for property, does not affect a claim for jurisdiction.

These are questions, however, more proper to be discussed, when the general merits of the case come before the court, upon a general denial of the plaintiff's bill. The principal question upon these pleadings is, whether length of time can be taken advantage of, upon a demurrer ? As this is a mere question of authority, we shall content ourselves with a reference to such cases as bear most strongly upon the point. Both in law and in equity, time has a two-fold operation ; often confounded by unskilful persons ; but possessing, in reality, characters wholly distinct, and wholly unlike each other. In many cases, it operates as a bar to the plaintiff's remedy. In a class of cases more numerous, it operates as a witness in favor of the defendant. In this last mode of its operation, it has nothing to do with the remedy, but it is applied to the merits of the plaintiff's claim.

In its first mode of operation, it is called a statute of limitations ; and unless the case is embraced by certain enumerated exceptions, such as infancy, coverture and other disabilities, which must be specially stated in answer to the special plea of the defendant, it is an unyielding and peremptory bar to the plaintiff's action. Still, the demand exists for certain purposes, although the remedy is destroyed. It still would form a sufficient consideration for a new promise. But in its second mode of operation, it is not necessary to plead the lapse of time relied upon. It is introduced as a witness in the cause before the jury ; and like all other witnesses, its testimony may be contradicted or qualified in a thousand ways, because it swears to matters of fact alone. Thus, in cases in which twenty years operate as

presumptive evidence of a grant; the opposite party may disprove the existence of the grant, or remove the presumption, by any means in his power, and the jury are to judge of the weight of conflicting testimony.

But a plea of the statute of limitations, if admitted by the plaintiff, that is, if he admits that the time has elapsed, and that *his case does not
*261] come within one of the specified exceptions, is matter of mere law, to be decided by the court. A statute of limitations prescribes a definite time, six years, or twenty years, beyond which no action can be brought. It operates alike in all cases, and if the lapse of time is admitted, is fatal to the plaintiff's case. No circumstances can ward off its unerring blow. But when time operates as evidence addressed to a jury, the plaintiff may safely admit the lapse of twenty, thirty or fifty years, and destroy its effect in a thousand different modes. In courts of law, a statute of limitations must be specially pleaded. Even if it appears upon the face of the declaration, that more than the prescribed time has elapsed, still the defendant must present it anew, in a special plea. But in those cases as to which courts of equity have concurrent jurisdiction with courts of law, and in which a statute of limitations applies, if it appear upon the face of the bill, that the prescribed time has elapsed, and the disabilities mentioned in the statute are not stated in the bill in avoidance of the bar, the defendant may demur to the bill. This difference in the mode of pleading the statute in the two courts is simply this, that in a court of law the statute must be pleaded by the defendant, and the disabilities, if any, introduced in the plaintiff's replication. But in a court of equity, if the lapse of time is apparent on the face of the bill, the disabilities in avoidance must also be stated, otherwise the defendant may demur to the whole bill.

In the case now under consideration, it is not pretended, that time operates as a bar. If the case had been on the law side of the court, there is no statute of limitations that could be pleaded in bar to the remedy. There is no provision in any statute in England, or this country, applicable to the subject-matter of this suit, jurisdiction—nor to the parties, sovereign states. Time, therefore, can only come to the aid of the defendant as a witness, to prove possession on the part of the defendant, and acquiescence on the part of the plaintiff. Like all other witnesses, his testimony must be offered to the jury upon an issue of fact, and not to the court upon an issue of law. In the case of *Deloraine* v. *Brown*, 3 Bro. C. C. 646 (Lond. edit. of 1819, by Eden), is a note of Lord THURLOW'S *opinion, preserved by Redes-
*262] dale, which places this question in its true light.

"The party who demurs," said his lordship, "admits everything that is well pleaded, in manner and form as pleaded; and a demurrer ought, therefore, in a court of law, to bring before the court a question of mere law; and in a court of equity, a question of law or equity merely. The demurrer, therefore, must be taken to admit the whole case of fraud made by the bill, and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that, from long acquiescence, it should be presumed, that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction. This must be an inference of fact, and not an inference of law, and the demurrer must be overruled, because the defendant has no right to avail himself, by demurrer, of an inference of fact, upon matter

upon which a jury in a court of law would collect matter of fact to decide their verdict, or a court would proceed in the same manner in equity. What limitation of time will bar a suit, where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend upon the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore, cannot be made on demurrer. But where the defence is not a presumption, from long acquiescence, but a positive limitation of time, which the court, by analogy to the statute of limitation, adopts, it may clearly be taken advantage of by demurrer."

In the case of *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629, it was decided, that in cases of a positive limitation of time as a bar to the remedy, a demurrer to the bill would be sustained. That case was decided by Lord REDESDALE, in 1806. In the edition of Lord Redesdale's Treatise upon Equity Pleading, by Jeremy, the edition of 1836 (revised by Redesdale himself), page 212, the distinction taken in the above note and opinion of THURLOW, is maintained. Mr. Justice STORY, is in his very able Treatise upon Equity Pleading, p. 378, states the doctrine with great clearness. "The same principle," he says, "will apply to a bill which states a *case within the statute of limitations at law, and upon which courts [*263
of equity follow the analogy of the law, for, under such circumstances, courts of equity hold that the objection may be taken as a defence by demurrer." In one of the latest treatises upon Chancery Practice, by Daniell (published in 1838, Lond. edit.), p. 43–4, all the decisions upon this subject are cited, and they show conclusively that a demurrer can be sustained in cases analogous to the statute of limitations. But he says, "It is to be remarked here, that all the above cases were decided upon the ground of their coming within the statute of limitations, or the rules of the court which have been adopted in analogy to the statute, and that, therefore, there was a positive limitation of time upon which the court could proceed. Where, however, there is no such positive limitation, the question whether the court will interfere or not, depends upon whether, from the facts of the case, the court will infer acquiescence, or confirmation or release. Such inference is an inference of fact and not of law, and cannot be raised on demurrer." He cites *Cuthbert* v. *Creasy*, Madd. Ch. 189, as a recent decision of the English chancery upon this very point. Upon the mere technical law of pleading, therefore, we feel great confidence that no advantage of time can be taken in the present case, by demurrer.

But besides the mere technical objection, there are reasons lying close to the merits of the case, which show conclusively that extreme injustice would be done to Rhode Island, to allow the lapse of time to be taken advantage of under a demurrer. We have stated in our bill, that Massachusetts took possession of the territory in dispute in 1719, and has continued in possession ever since. But we have also stated various matters in avoidance of this possession. In page 43 of the printed case it is stated "that the said province of Massachusetts, on or about the 14th of May 1719, wrongfully took possession of all that tract, &c." "And has since continued, wrongfully, to exercise jurisdiction over the same." The bill then proceeds to state that the line established by the agreement of 1719, was never con- [*264
firmed by Rhode Island, *"but that, on the contrary, the claim of said

colony uniformly was, that the true dividing line on the north part of said colony, was a line drawn three English miles, and no more, south of the south part of said Charles river, or of any or every part thereof, as defined and granted by the letters-patent aforesaid ; and that the claim of Massachusetts to any other or different line was never acquiesced in, or consented to, by said colony of Rhode Island ; and that the said claim of the said colony was publicly and frequently urged and maintained by said colony, and by the freemen and inhabitants thereof."

Here are clear and distinct allegations of facts. The demurrer admits the truth of them. It admits, that Rhode Island never acquiesced in the possession or claim of Massachusetts, but always maintained her claim for the charter line as now contended for. This demurrer admits the facts of non-acquiescence. It admits the truth of all evidence which the plaintiff by any possibility can offer, under that general allegation. The very question as to time in this case is, has Rhode Island acquiesced in the possession of Massachusetts? In her bill, she says she has not ; and she has a right to offer any and all evidence, which tends to prove that fact. But the demurrer excludes that evidence, by admitting the fact itself. It will not answer, to admit the fact in pleading, and deny it in the argument. It must be denied in pleading, so that Rhode Island may offer her evidence, or it cannot be denied at all. Can it then be gravely contended by the learned counsel of the very lofty and imposing state of Massachusetts that agreements entered into under a clear and admitted mistake, caused by her own misrepresentations, can stand for one moment in any court, in any civilized nation in the world? Can it be contended, that any length of possession, under such agreements, admitted to have been wrongfully taken in the first instance, wrongfully continued, and never acquiesced in by Rhode Island, can confer upon Massachusetts any title? Our difficulty has been to find, in the whole range of the case, a spot of debatable ground.

Webster, in support of the demurrer.—The bill of Rhode Island asks the *265] court to disturb a boundary *between that state and Massachusetts, which has been settled for more than 200 years. This is a question of great magnitude ; and the matter for the decision of the court is, whether a case has been made out in the bill, on which Massachusetts may resist the claim thus presented.

The charter of Massachusetts originated in a grant by the council established at Plymouth, on the 19th of March 1628, to Sir Henry Rosewell and others ; by which the soil and jurisdiction of the territory, now belonging to the commonwealth of Massachusetts, was granted to a southern boundary, to run three miles south of Charles river. In 1663, the province of Rhode Island was granted by King Charles II., and the grant was limited to and by the southern boundary of the colony of Massachusetts. As to the exact location of this boundary, difficulties arose, and commissioners were appointed by Rhode Island and Massachusetts ; and in 1719, agreements were made by the commissioners of both parties.

What is the ground on which these agreements are to be set aside? It is said to be, that they were founded in mistake ; and that by them Massachusetts has gained, and Rhode Island has lost, four miles of territory. This is the whole ground. No fraud is charged, none is alleged. No assertion

is made in the bill, that advantage was taken by Massachusetts in the adjustment; or that the commissioners of Rhode Island had not knowledge of the subject confided to them: and if they had been ignorant, it would not avail. They had full right and full opportunity to make all necessary examinations. It is said, that under the mistake, the line was placed seven miles from Charles river, instead of three miles; Rhode Island discovered the mistake in 1749, and the proceedings set forth in the bill, show that Rhode Island has not acquiesced in the line then established; the object of this application to the court is to obtain relief from the mistake discovered in 1749.

The question is, whether this court can interfere, after so long a period; whether time alone will not prevent the disturbance of an adjustment of such long standing, and in reference to which no adverse movement has been made for nearly 100 years; and as to which nothing has been done by Rhode *Island, other than expressions of dissatisfaction. If it were a recent transaction, no adjudged cases are known to sustain the [*266 application; and no principles of public law will sanction the interference of the court. If it was an affair of yesterday, the court would not act upon it.

Several things were to be ascertained by the commissioners. The course of Charles river and its branches, and then a line running three miles south of the river. This was the established charter boundary of Massachusetts, to which the northern line of Rhode Island was limited by her charter, granted many years after that of Massachusetts. After all the investigation the commissioners thought necessary, they adopted the Woodward and Saffrey station, as the point which was to determine the boundary line; a point which had been fixed twenty years before the existence of Rhode Island. No misrepresentations are charged to the commissioners of Massachusetts; no interference with the inquiries which the Rhode Island commissioners might be desirous of making; and the determination of the question was made, after every opportunity for examination. If a mistake was made, which is not admitted, can relief from it be now obtained, where no fraud is imputed.

The cases in the books sustain the views of the counsel for the state of Massachusetts. If better knowledge exist in one party to an agreement than in the other, the agreement will not be disturbed. 9 Ves. 273. If parties are dealing, and both have equal opportunities of knowledge, the court will not interfere. In this case, there were no confidential relations between the parties. They were dealing adversely. 1 Ves. jr. 408. If men have agreed to a boundary between them, and it may be afterwards disturbed on the ground of mistake, the consequences would be disastrous, and fatal to the tranquil ownership of estates. Boundaries must be settled for the assurance of cultivation. The husbandman would refuse to improve his land, unless he was at rest on the subject of the lines and corners of his property. If these principles regulate the concerns of individuals, how much more necessary are they in the relations between conterminous states. This is supported by the writers on international law. Vattel says, the agreements between nations, however mistaken, are to stand. If this is not so, how *267] shall such *disputes be at any time adjusted. The books, and all history, are full of these principles.

Mr. Webster referred to the controversy between William Penn and Lord Baltimore, in support of these principles ; the settlement of the disputes as to boundaries between the states of Kentucky and Tennessee ; and to other cases. Will any one say, these adjustments, and the lines established under them, can now be disturbed on the ground of mistake ? It is said, the bill of Rhode Island charges the mistake, and the demurrer admits it ; and therefore, the whole case of the complainants is admitted. The question to be decided by the court is not whether the mistake is admitted, but what is the effect of the mistake. The mistake is immaterial, and this is submitted to the court. If the mistake could not entitle the complainant to relief, its admission would not do so. If there had been a fraud ; if the commissioners of Rhode Island had been deceived, there is no ground for relief. It is too late, at this distant period, to inquire into such a transaction.

This brings the court to the inquiry, what is the effect of lapse of time ? But it is said, the demurrer will not permit the party to avail himself of lapse of time. In order to do this, an answer must be put in. But the lapse of time is on the face of the complainant's bill ; and when this is so, it will avail the party demurring. This is a question of pleading. The court has adopted the rules and principles of the court of chancery in England ; and they will regard the decisions of the English courts of chancery on this question. It has been settled in these courts for half a century. The case of *Foster* v. *Hodgson*, 19 Ves. 180–4, determines this point : cited also, 1 Ves. & B. 535–6 ; 7 Paige 195 ; 6 Ibid. 590 ; 2 Sch. & Lef. 630 ; Story's Equity Pleading 378, 389. The defendant, the state of Massachusetts, is right, therefore, in the form of pleading ; and lapse of time, possession and acquiescence, are a complete bar against fraud. The bill states that the mistake was discovered in 1749, and no proceedings took place in this court until 1835—eighty-six years afterwards !

*268] There are two modes in which lapse of time may be taken advantage of in courts of equity. The first, where the law *expressly applies to the case. A court of equity then adopts the same rule. 2 Jac. & Walk. 191 ; 2 Story's Equity Jur. 735. Second, wherever there has been *laches*, the statute of limitations will be applied by courts of chancery. Story 735–6. In this case, both rules apply. "There has been most abundant *laches*. Why did not Rhode Island apply to the privy council—to the continental congress—to this court, established in 1789 ? This is acquiescence ; no matter what the complainants say, it is acquiescence. Such a course of aquiescence cures fraud, if any fraud had existed. 2 Story's Equity 739, note : cited also, Story's Equity Plead. 379 ; 9 Pet. 405 ; *Boon* v. *Chiles*, 10 Ibid. 177 ; 1 Story's Equity, 139, 189, 502 ; 2 Sch. & Lef. 636. The complainants assert, that lapse of time is only evidence against their title, but the demurrer of the defendant takes away the operation of the evidence. This cannot be, or there would be no demurrer for lapse of time on the face of the bill. But courts of equity adopt a higher principle. They will not assist a plaintiff to maintain a stale claim. They will save a party from the trouble of resisting such demands. It is manifest, then, that if there was mistake ; if there was fraud, no relief will be granted after such a lapse of time.

There is another and an important point for the consideration of the court in this case. The constitution gives the supreme court a right to

decide controversies between the states of the Union. This is a case in which two states having agreed to an actual and defined boundary, nearly one hundred years ago, come before the court, and the court is asked to disturb this boundary, established before the states came into the confederacy—to change the limits of the territory each possessed when she entered into it—can this court interfere in such a matter? Each of the states took her position in the Union, holding the territory now held, with the actual boundaries to their territories well known and long established. Independence was declared by the states, with these limits. The treaty of peace, in 1783, acknowledged the states as they then existed. No disturbance can be made of the territories of each state, after this mutual recognition, and after this acknowledgment by the nation, to which, before the declaration of Independence and the treaty of peace, they were subject. No *tribunal which has its existence under a constitution of government formed after these relations existed, has power to interfere between them in such a question. [*269

Taney, Ch. J., delivered the opinion of the court.—The attention of the court has on several occasions been drawn to this case, by the important questions which have arisen in different stages of the proceedings. At the last term, it came before us upon a plea in bar to the complainant's bill, which, upon the motion of the complainant, had been set down for argument. This part of the case is reported in 14 Pet. 210, where the allegations contained in the bill are so fully set out, that it is unnecessary to repeat them here. The court having overruled the plea, for the reasons stated in the report of the case, the defendant has since demurred; and in this state of the pleadings, the question is directly presented, whether the case stated by Rhode Island, in her bill, admitting it to be true, as there stated, entitles her to relief.

The character of the case, and of the parties, has made it the duty of the court to examine very carefully the different questions which, from time to time, have arisen in these proceedings. And if those which are brought up by the demurrer were new to the court, or if the judgment now to be pronounced would seriously influence the ultimate decision, we should deem it proper to hold the subject under advisement, until the next term, for the purpose of giving to it a more deliberate examination. But although the questions now before the court did not arise upon the plea, and, of course, were not then decided, yet much of the argument on that occasion turned upon principles which are involved in the case as it now stands. The facts stated in the bill were brought before us, and the grounds upon which the complainant claimed relief were necessarily discussed in the argument at the bar, and the attention of the court strongly drawn to the subject. The whole case, as presented by the bill and demurrer, has been again fully and ably argued, at the present term; and as the court has made up its opinion, and are satisfied that the delay of our judgment to the next term would not enable us to obtain more or better light upon the subject, it would be useless to postpone the decision.

*The demurrer admits the truth of the facts alleged in the bill, and it is sufficient for the purposes of this opinion, to state in a few words the material allegations contained in it. 1. It alleges that the true [*270

boundary line between Massachusetts and Rhode Island, by virtue of their charters from the English crown, is a line run east and west, three miles south of Charles river, or any or every part thereof; and sets out the charters which support, in this respect, the averments in the bill. 2. That Massachusetts holds possession to a line seven miles south of Charles river, which does not run east and west, but runs south of a west course; and that the territory betweeen this line and the true one above mentioned, belongs to Rhode Island, and that the defendant unjustly withholds it from her. 3. That Massachusetts obtained possession of this territory, under certain agreements and proceedings of commissioners appointed by the two colonies, which are set out at large in the bill; and the complainant avers, that the commissioners on the part of Rhode Island, agreed to this line, under the mistaken belief that it was only three miles south of Charles river; and that they were led into this mistake by the representations made to them by the commissioners on the part of Massachusetts, upon whose statement they relied. 4. That this agreement of the commissioners was never ratified by either of the colonies: and the bill sets out the various proceedings of the commissioners and legislatures of the two colonies, which, if not sufficient to establish the correctness of the averment, are yet not incompatible with it. 5. The bill further states, that the mistake was not discovered by Rhode Island until 1740, when she soon afterwards took measures to correct it; that she never acquiesced in the possession of Massachusetts, after the mistake was discovered, but has ever since continually resisted it; and never admitted any line as the true boundary between them, but the one called for by the charters. Various proceedings are set out, and facts stated in the bill, to show that the complainant never acquiesced; and to account for the delay in prosecuting her claim. Whether they are sufficient or not for that purpose, is not now in question. They are certainly consistent with the averment, and tend to support it.

*271] *The case, then, as made by the bill, and to be now taken as true, is substantially this: The charter boundary between these colonies was three miles south of Charles river; and the parties intending to mark a line in that place, marked it by mistake, four miles further south, encroaching so much on the territory of Rhode Island; and the complainant was led into this mistake by confiding in the representations of the commissioners of the defendant. And as soon as the error was discovered, she made claim to the true line, and has ever since contended for it. We speak of the case, as it appears upon the pleadings. It may prove to be a very different one, hereafter, when the evidence on both sides is produced. But taking it as it now stands, if it were a dispute between two individuals, in relation to one of the ordinary subjects of private contract; and there had been no *laches* to deprive the party of his title to relief; would a court of equity compel him to abide by a contract entered into under such circumstances?

It is one of the most familiar duties of the chancery court, to relieve against mistake, especially, when it has been produced by the representations of the adverse party. In this case, the fact mistaken was the very foundation of the agreement. There was no intention on either side to transfer territory, nor any consideration given by the one to the other to obtain it. Nor was there any dispute arising out of conflicting grants of the crown, or upon the construction of their charters, which they proposed to

settle by compromise. Each party agreed, that the boundary was three miles south of Charles river; and the only object was, to ascertain and mark that point; and upon the case, as it comes before us, the complainant avers, and the defendant admits, that the place marked, was seven miles south of the river, instead of three, and was fixed on by mistake; and that the commissioners of Rhode Island were led into the error, by confiding in the representations of the Massachusetts commissioners. Now, if this mistake had been discovered a few days after the agreements were made, and Rhode Island had immediately gone before a tribunal, having competent jurisdiction, upon principles of equity, to relieve against a mistake committed by such parties, can there be any doubt, that the agreement would have been set aside, and Rhode Island restored to the true charter line? We think not. Agreements thus obtained *cannot deprive the complainant of territory which belonged to her before; unless she has forfeited her title [*272
to relief, by acquiescence or unreasonable delay.

But it has been argued, on the part of the defendant, that assuming the agreement to have been made by mistake, and that the complainant would have been entitled to set it aside, if she had prosecuted her claim within a reasonable time; yet, as Massachusetts entered into the disputed territory, immediately after the agreement, and has held it ever since, the complainant is too late in seeking relief; that after such a lapse of time, she is barred by prescription, or must be presumed to have acquiesced in the boundary agreed upon; and that if she did not acquiesce, she has been guilty of such *laches* and negligence in prosecuting her claim, that she is no longer entitled to the countenance of a court of chancery. The answer to this argument is a very plain one. The complaint avers, that she never acquiesced in the boundary claimed by the defendant, but has continually resisted it, since she discovered the mistake; and that she has been prevented from prosecuting her claim, at an earlier day, by the circumstance mentioned in her bill. These averments and allegations, in the present state of the pleadings, must be taken as true; and it is not necessary to decide now, whether they are sufficient to excuse the delay. But when it is admitted by the demurrer, that she never acquiesced, and has, from time to time, made efforts to regain the territory, by negotiations with Massachusetts, and was prevented, by the circumstances she mentions, from appealing to the proper tribunal to grant her redress; we cannot undertake to say, that the possession of Massachusetts has been such as to give her a title by prescription; or that the *laches* and negligence of Rhode Island have been such as to forfeit her right to the interposition of a court of equity.

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a court of equity. And when the fact appears on the face of the bill, and no circumstances are stated, which take the case out of the operation of the act; the defendant may undoubtedly take advantage of it by demurrer, and is not bound to plead or answer. The time necessary to operate as a bar in equity, is *fixed at twenty years, by analogy to the statute of limitations; and [*273
the rule is stated in Story Equity Plead. 389, and is supported and illustrated by many authorities cited in the notes. It was recognised in this court in the case of *Elmendorf* v. *Taylor*, 10 Wheat. 168–75. But it would be impossible, with any semblance of justice, to adopt such a rule

of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; the boundary in question was in a wild unsettled country, and the error not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve, after the mistake was discovered, was on the other side of the Atlantic, and not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident, that a possession so obtained and held by Massachusetts, under such circumstances, cannot give a title by perscription. The demurrer, therefore, must be overruled.

But the question upon the agreements, as well as that upon the lapse of time, may assume a very different aspect, if the defendant answers and denies the mistake; and relies upon the lapse of time as evidence of aquiescence, or of such negligence and *laches* as will deprive the party of his right to the aid of a court of equity. It will then be open to him to show that there was no mistake; that the line agreed on is the true charter line; or that such must be presumed to have been the construction given to the charters by the commissioners of both colonies; or that the agreement was the compromise of a disputed boundary, upon which each party must be supposed to have had equal means of knowledge. So too, in relation to the facts stated in the bill to account for the delay. It will be in the power of the complainant to show, if she can, that her long-continued ignorance of an error (which, if it be one, was palpable and open), was occasioned by the wild and unsettled state of the country; and that the subsequent delay was produced by circumstances sufficiently cogent to justify it, upon principles
*274] of justice and equity; or was assented to by *Massachusetts, or occasioned by her conduct. And on the other hand, it will be the right of the defendant to show, if she can, that Rhode Island could not have been ignorant of the true position of this line until 1740; or, if she remained in ignorance until that time, that it must have arisen from such negligence and inattention to her rights, as would render it inexcusable; and should be treated, therefore, as if it had been acquiescence with knowledge; or she may show that, after the mistake is admitted to have been discovered, Rhode Island was guilty of *laches* in not prosecuting her rights in the proper *forum*, and that the excuses offered for the delay are altogether unfounded or insufficient; and that Massachusetts never assented to it, nor occasioned it.

We state these questions as points that will remain open upon the final hearing, for the purpose of showing that the real merits of the controversy could not have been finally disposed of upon the present pleadings; but without meaning to say, that other questions may not be made by the parties, if they shall suppose them to arise upon the proceeding hereafter to be had. The points above suggested, which are excluded by the case as it now stands, make it evident, that this controversy ought to be more fully before the court, upon the answer, and the proofs to be offered on both sides, before it is finally disposed of. The court will, therefore, order and decree that the demurrer be overruled; and that the defendant answer the complainant's bill, on or before the first day of August next.

O'Hara v. United States.

THIS cause came on to be heard, on the amended bill and demurrer, and was argued by counsel: On consideration whereof, it is now here ordered by this court, that the said demurrer be and the same is hereby overruled; and it is also now further here ordered by this court, that the defendant answer the bill of complaint, as amended, on or before the first day of August next.

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*OLIVER O'HARA and others, Appellants, *v.* UNITED STATES, [*275
Appellees.

Florida land-titles.

A claim for land in East Florida, granted by Governor White, to Daniel O'Hara, rejected by the superior court of East Florida, and the decree of that court affirmed.

Governor White, on the petition of Daniel O'Hara, soliciting a grant of 15,000 acres made a decree, granting "the lands solicited" "at the place indicated," "in conformity with the number of workers which he may have to cultivate them, the corresponding number of acres may be surveyed to him," "and that he will take possession of said land, in six months from the date of the grant:" *Held*, that this was a decree not granting 15,000 acres as asked for; but so much, at the place where it is asked for, as shall be surveyed in conformity with the number of workers the grantee may have to cultivate the land; the quantity could be determined by the regulation of the governor, made the month after the grant, and determining the quantity of land to be surveyed, according to the number of persons in the family of the grantee, slaves included. That the grant was made before the date of the regulation, makes no difference.

No settlement was made on the lands claimed under the grant; the building of a house on the land, was but evidence of an intention to make a settlement, but was not a settlement, which required the removal of persons or workers to the land, and cultivating it.

No claim for the land can be sustained under a grant, or confirmation of a prior grant, made by a decree of Governor Coppinger, in 1819, as the same was substantially a violation of the treaty with Spain, which confirms only grants made before the 24th January 1819. The prior grant to O'Hara having become void, by the non-performance of the conditions annexed to it, the decree of Governor Coppinger, in 1818, was an attempt to make a new grant.

If the grant were not void from the non-performance of the conditions of settlement annexed to it, the omission to have the land surveyed and returned to the proper office, would make it void, unless the grantee had made a settlement; in which event, a survey would be presumed. The grant was made in the "district of Nassau," &c.; this was an indefinite description of the land, as was held in Buyck *v.* United States (*ante*, p. 215).

APPEAL from the Superior Court of East Florida. In the superior court of East Florida, Oliver O'Hara, for himself and for the other heirs of Daniel O'Hara, presented a petition, praying for the confirmation of a grant of 15,000 acres of land, made by Henry White, then the Spanish *governor of East Florida, on the 5th of September 1803, to Daniel [*276
O'Hara, the father of the petitioners; which was alleged to have been confirmed on the 3d of September 1818, by the Spanish governor, Coppinger. The grant, and the proceedings on the same, are fully stated in the opinion of the court.

Downing appeared as counsel for the appellants.

Gilpin, for the United States, contended:—The evidence of this grant is a certificate of Tomas de Aguilar, in the form of that commented upon in the case of the *United States* v. *Wiggins*, 14 Pet. 345. If this document be regarded as sufficient to establish the fact, that such a concession was actually made by Governor White; still there is no proof either of possession

or survey, or citizenship of the claimant; all of which were necessary to perfect a grant in Florida, to any quantity of land whatever.

The memorial of the claimant to Governor White is dated the 3d September 1803. He says, that he has but lately become an inhabitant of the province, and that he "intends to settle" there. Two days afterwards, he receives this grant, and on the same day, leaves the province, to which, so far as the record shows, he never returned. Early in June 1804, nine months subsequent to the concession, an agent, at St. Augustine, writes to him, as the record shows, urging him to "take possession of his lands," which he had not then done. On the 20th of June, in the same year, we have the decree of the district court of the United States at Savannah, in an admiralty proceeding, where the claimant is a party. This shows, that the brig Chance, being bound on a regular voyage from Jamaica to South Carolina, with some negroes on board, had been captured by a French privateer, and re-captured by a British cruiser, and subsequently ransomed by the claimant. It is alleged, that these negroes were the property of the claimant, who intended to place them on the tract lately granted to him in Florida; but no evidence of such intention is given; and if it existed, it never was carried into effect, although the decree of the court of admiralty was in his favor. A witness, Francis Marien, was produced, to prove, that soon after the grant, the claimant attempted a settlement; but it *277] *appears from his cross-examination, that he knew only, "from general information, that lands were grauted to the claimant in East Florida; that the claimant informed him, he had engaged a carpenter; and that the carpenter told him he was employed for the purpose of building a house;" there is no evidence whatever of such a house being commenced or built. From this time, until August 1821, after the actual cession of the Floridas, there is no evidence of an attempt by the claimant at settlement and possession; in a letter then written to him from St. Augustine, it is said, that "endeavors will be used to put a family on his lands at Nassau, to begin a settlement and take possession, which is very necessary should be done." That it was done, then or subsequently, is neither asserted nor proved. It is clear, therefore, that at no time did the claimant occupy or settle on the land alleged to be granted to him.

Nor was it ever surveyed, so as to perfect the grant. The survey, by the authorized public surveyor, was an essential requisite to every grant under the Spanish land laws. 2 White's New Rec. 230, 238, 278. The order of survey accompanied or shortly followed the concession. None such is produced with this grant. Parol testimony, taken after this suit began, was introduced, to establish, if possible, a survey in 1811; but the survey, if made, is not produced, nor is there any evidence that it was so made by the direction of any competent authority. In March 1819, after the date of the treaty ceding the Floridas to the United States, a survey was made. It is that now relied on by the claimant. It was not only made without any authority, but when an order for a survey was solicited from Governor Coppinger, it was refused. Had the order been then granted, the survey would have been illegal, as was ruled by this court, in the case of the *United States* v. *Clarke*, 8 Pet. 468; but so far from being granted, it was explicitly refused.

Spanish citizenship was an indispensable requisite to the validity of a

grant. The oath of allegiance was required as a primary condition. 2 White's New Rec. 232, 277. In a despatch of Governor White to the Marquis of Someruelos (2 White's New Rec. 258, 582), he comments, in strong language, on the course pursued by persons who came into the province, hastily took the oath of allegiance, and immediately left it. He declares *such a proceeding to be an abandonment of the land granted to them. The [*278 evidence in this case shows such a proceeding on the part of the claimant. In the admiralty suit at Savannah, he declared himself to be, in June 1804, a citizen of the United States. He always resided there; never in Florida. Was not this clearly an abandonment of any privileges he might have obtained by a short and temporary residence in Florida in 1803?

But if the grant had been perfected by survey and possession, what was its character? The claimant urges, that it was a grant to him of 15,000 acres of land, and he asks to be confirmed in such a grant. But what says the concession of Governor White, on which he relies? It permits him to occupy lands, at the place indicated, "until the time when, in conformity to the number of workmen whom he may have to cultivate them, the corresponding number of acres may be surveyed to him;" and it requires, that he shall "take possession of the said land, within the term of six months from the date" of the concession. The grant was thus conditional, altogether, on the fact of possession within six months; the evidence is clear, that there was no possession whatever, at any time. But had he taken possession, the quantity granted still remained conditional; it depended on the number of workers, according to the regulations which were freely discussed and passed upon by this court, in the case of the *United States* v. *Wiggins*, 14 Pet. 341, 351. Where there were no workers, there could not be "a corresponding number of acres surveyed" to the grantee. By his failure to introduce them, he abandoned his grant; it became "of no value or effect, and should be considered as not made." 2 White's New Rec. 284.

The argument, that it was revived by Governor Coppinger, in 1819, cannot be maintained. If it had been so revived, it would be subject to the original terms of settlement and cultivation by a proportionate number of workers, which have never been complied with to this day. But it was not so revived, and could not be. When the claimant applied to Governor Coppinger for an order of survey, under the original grant, the indorsement of the Governor was, "not admitted." Had it been admitted, it would have been a violation of the eighth article of the treaty (8 U. S. Stat. 258; 2 White's New Rec. 210), which declared all grants made since the 24th January 1818, void; for *such an act of Governor Coppinger would [*279 have been clearly a new grant, subsequent to that day, the former one, of 1803, having become totally void by the conduct of the grantee himself.

Wayne, Justice, delivered the opinion of the court.—Appeal from the superior court of East Florida. The appellants are the heirs of Daniel O'Hara, and they claim the land in controversy, in virtue of a alleged grant, dated the 5th of September 1803. The grant was adjudged in the court below, not valid.

The memorial for the grant; order of Governor White, to the command-

ant of engineers, to report upon it; the report of that officer; and the decree of the governor; are as follows:

His Excellency, the Governor: Don Daniel O'Hara, lately admitted an inhabitant of this province, under the protection of his Catholic Majesty, with due respect, represents to your excellency, that intending to settle in this province, with a considerable property and his large family, after having ascertained that all, or the greatest number of all those who had petitioned for lands, have solicited to have them located in the southern district, in the vicinity of Musquito river, and after having consulted many neighbors in reference to vacant lands, as he has no wish to enter into disagreeable litigation with other petitioners, or to injury them in any way, he begs of your excellency, be pleased to grant him 15,000 acres of land out of those lands which are vacant between the rivers St. John and St. Marys, in the place called Nassau, and in case the said vacant lands do not comprehend the number of acres he solicits, he begs your excellency to have the goodness, when the survey will take place, to grant him the deficiency on the river St. Marys, and he obligates himself to take possession of the said lands, within the term of six months; which favor, he doubts not, he will receive from the noble munificence of your excellency. DANIEL O'HARA.

St. Augustine of Florida, 3d of September 1803.

*280] *DECREE. St. Augustine, 3d September 1803. Let the commandant-engineer inform on the subject. WHITE.

Having taken cognisance of the petition, and in obedience to the preceding decree, I represent to your excellency, that the culture of the lands solicited by the petitioner does not interfere with the defence of the province, therefore, as far as the department of fortifications is concerned, your excellency may grant to him the number of acres you see fit. This is all I have to represent to your excellency, who will determine according to your pleasure. NICOLAS BARCELO.

St. Augustine of Florida, 5th September 1803.

DECREE. St. Augustine of Florida, 5th September, 1803. The lands solicited by the petitioner are hereby granted to him in the place indicated, without prejudice to a third party, and until the time when, in conformity to the number of workers whom he may have to cultivate them, the corresponding number of acres may be surveyed to him; it being well understood, that he shall not claim indemnity for damages or losses in the case; that under the apprehension of an invasion, or other motives relating to the royal service, he be ordered to retire in the interior of the province; and that he will take possession of the said land within the term of six months from this date. WHITE.

It will be perceived, that the memorialist asks for 15,000 acres, as it is his intention, with his vast property and numerous family, to settle in the province. He asks for it at the place called Nassau, and if it cannot be found vacant there, when the survey is made, that the deficiency may be granted on the river St. Marys; and he obliges himself to take possession within six months. The decree of the governor is, the lands "solicited by the petitioner, are hereby granted to him in the place indicated;" "in con-

formity to the number of workers which he may have to cultivate them, the corresponding number of acres may be surveyed to him;" "and that he will take possession of said land within the term of six months from this date."

*It is a decree, then, not granting 15,000 acres as asked for, but so much in the place where it is asked for, as shall be surveyed, in conformity to the number of workers he may have to cultivate the land; and as to what that quantity should be, there is no uncertainty, for we have the regulation of Governor White, promulgated by him, the month after the date of the decree; which states, to each head of a family of a new settler, there shall be granted fifty acres of land, and an equal quantity to a single person, widow or widower, and to the children or slaves of sixteen years of age, twenty-five acres each. This regulation, then, determines, in that respect, what the governor intended to grant; and the conclusion that the grant was to be in conformity with the regulation, cannot be shaken, by the suggestion that the decree was made before the date of the regulation, as it might be, if the grant had been for 15,000 acres in terms. There is no grant for any quantity; when it is found, that the decree is restrained to a right to be determined by the number of workers which the memorialist shall have, that the governor had the power to make a grant with such a restriction, and that so shortly after the decree was made, as the following month, he promulgated a general rule for grants to new settlers; the inference is good, until it is contradicted by some other fact, or other regulation applying to new settlers, that the memorialist was to take under the decree in his favor, as contemporary new settlers would have to take. The memorialist never made a settlement. The witness, Marien, says, he did attempt a settlement; that a house was built; and that O'Hara informed him he had employed a carpenter to build it; but the memorialist never took his family or negroes to the land. The construction of a house was no compliance with the condition of the grant. That act itself could not, under the regulation, give a right to any number of acres. The right rested upon the persons, black and white, who might be carried to make a settlement. The house is good evidence of an intention to settle with persons; but if the evidence discloses the fact, that no persons or workers were ever taken to it; that cultivation was not begun; the inference is made the stronger, that the rights of the memorialist under the decree were abandoned. [*281

The record discloses an attempt by the memorialist, immediately *after the decree of the governor, to get negroes from Jamaica for a settlement; and that the vessel in which they were embarked, was taken into Savannah and libelled in admiralty; but the proceedings in admiralty do not show that the memorialist was deprived, ultimately, of the negroes; and if he was not, and the negroes were restored, no cause is shown why they were not taken to Florida. But if they were not restored, it will scarcely be contended, that an unfortunate attempt to carry negroes to take possession of the land, fulfils the intention of a grant, the quantity of which is to depend upon the number of workers actually employed in cultivation. [*282

But there was not only a failure to settle in this case, there was an actual abandonment. We hear nothing of the memorialist, or of any attempt to settle the land, from the spring of 1804 until 1819. There never was a sur-

vey of any land, by authority, though one is alluded to, until March 1819; and that was made without the order of the Spanish authorities in Florida. Indeed, it was done against authority; for we find from the testimony in the cause, that O'Hara petitioned Governor Coppinger, on the 20th April 1819, within a few months of sixteen years after Governor White's decree had been given upon his memorial, for an order of survey upon the decree, and that it was refused. We have, then, in this fact, a denial of the memorialist's right to the land, by a governor of Florida. There can be no doubt, it was looked upon by Governor Coppinger as abandoned; and that the right to the same was lost, under the 9th article of Governor White's regulations, already spoken of, as contemporary with the decree upon the memorial of O'Hara. 2 White's New Rec. 278. It is not necessary for us to speak of a subsequent attempt, by O'Hara, to introduce negroes into Florida, in 1819, and its failure. His right to the land originally asked for, had ceased; he could make no claim under the decree of September 1803: and a revival of the old grant by the Spanish authorities would have been substantially a violation of the treaty with Spain, which only confirms grants made before the 24th January 1818. With this view of the case, we think the decree of the court below should be affirmed.

But if the right of the appellants had not been lost by their neglect to
*283] settle the land with workers, we should say, the grant *itself was too indefinite to convey any land, unless a survey had been made, and had been recognised by the Spanish authorities; or unless the grantee had settled and occupied land under that decree, in which event, a survey might be presumed. The memorialist asks for lands in the place called Nassau; and in the event of the whole quantity not being got there, for the deficiency to be made up on the river St. Marys. Such a place as the place called Nassau, is not known, unless is meant by it all the land between Nassau river and the St. Johns and St. Marys. It is equidistant, or nearly so, from those rivers, and wends its way to the Atlantic, in a course of fifty or sixty miles. If the land is to be taken on the Nassau, where shall a survey be begun, and on what part of the St. Marys shall the deficiency in quantity be taken, supposing that a part can be found in the "place called Nassau." The St. Marys is known as the boundary between Florida and Georgia; and that its head, or source, is on the Oquafanoche swamp. It is navigable for a hundred miles from its mouth to the Atlantic, between Cumberland and Amelia islands. Where, then, shall a survey begin in this range, under this decree? It is no answer to say, the decree is for vacant land; and if there is vacant land there now, a survey could be made; for the place where the survey is to be made, must first be made certain, if not as to fixed boundaries, at least so certain, by evidence of general or popular apprehension, as to show what was the grantor's notion of the limits of country within which he intended to grant. Unless, then, a survey can be made of the original grant, in the place called Nassau, the alternative for any deficiency on the St. Marys river cannot be shown; which alone would entitle the memorialist to land there. This grant is, therefore, void, on account of uncertainty. It is not made, as the court said, in the case of *Buyck* v. *United States* (*ante*, p. 215), in such a way as to distinguish it from things of a like kind; nor has the identity of the grant been shown by extraneous evidence. The decree of the court is affirmed. Decree affirmed.

*William M. Gwin, Marshal of the Southern District of Mississippi, Plaintiff in error, *v.* James H. Breedlove, Defendant in error.

Practice.

A case, on a writ of error to the southern district of Mississippi, was docketed and dismissed on the 9th of February, of the present term, upon motion of the defendant in error, under the 43d rule of the court; and on the 11th of February, a mandate, on a like motion, was ordered to issue to the circuit court, to proceed in the case; which was issued on the next day; on the 6th of March, the plaintiff in error appeared in court by his counsel, and produced and filed with the clerk the record of the case, and moved to strike off the judgment of dismissal, and to continue the case. The judgment of dismissal under the rule, is a judgment *nisi*; and it may be stricken out at any time during the court, upon motion; unless it appears that the omission to file the record and docket the case, at an earlier period of the court, has been injurious to the interests of the defendant in error; the motion to reinstate addresses itself to the sound discretion of the court; and care will always be taken, in granting the rule, that no injustice is done to the opposite party. The motion was granted.

Had the record in this case been filed at the time of the motion to dismiss, it is now evident, from the state of the business of the term, that the case could not have been reached and disposed of during the present session of the court. Owings *v.* Tiernan, 10 Pet. 14, cited.

Error to the Circuit Court for the Southern District of Mississippi.

Walker, for the plaintiff in error, stated, that he had a transcript of the record in this case, duly authenticated, which he was ready to file, and to docket the case, under the rules of the court; and he moved the court to set aside and annul the judgment of the court, docketing and dismissing the writ of error rendered on a prior day of this term, and also to revoke the mandate of this court, issued and addressed to the judges of the circuit court of the southern district of Mississippi, in this cause.

The motion was opposed by *Key*, for the defendant in error.

*Taney, Ch. J., delivered the opinion of the court.—This case [*285 was docketed and dismissed on the 9th of February, of the present term, upon the motion of the defendant in error, under the 43d rule of the court; and upon the 11th of the same month, upon a like motion, a mandate was ordered to issue to the circuit court to proceed in the case, which was accordingly issued on the next day. On the 6th of March, the plaintiff in error appeared in court, by his counsel, and produced and filed with the clerk the record of the case, and moved the court to strike out the judgment of dismissal, and to continue the case.

The judgment of dismissal, under the rule above mentioned, is a judgment *nisi*; and it may be stricken out, at any time during the term, upon motion, unless it appears that the omission to file the record, and docket the case, at an earlier period of the court, has been injurious to the interests of the defendant in error. The motion to reinstate addresses itself to the sound discretion of the court; and care will always be taken, in granting the rule, that no injustice is done to the opposite party. In the case of *Owings* v. *Tiernan's Lessee*, 10 Pet. 24, the motion to dismiss, and the motion by the plaintiff in error, to docket the case, were contemporaneous; and the court said, that the motion of the plaintiff ought to be allowed; although in that case it appeared, that the writ of error had been sued out to the preceding term of this court. According to this decision, the motion

of the plaintiff in error must have prevailed, if it had been contemporaneous with that of the defendant; and the delay since does not appear to have operated injuriously to him, nor to have retarded, in any degree, the ultimate decision of the case. For if the record had been filed at the time of the motion to dismiss, it is now evident, from the state of the term, that the case could not have been reached and disposed of, during the present session of the court. The court, therefore, will order it to be reinstated on the docket and continued, and the mandate, which was improvidently issued, to be recalled.

On consideration of the motion, and of the arguments of counsel thereupon had, as well against, as in support of, said motion, it is now here ordered and adjudged by this court, that the judgment of this court, docketing and dismissing, with costs, the writ *of error in the above-entitled cause, on Tuesday, the 9th day of February last, of the present term of this court, be and the same is hereby declared utterly null and void; and that the mandate of this court, directed to the judges of the said circuit court in this cause, be and the same is hereby revoked; and it is also now here further ordered, that the clerk of this court do forthwith send to the judges of the circuit court of the United States for the southern district of Mississippi, a copy of this order of court, under seal of this court.

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*287] *Jane Young and others, Legatees of John Parks, deceased, Appellants, *v.* Edward L. Smith and Henry N. Allen, Executors of the last will and testament of John Parks, deceased.

Appeal.—Final decree.

A bill was filed by residuary legatees, claiming to receive from the executors their respective proportions of the estate of the testator; on a reference to a master to take an account, the master reported $1795.27 to be in the hands of the executors, which sum was paid by them into court. The report was referred back to the master, who made his final report, by which he found a further sum in the hands of the executors, exclusive of sundry uncollected debts, then outstanding, some bad, and some good; exceptions were filed to this report, which were disallowed by the court. The circuit court decreed, that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors; and as to the residue of the debts due the estate, as soon as the same, or part of them should be collected, the amount should be paid into court for distribution, to be made under the direction of the court: *Held*, that this was an interlocutory, and not a final decree, in the sense of the act of congress; and an appeal from the same could not be taken.[1]

Appeal from the Circuit Court for the Southern District of Alabama. This case was before the court, on a motion to dismiss the appeal; the decree of the circuit court of Alabama, being, as was contended by *Sergeant*, for the appellees, an interlocutory, and not a final decree. *Key* opposed the motion.

Story, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of the southern district of Alabama, in a suit in equity; and the only question now submitted for our consider-

[1] See note to Lea *v.* Kelly, *ante*, p. 213.

ation is, whether the decree in the case is a final decree, in the sense of the acts of congress of the 24th of September 1789, ch. 20, § 22 ; and the act of 3d of March 1803, ch. 93 ; from which an appeal lies to this court.

The original bill was brought by the plaintiffs (now appellants) *against the appellees, as executors of John Parks, to recover their respective proportions, as residuary legatees, of the personal estate [*288 of the testator, under his will, and for an account and due administration of the assets. Upon the coming in of the answer, it was referred to a master to take an account ; the master afterwards made a report, to which exceptions were filed ; and it was thereupon ordered by the court, that the sum of $7795.27, admitted to be in the hands of the executors, be paid into court, subject to the order of the court, which was accordingly paid ; and the report was, thereupon, referred back to the master : and after several intermediate proceedings and reports, the master made his final report on the 2d of March 1840, by which he found a balance then in the hands of the executors, of $11,355.23, inclusive of the said sum of $7795.27, and exclusive of sundry uncollected debts, then outstanding, some of which were good, some doubtful, and some bad. To this report, the plaintiffs filed certain exceptions, on the 27th of the same month ; which exceptions were disallowed by the court as not having been taken before the master, or filed in the proper time. And thereupon, the court proceeded to decree that the report be accepted, that the plaintiffs should have execution for the said sum of $11,355.23 ; and "that as to the residue of the debts due to the estate of John Parks, deceased, and not collected, it is ordered and adjudged by the court, that as soon as the said executors shall succeed in the collection of the same, or any part thereof, that they do pay the amount into court for distribution, to be made under the direction of this court." The plaintiffs having received the said sum of $7795.27, acknowledged the receipt thereof ; which was to be credited on the decree as a payment made on the 18th of November 1838 : to the above decree, the appeal is taken.

We are of opinion, that the decree is an interlocutory and not a final decree, in the sense of the act of congress. It is plain, that it does not dispose of the whole matter in controversy between the *parties. And [*289 if an appeal could now lie upon the decree already rendered, an appeal could also lie, from time to time, from any future decree of distribution of any assets which may be collected after the former decree, *toties quoties ;* without any final decision being made of all the matters in controversy. In our judgment, this would be against the clear import and intention of the acts of congress ; which were designed to give an appeal only from a decree final upon the whole matters and merits of the controversy. The consequence is, that the appeal must be dismissed, 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 southern district of Alabama, and was argued by counsel : On consideration whereof, it is the opinion of this court, that the decree in this case is an interlocutory and not a final decree, in the sense of the act of congress ; whereupon, it is now here ordered and decreed, that this appeal be and the same is hereby dismissed, with costs, and that this cause be and the same is hereby remanded to the said circuit court, to be proceeded in according to law and justice.

*United States, Plaintiffs in error, *v.* William Linn and others, Defendants in error.

Bonds of public officers.—Sealed instrument.

The United States instituted an action of debt against the defendant, William Linn, and his sureties, to recover a sum of money in the hands of Linn, he having been appointed a receiver of public moneys at the land-office of the district of Vandalia, on the 12th of February 1835. The first count in the declaration stated, that the defendants had executed, on the 1st of August 1836, a "writing obligatory, sealed with their seals," to the United States, in the sum of $100,000, for the faithful performance of the duties of his office by Linn; and that certain sums of money had come into the hands of Linn, as receiver, which he had failed to account for and pay over to the United States; the second count stated the execution of "an instrument of writing," to the United States, by the defendants, signed by them, by which they promised to pay $100,000 to the United States, which was to be void and of no effect in case Linn faithfully executed the duties of the office of receiver of public moneys; and alleged that Linn had received a large sum of money belonging to the United States, which he had failed to pay over or account for to the United States. The judges of the circuit court of Illinois were divided in opinion, and the division was certified to the supreme court, upon two questions: 1. Whether the obligation of the defendants, being without seal, was a bond within the act of congress? 2. Whether such an instrument was good at common law? *Held*, 1. That the obligation, being without seal, was not a bond within the act of congress. 2. That such an instrument was good at common law.

If the contract, signed by the defendants, was entered into for a lawful purpose, not prohibited by law, and was founded on a sufficient consideration, it is a valid contract at common law. United States *v.* Tingey, 5 Pet. 115, cited.

From the decision of this court, in the case of United States *v.* Tingey, it follows, that a voluntary contract, or security, taken by the United States, for a lawful purpose, and upon a good consideration, although not prescribed by any law, is not entirely void. United States *v.* Bradley, 10 Pet. 364, cited.

Linn had been appointed receiver of public moneys, before the execution of the instrument declared upon, and was entitled to the emoluments of the office; this was a sufficient consideration, appearing on the face of the instrument, to support the promise. A benefit to the promisors, or a damage to the promisee, constitutes a good consideration; a consideration to the principal, is sufficient to bind the sureties.

The mere appointment of Linn as receiver of public moneys, was not the consideration of the contract; but the emoluments and benefits resulting from the appointment formed the consideration; it was a continuing consideration, running with his continuance in office, and existed in full force at the time the instrument was signed.

The act of congress under which this instrument was taken, directs that a receiver of public
*291] moneys shall, before he enters on the duties of his office, give bond, with *approved sureties, for the faithful discharge of the duties of his trust. This statute does not profess to give the precise form of the bond; it is only a general direction to give a bond for the faithful discharge of the trust; there are no negative words in the act, nor anything, by implication or otherwise, to make void a security taken in any other form; nor is there anything in reason or sound principle, that should lead to such a conclusion.[1]

The actual difference between an instrument under seal, and one not under seal is, that in the one case, the seal imports a consideration, and in the other, it must be proved. There ought to be some very strong grounds to authorize a court to declare a contract absolutely void, which has been voluntarily made, upon a good consideration, and delivered to the party for whose benefit it was intended.

Certificate of Division from the Circuit Court of Illinois. William Linn, one of the defendants, was appointed, on the 12th of February 1835, a receiver of public moneys at the land-office, in the district of Vandalia, which was established by the act of congress of the 11th May 1820. (3 U. S. Stat. 571.) By that act, he was to "give security in the same manner,

[1] See United States *v.* Hodson, 10 Wall. 395.

in the same sums, and his compensation, emoluments, duties and authorities were to be in every respect the same, as were or might be by law provided in relation to the registers and receivers of public moneys, in the several land-offices established for the sale of the public lands."

These provisions were stated more particularly in the act of 10th May 1800 (2 U. S. Stat. 73), which directed that a "receiver of public moneys should give bond, with approved security in the sum of $10,000, for the faithful discharge of his trust." At June term 1838, the United States brought this suit against the defendant, William Linn and the other defendants.

In the first count of that declaration, the United States, as plaintiffs, set out the execution by the defendants, on the 1st of August 1836, of a certain writing obligatory, sealed with their seals, and to the court shown, the date whereof was the same day and year aforesaid, by the names, contractions, abbreviations, and descriptions of "William Linn, D. B. Waterman, Lemuel Lee, J. W. Duncan, Wm. Walters, Asabel Lee, Wm. L. D. Ewing, A. P. Field and Joseph Duncan," by which they acknowledged themselves to be held and firmly bound unto the *said plaintiffs, in the full and just sum of $100,000, to be paid to the said plaintiffs, when they, [*292 the said defendants, should be thereunto afterwards requested; and the said plaintiffs, according to the statute in such case made and provided, averred, that the said writing obligatory was subject to a certain condition thereunder written, whereby, after reciting to the effect following, that is to say: That the president of the United States had, pursuant to law, appointed the said William Linn, receiver of public moneys, for the district of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years, from the 12th day of January 1835, by commission bearing date 12th February 1835, it was provided, that if the said William Linn should faithfully execute and discharge the duties of his office, meaning the office of receiver as aforesaid, then the said obligation was to be void and of none effect, otherwise, it should abide and remain in full force and virtue. Nevertheless, the said plaintiffs, in fact said, that after the making of the said writing obligatory, and after the appointment of the said William Linn to be receiver of public moneys as aforesaid, to wit, on the 22d day of November, in the year of our Lord 1837, at Vandalia aforesaid, he, the said William Linn, did not faithfully execute and discharge the duties of his said office, in this, to wit: That there came into and was then and there in the hands of him the said William Linn, as receiver of public moneys as aforesaid, while he was receiver as aforesaid, and within four years from the said 12th day of January, in the year last aforesaid, a large sum of money belonging to the said plaintiffs, received by him, the said William Linn, as receiver as aforesaid, and in virtue of his said office, for lands sold by the said plaintiffs, of the public lands subject to sale at Vandalia aforesaid, to wit, the sum of $4,000,000, which money it was the duty of the said William Linn, as such receiver as aforesaid, to pay to and account for, to the said plaintiffs, when requested so to do. Yet the said William Linn did not nor would he pay to, or account for, to the said plaintiffs, the said last-mentioned sum of money belonging to the said plaintiffs as aforesaid, and which came into and was *in the hands of him, the said William Linn, as receiver of public moneys as aforesaid, or any part thereof, although [*293

often requested so to do; but he, the said William Linn, hitherto wholly refused to pay to the said plaintiffs the said last-mentioned sum of money, or any part thereof, to the great damage of the said plaintiffs.

In the second count of their declaration, the United States, as plaintiffs, set out the execution by the defendants, on the 1st of April 1836, of a certain "instrument in writing, bearing date the same day and year first aforesaid, and that they, then and there, delivered the said instrument in writing to the said plaintiffs, and therein and thereby, reciting that the president of the United States had, pursuant to law, appointed the said William Linn to be receiver of public moneys, for the district of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th day of January, in the year our Lord 1835, by commission bearing date of the 12th of February, in the year last aforesaid, the said defendants did, then and there, in and by said instrument in writing by the names, contractions, abbreviations and descriptions of "Wm. Linn, D. B. Waterman, Lemuel Lee, J. W. Duncan, Wm. Walters, Asabel Lee, Wm. L. D. Ewing, A. P. Field and Joseph Duncan," acknowledge themselves to be held and firmly bound unto the said plaintiffs in the sum, and promised to pay unto the said plaintiffs the sum, of $100,000 of money of the United States, to which payment well and truly to be made, they, the said defendants, bound themselves, jointly and severally, their joint and several heirs, executors and administrators, by the said instrument in writing; which said instrument in writing, was, however, to be void and of none effect, in case and upon the condition that the said William Linn should faithfully execute and discharge the duties of his office, meaning the said office of receiver of public moneys as aforesaid, otherwise, the said instrument in writing, should abide and remain in full force and virtue; and the said plaintiffs in fact said, that after the making and delivery of the said instrument in writing, and after the appointment of him, the said William Linn, to be receiver of public moneys as
*294] aforesaid, he, the said William Linn, did not faithfully execute *and discharge, and hath not faithfully executed and discharged the duties of his said office as aforesaid: they then set forth the breach of the contract, to the same effect as in the preceding count.

In the third count of their declaration, the United States, as plaintiffs, set out the execution by the defendants of a certain "other instrument of writing, bearing date the same day and year first aforesaid, their own proper hands being thereunto subscribed," and that they then and there delivered the same instrument in writing to the said plaintiffs, and thereby, by the names, contractions, abbreviations and descriptions of "Wm. Linn, D. B. Waterman, Lemuel Lee, J. W. Duncan, Wm. Walters, Asabel Lee, Wm. L. D. Ewing, A. P. Field and Joseph Duncan," reciting in said instrument, that the president of the United States had, pursuant to law, appointed the said William Linn to be receiver of public moneys for the district of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th day of January 1835, by commission bearing date the 12th day of February, in the year last aforesaid, did acknowledge themselves to be held and firmly bound unto the said plaintiffs, in the full and just sum of $100,000 of money of the United States, which said sum of money, they, the said defendants, bound themselves, their joint and several heirs, executors and administrators, jointly and severally, by said instrument

in writing, and promised well and truly to pay to the said plaintiffs, if the said William Linn, so appointed receiver as aforesaid, and to act as such receiver, and in such office of receiver as aforesaid, should not faithfully execute and discharge the duties of his said office; and the said plaintiffs in fact said, that after the making and delivering of the said instrument in writing, and after the appointment of the said William Linn to be receiver of public moneys as aforesaid, he, the said William Linn did not faithfully execute and discharge the duties of his said office:" they then set forth the breach of the contract to the same effect as before; and concluded with a general averment of the neglect and refusal of the defendant, Linn, to comply with its conditions, whereby an action had accrued to them against all the defendants.

*To the second and third counts of the declaration, the defendants demurred, as sufficient in law to sustain the plaintiffs' action; [*295 and the United States joined in the demurrer.

On the argument of the demurrer, the opinions of the judges were opposed on the points: 1st. Whether the obligation set out in the second and third counts in the declaration, being without seal, was a bond within the act of congress? 2d. Whether such an instrument was good at common law? And on application of the plaintiffs, by their counsel, the above points were ordered to be certified agreeable to the act of congress.

Gilpin, the Attorney-General, for the United States.— The second count of the declaration, in this case, averred the execution, on the first day of August 1836, in the state of Illinois, of a certain instrument of writing, by the defendants; and that they then and there delivered the said instrument of writing to the plaintiffs; in which instrument of writing they recited the appointment of Linn to the office of a receiver, and that he was to hold it for four years then chiefly unexpired; and they acknowledged themselves to be bound to the plaintiffs in the sum, and promised to pay to them the sum, of $100,000, to which payment they bound themselves, jointly and severally, by the said instrument in writing; which said instrument was, however, to be void, if the said Linn faithfully executed the duties of his office; and the plaintiffs then aver, that he did, after the making and delivering of the said instrument, fail so to execute them, by refusing to pay over certain moneys; and they then set forth the failure, and charge that, though often requested, he has refused to pay over the said moneys. The third count recited the making of an instrument of writing by the defendants on the same day, their own proper hands being thereto subscribed, and then set out the consideration, the nature of the agreement, and the breach of its condition, as in the second count.

To both these counts, the defendants demurred, as insufficient *in law to sustain the plaintiff's action, and the United States joined [*296 in the demurrer. On the argument of the demurrer, the opinions of the judges were divided on the points: 1st. Whether the obligation, set out in the second and third counts of the declaration, being without seal, is a bond, within the act of congress? 2d. Whether such an instrument is good at common law?

The act of congress, establishing a land-office at Vandalia, was passed on the 11th of May 1820. (3 U. S. Stat. 571.) The fourth section provides,

that there shall be a register and receiver appointed to each of the aforesaid land-offices, who shall "give security in the same sums, and whose compensation, emoluments, duties and authority shall, in every respect, be the same as are, or may be, by law provided, in relation to the registers and receivers of public moneys in the several land-offices established for the sale of the public lands." The first law regulating such security, is that of 18th May 1796 (1 U. S. Stat. 464), which prescribes that the receiver in the western territory shall "give bond, with sufficient security, for the faithful discharge of his trust." The next act is that of 10th May 1800 (2 Ibid. 73), which first established regular land-offices; it required the receiver of public moneys "to give bond, with approved security, in the sum of $10,000, for the faithful discharge of his trust." In all the acts passed from that time to 1834, establishing land-offices, it is provided, in the same uniform language, that the receivers shall give security in the same manner, in the same sums, and their compensation, emoluments, duties and authorities, be the same as are or may be provided by law. The act of 26th June 1834 (4 Ibid. 686), somewhat varies this language, by directing that the receiver "shall give give security. and discharge all duties pertaining to such office, as are prescribed by law."

1. The language of these laws is so uniform, that it seems to preclude any argument on the first question. The law has given to sealed instruments a higher degree of obligation, in many respects, than instruments not executed with that formality; and it cannot be doubted, that it was the *297] intention of congress, in using this *language, to require that instruments carrying with them the highest sanction should be given. Taking this view of the subject, it is not necessary to offer any observations, which may seem to sanction either party—the officers who take the security, or the parties who give it—in substituting, under any circumstances, an obligation less complete and binding, under every aspect of the law, than that which congress has required. Neither is it necessary to discuss how far redress might be obtained in a court of equity, if the omission of the seals was a mere result of accident. 1 Story's Equity 165; *Montville* v. *Haughton*, 7 Conn. 545; *Wadsworth* v. *Wendell*, 5 Johns. Ch. 224. It is sufficient, that the act of congress has required a "bond," which this instrument, technically, is not.

2. As to the validity of the instrument which was taken, and its binding obligation on the parties, it seems too clear to admit a doubt. Although the act of congress required that a bond should be taken, this is not all that it requires. It directs that "security" also should be taken. A bond is a species of security which it designates; but it is not the only security which it contemplated, unless that should be deemed to be sufficient. Can it be doubted, if an officer gave a mortgage as security, in addition to his bond, that it would be authorized by the terms of the act of congress? Can it be doubted, that if an officer were to deposit a sum of money in the treasury (as is done in France), as his security, it would be within the law? The object to be attained is security; the bond is designated as the usual, and generally the most certain and efficient form of security, and it should always be taken; but it does not preclude any other; on the contrary, it clearly recognises it, by adding to a specification of the particular instrument, the object which it desires to reach. In the law of 1834, we see, that the bond

is not particularly named; the object alone is stated, leaving the form to be adopted by the officers required to receive and give the security. The receiver there is bound "to give security," as he is bound to "discharge all duties pertaining to his office;" the form of the one, and the details of the other, are not prescribed, though the objects to be attained are distinctly stated. It is therefore, clear, by the language of the act, that the giving "security for the faithful execution of his *office," by the defendant, [*298 is within its provisions; as well as the giving of a bond.

But if it were not within the provisions of the act, in terms, it is an implied right on the part of the United States. They have a clear authority to accept such voluntary security for the faithful performance of official duties, as they may deem expedient. It appears by the record in this case, that the defendants voluntarily made, signed and delivered to the United States, this instrument in writing, as a security that the defendant, Linn, would faithfully perform his official duties. Such an instrument, so executed and delivered, if valid in itself, is one that the United States may receive, and one whose obligation is binding on those who give it. They are at liberty to make and to enforce all contracts, not prohibited, which are necessary to the successful exercise of the authority intrusted to them. Thus, as early as 1813, this court, in the case of *Dugan* v. *United States*, 3 Wheat. 172, decided, that the United States might be the purchasers and indorsees of a bill of exchange, and that, on its non-payment, they might enforce by suit the obligation of the prior indorser, although there was no act of congress giving special authority for the one or the other. It was a voluntary contract between them and the indorser, being entered into in the transaction of the public business, by a public officer, for the benefit of the public; and the court said, in reply to an objection similar to that which is urged here, that they "were not bound to presume, that the officer acted otherwise than according to law, or those rules which had been established by the proper departments of government for the transaction of business of that nature." In the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 638, this court said, "it is not unusual for a legislative act to involve consequences not expressed. An officer, for example, is ordered to arrest an individual; it is not necessary, nor is it usual to say, that he shall not be punished for obeying this order." This is a consequence naturally resulting from the power required. He may lawfully exercise it, and the court will protect him in it, as fully as if every consequence had been the subject of legislation. In the case of the *Postmaster-General* v. *Early*, 12 Wheat. 136, a bond was given by the defendants to the postmaster-general, as security that Early *would faithfully discharge his duties as a deputy- [*299 postmaster. The defendants pleaded that their contract was not one authorized by any law of the United States, and that it could not, therefore, be enforced. This court, however, held, that the postmaster-general, as a public officer, was fully warranted in taking a bond which was to secure the payment over of moneys coming into the deputy-postmaster's hands, where no law prohibited such a security. In the present case, not merely is the payment of moneys part of the actual condition (since the law makes it one of the duties of a receiver for the performance of which the bond stipulates), but besides, the law authorizes expressly "security" to be taken. The case of the *United States* v. *Tingey*, 5 Pet. 115, 127, may be regarded as having

decided the same principle conclusively. In that case, a suit was instituted against the sureties in a bond given to secure the faithful performance of official duties; but the instrument was not such a one as the act of congress prescribed. On this account, it was contended, that the United States could not recover. But this court said, "upon full consideration of this subject, we are of opinion, that the United States have such a capacity to enter into contracts." Afterwards, they say, "we hold, that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity, in official duties, of a receiver, or an agent for disbursing public moneys, is a binding contract between him and his sureties, and the United States, although such bond may not be prescribed or required by any positive law."

Here, then, we have the full, general and express declaration of this court, of the right of the United States to make such contracts, without positive authority of law; we have it stated, in terms, in regard to a bond. How much more fully does the principle apply, when there is a law requiring security to be taken, and when the contract is one of a less severe and imperative character than the bond which they admit to be authorized. In the case of *Farrar* v. *United States*, 5 Pet. 388, this court held, that an official bond, although a provision which the act required it to contain, was omitted, was yet binding to the full extent of its own language. In the case of the *United States* v. *Robertson*, Ibid. 651, there was an agreement made by the Bank of *Somerset with the United States, to pledge the estate of the bank, to secure, so far as it would secure, the payment of a debt due to the former; a bond was given to fulfil this agreement; neither instrument was authorized by any statute; yet this court expressed no doubt as to the right of the United States to be a party to these contracts, and to enforce their performance. The case of the *United States* v. *Bradley*, 10 Pet. 359, was one were a paymaster gave a bond in terms different from those required by the act of congress; and the sureties, who were parties to it, contested their liability on that ground; but the court re-affirmed the doctrine asserted in *Tingey's Case*, and decided, that the United States had capacity to enter into contracts, wherever such contracts were not prohibited by law. The case authoritatively decides the point, affirming, as it does, the principles which, in a less general form, had been considered in those of *Dugan*, *Early* and *Tingey*; and places it beyond a doubt, that a contract, valid in itself, made with the United States, by the defendants, to secure the faithful performance of Linn's duties, was binding on all the parties, and can be enforced by their courts. If it were necessary, which it is not, to strengthen these views, thus drawn from the decisions of this court, it might be added, that the principles on which they are founded, have been recognised, over and over again, by the ablest judicial tribunals throughout the Union. *Dixon* v. *United States*, 1 Brock. 181; *Commonwealth* v. *Lacaze*, 2 Dall. 122; *Commonwealth* v. *Wolbert*, 6 Binn. 296; *Morse* v. *Hodsdon*, 5 Mass. 318; *Thomas* v. *White*, 12 Ibid. 369.

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To impair the force of these views, it is argued, that this contract is not such a one as the act authorized, and is, therefore, contrary to its policy; and it is inferred from this, that it must be regarded as void. To support the position, numerous cases have been cited, where bonds taken under statutes, and containing provisions wholly different from those prescribed

by the statutes, have been held to be invalid. This argument assumes a principal point, which is, that any security, other than a bond, is forbidden. There is nothing in the language of the act, which warrants this assumption, but the reverse. Security for the performance of certain duties was the policy; the highest sort of security was preferred, it is true; but to say that the neglect of an *officer, in point of form, to take that sort, and an acceptance in lieu thereof, of an inferior species of security, is less [*301 consistent with that policy, than an abandonment of all security, is an inference that just reasoning can never sanction. In the case of the *United States* v. *Bradley*, this court distinctly adverted to, and repudiated, a similar argument. They say, that an inference that a designation of a particular form of bond in an act of congress makes every other form void, is not warranted by any principle of public policy which the law was designed to promote. The cases cited on behalf of the defendants are, it is believed, without an exception, those where there have been omissions or insertions of substantial clauses, in statutory obligations, which operated to the injury of the parties, and were at variance with the object and intent of the law. In the present case, no such error is alleged. The contract is altogether correct in point of form. The obligations imposed, are such as the law warrants. There would be no departure, in the instrument, from the requirements of the act, if it had been properly executed. That it was given in furtherance of its objects, is not contested; that it would have effected this purpose, and no other, if the seals had been affixed, is not denied. How, then, can an argument, which asserts that it is a void instrument, be sustained by the authority of cases, which differ from the present in all these particulars?

If, then, it be established, that the United States have a right to accept and enforce a valid obligation of this sort, the only inquiry that remains is, whether or not this instrument is a valid contract in itself; whether, if executed between man and man, it would be binding on the parties? This is a contract of suretyship or guaranty. It is a promise of one person to answer for another person, in consideration of this latter obtaining some trust, confidence or credit. It is, in this instance, a contract of Linn, Waterman, Lee and the other defendants, with he United States, in which they promise to answer, to the extent of $100,000, for Linn, in consideration of his being allowed by the United States, to hold the trust created by his being a receiver of public moneys, for several years to come, if he faithfully discharges its duties. That such a contract is a lawful one, it is needless to assert. It is known to the law of every civilized nation. To make the instrument, *which is evidence of this contract, binding and sufficient, it is necessary that it should be duly executed in writing, by the parties; and that it should show a sufficient legal consideration. [*302

That the instrument now in question is duly executed, appears by the record; it is one in writing, and signed by the parties, delivered and accepted. This is all the formality that is necessary to its complete execution. *Ballard* v. *Walker*, 3 Johns. Cas. 64; *Duncan* v. *United States*, 7 Pet. 448. The authorities cited on behalf of the defendants, do not establish the ground which is assumed, that this instrument is void from defective execution. Those authorities only sustain a position, not at all applicable, that where a contract is in itself a joint one, intended to be executed by several parties, none of whom dispense with the participation of the others,

the execution by one of them is imperfect, and the contract may not be binding upon him.

This contract, then, is duly executed. Does it also show a sufficient legal consideration? It is said by Judge YATES, in the case of *Pillans* v. *Van Mierop*, 3 Burr. 1669–71, that "any damage or suspension of a right, or possibility of a loss, occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising." This rule, thus so clearly laid down, is sustained by a long series of cases. *Ex parte Minet*, 14 Ves. 189; *Ex parte Gardom*, 15 Ibid. 287; *Morley* v. *Boothby*, 3 Bing. 107; *Newbury* v. *Armstrong*, 4 Car. & Payne 59; *Kemble* v. *Farren*, 6 Bing. 34; *Packard* v. *Richardson*, 17 Mass. 140–1; *Lansing* v. *McKillip*, 3 Caines 291. Now, the present instrument sets forth, in terms, that Linn has received from the plaintiffs, the office of a receiver, "for four years," and is to perform its duties for the plaintiffs, and that if he shall fail to do so, which must necessarily occasion a damage and a suspension of the rights of the plaintiffs, and a possibility of a loss to them, the defendants will indemnify them. It contains a consideration for the promise, stated on the face of the contract, and shows the loss that must accrue to the plaintiffs, if Linn violates his part of the contract. In the case of *Violett* v. *Patton*, 5 Cranch 142, this court decided, that "to constitute a consideration, it is not absolutely necessary that a benefit should accrue to the person making the promise; but that it is sufficient, *if something valuable flows from the *303] person to whom it is made." So, in the case of *Townsley* v. *Sumrall*, 2 Pet. 182, this court said, that "it is of no consequence that the direct consideration moves to a third person, for it moves from the purchaser (of a bill of exchange), and is his inducement for taking the bill. He pays his money on the faith of it, and is entitled to clam a fulfilment of it. Damage to the promisee constitutes as good a consideration, as benefit to the promisor." But is there not a direct benefit to the promisor? It is but a single and entire contract, to which Linn, and the sureties are jointly a single party; to this party, on the one hand, there is a benefit passing from the United States, as fully and completely, as there is, on the other, a service rendered by it to the United States. The office of receiver, its emoluments and compensation, had passed to one of these joint parties, and was held and enjoyed by him, when the contract was entered into. Undoubtedly, there is a valid and sufficient consideration, arising from an actual benefit received.

It is argued, however, that the consideration is past, and was executed at the date of the contract; and numerous authorities are cited to prove that, on such a consideration, it cannot be sustained. But how is this an executed consideration? The mere appointment is past, it is true, but the office exists and continues; its emoluments are to be received in the future, and its duties are to be performed.

This, then, is a contract, not only legally executed, but binding and obligatory in its character upon the parties. It is, as has been shown, one into which the United States had a right to enter. It is, therefore, one which is good at common law, independently of the requirements of the act of congress, in relation to the form of security to be given by a receiver.

N. H. Swayne, for the defendants.—This case was certified up from the

circuit court of the United States for the district of Illinois, the opinions of the judges being opposed on the following questions: 1. "Whether the obligation set out in the second and third counts in the declaration, being without seal, is a bond within the act of congress." 2. "Whether such an instrument is good at common law."

*1. The act of congress upon this subject was passed May 10th, 1800. (See 2 U. S. Stat. 73.) The provision referred to is in these [*304 words: "There shall be appointed by the president of the United States, with the advice and consent of the senate, a receiver of public moneys for lands of the United States, at each of the places, respectively, where the public and private sales of the said lands are to be made, who shall, before he enters on the duties of his office, give bond with appropriate security, in the sum of $10,000, for the faithful discharge of his trust." The meaning of the term "bond" is well settled. It is "an obligation for the payment of money." See Toml. Law Dic. tit. Bond, and the authorities there cited. The sealing is indispensable. Com. Dig. tit. Obligation, A. 2. It is more important than the signing. The former, without the latter, was formerly held sufficient, while the latter, without the former, at most, constitutes only a simple contract. Bac. Ab. tit. Obligation, C. The terms "bond," "writing obligatory," and "obligation," *ex vi termini*, import a sealed instrument. See 1 Chitty's Pl. 313, and the cases there cited. "An instrument containing the words, 'sealed with my seal,' without a seal, &c., is not a deed." *Deming* v. *Bullitt*, 1 Blackf. 241; *Taylor* v. *Glaser*, 2 Serg. & Rawle 502; *Warren* v. *Lynch*, 5 Johns. 239; *Harman* v. *Harman*, Bald. 129; Perk. Cont. § 129. Upon this point, it cannot be necessary to multiply authorities. The instrument not being a "bond," of course, is not within the meaning of the act of congress.

2. Is "such an instrument good at common law?" The negative of this proposition is maintained upon the following grounds: 1. It is inchoate, imperfect and *primâ facie* void. 2. It is without consideration; and if not— 3. The consideration was executed at its date, therefore, insufficient. 4. It is contrary to the policy of the act, and is therefore void. The following authorities are relied upon:

*1. That it is inchoate, imperfect and *primâ facie* void. "A [*305 bond signed by one surety, which contained in the body of it, the names of two, is not recoverable against the one who signed it, unless it be proved that he who signed it, dispensed with the execution of it by the other." *Sharp* v. *United States*, 4 Watts 21. See also, *Bean* v. *Parker*, 17 Mass. 605; *Wood* v. *Washburn*, 2 Pick. 24; and *Wells* v. *Dill.*, 1 Mart. 592. In the case of *Bean* v. *Parker*, the court say: "This bond must be considered as declared upon according to its real tenor, in the same manner as if it had been recited *in hæc verba*, and then purporting to be a bond signed by principal and sureties, and no principal having executed it, it must be taken to be void." In *Wells* v. *Dill*, the court hold this language: "The contract is incomplete, until all the parties contemplated to join in its execution affix their names to it, and while in this state cannot be enforced against any one of them. The law presumes that the party signing, did so upon the condition that the other obligors named in the instrument should sign it, and their failure to comply with their agreement, gives him a right to retract." Upon a careful examination of the

cases cited, and the one under consideration, it is believed, they will be found to exhibit a striking analogy, and to turn on the same principle. It is, that the face of the instrument itself shows that it is imperfect, and is a *caveat* to the obligee. It is apparent, that something remains to be done to complete it, and until that is done, a *locus pœnetentiæ* is left to the obligor. He may revoke it, or impose such terms and conditions as he may think proper.

The point to which the cases above cited relate, arose in the case of *Duncan* v. *United States*, 7 Pet. 435. But that case is distinguishable from this in two essential particulars: 1. It appeared from the record, that the parties signing had severally acknowledged the validity of the bond before a notary-public. 2. It also appeared, that the jury had found that the parties who signed, had delivered the bond as a valid instrument. Hence, it would seem, that this authority does not apply.

*306] *In Perkins on Contracts, § 129, p. 58, the law on the point under consideration, is thus laid down: "And it is to be known, that notwithstanding that the words, obligatory, or, &c., are written in parchment or paper, and obligor, or, &c., deliver the same as his deed, and it is not sealed at the time of the delivery, it is but an escrowl, notwithstanding that the name of the obligor be subscribed." This is the only direct authority upon this point, that has been found.

2. It is without consideration, and therefore void. It appears from the recital of the instrument, that the commission bears date nearly eighteen months prior to its execution. If there be any consideration, what is it? None is expressed in the instrument, and none is alleged in the declaration. All agreements, without consideration, except those under seal, and those within the law-merchant, which of themselves import a consideration, are void. *People* v. *Shall*, 9 Cow. 780; *Burnet* v. *Bisco*, 4 Johns. 236; *Cook* v. *Bradley*, 7 Conn. 57; *Thatcher* v. *Dinsmore*, 5 Mass. 302. Mere written agreements, are in this respect, on a footing with oral contracts. 1 Saund. 211; Ibid. note 2; *Cook* v. *Bradley*, 7 Conn. 57. Even in cases within the satute of frauds, the rule as to the consideration is unchanged. The statute only superadds the necessity of written evidence of the agreement. *Saunders* v. *Wakefield*, 4 B. & Ald. 595; *Rann* v. *Hughes*, 7 T. R. 350; *Reech* v. *Kennegal*, 1 Ves. 123; *Leonard* v. *Vredenburgh*, 8 Johns. 29. An unqualified acknowledgment of indebtedness, or a promise to pay, by a writing not under seal, if it depart from the forms recognised by the law-merchant, does not dispense with the necessity of averring and proving a sufficient legal consideration. *Carlos* v. *Fancourt*, 5 T. R. 482; *Lansing McKillip*, 3 Caines 287; *Beauchamp* v. *Bosworth*, 3 Bibb 116. A guarantee of a note, like any other promise without consideration, is void. *Aldridge* v. *Turner*, 1 Gill & Johns. 427; *Henry* v. *Prince*, 4 Pick. 385; s. c. 7 Ibid. 243; *Bailey* v. *Freeman*, 4 Johns. 280. A promise orig-

*307] inally without consideration, will not be supported *by the fact, that the party to whom it was made has sustained special damage by its non-performance. *Thorne* v. *Deas*, 4 Johns. 84.

3. If there be any consideration, it was executed at the date of the instrument, and therefore insufficient. It has been already remarked, that the bond bears date nearly eighteen months later than the commission. It recites that the president had "appointed," &c., "by commission, bearing

date," &c. For the general doctrine on the subject of executed considerations, see 1 Saund. 264, and note.

I cannot do better than to add the following extract from the American Jurist, No. 43, p. 3, in which most of the leading authorities upon this point are collected : "In the case of *Hunt* v. *Bate*, 2 Dyer 272 *a*, the declaration averred, that the defendant promised to save the plaintiff harmless, in consideration that he had become bail for the defendant's servant. Judgment was arrested. So, where the declaration alleged that the defendant promised to pay the plaintiff five pounds, in consideration that the plaintiff had delivered to him twenty sheep. *Jeremy* v. *Goochman*, Cro. Eliz. 442. So, of a promise by a lessor to give a new lease, in consideration that the lessee had incurred expense in defending his title under the old lease. *Moore* v. *Williams*, Moore 220. So, of a promise to loan the plaintiff ten pounds upon request, in consideration that the plaintiff had formerly loaned the same sum to the defendant. *Dagget* v. *Vowell*, Moore 643. So, of a promise to repay sixty pounds, in consideration that the plaintiff had before paid that sum to the defendant's creditors, in satisfaction of the debt. *Barker* v. *Halifax*, Cro. Eliz. 741. So, of promise in consideration that the plaintiff had sold and delivered goods, lent money, &c., to the defendant, or had done work for him, or had sold and conveyed a farm to him." The following authorities are referred to in a note, and will be found fully to sustain the latter part of the text. *Oliverson* v. *Wood*, 3 Lev. 366 ; *Hayes* v. *Warren*, 2 Barnard. K. B. 55 ; s. c. 2 Str. 933 ; *Comstock* v. *Smith*, 7 Johns. 87 ; *Parker* v. *Crane*, 6 Wend. 649 ; *Leland* v. *Douglass*, 1 Ibid. 492 ; *Balcomb* v. *Craggin*, 5 Pick. 295 ; *Stanhop's Case*, Clayt. 65. "A. B. gave a writing to the plaintiff, as follows : In consideration *of your having indorsed the under-mentioned notes, drawn by S. & F., in your favor, we hereby hold ourselve accountable to you [*308 for them, in the same manner as though said notes were drawn by us." It was held, that the consideration was past and insufficient. *Bulkley* v. *Landon*, 2 Conn. 404. See also Chitty on Contracts 52. In *Jenkins* v. *Reynolds*, 3 Brod. & Bing. 14, the guarantee was in these words : "To Messrs. Jenkins & Jones—Gentlemen : To the amount of 100*l*., be pleased to consider me as security on Mr. James Cowing & Co's account." It was held insufficient, because on its face it was doubtful whether it related to a past or a future consideration. See also 3 Conn. 585, and 1 Leigh's Nisi Prius 36.

4. It is contrary to the policy of the act, and therefore void. It is conceded, that the appointment was complete, when the commission was issued. The requirement that bond should be given before the receiver entered on the duties of his office, was merely directory, and does not in this view affect the validity of the instrument. A bond taken afterwards, would have been as valid as if taken before. *United States* v. *Bradley*, 10 Pet. 363. It is also well settled in the courts of the United States, that when a statutory bond contains conditions required by the act under which it is taken, and others not required ; and such conditions "are severable," it is valid as to the former and void as to the latter. Ibid. See also *Armstrong* v. *United States*, Pet. C. C. 47 ; *United States* v. *Howell*, 4 W. C. C. 620 ; *United States* v. *Brown*, Gilp. 174.

It seems also to be settled, that if the bond be wholly different from

what the statute requires, from the omission of a necessary member in its conditions, or from any other cause; or contain the requisite conditions so mingled with others not required, as not to be severable from them, it is wholly void. This would seem to be a necessary result of the preceding proposition; but the point is believed to have been expressly ruled in the following cases. *United States* v. *Morgan*, 3 W. C. C. 10; *Dixon* v. *United States*, 1 Brock. 178; *United States* v. *Gordon*, Ibid. 191; *United States* v. ———, Ibid. 195; *United States* v. *Hipkin*, 2 Hall's Law Jour. 80.

*309] To sustain such a bond (to use the language of Judge STORY *in another connection) "would be, not to execute but to supersede the requisitions of the law." *United States* v. *Tingey*, 5 Pet. 129. "Where an essential circumstance required by law is omitted in the bond, the court does not believe itself competent to supply the omission and make the bond conform to the statute. No analogous case is known, in which a court of law exercises such a power." *United States* v. ———, 1 Brock. 197. Where a form of security wholly different from that prescribed by the statute is taken, is it not as much a departure from the statute, as contrary to its policy, and therefore void, as a bond wholly different from its requirements? The act of congress directing that a bond shall be taken, "implies a prohibition of every other species" of security. *Billings* v. *Avery*, 7 Conn. 236; *Cole* v. *Gower*, 6 East 117. If it were competent for the proper officer to receive this instrument in lieu of a bond, what shall be the limits of his discretion? Might he not, with equal propriety, have received a real or chattel mortgage upon property situated no matter where; or a mere oral contract with these same parties? And may he not require a sufficient bond from one party, and receive something entirely different from another? This, it is presumed, will not be contended for upon the other side; yet, in principle wherein lies the difference?

The policy of the law in requiring a bond, is obvious. 1. It is the most solemn form of contract. 2. It imports a consideration, and dispenses with the necessity of proving one. 3. Independent of the act on that subject, it would in some of the states, give to the United States, in the collection of their debts from the estates of decedents, priority over simple-contract creditors.

The doctrine upon the subject of official bonds, has been pushed to great lengths in sustaining them; but, except in the view already taken, it is believed those cases do not affect this question. This is not the case of a bond taken where none is required; nor of a bond taken under a statute,

*310] but in part or wholly inconsistent with its requirements. *It is a different security from that which the statute demands. No case, it is believed, can be found, where such an instrument, under such circumstances, has been supported at law. Where a statutory bond was executed to an obligee, other than the one indicated in the statute, it was for that reason holden to be void. *Purple* v. *Purple*, 5 Pick. 227. The same point was ruled in *Warner* v. *Racey*, 20 Johns. 74. These are instances of departure from the statutory requisitions, much less material, it would seem, than that under consideration. See also, *Commonwealth* v. *Jackson's Executors*, 1 Leigh 484; *Branch* v. *Commonwealth*, 2 Call 510; *Steward* v. *Lee*, 3 Ibid. 421; *Hyslop* v. *Clarke*, 14 Johns. 458.

If the omission of the seals arose from accident or mistake, a court of

equity would undoubtedly supply the defect. See 1 Story's Equity 165–81. The authorities on this point are so fully collected, and so clearly stated by the author, that a more particular reference to most of them is deemed unnecessary. In *Wadsworth* v. *Wendell*, 5 Johns. Ch. 224, it will be observed, that the seal only was wanting, and that the chancellor established and enforced the instrument. The case of *Montville* v. *Haughton*, 7 Conn. 545, is in most respects indentical with this. A court of equity gave the relief prayed for. This goes strongly to show, that it is only in such a court that the obligee can be aided ; and that would seem to be the appropriate tribunal for such cases.

There is an apparent defect which, *primâ facie*, vitiates the instrument ; yet enough is done to show an intention to make a valid contract. On the other hand, the parties in answering the bill, especially the sureties, have an opportunity to develope all the facts in relation to the execution of the instrument, and may thus avail themselves of a meritorious defence, which they could not establish in any other way. The contract of a surety is to be construed strictly. *Miller* v. *Steward*, 9 Wheat. 680.

Whether this instrument be void or not, the United States have a valid separate demand against the principal, for money had and received. *Walton* v. *United States*, 9 Wheat. 651.

*Thompson, Justice, delivered the opinion of the court.—This case comes from the circuit court of the United States for the state of Illinois, on a certificate of division of opinion upon the following points : 1st. Whether the obligation set out in the second and third counts in the declaration, being without seal, is a bond within the act of congress. 2d. Whether such instrument is good at common law. [*311

Upon the first point, no doubt can exist. There being no seal to the instrument, it is not a bond. This point was abandoned by the attorney-general, on the argument ; and the question must, of course, be answered in the negative. And as the act of congress directs the security to be taken by bond, this answer necessarily implies, that the instrument now in question is not in form the instrument required by the act of congress.

The second point presents the broad question, whether the instrument is good and binding at common law, independent of the statute, as to the mere form of the security. If this is a contract entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract, at common law. In the case of the *United States* v. *Tingey*, 5 Pet. 115, it was held by this court, that the United States, being a body politic, have a capacity to enter into contracts, and take bonds or securities within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are intrusted, whenever such bonds or contracts are not prohibited by law, although the making such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. From this, it follows, that a voluntary contract or security, taken by the United States, for a lawful purpose, and upon a good consideration, although not prescribed by any law, is not utterly void. That the instrument in question was taken for a lawful purpose, cannot be

questioned. It was taken to secure the faithful performance of duties imposed by law upon a receiver of public money.

Although the question came up in the circuit court upon a *demurrer to the declaration, the point certified does not involve any [*312 inquiry respecting the sufficiency of the declaration. The declaration is referred to merely for a description of the instrument upon which the question arose. And if the instrument can be made valid and binding at common law, by any averments and legal evidence, the question must be answered in the affirmative.

This instrument, as set out in the second and third counts in the declaration, bears date on the first day of April, in the year 1837, reciting that the president of the United States had, pursuant to law, appointed the said William Linn to be receiver of public moneys for the district of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th day of January, in the year 1835, by commission bearing date on the 12th of February 1835, That the said defendants did, then and there, in and by said instrument in writing, by the names, contractions, abbreviations and descriptions, &c. (naming all the defendants), acknowledge themselves to be held and firmly bound unto the said plaintiff, in the sum of, and promised to pay unto the said plaintiffs, $100,000 of money of the United States ; to which payment well and truly to be made, they, the said defendants, bound thamselves, jointly and severally, their joint and several heirs, executors and administrators, by the said instrument in writing ; which said instrument in writing was, however, to be void and of none effect, in case, and upon the condition, that the said William Linn should faithfully execute and discharge the duties of his office of receiver of public moneys as aforesaid ; otherwise the said instrument in writing should abide and remain in full force and virtue. And the question is, whether this instrument is binding at common law, as a security for the faithful discharge of the duties of receiver of public moneys, by William Linn.

The argument urged to the court against the validity of this instrument, has been presented under the following heads : 1. That the writing is without consideration. 2. If not without consideration, it was a past and executed consideration. 3. That it is contrary to the policy of the act of congress, and so void.

*The recital in the instrument is, that the president of the United *313] States, pursuant to law, had appointed the said William Linn receiver of the public money, for the district of land, subject to sale at Vandalia, in the state of Illinois, for the term of four years from the 12th of January 1835, and who was duly commissioned for that purpose ; and he was accordingly, by the laws of the United States, entitled to receive the same compensation and emoluments, and subject to the same duties in every respect, in relation to the lands to be disposed of at his office, as are or may be by law provided in relation to the receivers of public money, in other offices established for the sale of public lands ; and was by law required to give security in the same manner and sum as other receivers of public moneys for the sale of public lands. 4 U. S. Stat. 686 ; Act 26th June 1834. These emoluments were the considerations allowed him for the execution of the duties of his office ; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official

rights and duties attached upon his appointment. This was so held by this court in the case of the *United States* v. *Bradley*, 10 Pet. 364. The court there say, it has been objected, that Hall was not entitled to act as paymaster, until he had given the bond required by the act of 1816, in the form therein prescribed ; and that not having given any such bond, he is not accountable as paymaster for any moneys received by him. We are, say the court, of a different opinion. Hall's appointment as a paymaster was complete, when his appointment was duly made by the president, and confirmed by the senate. The giving the bond was a mere ministerial act, for the security of the government ; and not a condition precedent to his authority to act as a paymaster. Having received the public moneys as paymaster, he must account for such money. According to this doctrine, which is undoubtedly sound, Linn was a receiver, *de jure*, as well as *de facto*, when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law ; and being entitled to the compensation and emoluments attached to the office, which by his commission was to continue for four *years from [*314
the 14th of January 1835 ; this was a sufficient consideration appearing on the face of the instrument, to support the promise. A benefit to the promisor, or damage to the promisee, constitutes a good consideration. 5 Cranch 150 ; 2 Pet. 182. If Linn received a sufficient consideration to uphold the promise on his part, it was sufficient to bind the sureties. There was no necessity for any consideration passing directly between the plaintiffs and the sureties. It was one entire and original transaction ; and the consideration which supported the contract of Linn, supported that of his sureties. If the contract between the plaintiffs and Linn had been executed and perfectly past, before the other defendants became sureties, so that their promise and undertaking could not connect itself with the original contract, it would have required a distinct consideration. But the whole being one entire and original contract, and not collateral on the part of the sureties, the consideration received by Linn was sufficient to support the contract on the part of his sureties. 8 Johns. 37 ; Cro. Eliz. 137 ; 3 Burr. 1886.

2. This was not a past and executed consideration. The mere appointment of Linn as a receiver of public moneys, was not the consideration of the contract, but the emoluments and benefit resulting from the appointment formed the consideration. It was a continuing consideration, running with his continuance in office ; and existed in full force at the time the instrument in question was signed. This appears from the recitals in the contract. The term of office was four years from the 12th of January 1835.

3. But it has been very strongly pressed upon the court, that it is against the policy of the act of congress, to allow security to be taken otherwise than by a bond. It may be well questioned, whether this objection comes properly under consideration in the question certified to this court ; which is simply, whether this instrument is good at common law. This, in strictness, presents the question, entirely independent of the statute, and as if no statute had ever been passed on the subject. But we do not wish to confine ourselves to this narrow view of the question. The act of congress, under which this instrument was taken (2 U. S. Stat. 73, § 6) directs, [*315
that a receiver of public moneys shall, before *he enters upon the

duties of his office, give bond, with approved security, in the sum of $10,000, for the faithful discharge of his trust. The statute does not profess to give the precise form of the bond. It is only a general direction to give a bond for the faithful discharge of the trust. There are no negative words in the act, nor anything, by implication or otherwise, to make void a security taken in any other form ; nor is there anything in reason or sound principle, that should lead to such a conclusion. Had it been deemed by congress of such importance as is now attached to it, it is reasonable to suppose, that securities taken otherwise than by bond, would have been declared void. The only objection urged against the validity of this instrument is, that it has no seals annexed to the names of the signers. In every other respect, it is not pretended, but that it conforms precisely to the requirements of the statute. And what is the real difference between an instrument under seal, and one not under seal? The only material difference is, that in the one case, the seal imports a consideration, and in the other, it must be proved. There ought to be some very strong grounds to authorize a court to declare an instrument absolutely void, which has been voluntarily made, upon a good consideration, and delivered to the party for whose benefit it was intended. There is, in this case, no principle of public policy or morality violated ; but on the contrary, the object and purpose for which the instrument was given, was in furtherance of the provisions of the statute, and in compliance with the legal and moral obligations imposed upon the receiver of public moneys. The act of congress directs a bond to be taken, in the penalty of $10,000. Suppose, a bond should be taken in the penalty of $20,000, would it on that account be void? If it must pursue the precise directions of the act, it certainly would be void. The authority given to the president to increase the amount of the bonds, was not passed until the year 1820 (3 U. S. Stat. 571); and if any departure from the precise form of the security directed by the statute would make void the bond, an increase of the penalty would have had that effect, before the act of 1820. The act directs a bond to be given, with approved security. The nature of this security is not prescribed. A mortgage, or any other approved security, voluntarily given, would, no doubt, be *valid ; and it would be no very forced interpretation of this act, to consider this instrument as such security. It will be seen, from the recital, compared with the date of this instrument, that it was given long after the appointment of Linn. Why, and under what circumstances, it was given, do not appear ; nor is it important here to inquire. Should that become necessary, the proper time to inquire into that matter will be upon the trial of the cause.

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The point now presented to this court is a single and abstract question ; whether this instrument is good at common law. It is argued, that this instrument is absolutely void, on the ground, that it is against the policy of the act to permit security to be taken in any other form than is prescribed by the act. In a certain sense, this may be true. It is the duty of all public officers intrusted with the execution of powers delegated to them, to pursue the directions of the law conferring the power. But to construe all such laws as a special delegation of authority, to be strictly and literally pursued ; and to consider every departure from it, as done without authority, and absolutely void ; would frequently be defeating the very object and purchase for which the law is made, and ought not to receive such a con-

struction, unless the statute itself declares all such acts void. But if the mere omission to put seals to the instrument shall make it void, every other departure from a strict and literal compliance with the direction of the act, would make void the security.

This has not been the light in which this court have viewed analogous cases. In the case of the *United States* v. *Bradley*, already referred to, the court say, "it has been urged, that the act of 1816, ch. 69, does, by necessary implication, prohibit the taking of any bonds from paymasters, other than those in the form presented by the 6th section of the act; and therefore, that bonds taken in any other form, are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is in this respect directory to that department; and, doubtless, it would be illegal for that department to insist upon a bond containing other provisions and conditions, differing from those prescribed or required by law. But the act has nowhere declared that all other bonds, not taken in the prescribed form, shall be *utterly void. Nor does such an implication arise from any of the terms con- [*317
tained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intendment of the act, that the bond should be utterly void. Nothing, we think, but very strong and express language should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it. Where it is silent, it is a sufficient compliance with the policy of the act to declare the bond void, as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense."

The act under which the security, in that case, was taken, is substantially the same as the one under which the instrument now in question was taken. (3 U. S. Stat. 298.) It requires the paymaster to give good and sufficient bond to the United States, fully to account for all moneys and public property which he may receive, in such sums as the secretary of war shall direct. All the reasons urged in favor of the validity of the bond in that case, apply with equal force to the one now before the court. The only departure of the instrument from the directions of the act, is the want of a seal; and this, as is said in the case against Bradley, may have been omitted by mutual mistake or accident, and wholly without design. We think that the mere want of seals is not such a departure from the act as to warrant the court, upon any supposed principles of public policy, to pronounce this instrument utterly void; it being good at common law, and given in furtherance of the great object of the statute, and as security for the faithful discharge of the duties required of the office. We are, accordingly, of opinion, that the second question must be answered in the affirmative.

Story, McLean and Baldwin, Justices, dissented.

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 *Illinois, and on the points and questions on which the judges of the said circuit court [*318

were opposed in opinion, and which were 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, 1st. That the obligation set out in the second and third counts in the declaration, being without seal, is not a bond within the act of congress; and 2d. That such an instrument is good at common law: whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said circuit court.[1]

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*319] *United States, Appellants, *v.* Joseph Delespine, Appellee.

Florida land-claims.

A grant by the Spanish authorities was made of 92,160 acres of land at New river, in Florida, in 1813, afterwards, the grantee determined to locate the grant on a river seventy miles south of New river; the grantee proposed erecting mills for sawing timber; no survey was made of land at New river, and the grantee claimed to have the grant confirmed, and to locate the same, by survey, at the place last selected; no mills were erected on the lands claimed, nor was anything done by him under the grant, for the purpose of using or improving the land claimed to have been granted: *Held*, that the grant made in 1813, of land at the mouth of New river, imposed no obligation on the government of Spain, at the date of the Florida treaty, in 1819, to confirm the title claimed by the grantee; and that none rested on the government of the United States, as the successor of the government of Spain to the rights and obligations of Spain.[2]

A concession of lands by the council at St. Augustine was not authorized by the laws of Spain relative to the granting and confirming land-titles.

When a grant of land is indefinite as to its location, or so uncertain as to the place where the lands granted are intended to be surveyed, as to make it impossible to make a survey under the terms of the grant, with certainty, the grant will not be confirmed.

The act of congress of 26th May 1830, requires, that all claims to lands which have been presented to the commissioners, or to the register and receiver of East Florida, and had not been "finally acted upon," should be adjudicated and settled, as prescribed by the act of 1828; thare was no direct limitation as to the time in which a claim should be presented.

When a petition for the confirmation of a claim to lands in Florida was presented, and was defective, and the court allowed an amended petition to be filed, it would be too strict to say, the original petition was not the commencement of the proceeding, but that the amendment allowed by the superior court should be taken as the date when the claim was first preferred.

When certain testimonials of title, under a Spanish grant, have been admitted, without exception, before the commissioners of the United States for the adjustment of claims to lands in Florida, and before the superior court in Middle Florida, without objection as to the mode and form of their proof; the superior court, on an appeal, will not interfere with the question as to the sufficiency of the proof, or the authenticity of the acts relating to the title, that had been admitted by the authorities in Florida, which was the tribunal to judge of the evidence. United States *v.* Clarke, 8 Pet. 454, cited.

Appeal from the Superior Court for the Southern District of Florida.

*320] *In November 1830, Joseph Delespine presented a petition to the superior court of East Florida, asking for the confirmation of a grant by the Spanish government of Florida, of a tract of land on Rio Neuvo, of two leagues to each point of the compass, to contain 92,160 acres. The claim of the petitioner was founded on an alleged grant to Juan Xavier de Arrambide, a Spanish subject, by the captain-general of the island of Cuba, on the 15th of November 1813, which was confirmed by the governor and corporation of East Florida, the 22d of March 1814.

[1] For a further decision in this case, see 1 How. 104, reversing s. c. 2 McLean 501.
[2] United States *v.* Miranda, 16 Pet. 153.

The petition alleged, as the reason the claim was not before presented for confirmation, there was no person, during a great portion of the time, as the district-attorney of the United States, on whom process could be served as is required by the act of congress. The documents on which the claim was founded, and which were referred to in the proceedings, on the part of the petitioner, are particularly referred to, in the argument of the attorney-general of the United States, and in the opinion of the court.

The United States resisted the claim, on the allegation, that if there had been a grant, which was not admitted, and without condition, the present claimant holding under the alleged grant to Juan Xavier de Arrambide, did not comply with the requisitions of the statute in such case made and provided; and also, that the claim was not protected by the Florida treaty. The superior court of Florida made a decree in favor of the claimant; and the United States prosecuted this appeal.

The case was argued by *Gilpin*, Attorney-General, for the United States; and by *Downing*, for the appellee.

Gilpin, for the United States.—This is a claim for the enormous amount of 92,160 acres of land, which now are, and always have been unsettled and uncultivated. The claim has been allowed by the superior court of East Florida, and this court is now called upon to ratify that decision. There are several grounds upon which this ought not to be done.

1. The claim is one of which the court below had no legal cognisance, at the time it passed upon it. Under the act of congress, *of 3d March 1823 (3 U. S. Stat. 754), commissioners were appointed to examine [*321 into the validity of these claims, and under its provisions this was presented to their consideration. Their report thereon was made in December 1825, and submitted to congress. On the 23d May 1828, an act was passed (4 Ibid. 284), authorizing claimants, whose claims had not been finally settled under the regulations previously adopted, to submit them for an adjudication to the judge of the superior court of that district in Florida in which the lands lay; but there was an express provision that they should be for ever barred, unless this should be done within one year from the passage of the act, that is, before the 23d of May 1829; or if, from any neglect of the claimant, they were not prosecuted to a final decision within two years, that is, the 23d of May 1830. On the 26th of May 1830, congress, by an act then passed (Ibid. 405), provided for certain claims that had been reported upon, among which the present was not embraced; they then went on to declare, in express terms, "that all the remaining claims, which had been presented according to law, and not finally acted upon," should be adjudicated by the courts in Florida, in the manner prescribed by the act of 23d May 1828. On the 20th of November 1830, the present claim was presented to the superior court of East Florida. This the claimant had no right to do, unless it had been previously presented in the manner the law prescribed, and not finally acted upon. It may be doubted, whether the submission of it to the commissioners. their decision, and its report to congress, did not amount to such a final action as the law contemplated. Such cases cannot be considered as those which congress regarded as unacted upon, and for which it was the object of the law to provide. It was evidently meant to grant time beyond the two years prescribed in the act of 1828, for the adjudication of the claims that might

be then pending in the courts of Florida. But admitting that this case was not finally acted upon by the proceedings in 1825, still the main inquiry is, whether it had been previously presented "according to law." This was an indispensable requisite. The law required its presentation before the 23d May 1829; it was not so presented. Had it been so presented and not properly prosecuted, it would then have been within the terms of this act.

*322] *It never was the intention of congress to permit those who had allowed their claims thus to remain unpresented, now to bring them. for the first time, before the courts. The failure to "present the claim according to law," is fatal, therefore, to the present proceeding.

2. The title of the claimant is denied, under a grant to Juan Xavier de Arrambide, said to have been made by the council of the city of St. Augustine, on the 22d of March 1814, in pursuance of a "*certificacion*," or testimonial in his favor, purporting to have been issued by the provincial deputation at Havana, and filed among the records of the city council. The sole evidence of this grant, produced by the claimant, consists of a copy of the filed copy of the proceedings of the deputation at Havana, and of the proceedings thereon of the city council at St. Augustine. The whole of these are certified at St. Augustine, by Juan de Entralgo, who merely says, "this a copy." There is also a certificate, that Entralgo is secretary of the city council, and a notary of the government. There is no secondary or corroborative testimony to sustain the grant. There is no evidence of the existence of the original documents, either in Cuba or Florida. There is no survey, or subsequent order, or proceeding connected therewith. There is no proof of Entralgo's signature, or that of the annexed certificates. It is submitted, that this evidence is altogether insufficient to bring the case within the rule established by this court, in the case of the *United States* v. *Wiggins*, 14 Pet. 348. If an alleged copy of a grant, thus unsupported by any additional testimony, is received as sufficient, it would not be difficult to sustain the most unfounded claims. The rule just referred to, is certainly one of the broadest liberality; it is all that claimants can require; to extend it, in the manner now proposed, would be seriously to endanger the evidences of titles, while it would give to claimants an indulgence which no just or prudent liberality requires.

3. But the grant, if made, was not legal and valid; it was not, and could not have been "perfected into a complete title, under and in conformity to the laws, usages and customs" of the Spanish government. The grant consists of two distinct parts and proceedings. First, the "*certificacion*," or testimonial of the provincial deputation of Havana, dated 4th

*323] *December 1813, in which they "are pleased to state" to the city council of St. Augustine, "that they grant in property" to Arrambide, two leagues "of the land he may choose, from the mouth of New river, which discharges itself on the coast of East Florida, and through Puerto Largo, on the south part, following the same course to the shore." Secondly, the "*accuerdo*," or resolution of the "*ayuntamiento*," or city council of St. Augustine, dated 22d March 1814; in which, "in obedience as well to the resolution of the aforesaid deputation, as to the approval of the most excellent captain-general, they determined to grant the favor solicited" by Arrambide, which was "to despatch to him the title of property of the said two leagues to the north of the river Miamis, which are on the

north-west side of the Cayo Biscayno ;" he reserving to himself to produce the plat of the said lands as soon as he found himself prepared to take it out ; and they directed their secretary to deliver to him an authenticated copy of all these proceedings. This purports to have been done on 3d June 1814.

This grant thus depends, in fact, on the authority of the provincial deputation at Havana to make it. Whence is their power derived? No instance, among the numerous cases that have been adjudged by this court, has occurred in which such an authority has been relied on by a claimant. It is at total variance with usage and practice ; it is at total variance with the whole land system of the Spanish colonies ; it has no sanction in the laws of the Indies. The answer given by counsel for the claimants to these objections is, that "the land was granted by the provincial committee, the constitution of that day being then in force in the provinces, and said committee having power to grant lands." To support this allegation, it must be shown that, by the constitution or laws of Spain, the provincial deputation at Havana had authority to grant lands in East Florida. What authority to this effect has been produced? Nothing, whatever, but the decree of the Cortes of the 4th of January 1813. 1 Clarke's Land Laws 1006. A slight examination of that decree, and of the constitutional provisions out of which it grew, will show, not only that it confers no such power, but that the exercise of it is at variance with the provisions and object of the decree. The new constitution of Spain was adopted by *the Cortes, in the absence of the king, on the 14th of March 1812. The first and second chapters of the sixth title establish [*324 the "*ayuntamientos*" or town councils, and the "*diputaciones provinciales ;*" and prescribe the functions of both. Among these, no power is conferred to dispose of the public domain. It may have been the intention of the Cortes, and probably was, to vest in them this power, under regulations to be digested in future laws. By the constitution, however, it was neither directly or indirectly done. 2 Decretos de las Cortes, 154, 157. Early in the following year, we accordingly find the Cortes acting on the subject. On the 17th of January 1813, the regency promulgated the decree adopted by the Cortes on the 4th of that month (3 Decretos de las Cortes, 174 ; 1 Clarke's Land Laws 1006 ; 8 Pet. 454 ; 14 Ibid. 342), by which it was determined, that the public domain (contrary to the system previously existing) should be no longer ceded gratuitously to settlers, but be "made to serve as an aid to the public necessities." Among the articles of this decree was one directing "the provincial deputations to propose to the Cortes, through the medium of the regency, the time and the terms when it would be most convenient to carry this disposition into effect, in their respective provinces, according to the circumstances of the country, and the lands which it may be indispensable to preserve for the townships, in order that the Cortes may determine upon what may be most convenient to each territory ;" and it was further directed, that "this business be recommended to the zeal of the regency of the kingdom, and to the two secretaries of state, in order that they may bring forward and inform the Cortes at all times of the representations which the provincial deputations direct to them." 1 Clarke's Land Laws 1006. This is all that the decree says in regard to the power of the provincial deputations. It has no reference.

whatever to grants of the public lands by them. They were required to make reports, as it may be seen that they again were in 1820, when similar changes were again contemplated (6 Decretos de las Cortes, 345), on certain points which the Cortes desired to ascertain, in order to perfect the contemplated change in the mode of disposal of the national domain. They were to examine what quantity was to be reserved for township purposes. They
*325] were to communicate *their opinions to the secretaries of state. These powers and duties were the only ones which the most liberal view of the decree confers on the provincial deputations. To construe language such as this, in a decree founded on a system which was to make the public lands "serve as an aid to the public necessities," into a power to grant gratuitously in absolute property, more than 90,000 acres to a single individual, is to interpret it in a manner warranted by no rules of reasonable or legal construction. It is also to be inquired, how any power conferred on the provincial deputation at Havana could either be exercised by themselves in East Florida, or be delegated by them to the city council at St. Augustine; for it was from that body that the grant to Arrambide actually emanated.

But if the provincial deputation ever possessed such a power, it was annulled before the grant was perfected. Arrambide did not receive the "*expediente*," or copy of the proceedings, till the 30th of June 1814. He was, after that, to "produce the plat of the said lands," and was not to receive his title in form, until he did so. On the 4th of May 1814, Ferdinand VII. resumed the throne of Spain; and among his very first acts was a royal order, dated on that day, restoring the authority of the captains-general and governors in the provinces (1 Decretos de Fernando VII., 13), succeeded very shortly by other decrees re-establishing the ancient laws and usages in America. On the 4th of June, he directed the observance of the laws of the Indies, and the ordinances of the intendants in regard to the public domain; and during that and the succeeding month, several royal decrees to the same effect were promulgated. Decretos del Rey Fernando VII., v. i; 1 Clarke's Land Laws, 1010; 2 White's New Rec. 155. How then could Arrambide produce to the provincial deputation, or to the city council, the plat which he had promised? How could he receive his title in form, or perfect his grant, under a system which was totally annulled? How could it derive validity from the acts of an authority, which, if it ever possessed power to make such a grant, had ceased, by the change of the government, to retain it, even before the time when he received from the notary the evidence of his incipient title? And that such, too, was the opinion of the officers of the Spanish government, who have ever been dis-
1326] posed *to countenance, as far as possible, these claims in Florida, is evident from the testimony of the superior accountant of Havana; which may be seen in a report made by him, in 1824, under a royal order, in relation to grants of land in Florida. He says, that no evidence whatever was found in regard to this grant, in the principal treasury at Havana; and in a report made shortly after, by another of the public authorities, this grant (with the exception of that to Arredondo, which was made some years afterwards, under the royal authority) is declared to be the only one ever known to have been made of land in East Florida, by the authorities of Havana. 2 White's New Rec. 378, 380. It may be assumed, then, as

beyond a question, that this grant from the the provincial deputation at Havana, would not have been recognised as "valid, if the territories had remained under the dominion of his Catholic Majesty," and therefore, that the United States are not bound to ratify and confirm it.

Admit, however, that the provinciai deputation had the legal right to authorize the city council of St. Augustine to make the grant, as stated in the testimonial; still, the grant made by the council, on which the claimant rests his title, is not warranted by it. No description can be more carefully explicit than that which designates the tract intended to be granted by the provincial deputation. It is a square of land, comprising two leagues to each cardinal point of the compass, on the south side of New river, reaching down to the sea-shore, at the inlet of Puerto Largo, where that river discharges itself into the ocean. This, and this only, the city council were authorized to "grant in property" to Arrambide. But the resolution of the council grants him "two leagues of land to the north of the river Miamies, which are on the north-west side of Cayo Biscayno," and that is the tract in which the claimant now asks to be confirmed. The localities are altogether different. The two places are distant from each other sixty or seventy miles. The position, that the location cannot be varied from the description in the grant, unless, as in the case of the *United States* v. *Sibbald*, 10 Pet. 321, such variation be expressly authorized, has been repeatedly laid down by this court. If the claimant abandons his title under the grant of the provincial deputation, and relies on that of the city council of St. Angustine, he is met by two objections, *either of which is fatal. The council had no authority, under any law or royal order that has ever been [*327 produced, to make grants of land in the territory of East Florida; and if they had, this grant, which they have here made, is so deficient in a description of locality, that, as in the case of the *United States* v. *Forbes*, it is impossible to found a decree upon it, in the absence of any return of survey.

4. If the claimant has established, that the grant of the land he claims was, in fact, made in due form, still the validity of his title depended on the survey, occupation and settlement of it, and the erection of mills. The concession was not solicited or conferred on account of any services. In his representation, Arrambide promises "to produce the plat of the lands, as soon as he finds himself prepared to take it out, to commence the establishment which he is to effect." The survey and demarcation of the land were thus a condition of his own making, in the year 1814; until this should be done, he was not prepared to receive his title; by the existing regulations in regard to grants of public lands, he could not have done so, unless a settlement and survey had been made within a limited period, but in addition to that, the terms of his own application prescribed their necessity. In the testimonial of the provincial deputation, it is stated, that he solicited a grant of the land, "with the object of establishing on it mills for sawing timber; and this is assigned as a reason for granting him a tract so unusually large. From the claimant's own evidence, as set out in the record, it is apparent, that there was an entire neglect to comply with any such conditions. In 1818, Arrambide told one of the witnesses, that "he was going to build mills;" and in 1824, another witness, who resided near the Miami river, "knew of no mills being erected there" by him. A witness who was there in 1815, "saw two white families and some negroes belonging to the

establishment" of Arrambide; but on returning there, about four years afterwards, he "found but one of the families remaining, and understood, that they were there on their own account." It is not even alleged, that, before this abandonment, any survey had been made, or any plat of the lands produced. "The assignment," says Saavedra, in his first report, in 1818, to Governor Coppinger, "of extensive portions of territory, which
*328] have been made for the establishment *of factories, to persons who did not then comply, or have not since presented themselves to establish their mechanical works, ought to be considered without any right or value, and said lands declared perfectly free, that they may revert into the class of public lands." And in his second report, made in the following year, he again says, "as it is certain, that many individuals who have obtained such concessesions have remained in inaction, without having for so long a period advanced the establishment of said works, it appears just, that such concessions, which have remained in inactivity, should be declared null and of no effect." 2 White's New Rec. 284, 290.

Downing, for the appellee, stated:—This is a claim for "two leagues of land, to each point of the compass, for the purpose of erecting saw-mills, making, &c., and cutting lumber. The land was granted by the "Provincial Committee," December 4th, 1813; the constitution of that day being then in force in the provinces, and said committee having the power to grant lands. This grant was subsequently approved by Governor Kindelan, and was never annulled. 1. This grant was filed before the court in time. (A. of 1830, § 4.) 2. It was made by full authority; it was unconditional, and is valid.

Catron, Justice, delivered the opinion of the court.—The first objection to the decree of the court below, made in behalf of the United States, is, "That the claim ought not to be sustained; because, neither the claimant, nor those under whom he claims, ever came within the provisions of the act of congress, applicable to the said claim; nor filed any petition, memorial or necessary documents within the term required by law."

1. By the act of the 26th of May 1830, congress declared, that all claims to lands not settled by that act, and which had been presented to the commissioners of East Florida, or to the register and receiver, acting as such, and which had not been "finally acted upon," should be adjudicated and
*329] settled as prescribed *by the act of 1828. The final action referred to in the act of 1830, was that of congress. 7 Pet. 94. So that the claim in controversy is of the description required, and within the jurisdiction of the courts, by the fourth section of the act of 1830; nor do we find anything in the act, which precluded the court below from entertaining the petition for the establishment of the claim, on the ground, that it had not been filed in time. By the act of 1828, ch. 70, § 12, it was declared, that claims not brought before the courts within one year from the date of that act, should be for ever barred; and thus stood Delespine's claim, when the act of 1830 was passed. This act has no direct limitation in it; nor is it open to inquiry in this case, whether a limitation can be applied; because the petition was filed in November 1830, within one year after the date of the act: and although the first petition was informal, and defective in substance, still, it would be too strict, to say, it was not the commencement

of the proceeding, but that the amendment allowed by the superior court, in November 1833, should be taken as the date when the claim was first preferred. It had been filed before the commissioners for adjudicating the Florida claims, as early as 1825, we are informed by the petition; and reported to congress, with a recommendation that it be confirmed. This fact is not denied nor controverted; and which we take to be true.

2. It is insisted, that the evidence in the cause is insufficient to prove that the alleged grant or concession was ever made. It appears, that on the 28th day of May 1813, Arrambide applied to the provincial deputation, at Havana, for two leagues of land to each point of the compass, making 92,160 acres; that on the 4th of December 1813, the deputation stated to the council of St. Augustine, that it granted the land to Arrambide; and referred the grantee to the council, with a command to the council to expedite to him the title. The ordinary modes of granting lands in Florida, had been, directly, either by the captain-general of Cuba, or the governor of Florida; but owing to a recent call of the Cortes in Spain, and a re-organization of the Spanish government, existing at the date of the concession; and which state of things lasted only for *a short time, the [*330
mode of proceeding, in regard to granting the public domain, was changed, and the powers vested in the tribunals known as "the Provincial Deputations." This appears by the royal order of the 4th of January 1813, found in the United States Land Laws, App'x, 1006. It was made the duty of the provincial deputations, to devise the most convenient means of making grants; and through the secretaries of state, to report the same to the Cortes, for their recognition and adoption. The deputation at Havana assumed the power to grant; and nothing appearing to the contrary of the existence of the power in that body, and the concession made at Havana, not being opposed to the royal order of January 1813, and there being no occasion, in this case, to inquire into the powers of the provincial deputation; we have treated the testimonial as emanating from the proper authority, leaving the point open to future inquiry, should an occasion call for it, and positively require us to decide whether the deputation had the power assumed.

It was necessary to state thus much of the case, and of the then state of the Spanish tribunals and history, preparatory to discussing the effect of the proofs intended to establish that the grant had in fact been made.

Jose Leal, representing himself as a notary at Havana, certifies, that on the 13th of January 1814, he had recorded the original memorial of Arrambide, and the documents accompanying the same, with the testimonial or concession; a record of which he testified in presence of two witnesses. This record purports to have been made pursuant to the order of the captain-general, on the petition of Arrambide. Thus authenticated, the testimonial of the grant appears to have been presented to the council of East Florida; but none of the accompanying documents, so far as can be seen, or inferred from the record before us, were presented. On the 1st day of February 1814, the council acted upon the testimonial, but granted lands at a different place from the one therein expressed. On the 3d of June 1814, Entralgo, the secretary, says, "This is a copy." And on the 6th of June following, Ygninez and *Lopez, styling themselves royal collector, and treasurer, [*331
certify to the official character of Entralgo.

How far the forms of these certificates could have been called in question, in the superior court, it is difficult to say ; no objection, however, on the hearing in that court, was made to the introduction of the testimonial given the interested party at Havana ; nor to the resolution taken thereon by the council at St. Augustine ; and we, therefore, do not feel ourselves justified in rejecting them, on this appeal, because of the informality in the evidence adduced to the court below of their existence in the public archives of Florida. The claim had been presented to the American commissioners, years before, without objection to the existence of the title by the board, so far as we are informed. But we chiefly rely on this, that from the nature and great extent of the claim, if such an objection had been well founded, or even suspected, it is fair to presume, the counsel for the government of the United States would have interposed and demanded of the superior court, on the hearing, the rejection of the claim, on the ground that the evidence did not establish its existence. From anything that appears to the contrary, the originals of the proceeding had before the council of St. Augustine, in 1814, may have been before the court, and admitted in evidence, without objection.

Furthermore, the authenticity of the testimonial made in Arrambide's behalf, at Havana, was sanctioned by the council of St. Augustine, in March 1814 ; that was the tribunal to judge of its character as evidence : and having been treated as an existing and authentic act, this court cannot, with any propriety, at this day, hold otherwise ; especially, as not the slightest suspicion attaches to the authenticity of the title papers, such as they are found in the record.

3. Having disposed of the exceptions taken to the existence of the title, we will next inquire what the effect of the testimonial was. We will take for granted, that the papers, on their face, considered in connection with the royal order of January 4th, 1813, sufficiently establish the fact, that the power to grant at the particular time when the grant was made, was in the provincial deputation at Havana, and not in the council of the city of St. Augustine. The council had imposed on it the duty *"to despatch *332] the corresponding title" to the lands granted by the deputation. And to this end, and with this request, by the petition of Arrambide, was the testimonial laid before the council, in the present instance. After the title in form was despatched, the proceedings were to be returned to the provincial deputation ; conforming in this respect to the 12th and 17th articles of the royal order. The resolution of the council must, therefore, found itself on the testimonial.

The provincial deputation stated to the council, "that they granted in property to Arrambide, two leagues square to each point of the compass, of the lands he may choose, from the mouth of New river, which discharges itself on the coast of East Florida, and through Puerta Largo, on the south part, following the same course to the sea-shore ; conforming as near as possible to the said decree." New river, and the inlet through which it passes into the ocean, are well known in the geography of East Florida ; lying north of the twenty-sixth degree of latitude, on the eastern coast, Fort Lauderdale being now established at the mouth of that river. From the mouth of this river, the interested party was authorized to choose the

land ; and we apprehend it was to be taken on the south part of the river, and was certainly to lie partly on the ocean.

On the 1st of February 1814, Arrambide, by his petition, dated at Havana, solicited the counsel of the city of St. Augustine, to expedite to him the title, in conformity to the grant of the 4th of December 1813, in the territory of the province of East Florida, and on the south part thereof. "The testimonial leaving," says he, "to my choice, the place where I should settle myself ; and desiring to possess two leagues to the north of the river Miamies, which is at the north-west side of Largo Byscayno, I pray your honors to be pleased to expedite to me the corresponding title of property for the two leagues of land to each point of the compass, agreeably to this situation : reserving to myself to produce the plat of the said lands, as soon as I find myself prepared to take it out, to commence the establishment, which I am to effect." The Miamies is a river also well known in the geography of East Florida, and lies about one degree of latitude south of the New river ; and at the mouth of which is now Fort Dallas.

*The grant made at Havana, was "with the object of establishing on it mills for sawing timber ;" such was the representation made by [*333 Arrambide to the deputation, as we are bound to infer from the papers adduced ; although the representation does not appear in the record. No survey has ever been made at the mouth of New river ; nor could any be made, unless ordered by the council of St. Augustine ; nor has the proposed establishment been made at that or any other place. On applying to the local council of East Florida, Arrambide abandoned his first location, and claimed to select another, in the neighborhood of a river lying sixty or seventy miles further south. Of the abandonment, there can be no doubt. No claim is set up, in the petition, for the land at the mouth of New river, as granted by the provincial deputation.

To the grant at Havana, the rule applies which was laid down by Saavedra, at the command of Governor Coppinger, in answer to the inquiries of the agent of the Duke of Alagon, and recited in the case of the *United States* v. *Clarke*, 8 Pet. 461 ; that "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 since presented themselves to establish their mechanical works, ought also to be considered without any right or value ; and said lands perfectly free, that they may revert into the class of public lands." The opinion and report, from which the foregoing is an extract, was recognised as authority by this court, in the case of the *United States* v. *Wiggins*, 14 Pet. 351 ; and we imagine its accuracy is indisputable. We, therefore, think, from the facts presented by the record, as also by the laws of Spain, the grant made at the mouth of New river, by the provincial deputation, imposed no obligation on the government of Spain, at the date of the treaty of 1819, to confirm the title to Arrambide ; and that none rests on the government of the United States, as the successor to the rights and obligations of Spain.

4. Did the concession, made by the council at St. Augustine, confer any title? It was professedly made in conformity to the authority of the testimonial and decree of the provincial deputation of Cuba ; and could only be intended to expedite the formal title. The council neither had, nor professed to have, in *itself, the power to make a new and inde- [*334

pendent grant to Arrambide; thereby disregarding the commands of its superiors, and of the laws and regulations recently adopted for the government of the provincial authorities, when granting lands. The concession was, therefore, void, for want of power in the tribunal that assumed to make it. This court say, in the case of the *United States* v. *Clarke*, 8 Pet. 454–5, that the royal order of the 4th of January 1813, founded on the decree of the Cortes, seems to have been repealed on the 22d of August 1834. That it was annulled by the king about that time, there can be no doubt; and it may be, the title of Arrambide would not have been recognised by Spain, after the repeal. So it may have been impossible for him to make the survey, or return the proceedings to the deputation of Havana, according to any known law, after the repeal; that he had no time to do so, between the 22d of March 1814, when the council made the concession, and the 22d of August of that year, when the repeal took place, may be safely assumed: yet, with the very slight information we have on this subject, and of those times, in the history of Spain, it has been deemed proper not to institute an inquiry into the effect of the repeal of the royal order of 1813.

The decree below is for a square of land of twelve English miles; the centre of the tract, to be two leagues northward from the mouth of the Miamies, and two leagues from the sea-coast; the lines of the survey to be to the cardinal points of the compass. The petition of Arrambide, asked of the council of East Florida, two leagues to each point of the compass, "to the north of the river Miamies." That the land was to have been selected in the neighborhood of some part of the river, and north of it, is sufficiently plain; but whether near the ocean, or near what other port of the river, does not appear, and for an obvious reason, the grantee reserved to himself, "the right to produce the plat of the said lands, as soon as he found himself prepared to take it out, and to commence the establishment which he was to effect." This was never done, and no particular lands could have been decreed to Arrambide, had the council at St. Augustine possessed the power to grant. The *doctrine on this subject is stated in several cases *335] decided at the present term; and which need not be repeated. It was not possible for the superior court to locate any land, as no particular spot was granted; lands not previously granted, were, by the treaty, vested in the United States, as part of the public domain; the public domain cannot be granted by the courts; this, the decree below attempted to effect; and on this ground, was there no other objection to the decree, it should be reversed; which is ordered; and that the petition be dismissed.

This cause came on to be heard, on the transcript of the record from the superior court for the southern judicial district of Florida, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said superior court, with directions to dismiss the petition of the claimant.

*Charles Gratiot, Plaintiff in error, *v.* United States, Defendants in error.

Public accounts.—Treasury transcripts.—Corps of engineers.—Chief engineer.

The United States instituted a suit against Charles Gratiot, to recover a balance alleged to be due by him, for money paid to him as "chief engineer in the service of the United States," as shown by two treasury transcripts; the claims of General Gratiot against the United States, as off-sets to the demand against him, which had been exhibited to the accounting officers of the treasury, were for commissions on disbursements of public money at Fortress Monroe and Fort Calhoun, being two dollars per day, during the times of the disbursements; which two dollars per day were charged, separately, for each day; and for extra services in conducting the civil works of internal improvement, carried on by the United States. In the circuit court, the evidence offered to prove the set-off claimed by the defendant, was rejected: *Held*, that unless some law could be shown establishing clearly and unequivocally the illegality of each of the items of set-off, and no such law exists, the refusal of the circuit court to admit the evidence could not be supported; it was competent and relevant evidence, and proper for the consideration of the jury, as conducing to the establishment of the facts.

Certain requisitions had been paid to General Gratiot, on account of Fort Grand Terre, and other public works, as stated in a transcript of the treasury of the United States; and it was contended, that this transcript was not evidence, in an action against "the chief engineer," as the transcript did not state the money to have been paid to him in that capacity: *Held*, that the balance claimed in this action from the defendant was upon a transcript from the treasury including those items, which had been charged to him as chief engineer; and as there was no distinct charge on the transcript objected to, the refusal of the circuit court to sustain the objection was proper.

The United States possesses the general right to apply all sums due to an officer in the service of the United States for pay and emoluments, to the extinguishment of any balances due to them by such officer, on any other account; whether as a private individual, or an officer of the United States. It is but the exercise of the common right which belongs to every creditor, so apply the unappropriated moneys of his debtor in his hands, in the extinguishment of the debts due by him.

It is wholly immaterial, whether the claim to set-off against the United States be a legal or an equitable claim; in either view, it constitutes a good ground of set-off or deduction. It is not sufficient, that these items ought to be rejected, that there is no positive law which expressly provides for or fixes such allowances; there are many authorities conferred on the different departments of the government, which, for their due execution, require services and duties which are not strictly appertaining to, or devolved upon, any particular officer, and which require agencies of a discretionary nature. In such cases, the department charged with the execution of the particular authority, business or duty, has always been deemed incidentally to possess the right to employ the proper persons to perform the same, as the appropriate means to carry into effect the required end; and also the right, where the *service or [*337
duty is an extra service or duty, to allow the person so employed a suitable compensation. Cited, United States *v.* Wilkins, 6 Wheat. 135; United States *v.* Ripley, 7 Pet. 18; United States *v.* Macdaniel, Ibid. 1; United States *v.* Fillebrown, Ibid. 28.[1]

The act of congress of the 16th March 1802, which provided for the organization and establishment of the corps of engineers, never has been supposed to authorize the president of the United States to employ the corps of engineers for any other duty except such as belongs either to military engineering, or to civil engineering. Assuming, that the president possessed the fullest power under the act to employ, from time to time, every officer of the corps in the business of civil engineering, still it must be obvious, that as their pay and emoluments were, or would be, regulated with reference to their ordinary military and other duties, the power of the president to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be

[1] See notes to United States *v.* Macdaniel, 7 Pet. 1.

inferred from such practice and usage of the war department in similar cases, acting in obedience to the presumed orders of the president.

The regulations of the army of the United States, which were sanctioned by the president in 1821, art. 67, and in 1825, art. 67, which allow two dollars *per diem*, not to exceed two and a half per cent. on the sum disbursed, to the agents for disbursing money at fortifications, do not limit this allowance to the engineer superintending the construction and disbursing the money, as agent for fortifications, to a single *per diem* allowance of two dollars for all the fortifications for which a distinct appropriation has been made; when he is employed at the same time upon several fortifications, each requiring separate accounts of the disbursements to be kept, on account of there being distinct and independent appropriations therefor. It would be unreasonable, to suppose, that these regulations intended to give the same amount of compensation to a person disbursing money upon two or more distinct fortifications, that he would be entitled to, if he were disbursing agent for one only; although his duties might be thus doubled, and even trebled.

A claim of set-off was presented for $37,262.46, for extra services in conducting the affairs connected with the civil works of internal improvement: *Held*, that, upon its face, this item had no just foundation in law; and the evidence offered in support of it, if admitted, would not have sustained it. Upon a review of the laws and regulations of the the government, applicable to the subject, it is apparent, that the services therein alleged to be performed, were the ordinary special duties appertaining to the office of chief engineer, and which the chief engineer was bound to perform; and without any compensation beyond his salary and emoluments as a brigadier-general of the army of the United States, on account of such services.

ERROR to the Circuit Court of Missouri. An action was instituted in the circuit court of the United States for the district of Missouri, by the United States against *Charles Gratiot, late chief engineer, to recover a sum of money alleged to have been received by him, "as chief engineer," to the use of the United States. The defendant pleaded *non assumpsit*, and a set-off; and the jury found a verdict for the plaintiff for $31,056.93, under the charge of the court. The defendant tendered four bills of exception, and prosecuted this writ of error—a judgment having been given by the court for the amount of the verdict.

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The plea of set-off was as follows: The defendant says, the United States ought not to have and maintain the action against him, because, at the commencement of the suit, and still, the United States were and are indebted to him a large sum of money, exceeding the amount claimed by them, for work, labor, care, diligence and responsibility by him, before the commencement of the suit, done and performed, in and about the affairs of the plaintiff, at the request of the United States, and for performing the duties of agent for fortifications at Fortress Monroe and Fort Calhoun, two fortifications of the United States, for ten years; and for disbursing and expending in the construction of the fortifications to the amount of $3,000,000; and for receiving and disbursing a large sum of money in and about the repairs and contingencies of fortifications; and for work and labor, care, diligence, skill and responsibility, done and incurred about the civil works of internal improvement of the United States, not pertaining to his ordinary and regular duties as chief engineer of the United States.

The evidence offered to the jury by the plaintiffs, was two documents, purporting to be "transcripts of the treasury," and duly certified, the last of which exhibited a balance charged against the defendant, of $29,292.13. This transcript also contained a statement of the claims of the defendant against the United States, which had been presented to the treasury, and disallowed. Among the claims so presented, and in part disallowed, were the following:

For disbursing $603,727.42, on account of Fort Calhoun, from the 13th November 1821, to 30th September 1829, being 2879 days, at $2 per day, *being less than two and a half per cent. on the amount disbursed, as allowed by the regulations of the army, to a officer disbursing at a fortification, ...	[*339	$5758
For disbursing $848,718.80, on account of Fort Monroe, during the same period, 2879 days, at $2 per day, . . .		5758
		$11,516
For disbursing $33,447.26, on account of contingencies of fortifications at 2½ per cent., as authorized by regulations above referred to, ...		836 18
This sum for extra services, in conducting the affairs connected with the civil works of internal improvements carried on by the United States, and referred to the engineer department for execution, and which did not constitute any part of his duties as a military officer, from the 1st day of August 1828, to the 6th day of December 1838, inclusive, ten years and one hundred and twenty-eight days, at $3600 per annum, that being the pay granted to John S. Sullivan, David Shriver, James Geddes and Nathan S. Roberts, Esq'rs., civil engineers, employed under the act of 30th April 1824, entitled, "an act to procure the necessary surveys, plans, and estimates upon the subject of roads and canals." . . .		$37,262 46

The said transcripts showed, that of the first two items of claim above mentioned, the sum of $5758 was disallowed by said accounting officers, and that the like sum of $5758 was allowed to said defendant, for the said disbursements, at the rate of one dollar per day, for each of said forts, Monroe and Calhoun, for the time specified in the defendant's claim.

After the plaintiffs had closed their evidence, the defendant (relying on the plaintiff's evidence to show the claims he had presented to the treasury department, as matters of set-off, and which had been disallowed by said department, so as to let in his evidence as to the pay) was proceeding to offer evidence in *support of the claims presented and disallowed, as above specified, when the district-attorney, on the part of the plaintiffs, moved the court to exclude all evidence which the defendant might offer in support of the items of claim above specified and disallowed; which motion was by the court sustained: and the court refused to permit the defendant to give any evidence in support of the disallowed items of claim above specified. The defendant excepted. [*340

The transcripts also showed the objections, by the auditor, to the charge of $37,262.46; they were:—"This is a new claim, now for the first time presented by General Gratiot. Lieutenant-Colonel Gratiot of the corps of engineers, was made a full colonel on the 24th May 1828, and on the 30th of July 1828, assumed his station, as chief of the corps of engineers, at the seat of government, as required by the general regulations of the army, of 1825. Art. 67, par. 887, directs, 'that the chief of the corps of engineers shall be stationed at the seat of government, and shall direct and regulate the duties of the corps of engineers, and those also of such of the topo-

graphical engineers, as may be attached to the engineer department, and shall also be the inspector of the military academy, and be charged with its correspondence.' 888. 'The duties of the engineer department comprise reconnoitring and surveying for military purposes, and for internal improvements, together with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects,' &c. 'Also the superintendence of the execution of the acts of congress in relation to internal improvements, by roads and canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or to the entrance into the same, which may be authorized by acts of congress, with the execution of which the war department may be charged.' By these regulations, it is made the express duty of the chief of the corps of engineers to superintend the execution of the acts of congress in relation to all works of internal improvement, and it does not appear in these or any subsequent regulations, or in any of the acts of congress author-
*341] izing works of internal improvement, *that any extra allowance was ever made, or contemplated to be made, to the chief of the corps of engineers, for extra services, nor can the services here charged for be deemed extra, when, by the regulations in force, before and at the time of his assuming the duties of his office, were in part the very duties he was, by his appointment, directed to perform; and further, on the 26th March 1829, Col. Gratiot received a brevet of brigadier-general, to take effect from the day that he received his promotion as colonel, on the 24th May 1828, and with it all the pay and emoluments of a brigadier-general, besides double rations allowed to him, in consequence of his promotion and residence at the seat of government. The brevet rank was unquestionably conferred upon Gen. Gratiot, in consequence of his new command as chief of the corps of engineers, to whom was confided the superintendence of all works of internal improvement, as appears by the regulation before mentioned; and in that way was he compensated for all the duties he was required to perform. On the 30th June 1831, the secretary of war established a separate bureau for the topographical department, and directed a transfer from the office of the chief engineer, of the correspondence connected with the topographical department, to that bureau; thus relieving the chief of the engineer department from the direction and superintendence of all that portion of duty which, by the regulations of 1825, above recited, he was charged with.

"The cases cited by Gen. Gratiot, of pay granted to John S. Sullivan, David Shriver, James Geddes and Nathan S. Roberts, civil engineers, are by no means analogous to his claim; they were civil engineers, appointed by the secretary of war, in virtue of an act of congress, and charged with the performance of certain specific duties, and for which they were paid, out of an appropriation for that purpose, a compensation fixed by the secretary of war; they held no military rank, nor received compensation from the government, in any other capacity, or for any other service. Not so with Gen. Gratiot: he was an officer of the army, exercising a position as chief of the corps of engineers, and in virtue of which had received the brevet rank of brigadier-general, and the pay and emoluments of his brevet, beside double rations. It is fair to presume, that the brevet was conferred, in part,
*342] in consequence of the increased number of *persons and the importance of the works under his charge, produced in a great measure by

the appointment of civil engineers and their attendants; besides, the act of the 3d March 1835, expressly prohibits any extra allowance whatsoever, to any officer of the army. See act entitled 'an act moking additional appro priations for the Delaware breakwater, and for certain harbors, and removing obstructions in and at the mouths of certain rivers, for the year 1835.'"

The defendant's second bill of exceptions was to the refusal of the court to charge the jury, that the United States were not entitled to recover in the action, for any public money received by the defendant, in any other capacity or office, than that of "chief engineer;" and secondly, that three items in one of the treasury transcripts, charged against the defendant, as "General Charles Gratiot," were not evidence of money had and received by the defendant, to the use of the plaintiff. They were:

To requisition No. 4476, dated 17th November 1835, on account fort at Grand Terre, ...	$20,000 00
To requisition No. 4575, dated 21st December 1835, on account fort at Grand Terre, ...	30,000 00
To requisition No. 4728, dated 26th January 1836, on account Fort Columbus and Castle Williams, . . .	3,000 00
Fort at Throg's Neck, ...	37,956 62
	$100,956 62

The court refused the instructions, being of opinion, "that the defendant is charged by the declaration, with moneys received by him, while acting in the capacity of chief engineer, but the United States have not introduced any evidence, save the two treasury transcripts, to sustain the declaration. By these, it appears, that the sums claimed of the defendant, were placed in his hands as chief engineer, in 1835, to be expended in works at Grand Terre, in Louisiana; about $30,000 of which had been retained. The balance due from the defendant, when he was appointed chief engineer, was carried to his account, at and after that date, and became part thereof; and was afterwards extinguished, and he fully credited; that is, in 1838. The *instruction asked was, therefore, refused; because there was no subject-matter growing out of the plaintiff's evidence, to which the instruction could apply, if given." [*343

The defendant's third bill of exceptions was to the refusal of the court to allow evidence offered by him to be given to the jury, being the depositions of witnesses, with the documents annexed to the same respectively (which depositions, and documents are hereinafter set out), for the purpose of proving, that he had rendered services to the United States, over and above the ordinary and regular duties of his office; and the value of such extra services, and the established usage and practice of the government, in allowing to engineers, and other officers, their claims for extra compensation for like services; to the reading of which, in evidence, the district-attorney, on behalf of the United States, objected, alleging that the same was incompetent and irrelevant; and waived all objection to the regularity of the taking of said testimony, the same having been taken by the consent of parties; and it being admitted by the defendant, that the services rendered by him for the United States, which he intended to prove by said

depositions and documents, and for which he claimed extra compensation, were the same services for which he claimed an allowance, by the accounting officers of the treasury department, which claims had been presented and disallowed, as appears by the treasury transcripts given in evidence by the plaintiff, and made part of the first bill of exceptions. Which objection, so made by the district-attorney, was sustained by the court.

The defendant's fourth bill of exceptions was, that the defendant moved the court to instruct the jury :

1 and 2. That the treasury transcripts given in evidence, were defective and illegal, and did not prove the plaintiff's demand, as stated in the declaration, and put in issue.

3. That the items charged against the defendant as chief engineer, in the treasury transcript, marked A, which had been given in evidence and stated as follows (which see in said transcript) :

" 1829, Aug. 18. To balance on settlement, No. 8879, on account of fortifications, ... $8,086 61
On account of repairs and contingencies,. . 11,522 44
*344] *Aug. 22. To balance on settlement, No. 8903, on account of Fort Calhoun, ... 42,751 13
On account of Fort Monroe, ... 2,604 12"

being charges in gross, without the items, going to show said balances were not competent evidence to charge the defendant in this action.

4. That the plaintiff could not recover in this action against the defendant, in any character or office, other than that of chief engineer.

5. That the defendant was not chargeable in this action, with any public moneys received by him in any other capacity than as chief engineer ; and the accounting officers of the treasury department ought not to blend in the same account charges against him as chief engineer, and as an engineer officer superintending the construction of Forts Monroe and Calhoun ; and that the said accounting officers had no legal right, without the consent of the defendant first had, to extinguish the balance reported against him in the account now before the jury, on account of his superintendency of the construction of said Forts Monroe and Calhoun, by setting off against that reported balance, the amount due to the defendant for his pay and emoluments as a general of the army, and while he was chief engineer ; the payment of which pay and emoluments had been stopped ; but that he had now the right to claim it as a credit upon, or set-off against the claim preferred against him as chief engineer, if it appeared, on the treasury transcript aforesaid, before the jury, that the pay and emoluments aforesaid had been allowed or credited to him by the accounting officers of the treasury, but never actually paid to him.

The court refused to give the first, third and fifth instructions as moved for ; gave the second instruction as moved, and also gave the fourth instruction, with a qualification in the following words in writing : " Given, with this explanation, that it appears from the account A, that the indebtment the defendant is charged with, is for moneys received by him as chief engineer." The defendant excepted.

The case was argued by *Brent* and *Jones*, for the plaintiff in error ; and by *Gilpin*, Attorney-General, for the United States.

*For the plaintiff in error it was contended—

1. That the court erred in refusing to allow the items set-off in the appellant's account, and disallowed by the accounting officer of the treasury, to go to the jury, as proper matters of set-off to the plaintifi's demand; as pleaded by the appellant in his plea of set-off, on which the plaintiffs took issue.

2. That there was error in the refusal to allow the appellant to give evidence in support of his claims as a set-off; and which claims had been presented to, and disallowed by, the proper accounting officer of the treasury.

3. That there was error in permitting certain items named in the second bill of exceptions to be given in evidence by the United States in this suit; and also in refusing to instruct the jury, that the plaintiffs were not entitled to recover moneys received by the appellant in another capacity or office than that of chief engineer.

4. That the court erred in rejecting the evidence contained in the third and fourth bills of exception.

5. That there was error in not giving the first, third and fifth instructions; and in giving the explanation and qualification in the fourth exception, asked by the plaintiff in error.

6. That there was error in admitting the treasury transcripts in evidence; the same not being such as the law requires to make them evidence for the United States.

Brent and *Jones*, for the plaintiff in error, contended, that the services required by law from the chief engineer, were different from those required from officers of the army. 7 Laws U. S. 487, 575; 8 Ibid. 575, 338, 288, 492, 493, 635, 811; 9 Ibid. 98, 99, 248. Having shown that by no laws of the United States, the duties performed by General Gratiot were required, and that the services were extra-official; they contended, that there were no army regulations which imposed upon that officer those duties. The army regulations did not apply to the chief engineer. If any of those regulations can be construed to apply to the chief engineer, they were never sanctioned by the president of the United States. They were violations of the constitution, which gives to congress alone the power to establish army regulations. They could not, therefore, be valid.

*The reasoning of the auditor, when he rejected the claims of General Gratiot, was not warranted by the facts in the case; nor by [*346 the facts alleged by him on which he drew his conclusions. The brevet rank conferred on General Gratiot had no connection with the services performed by him. If the reasons for the rejection of the claim, and the facts on which they rest are not correct, the claim should be sustained.

The evidence which was offered on the part of the plaintiff in error, in the circuit court, was entirely proper. It went to show the equitable circumstances under which the claim for compensation was made, and the general practice of the department to make such allowances. This course has been sanctioned by this court, in the cases of the *United States* v. *Macdaniel*, 6 Pet. 634; *United States* v. *Fillebrown*, 7 Ibid. 28; and *United States* v. *Ripley*, Ibid. 18.

The irregularity of the transcript, as evidence, to charge General Gratiot

with money paid to him, not as chief engineer, is shown by the decision of this court, in the case of the *United States* v. *Jones*, 8 Pet. 375. The question under the exception to the regularity of this evidence, is, primarily, one of variance between the proof and the declaration. The declaration charges the receipt of money to General Gratiot in a particular capacity, as chief engineer. The money was not so received, and is not so charged in the second transcript. It could not, therefore, be evidence. The principle of law is well established, that although an averment may not be necessary, yet, when it is made, it must be fulfilled. This is the law ; while it would have been different had there been a general averment, yet, when a particular one is made, it must be supported by evidence.

The proposition of the attorney-general is, that if the services, for which charges are made by General Gratiot, were extra, all that he did was part of the duties attached to his office as chief engineer. If this is correct, the allowances which have been made at the department to engineers and officers of the topographical corps, must be declared incorrect. So too, allowances which have been made to the highest officers of the government ; as to the attorney-general of the United States, when performing the duties
*347] of secretary at war. Evidence of these allowances *was offered, but was excluded by the ruling of the circuit court. Cited, 4 Story 2372, 2404, as to extra compensation for repairing roads by the military.

As to the claims for compensation for disbursements at Fortress Monroe, and Fort Calhoun, the counsel contended, that the establishments were distinct ; the services were distinct ; and the responsibility separate and independent ; whether performed by one person or by two, they were equally the subject of distinct compensation. The accounts were separately kept, and adjusted by settlements at the treasury. The allowance to the same officer has been made by the treasury, as claimed by General Gratiot, as is fully shown by the evidence rejected by the circuit court.

The counsel for the plaintiff in error also submitted to the court, as part of their argument, the opinions of counsel on the claims rejected by the treasury. These opinions were as follow.

Mr. Jones, in his opinion stated : " 2. Compensation for ' extra services' connected with the practical execution of certain works of internal improvement, provided for by acts of congress. The services for which compensation is claimed, under this head, were clearly extra-official, without having any stated compensation appointed for them by law ; they were such as the government might have employed and paid any private individual to perform. That any officer, no matter what his denomination or rank, civil or military, who is employed by the government to perform such services, is entitled to such reasonable compensation, over and above his official salary or pay, as any private individual might have claimed, if employed to perform the same services ; and that the rate and amount of his compensation are to be liquidated by such standards of value or merit, and according to such usages in similar lines of business, as in transactions between private individuals, has all been long and conclusively settled by the most unquestionable precedent and authority. The act of congress (30th April 1824) directing certain surveys, &c., and assigning certain duties, in execution of the act, to " officers of the corps of engineers," does not include in those duties any part of the services for which General Gratiot claims com-

pensation. That act neither directs nor authorizes the execution of any work of internal improvement whatever ; it merely takes certain preparatory steps, and provides for collecting *such information as may [*348 enable congress, at some future time, and by subsequent and independent legislation, to judge of the expediency of setting on foot such works, and of providing for their execution ; and with that view, it authorzes the president to cause "surveys, plans and estimates to be made of the routes of such roads and canals as he may deem of national importance ;" it also authorizes him to employ officers of engineers, or other persons, in preparing these materials for future legislation. The results of these preliminary investigations are required by the act to be reported to congress ; they were so reported ; and it then remained for congress alone, at some future time, to provide for the execution of such of the works as those results may have shown to be practicable and expedient. With the execution of these "surveys, plans and estimates," the entire execution of the directions and purposes of the act of congress was completed, and all the duties assigned by the act to officers of the engineer corps were executed and determined. When congress did afterwards provide, by substantive acts of legislation, for the construction of any of these works, without assigning any further duties to officers of the engineer corps, such officers had no official concern whatever with those works ; the works were to be carried on exclusively by civil, not by military, means and instruments. Of course, when the government employed any officer of the corps in any branch of the business connected with the practical execution of the works, it was an employment purely extra-official : for which he was just as well entitled to extra-official compensation, and to the same rule and rate of compensation, as if he had not been clothed with any official character."

Mr. Binney :—I have considered the questions discussed in General Jones's opinion, and as, upon his statement of General Gratiot's claims, I agree in all points, it might be sufficient to express my assent generally ; but I think that an additional remark will be found to fortify General Jones's interpretation of the army regulations of 1821 ; the part of the case which appears to present the greatest difficulty. The objection to General Gratiot's claim to distinct compensation for distinct services in disbursing money for Fortress Monroe, and also for Fortress Calhoun, seems, while the army *regulations of 1821 applied to the case, to rest upon the suggestion [*349 that he was performing the duties of but one agent, and, therefore, was entitled only to two dollars *per diem* for the whole collective service ; that he was substituted by the 14th section of article 67, for an officer who is spoken of as an agent for fortifications, and was not to be substituted, except where there was "no agent for fortifications ;" and therefore, that being substituted for the performance of a general or collective service, the two dollars *per diem* is all that he could claim, whether he performed the agent's duties at one or at ten fortifications. This is a question of interpretation of the 14th clause of the 67th article. The remark I have to make is, that the army regulations of 1821 do not speak of any such officer as an agent for fortifications, generally and collectively. The 7th section of the 67th article says, "there shall be appointed as many agents for fortifications as the service may require." They might be one, or one hundred in number, according to the necessities of the service ; but from the nature of

the duties assigned to them by the army regulations, they must have been agents for some fortifications in particular, and not for two or more jointly or generally. Two or any other number of fortifications, might have been placed by the department under the agency of the same person, and he might by agreement have received one compensation for the performance of his duties at all the posts; but the agency for each would have been, by its prescribed duties, a separate agency for each, and not a joint or collective agency for the whole. This is shown by all the sections of article 67, from the 7th to the 13th inclusive; for although they speak of agents and fortifications in the plural, they do so with reference to duties of disbursing and accounting, which necessarily belong to the agent in regard to each fortification separately, and not two or more fortifications jointly. It is out of the question, to suppose, that the army regulations meant to authorize or to require the blending in one account of the disbursements, the articles purchased, the laborers employed, and the abstracts made out for two or more fortifications jointly; the appropriations, which are for fortifications *separately, would all be confounded by it; and if this was not intended, then they meant to regard the duty of disbursing and accounting as a separate service in regard to each fortification; and it is so to be understood throughout, notwithstanding the use of the word fortifications in the plural. It follows that this word, wherever it is found in this part of the army regulations of 1821, is to be considered as used distributively, and not collectively—as comprehending two or more fortresses within the limits of a joint duty.

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"When the 14th section declares, that 'where there is no agent for fortifications,' the superintending officer shall perform the duties of an agent, it consequently does not mean that where there is no agent having the collective duty of disbursing for all fortifications, the superintending officer shall perform that collective duty; but using the word distributively, it means to say, that where there is no agent for a fortification to be constructed, the superintending officer shall perform the duties of agent in regard to the fortification in question: and when it says, that as a compensation for the performance of that extra duty he will be allowed, for moneys expended by him in the construction of 'fortifications,' at the rate of two dollars *per diem*, it means to use the word with the same effect, and to give the compensation as distributively as the service. If this be not so, the superintending officer would be entitled to nothing for moneys expended by him in the construction of a single fortification. The word is 'fortifications,' and if it is to be understood only of more than one, then nothing is to be allowed for one; and if it is to be understood of one or more, then it is to be understood of each one as a separate service and duty, as it is before described; and the compensation allowed for the service must be separate also. If the superintending officer is required by his superior to undertake the duty of agent for Fortress A, to-day, and for Fortress B, tomorrow, and for Fortress C, the next day, and all these duties were prosecuted for years, they are not one collective service, but three separate services; and it is the same thing if all are ordered and begun on the same day. They would be separate agencies, though but one agent performed the whole, and he received but one general *compensation; and the account of the appropriations for the three fortresses would not be truly kept, unless the general compensation was

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duly apportioned among them. This I conceive is the effect of the army regulations of 1821, as it more plainly is of the regulations of 1825. Each fortification is separate in appropriation, separate in disbursement, and separate in agency. It is meant also to be separate in compensation for agency. It might not be material to the agent, or to the department, that the compensation should be separately estimated for each fortification of two or more confided to the same agent; though, as I have said, I do not see how the appropriation can be truly accounted for, except by a due apportionment of the aggregate compensation among the several fortifications. But when a specific compensation is allowed, reason and justice require, that it should have reference to a specific or definite service; and hence, in the case of such a compensation, the very limitation enters into the interpretation of the clause. What is the service intended to be compensated by two dollars *per diem?* Is it the definite service of disbursing for one fortification, or the variable but always increasing service of disbursing for from one to ten? If it be the latter, there are gross inconveniences, which are not to be encountered, unless clear language requires it. If it be the former, the interpretation becomes the more reasonable, from its just and reasonable consequences. The prescribed compensation, therefore, sustains the interpretation that the service referred to was separate and distinct for each fortification, as the separate nature of the service sustains the interpretation, that the prescribed compensation was to be allowed in as many instances as there should be fortifications to be superintended.

"Upon the other points of General Jones's opinion it is unnecessary for me to make a remark. I concur with him in all points. Since the cases of the *United States* v. *Macdaniel*, *United States* v. *Fillebrown*, and *United States* v. *Ripley*, reported in 7 Peters, it is not to be doubted, that an officer of the United States, performing, under the lawful sanction of a department, extra services, which do not come within the line of his official duty, is entitled to an allowance, to be graduated by the amount paid for like services, under similar circumstances."

**Gilpin*, Attorney-General, for the United States.

[*352 On the 2d of March 1819, the plaintiff, then an officer of engineers in the army of the United States, was ordered to Old Point Comfort, to take charge of the works there building, at the two fortifications, Fort Monroe and Fort Calhoun. These works form part of a united system of defence for Hampton Roads; and are separated by a channel or arm of the sea, about a mile wide. On the 8th of November 1821, the disbursing agent then at the post was removed, and the plaintiff was directed to "take upon himself the disbursements of the public money, agreeably to the regulations for the government of the engineer department;" which he did. Until the 30th of June 1825, he rendered his regular quarterly accounts, and charged and received credit for two dollars *per diem*, as his compensation for these disbursements. He kept separate heads of account, for the disbursements at Fort Monroe and at Fort Calhoun. In his quarterly account, rendered on the 30th of September 1825, he, for the first time, charged four dollars *per diem*, being a separate compensation of two dollars, for the disbursements at each work. The second *per diem* was disallowed

at the treasury. On the 1st of August 1828, the plaintiff became chief engineer, and removed to Washington; but continued in charge of the works at Old Point Comfort, until the 30th of September 1829. In his final account then rendered, he charged a second *per diem* from November 1821, amounting to $5758, which, on its settlement at the treasury, was disallowed, together with some other items, amounting to $3200.91, and making together $8958.91. This balance remained unpaid; and on the 26th of March 1833, the plaintiff presented a new account as "agent of fortifications at forts Monroe and Calhoun." In this he relinquished both *per diem* allowances, and made one general charge of one per cent. commission, from November 1821, to September 1829. This was also disallowed at the treasury.

On the 30th of June 1834, congress made an appropriation of $50,000, for "a fort at Grand Terre." The whole of this sum was drawn from the
*353] treasury by General *Gratiot, as chief engineer, in November and December 1835. On the 6th of October 1836, he repaid into the treasury $15,000 thereof, retaining $35,000, in addition to the balance of $8958.91, charged against him for the disbursements at Old Point Comfort.

On the 1st of April 1836, the pay and allowances to which General Gratiot was entitled, were stopped; and the amount thereof directed to be appropriated to the extinguishment of his debt to the United States. On the 15th of December 1831, his accounts were again adjusted. The sums stopped from his pay and allowances, to the amount of $8958.91, were applied so as entirely to extinguish the balance charged against him for disbursements at Old Point Comfort. He was also credited with a sum of $1805.08, which he had disbursed for the fort at Grand Terre, and with $1520.47 stopped from his pay and allowances, which reduced the balance due from him, to $31,674.45. This was further reduced, on account of allowances for transportation, expenses of some journeys, and other items, by the sum of $2382.32, leaving in his hands, unexpended and unaccounted for, of the $35,000 drawn from the treasury, for the fort at Grand Terre, the sum of $29,292.13. As an off-set to this, General Gratiot, on the 11th of January 1839, presented a new account at the treasury, in which he renewed his first claim of $5758, for a second *per diem*, for disbursements at Old Point Comfort; and added thereto a claim of $816,18, being a commission of two and a half per cent. on disbursements made by him, of "contingencies for fortifications;" and also a claim of $37,262.44, as compensation for extra services, in conducting works of civil engineering, from 1828
*354] to 1831, at the rate of $3600 **per annum*, in addition to his pay. These claims, which would, if allowed, have extinguished the balance against him, and left the United States largely in debt to him, were disallowed at the treasury.

In February 1839, a suit was brought against him by the United States, in the circuit court for the district of Missouri. It was tried in April 1840, and resulted in a verdict in favor of the United States, $31,056.93. On the trial, the only evidence given by the United States was a treasury transcript, containing the accounts and settlements made as the treasury, with the claims of General Gratiot, and the grounds of their disallowance. He offered, on his part, certain documentary evidence, with a view to sustain

the three items of his claims for set-off, but it was entirely rejected by the court. Four bills of exception were sealed by the court, at the request of the defendant; but they embrace substantially only the two questions, whether the court properly admitted the treasury transcript, as evidence to sustain the demand of the United States; and whether it properly rejected the evidence offered by the defendant below, with a view to sustain his set-off. These also form the entire ground of the present proceedings in error.

I. There were four objections taken to the treasury transcript; that it did not show that the balance demanded was, as stated in the declaration, for moneys received by the defendant, "as chief engineer;" that it charged him, not with moneys received, but merely with "requisitions" therefor; that it set out "balances" due, without the items of which they were composed; and that it credited his account for disbursements, as an agent of fortifications, with the pay and allowances subsequently accruing to him as chief engineer.

1. The slightest examination of the treasury transcript, or of the state of the accounts of General Gratiot, shows, that, in point of fact, no money was sued for, except what was received by him as chief engineer. The balance of $8958.91, due on account of his disbursements at Old Point Comfort, was entirely extinguished on the settlement of his account in December 1838. The only sum remaining then in his hands, was that drawn by *him from the treasury, as chief engineer, to apply to the erection of the fort at Grand Terre. That the United States had a right thus to [*355 extinguish the balance first accruing, by applying to it the first moneys received from the debtor, is too clear to be contested. The whole account was solely between these two parties; no one but themselves was affected by, or interested in, the settlement; no objection was made by General Gratiot, at the time; there was no request for any different application of the moneys. The propriety, therefore, of extinguishing the first debt, cannot be doubted. *United States* v. *January*, 7 Cranch 572; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *Cremer* v. *Higginson*, 1 Mason 323; *United States* v. *Wardwell*, 5 Ibid. 87: *Armstrong* v. *United States*, Pet. C. C. 46; *Postmaster-General* v. *Norvell*, Gilp. 125, 132. The first debt being extinguished, all that was sued for was a debt incurred as chief engineer, as set out in the declaration. The treasury transcript shows it to be money drawn on his own requisition, "as chief engineer." This answers the objection; but even if all this did not appear by the treasury transcript, his mere receipt of the money which is sued for, from the treasury, while he was chief engineer, would sustain the declaration. In the case of *Walton* v. *United States*, 9 Wheat. 651, this court held a declaration against the defendant, as an individual, to be sustained by a treasury transcript against him as a receiver; and say, that the evidence of moneys received in the latter capacity, is sufficient. The reverse holds equally good. Where there are no third parties interested, proof of the receipt of the money for the use of the plaintiff is sufficient. So, in the case of *Smith* v. *United States*, 5 Pet. 302, this court say, that official transactions are evidence of official character; and in that of the *United States* v. *Buford*, 3 Ibid. 28, they held, that the mere fact of public money being paid by one officer to another, is proof that the payment was received by the latter in his exist-

ing official capacity. On the same principle, the payment of money from the treasury to General Gratiot, while he was chief engineer, sustains the declaration, without further proof.

2. An examination of the treasury transcript will also show, that General Gratiot was not charged, as is alleged, with "requisitions." It is, on the contrary, a general account for "moneys *advanced." The requisitions, under which each item of advance is made, are, indeed, separately stated; and the general object of them is not repeated; had it been, the objection could not have been made. It depends, therefore, on no actual error in the account; no false or indistinct charge; but is a mere matter of form, in which it would seem, that the usage of the accounting officers is altogether the more simple and correct. There is no similarity whatever with the case of an account, held by this court to be insufficient (*United States* v. *Jones*, 8 Pet. 381), which charges an officer with "orders" or "bills of exchange," without the production of, or further evidence in regard to, those instruments. It does not follow, in such cases, that the payment is justly chargeable by the United States to the officer. That must depend on the nature of the order, or the bill of exchange. But an advance of money from the treasury to a disbursing officer, on his own requisition, is evidence that it was money received by him for the use of the United States.

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3. It is not denied, that a treasury transcript, charging an officer with "balances" in gross, and not stating the items which compose them, is insufficient evidence. Unquestionably, it must contain a full statement of the items of the account, so as to exhibit every credit, and every charge necessary to enable the jury to do entire justice between the parties. *United States* v. *Jones*, 8 Pet. 383. Now, in all this series of accounts between the United States and General Gratiot, it never has been alleged, that a single erroneous charge has been made against him, or that any credits have been refused him, except those which are contested in this suit, not upon any ground of error in fact, but merely as to their legal propriety. His own balance, as set out in the statement of differences annexed to the transcript, agrees with that of the United States, if the items contested on legal grounds shall be admitted. If, therefore, the treasury transcript did not contain all the items which compose any of the balances, it is evident, that no injustice would have been done thereby to General Gratiot, in presenting his case to the jury. But, not resting upon this ground, the fact is, that the transcript does not contain every item of which these balances are composed. It only requires an examination of the transcript, to see that there is a complete and detailed account of *every charge and credit; and the balances objected to are merely rests in the account, during its progress, and when different settlements were made. Taking the whole transcript together (which must be done, unless each successive settlement is to embrace all the details of the previous one), it is plain, that every item is to be found, from first to last.

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4. The objection that the pay and allowances of General Gratiot, which were stopped after the 1st of April 1836, should have been applied to the reduction of the balance due from him for the money drawn from the treasury, for the fort at Grand Terre, and not to the extinguishment of the balance due on his account for disbursements at Old Point Comfort, is

answered by the observations made in reply to the first objection to the transcript. The application of the moneys coming into the hands of the United States from their debtor, and not appropriated by him, is to be made in such manner as they deem expedient. There was no objection by Generel Gratiot to this mode of appropriation; the money received had no relation to the one debt more than to the other; the right so to appropriate, which was clearly vested in the United States, as creditors, was not affected or controlled by any circumstance, equitable or legal.

II. The principle ground on which it is sought to reverse the judgment of the circuit court of Missouri, is the rejection, by the court, of evidence offered by the defendant below, to sustain his plea of set-off. Now, it is not denied by the plaintiff in error, that the sole object of this evidence was, to support those identical claims, and no others, which, as to their nature and amount, were set out in the treasury transcript that was in evidence and went before the jury. It is admitted, on our part, that, if the court rejected evidence of any fact which was a legal ground of set-off or credit, they erred. The question, therefore, resolves itself into the inquiry, whether the particular items of claim, as set out in the treasury transcript, were, if proved, a legal ground of off-set by General Gratiot against the United States. The items are three in number. The first is a claim for $5758 for a second *per diem* allowance for the disbursements made at Old Point Comfort. The second is a claim for $816.18 for disbursing "contingencies of fortifications." The third is a *claim for $3600 *per annum*, in addition to his pay, during the whole time he was chief [*358 engineer, for services in conducting works of civil engineering. It is submitted, that each of these claims is contrary to law; and therefore, that the court properly refused to receive any evidence to support them.

1. The plaintiff in error took the direction, as an officer of engineers, of the fortifications at Old Point Comfort. While there, he became the disbursing officer, in place of the agent of fortifications. He took exactly the place of that agent. It was his duty to do so. The regulations of the army required it; and those regulations were made in pursuance of law, and constituted a legal obligation. 2 Story's Laws, 1000, 1312; 3 Ibid. 1576, 1811, 1852. Had they not been recognised by law, it would have been properly within the power and authority of the war department to make them. 7 Pet. 14. These regulations prescribed the duty, and fixed the compensation. This duty was, to take the place of the "agent of fortifications." "Where there is no agent for fortifications, the superintending officer shall perform the duties of agent; and while performing such duties, the rules and regulations for the government of such agents shall be applicable to him." Army Regulations of 1821, Engineer Department, art. 67, par. 866-7. This regulation was in force when the plaintiff in error commenced performing the duties of the agent of fortifications at Old Point Comfort. In 1825, while he was still performing them, a new set of regulations was adopted. They declared, that "the engineer, superintending the construction of a fortification, will disburse the moneys applied to the same." Army Regulations of 1825, par. 893, p. 170. The compensation allowed to an agent of fortifications, was a commission of two and a half per cent. on the moneys he disbursed, but he received no other pay or allowances. When his duties were assumed by an officer of the corps of

engineers, that officer was allowed to receive the same commissions, but as he received also his pay and allowances as an officer of the army, their amount was limited not to exceed two dollars a day. "As a compensation for the performance of that extra duty," say the regulations of 1821, p. 167, "he will be allowed for moneys expended by him, in the construction of fortifications, at the rate of two dollars *per diem*, during the continuance of such disbursements; provided the whole amount of emolument shall not exceed two and half per cent. on the sum expended;" and in those of 1825, p. 170, it is said, "as a compensation for the performance of that extra duty, he will be allowed at the rate of two dollars *per diem*, during the continuance of such disbursements, provided the whole amount of emoluments shall not exceed two and half per cent. on the sum disbursed." It seems impossible to doubt the intention of this provision; it was meant to substitute the engineer officer for the agent.. Col. Gratiot was to do exactly what the agent did; for that extra service, "the whole amount of his emoluments" was not to exceed two dollars a day, in addition to his pay. If a single agent had more than one work under his agency, and an officer was put in his place, then "the whole amount of his additional emoluments" was allowed for the performance of this additional duty. The plaintiff in error called himself the "agent of fortifications." His extra duty was a single one; it was the assumption of that discharged by the person whose place he took; his allowance was a commission, "during the continuance" of that duty, of two and a half per cent., or of two dollars a day. There is not a word to be found in the language or fair construction of the regulations, that indicates an intention to allow a single officer, charged with the same duty as a single agent, whose place he takes, a double rate of compensation. It is, besides, a *per diem* allowance; an allowance for the additional work "of the day." This is not necessarily increased by the number of contiguous works in charge of a single agent. Thus, at the harbor of New York, in 1836 (9 Laws U. S. 458), there were three works in charge of one officer, for which congress appropriated $20,000; and in the same year, at the harbor of Newport, was one work in charge of an officer, for which they appropriated $200,000. Could it be intended that the former was to receive three times the amount of extra compensation that the latter did, while the amount of extra labor was only one tenth as much; and when an "agent of fortifications," for whom each was substituted, would, at the latter place, have received ten times as much as at the former? There would be neither reason nor justice in such a construction.

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Besides, the uniform usage of the army *and the war department has been otherwise. General Macomb, himself for a long while the chief engineer, and now at the head of the army, states the settled construction to have been but a single allowance. The testimony of the accounting officers, offered by the plaintiff in error in the court below, corroborates that of General Macomb; and of numerous instances adduced, where a single officer has had more than one fortification under his charge, none are found, in which the double *per diem* allowance now claimed, has been made or sanctioned. The record in this case shows, that between 1820 and 1838, more than $13,000,000 were disbursed by officers of engineers, at various posts; it is well known, that, at many of them, there are several separate works contiguous to each other, and included in a single superintendency.

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What stronger proof of a just as well as a settled construction could be desired, than a uniform practice through so long a period? The argument that the duties of the agent are increased, because there are more works included in his agency, is founded on an erroneous assumption of fact. In the first place, if the amount of disbursement be not increased by the additional number of works (and, in many instances, as we have seen, it is actually less), there is, in reality, no increase of labor; but besides, the supposed multiplication of accounts does not, as will be seen by the treasury transcript, exist in reality; the account of the agent is but a single one, merely designating, under separate heads, the place of expenditure, in accordance with the designation of the appropriation, as made by law.

2. The charge of two and a half per cent. commissions for disbursing contingencies of fortifications, is so clearly contrary to law, that all evidence to sustain it was properly rejected. Admitting the disbursement to have been made, as charged, such an allowance, therefore, could not be lawfully claimed. The army regulations, above referred to, declare that "the whole amount of emoluments" is to be the *per diem* allowance of two dollars; this is to be for the performance of the entire extra duty of disbursements; of course, this charge of commission, in addition to the *per diem* allowance, is directly contrary to the provisions of these regulations; and they have the force and authority of law, in regard to the subjects properly falling within their purview. If even the plaintiff in error could have offered any proof *of usage, in favor of such an allowance (and the rejected evidence contains none such), yet that would not have warranted its admission, in the face of so clear a legal provision, forbidding such an allowance. Nor is there any force in the argument, that these disbursements may have been other than those at Forts Monroe and Calhoun, for which the *per diem* allowance is claimed; because it appeared by the account of the plaintiff in error himself, annexed to the treasury transcript, and already before the court, when the evidence to sustain this claim was rejected, that these disbursements for contingencies of fortifications, were, in fact, a part of those made by him at Forts Monroe and Calhoun. [*361

3. The last and largest offset, claimed by the plaintiff in error, is the gross sum of $37,262.46, for "extra services in conducting the affairs connected with the civil works of internal improvement, carried on by the United States, and referred to the engineer department for execution," during a period somewhat exceeding ten years, while he was chief engineer. For these he claims the same annual salary, in addition to his pay, which was given to Mr. Sullivan, and other civil engineers, who were specially employed, under the provisions of the act of congress of 30th April 1824. 3 Story's Laws 1940. This salary was $3600. This claim appeared, for the first time, in the accounts of General Gratiot, on the 11th January 1839, after his removal from office. Never before had it been made in any of his various accounts. It is a charge for his own extra services, and for his alone, in regard to civil works of internal improvement, referred to the department of which he was an officer. What did he, in fact, do? In 1828, he "assumed his station at the seat of government as chief engineer; he continued there till December 1838; he made no disbursements on any of these civil works of internal improvements; he made no explorations or surveys; he examined no localities, ran no lines, surveyed no harbors, built

no piers; he performed none of the services which were actually performed by the civil engineers, specially employed, whose salary he claims. As the head of the engineer office, stationed at Washington, he superintended the execution of duties of this sort, referred to his office, as he *superintended other duties referred to it. Such was the sum of his services. Was this within the line of his official functions, or was it not? It is submitted, that he was bound to perform it, by the clear intent of the acts of congress, by the regulations of the war department, and by the established construction always given to those regulations; nor was there any point in which it was analogous to any service performed by the civil engineers, whose salary he claims.

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The whole series of legislation, in regard to the engineer corps and to these words, shows that when the latter were required to be done by law, they came appropriately within the superintendence of the former. The act of 9th May 1794 (1 Story's Laws 336), which constitutes the corps, gives it no specific duties, but places it generally under the orders of the president to perform appropriate services on the coast or the frontiers. In 1802 (2 Ibid. 835), it was re-organized to "do such service as the president should direct," clearly embracing every service relating to engineering, which it might become the duty of the president to have executed, whether military or civil. The act of 10th April 1806, § 1, art. 63 (Ibid 1000), distinctly authorizes the president to employ the engineers out of the line of their merely military profession; and in 1812, when the corps was increased (Ibid. 1241), and some arrangements made in regard to the military academy, which is a part of the corps, a professor of engineering "in all its branches," that is, civil as well as military, was appointed. In 1813 (Ibid. 1312), the topographical department of the corps was constituted; clearly indicating that such works of topography and survey were regarded by congress as a branch of the services falling within the appropriate superintendence of the head of the corps. In 1818 (6 Laws U. S. 360), we find the officers of engineers joined with those of the navy, in surveying the waters of the Chesapeake. In 1821 (3 Ibid. 1810), when the army was re-organized, the corps was continued exactly as it had previously existed, with the same powers and duties; and when, in 1838 (9 Laws U. S.), its topographical branch was increased, the employment of civil engineers to aid it was forbidden. The number of its bureau officers and clerks was increased, as the civil works of internal *improvement referred to it were increased. Biennial Register of 1828, p. 72, 79; and of 1837, p. 104, 118. This series of laws exhibits the organization of a separate department, having a military officer as its chief, forming an executive office at Washington, which was to superintend all the subjects appropriately belonging to "engineering in all its branches," that might be referred to it, either directly by law, or by the president in the execution of duties devolved on him by law. If we examine the legislation of congress upon these subjects, it will be found to indicate a similar intention. As early as 1817 (6 Laws U. S. 219), the opening of the Chickasaw road was intrusted to "the direction of the secretary of war." In 1819 (Ibid. 368), the appropriations for surveying the water-courses west of the Mississippi are among those for the military service. In 1820 (Ibid. 483), the general "military" appropriation bill, contains a series of appropriations for surveys of streams, rivers and roads.

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in 1822 (7 Ibid. 82), are similar appropriations among those for the "military service" of that year. In 1824 (3 Story's Laws 1940), the president is authorized to employ civil engineers, in addition to "the officers of the engineer corps" and such others as he may direct, to make surveys for internal improvements. In 1825, 1826 and 1827 (7 Laws U. S. 338, 451, 537), the appropriations for continuing these and making other surveys are embraced in the bill for the "military service" of those years. In 1821, and subsequently, there was a separate appropriation bill for these works of internal improvement, referring to them as under the superintendence of the war department. 1 Ibid. 72, 389. Here, then, is a series of laws showing that, from the earliest period when these civil works of internal improvement became the subjects of legislation, they were regarded by congress as appropriately belonging to the war department and the military service. To what office of that department, or to what branch of that service, could they belong, but to the department and corps of engineers? What duty of the head of that corps could be more evident and appropriate than the superintendence of them?

The army regulations are uniformly in accordance with this *view of the legislation of congress. As early as those of 1806 (Army [*364
Regulations, art. 63), when appropriations for civil works of improvement in the states, were almost, if not entirely, unknown, we find this corps directed to perform such special duties as the president shall assign them, even out of the line of their profession. Those of 1816, p. 96, repeat the same regulation. In 1821 (Army Regulations, art. 67), it is expressly declared, that "the chief of the corps of engineers shall be stationed at the seat of government, and shall be charged with the superintendence of the corps of engineers to which that of the topographical engineers is attached." In 1825, when civil works of internal improvement became the subject of large appropriations, a still more definite reference to them was introduced into the army regulations. Regulations of 1825, art. 67, par. 888. By them it was provided, that "the duties of the engineer department comprise reconnoitring and surveying for military purposes and for internal improvements, together with the collection and preservation of topographical and geographical memoirs, and drawings referring to those objects; the selection of sites, the formation of plans and estimates, the construction, repair and inspection of fortifications, and the disbursement of the sums appropriated for the fulfilment of those objects, severally, comprising those of the military academy; also, the superintendence of the execution of the acts of congress, in relation to internal improvement by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of congress, with the execution of which the war department may be charged." These regulations, thus specific, were in force when General Gratiot became the chief engineer; and in 1835, while he still occupied that post, on a revision of the army regulations which must be presumed to have passed, in relation to his own branch, under his own immediate notice, we find the superintendence of these works classed among the regular duties of his department. Regulations of 1835, p. 156. The regulations, also, of the Academy at West Point, p. 11, include civil engineering as one branch of the course of instruction properly embraced under the class of "engineer-

ing." Can it be argued, in the face of these regulations, *that the chief engineer, stationed at the seat of government, is performing an extra service, in superintending the acts of the subordinate officers of his corps, while employed on these works, any more than when they are employed on a fortification? Is it an extra service, to receive, examine, file or submit to congress the reports they may make, from time to time, in regard to one more than in regard to the other?

These questions are not more distinctly answered, by the explicit language of the regulation, which has been referred to, than by the uniform construction put upon it by the officers of the corps themselves. The public documents, for years past, contain the annual reports to congress, made by the chief engineers, including General Gratiot. The works of civil construction will be found to be stated, and reported upon, with the same reg, ularity as those for military purposes. No intimation will be discovered, through a series of years, that the former were less appropriately attached to the department than the latter. This record exhibits an effort by General Gratiot, to extract from the files of the departments, some evidence to show that such services had been regarded as extra services; but no single case to establish that point, has resulted from that endeavor. If even it had been shown, that the actual services in the field of officers of engineers, on civil works of internal improvement, had been regarded as duties extraneous to their profession, this would have afforded no analogy to the case of the head of the engineer office, who, at the seat of government, merely superintends the acts of his subordinate officers; but no instance, even of that kind, has been produced. The few cases cited of extra allowances to officers of engineers, are found, upon examination, to depend upon circumstances, which totally and explicitly distingush them from those where the officers of the corps have been employed upon civil works "referred to the engineer department for execution." Of all the numerous works, which, under the skilful practical superintendence of this corps, have, during the last fifteen or twenty years, developed the resources of various parts of the United States, improved their harbors, and facilitated their internal communications; on which so many millions of dollars have been spent; which have been the subjects, at every session, of careful and detailed reports to congress; *of all these, none have been regarded by the offi- *366] cers of engineers, who had the actual charge and execution of them, as works of extra service; yet, with how much more justice might their labors have been so regarded, if the law, or regulations of the army, would have borne such a construction, than the mere official supervision of them, by the chief of their corps, at Washington.

The civil engineers, whose whole annual compensation General Gratiot takes as the whole standard of an allowance to himself, in addition to the pay, emoluments and allowances received besides, by the chief engineer, to an amount, as appears by the public documents, of not less than $6000; these civil engineers were not only specially engaged, by the direct authority of an act of congress, but their duties were the arduous and responsible services of the field. Long lines of survey were explored and located by them; minute estimates and reports, filling many pages of the public documents, show the nature and extent of their labors; journeys and explora-

tions of months, were their ordinary services to the public; their whole time was engaged by the duties for which this compensation was bestowed. If the services of the plaintiff in error, for which he claims to retain, in addition to his pay, more than the $35,000 drawn by him from the treasury for the erection of the fort at Grand Terre, were not services falling within the line of his duty, as chief engineer, they are yet services totally different from those to which he represents them as analogous; and the compensation allowed for the latter, affords no evidence whatever, of the propriety of the allowance that is claimed.

Is there, then, any foundation in law, whatever, for this claim? Is there any doubt, but that the service were clearly such as belonged to the office General Gratiot held; such as he was bound, by law and the regulations of the army, to perform, without any additional compensation? If so, by what authority was he entitled to offer evidence to sustain it? In what respect did the court err, by rejecting entirely all testimony which was presented for that purpose? It formed no legal or equitable ground of credit. If proved in every particular, it came within no rule ever laid down by this court, in regard to the admission of such off-sets. It is, therefore, [*367 submitted, that the court did not err, in rejecting all evidence offered for the purpose of sustaining this claim.

The counsel for the plaintiff in error has elaborately argued against the application to this claim of the provision of the act of 3d of March 1835 (9 Laws U. S. 207), which prohibits an officer of the army from receiving any extra allowance, unless the same be authorized by law, on the ground, that the provision in question, is applicable only to the appropriations made during the year 1835. It is submitted to the court, that the provision is a permanent regulation, applicable to subsequent appropriations, as well as to those of 1835; but that act is not relied upon in the present case, on behalf of the United States, as furnishing the ground on which the court were bound to reject this evidence; for the claim of the plaintiff was for many services anterior thereto. Had all these services of General Gratiot been rendered subsequently to the 3d of March 1835, it would then have been contended, that, if they were in fact extraneous, yet, that all compensation for them was prohibited by that law; and on that ground, that all evidence to sustain them, should have been rejected. As it is, the ground relied upon is, that the services for which this compensation is asked, clearly appertained to the ordinary official duties of the chief engineer.

It is submitted, therefore, that all these claims, whether for an additional *per diem* allowance, a commission for disbursing the contingencies of fortifications, or an extra compensation for superintending civil works of internal improvement, are contrary to law, and could not, if established by the evidence offered, in every particular, be a legal off-set to the claim of the United States, for the repayment of the money drawn by General Gratiot, from the treasury, in the year 1835, for the avowed purpose of applying it to the erection of the fort at Grand Terre; but which has been retained by him, and never, with the exception of $1805.08, applied, in fact, to that or any other public object. If the court shall be satisfied upon these points, there was then no error in the decisions of the circuit court, and its judgment ought to be affirmed.

*STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the circuit court of the district of Missouri. The original action was *assumpsit*, brought by the United States against General Gratiot, the plaintiff in error, as chief engineer, for $50,000 alleged in the declaration to be money had and received by him as chief engineer, to the use of the United States. At the trial, the controversy turned mainly as to the merits of three items of set-off, or credit, which were claimed by the defendant, in the reduction or extinguishment of the supposed debt due to the United States. These items were as follows:

1. For disbursing $603,727.42, on account of Fort Calhoun, from the 13th of November 1821, to the 30th of September 1829, being 2879 days, at $2 per day, being less than two and a half per cent. on the amount disbursed, as allowed by the regulations of the army to an officer disbursing at a fortification, . . $5758 00

2. For disbursing $33,447.36 on account of contingencies of fortifications, at 2½ per cent., as authorized by the regulations above referred to, ... 816 18

3. For extra services in conducting the affairs connected with the civil works of internal improvement carried on by the United States, and referred to the engineer department for execution; and which did not constitute any part of his duties as a military officer; from the 1st day of August 1828, to the 6th day of December 1838, inclusive, ten years and one hundred and twenty-eight days, at 3600 dollars per annum, ... 37,262 46

These items had all been disallowed by the treasury department, for reasons stated by the proper accounting officers, and spread upon the record; and were insisted upon as just and proper allowances by the defendant.

The jury, at the trial, found a verdict for the United States, upon which judgment was entered; and from that judgment the present writ of error has been brought to this court.

*369] Four several bills of exception were taken at the trial, on *behalf of the defendant. The first was taken to the refusal of the court to allow any evidence to be given in support of either of these items of claim. The third was to a like refusal of the court to allow certain depositions and documents, offered by the defendant, to be given in evidence, to prove that he had rendered services to the United States, over and above the ordinary and regular duties of his office, and the value of such services; and the established usage and practice of the government in allowing to engineers and other officers their claims for extra compensation for like services. The second and fourth exceptions proceeded upon minor points in the case. The second asked the instruction of the court, that the United States were not entitled to recover for any public money received by the defendant in any other capacity or office than that of chief engineer; and that certain requisitions, stated in the exception, on account of Fort Grand Terre, and Fort Columbus, and Castle Williams, and the Fort at Throg's Neck, were not evidence of money had and received by the defendant to the use of the United States. The court refused these instructions, because there was no subject-matter growing out of the evidence for the United States, to which the instructions could apply, if given; inasmuch as it appeared from the

treasury transcript, given in evidence, that the balance sued for was of sums placed in the hands of the defendant, as chief engineer, in 1835, to be expended on the works at Grand Terre; and therefore, in effect, the money sued for was received by him in his capacity of engineer. We are of opinion, that these instructions were rightly refused by the court, for the reasons given by the circuit court; and for the additional reason, that the first was afterwards virtually given upon the prayer of the defendant on the fourth exception, so far as it was applicable to the case; and the second asked the opinion of the court upon a matter of fact proper for the cognisance of the jury.

The fourth exception, so far as it has not been already disposed of, asked the court to instruct the jury, that the items charged against the defendant, as chief engineer, in the treasury transcript, marked A, which was given in evidence, consisting of certain balances charged in gross, without the items going to show the said balances, were not competent evidence to charge *the defendant in the action. This instruction [*370
the court refused to give, and in our judgment, rightly; for taking the whole transcript together, and examining its details, as a mere matter of account, it is plain, that all the items on which these balances are struck, are there to be found regularly entered and brought forward. The supposed objection, then, which was stated by this court in the case of the *United States* v. *Jones*, 8 Pet. 375, 383, as to mere naked balances on the transcript, did not apply.

There is another instruction asked under this exception, in a complicated form, but which mainly turns upon the consideration whether the treasury department had a right to deduct the pay and emoluments of the defendant, as a general of the army, and while he was chief engineer, by setting them off against the balance reported against him, on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.

Having disposed of these minor points, we now come to those arising under the first and third exceptions, and which constitute the only real difficulty in the case.

The first exception, under which the court excluded all evidence in support of the three items of credit disallowed by the treasury department, is certainly well founded; unless it is clear, in point of law, that neither of these items constituted a legal or equitable claim against the United States. It is wholly immaterial, whether the claim be a legal or an equitable claim, as in either view, under the act of 1797, ch. 74, as was decided by this court in the case of the *United States* v. *Wilkins*, 6 Wheat. 135, it constitutes a good ground of set-off or deduction. It is not sufficient, to establish that these items ought to be rejected, that there is no positive law which expressly provides for, or fixes such allowances. There are many [*371
authorities conferred on the different *departments of the govern-

ment, which, for their due execution, require services and duties to be performed, which are not strictly appertaining to, or devolved upon, any particular officers, or which require agencies of a special discretionary nature. In such cases, the department charged with the execution of the particular authority, business or duty, has always been deemed, incidentally, to possess the right to employ the proper persons to perform the same, as the appropriate means to carry into effect the required end; and also the right, when the service or duty is an extra service or duty, to allow the persons so employed a suitable compensation. This doctrine is not new in this court; but it was fully expounded in the cases of the *United States* v. *Macdaniel*, 7 Pet. 1; *United States* v. *Ripley*, Ibid. 18; and *United States* v. *Fillebrown*, Ibid. 28.

To sustain the refusal of the court, in the present case, it is, therefore, indispensable, to show that there is some law which positively prohibits, or by just implication, denies any allowance of the disputed items, or of any part thereof. We know of no law which has such an effect, or which contains any such prohibition or denial. It is true, that the act of the 16th of March 1802, ch. 9, which provided for the organization and establishment of the corps of engineers, in one of its sections (§ 27) declares, "that the said corps, when so organized, shall be stationed at West Point, in the state of New York, and shall constitute a military academy; and the engineers, assistant engineers, and cadets of the said corps, shall be subject, at all times, to do duty in such places, and on such service as the president of the United States shall direct." But however broad this enactment is, in its language, it never has been supposed to authorize the president to employ the corps of engineers upon any other duty, except such as belongs either to military engineering, or to civil engineering. It is apparent also, from the whole history of the legislation of congress on this subject, that, for many years after the enactment, works of internal improvement and mere civil engineering, were not, ordinarily, devolved upon the corps of engineers. But, assuming the president possessed the fullest power, under this enactment, from time to time, to employ any officers of the corps in the business of civil engineering, still it must be obvious, that as their pay and
*372] emoluments were, or *would be, regulated with reference to their ordinary military and other duties, the power of the president to detach them upon other civil services, would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the war department in similar cases, acting in obedience to the presumed orders of the president. Now, it is perfectly consistent with the record in this case, that the defendant might have offered direct or presumptive evidence of such a contract, either express or implied, from the practice and usage of the war department, applicable to the very services stated in some, at least, of the disallowed items. We do not say, that he could, in point of fact, have established any such contract, or any legal or equitable right to such allowances. That is a point on which we have no right to pass judgment, since he was stopped from offering any proof whatsoever, at the very threshold of the inquiry. In short, unless some law could be shown establishing, clearly and unequivocally, the illegality of

each of these items; which, as we have said, has not been shown; the refusal of the court to admit the evidence cannot be supported; and we are, therefore, of opinion, that this exception was well taken; and that there was error in the refusal of the circuit court.

The third exception opens this matter still more fully and exactly; for there, the defendant offered certain depositions and documents, as proofs to establish that he had rendered services over and above the regular duties of his office, and the value of such extra services, and the established usage and practice of the government in allowing to engineers and other officers their claims for extra compensation for the like services. This evidence the court also rejected, as the record asserts, as incompetent and irrelevant; but, undoubtedly, upon the more broad ground, on which the evidence offered under the first exception, was rejected, that the claims had no just foundation in law. That the evidence so offered would, in point of fact, have maintained the asserted statements, we have no right, absolutely, to affirm. That it was competent and relevant for the purpose for which it was offered, and proper for the consideration of the jury, *as conducing to the establishment of the facts, has not been denied at the argument, and, indeed, seems not to admit of any well-founded doubt. A very elaborate examination and analysis of this evidence, and of its supposed bearing and agency on the merits of each of the claims, has been gone into at the bar; but, in the view which we take of the case, it is matter of fact, belonging, in a great measure, if not altogether, to the consideration of the jury, and with which, as a court of error, we are not at liberty to intermeddle. Without, therefore, taking up more time upon this point, it is only necessary for us to say, that for the reasons already stated, we are of opinion, there was error also in the circuit court in excluding the depositions and documents, so offered, from the jury. [*373

But as the merits of these claims have been fully argued before us, upon several points of law, as well as upon certain admitted conclusions of fact, as if the evidence had been admitted, and both parties desire our opinion in respect to the matters of law connected with these facts; we have deemed it right, for the purpose of bringing this protracted controversy within narrower limits, upon the new trial in the circuit court, to state some of the views now entertained by the court upon these points.

1. As to the first item. It purports to be founded on certain regulations of the army, which are spread over the record, and which received the sanction of the president in 1821 and 1825. The 67th article of the regulations of 1821, provides as follows: "1. The chief of the corps of engineers shall be stationed at the seat of government, and shall be charged with the superintendence of the corps of engineers, to which that of the topographical engineers is attached; he shall also be inspector of the military academy, and be charged with its correspondence. 2. The duties of the engineer department will comprise the construction and repairs of fortifications, and a general superintendence and inspection of the same, military reconnoitrings, embracing general surveys and examinations of particular sites for fortifications, and the formation of plans and estimates, in detail, for fortifications for the defence of the same, with such descriptive and military memoirs as may be necessary to establish the importance and capabilities of the position intended to be occupied; the general direction of the

disbursements on fortifications, *including purchases of sites and materials; hiring workmen, purchases of books, maps and instruments; and contracts for the supplies of materials, and for workmanship. 14. Where there is no agent for fortifications, the superintending officer shall perform the duties of agent, and while performing such duties, the rules and regulations for the government of the agents shall be applicable to him; and as a compensation for the performrnce of that extra duty, he will be allowed, for moneys expended by him in the construction of fortifications, at the rate of two dollars *per diem*, during the continuance of such disbursements; provided the whole amount of emolument shall not exceed two and a half per cent. on the sum expended."

The 67th article of the regulations of 1825, provides as follows: "888. The duties of the engineer department comprise reconnoitring and surveying for military purposes, and for internal improvements, together with the collection and preservation of topographical and geographical memoirs, and drawings referring to those objects; the selection of sites, the formation of plans and estimates, the construction, repair and inspection of fortifications, and the disbursements of the sums appropriated for the fulfilment of those objects, severally, comprising those of the military academy; also the superintendence of the execution of the acts of congress, in relation to internal improvement, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of congress, with the execution of which the war department may be charged. 893. The engineer superintending the construction of a fortification will disburse the moneys applied to the same, and as compensation for the performance of that extra duty, will be allowed at the rate of two dollars *per diem* during the continuance of such disbursements, provided the whole amount of emolument shall not exceed two and a half per cent. on the sum disbursed."

So far as the present item is concerned, these regulations do not differ in substance. They both raise the question as to the proper interpretation of them, whether the allowance of two dollars *per diem*, not exceeding
*375] two and a half per cent., is intended to be limited to a single *per diem* allowance; notwithstanding the engineer superintending the construction, and disbursing the moneys, as agent for fortifications, is employed at the time upon several fortifications, each requiring separate accounts of the disbursements to be kept, on account of there being distinct and independent appropriations therefor; or whether the *per diem* allowance is cumulative, that is to say, two dollars a day for every fortification, for which there is a distinct and independent appropriation, of which separate accounts are required to be kept, and the disbursements are confided to one and the same engineer, as superintendent and agent of disbursements. The court are of opinion, that the latter is the true construction of the regulations; upon the ground, that it would be unreasonable to suppose, that these regulations intended to give the same exact amount of compensation to a person disbursing moneys upon two or more distinct fortifications, that he would be entitled to, if he were disbursing agent for one only, although his duties might be thus doubled, and even trebled; and that the natural import of the language is, that the compensation is to be given to each agent of a

separate fortification, for his disbursements about that particular fortification, without any reference to the consideration whether his agency was limited to that, or extended to other fortifications. Under such circumstances, as the defendant was the disbursing agent, both at Fort Monroe and Fort Calhoun, under distinct and independent appropriations, there does not seem to be any reason why he may not be entitled to the *per diem* allowance which he claims for each of those forts.

2. As to the second item. The right to the commissions charged for disbursing $33,447.26, on account of contingencies on fortifications, must, essentially, depend upon the evidence which may be adduced in support of the claim. There is nothing in the character of the item which precludes the defendant from showing that he is entitled to the commissions of two and a half per cent., or of a less amount, if he can prove that the disbursements were other than those on Forts Monroe and Calhoun; and that it has been the usage of the department, to make the like compensation for disbursements, under the like circumstances, or that the *allowance is [*376
just and equitable in itself. The court are of opinion, that evidence ought to have been admitted to establish it.

3. As to the third item, constituting a charge of $37,262.46, for extra services in conducting the affairs connected with the civil works of internal improvements, very different considerations may apply. The court are of opinion, that, upon its face, this item has no just foundation in law; and therefore, that the evidence which was offered in support of it, if admitted, would not have maintained it. The ground of this opinion is, that upon a review of the laws and regulations of the government, applicable to the subject, it is apparent, that the services therein alleged to be performed were the ordinary special duties appertaining to the office of chief engineer; and such as the defendant was bound to perform, as chief engineer, without any exact compensation, over and above his salary and emoluments as brigadier-general of the army of the United States, on account of such services. In this view of the matter, the circuit court acted correctly in rejecting the evidence applicable to this item.

Upon the whole, upon the other grounds already stated, the judgment of the circuit court must be reversed; and the cause remanded, with directions to that court to award a *venire facias 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 Missouri, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there was error in the said circuit court, in rejecting the evidence offered by the defendant (Gratiot) in support of his claims set forth in the first bill of exceptions; and also error in refusing to allow the depositions and documents to be given in evidence stated in the third bill of exception, for the purposes for which the same was offered by the said defendant. It is thereupon now 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.*

*United States, Plaintiffs in error, *v.* The Bank of the Metropolis, Defendant in error.

Bills of exchange.—Acceptance—Condition.—Estoppel.—Treasury department.

The United States instituted a suit against the Bank of the Metropolis, claiming $27,881.57, the balance, according to the statements of the treasury, due to the United States; the defendant claimed credits amounting to $23,000, exclusive of interest, which had been presented to the proper accounting officers, for acceptances of the post-office department of the drafts of mail-contractors, and an item of $611.52, over-draft of an officer of the post-office department, on the Bank of Metropolis. The drafts of the contractors, accepted by the post-office department, were discounted by the bank, in the way of business; one draft was accepted unconditionally; the other drafts were accepted, "on condition, that the contracts be complied with:" *Held*, that the bank became the holder of the draft, unconditionally accepted, for valuable consideration; and its right to charge the United States with the amount cannot be defeated by any equities between the drawers and the post-office.

When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibilities, of individuals who are parties to such instruments; there is no difference, except that the United States cannot be sued. But if the United States sue, and the defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the treasury; and if the liability of the United States on it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury as a credit against a debt claimed by the United States; this is the privilege of the defendant for all equivalent credits, under the act of March 3d, 1797. United States *v.* Dunn, 6 Pet. 51, cited.

From the daily, and almost unavoidable, use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining the principles of commercial law involved in this case.

It was no matter, how the account of the drawer of the draft, unconditionally accepted, stood with the post-office department whether he was a debtor or a creditor; whether the bank knew one or the other; an unconditional acceptance was tendered to the bank for discount; it was not the duty of the bank to inquire, how the account stood, or for what purpose the acceptance was made; all it had to look to was, the genuineness of the acceptance, and the authority of the officer to give it.[1]

The rule is, that the want of consideration between the drawer and the acceptor is no defence against the rights of a third party, who has given a consideration for the bill; and this, even though the acceptor has been defrauded by the drawee, if that be not known to such third party.

If one purpose making a conditional acceptance only, and commit that acceptance to writing, he
*378] should be careful to express the condition therein; he cannot use general *terms, and then exempt himself from liability, by relying upon particular facts which have already happened, though they are connected with the conditional acceptance. By express terms, the acceptor might have guarded against any construction, other than that which was intended by, or was the apparent meaning of the words of, the acceptance; it matters not what the acceptor meant by a cautious and precise phraseology, if it be not expressed as a condition.

Nothing out of the condition expressed in the words of the acceptance can be inferred; unless it be in a case where the words used are so ambiguous as to make it necessary that parol evidence should be resorted to, to explain them.

It must be conceded, as a general principle, that one having knowledge of particular facts upon which he intends to rely, to exempt him from a pecuniary obligation about to be contracted with another, of which facts the other is ignorant, and can only learn from him, or from documents in his keeping, that the fact of his knowledge raises the obligation to tell it.

If two persons deal in relation to the executory contract of a third, and one of them, being the obligee, induces the other to advance money, "upon condition that his contracts be complied with," and he knows that forfeitures have been already incurred by the obligor, for breaches of his contract, and does not say so; he will not be permitted, afterwards, to get rid of his

[1] See the case of the Floyd Acceptances, 7 Wall. 666.

liability, by saying, "I cannot pay you, for when I accepted, there was already due to me from the drawer of the bill, more than I accepted for; you did not chose to make inquiry."

The terms "accepted, when the contracts of the drawer of the bill are complied with," are not retroactive; they do not refer to past transactions, but to the subsequent performance of the contractors.

The postmaster-general has the same power, and no more, over the credits allowed by his predecessor, if allowed within the scope of his official authority, as given by law to the head of the department; this right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance was made; and to settle the right between the United States, and the party to whom the credit was given; it is no longer a case between one officer's judgment, and that of his successor. No statute is necessary to authorize the United States to sue in such a case; the right to sue is independent of statute, and it may be done by the direction of the incumbent of the department.

It is certainly the treasury of the United States, where its money is directed by law to be kept; but if those whose duty it is to disburse appropriations made by law, employ, or are permitted by law to employ, either for safe-keeping or more convenient disbursement, other agencies, and it shall be necessary for the United States to sue for the recovery of the fund, the defendant may claim against the demand for which the action has been brought, any credits to which he shall prove himself entitled, if they have been previously presented to the proper accounting officers of the treasury department, and have been rejected; this right was early given to defendants, in all suits brought by the United States.

When any instructions to the jury are asked of the court, on the trial of a cause, they should be precise and certain to a particular intent, that the point intended to be *raised may be distinctly seen by the court; and that error, if one be made, may be distinctly assigned. [*379

Error to the Circuit Court of the District of Columbia and county of Washington. The United States, on the 25th of June 1838, instituted an action of *assumpsit* against the President and Directors of the Bank of the Metropolis, for the recovery of $27,881.50, for sundry matters properly chargeable in an account, as by an account annexed to the declaration appeared. The declaration contained the usual counts in an action of *assumpsit*.

The account referred to contained numerous items of deposits made in the Bank of the Metropolis, from the post-office department, leaving a balance due to the United States of the sum stated in the declaration. The defendants pleaded the general issue.

The defence to the claim of the United States, was founded on credits which amounted to $23,000, exclusive of interest, which had been presented to the accounting officers of the treasury, and which had been refused allowance. They were for acceptances of the post-office department of drafts drawn upon the post-office department, and an over-draft by E. F. Brown, an agent of the post-office department. The jury found a verdict for the defendant, and certified that there was due from the United States to the bank, $3371.94, with interest from March 6th, 1838.

The plaintiffs, on the trial, asked the court to give certain instructions to the jury, which was refused, to which the plaintiffs excepted. These are stated in the opinion of the court. The United States prosecuted this writ of error to the judgment of the circuit court, entered on the verdict. The case is fully stated in the arguments of the counsel, and in the opinion of the court.

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

Gilpin, Attorney-General, for the United States.—In the year 1836, the
*380] Bank of the Metropolis was a depositary *of public moneys, which were in the treasury of the United States. On the 2d July, an act of congress (5 U. S. Stat. 80) was passed, ordering that all the public revenue derived from postages should be deposited, when collected, "in the treasury of the United States," as the rest of the revenue was; and that it should be there held by the treasurer, to pay such appropriations as might be directed by congress "for the service of the post-office department." On the 16th July, deposits were made, under this act, in the Bank of the Metropolis; and when they were so made, written instructions were given by the postmaster-general, and acceded to by the bank, that the post-office revenue, as deposited, was to be kept in the name ef the "treasurer of the United States for the service of the post-office department;" to be paid on his warrants, to be reported monthly, and settled quarterly, with him; and that "there was to be no credit, deduction or set-off admitted, except for moneys drawn out on the treasurer's warrant." At the monthly return of 1st October 1837, there was a balance of revenue deposited to the credit of the treasurer of the United States of $42,171.88. During that month, the deposit was increased by the sum of $1317.57, and warrants of the treasurer, amounting to $16,132.88, were paid; thus leaving a balance to the treasurer of $27,356.57. Instead of reporting this balance on the 1st November 1837, the bank admitted a balance only of $1031.97, having deducted therefrom the amount, with interest, of a draft for $10,000, drawn on the 14th April 1835, at ninety days, by Edwin Porter, on Richard C. Mason, treasurer of the post-office department," and accepted by him, as "treasurer;" and also of four drafts for $13,000, drawn in October 1835, at ninety days, by James Reeside, on Amos Kendall, postmaster-general, and accepted by him "on condition that his contract be complied with." All these drafts had been discounted by the bank, before they became due; but
*381] had not been paid by the acceptors. The bank also deducted *$611.52, which sum was overdrawn, in the year 1835, by E. F. Brown, the agent for disbursing the contingent fund of the post-office department. These credits were claimed at the treasury and disallowed.

At June term 1838, a suit was brought by the United States to recover the whole balance of $27,356.57. On the trial, the bank proved the facts above stated, and claimed the credits which had been disallowed. The district-attorney of the United States requested the court to charge the jury on three points; which were, substantially, as follows: 1. That if they believed there was nothing due to Porter and Reeside, at the time of the acceptance of their drafts, or at the time they became due, the bank was not authorized by law to set off such draft againt the deposit of "the treasurer of the United States." 2. That if the accounts of Porter and Reeside were not finally settled at the department, it was the duty of the postmaster-general to have them settled; and in such settlement, he ought not to allow credits for illegal extra allowances, where such allowances had been merely entered in the journal, but never brought into the ledger. 3. That the over-draft of the agent for disbursing the contingent fund could not, by

law, be set off against the deposit of "the treasurer of the United States." These instructions the court refused to give; and it is submitted, that they erred in so doing.

I. When Porter's draft became due, was it a just claim against the United States? would the acceptor have been justified, by law, in paying it to the drawer? He accepted the draft as a public officer—as "treasurer of the post-office department." He was to pay it out of the public money in his hands, appropriated by law to pay the drawer, when it became due. It was an arrangement between the department and a contractor, for the benefit of the latter. It was an acknowledgment in advance. When the day of payment arrived, the money had not been earned; no debt was due from the United States to Porter; there is, consequently, no appropriation by law to pay him. If paid, he receives, from the public treasury, money not *appropriated to him. Could the acceptance of a public officer, made under a misapprehension of the facts, authorize this? If it be [*382 a principle not doubted, that the neglect of a public officer cannot deprive the United States of their right to recover money from their debtors; is it not a principle equally well founded, that they cannot be made to pay money twice, by his error or indiscretion? Can the treasurer of the post-office department, or any other officer, promise to pay a sum of public money, ninety days hence, and then draw it from the public treasury, whether justly due or not? Under the instruction, as asked, the question whether the money was owing or not to Porter, on the day when the draft became due, does not arise; for it was requested, in the event of the jury believing that nothing was owing; but the evidence shows, that when that day arrived, everything to which he was entitled had already been absorbed by forfeitures and drafts previously drawn and accepted. A payment made to him, then, would not have been made, because he was entitled to the money, but only because the treasurer of the post-office department had accepted his draft. The constitution, art. I. § 9, par. 6, forbids the payment of any money from the treasury, but in pursuance of appropriations made by law. The appropriation for the benefit of Porter was exhausted. He had received from it all that he was entitled to. To pay him more would be to pay that for which there was no appropriation. *United States* v. *Barney*, 3 Hall's Law Jour. 130; *United States* v. *Nicoll*, 1 Paine 649.

If, then, it be established, that the United States would not have been bound to pay Porter himself, notwithstanding his possession of the acceptance, were they bound to pay the bank to whom he transferred it? An illegal payment is not authorized, by the constitution or law, to be made to a transferee, any more than to the claimant himself. Every principle which forbids double payment to one, forbids it to the two. It is not requisite to controvert the general rule of commercial law, discussed before this court in the case of *Townsley* v. *Sumrall*, 2 Pet. 183, 185, as to the liability of an acceptor, whether he has funds or not, for an unconditional acceptance; nor is it necessary to examine how far the ordinary responsibility, which attaches to parties to negotiable paper, can be imposed, by the *acts [*383 of their officers, on the United States; nor how far such rules can be applied to them, in a case where they have the effect to draw money from the treasury, without an appropriation (12 Wheat. 561; 4 W. C. C. 464); because, in this instance, the acceptance was clearly of such a nature as to

put the acceptor on his guard. If it was not strictly conditional, in terms, it was so in substance. The bank knew, when it received the draft, that it was payable out of a public fund ; and that the payment could not be made, unless there was money, appropriated by law for that purpose, in the hands of the acceptor. They knew the acceptance was given by the acceptor "as treasurer ;" and that the law of the land gave public notice that the treasurer could not bind the United States, beyond the funds appropriated for the use of the drawer. Suppose, an agent accepts as agent, will it be pretended, that the principal is bound beyond the extent of his agency? The holder must inquire into that extent ; must see the acceptor's authority ; must know how far the acceptance binds the principal. 1 Pet. 283, 290. There is no hardship or injustice in this ; the bank, like any other holder, had ample opportunity, before it discounted the draft, to ascertain the exact extent of the obligation assumed by the acceptor. This principle, which is just in every case, is peculiarly proper in that of the United States. How can they guard themselves against acts of their agents, either intentionally or accidentally wrong, except by their laws? These are notice to every person dealing with their officers. These make their acceptances, special acceptances, whether so declared in terms or not. Not only, however, did the bank know the special and conditional character of the acceptance ; but they knew also that it was payable on a contingency, and out of a particular fund ; that if that fund was previously exhausted, the acceptor could not pay it. On settled principles of commercial law, therefore, the bank was not entitled to payment, any more than the drawer himself, if the fund was exhausted. If they advanced their money imprudently, it was yet done advisedly ; they could have easily guarded against the loss ; they can now only repair it, so far as the United States are concerned through the action of the legislature.

*384] II. These principles apply more strongly to the acceptances *of Reeside's drafts, because they were conditional in express terms. They were only to be paid "on condition that his contracts were complied with." The bank need not have discounted a conditional acceptance, but having done so, it assumed the burden of showing that the condition has been performed, before it can charge the acceptor. 4 Maule & Selw. 460 ; 2 W. C. C. 514. Has it done so? The only evidence adduced by them is, that Reeside performed, in the year 1835, the mail services for which he contracted. That a "compliance" with all the terms of his contracts has been shown, will scarcely be pretended. If it were, evidence, adduced by the bank itself, sufficiently refutes it. It is proved, that stipulations were expressly made by him, not only to perform mail services, but to "pay all forfeitures," and to "repay all advances." Was his contract complied with, if forfeitures were unpaid, and advances not refunded? Had such a contract existed between man and man, and such an acceptance been given and received, could the holder, in the face of such proof, recover from the acceptor? How, then, can it be sufficient, when that acceptor is a public officer, to make him twice pay the money from the public treasury?

III. As if aware of the force of these objections, it has been strenuously argued, that there were, in fact, moneys due, which were sufficient to pay all these acceptances. If this were so, it is immaterial as to the error in the charge of the court, because, in the instruction prayed, that was left as a

matter of fact for the jury. But how is it attempted to be shown that it was so? It is not by proving that the forfeitures were not incurred, or that the advances were returned; but it is said, that allowances, sufficient to cover them, were made by the former postmaster-general. It is true, that such allowances are found to be entered in the journal; but they were never finally credited in the settlement of the accounts. It may be admitted, as has been argued, that when the head of an executive department has finally acted upon a matter within the scope of his authority, his decision cannot be reversed by his successor, to the disadvantage of a third person, without the disclosure of material error, otherwise than by resorting to judicial proceedings. But such is not the case here. These were merely journal memorandums, such as must necessarily be made in the course of proceedings between *a mail contractor and the post-office department; they were left to be finally settled, when the account was [*385 adjusted. Would it be contended, if the contractor had, in his own journal, charged himself with a payment he had not received, or a forfeiture he not incurred, that the error could not be corrected in the final settlement? In the case of *Ex parte Randolph*, 9 Pet. 15, which is relied on, the account had been entirely settled; it had passed through all the forms of the treasury; it reposed in the register's office as a final and conclusive adjustment. The ground taken, therefore, does not sustain the assertion that the money was due; and the court below should have instructed the jury to that effect. They should have instructed them, that the mere fact of there having been allowances made in the journal, and while the account was unsettled, which allowances are alleged to be illegal and contrary to the contract, and were rescinded as such, before the account was closed, cannot of itself authorize the admission of a credit for their amount.

But it is said, that even if these forfeitures and advances might be lawfully recharged, yet that the condition of the acceptances had no reference to them; that it was not retrospective, but had relation merely to the performance of future duties under the contract. Such a distinction, between the several duties to be performed under the contract, is not warranted by the language of the condition, which is general. The condition was inserted for the safety of the acceptor; the acceptance was for the benefit of the contractor; in conferring that benefit, the protection of the acceptor was to be provided for; the bank knew this to be the case; the advance of money by it was a voluntary act, for its own advantage, and in making it, there was no pretext for overlooking the safety of the acceptor; this depended no less on the repayment of past advances, than on the performance of future services. Why should the acceptor, in seeking to protect himself, guard less against one than the other? The condition referred to the contract, the whole contract; that condition was submitted to the bank, before its money was advanced; the whole contract, therefore, was, or might and ought to have been, known; and it would be a great injustice to the acceptor, when he states his condition in terms so broad as clearly to secure for himself the performance of every stipulation *of the contract, were the party that obtains his guarantee for the payment, to be permit- [*386 ted to diminish that security in regard to some of the most essential of those stipulations. It is not possible, in an acceptance, to state all the particulars of a contract; it is sufficient to embrace it entirely, by general and

comprehensive words, not susceptible of being misunderstood. When this is done, no one has a right to allege ignorance of any part of that which he might easily have known. How could the acceptor apprise every one, into whose hands the draft might pass, of every stipulation of the contract? It was sufficient, that he apprised him, before he incurred any responsibility, that a contract existed between the drawer and the acceptor, which might be ascertained, and must be performed in all its parts, before the latter either intended or engaged to be responsible.

IV. The claim to be repaid the over-draft of E. F. Brown, cannot be sustained. He deposited in the bank, on the 30th of April 1835, the sum of $7070.24 ; he drew checks on this till the 2d December 1835, when he had received thereon $7671.76 ; that is, $611.24 more than he had deposited. There is no proof, nor even an allegation, that this latter sum was applied to the use of the United States. The sole grounds of claim are, that, from June 1835, the checks of Brown were countersigned by the accountant of the department ; and that, after the contingent fund was exhausted, and previous to the passage of the annual appropriation act, some ordinary bills, certified by the accountant, were paid by the bank. In what manner do these acts recognise the over-draft? In itself, it was wrong. It was a transaction known only to the bank and Brown. It might have been prevented by the former. It is excused by no proof that such agents as he was, were usually, or ever, permitted to make over-drafts. The counter-signature by the accountant, and the payment of bills, at the express request of the postmaster-general, are proofs that any deviation from the usual mode was only to be made by express authority. None such is exhibited for this over-draft. It was therefore, an act voluntarily done by the bank, not for the benefit of the United States, and with which it has no right to charge them.

*387] *V. But suppose, all these sums are legal credits, can they be set off or deducted from moneys deposited in the bank, after the 2d of July 1836, to the credit of "the treasurer of the United States, for the service of the post-office department?" That was public money in the treasury. It could be drawn out in no way but by a warrant, under an appropriation made by act of congress. It was not under the control of the postmaster-general. It was not money which he had received in order to disburse ; nor was it under the control of the treasurer himself, except to pay it on such a warrant. He could have no other voucher to discharge himself, if the money was not in the treasury. 1 Story's Laws 46. These provisions of law were known to the bank, when it received the deposit from the treasurer. They cannot charge against it a claim which, if the treasurer himself had paid, he would not be credited with.

The debts do not arise in the same right, nor are they of the same nature. It is true, that the United States are, eventually, the parties ; but the public funds, distributed for different objects, are separate funds in the transactions between a claimant and the various officers of the government. Such a distinction is indispensable. The relations between a bank and the treasurer as a public depositary, are totally distinct from those between a bank and the head of an executive department, in relation to contracts existing between them. The settlement of its account with one, would have no reference to that with the other. They are, therefore, in fact, debts that

do not arise between the same parties, or in the same right. In every case of set-off recognised by this court, it has been for moneys properly payable out of the same fund which the United States sought to recover.

An agent intrusted with money cannot pay off his principal's debts, and then set off the payment. This is here attempted, for it is the payment of a debt to Porter and Reeside, with funds with which the agent is intrusted for a different purpose. 1 Rawle 330. Nor can an agent convert to one purpose, funds deposited with him for another. Nor can he avail himself of the advantages of his agency, to do, for his own benefit, that which injures or affects his principal. 1 Johns. Ch. 394 ; 6 Pick. 204.

The inability, thus established, to sustain, upon general principles of law, such a right of set-off as is now contended for, is confirmed *by the peculiar facts of this case. The whole claim of the bank was ascer- [*388 tained and liquidated in January 1836. This deduction is made out of money placed in its hands subsequent to that time, under a promise, both express and implied, that it would not be appropriated to the payment of that claim. Before so depositing the money, the postmaster-general, in his letter of 16th July 1836, stipulated, that it should "be paid out only on the checks of the treasurer," and that, in accounting for the sums thus deposited, "no other credit, set-off or deduction would be admitted." On this condition, and on this alone, did the bank receive the money ; and that, at a time when both parties knew that there was this actual pending claim to a credit, set-off and deduction, existing and disputed between them. Even if the bank had not agreed to this express stipulation, when it received the money, would not their consent to transfer the fund they then had to a new account, their silent acquiescence, their settlement of repeated monthly and quarterly accounts, without an allusion to a claim of right to make this deduction, have proved, by an implication, not to be resisted, that they did not mean to assert any such right? Did not their special acceptance of the fund, their voluntary agreement to hold it for a special purpose, deprive them of any general claim they might previously have had upon it? 16 Ves. 279–80 ; 5 Maule & Selw. 186 ; 15 Mass. 397.

However broad the terms of the act of congress (1 Story's Laws 464) are, therefore, in allowing equitable off-sets ; and if they were not meant to be exclusively applicable to disbursing officers, and to cases where the claim, if just, would have been paid out of the fund in controversy (9 Cranch 236 ; 6 Wheat. 163 ; 7 Pet. 1), still, the positive agreement of the party, after the claim has arisen, and before the money was paid, put into his hands, that the latter was not to be applied to the former, must, on every principle of law, prevent his present resort to a privilege which he thus consented to forego.

Coxe, for the defendant in error.—For many years, the government of the United States have made use of the banks in the city of Washington in their financial operations ; and the Bank of the Metropolis was for a long time one of these banks. In 1835, Mr. Kendall became *postmaster- [*389 general ; and up to the period of his entering on the duties of his office, there were no matters with the bank unsettled in the post-office. The post-office was in the practice of giving acceptances on drafts of contractors ;

and sometimes, the Bank of the Metropolis was resorted to for the immediate exigencies of the post-office.

The position assumed is, that the instructions asked for by the plaintiffs in the circuit court were not such as the court should have given, being informal, and rather a demurrer to the evidence on the part of the defendant. The party asking the instructions of the court is bound to place them in proper form; and the court are not to modify and adapt them to the case. In this case, all the grounds of the defence were placed together, and if any of the items were good as set-off to the claim of the United States, the instructions asked for were improper; and the court will give the defendant judgment. The other instructions are equally defective.

The credits allowed by the postmaster-general, before the office was held by Mr. Kendall, were final. When entered in the journal, this was the effect of such entry; and the head of the department cannot afterwards alter them. Entries in the ledger have no effect on those credits. One of the instructions asked for by the plaintiff was, that, as the entries in the ledger were made by a clerk, they were of no effect! If allowances had been made by the postmaster-general, which were deemed illegal by his successor, the proper course would have been to institute an action to surcharge and falsify the settlement. But it is not in the power of the successor to re-open the account, and to revise and alter it. This was decided in this court in the *United States* v. *Fillebrown*, 7 Pet. 1; and in 8 Ibid. 383–4. The act of congress of March 1836, which directs the postmaster-general to institute suits for money improperly credited, does not allow that officer to charge a contractor with money which had been allowed and credited to him, and thus, by his own act, decide the propriety of the charge.

The acceptances of the post-office department, which were charged by the defendants to the United States, should be governed by the same rules and
*390] principles of law which operate in *relation to such contracts, in their usual employment in commercial transactions. The United States submit themselves to these rules, when such contracts are entered into for them, by their authorized agents.

Mr. Coxe also contended, that if the contracts of the persons whose drafts had been accepted by the post-office department had not been performed, it was the duty of the department to have given the defendants notice of the same, and to have proved the non-performance. As to the acceptance of the draft of Edwin Porter, certainly, no debts due by him before the date of the acceptance could be set off against the claim of the bank on the acceptance. It was a general and an unqualified acceptance.

Wayne, Justice, delivered the opinion of the court.—This is an action of *assumpsit* brought by the United States to recover the sum of $27,881.57. The defendants pleaded the general issue. On the trial of the cause, the defendants claimed credits, amounting to $23,000, exclusive of interest and costs. The items had been presented to the proper accounting officer and were not allowed. They were acceptances of the post-office department, of the drafts of mail-contractors, and an item of $611.52, called in the record "E. F. Brown's over-draft."

The jury found for the defendants, and certified there was due to them by the United States $3371.94, with interest from the 6th March 1838

The errors assigned are, that the court refused to give to the jury the following instructions, which were asked after the evidence had been closed on both sides.

1. That upon the evidence aforesaid, the defendants are not entitled in this action to set off against the plaintiff's demand, the amount of the acceptances given in evidence by the defendants, nor the amount of the over-draft of E. F. Brown.

2. If the jury believe, from the evidence, that when the acceptance of the draft of E. Porter was given by the then treasurer *of the department, there was nothing due to Porter standing on the books of the [*391 post-office department, and that on the department, when the acceptance fell due, there was nothing due to him; then the defendants cannot set off the amount of said acceptance against the plaintiff's claim in this action.

3. That if the accounts of E. Porter and Reeside, as contractors with the post-office department, were not finally settled on the books of the post-office department, when the present postmaster-general came into office, it was his duty to have said accounts settled; and if, in such settlement, there were credits claimed by them, as allowed by order of Mr. Barry, when postmaster-general, and entered on the journal, but not carried into these accounts in the ledger, and finally entered as credits in these accounts, which credits were for extra allowances which the said postmaster-general was not legally authorized to allow them, then it was in the power and was the duty of the present postmaster-general, to disallow such items of credit.

We will consider the instructions asked, in connection, and upon the merits of the case; but before we conclude, will express an opinion upon the form of the first. It appears, that the five drafts claimed as credits were drawn on the post-office department by contractors for carrying the mails. That they were accepted, and were discounted at the Metropolis Bank, in the way of business. Porter's draft was at ninety days after date, for $10,000, payable at the Metropolis Bank, to his own order, to be charged to account, and was unconditionally accepted by R. C. Mason, signing himself treasurer of the post-office department. It is admitted, that he was so. Reeside drew four drafts. One on the 17th October 1835, for $4500; another on the 20th October 1835, for $1000; a third on the 23d October 1835, for $4500; and the fourth on the 28th October 1835, for $3000. They were payable to his own order, ninety days after date, for value received; to be charged to his account for transporting the mail, and addressed to the postmaster-general. The following was the form of all of them, and of the acceptances of the postmaster-general.

*$4500. Washington City, October 17th, 1835. [*392

Sir:—Ninety days after date, please to pay to my own order, four thousand five hundred dollars, for value received, and charge to my account, for transporting the mail. Respectfully yours, JAMES REESIDE.

Hon. AMOS KENDALL, Postmaster-General.

Accepted, on condition that his contracts be complied with.

AMOS KENDALL.

Porter's draft was unconditionally accepted. It was discounted by the defendants, upon his indorsement. The bank became the holder of it, for

valuable consideration, and its right to charge the United States with the amount cannot be defeated by any equities between the drawer and the post-office department, of which the bank had not notice. When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. But if the United States sue, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has boen disallowed by the accounting officers of the treasury; and if the liability of the United States upon it, be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury, as a credit against the debt claimed by the United States. This is a privilege of the defendant, for all equitable credits given by the act or March 3d, 1797. 1 Story 464. This, and the liability of the United States, in the maner it has been stated, has been repeatedly declared, in effect, by this court. It said, in the case of the *Bank of the United States* v. *Dunn*, 6 Pet. 51, "the liability of parties to a bill of exchange or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper; these principles originated in the convenience of commercial transactions, and cannot now be departed from." From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining these principles.

*393] *It was held in the case of the *United States* v. *Barker*, 4 W. C. C. 464, that the omission of the secretary of the treasury, for one day, to give notice of the dishonor of bills, which were purchased by the United States, discharged the drawer. And this court said, when that case was brought before it, there was no right to recover; on the account of the neglect in giving notice after the return of the bills. 12 Wheat. 561. That, and other cases like it, show how rigidly those principles have been applied in suits on bills and promissory notes, in which the United States was a party. The acceptance of Porter's draft was unconditional, and there is nothing in the evidence to discharge the acceptor. There is neither waiver, express or implied, of his liability. There was no understanding nor communication concerning it between the bank, and any officer of the post-office department, before it was discounted. The bank advanced the money, which it was the object of the bill to obtain. It cannot be doubted, the acceptance was given for that purpose. The want of consideration, then, between the drawer and the acceptor, can be no defence against the right of the indorsee, who gave a valuable consideration for the bill.

It does not matter how the drawer's account stood. Whether he was a debtor or a ereditor of the department; whether the bank knew one or the other. An unconditional acceptance was tendered to it for discount. It was not its duty to inquire how the account stood, or for what purpose the acceptance was made. All it had to look to was the genuineness of the acceptance, and the authority of the officer to give it. The rule is, that a want of consideration between the drawer and acceptor, is no defence against the right of a third party, who has given a consideration for the bill, and this, even though the acceptor has been defrauded by the drawer; if that be not known by such third party, before he gives value for it. The evi-

dence, then, concerning Porter's account, was immaterial and irrelevant to the issue. It cannot affect the rights of the bank, and did not lessen the obligation of the department to pay the acceptance when it became due.

But the evidence does not show that anything was due by Porter, when the draft was accepted, or when it came to maturity. Mason, the witness, says, "that in the *interim*, a sufficient *sum had been raised and carried to the credit of Porter, to pay the draft; but that he had also, [*394 within the dates, been charged with the amount of a draft, drawn upon him by the postmaster at Mobile, accepted by him, which draft was payable in 1833, and that he was charged with failures and forfeitures incurred as contractor, in 1833; which charges were made by order of Mr. Barry, then postmaster-general. It was certainly right, to debit Porter with these charges, if they were due by him; but that did not change the relative rights and obligations of the bank and the department upon his bill. If either are to lose by Porter, shall it be that party, who was bound to know the state of the account, before it gave an unconditional acceptance, for the purpose of accommodating its own agent; or the other, who placed faith in the acceptance, advanced the money upon it, which it was intended to raise; and who could not have learned what was the state of Porter's account, as it is proved that the charges which it is now said should have priority of payment over the bill, were not made against Porter, until after his bill had been accepted. Certainly, the loss should fall upon the first. It cannot be otherwise, unless it would be affirmed, that an acceptor may claim to be discharged, on account of his own negligence, and that having induced a third party to advance money upon his acceptance, he shall be permitted to intervene between himself and the indorsee of the paper, a debt due to him by the drawer. The evidence offered to invalidate this credit was done from ignorance of the legal consequences incurred by such an acceptance. In such a case, the bank rightfully looked to the United States for payment of this bill; and if Porter owes anything for forfeitures incurred as contractor, or on account of the Mobile draft, the United States must look to him. There is no proof on the record, however, of anything being due by Porter on those accounts; and we do not intend to express any opinion upon his liability, or the rights of the United States, in respect to them, one way or the other.

What are the merits of the case, upon Reeside's drafts? They were drawn on the postmaster-general, at ninety days, payable to the order of the drawer, and were to be charged to his account for transporting the mail. They were "accepted, on condition that his contracts be complied with." This is, of course, *as binding as an absolute acceptance, if [*395 the condition has been performed. What is the proof of performance? and how shall this conditional acceptance be construed? Mason, the witness, says, "Reeside, in fact, performed the services for which he was contractor, in the year 1835; and the money which he earned upon his contracts was applied, to an extent exceeding the amount due upon his drafts, to the extinguishment of balances created against him, by recharging him with sums of money which had been allowed to him by Mr. Barry, the former postmaster-general, as contractor for carrying the mail, by giving him credit therefor in a general account-current on the journal, but not entered in the ledger, where his account remained unsettled when the present post-

master-general came into office." It is said, this does not cover the condition of the acceptance, because Reeside stipulated, by his bond, to pay forfeitures, and repay advances ; and that he owed the department on both accounts, when these acceptances were given ; and that in this sense, his contracts were not complied with. If this be so, in one sense, the contracts would not be complied with ; but is that the construction which should be put upon such a condition, when the subject-matter to which it relates is considered ?

If one purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the condition therein. He cannot use general terms, and then exempt himself from liability, by relying upon particular facts which have already happened, though they are connected with the condition expressed. Why ? Because the particular fact is, of itself, susceptible of being made a distinct condition. This case furnishes as good an illustration of the rule as any other can do. Instead of the words being used, " accepted, on condition that his contracts be complied with," could it not have been as easily said, accepted, on condition "that forfeitures already incurred shall be paid, and that advances made shall be refunded." This would have conveyed a very different meaning ; and would have put the bank, when the drafts were offered to it for discount, on inquiry. If they had been discounted, without inquiry, it would have been done, at the risk that the earnings upon the contracts, and such as
*396] might be earned between the date of *the acceptances and the times of payment, would be enough to pay forfeitures, repay advances and to take up the bills. It matters not, what the acceptor meant, by a cautious and precise phraseology, if it be not expressed as a condition. And when we are told, as we are in this case, by the person making these acceptances, that the form of words was devised expressly for that purpose, meaning for the purposes of having forfeitures paid and advances refunded, and to avoid promising to pay anything to the order of contractors, so long as anything should be due from them to the department ; we think it will be admitted, that the purpose explained is larger than the condition expressed. And from the passage in the evidence just cited, how just does the rule appear, which has been laid down by the court, that in the case of acceptances of commercial paper, that which can be made a distinct condition must be so expressed ; nor can anything out of the condition be inferred, unless it be in a case where the words used are so ambiguous as to make it necessary that parol evidence should be resorted to, to explain them. Then the *onus* of the proof would be on the acceptor, and the proof would be of no avail, if the holder, or any person under whom he claims, took the bill, without notice of such conditions, and gave a valuable consideration for it. The error in this case arose from the acceptor supposing that the defendants did know, and if they did not, they were bound, upon such an acceptance, to inquire into the stipulations and conditions of Reeside's contracts, before they discounted the bills ; and it is said, they did not use " due diligence to acquire information." The objection then implies that information of these forfeitures and advances could have been given, and that it was not given, when these acceptances were made. This makes it, then, a question of due diligence between the acceptor and the defendants,

as to his obligation to communicate what he knew; and their want of caution in not making the inquiry.

We think it will be conceded to be a general principle, that one having knowledge of particular facts upon which he intends to rely to exempt him from a pecuniary obligation, about to be contracted with another—of which facts that other is ignorant, and can only learn them from the first, or from documents in his keeping—that the fact of knowledge raises the obligation upon *him to tell it. This would be the law in such a case, and it is in this case. Inquiry by the defendants would, at most, have resulted in [*397 obtaining what was already known to the acceptor. He held the contracts; he knew, or should have known, officially, the state of the accounts between the contractor and the department, and when he conditionally accepted his drafts, which were to be charged to his account for transporting the mail; as his liability to pay them would occur in ninety days, it was but reasonable, that he should have said in plain terms, when giving his acceptances, "If the earnings of the contractor from this time to the maturity of the draft, shall be sufficient to pay what he owes, and the debt he may incur until then, then these drafts will be paid." This would have been a condition about which there would have been no mistake.

But further, if two persons deal in relation to the executory contracts of a third (as these contracts were); and one of them, being the obligee, induces the other to advance money to the obligor, upon "condition that his contracts be complied with;" and he knows that forfeitures have been already incurred by the obligor, for breaches of this contract, and does not say so; shall he be permitted afterwards to get rid of his liability, by saying to the person making the advance, "I cannot pay you, for when I accepted there was already due to me from the drawer of the bill more than I accepted for. I had knowledge of it then, and so might you have had, if you had made the inquiry, but you did not choose to inquire; so I will pay myself first, because my acceptance was on condition that his contracts be complied with?"

Such is the case before us, as it was presented by the argument; and we cannot doubt, it will be thought decisive, that it was the duty of the acceptor, in this instance, to communicate what he knew of Reeside's account, if he had any conversation with the defendants, before the drafts were discounted, and that it was not the duty of the defendants to inquire. It cannot be answered, by saying, the words of the acceptance were intended to provide for what might exist, but what was not then known, or for breaches of the contracts which had already occurred, but which had not been charged with a penalty; for either would be an admission that inquiry by the defendants, when the acceptances *were made, could not have [*398 resulted in getting the information at the department.

But again, will the terms of the acceptance admit in any way of retroactive construction? The words must be taken according to the ordinary import of them. They are "accepted, on condition that his contracts be complied with." Can there be compliance with an executory contract, but in future, if breaches have already happened? Supposing no breaches to have occurred, necessarily implies such as may occur in future, and subsequent compliance. If both past and future breaches, then, are, as contended for, to be comprehended within the condition of this acceptance, why may

not the condition be extended to such as may happen after the maturity of the drafts, as well as to such as had occurred before they were accepted? A literal interpretation must lead to both, and that will not be contended for. But the argument is, that the defendants should have inquired into the "stipulations of the contracts and the extent of the condition;" and it is said, "the bank would have been informed, that the department expected Mr. Reeside to renew his drafts, until the accumulation of his current pay would be sufficient to meet them; and had his pledge to take them up himself, if earlier payment should be required." Be it so! Can there be a plainer admission than there is in the preceding sentence, written by the acceptor, that it is necessary to go out of the condition of the acceptance to ascertain his meaning, and that his construction rests upon facts, known by himself and Mr. Reeside, which the defendants could not have known but from one or the other of them? facts out of the condition, and which could alone become a condition, by being so expressed. Again, it is taken for granted in the argument, if the defendants had inquired into the stipulations of the contracts and the bond, that they would have been informed of the forfeitures which had been incurred. But that would not follow. Before such knowledge could have been obtained, it would have been necessary to take one step further beyond the condition—an inquiry into the accounts. Where shall such construction stop, if it be allowed at all. The law does not permit a conditional acceptance to be construed by anything extraneous to it, unless where the terms used are so ambiguous that it cannot be otherwise ascertained.

*399] *We will suppose, however, that the stipulations of Reeside's contract and his bond, had been known to the defendants. Might they not very justifiably have concluded, that his drafts were accepted, to aid him with an advance to fulfil his engagements? The bond in evidence shows that a necessity for advances was contemplated. It had been the habit of the department, to make them to contractors. Its exigencies, it is said, required advances to be made. The witness, Mason, says, "From the year 1830, the pecuniary affairs of the department were much deranged, and it was frequently unable to pay debts due by it to contractors. Under such circumstances, the department was in the practice of giving to contractors acceptances for sums less than was actually standing to their credit, unconditionally; and such acceptances were always taken up at maturity, prior to May 1835. That, occasionally, and with the special approbation of the postmaster-general, acceptances were given, upon the faith of existing contracts, conditional upon the performance of the contracts, which were understood to become absolute, if the contractor performed the services stated in the contract." The defendants, in the year 1835, held acceptances of the same character, for more than $70,000, all of which were under protest for non-payment, but subsequently paid, prior to the institution of this suit, except those in dispute in this case. The witness further says, the Bank of the Metropolis, and other banks in the city of Washington and elsewhere, have been, for many years, in the practice of discounting such acceptances. That it was often done for the accommodation of the department, often for the accommodation of the drawer, and frequently, of both. This testimony brings the department of the bank in connection upon acceptances of the former for contractors; shows the course of business upon them; and aids

to give a proper construction to the acceptances under consideration. When it is remembered also, that these acceptances were given to renew others of the department, which were over-due, we think it cannot be doubted, that the terms, "accepted, on condition that his contracts be complied with," cannot retroact to embrace forfeitures which had been incurred, and to refund advances said to have been made before the date of these acceptances. The argument upon this point was made upon the false assumption, *that there had been a communication between the postmaster-general and the defendants, concerning these acceptances, before they were [*400 discounted; or that there was an obligation upon the part of the defendants to make an inquiry into the state of Reeside's contracts, and his fulfilment of them, because the acceptances were conditional. It did not exist here, nor does it in any case of a conditional acceptance. The acceptor is bound by his contract, as it is expressed; and so it may be negotiated; without any further inquiry.

Having fully canvassed the argument upon the point of the obligation of the defendants to inquire into the condition of the acceptance; we turn, for a moment, to the case as it is shown to be by the evidence. Reeside's earnings, between the date of the acceptances and the time for the payment of them, were not applied to pay forfeitures, or refund advances. They were exhausted, by recharging him with sums of money, which Mr. Barry had allowed to him as contractor for carrying the mail, which were credited in the journal, but not entered into the ledger. That they were not posted, cannot affect Reeside's right to such allowances; and something more must appear than the testimony in this case discloses, before it can be admitted, that credits given by Mr. Barry were legally withdrawn by his successor. There is no evidence in this cause, to impeach the fairness and legality of the allowances credited by Mr. Barry; no proof that Reeside had incurred forfeitures, or that advances had been made to him. Proofs should have been given, if it was intended to justify the recharges for the causes stated. No attempt was made to do so. The allowances, then, are credits in Reeside's account, which the defendants may use to prove his performance of the conditions of the acceptance; and they do show performance, as the amount earned would have paid his drafts, if it had not been diverted.

The third instruction asked the court to say, among other things, if the credits given by Mr. Barry, were for extra allowances, which the said postmaster-general was not legally authorized to allow, then it was the duty of the present postmaster-general to disallow such items of credit. The successor of Mr. Barry had the same power, and no more, than his predecessor; and the power of the former did not extend to *the recall of credits or allowances made by Mr. Barry, if he acted within the scope of [*401 official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer

a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment, on a credit so given, but by the intervention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the department. The act of 2d July 1836, entitled "an act to change the organization of the post-office department," is only affirmative of the antecedent right of the government to sue, and directory to the postmaster-general to cause suits to be brought in the cases mentioned in the 17th section of that act. It also excludes him from determining, finally, any case which he may suppose to arise under that section. His duty is to cause a suit to be brought. Additional allowances, the postmaster-general could make, under the 43d section of the act of March 2d, 1825 (3 Story 1985), and we presume it was because allowances were supposed to have been made contrary to that law, that the 17th section of the act of 2d July 1836, was passed. In this last, the extent of the postmaster-general's power in respect to allowances, is too plain to be mistaken.

We cannot say, that either of the sections of the acts of 1825 and 1836, just alluded to, covers the allowances made by Mr. Barry to Reeside. But if the postmaster-general thought they did, and that such a defence could have availed against the rights of the bank to claim these acceptances, as credits in this suit, the same proof which would have justified a recovery in *an action by the United States, would have justified the rejection of them as credits when they are claimed as a set-off.

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We pass to the credit claimed, and called E. F. Brown's overdraft. But why it is so called, we do not know; for certainly no over-draft occurred when he checked alone upon the contingent fund of the department deposited to his credit in the bank: $7070.24, on the 30th of April 1835, were deposited to his credit; by 7th of June, he had drawn of that sum $3076.97. Then, the postmaster-general directed the bank not to pay Brown's checks, unless they were approved by Robert Johnson, the accountant of the department. It is in proof, that no check of Brown's was afterwards paid, without Johnson's approval. On the 2d of December following, the original deposit to Brown's credit was drawn out on his checks, approved by Johnson, and it was found there had been an over-draft of something over $600. We do not say, that an over-draft out of the bank, by authorized officers of the United States, is in any case chargeable to the United States, unless it can be shown that the money over-drawn has been applied to the use of the United States; but in the present instance, we think no proof of such application was necessary, and we cannot resist the conclusion, that the defendants are, in equity, entitled to this credit, for the proof is, that on the day that the over-draft was known, the postmaster-general wrote a letter to the cashier of the bank, stating that "the contingent fund of the department was exhausted, but the public service requires that a number of bills chargeable to that appropriation, shall be paid sooner than the usual sum can be obtained from congress; I, therefore, request the favor of our bank, to pay such bills against the department, of that character, as may be presented, with the certificate that the amount is allowed, signed by Robert Johnson, accountant of this department." The request was complied with,

and the bank advanced, until the 14th of May 1836, more than $6000, to pay claims on the contingent fund. In this case, as in those of more humble dealings, the course of business between parties must be used, when it can apply, to explain their understanding of past transactions. Nor can the inference be resisted, that when the postmaster-general *discovered [*403
the contingent fund had been over-drawn, and requested that other over-drafts might be made on the same account, that it was an admission of the correctness of the first. We think, then, that the United States was a debtor to the defendants for Porter's draft, and Reeside's drafts, and for the over-draft on the contingent fund, principal, interest and costs.

But it is said, though the credits claimed by the defendants shall be found to be due by the United States, they cannot be set off in this suit. This was the first instruction asked, and refused by the court. It is urged, that to allow them as credits in this suit is, in effect, to permit money to be taken from the treasury, otherwise than it is directed to be disbursed by law. That the money previously held by the defendants had been passed to the account of the treasurer of the United States, by direction of the postmaster-general, in conformity with the act of the 2d of July 1836. 4 Story 2464. That when the defendants complied with the letter of instruction, written to them by the postmaster-general, on the 16th of July 1836, and transferred the money then on deposit to the credit of the department to the treasurer of the United States, for the service of the post-office department; and when they consented to receive future deposits according to a form sent, and to transact the business according to the regulations contained in the letter of the 16th of July 1836; that the defendants cannot legally charge their claims against that account, by way of set-off in this suit.

To the foregoing objections, a brief but conclusive answer may be given. That is certainly the treasury of the United States, where its money is directed by law to be kept; but if those whose duty it is to disburse appropriations made by law, employ, or are permitted by law to employ, either for safe-keeping, or more convenient disbursement, other agencies, and it shall become necessary for the United States to sue for the recovery of the fund, that the defendant in the action may claim, against the demand for which the action has been brought, any credits to which he shall prove himself entitled to, if they have been previously presented to the proper accounting officers of the treasury, and been rejected. Such is the law, as it now stands. This right was early given by an act of congress to all defendants *in suits brought by the United States. It has been repeat- [*404
edly before this court. The decisions upon it need not be cited. They apply to this case. The transfer of the deposit to the treasurer of the United States; the letter of the postmaster-general directing it to be done; his regulations for keeping the account, and for disbursing it, were directory to the defendants; and their compliance with such directions, was an acknowledgment that the postmaster-general had the right to give them, as the conditions upon which they were to continue the depository of the fund. But it cannot be inferred, either from the act of 2d of July 1836, requiring that when the revenues of the post-office department have been collected, that they shall be paid, under the direction of the postmaster-general, into the treasury of the United States; or because appropriations for

the service of the department, shall be disbursed by the checks of the treasurer indorsed upon warrants of the postmaster-general, and countersigned by the auditor for the post-office department, under the words "registered and charged;" or from the declaration in the postmaster-general's letter to the defendants, that no other credit, set-off or deduction will be admitted in this account. It cannot be inferred, that the defendants accepted the postmaster-general's letter as a contract to surrender the right secured to them by the statute, to claim credits in a suit brought against them by the United States; or that it imposed upon them any legal obligation not to do so.

From the previous and contemporaneous correspondence between the bank and the postmaster-general, concerning these drafts, it is clear, such was not the apprehension of the defendant, when the account was opened with the treasurer of the United States, in compliance with the postmaster-general's letter. That was done in compliance with the law, changing entirely the fiscal arrangements of the department; and for that purpose, the postmaster-general was the proper organ to direct it to be done; but any condition in that letter, not required by the act of congress, under which he was acting, though officially made, is rather an evidence of what he wished to do, than a conclusion that he had the power to impose it; or that the defendant had consented to look to congress for the reimbursement of the debt due them, and not to the courts of justice. When the account was
*405] changed *to the treasurer of the United States, there was a large balance on deposit to the credit of the post-office department. The fund, however, was not the less that of the United States, in the one case or the other. The change, then, made no difference as to the ownership of the fund, in their right to retain, if the defendants had any right all to retain it for their debt. They had been dealing with the executive branch of the government in a matter of money, and could not be turned to the legislature, without their consent, to ask it to do as a favor, what the judiciary could settle as a right. If the defendants had supposed such was to be the consequence of carrying the fund to the treasurer's account, it is manifest from the evidence in the case, that it would not have been done. That they did not do so, it is to be inferred also from the evidence, arose from an indisposition to enforce a right, until every effort had been made to obtain it by amicable adjustment; and from an indisposition to embarrass a department which had been severely pressed, and was then just beginning to be relieved. The postmaster-general says, in his letter of March 19th, 1838, that, "excepting the refusal, in common with other banks, to pay the warrants of this department in gold and silver, or an equivalent, commencing in May last, and the seizure of both a general and special deposit of moneys in the treasury to meet alleged claims, under the circumstances exhibited in the annexed papers, the Bank of Metropolis has faithfully discharged its duties as a deposit bank for this department." The circumstances alluded to are those which have been the subject of comment in this case; and it is our opinion, that they confirm the right of the defendants to the credits claimed. There was no error, then, in the court not giving the instructions asked for, and the judgment is affirmed.

It is proper for us to say, however, if the law and the merits of the case were not with the defendants, that the court might well have refused to

give the first instruction, from the manner in which it is asked. After the evidence had been closed on both sides, the court was asked to say, "that upon the evidence aforesaid, the defendants are not entitled, in this action, to set off against the plaintiffs' demand, the amount of acceptances aforesaid, so given in evidence by the defendants, nor the amount of the overdraft of E. F. Brown." It raises all the issues, both of *law and fact, [*406 in the case, and requires the court to adjudge the case for the plaintiffs. This the court could not do, as there were contested facts in the case, which it was the province of the jury to decide. The court could only have said, alternatively, what was the law of the case, accordingly as the jury did or did not believe the facts; and this, it will be admitted, would have been equivalent to a refusal of the instruction. When instructions are asked, they should be precise and certain, to a particular intent; that the point intended to be raised may be distinctly seen by the court, and that error, if one be made, may be distinctly assigned.

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 now here 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, Plaintiffs in error, *v.* John Fitzgerald and [*407 Hipolite Fitzgerald, Defendants in error.

Public lands.

John Fitzgerald had been appointed, in 1833, inspector of the customs for the district of Mississippi; and by the collector at New Orleans, he had been employed as boarding-officer at the south-west pass on the Mississippi river, and went into possession of a tract of land which had been occupied by a former boarding-officer in the service of the United States. The collector was not instructed by the treasury department to place the boarding-officer on that or any other tract of land; nor was he bound to reside there; the United States had provided no accommodations for the boarding-officer; the collector had never, before possession was so taken, requested that the land should be reserved for the use of the boarding-officer, or of the custom-house at New Orleans. John Fitzgerald, on the 18th June 1836, entered the tract of land with the register of the land-office in New Orleans, and he and Hipolite Fitzgerald, his wife, expended their own money on the improvement of the tract, and complied with all the requisitions of the laws of the United States granting pre-emption rights; proof was made, before the register of the land-office, of the possession and cultivation of the tract of land in 1833; and the purchase-money was paid to the United States. The acting commissioner of the land-office, on the 3d November 1836, wrote to the register of the land-office at New Orleans, stating that the secretary of the treasury had directed that the land should be reserved from sale, for the use of the custom-house at New Orleans, and requesting that it should be marked as reserved from sale, on the plats of land in his office. The circuit court of Louisiana dismissed the petition which had been presented by the United States, claiming this land, and decreed, that John and Hipolite Fitzgerald should be quieted in the possession of the land; and on appeal to the supreme court, the decision of the circuit court was affirmed.

No law is known to exist, which deprives an officer in the service of the United States of a right to acquire a portion of the public lands, by any mode of purchase common to other citizens.

If a tract of land has been severed from the public domain, by a legal appropriation of it for any public purpose, no right can be acquired to it by cultivation or possession; because the land thus severed is not subject to the pre-emption law.

It cannot be pretended, that the land held by John and Hipolite Fitzgerald was reserved from sale, by an act of congress, or by order of the president; the direction of the secretary of the treasury, to reserve it from sale, several months after it had been sold and paid for, would not amount to such a reservation.

No appropriation of public land can be made for any purpose, but by authority of an act of congress. By the 3d section of the constitution of the United States, power is given to congress to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States. No authority is known to exist in any collector, under a law of congress, to make an appropriation of land for the use of the United States.[1]

*408] *If an act of congress had directed a light-house to be erected on the tract of land held by John and Hipolite Fitzgerald, before they had entered it, according to the decision of this court in the case of Wilcox *v.* Jackson, 13 Pet. 498, this would have been an appropriation of the tract to the use of the United States, within the meaning of the act of congress of 29th of May 1830; and would have taken away the right of pre-emption.

Error to the Circuit Court for the Eastern District of Louisiana. The United States, by petitory action in the circuit court of Louisiana, claimed a tract of land, situated in the parish of Plaquemine, on the river Mississippi, below the port of New Orleans. This land, 160 acres, had been entered by the defendants in error, under a pre-emption right alleged to be founded on the possession and cultivation of the tract, commencing in 1833. The entry had been regularly made in the office of the register of public lands, in Louisiana, under the act of congress of 1834, on the 18th of June 1836, and the purchase-money paid to the United States.

John Fitzgerald on the 6th of May 1833, had been appointed an inspector of the customs for the port of New Orleans, and was dispatched by the collector of that port to the south-west pass of the Mississippi river, in order to discharge the duties of boarding-officer. He was stationed at a proper point on the river, and himself and his wife took possession of a house which had been occupied by a former boarding-officer, on the public lands of the United States. The government had provided no place for the residence of the boarding-officer. The land was cultivated and improved by John Fitzgerald and Hipolite Fitzgerald, his wife, in the manner which, by the laws of the United States, gave them a pre-emption right to the same, unless there had been a previous appropriation, by the United States, of the tract for public purposes. Some months after the entry of the land and the payment of the purchase-money, the secretary of the treasury, through the acting commissioner of public lands, directed the tract to be reserved from sale for the use of the United States.

*409] The United States proceeded, by this action in the circuit court, *to establish their right to the land; alleging that Fitzgerald and his wife had acquired no right or title to the land, but that the same continued a part of the public lands of the United States. They averred, that the possession which had been taken of the land by John Fitzgerald and his wife, had been for the use of the United States; John Fitzgerald being at the time an officer in the service of the United States.

The circuit court ordered the petition of the United States to be dismissed; and decreed that the defendants in error should be confirmed in their title to the land. The United States prosecuted this writ of error

The case was argued by *Gilpin*, Attorney-General, for the United States; and by *Bell*, for the defendants in error.

[1] Irvine *v.* Marshall, 20 How. 558.

Gilpin, for the United States.—The mouth of the Mississippi river consists, as is well known, of five outlets or "passes," as they are called, which run through the narrow banks or tongues of alluvial land that stretch into the Gulf of Mexico. The principal of these, the south-west pass, extends for almost fifteen miles into the ocean, having on each side a narrow margin, chiefly of swamp. In some places, this bank between the river and the ocean, is not more than three or four hundred yards in width. In other places, it has greater breadth. On this narrow strip, on the west side of the river, a short distance above the Balize, or extreme mouth of the Mississippi, is a spot which afforded a small space sufficiently protected to enable the boarding-officer attached to the custom-house at New Orleans, to have a sort of land station. It was so occupied, as is in evidence in this cause, as early as the year 1830; and by common repute, and without doubt, it had been so occupied long before. On the 2d of March 1829, congress, by law, directed a survey of the passes of the Mississippi, with a view to the improvement of their navigation, and the building of light-houses (8 Laws U. S. 202); and on the 3d of March 1831, they passed an act appropriating $40,000 for building a light-house on the south-west pass, and another near the Balize. The boarding-station at the former place may be regarded as being, in the contemplation of congress, the spot *for the former, it being, as the evidence in this case states, the only spot in that region [*410 where such a station could be made. In the year 1833, four years after the survey, and two years after the appropriation for building the light-house, the collector of the customs at New Orleans, employed the defendant, John Fitzgerald, as an inspector, and stationed him, as the boarding-officer, in the cruising vessel at the south-west pass. He was allowed to be occasionally on shore, at a convenient place on the pass, and the spot in question had always been used for that purpose. There was a house there; but by whom originally built does not appear. There is no evidence of its being built by the United States, nor any of its erection by the defendant. The collector says, that finding this place "so used by the boarding-officer, he continued him there, without any special instruction from the president, or the secretary of the treasury." On the 6th of March 1834, the legislature of Louisiana passed a law, ceding the civil and criminal jurisdiction over the land to the United States.

On the 29th May 1830, an act of congress was passed (4 Story's Laws 2213), to grant pre-emption rights to settlers on the public lands. The provisions of that act were, that every "settler or occupant" of the public lands, who was then in possession, and had cultivated it, in the year 1829, might enter at the land-office not more than 160 acres, to include his improvement, at the minimum price. If there were two or more persons settled on the same quarter section, it might be divided between them, and each enter eighty acres elsewhere. Before entry under the act, proof of settlement or improvement was to be made to the register and receiver, agreeable to the rules prescribed by the general land-office. No entry was to be made under the act, of any land which was either "reserved for the use of the United States, or either of the several states, or reserved from sale by act of congress, or by order of the president, or which might have been appropriated for any purpose whatever." This law was to expire in one year from its date. On the 10th June 1830, and the 14th September 1830,

full rules were prescribed by the commissioners of the general land-office relative to the execution of this law, directing the precautions to be taken
*411] in regard to proof of occupancy and *cultivation, what was the meaning of those terms, and requiring actual payment. 2 Birchard's Land Laws, 539, 545. On the 10th June 1834, an act was passed to revive the pre-emption act of 1830, which gave, for two years from its passage, al the privileges of that act to every settler or occupant of the public lands who was then in possession, and had cultivated any part thereof, in the year 1833. On the 22d of July 1834, full rules were issued by the commissioner of the general land-office (2 Birchard's Land Laws 589), as the law required, and directions were given as to the nature and mode of proof by which the pre-emptor's right was to be ascertained. On the 29th February 1836, additional rules (Ibid. 624) on the same subject were issued, as the period at which this privilege was about expiring approached; in this, the regulations as to proof were more fully set forth, especially, in the cases where floating rights were claimed by an alleged settlement of more than one person. On the 2d June 1836, John Fitzgerald and Hipolite Fitzgerald his wife, made an affidavit before W. B. G. Taylor, a justice of the peace in the parish of Plaquemines, annexed to an application to the register and receiver at New Orleans to become the purchasers of 160 acres of land, being section 8, of township 24, range 30 east, under the provisions of the act of 19th June 1834, and stated that they had cultivated the same and were in actual possession and occupancy thereof at the date of the law. On the 3d June, the day after, a deposition was made by two persons before the same justice, stating, generally, that the facts set forth in the application of Fitzgerald and his wife were true. On the 18th of June, the day on which the act expired, an application for a float for 160 acres in addition, appears to have been made, but is not signed by either Fitzgerald or his wife. On the same day is a certificate signed by the register at New Orleans, stating, "that the foregoing lots contain 327½ acres, as stated in the foregoing application, according to the returns of the surveyor-general, and that the price agreed upon is one dollar and twenty-five cents an acre." On the 3d of November 1836, a letter was addressed to the register, by the commissioner of the general land-office, stating that the application of "John
*412] Walker" to enter section 8, *township 24, range 30 east, had been received from him, but that the secretary of the treasury has directed it to be reserved from sale, as important for the use of the custom-house, and he directs him to apprize Mr. Walker, and Messrs. John and Hipolite Fitzgerald, that no entry whatever can be permitted. Fitzgerald, however, subsequent to the termination of his office as an inspector, continued to assert his right to the property as pre-emptor, which had become valuable from the light-house being erected upon it; and on the 5th of January 1837, a petition was filed, by the district-attorney, in the circuit court of the United States, in Louisiana, setting forth this claim, denying its legality, and praying that they should be adjudged to deliver up possession of the land to the United States. On the 20th February 1837, the defendants filed their answer, in which John Fitzgerald admitted, that he was boarding-officer at the south-west pass, and stated, that he was under the necessity of "procuring accommodations" there, the same not being furnished by the United States; and that he was entitled to the benefits of the pre-emption

law ; they, therefore, prayed that the suit might be dismissed, and all other relief granted that the nature of the case might require. On the 29th December 1839, the circuit court, the district judge alone sitting, gave judgment "that the defendants be quieted in their possession of the premises in dispute, and that the plaintiffs take nothing by their petition." On the 21st April 1840, a writ of error was issued from this court.

It is submitted, that this judgment was erroneous, because : 1. A decree to quiet the possession of the defendant, was not one which the court could properly render in this suit against the United States. 2. The defendant could not, at the time this suit was brought, claim the benefits of a preemptor in the land mentioned in the declaration. 3. The land mentioned in the declaration was not subject to entry, under the act of 19th June 1834.

I. A decree to quiet defendants' possession, is not one that the court ought to have made. It is given as a mere interlocutory proceeding, while a suit to try the right of possession is pending (2 Story's Equity 161), but in this case, it is a final decree, barring the plaintiff's right. *York* v. *Pilkington*, 1 Atk. 284 ; **East India Company* v. *Sandys*, 1 Vern. 129 and note ; *Anon.*, 2 Ves. sen. 414 ; *Belknap* v. *Belknap*, 2 Johns. Ch. 472. [*413 Nor was such a decree asked for by the defendants. The United States claimed the land ; the defendants were in possession ; the United States were to establish their title ; if good, to get possession ; if bad, to be refused it, and dismissed. What necessity was there for the court to give any other judgment ? It was totally uncalled for ; and if given in accordance with any peculiar practice of Louisiana, let that be shown. Such would not seem to be the case, judging from the decision of the supreme court of that state, in the case of *Cullivec* v. *Garick*, 11 La. 89. Unless sustained by such local practice, the precedent is a dangerous one. In ejectment, the plaintiff relies on his own title. He is prepared only to examine and present that. If he fails to make it good, his suit is lost. If the court, passing beyond this, decides upon the defendants' title, they decide a point not necessarily before them, and which the plaintiff was not warned would be presented, or prepared to meet.

If, however, the defendants' title was properly before the court, on what ground could it adjudge that they were entitled to possession ? Under what right were they ? It is admitted, that they had no legal title ; that remained in the United States. At the most, they could have had nothing more than an equitable claim to a title ; and they had not, in fact, even that. If they had a register's certificate, in due form, it gave them no title ; it proved merely a few facts, necessary, indeed, to their procuring a title, but by no means sufficient or conclusive. But by this judgment, they obtain, on such a ground, an absolute and complete title. They have a decree of a court, awarding to them a possession that nothing is to disturb. This, too, they obtain against those who have, and never have parted with, the actual fee. A patent could give them no more. This decree, therefore, to "quiet the defendants' possession," is a title equivalent to a patent, against the owner who still holds the patent ; for the United States, never having issued it, are as fully the holders of it as their grantees could be. Now, when has it been heard, that a register's certificate is to prevail against a patent ? The acts of congress, from the beginning of the government, recognise a patent as the complete evidence of title to the public domain ; *and [*414

nothing else. 1 Story's Laws 424, 787, 818 ; 2 Ibid. 896, 1022, 1067, 1201, 1239, 1417. The holder of an unpatented location cannot dispossess him who holds under a patent; much less can he dispossess the United States, who have never issued a patent. *Terrett* v. *Taylor*, 9 Cranch 43 ; *Polk* v. *Wendall*, Ibid. 87 ; *Russell* v. *Transylvania University*, 1 Wheat. 432 ; *McClung* v. *Silliman*, 6 Ibid. 605 ; *Ross* v. *Doe*, 1 Pet. 664 ; *Bagnell* v. *Broderick*, 13 Ibid. 450 ; *Wilcox* v. *Jackson*, Ibid. 517 ; *Ritchie* v. *Woods*, 1 W. C. C. 11 ; *Depassau* v. *Winter*, 7 La. 6 ; *Boatner* v. *Ventris*, 8 La. (N. S.) 653. It was never the intention of the law, from which alone these certificates gain any force, that they should take the place of patents. They are inferior evidence. They establish certain facts ; they do not confer title. Can the district judge change their character ? Could he make them what the law never intended them to be? He should have dismissed the plaintiffs' application, if he deemed the evidence insufficient to sustain it ; but he had no right to decree the sufficiency of the defendant's title. In this there was error.

II. The defendant, Fitzgerald, could not, at the time the suit was brought, establish any possessory title, under the pre-emption law of 1834. He had neither done what was necessary to entitle him to its privileges, nor had he, in fact, received from any authorized officer, any legal recognition to that effect. He was not a settler ; he had made no improvement or cultivation ; he had offered no proof satisfactory to the register and receiver ; he had made no entry ; and he had received no certificate. A settler is a person who takes possession, for the purposes of cultivation ; who personally occupies the land, and makes it his home, not occupying it for a cause merely temporary ; he must use it for farming purposes. In the case of *Henderson* v. *Poindexter*, 12 Wheat. 530, this court considered settlement as meaning an actual *bonâ fide* residence. Now, the evidence in this case shows, that the settlement of Fitzgerald bore no resemblance, whatever, to such occupation. Even if he cultivated this remote, inhospitable strip of land, jutting into the ocean, it was done with no such intention on his part. He went there from necessity, as a public officer, for a public purpose. He did not go even voluntarily ; he was sent there. Can a public officer, sent for a *415] *public object, on to a part of the public domain, be considered as a settler? Could a body of troops, stationed through the winter on public land, near the frontiers, acquire the pre-emption rights of settlers? Do the commanders of temporary posts acquire all those rights ? Fitzgerald admits, that he went to this place as the boarding-officer ; that he took possession as such ; that he occupied the cabin as such. The collector proves, that in such capacity, he allowed such occupation. If this gives a pre-emption right, there is no occupation of public soil, for public purposes, by an officer sent upon them, that will not give it. Nor did Fitzgerald make any improvement. The house was there, when he was sent to the station ; and it is evident, that, so far from seeking to improve it, he used it merely as a temporary residence, in the intervals of his duty as the boarding-officer.

But it is not sufficient, that these things were done, had that been the case. They must have been proved, within the time limited by law, "to the satisfaction of the register and receiver," agreeable to the established rules. Now, of this having been done, there is not the slightest evidence.

The signature of the register does not appear to a single paper to that effect; that of the receiver is not affixed to any other document than a mere receipt for money paid. Surely, the examination by these officers, of the facts on which so great a privilege rests, as that which the law accords to pre-emptors, is not to be thus lightly dispensed with. 2 Birchard's Land Laws 589. Nor does this defect stop here. So far as the record enables us to discover, Fitzgerald never made any entry at all. There is evidence of an application to enter; but there the record stops; there is no certificate of its having been made or allowed. The document, which, in the case of *Wilcox* v. *Jackson*, 13 Pet. 505, showed so fully a compliance with all the necessary forms, is here totally wanting.

It is unnecessary to comment upon another fact connected with this pre-emption claim; that is, the right to a float derived from an alleged separate settlement by Fitzgerald's own wife; because the present decree of the court does not extend to the entry under that claim.

III. But suppose, that the defendant's right to a pre-emption was not affected, for any of the reasons stated; could it be *located on this tract of land? The terms of the law are very broad; they positively [*416 exclude, from any such location, all land reserved for the use of the United States; or reserved from sale by any act of congress; or appropriated for any public purpose. 4 Story's Laws 2213. Now, what appropriation for a public purpose can be more complete than this very act of Fitzgerald's. He is sent to the land by the collector, for a public purpose; necessarily occupies it for that purpose. Is not this an appropriation? In fact, the whole evidence shows, that for years and years before, it had been so used, so appropriated. The testimony of the collector at New Orleans is positive upon this point. The language of this court, in the case of *Wilcox* v. *Jackson*, 13 Pet. 511–12, shows, that wherever there is a real and permanent use of a part of the public domain for a public purpose, it is such an appropriation of it as the law intended. It is quite apparent, from the words of the act, that they were inserted for the express purpose of protecting from pre-emption settlements, such spots on the public domain as the public convenience had made it necessary, from time to time, to use; and which, as all the land belonged to the United States, operated injuriously to no one. The act reserved from pre-emption, in express terms, every tract that had been set apart for the use of the United States, either by the president (of course, embracing the acts of the executive departments, under his actual or implied direction) or by act of congress. It then proceeded to reserve an additional class, that is, such spots as were then actually appropriated, or used for a public purpose. Of course, the positive reservation by the executive, or by law, was not necessary in the latter class of cases. This was meant to refer to cases of actual appropriation, not arising from definite and specific acts, as distinguished from reservations made by the former.

But, in fact, there does appear to have been an express reservation of this piece of ground, by the secretary of the treasury. As soon as information reached the general land-office, of Fitzgerald's application, the register was informed that "the secretary of the treasury had directed that tract of land to be reserved from sale, as it was important for the use of the custom-house, at New Orleans." This language has evident reference, not to a reservation then first made, but to one that had been *pre- [*417

viously made, for a well-ascertained object, of which the importance was fully recognised and already known. The light-house, too, though on an island, separated by a narrow channel from the particular spot where the cabin occupied by Fitzgerald stood, was, in fact, to be regarded as a part of the same premises. It was all a piece of land embracing a few acres, in a narrow circuit, stretching into the ocean, where alone these public objects connected with commerce could be attained. These acts, if not reservations within the express terms of the act of congress, are yet clearly such as are held to be sufficient, under the opinion of this court, in the case of *Wilcox* v. *Jackson*, 13 Pet. 498.

On the whole, therefore, it is submitted, that the court below erred, in giving, by its decree, an absolute title to the defendant, instead of merely dismissing the plaintiff's bill; and that, on the merits, the defendants had shown neither a sufficient title under the pre-emption law, nor a right to locate it upon the land they claimed.

Bell, for the defendants in error, contended, that the land in controversy was, in 1833, part of the public land of the United States, and was subject to entry and sale, under pre-emption rights. When John Fitzgerald went to the land, and took possession of the building upon it, he did so for his own personal accommodation, and not for the use of the United States; while it was certainly the province, in all justice, of the government, to provide a residence for the boarding-officer, at a place most convenient for the performance of his duty; yet, having failed to do so, it became necessary for him to procure one for himself. In this, he did not act for the government; he had no authority to act for them; and all he did, was at his own private cost, and inured to his own personal benefit. May not a public officer purchase public lands for his individual account? May he not cultivate and improve public land, and entitle himself to the privileges and rights of a pre-emptor? The questions can receive but one answer: although an officer in the service of the United States, no exclusion from such rights exists by law. He enjoys them in common with every citizen of the United States.

*418] *In fact, no appropriation of this land for public purposes, has ever been made. Although the directions of the secretary of the treasury to reserve this land from sale, were given after the defendants in error had acquired a full title to the land; yet, if they had not acquired such title, the public lands cannot be appropriated to the use of the United States, by any act of the secretary of the treasury, unless specially thereto authorized by law. The public lands are, by the constitution, placed in the hands of congress; and an act of congress is required to authorize any and every severance of any part of them from the great body of the public domain, for the special use of the government. While the president of the United States is authorized, in particular cases, to appropriate portions of the land, for the purpose and use of the government, no such right or privilege is given to the head of the treasury department.

McKinley, Justice, delivered the opinion of the court.—This is a petitory action, brought by the plaintiffs, in the circuit court of the United States for the eastern district of Louisiana, to recover 160 acres of land, claimed by the defendants, under the pre-emption law of the 19th

of June 1834. In their petition, the plaintiffs allege, that the defendants, under the pretence that they were entitled to section No. 8, containing 160 acres in township 24, of range 30, by right of pre-emption, on the 18th day of June 1836, entered it with the register of the land-office at New Orleans; that the defendant, John Fitzgerald, took possession of the land as an officer of the customs, by direction of the collector at New Orleans, and not as a settler; and that the land had, long previous to the entry, been appropriated to public purposes, and attached to the custom house at New Orleans.

The defendants admit in their answer, that John Fitzgerald was an officer of the customs, and discharged the duties of boarding-officer at the south-west pass; where, finding no accommodations or dwelling provided for them by the United States, they were under the necessity of procuring one for themselves, in which they expended their own money. That having complied with all the requisitions of the laws of the United States granting pre-emption rights, they entered the said tract of land; and [*419 insist that, by the laws of the United States, they are entitled to it.

It was proved on the trial, that the defendant, John Fitzgerald, had been appointed, by the secretary of the treasury, inspector of customs for the district of Mississippi; and by the collector at New Orleans, he had been appointed boarding-officer, at south-west pass, on the Mississippi river, and put into possession of the tract of land in controversy, which had been occupied by former boarding-officers. The collector was not instructed, by the treasury department, to place the boarding-officer on that tract of land, nor was he bound to reside there; but might reside at any other place, convenient for the discharge of his duties. The collector had never requested that this land should be reserved for the use of the boarding-officer. A letter from the acting commissioner of the general land-office, dated the 3d of November 1836, directed to the register of the land-office, at New Orleans, stating that the secretary of the treasury had directed that this tract of land should be reserved from sale, for the use of the custom-house at New Orleans, and requesting the register to note upon his plats, that it was so reserved from sale, and to give notice of the fact to the defendants, was also read as evidence.

The defendants proved, that they had made proof of their possession and cultivation of the tract of land in controversy, before the register and receiver, according to law, and had entered it with the register and paid the purchase-money. Whereupon, the court below, according to the usual form of rendering judgment in such cases in Louisiana, decreed that the defendants be quieted in their possession of the premises in dispute, and that the plaintiffs take nothing by their petition. To reverse this judgment, the United States have prosecuted this writ of error.

Two objections have been taken to the judgment. 1. The defendant, John Fitzgerald, being in the service of the United States, while residing on the public land, could not, by cultivation and possession, acquire a right of pre-emption; and if he could, this land was not subject to pre-emption, it having been appropriated to public use. *2. The court had no power to quiet the defendants in their possession of the premises in [*420 dispute, the fee in the land being in the United States.

No law has been produced, to show that an officer of the United States is deprived of the benefit of the pre-emption laws; nor do we know of any

law which deprives him of the right to acquire a portion of the public land, by any mode of purchase common to other citizens. Had this tract of land been severed from the public domain, by a legal appropriation of it, for any public purpose, Fitzgerald could have acquired no right to it by cultivation and possession ; not because he was an officer of the United States, but because the land would not have been subject to the pre-emption law. Was this land so appropriated? The pre-emption law of the 19th of May 1830, which was revived by the act of the 19th of June 1834, declares, that the right of pre-emption shall not extend to any land which is reserved from sale by act of congress, or by order of the president, or which may hava been appropriated for any purpose whatever. 4 Story's Laws 2213. The first section of the act of the 19th of June 1834, gives to every settler or occupant of the public lands, prior to the passage of that act, who was then in possession and cultivated any part thereof, in the year 1833, all the benefits and privileges provided by the act, entitled an act to grant pre-emption rights to settlers on the public lands, approved the 29th of May 1830, and which act was thereby revived. The reservation and appropriation mentioned in the act of the 29th of May 1830, must have been valid and subsisting at the date of the act of the 19th of June 1834, to deprive the defendants of their right of pre-emption. It cannot be pretended, that the land in controversy was reserved from sale by any act of congress, or by order of the president, unless the direction of the secretary of the treasury to reserve it from sale, several months after it had been actually sold and paid for, could amount to such an order. As no reservation or appropriation of the land made, after the right of the defendants accrued, under the act of the 19th of June 1834, could defeat that right, it is useless to inquire into the authority by which the secretary of the treasury attempted to make the reservation.

*421] *The remaining question, under the first objection is, whether there had been any appropriation of this land for any purpose whatever, prior to the passage of the act of the 19th of June 1834. No appropriation of public land can be made for any purpose, but by authority of congress. By the third section of the fourth article of the constitution of the United States, power is given to congress to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States. As no such authority has been shown, to authorize the collector at New Orleans to appropriate this land to any use whatever, it is wholly useless to inquire whether his acts, if they had been authorized by law, would have amounted to an appropriation.

But it has been contended, in argument, that the act of the 3d of March 1831, authorizing the erection of a light-house at the mouth of the south-west pass, was an appropriation of this land for that purpose. By the plat, found in the record, it appears, that there are between forty and fifty tracts of land, containing 160 acres each, including the tract in controversy, all fronting on the south-west pass. If the act had directed that the light-house should be built on this particular tract, according to the decision of this court in the case of *Wilcox* v. *Jackson*, 13 Pet. 498, it would have been such an appropriation, within the meaning of the act of the 20th of May 1830, as would have deprived the defendants of their right of pre-emption. But the same plat shows, that the light-house was built on Wagoner's Island,

which appears to be at the mouth of the south-west pass, and not included or connected with this or either of the other tracts of land exhibited on the plat. From this examination of the case, it is clear, that the land in controversy was neither reserved from sale nor appropriated to any purpose whatever.

As the United States have placed their right to recover in this case upon the single ground, that the land was not subject to the pre-emption right of the defendants, because it had been previously appropriated for the use of the officers attached to the custom-house at New Orleans, that point being decided against them, they ought not to prevail upon the second objection urged against the judgment; even if the judgment *were technically [*422
defective; but it being in the usual form of judgments, in the courts of Louisiana, and not inconsistent with the justice of the case, we think it ought not to be disturbed.

It has, however, been suggested, that fraud has been practised, in some way, by the defendants, in obtaining the land in controversy. Everything on the face of the record appears to have been perfectly fair; and, so far as we can perceive, the defendants are legally entitled to a patent for the land. But if fraud has been practised upon the plaintiffs, the courts of chancery are open to them to seek a rescission of the contract. The judgment of the court below is affirmed.

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 Louisiana, and was argued by counsel: On consideration whereof, it is now here 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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*Philip Minis, Plaintiff in error, *v.* United States, [*423
Defendants in error.

Public officers.—Extra compensation.—Construction of statutes.

Dr. Minis, a surgeon in the service of the army of the United States, was appointed a military disbursing agent for removing and subsisting the Cherokee Indians; he charged two and a half per cent. on the sum of $514,237 actually disbursed by him in the course of his agency, in 1836–37; the charge was rejected at the treasury, on the authority of a clause in the act of congress of March 3d, 1835, ch. 303. It was contended by the plaintiff in error: 1. That this act of congress did not apply to the case; 2. That from the long-established practice of the government, as well as from the established law of the land, he was entitled to commissions, there being no law, prior to 1839, disallowing commissions on moneys disbursed for the government; 3. That the charge of commissions should be allowed, because the charge was made on disbursements of moneys appropriated during the session of congress of 1836–37, and therefore, neither the act of 1835, nor of 1839, were applicable to the claim: *Held*, that the claim was not supported by the laws of the United States; and that no commissions were chargeable to the United States on the moneys disbursed by the agent of the United States for removing and subsisting the Cherokee Indians. The case falls directly within the act of 30th June 1834, ch. 162, for organizing the Indian department; that act authorizes the president of the United States to require any military officer of the United States to execute the duties of Indian agent; and prohibits any other compensation for their services, than an allowance for actual travelling expenses.

In the act of congress of 3d March 1835, ch. 303, entitled an act making certain additional appropriations for the Delaware Breakwater, &c., a proviso is introduced: "Provided, that no officer of the army shall receive any per cent. or additional pay, extra allowance or com-

pensation, in any form whatsoever, on account of disbursing any public money appropriated by law, during the present session, for fortifications, &c., or for any other service or duty whatsoever, unless authorized by law:" *Held*, that this proviso applied only to the appropriations made for military purposes by that act, and to any which might be made during that session of congress; and was not a general permanent regulation, applicable to all cases of expenditures for the military purposes of the United States, under the provisions of acts of congress. It would be somewhat novel, to find engrafted upon an act making special and temporary appropriations, any proviso which was to have a general and permanent application to all future appropriations; nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.

The office of the proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended by the legislature to be brought within its purview.[1]

*424] *The money appropriated to the payment of the Cherokee Indians, upon their removal, and the cession of their land, was properly public money; and the disbursements thereof were on account of the United States, and for their benefit, in fulfilment of the obligations of the treaty.

ERROR to the Circuit Court of Georgia. The United States, at August term 1838, presented a petition to the district judge of the district court of the district of Georgia, stating that Philip Minis was indebted to the United States in the sum of $13,589.05, exclusive of interest, for money lent, money paid by the United States for the use of the defendant, and for money had and received and found due by him to the United States.

The claim of the United States was on a treasury transcript, duly certified, of the account of the United States with the defendant, Philip Minis, surgeon and military-district agent, dated January 15th, 1838, showing the amount claimed to be due by him to the United States. Against this demand, the defendant claimed certain allowances which had been submitted to the treasury, among which was a charge of two and one-half per cent. commissions for disbursing $514,237.61, the same sum having been paid by him as the agent of the United States for removing and subsisting the Cherokee Indians. This was disallowed at the treasury of the United States, under the act of 3d of March 1835, which prohibits the allowance of any per cent. or additional pay in any form, on account of disbursing any public money, unless authorized by law.

On the trial of the cause, the counsel for the defendant prayed the court to give the following instructions to the jury.

1. That the clause in the act of congress of the 3d March 1835, and which is relied upon as the authority by which the defendant's claim for commissions was rejected, does not apply to defendant's case; because it expressly refers to moneys appropriated during that session of congress, and therefore, the second auditor erred in disallowing the charge for commissions.

*425] *2. That Dr. Minis was entitled to the commissions charged by him, as well from the long-established practice of the government, as from the law of the land; there being no law, prior to the 3d March 1839, disallowing commissions on moneys disbursed for the government.

3. That the charge for commissions should be allowed, because the charge is made for the disbursement of moneys appropriated during

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1 Huidekoper *v.* Burrus, 1 W. C. C. 119

the session of 1836 and 1837, and therefore, neither the act of 1835 nor of 1839 is applicable.

4. That the amount of West's account should have been allowed as a credit to Dr. Minis, because the same was paid in good faith by him; and that the United States should not discredit the act of their own agent.

5. That as Dr. Minis's duty was to pay money upon the requisitions of the superintendent and commissioners, he was fully authorized to pay West's account to any one who had possession of the account thus passed and certified to by the superintendent; and that this case was still stronger, because John W. West was the acknowledged attorney of Jacob West, and had before received money from Doctor Minis, as disbursing agent.

Which instructions the court refused to give, but instructed the jury, "that in the relation which the defendant had stood to the United States, as an officer in the army, he had no claim by law for commissions on the sum disbursed by him, whatever interpretation might be given to the concluding proviso of the act of the 3d March 1835; and admitting that such proviso was limited to a probibition of per cent., additional pay, extra allowance or compensation, on account of dirbursing any public money appproppriated by law during the session of congress when the act was passed containing the proviso, that said proviso could not be interpreted to give commissions or per cent. upon disbursements of antecedent or subsequent appropriations of money by congress, unless the same were authorized by law; and that no law authorized the defendant to charge commissions; and therefore, that the second auditor had not erred in disallowing commissions to the defendant. The defendant excepted to the opinion of the court; and a verdict and judgment having been rendered for the United States, the defendant prosecuted this writ of error.

*The case was presented by *Coxe* and *Jones*, for the plaintiff in error, on a written argument; and was argued at the bar, by *Gilpin*, Attorney-General, for the United States. [*426

Coxe and *Jones*, for the plaintiff in error.—This action was originally instituted in the district court, where issued was joined; and in August 1839, on the application of the attorney for the United States, it was suggested, that the district judge, having been of counsel for defendant, it was ordered, that such fact be entered on the records of the court, and than an authenticated copy of the same, with all the proceedings in the action, be certified to the circuit court. Whether this was done, does not appear; or whether there was any action, or order in the circuit court, assuming jurisdiction; but the next proceeding is in the circuit court, viz., the swearing of the jury.

The account filed with the declaration exhibits the items in controversy. Among the items, is one for commissions of two and a half per cent., for disbursing the sum of $514,237.61, which was claimed by the plaintiff in error, and disallowed by the auditor, under a construction given by him to the act of 3d March 1835. The record is very imperfectly prepared. It is, however, understood, that the treasury account was the only evidence given by the plaintiffs in the circuit court, and that the real question in contest, was the propriety of the claim for the commissions charged. The auditor

places his rejection of the claim upon the single ground that the act of 1836 prohibits such allowance.

The learned judge who tried the case puts it on the more general ground, that, whatever interpretation might be given to that act, yet it was clear, that it could not be construed to give commissions, &c., upon disbursements, and that there was no law authorizing the defendants to charge commissions; and therefore, that the auditor had not erred in disallowing them. The conclusion, therefore, to which the court arrived was, that the judgment of the auditor was right.

The facts of the case are very imperfectly stated in the record; *427] *but the learned judge who tried the case, and the attorney-general will be able to correct any error in the statement, which, in general, will be found corroborated by the record. The plaintiff in error was a surgeon in the army of the United States, and as such was directed to aid in the removing of the Cherokee Indians from their country to the new country assigned them beyond the Mississippi. While thus engaged, he was called upon, by the government, to disburse, in the years 1836 and 1837, large sums of money in fulfilling the stipulations of the treaty of New Echota, of the 29th of December 1835. This duty he faithfully performed, from the 15th of October 1836, till the 25th of July 1837. These facts appear from the government accounts. The same accounts show, that the amount was $514,317.61, less the balance of $15,536.11, say, $498,781.43.

It is obvious, that this duty was foreign to his duty as surgeon in the army, and if any question of fact be raised upon the evidence, as exhibited on the record, it may be remarked, that all the facts upon which the allowance is claimed are clearly set forth, while the fact of his being a surgeon is only matter of inference. That he disbursed the money is shown; that he was at the time, an officer in the service of the government, is not distinctly apparent anywhere; although it would be conceded, that such was the case, provided the government will, on its part, concede the other facts which constitute the foundation of the claim, and the truth of which may be verified by the public records.

Upon this state of the law, these questions arise: 1. Whether the act of congress of the 3d of March 1835, applies to this case, and forbids the allowance? 2. Whether, independently of that statute, such a claim can be allowed?

I. The proviso attached to the act of March 3d, 1835, c. 303 (9 Laws U. S. 207–8), declared, that "no officer of the army shall receive any per cent., extra allowance, or compensation, in any form whatever, on account of the *428] disbursing *any public money appropriated by law, during the present session," &c.

1. It may be remarked, in regard to this act, that the money disbursed by Dr. Minis, cannot, with propriety, be termed public money. It did not belong to the United States, nor was the service one rendered to the government. It was part of the fund stipulated by treaty to be paid to the Cherokee Indians, for the cession of their territory, by the treaty of 1835. The disbursement was made on account of the Cherokees, and with all other expenses attending the removal of the Indians, was to be charged to that fund. It is, therefore, analogous to a case in which a public officer has rendered a service to a third party, not necessarily connected with his

public duty, as salvage by an officer of the government; can the payment for this service be rejected, because of the office the individual held? See the case of *The Tigre*, decided by Judge Washington. 3 W. C. C. 567.

2. This proviso was well considered, in the case of the *United States* v. *Gratiot*. The terms of the act, by their own force, are limited to appropriations made during the then session of congress.

II. Whether, upon general principles, independent of the act of 1835, can such allowance be made? This question may also be regarded as comprehended in the argument of *Gratiot's Case*. There are, however, some points of distinction. In that case, it was urged on behalf of the government, that the services for which compensation was asked, were not extra, but strictly within the line of official duty. Upon this ground, the various cases in which compensation was made for services rendered in relation to Indian matters, were distinguished from the case at bar. The allowances to General Scott, Governor Cass, Colonel Abert, were vindicated upon this ground. This distinction is even more clear in the present case. There is not the remotest resemblance between the professional duties of a surgeon, and those of disbursing military-agent. They are wholly foreign to each other. The accounts in this case describe the defendant as surgeon, but the account is against him as military disbursing-agent, and the items of claim are for *money placed in his hands in this capacity. In fact, [*429
his accounts as an officer in the army are properly settled in the third auditor's office; the disbursements on Indian accounts, in another department of the treasury. The nature and character of the duties, then, are wholly distinct; the funds out of which payment is made, are equally so; and the accounts are settled in different departments, and by different officers of the treasury: no case can be more clearly one of extra-official duty or performance. In cases where the distinction was far less obvious, the usage of the government to pay a *quantum meruit* for extra services, has been fully recognised. A reference is made to the cases of *Fillebrown*, *Macdaniel*, and *Ripley*, in 7 Peters. This usage having been judicially established, need not be again proved by evidence, but will be judicially recognised and acted upon. 7 Cranch 506; 9 Wheat. 581; Pet. C. C. 225.

The act of June 30th, 1834, c. 162 (9 Laws U. S. 137, &c.), has been cited by the attorney-general. A reference to this act will show, that it had no other agents in view than those designated by the act as Indian agents, and that neither the 4th, the 10th, nor the 13th sections have any application to the case at bar.

As to the peculiar hardship of this case, it is unnecessary to speak. The disbursements were made in the Indian country, and while attending the Cherokees across the Mississippi. No places of deposit existed; no military escort was furnished; payments made in small sums; and the party compelled to preserve them all at his own risk, the responsibility was heavy, and the duties onerous in the extreme. They have been faithfully performed, and the compensation asked would still leave the claimant a loser by the operation.

Gilpin, for the United States.—This was an action of *assumpsit*, instituted in the circuit court of Georgia, by the United States, against Philip Minis, to recover $13,589.05. The defendant pleaded the general issue, and at the

trial of the cause, produced Captain John Mackay, of the United States army, as a witness, who gave evidence that he had been *in the *430] Cherokee country about the same time with the defendant; that he had been allowed for fuel and quarters, and that such charges were usual; and that it was also usual to allow officers, whose accounts were large, their travelling expenses in going to Washington to settle them. The record then proceeds to say: "Whereupon, the said counsel for the defendant did then and there pray the judge of the said court to give the following instructions to the jury." The instructions asked are then set forth, and, in substance, declare, that the defendant is not debarred of his claim to commissions on disbursements which he made, by reason of the proviso of the act of 3d March 1835, the same not being applicable to his case; that he is entitled to them from long-established practice of the government, there being no law before 3d of March 1839, disallowing them. The court refused to give these instructions, but did instruct the jury, in effect, that the defendant, being an officer of the army, had no claim by law to such commissions, whatever might be the construction of the proviso of the act of 1835, because the same were not authorized by any law. To these instructions, the defendant excepted, and the jury found a verdict for the plaintiffs, for $11,461.56, and judgment was entered therefor. Annexed to the record is a treasury transcript of the account between the plaintiffs and defendant. It is not referred to in the record, nor is it stated to have been given in evidence. It appears to have been filed with the declaration or plea. Will this court, upon this record, reverse this judgment? If there is ground so to do, it must be in the charge of the court on the points excepted to.

1. To this it is answered, in the first place, that the bill of exceptions is totally defective, in not presenting a statement of the evidence to which the charge of the judge referred. A bill of exceptions is a privilege by which a party subjects the opinions of the judge to re-examination, at his own pleasure; it is necessary, therefore, that all which relates to, or bears upon, that opinion, should be carefully set forth. Without that, the court which revises has not the same case before them. It cannot tell, whether the instruction given or refused, or the decision made, was warranted or not. This rule, so apparent to common *sense and justice, is abundantly *431] fortified by judicial decisions. Bull. N. P. 317; 2 Tidd's Pract. 912; Brownl. 129; 1 Lutw. 905; 1 Salk. 284; 3 T. & R. 27. Does this bill of exceptions comply with any of these requisites? Is there anything in it which will enable this court to say that the charge of the judge was wrong? It shows that the judge was asked to say that a certain act of congress did not "apply to the defendant's case." What case? the money received by him; or the promise to pay, as set forth in the declaration; or the allowance for fuel and travelling expenses? These are the only points of the case which the record exhibits, yet the are manifestly not those to which the charge relates. Is it said, that all this appears in the treasure transcript which is found among the papers before the court? That cannot be; there is no evidence, nor even any allegation, that this paper was before the jury; none that it was offered; if offered, whether rejected or received; if received, whether it stood alone, or was contradicted or corroborated; it is now before us, as a paper filed among the documents relating to the case, further than that, we know nothing of it. Is it possible, that we can take

for granted that the charge of the court related to this paper and no other? Are we to admit, that the exception taken related to certain commissions in this transcript? To pass upon the charges and decisions of courts in this way, would leave them at the mercy of the party thus preparing his bill of exceptions. It is not contended, that it is necessary to set out the whole evidence (even that relating to the instructions) at large; but it is necessary that the evidence referred to should be distinctly stated, so far as it bears upon them.

2. This objection is the more fatal, in this instance, because the sufficiency of the defence, even had the instruction been given as prayed for, depended upon evidence of the defendant having complied with the requisitions of the act of congress, by presenting his claim or off-set at the treasury, and its having been there allowed or disallowed. This fact must appear, before it can be said whether the charge of the court was incorrect or not; yet it does not appear; it is not stated in the bill of exceptions; if we suppose the treasury transcript to be part of the bill of exceptions, it then even does not very clearly appear; but *if that document be not a part of it, then there is nothing whatever to show that the defendant had a [*432 right to ask from the court the instructions that he did. In no case whatever in which this court has passed upon the legality of a claim of an officer to credits as a set-off, has he failed to make it appear by the record, that the claim had been duly presented and disallowed. "Had this claim," say this court, in the case of the *United States* v. *Macdaniel*, 7 Pet. 11, "never been presented to the department for allowance, it would not have been admitted as evidence by the court;" and in the case of the *United States* v. *Fillebrown*, Ibid. 48, they say, "the claim must have been presented to the proper officers and disallowed." The defendant prays the court to charge, that he is not to be debarred by an act of congress from certain commissions, and the court refused to do so; he must show by evidence, or state distinctly in his bill of exceptions, what the commissions were; and he must show or state, in the same manner, that he had complied with the law which authorized their allowance. Not having done this, the refusal of the court to give the instructions cannot be treated as an error.

3. But the bill of exceptions is still more defective, in another point. It excepts to the judge not having charged the jury, that the defendant was entitled to certain commissions, on the ground of "long-established practice of the government;" and yet neither the bill of exceptions, nor any part of the record, contains any evidence of such practice; nor any averment that such evidence was offered to the jury; nor any assertion that such a practice, in the case of a public officer such as the defendant was, ever did exist. Evidence of a usage, is indeed, given, and is set out in the bill of exceptions; but it is usage to allow fuel, quarters and travelling expenses, not commissions on disbursement. Even the treasury transcript, if a part of the record, throws no light upon this point. How, then, can this court say, that the court below erred in refusing to charge the jury, that a certain claim to commissions was authorized by "long-established practice," when it does not appear that one particle of evidence of such practice was offered? The prayer is not to instruct the jury that "if they believed such practice existed, they should allow the claim;" but it is to instruct the jury that "the defendant *was entitled to it from long-established practice." [*433

There have been numerous cases where this court has been called on to review the decisions of courts below, in allowing or rejecting evidence of usage, and their opinions on the weight to be given to usages that have been proved ; but in every such case, it has been made to appear to this court, that proof of the usage was submitted. Unless a usage be so certain, uniform and notorious as to be understood and known by both parties, it cannot enter into their contract, even where not forbidden by law ; and therefore, in every case of extra allowance that has been brought before this court, it has appeared, that evidence of its being so, was offered in the trial below. The total omission of all such evidence in this bill of exceptions, and the want of any averment on the subject, preclude this court from saying that the judge erred in refusing to give the charge prayed for.

On these grounds, it is submitted, that the judgment ought not to be reversed. The bill of exceptions is totally defective, not in form merely, but in substance. To say, that the court erred, upon such a statement of its proceedings, would be to pass a judgment, not upon what we have before us, but upon what the imagination of counsel can extract by their own interpretation of this record. That the commissions referred to in the bill of exceptions, may be the commissions stated in the treasury transcript annexed to the papers, and that the "long-established practice" may be a practice to allow surgeons two and a half per cent. commission on disbursements made by them under special orders of the war department, cannot be denied ; but this possibility is not sufficient. They may as well relate to other commissions and to other usages ; and we cannot assume, that they are exactly those which it is necessary they should be, to sustain the defendant's argument against this judgment.

4. Passing, however, from this defect in the record, and admitting, for the sake of argument, that it appears clearly, by the bill of exceptions, that the defendant below, who was an officer in the army, did disburse a considerable sum of money, as a disbursing agent, by the authority, and under the orders of the war department, in the year 1836, the question remains, is he entitled to an allowance of two and a half per cent., in addition to his pay, as a compensation for so doing? The court below have *decided that he is not so entitled, by the laws of the land ; and the correctness of that decision we are now to examine.

*434]

The defendant below was a surgeon in the army, and on the 16th of October 1836, was detailed to act as an agent for the removal of the Cherokees, under the act of 2d July 1836 (9 Laws U. S. 453), with an allowance, in addition to his pay, of five dollars a day, for such travelling expenses as he might incur. The duty to which he was thus assigned, was one which the secretary of war was authorized to assign him. On the establishment of the war department, as long since as 1789, all duties connected with Indian affairs were specially referred, subject to the directions of the president, to the secretary of war. Since then, they have always remained under his charge. In 1830, by the act of 28th of May (4 Story's Laws 2204), the system of removing the Indians beyond the Mississippi was introduced, and the president was authorized to furnish aid and assistance to the emigrating Indians. On the 9th of July 1832 (Ibid. 2305), on the re-organization of the office of Indian affairs, it was again expressly provided, that the management of all matters arising out of Indian relations should be under

the direction of the secretary of war. On the 30th of June 1834, a further act (Ibid. 2401) was passed, relative to Indian relations. In that act, the Indian agents were expressly charged with the duties of managing and superintending the intercourse with the Indians; and they were directed to obey the instructions given to him by the secretary of war, the commissioner of Indian affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as might be prescribed by the president. The same act provided, that it should be competent for the president to require any military officer of the United States to execute the duties of an Indian agent; and it then went on to declare, that the duties required by any section of the act, from military officers, should be performed without any other compensation than their actual travelling expenses. On the 29th of December 1835, the final treaty of removal was made by the Cherokees (9 Laws U. S. 1351), which provided, that, until their removal (which was to be in two years), they were to receive from the United States, provision and clothing, and that they were then to be *removed to their new homes, and subsisted there for one year. On the 1st of March 1836, a supplementary treaty [*435 was made (Ibid. 1356), by the third article of which, it was agreed, that the sum of $600,000 should be applied by the United States, for the expenses of removal, and distributed as the treaty provided. On the 3d of March 1836, the general appropriation bill (9 Laws U. S. 453), for the expenses of the Indian intercourse, was passed; which contained a clause appropriating "for the removal of the Cherokees and for spoliations, according to the third article of the supplementary treaty of 1st March 1836, six hundred thousand dollars." On the 16th of October 1836, the defendant, an officer of the army, was charged with performing this duty; and was engaged in it, from the 16th of October 1836, to the 25th of July 1837, a period of 285 days. He received his pay as an officer, for the same period, and in addition, an allowance of five dollars *per diem*, for travelling expenses, through, out the entire period. That the duty in question was clearly one which the defendant was bound to perform, as an officer in the army, seems too clear to admit of question; that for performing the duty he was limited to the compensation he received, seems also to be established by the laws already referred to. He was a military officer, charged with special and temporary duties, as an Indian agent, which were, in all probability, among the very acts which the law of 1834 was intended to embrace, as those to be confided by the president to army officers. If, therefore, we were to go no further, we might confidently assert, that the decision of the court below, in declaring that "the defendant, as an officer of the army, had no claim, by law, for commissions on the sum disbursed by him," is clearly warranted by the letter and intention of the acts of congress, which apply directly to his case.

But these are not the only laws which preclude the claim of the defendant. He is an officer of the army, and, as such, he is debarred from charging commissions on the moneys disbursed. The settled policy of the law has been, to prevent officers of the army from receiving commissions, and to give them a regular sum for disbursing the public funds. By the act of the 24th of April 1816 (3 Story's Laws 1575), the president was authorized *to employ subaltern officers of the regular army, as paymasters, but their compensation was limited expressly to the pay and emoluments [*436 of a major. So, by the act of the 2d of March 1821 (Ibid. 1810), the assist-

ant commissaries, by whom large disbursements for purchases were to be made, are to be taken from the subalterns of the line, and their compensation is merely to be an addition, while so employed, of twenty dollars per month, to their pay in the line. So, by the same act (Ibid. 1810), the assistant quartermasters, who are charged with immense disbursements, are officers taken from the line, and receive as their compensation, a monthly addition of twenty dollars to their pay. And all these officers, thus charged with vast and responsible duties, additional entirely to the regular duties of officers, are obliged to give bonds in considerable sums. These laws, which embrace all the duties as disbursing officers that could be delegated to these great divisions of the military service, and extend to several millions of dollars a year, thus contemplate, as will be seen, the employment of officers taken from their immediate service in the line. So far from allowing them commissions, they confine their compensation to their pay, and a small additional allowance, less considerably than that which was received by the defendant in this instance. The assignment of Indian duties has arisen under the peculiar circumstances of the removal of the Indians, within the last few years; but disbursements for it differ in no respect from those of the quartermaster's department; they are, in fact, a branch of the duties of that department. To suppose, then, that an officer taken from the army to disburse provisions and money, and to superintend the transportation of Indians, is to receive his regular pay, and $150 a month, and then to receive besides, $12,000 for nine months, in the shape of commissions, while the same officer, if he had been assigned to disburse provisions and money, and to superintend the transportation of troops, would receive his regular pay, and $20 a month, and nothing more, presents an inconsistency so glaring, as to set at defiance all justice or regularity in the provisions of the laws.

We are not left, however, to apply to officers employed as the defendant
*437] was, the general principle merely derived from these *enactments. We have two express provisions on the subject, in the shape of authentic army regulations, promulgated before the account of the defendant was rendered. The army regulation of the 14th of March 1835, published as a general order, by the secretary of war, declares in express terms, that "an allowance of all extra compensation of every kind whatsoever, is prohibited, for which provision is not made by law;" and it enumerates, in terms, "per-centage to officers, for disbursing funds not properly appertaining to their department:" and also "compensation to officers on duty, connected with the removal of the Indians, except their actual travelling expenses, which are allowed by the act of 30th June 1834." And the volume of army regulations of 1835, is still more explicit; for it provides for the identical case, by its fifty-sixth article, which is in these words: "In all cases where an officer of the army is required, by the direction of the war department, to perform duties, or to make disbursements, for which compensation is not specially provided by law, and where the instructions directing such duties to be done, or such disbursements to be made, make no provision for any additional compensation, no allowance therefor will be made to such officer. It will then be considered, that, in the opinion of the war department, the services so required are within the proper sphere of his duty, as an officer of the army." It will thus be seen, that, in addition to express prohibition of the defendant's claim, as arising out of services per-

formed by him, connected with the Indian department, he is equally and fully prohibited from receiving it, as an officer of the army, for any disbursement he might make as such. On the law of the land, then, as expressed in its statutes, the charge of the court below was right.

It has been attempted to escape from the force of these prohibitions, by appealing to decisions of this court which are supposed to sanction this claim for commissions, on the ground of its being an equitable allowance for extra services. A brief examination of these cases will show, that the defendant can derive as little aid from them in this attempt to overthrow the decision of the circuit court, as he can from the statute book.

The first of these cases is that of the *United States* v. *Macdaniel*, 7 Pet. 12. The defendant, who was a clerk in the *navy department, was directed, in addition to his duties as such, to perform those of a [*438 special agent, at the navy yard in Washington, where, by law, certain disbursements were to be made, but which, under the construction given to the acts of congress, there was no agent to perform. The secretary of the navy allowed him a commission of one per cent., being that allowed to other agents similarly employed. This was done as early as 1817; the allowance was sanctioned by successive secretaries, and was annually reported to congress. In 1829, the secretary discontinued the agency, and refused to allow the commissions then due and unpaid, according to the previous practice. This court allowed the commissions, on the ground that they had been allowed by the head of an executive department, under a construction of a law, evidenced by long usage, and that such allowance was not beyond the power vested in him by law.

In the case of the *United States* v. *Ripley*, 7 Pet. 26, the defendant claimed to be allowed commissions for disbursements and services, which he stated to be out of the regular line of his duty, as a major-general; but this court refused to sanction them, on the grounds, that they had not been shown by him to be out of the range of his official duty, or to have been performed with the sanction of the head of the department, or under any peculiar emergency, or to be warranted by any usage.

In the case of the *United States* v. *Fillebrown*, 7 Pet. 44, the defendant was regularly appointed the secretary of the navy-hospital fund, at a salary of $250; some time after he had executed the duties of this office, the accumulation of moneys in the fund led to the commencement of large expenditures for the erection of hospitals, and the board directed the defendant to attend to the collections and disbursements, but not as a duty belonging to him as secretary; with the understanding that he was to receive compensation, according to the usage of the government in similar cases, which was considered to be a per-centage on the money disbursed. This court allowed these commissions, on the ground, that these disbursements were extra services, which the board were authorized to have performed, on the usual compensation, and which were not included in the regular duties of the defendant; and that it was the settled usage, to allow a commission for their performance.

*These are the only cases in which this court has recognised the [*439 claim of an officer, receiving a fixed compensation, to charge commissions on moneys disbursed by him, where he is not, in terms, authorized by law to do so. What are the principles that they lay down? They are

these : that where a person, in the public service, is required by the head of an executive department, to disburse moneys which the law requires to be disbursed, but for which no person is designated, he may receive, unless prohibited by law or notice, such commissions as the head of the department shall agree upon, on such as have been sanctioned by an established usage. Do the principles thus laid down apply in any one respect to the present case? They do not! The defendant, being an officer in the public service, was required to disburse moneys and provisions, under the specific provisions of an Indian treaty, to or for the use of the emigrating Cherokees ; that this is a duty of an Indian agent, under the directions of the war department, is too clear to admit of question. The act of 1834, then, says, that all officers of the army may be required to perform any duties appertaining to an Indian agency ; and it expressly directs, that, where these duties are the distribution of money or provisions, an officer of the army shall be present, even though another agent is specially charged with them. These, then, are disbursements of moneys which he may by law be called on to perform ; and they are thus withdrawn at once from the class to which the opinions of this court refers. But again, such a payment for them is expressly prohibited, both by law and by previous notice ; the law of 1834 says, than an officer of the army shall receive no compensation in addition to his regular pay, except his travelling expenses ; and this the defendant claimed and received, to the extent of a very liberal allowance of five dollars for every day of his agency ; the army regulations, too, of 1835, which are issued under the authority of an act of congress, and, when so issued, become law, expressly prohibit the charge ; the general order of the secretary of war, of March 1835, publicly issued, more than eighteen months before his appointment, gave him notice that no such allowance could be admitted. Thus, suppose the services were not such as he was required by law to perform, still he could not receive any such compensation as he asks, because it is prohibited *by law and previous notice. But again, if such were not the case, he has still failed to make out his right in other particulars equally necessary to bring it within the rules of this court ; it was neither allowed by the head of the executive department who employed him, nor was any usage proved, or attempted to be proved, in its favor ; on the contrary, we have seen that the head of the war department, by published orders in March 1835, and in December 1836, explicitly refused in advance to sanction such a claim ; the only usage attempted by the defendant is one for an allowance of fuel and quarters, and certain travelling expenses ; and the whole system in regard to allowances to officers taken from the service to perform such duties, either in the pay, commissariat or quartermaster's departments, is shown to be exactly the reverse of what the defendant claims, and exactly in accordance with what he is allowed ; that is, a sum to cover his additional expenses, added to his pay. Thus fails the endeavor to sustain this claim on principles derived from the judicial decisions of this court. It is as little sustained by them as by positive law.

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5. If the defendant could, however, have derived color from any general laws ; or if he could have brought his case within the principles established by this court in 1833 ; if there had been a previous usage to make such allowances, and if they had been sanctioned by the secretary of war, still his present claim would not avail him. The service was performed after

the passage of the act of 3d March 1835 (9 Laws U. S. 207), which declares, that "no officer of the army shall receive any per cent. or additional pay, extra allowance or compensation, in any form whatsoever, on account of the disbursing of any public money appropriated by law during the present session, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatsoever, unless authorized by law." The duty of the defendant is not one arising under any of the specified appropriations for the session of 1835 ; it is embraced, if at all, by the final clause ; "for any other service or duty whatsoever, unless authorized by law." It is admitted, that, if this is a general provision, applicable to other years than 1835, it is a legal prohibition of the defendant's claim. We are then to ascertain, whether it is so limited. It is submitted, that is is not ; that it is a general provision prohibiting the receipt, by an officer of [*441 the army, of any per cent. or additional pay, extra allowance or compensation, in any form whatever, for any service or duty whatsoever, unless authorized by law. This provision should be so construed, because such is the general intention of the act ; and because such is the true grammatical construction of its language. The general intention of the act may be inferred, from the previous legislation to which I have adverted. We have seen, that successively, in 1816, 1821, 1826 and 1834, congress had legislated on these allowances to officers of the army. They had, in succession, positively forbidden that when they were called on to perform duties in the pay department, the commissariat, or quartermaster, or in connection with Indian agencies, they should be limited to a small addition beyond their pay. Nothing can more clearly show the intention of congress, as to the general rule it desired to establish. It had, by law after law, up to 1834, put its veto against these allowances in each of the branches in which they were most usually claimed. In 1835, the subject of the internal improvements, to which this appropriation act immediately referred, was before them ; that was another class in which it was known similar claims were made ; they declared, that in the appropriations they were then making, such allowances should be forbidden ; and they determined to close the subject, by a general declaration to the same effect, in regard to all officers of the army. So to do, was evidently to carry out their previously expressed intention ; it was perfectly consistent with it ; it makes the whole legislation, in regard to officers of the army, harmonious. So too, if we look at their subsequent legislation ; we find them, in 1839, adopting a similar provision (9 Laws U. S. 1013), in regard to "all officers, in every branch of the public service;" thus completing a system which was commenced in 1816, or, perhaps, earlier; never relinquished ; and enforced successively, as cases occurred which showed a deviation from it. That the construction of the provision of 1835, therefore, as a permanent one, applicable to all officers of the army, is in accordance with the intention of congress, will hardly be denied. On the other hand, is the limitation of it to a single year consistent with such intention? It is not, in the first *place, because it is at variance with [*442 these previous laws ; in the second place, there is no conceivable reason why it should be limited to the year 1835 ; there was nothing peculiar in the duties or services of that year. Again, there is nothing in the nature of the provision, that should make it temporary ; if it was just in one year,

it was just in another ; it was as much so in 1835, as in 1834 or 1836 ; in fact, this class of duties was unusally large in 1835; the disbursements were very great ; the labors of the officers were such as, far more than in former years, to entitle them to an allowance, if the policy of the laws justified it. There is, then, every reason to suppose, that congress intended to make a general provision ; and none for believing that they intended to make a temporary one. This should have great weight with us, in construing language that is doubtful.

But examining the clause, in its grammatical construction, brings us to the same result. It cannot be properly read as limited to a single year ; the limitation is simply a reference to particular appropriations, which are included in the provision ; a designation of them, not a qualification of the general and specific enactment. It says, that no officer shall receive extra compensation, on account of disbursing any public money, appropriated during the present session, for fortifications, &c. ; or any other service or duty whatsoever, unless authorized by law. The only subject to which the words, "during the present session," refer, are what is then appropriated. Are duties and services "appropriated?" We must read the sentence in one of two ways ; either it is to be read, "no officer shall receive extra compensation for any other service or duty whatsoever, unless authorized by law," which is a general provision ; or it is to be read, "no officer shall receive extra compensation, on account of disbursing any public money, appropriated during the present session, for any service or duty, unless authorized by law." In the first place, this presents a contradiction in terms. How can the money be "appropriated for a service or duty," and yet the service or duty not be "authorized by law?" But again, how can it be said, that an appropriation is made for "a service or duty?" these are words that relate to the performance of acts by officers, not to what is the subject-matter of an appropriation ; the particular works mentioned are objects of
*443] appropriation ; *and, as the yearly provision for them is the subject of the bill, it is natural and proper, that in speaking of it, they should be so alluded to ; to extend it beyond this, is to give it a construction that the words do not fairly authorize.

It is submitted, then, that the decision of the circuit court ought not to be reversed, because no case for reversal, on the defendant's own ground, is presented by his bill of exceptions; and if his case were properly set forth, yet the decision of the court is in accordance with the law, as prescribed by the statute book, and as expounded by this tribunal.

Story, Justice, delivered the opinion of the court.—This is the case of a writ of error to the circuit court for the district of Georgia. The original suit was brought by the United States against Doctor Philip Minis (the plaintiff in error), to recover the balance of $13,589.05, due from him to the United States. At the trial of the cause, upon the general issue, a transcript of the account from the treasury department, establishing the balance, was given in evidence ; and the sole question in controversy between the parties was, whether Doctor Minis was entitled to credit for certain items which had been disallowed by the treasury department. The principal item, and the only one now in controversy, was a claim by Doctor Minis, who was a surgeon in the army, and was appointed military disburs-

ing agent for removing and subsisting the Cherokee Indians, of two and a half per cent. commissions on the sum of $514,237.61, actually disbursed by him in the course of his agency, in 1836 and 1837. No evidence was offered on the part of Doctor Minis, of any contract, or of any usage of the government, for the allowance of any such commission, in cases of this sort. The counsel for Doctor Minis, among other things (not material in the present sate of the case), prayed the court to instruct the jury: 1. That the clause in the act of congress of the 3d of March 1835, ch. 303, which was relied upon as the authority by which the defendant's claim for commissions was rejected, did not apply to the defendant's case; because it expressly refers to moneys appropriated during that session of congress, and *therefore, that the second auditor erred in disallowing the charge for commissions: 2. That the defendant was entitled to the commissions charged by him, as well from the long-established practice of the government, as from the law of the land; there being no law, prior to the act of the 3d of March 1839, disallowing commissions or moneys disbursed for the government: 3. That the charge for commissions should be allowed, because the charge is made for the disbursement of moneys appropriated during the sessions of congress of 1836 and 1837; and therefore, that neither the act of 1835 nor of 1839 was applicable. [*444

These instructions the court refused to give; but instructed the jury, "that in the relations which the defendant had stood to the United States, as an officer in the army, he had no claim by law for commissions on the sum disbursed by him, whatever interpretation might be given to the concluding proviso of the act of the 3d of March 1835, ch. 303; and admitting that such proviso was limited to a prohibition of per cent., additional pay, extra allowance or compensation, on account of disbursing any public money appropriated by law, during the session of congress when the act was passed containing the proviso; that said proviso could not be interpreted to give commissions or per cent. upon disbursements of antecedent or subsequent appropriations of money by congress, unless the same were authorized by law; and that no law authorized the defendant to charge commissions; and therefore, that the second auditor had not erred in disallowing commissions to the defendant." To this opinion of the court, the defendant excepted. The jury found a verdict for the United States, after deducting certain other disallowed items; and judgment was rendered, accordingly, for the United States; and the present writ of error is brought to revise that judgment.

It is certainly true, as has been suggested at the bar, that the case is, as to the evidence necessary to raise some of the questions, very imperfectly and defectively stated; and therefore, some of the instructions might on this account have been well refused. It is, however, much more satisfactory to us to be able to dispose of the case upon its true merits.

The first instruction asked embraces the question, what is the true construction of the first section of the act of the 3d of *March 1835, ch. 303, entitled "an act making certain additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouth of certain rivers, for the year 1835." That act, after making the specific appropriations, contains the following proviso: "Provided, that no officers of the army shall receive any per cent. or addi- [*445

tional pay, extra allowance or compensation, in any form whatsoever, on account of the disbursing any public money appropriated by law, during the present session, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatsoever, unless authorized by law." The argument on behalf of the United States is, that this proviso, although found in a mere appropriation law of a limited nature, is to be construed, by reason of the words "or for any other service or duty whatsoever, unless authorized by law," to be permanent in its operation, and applicable to all future appropriations, where officers of the army are employed in such service or duty; and that it appears from the record, that this was the very ground on which the treasury department rejected the claim of Doctor Minis for commissions. The same question has been made and fully argued in the case of *Gratiot* v. *United States*, at the present term (*ante*, p. 336); and we have given it our deliberate consideration. We are of opinion, that such is not the true interpretation of the terms of the proviso; and that it is limited exclusively to appropriations made at the session of 1835.

It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally *be expected to find its proper place in some distinct and independent enactment. [*446]

Now, the language of the present proviso is perfectly satisfied by confining its operation to appropriations to be made during the then existing session. It seems clear, that the words of the proviso ought to receive this interpretation, if the last clause, "or for any other service or duty whatsoever, unless authorized by law," were left out. The proviso would, then, in legal effect, read: that no officer of the army shall receive any per cent. or additional pay, extra allowance or compensation, in any form whatever, on account of the disbursing any public money appropriated by law, during the present session, for fortifications, for execution of surveys, for works of internal improvement, for building of arsenals, for the purchase of public supplies of every description. What difficulty, then, is created by the addition of the subsequent clause? In our judgment, none whatsoever. The preceding enumeration is of special services in disbursing public money on account of particular appropriations for fortifications, &c. But it was foreseen by congress, that other appropriations might be made, during the same session, for other objects not comprehended in the preceding enumeration; and therefore, *ex industriâ*, the subsequent clause was added, to supply any defect of this nature, and to cut off all claims for extra pay, allowance or compensation for disbursements connected with such objects. The whole clause in this view would read precisely as if it had been introduced imme-

diately after the words "for fortifications." It would then be, that no officer of the army shall receive any per cent., &c., on account of disbursing any public money appropriated by law during the present session, for fortifications, or for any other service or duty whatsoever. This, too, is the grammatical sense of the words of the whole proviso, in the order in which they stand. On the other hand, the interpretation put upon the proviso, on behalf of the United States, requires the court to read it as if the last clause were wholly independent of the preceding enumeration, and permanently prohibited any extra allowance or compensation, "for any other service or duty" than disbursements, but prohibited it for disbursements only, under appropriations made during that session. This would seem obviously to be inconsistent with the policy *upon which the supposed permanency of the proviso is made to rest. The prohibition would then be utterly [*447 inapplicable to disbursements of future appropriations, which in most cases is the leading item of charge, and would be confined to "any other service or duty." Such an interpretation certainly ought not to be adopted in a proviso to an act making appropriations for certain specified objects, unless it be unavoidable. And to make the proviso apply to disbursements under future appropriations generally, the court would be driven to interpolate into it the words "or at any future session;" a liberty which, consistently with the known limits of judicial duty, could never be properly assumed.

The subsequent legislation of congress, even if it could be brought in aid of the argument, rather tends to confirm, than to impugn the interpretation which we have given to the proviso. It was not until the act of 3d March 1839, ch. 82, that congress made a general provision on the subject, and enacted, by a distinct section, that no officer, in any branch of the public service, or any other person, whose salaries, or whose pay or emolument, is or are fixed by law, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be allowed by law. The generality of this section would seem to show, that until that period, no law existed on the subject, which was permanently applicable to any branch of the public service. We think, then, that according to the natural meaning of the words, and the order in which they stand, the true interpretation of the whole proviso is, that it is limited to appropriations made during the session of 1835. If, therefore, the disallowance of Dr. Minis's claim to commissions depended upon the act of 1835 (as was the construction of the treasury department), the instruction asked on this point ought to have been given by the circuit court.

But we are of opinion, that his claim was properly disallowed, upon another and distinct ground. No evidence of any contract or usage was offered to sustain it; and the case appears to us to fall directly within the provisions of the act of 30th of June 1834, ch. 162, for the organization of the department of Indian affairs. The 4th section of that act provides, that *448] "it shall be competent *for the president to require any military officer of the United States to execute the duties of an Indian agent." The 13th section further provides, that "the duties required by any section of this act, of military officers, shall be performed without any other compensation than their actual travelling expenses." Dr. Minis being a surgeon in the army, was appointed disbursing agent for removing and subsisting

the Cherokee Indians, and has been allowed a compensation for his travelling expenses, under the agency, of five dollars per diem, amounting, in the whole, to the sum of $1420. It is not pretended, that this sum was not a reasonable compensation.

It has been suggested at the argument, that no other agents are within the purview of the act of 1834, than such Indian agents as are to be appointed under that act, as general Indian agents; and that Dr. Minis was not in that predicament. But looking to the whole scope and object of that act, contemplating, as it does, that military officers might be called upon to perform duties, in connection with the general Indian agents, by the direction of the president, we cannot but entertain the opinion, that the terms of the act were designed to exclude such military officers from any other compensation than their travelling expenses; as, in truth, when detached upon such special service, they were still entitled to their ordinary military pay and emoluments.

It has also been suggested, that the disbursements in the present case were not properly of public money, because it was money stipulated by treaty to be paid to the Cherokees, upon their removal, and the cession of their lands. But we think this objection is unmaintainable. The payments made were properly public money, and the disbursements thereof were on account of the United States, and for their use and benefit, in fulfilment of the obligations of the treaty.

Upon the whole, therefore, we are of opinion, that the circuit court, rightfully, under all the circumstances of the case, refused the instructions prayed for; and gave the very instruction which was required by law. The judgment is, therefore, affirmed.

Judgment affirmed.

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*449] *Moses Groves and James Graham, Plaintiffs in error, *v.* Robert Slaughter, Defendant in error.

John W. Brown, Moses Groves, R. M. Roberts and James Graham, Plaintiffs in error, *v.* Robert Slaughter, Defendant in error.

Illegal contracts.—Inter-state slave-trade.—Constitutional law.

An action was instituted in the circuit court of Louisiana, on a promissory note given in the state of Mississippi, for the purchase of slaves in that state; the slaves had been imported in 1835–6, as merchandize, or for sale, into Mississippi, by a non-resident of that state. The constitution of Mississippi, adopted on the 26th October 1832, declared, that the introduction of slaves into that state, as merchandize, or for sale, should be prohibited, from and after the first day of May 1833. The parties to the note contended, in the circuit court, that the contract was void; asserting that it was made in violation of the provision of the constitution of Mississippi, which, it was insisted, was operative after May 1st, 1833, without legislative enactment to carry the same into effect: *Held*, that the prohibition of the constitution did not invalidate the contract, but that an act of the legislature of the state was required to carry it into effect; and no law on the subject of the prohibition in the constitution, was passed until 1837.[1]

The construction of the provision in the constitution of Mississippi, relative to the introduction of slaves for sale, into that state, had not been so fixed and settled by the courts of Mississippi as to preclude the supreme court of the United States from regarding it as an open question.

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[1] Rowen *v.* Runnels, 5 How. 134; Truly *v.* Wanzer, Id. 141; Sims *v.* Hundley, 6 Id. 1; Hardiman *v.* Harris, 7 Id. 726.

The language of the constitution obviously points to something more to be done, and looks to some future time, not only for its fulfilment, but for the means by which it was to be accomplished. But the mere grammatical construction ought not to control the interpretation, unless it is warranted by the general scope and object of the provision.

Under the constitution of Mississippi, of 1817, it is declared, that the legislature shall have power to prevent slaves being brought into the state as merchandize; the time and manner in which this was to be done, was left to the discretion of the legislature; and by the constitution of 1832, it is no longer a matter of discretion, when this prohibition is to take effect; the 1st day of May 1833 is fixed on as the time, before which the prohibition shall not operate. But there is nothing in this provision which looks like withdrawing the whole subject from the action of the legislature; on the contrary, there is every reason to believe, from the mere naked prohibition, that it looked to legislative enactments to carry it into full operation; and, indeed, this is indispensable; there are no penalties or sanctions provided in the constitution, for its due and effectual operation. The constitution of 1832 looks to a change of policy on the subject, and fixes the time when the entire prohibition shall take effect; and it is a fair and reasonable conclusion, that it was the only material change from the constitution of 1827.

*Admitting the constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect upon the construction of this article; legislative provision is essential to carry into effect the object of the prohibition; it requires the sanction of penalties, to accomplish this object. [*450

What would become of the slaves thus introduced, if the construction be such as to give the provision immediate operation? Will they become free immediately, on introduction, or do they become forfeited to the state? These are questions not easily answered; and although these difficulties may be removed by subsequent legislation, yet they are proper circumstances to be taken into consideration, when requiring into the intention of the convention, in forming the constitution. It is unreasonable to suppose, that if this prohibition was intended to operate, *per se*, without any legislative aid, that there would not have been some guards and checks thrown round it, to insure its execution.

The proviso in this article, that actual settlers shall not be prohibited from bringing in slaves for their own use, until the year 1845, must, necessarily, be considered as addressed to the legislature, and must be construed as a restriction on their power; the enacting part of the article, "shall be prohibited," is also addressed to the legislature, and is a command to do certain acts. The legislative enactments on this subject strongly fortify the conclusion, that this provision in the constitution was not understood but as directory to the legislature.

The enactment of laws in 1837, to carry the provision of the constitution into effect, by imposing penalties, from and after the passing of the law, shows the sense of the legislature on the subject; and that, in the opinion of the legislature, such a law was necessary. The laying of a tax on slaves brought into the state for sale, after May 1st, 1833, also shows that the provision in the constitution was not considered in operation, without some legislative provisions to carry it into effect.

To declare all contracts made for the purchase of slaves, introduced as merchandize, or for sale, from the 1st of May 1833, until the passage of the law of 1837, illegal and void, when there was such an unsettled state of opinion and course of policy pursued by the legislature, would be a severe and rigid construction of the constitution; and one that ought not to be adopted, unless called for by the most plain and unequivocal language.[1]

The court do not mean to say, that if there appeared to have been a fixed and settled course of policy in the state of Mississippi, against allowing the introduction of slaves, as merchandize, or for sale, after the 1st day of May 1833, a contract made in violation of such policy would not be void. But the court cannot think that this principle applies to this case; as, when the sale of the slaves in question was made, there was, certainly, no fixed and settled course of policy which would make void or illegal such contracts.

ERROR from the Circuit Court for the Eastern District of Louisiana.

In the first case, the defendant in error, on the 11th day of February 1839, had instituted a suit, by petition, in the circuit *court of [*451

[1] A promissory note given for the price of a slave, before the abolition of slavery, is a valid contract, protected by the constitution. White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, Id. 654; Boyce *v.* Tabb, 18 Id. 546; French *v.* Tumlin, 19 Am. L. Reg. 641.

Louisiana, against the plaintiffs in error, on a promissory note for the sum of $7875, dated at Natchez, on the 20th of December 1836, payable at the Commercial Bank at Natchez, drawn by John W. Brown, to the order of, and indorsed by, R. M. Roberts, and also indorsed by Moses Groves and James Graham, payable at the Commercial Bank at Natchez, twenty-four months after date; which note had been regularly protested for non-payment.

In the second case, the suit had been instituted on the 5th day of April 1838, on a promissory note for $7000, also drawn by John W. Brown, payable at the Commercial Bank at Natchez, to R. M. Roberts, or order, at Natchez, and indorsed by him and the other plaintiffs in error, dated 20th December 1836, payable and negotiable, twelve months after date, and regularly protested for non-payment.

The answers of the plaintiffs in error, in both the cases, stated that the notes were given by the maker, Brown, to the plaintiff, in part payment of the price of certain slaves purchased by him from the plaintiff, and the notes were given at Natchez, in the state of Mississippi, on or about the day of their dates, respectively. That the petitioner, Robert Slaughter, did introduce into the state of Mississippi, after the 1st day of May 1833, the slaves for which the notes were given, as merchandize, and for sale; and did sell the slaves, so imported, to the said Brown; and did take, in part payment thereof, the said notes, whiah had been indorsed in blank by the respondents, to accommodate the said Brown. The respondents alleged, that the cause or consideration for which the notes were given was null and void, the notes were null and void, and of no effect; because the contracts on which they are found were in direct violation of the constitution of the state of Mississippi, which expressly prohibits the introduction of slaves into that state, as merchandize, or for sale, after the first day of May 1833.

Afterwards, on the 14th of June 1839, the following agreement was filed, in each of the cases, as a statement of facts by the parties. "In this case, it is consented, that the question of fraud is waived by defendants, except as hereinafter reserved; the case *is to be defended solely on the question of the legality and validity of the consideration for which the notes sued on were given. It is admitted, that the slaves for which said notes were given, were imported into Mississippi, as merchandize, and for sale, in the year 1835 and 1836, by plaintiff, but without any previous agreement or understanding, express or implied, between plaintiff and any of the parties to the note, but for sale generally, to any person who might wish to purchase. The slaves have never been returned to plaintiff, nor tendered to him by any of the parties to the notes sued on."

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The constitution of the state of Mississippi, adopted in 1832, provided, in the 2d section, title "slaves," as follows: "The introduction of slaves into this state, as merchandize, or for sale, shall be prohibited from and after the first day of May 1833: provided, that actual settler or settlers shall not be prohibited from purchasing slaves, in any state in this Union, and bringing them into this state for their own individual use, till the year 1845."

The cases were argued by *Gilpin* and *Walker*, for the plaintiffs in error; and by *Jones*, *Clay* and *Webster*, for the defendants.

Gilpin, for the plaintiffs in error.—This is a case which involves but a single question, yet, that it is one of surprising interest, is proved by the ability with which it has been discussed, the zeal and eloquence with which every position in relation to it has been scanned. The simple and single inquiry is, whether a contract, directly opposed to a constitutional provision, not accompanied with any legislative action, will be carried into effect by the judicial tribunals.

The first constitution of the state of Mississippi, was adopted on the 15th of August, 1817, and solemnly approved by congress (3 U. S. Stat. 472) and by the president, on the 10th December of the same year. In its article entitled "slaves," was this provision: "The general assembly shall have no power to prevent emigrants to this state from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any persons of the same age or description *shall be continued in slavery by the laws of this state: provided, that such person or [*453 slave be the *bonâ fide* property of such emigrants." And afterwards, the same article continues, "They shall have full power to prevent slaves from being brought into this state as merchandize." In the year 1822, a law was passed (Revised Code of Miss. 155), declaring that if slaves were brought for sale, he who brought them must have a certificate, made before certain persons, of the place from which they came, to serve as evidence of their good character; and a severe penalty was imposed for a violation of it. In the same year, a law was passed (Revised Code of Miss. 154), declaring that persons held to service for life, in other states, and brought into the state of Mississippi, pursuant to law, and no others, should be deemed slaves. On the second Monday of September 1832, a convention met at Jackson, to amend the state constitution. The very first amendment proposed by the committee was to alter the article "slaves," by striking out the words, that the legislature "shall have power to prevent slaves being brought into this state as merchandize," and to insert in lieu of them, "the introduction of slaves into this state, as merchandize, shall be prohibited after the — day of —— 18—." As soon as it came up for discussion, it was proposed to date the prohibiton from May 1833. It was moved to make it 1899. The former was adopted. It was then proposed to add, that "no law shall be passed before 1850, to prevent any citizen of the state from purchasing and bringing in slaves for his individual use." This also passed. In the subsequent stages of the proceedings of the convention, the subject became matter of long debate, and was finally referred to a committee, of which Judge Trotter was a member, who reported the clause as it had stood before; leaving to the legislature the power to prevent the importation of slaves, as merchandize. To this, a clause was moved as an amendment, in the words now forming a part of the constitution, and adopted by a vote of twenty-six to seventeen; Judge Trotter and Governor Lynch both voting against it. That clause, thus adopted in lieu of that which was in the constitution of 1817, is in the following words: "§ 2. The introduction of slaves *into this state, as merchandize, or for sale, [*454 shall be prohibited, from and after the 1st day of May 1833: provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any state of this Union, and bringing them into this state for their own individual use, until the year 1845." The constitution also

went on to declare, that all laws then in force, not repugnant to the constitution, should continue to operate till they expired by their own limitation, or till they should be repealed.

On the 2d of March 1833, the legislature, being in session, passed a law to submit to the people an amendment of the new constitution, to restore to the legislature power to regulate this subject, without the restraint of a constitutional provision. They enacted (Laws of Mississippi 478), "that the second section of the seventh article of the constitution of the state, under the title or head 'slaves,' be so altered, changed and amended, as to read as follows, viz: § 2. The legislature of this state shall have, and are hereby vested with, power to pass, from time to time, such laws, regulating or prohibiting the introduction of slaves into this state, as may be deemed proper and expedient." To make this law effectual to change the constitution, it was necessary that it should be approved by a majority of the citizens of the state, qualified to vote for members of the legislature. This was not done, and the clause in the constitution, therefore, remained as it was adopted in 1832.

When, on the meeting of the legislature, it was found that this proposed amendment was not adopted, the senate passed a bill again to submit it in exactly the same terms, to the people; thus showing that, in their opinion, a constitutional sanction was necessary to enable the legislature to regulate the subject. The house refused to concur in this; but both bodies united in passing the law of the 23d of December 1833 (Laws of Mississippi 525), to tax vendors of slaves. A more certain indication that this law was not meant to apply to importers of slaves for sale, but solely to citizens and residents who had occasion to vend them, could not be given. The house, at the same session, introduced a bill to provide penalties in aid of the constitutional prohibition. It did not then pass, but it became a law on the 13th of May 1837, which, owing to the biennial sessions of the legislature,
*455] *and the omission to hold one at the following regular term, was, in fact, at the next meeting of that body. This law (Laws of Mississippi 758) enforced the prohibition of importations for sale, by severe penalties, declaring that any persons who should introduce or import slaves into the state, as merchandize, should be guilty of a misdemeanor, and be fined and imprisoned.

In the year 1835 or 1836, as stated in the record, Robert Slaughter, the defendant in error, introduced into the state of Mississippi a number of slaves. It is admitted, and makes part of the case, that they were so introduced and imported, "as merchandize, and for sale." They were purchased at Natchez, in Mississippi, on the 20th of December 1836, by a person named Brown, who had received two certain accommodation notes, indorsed for his use, by the plaintiffs in error, Groves and Graham. In payment for the slaves purchased from Slaughter, he gave him the two notes, so indorsed, one for $7000, payable in twelve months after date; the other for $7875, payable in twenty-four months after date. It is admitted, that this proceeding took place, without any agreement or understanding, express or implied, between the two indorsers who now prosecute this writ of error, and the parties to the note.

When the notes became due, the indorsers refused to pay them, or in any way to become parties to a transaction which was in direct violation of

the laws of Mississippi, and suits were instituted against them in the circuit court of Louisiana. Evidence appears to have been taken relative to fraud and collusion charged; but it was finally agreed to waive that question, and to leave the case to depend upon the legality and validity of the notes which were the consideration of the plaintiff's claim. The district judge, sitting as a circuit judge in the court below, having decided that they were a valid consideration, upon which the plaintiff could recover, the correctness of that decision is now to be examined.

It will thus be seen, that Slaughter, in the year 1836, and in the state of Mississippi, sold to Brown, slaves introduced by him, as merchandize, and for sale, into that state, in the year 1835 or 1836; and that he received in payment therefor, these notes, indorsed by Groves and Graham, and still holds them. *Is this such a legal, valid and binding contract between these indorsers and the holder of the notes, as a court of justice will [*456 enforce? To make a contract legal, valid and binding, it is not sufficient, that there should be an agreement on one side, to do a particular act, as to pay a certain sum of money, on a certain day; but that the consideration of this agreement, or the act for obtaining the performance of which it is made, should be, in itself, legal and sufficient. Plowd. 5–6, 17; 5 East 16; 7 T. R. 350. The act to be performed, in this case, was the completion of a transaction, in direct violation of a provision in the constitution of the state of Mississippi, the place of contract. It was, that Slaughter would sell to Brown, slaves imported by him into that state, in 1835 or 1836, for the express purpose of selling them; Slaughter thus selling them, and Brown thus receiving them, in the face of the constitutional provision.

No language can make such a transaction more certainly illegal, than that used in the present constitution of Mississippi. It is an absolute and positive prohibition, going into full effect on the 1st of May 1833, and making, from that time, the introduction of slaves, for the purposes of sale, a direct violation of the fundamental law of that state. An attempt has been made, on the argument of the case in this court, to avoid the force of this language, by construing it into a direction for future action by the legislature, instead of regarding it as a present and positive command, deferred only in its operation for a few months. But this construction cannot be sustained, either by the language of the clause itself, or by a reference to the language of other sections of the constitution; or by a comparison with the provisions of the previous constitution of the state, and the acts of its legislature; or by the construction given to similar language, in other laws and public acts; or by the judicial interpretation of this identical clause, by every tribunal of the state of Mississippi. There is nothing in the language of the section which contemplates future action, to constitute the prohibition; what is future relates merely to the time when the prohibition is to take effect. Not intending to enforce immediate prohibition, present words could not be used. To say that a thing is now prohibited, *which is now [*457 permitted, involves great inaccuracy of language. If, as was, no doubt, the case, the people of Mississippi intended that a person might introduce slaves for sale, until the 1st of May 1833, but that on that day his right to do so should cease; it seems difficult to imagine how they could have expressed their intention in clearer language. They forbade it. There is nothing in forbidding a thing to be done which requires future action.

Future action may be necessary to punish a violation of the prohibition; but that is a matter totally different from the prohibition itself. The act of the legislature, in 1837, makes a violation of this prohibition an offence punishable by fine and imprisonment, but this is not the prohibition—that is already complete. Suppose, this act of the legislature, instead of imposing a fine and imprisonment, had gone no further than the constitution itself has done, and had enacted that such importation should be prohibited after a certain day, will it be contended, that when that day arrived, a still further law was necessary? A law containing no penalty for transgression may be defective in its operation on the individual, but it is complete to establish the nature of the offence. In Mississippi, a traffic in slaves existed, which the people of that state desired to stop. They declared, that it should stop after a certain day. They do not say, a law shall be passed to stop it, but they say it shall stop. If they had intended to leave it to future legislation, they would have said "may" be prohibited; but they do not do so. They declare, that the act shall cease on that day. No legislative action is necessary to complete the prohibition; it is, at best, surplusage; it can do again only what the convention has done before; it can only say, as the constitution has said, this traffic shall stop; if anything was to be done on the first of May, legislative action might be necessary; where there is nothing to be done, it cannot be. And how fatal would be the consequence, if it were otherwise; if legislation is necessary to the prohibition, it may be refused; and thus we have that actually done, which the words of the constitution forbid to be done.

If we were even to admit (for the sake of argument), that something is requisite to make the prohibition complete on the 1st of May; still, what is there to require it to be legislative action? It is said, that the introduction of slaves must be prohibited *on that day "by law." What authorizes the insertion of those words? Why not fill the *hiatus* with the words "by this constitution;" or, "by the action of the courts?" To assume there is a blank to be filled, and then to fill it in the manner best suited to the case of the plaintiff, may be an easy way to make the constitution favorable to his construction of it, but can hardly be regarded the proper mode of interpreting a written instrument. It is submitted, then, that this is, by its terms, an absolute prohibition, existing, *proprio vigore*, on and after the 1st of May 1833.

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The constitution of Mississippi is full of phrases which illustrate and confirm this view of the section in question. It declares, that "the exercise of religious worship shall be free to all persons." Is a law necessary to carry this declaration into effect? It is true, that without a subsequent law, he who interferes with the exercise of another's worship may not be punished, but surely, the privilege is derived, or the right is acknowledged, not under the law, but under the guarantee of the constitution, which is complete. So, there are numerous prohibitory provisions, directing that warrants shall not be issued without certain pre-requisites; that property shall not be taken, except in certain cases; that offices shall not be held beyond a limited term; that persons guilty of bribery shall be disqualified from holding office; all these have a future phraseology, especially the latter; yet it will hardly be contended, that the prohibition was not absolute

and complete, without any further law. On the other hand, where future legislation is necessary, it is so provided. It is said, "the judges of all courts shall be conservators of the peace, and shall be, by law, vested with ample powers." The authority is present and immediate; the particular powers are to come from future legislation; and in that case, it is so declared. Again, in the clause which, *per se*, disqualifies for bribery, it is provided, that the legislature may disqualify for crime. Numerous similar clauses, contemplating future legislative action, may be cited. But perhaps, the strongest illustration is in the very article on "slaves." In that, all the acts contemplated are future; yet some of them are to result from legislation (Rev. Stat. 34–5), some spring directly from the constitution. Is it possible, that this distinction is without *meaning? Is it possible, [*459
that the constitution should permit a discretion to the legislature, in one clause of a section, omit it in another, and permit it again in a third, without evidently intending to make that distinction which is apparent from its letter?

The inference which thus results from the language of this provision, and from a comparison of it with that used in other parts of the same instrument, becomes more certain, when we examine the proceedings of the convention that framed the constitution, and of the legislature, in regard to the clause in question. The former constitution made this prohibition a future legislative act, just as it left the provisions in regard to the emancipation and treatment of slaves to be matters of legislation. This was the only power in regard to slaves which the amended constitution did not continue with the legislature. By what proper inference, can we suppose, they intended it should remain with that body? The former constitution gave it to the legislature; the people altered the clause that did so; of course, they meant to establish the provision, independently of its action. So they declared, the prohibition should go into operation, on the 1st of May 1833. Did they fix that early day, before which but one short session of a legislature could occur; and yet give it an option to defeat their express provision? Had they intended to do so, would they not have used the language used in the constitution of the United States, when they did intend to leave this option to congress; the importation "shall not be prohibited by the congress, prior to the year 1800?" Const. I. 9. So, when the legislature desired to prevent the prohibition from taking effect, they passed a law to obtain an amendment of the new constitution, although it had not yet gone into operation, so as to restore this subject to the legislature, and permit them to enforce the prohibition by law, at their discretion; a change which the people refused to confirm. Had that legislature considered any further law necessary to enforce this prohibitory clause, their proposed amendment was totally superfluous.

This idea, that the use of a phrase relating to a future event, necessarily requires future action, has been repudiated more than once by this court; and that, not only in cases which, by merely prohibiting a thing to be done, do not, and cannot, require a direct act, but in cases where a positive and affirmative result was *to arise from the language used. In the case [*460
of the Florida treaty, this court said: "although the words 'shall be ratified and confirmed,' are properly words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that

they 'shall be ratified and confirmed' by force of the instrument itself." It has been attempted to impair the effect of this declaration, by referring to the previous construction of the same clause in the case of *Foster* v. *Neilson*, and to ascribe the change to a mere difference in the translation of certain Spanish words: but surely this view is not sustained. The question in both cases, was decided on the whole scope of the treaty provision; on the extent to which a previous grant was valid after the cession; whether further legislation was or was not necessary. In *Foster* v. *Neilson*, it is true, the majority of the court held it to be so; but Chief Justice MARSHALL and another judge held, that the words, "shall be confirmed," might be regarded as making the grants as complete under the government of the United States as under that of Spain. When, afterwards, in the cases of *Arredondo* (6 Pet. 691) and *Percheman* (7 Ibid. 51), the clause was more fully considered, with reference to the laws of nations and the whole scope and bearing of the treaty, this construction was given to them by the whole court. It is true, that the Spanish version is referred to; but this is not assigned as the reason of the charge, but merely as evidence of the correctness of the later construction. At all events, it shows, that the words "shall be," do not necessarily denote future action, where the scope and intent of the instrument give them a present and positive character. In the treaty of 1778, with France, it was stipulated, that the subjects of France "shall not" be reputed to be aliens; and in the treaty of peace, in 1783, with Great Britain, the ninth article provided that British subjects "shall continue" to hold lands; these clauses were held to confer a present right to hold property. *Ware* v. *Hylton*, 3 Dall. 235; *The Peggy*, 1 Cranch 109. So, in the convention with France, in 1801, the stipulation that property "shall be" restored, was held to operate as an immediate restoration. 14 Pet. 412. If words like these, forming a contract between two nations, instead of being, as a state constitution is, an ordinance, an act of supreme
*461] authority, a decree—if words in a *treaty between two parties, providing for a thing to be done, can be construed, where such is the intention of the contracting parties, to have a present signification, who can doubt, that these words, merely prohibitory in regard to the conduct of the citizen, are to be so construed?

And so has thought every court of the state of Mississippi. In a succession of cases, the construction of this clause of the constitution has come before the different tribunals of that state. Each has decided, that, so far as the construction of this clause was to be considered, it was unquestionably a prohibition, *proprio vigore*, of the act of importation for purposes of sale. Judge NICHOLSON, the presiding judge in one of the circuits of the state, is reported as having so decided, though we have not the case before us. Chancellor BUCKNER, in the case of *Glidewell* v. *Hite*, of which a MS. report has been read, decides, that the contract of sale is valid, because it is only importation, not sale, which is prohibited; but he holds distinctly and unequivocally, that the prohibition (whichever it may be) is complete, under the constitution, and not dependent on any subsequent legislative act. The clause in the constitution, he says, "points out, and defines, what should constitute the evil or offence which the constitution intended to guard against and prohibited." "I mean to declare," says the chancellor, afterwards, "that the moment the negroes were introduced, as merchandize, or for sale,

the offence was at once complete; no further step was necessary to bring it within the intent and meaning of the prohibitory clause of the constitution." "Suppose," he again observes, "that the defendants had been indicted under the clause of the constitution in question, would anything have been necessary to sustain the prosecution, further than the single proof of the purpose of the act of introduction, accompanied with the proof of offering them for sale." But the court of errors, the highest tribunal of the state, was still more emphatic. The case of *Green* v. *Robinson* (4 Miss. 105), was an appeal from a similar decision of Chancellor BUCKNER. He had decided in favor of the validity of the sale, on the ground, that the prohibitory clause extended only to the importation; and also in favor of the defendant, because the plaintiff had neglected to avail himself, in a suit at law, of this defence. The court of errors, in reviewing the *chancellor's decision, use the following language: "That it is competent for the people in convention, to establish a rule of conduct for themselves, and to prohibit certain acts, deemed inimical to their welfare, is a proposition which cannot be controverted. And such rule, and such prohibition, will be as obligatory, as if the same had been adopted by legislative enactment. In the former case, it is endowed with greater claims upon the approbation and respect of the country, by being solemnly and deliberately incorporated with the fundamental rules of the paramount law, and thus placed beyond the contingency of legislation. It is difficult to conceive, in what better or more appropriate language the convention could have designated its will, or declared the principle of public policy intended to be enforced. It has been argued, that this provision in the constitution is merely directory to the legislature. This interpretation is opposed, as I conceive, to the plain language of the provision itself, as well as to the obvious meaning of the convention. It cannot surely be maintained, that this provision is less a prohibition against the introduction of slaves as merchandize, because it is not clothed with the sanction of pains and penalties expressed in the body of it. That belonged appropriately to the legislature. Their neglect or refusal to do so, might lessen the motives to obedience, but could not impair the force of the prohibition. It cannot be doubted, that, if the legislature, instead of remaining inactive, had passed a law to authorize the introduction of slaves for sale, that such act would have been void." The language thus used, which is conclusive as to the judgment and opinions of the judicial tribunals of Mississippi, was intended to settle, finally and decisively, the question of the validity of these contracts. It was not extra-judicial, for, though the judgment of the court depended on other grounds, yet this was expressly brought under their review. The chancellor declared, that his judgment was so given, as to "put the point in a train for ultimate decision," by the court of appeals. Nor should it be forgotten that the opinion was delivered by Judge TROTTER, himself, as has been seen, not merely a member of the convention which inserted this very clause in the state constitution; but one of those who voted, and preferred to leave to the *legislature the authority of making the prohibition, instead of thus inserting it absolutely in the fundamental law.

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It is submitted, that, under the well-established rule of this court, these decisions of the judicial tribunals of Mississippi, are conclusive of the present controversy. No point is more authoritatively settled, than that the

construction given to the constitution and laws of a state, not conflicting with those of the Union, by the courts of the state, will be adopted by this court. *Green* v. *Neal*, 6 Pet. 295.

And how is it attempted to obviate this clear intention of the people of Mississippi, as derived from the plain letter of their constitution; from a comparision of this, with other language of that instrument; from a review of successive efforts made by them to effect this object; from that interpretation of their language which is consistent with the just and settled rules of construction; from the direct and authoritative exposition given by their own courts of justice? How is it attempted to obviate this intention thus expressed? It has been done, by saying, that the legislature of Mississippi regarded the clause of the constitution, in 1833, as merely permissive to the legislature; and that Governor Lynch, in 1837, so regarded it. If this were so, would it be an answer? It was evidently the wish of the legislature, to retain a power that the people had taken from them; they tried to obtain it by an amendment of the constitution; it is natural, they should seek it, that mode failing, by ingenious interpretation, If it were so, their construction could avail nothing against that derived from the rules already stated. But it is not so. The act of March 1833 shows, the legislature thought an amendment of the constitution necessary to prevent the immediate and positive operation of the prohibitory clause. The act of December 1833 does not relate to those who imported slaves for sale, in violation of the law, but to transient merchants, or persons selling their own slaves. As to the recommendations of Governor Lynch, they were to give effect to the provision by adequate penalties. The sales might be made for cash, the payment on delivery, in such case, all the evils he adverts to would occur, and the contract be completed, notwithstanding the prohibition. So, too, in cases where *the person seeking to discharge himself was he who received the slaves; a party to the illegal transaction; the courts would not interfere on his behalf; and thus the provision of the constitution would be violated. Cases like the present, where the defendant is ignorant of the transaction, and, from that circumstance, could readily receive the aid of a court, might be expected seldom to occur. These objections, therefore, if they could have weight against such arguments as those presented to sustain the constitution of Mississippi, are not, in reality, when properly examined, objections to our construction of that instrument.

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It may, then, be confidently said, that after the 1st of May 1833, it was unlawful, by the constitution of Mississippi, to introduce slaves into that state for sale, or as merchandize. Was such a provision in that constitution a legal one in itself? A constitution is the will, deliberately expressed, of the whole people of a state; the most binding and solemn compact; original and organic; restrained in nothing which the people may desire to introduce, unless so restrained by the previous compact of the same people with their fellow-citizens of the rest of the Union. If, then, it has been shown, that the people of Mississippi did prohibit the importation of slaves, as merchandize, after 1st May 1833, that prohibition is binding and operative, unless it be contrary to the constitution of the United States. Is it so?

It is said, that it is, because the constitution gives to congress the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." Is the prohibition to import slaves into Mississippi,

for sale within that state, such a regulation of commerce among the several states, as congress had the sole authority to make? It is submitted—1. That it is not a regulation of commerce among the states. 2. That if it were, it is one excepted from this power of congress, and remains in the state. 3. That if it were vested in congress, it may also be exercised by the state.

I. The regulation of commerce among the several states has been defined with such great simplicity, distinctness and precision *by Chief Justice MARSHALL, that it is useless to speculate upon it for ourselves. [*465 He says, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 194, "It is not intended to say, that these words" (to regulate commerce among the several states) "comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration pre-supposes something not enumerated; and that something, if we regard the language or subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

Is it possible to conceive a case falling more clearly within this definition? Is not this a commerce carried on between man and man, in the state of Mississippi? Is it not a matter that does not affect other states? Is it necessary for the general government to interfere, for the purpose of executing its powers? It is the importation of a slave; the sale of a slave. His being a slave; his being a subject of sale, is a matter depending solely on the state of Mississippi. It is by the local law alone, that the subject-matter of importation and sale is created. No other state is affected by its existence or non-existence. It is not necessary for any powers of the general government, that it should be able *to enforce this sale or this [*466 importation, unless it has the power not to regulate, but to create articles of commerce. It does not differ, in principle, from the very common prohibition against the introduction of lottery-tickets, or of bank-notes under a certain denomination. Whether these are, or are not, articles passing in trade in a state, depends on her own laws. Could congress, because they may be articles of traffic, deprive a state of her right to admit or exclude them? Suppose, Mississippi had said, no negroes shall be sold as slaves, within her limits; can congress interfere, to abolish this, on the ground that it affects other states? That will not be contended; yet, if it

cannot, then its interference to regulate the disposition of them—the manner in which they are to be dealt with—is assuming a power over a subject-matter which the states themselves can abolish or create.

To avoid the force of this inference, a distinction has been taken, in regard to the importation of slaves into the slave-holding and non-slave-holding states. But where is this distinction found? Certainly not in the letter of the constitution; certainly not in its spirit. It is admitted, that the importation of a slave into New York, where the sale as a slave, and his detention in slavery, are forbidden, may be prohibited; yet it is urged, that the importation of a slave into Mississippi, where his sale, when so brought, is forbidden, cannot be prohibited. The distinction is not to be sustained. Commerce is the traffic in articles which are the subjects of traffic, either in the place from which they are brought, or the place to which they are taken, If the place from which they are brought is the test, then is every slave, taken from Virginia to New York, an article of commerce, and any regulation by the latter in regard to him, is a violation of the constitution. If the place into which they are imported, determines their character, then is the privilege of the slave state, in regard to their disposition as matters of commerce, as strictly constitutional and complete as that of the free states. On the principles, then, laid down, in the case of *Gibbons* v. *Ogden*, this is clearly a matter of commerce, depending on the state laws, affecting the state laws, and not necessary for any of the purposes of the general government.

But it is said, that being an importation of an article, it necessarily pre-
*467] sumes intercourse, which is commerce. To that it is *answered, that mere intercourse, even between different states, is not commerce; it must be intercourse connected with, or auxiliary to trade. Such is the evident meaning of the court, in the case of *Brown* v. *State of Maryland*. But here, this necessary ingredient is prohibited; the article cannot be sold. There is, therefore, no object upon which commercial regulation can act.

In the only remaining case where this constitutional clause was discussed, *New York* v. *Miln*, 11 Pet. 135, is there a word found which sustains the idea that this power authorized congress to interfere with the traffic in slaves among the states, or the regulation in regard to it? The reverse! That case most ably examines the decisions of *Gibbons* v. *Ogden*, and *Brown* v. *State of Maryland*. It shows, that the former extended only to the regulation of navigation, under an act of congress, as a branch of commerce; the latter involved the right of the state to interfere, by a tax, with the taxing power of congress. But further than this, it (11 Pet. 136) sustains the very position now submitted; that the regulation of commerce is intended to apply to "goods,"—to the articles that are strictly merchandize.

Take, then, the construction given by this clause, and it is evident, that congress cannot make commercial regulations about anything that is not in itself commercial property, and so recognised by the state. Now, the state of Mississippi does not recognise these as property, subject to sale—subject to commerce—when thus imported. It seems, it does not recognise them as such property at all; they are at the disposition of the legislature, under the act of 1822; but at all events, they are not property liable to commercial traffic, when so introduced. In the case of the *State of Mississippi*

v. *Jones*, Walk. 83, the law of that state was established clearly, that they were the creatures only of positive law, not property by any other right.

II. But suppose, that slaves are to be so regarded, still, as a regulation in regard to property brought into the state, these prohibitory enactments are authorized. This court, in the cases of *Gibbons* v. *Ogden*, and *Brown* v. *State of Maryland*, had laid down the rule, that a state might do whatever was necessary to protect itself internally; its quarantine, *police, [*468 pilot laws, &c., all relating to and connected with navigation and commerce. But in the case of *New York* v. *Miln*, 11 Pet. 139, this principle was more broadly and fully enunciated. After declaring, that the authority of a state is "complete, unqualified and conclusive," in relation to those powers which refer to merely municipal legislation, the court observe, that "every law comes within this description, which concerns the welfare of the whole people of a state, or any individual within it; whether it relates to their rights or their duties; whether it respects them as men, or as citizens of the state." This view clearly embraces the present case. The evils against which the people of Mississippi desired to protect themselves, have been fully pointed out. Their determination to stop the introduction of slaves, without corresponding emigration; to guard against the admission of the vicious, through the deceptions of negro-traders, were evidently objects of proper municipal regulation, equally concerning the welfare of the whole people of the state, and that of many an individual within it.

III. But suppose this to be a commercial regulation; not of the class above referred to, but one which congress might make; still, is the power of congress exclusive or concurrent? It is not meant to contest the general principle assumed by the counsel of the defendant, that in matters clearly within the scope of those powers and duties pertaining to the general government, it is exclusive; but is this such a case? In matters which are legitimate objects of legislation by the states, they may exercise a power as well as the general government. Each may levy taxes; each may regulate passengers coming in foreign vessels; each may improve navigable streams. Are not the powers now claimed by the state of Mississippi of this class? Even if we admit congress might regulate them, could not that state also do so? And if not, to what serious evils might it lead! Congress has never yet acted on the subject; yet who can deny, that it is a subject that must have been acted on? It is submitted, therefore, on all these grounds, that this is not a regulation of "commerce among the states," according to the meaning of the constitution; but if it is, it is one that the states themselves have also a right to make.

Nor should we forget, that this is the settled construction given from the earliest days of the government, by congress, by the *states, and [*469 by the courts of the United States and the states. Congress, when it admitted the states of Alabama, Illinois, Missouri, Arkansas, as well as Mississippi, approved of constitutions having similar provisions in them. In nearly every state of the Union, laws of the same character have been enacted, without hesitation, even from the days of the revolution. They exist in the free states, as well as the slave states; for the principle is the same. If the right to forbid importation for sale does not exist, how can it be exercised in a free state more than in a slave state? The decisions of courts of the United States and of numerous states of the Union, recognising

the validity of laws which depend on this principle, have been already referred to so fully, that it is unnecessary to dwell further upon them. Now, it is respectfully asked, can this court undertake, for the first time, to give a construction to the constitution which will set at naught these constitutional provisions of the states, these laws, and this uninterrupted series of judgments of judicial tribunals? Yet it is in vain to disguise it, that this must be the effect of a decision in favor of the defendant on this point of the case. It would, indeed, be, as was said, to sacrifice a hecatomb of laws. And for what purpose—what good? Have not these regulations been safe, just and prudent? Are they not conformed to the feelings, opinions and laws of the several states, whether permitting or prohibiting slavery? Would these be better suited by what congress would do? On the contrary, would not an attempt on the part of congress, now, for the first time, after a lapse of fifty years, exclusively to do that which the states have always done themselves, strike a blow at the laws and institutions of the states? Would the free states readily submit; or would slave states? If such fate is reserved for the constitutions, laws and judicial decisions of the states; if they are all to be broken down, and a new power of regulation awaits them; who can tell, what may be its effect on the institutions and power of the Union itself?

On all these grounds, therefore, it is submitted, that this prohibitory clause in the constitution of Mississippi is not only clearly expressed, but it is, in itself, a legal and constitutional provision.

The next question is, was the conduct of the plaintiff below intentionally at variance with this provision of the fundamental *law? That it *470] was, is evident, when we take the whole transaction together. The sale of the imported negroes formed necessarily a part of the transaction, without which the violation of the law was not complete. It will be seen, that the introduction of slaves into Mississippi, from other states, is not forbidden. They may be brought there by persons coming to the state for a limited period, or intending to remain there permanently. It is only when brought there to be sold, that the constitution is violated. The evidence of this subject—the only violation of the law—is the sale, or the offer to sell. Until that moment, the crime is *res infecta*, an unaccomplished act: when the slave becomes the subject of a bargain, then it is, that the introduction as merchandize is apparent, and the violation of the law complete. Whether there might not be an act indicating the intention and purpose for which the slaves were introduced, other than the contract for their sale, it is not necessary to discuss; when the sale follows, it forms part of the illegal transaction; characterizes the introduction; shows its improper character; and so taints the whole bargain, that to consummate it through the agency of a court, would, in the language of Chief Justice Wilmot, "pollute the pure fountain of justice."

Here, then, is a solemn provision of the constitution of Mississippi, and a transaction of the defendant in error, yet unfinished, which is in direct violation of it. He now seeks to compel the completion of this transaction; to accomplish the business, for his own benefit, and in the face of the law of Mississippi, at the expense of third persons, and through the agency of this court. Can he do so? That he cannot, is a principle established by the laws of every civilized country. By the Roman law (1 Pothier on Obl. 25; Story's Conf. of Laws 204), it was well settled, that where the founda-

tion of a contract or a promise was an act repugnant to justice, good faith or morals, the promise could not be enforced in a court of justice. By the common law, as settled by repeated decisions of English courts, wherever a transaction contravenes the general policy or the express stipulations of the law, no form of expression is permitted to veil its inherent impropriety ; the real object of each party to the contract will be examined, and if either is found to be aiming at that which is repugnant to principles established for the general benefit *of society, the courts of justice will repudiate it, however artfully the arrangements have been made to accomplish [*471 the desired end. Where both have been equally guilty, the courts have, with equal pertinacity, refused to interfere, though that refusal has indirectly benefited one of the guilty parties. Casuists in the law of nature and of conscience, have speculated on the obligations which bind those who profit by such contracts, to fulfil them ; but the common law, with a clearer and more honest perception, has repudiated all such speculations, and has refused totally and peremptorily to interfere.

It would be easy to trace this principle through a number of adjudged cases, illustrated by every variety of facts, but this is needless. It will be sufficient, to advert to a few, of unquestioned authority, which exhibit it under circumstances analogous to the present case. It is an established rule, to which no exception has been produced, that prohibited goods cannot form the consideration of a valid contract ; a principal laid down by Huberus, recognised by Lord MANSFIELD, and never denied by one single authority. Story's Conf. of Laws 209. That was the principle in *Law* v. *Hodson*, 2 Camp. 147, in regard to the bricks ; there the making of such articles was forbidden ; and every contract in relation to them was void. That was the principle in *Billard* v. *Hayden*, 2 Car. & Payne 472, where the importation of the silks was prohibited ; and it was exactly a similar case to the present, for it was a suit against the acceptors of a draft given in payment of the articles, after their importation.

The next principle, which also is indisputable, is, that wherever the object of a prohibition is to protect the public, and not one for purposes of revenue, or some regulation connected with the execution of municipal laws, there can be no recovery by a person who has committed an act at variance with the prohibition, whether the act be the particular thing forbidden or not. In the case of *Steers* v. *Lashley*, 6 T. R. 61, the sale of stocks was prohibited, as against public policy, and the court refused to allow a person to recover, who had advanced money to pay a difference ; not actually to buy the stock. So in *Langton* v. *Hughes*, 1 Maule & Selw. 593, the adulterating of beer was prohibited, and the sale of articles to a person engaged in adulterating it, *was not deemed a ground for recovery. So, in [*472 the case of *Fales* v. *Mayberry*, 2 Gallis. 560, the employment of vessels in the slave-trade was prohibited ; and the purchase-money of a vessel, sold in a foreign country, after her employment ceased, could not be recovered. There has been no authority produced, to contradict this principle; yet it is completely applicable to our case.

The principle contended for by the defendant, is, that in the present case, the contract is merely collateral, and not a part of the illegal transaction. This is not so ! It is clearly the only real part of the transaction ; and the subtle train of reasoning, by which it is attempted to show that it is not,

is neither accordant to the morals or the judgment. But admit it to be correct; it yet applies only in cases where the principles above asserted do not exist. It does not apply to cases where there is a positive prohibition to import an article, or to do a certain act. In one case already cited, 1 McClel. & Yo. 122, neither party knew of the prohibition, yet the sale was held to be void.

These are the cases at common law. Let us look to our own decisions. This court has examined the same principle in several cases. That of *Hannay* v. *Eve*, 3 Cranch 242, was one where a resolution of congress had declared that an enemy's vessel, captured by her own crew, should be a lawful prize to the captors. Eve, the master of a British vessel, during the war, found himself in a sinking condition, and agreed with the crew, that they should put into a port of the United States, and libel the vessel as captors, and that he would hold a certain portion of the proceeds in trust for the owners. The vessel was condemned and sold, and the owners sued the master under this contract. This court denied their right to recover, because the contract was against the resolution of congress. In the case of *Patton* v. *Nicholson*, 3 Wheat. 204, Patton became possessed (without any intercourse with the enemy) of a British license, in time of war. This he sold to Nicholson (who had not assisted in procuring it), and took his note in payment. A suit was brought to recover the amount. This court refused to interfere, to sustain the suit, on the ground, that the procuring of such a license being unlawful, the sale of it was equally so. In the case of *Armstrong* v. **Toler*, 11 Wheat. 258, the law upon this subject was very
*473] fully examined. That was a case where goods were imported into the United States, contrary to law, and consigned to Toler. They were libelled, and before trial, delivered to Armstroug; Toler, the consignee, giving security for the whole, on agreement of Armstrong to repay him, if they were condemned. They were, and the amount secured was paid by Toler, who sued Armstrong to recover this amount. This court sustained his right to recover, on the ground that the agreement was unconnected with the illegal act; and was a new contract; founded entirely on a new consideration, and not affected by the illegal proceeding; but that it would have been otherwise, if Toler had been himself interested in the goods illegally imported, or had been concerned in the scheme. They added, "that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

In the case of *Gaither* v. *Farmers' Bank of Georgetown*, 1 Pet. 37, the bank made a usurious contract with Corcoran, who indorsed over to them, as collateral security, a note from Gaither to him, who had nothing whatever to do with the transaction between Corcoran and the bank. On this note, the bank brought suit as indorsees, but this court refused to sustain their right to recover, on the ground, that it was tainted and destroyed, by its connection with the usurious and illegal transaction. In the case of *Bartle* v. *Coleman*, 4 Pet. 184, Bartle, a contractor for rebuilding a fort, made a corrupt agreement with Marsteller, the public agent charged with the superintendence of the work, and Coleman, to divide the profits; Marsteller

was to make the certificates, and Coleman to receive the money from government and disburse it. The fraudulent character of the affair was discovered, and the contract dissolved. Marsteller died. A suit was brought by Bartle, to obtain a settlement of accounts between him and Coleman. This court refused to interfere, and declared, that where a loss was the result of a violation of the laws, the parties must be left to settle the matter between themselves. In the case of *Craig* v. *State of Missouri*, 4 Pet. 436, Craig purchased of the state certain *loan-office certificates, emitted by the state, under a general state law, but which were, in fact, bills of [*474 credit. For this purchase, he gave a note to the state, and this suit was brought to recover the amount. This court refused to sustain the demand, because the issue of the certificates was a violation of the constitution. It will thus be seen, that, by a uniform series of accordant decisions, the common-law courts of England, of the states, and of the Union, have irrevocably fixed the great rule, in regard to a remedy for violated contracts; that no plaintiff will receive the aid of the court, in prosecuting his claim, where it is founded on a violation of the law, or an act contrary to public policy. This rule, asserted, more than a century ago, in the comprehensive language of Holt, when he said, that "every contract made for or about anything that is prohibited by a statute, is void," receives, in our own day, its final stamp, from one of as clear honesty, and of broader genius, when he affirmed, and maintained it, though the plaintiff and the contractor was a sovereign state.

In no case cited or known, has this rule been infringed; never has the plaintiff been permitted to profit immediately or remotely by the consequences of his violation of the law. In some of the instances adverted to, nice distinctions have been drawn, to prevent a defendant, who was himself a participator, from escaping from his share of the loss; but even then, the plaintiff has been required to satisfy the court, that the actual matter of contract was but remotely or indirectly connected with the illegal transaction, and that, if acquainted with, he was yet free from participation in it.

In the present case, the rule applies with full force, and is met by all the facts which are necessary to its complete recognition. The party who seeks the benefit of this violation of the constitution of Mississippi, is he who violated it; the contract, if fulfilled, gives him a reward, in an immense sum of money, for the successful accomplishment of that violation; it is done at the expense of those who were innocently made, to some extent, parties, if not to the offence, yet to the transaction incident to it; the contract, the bargain, the sale, is part of the illegal act, since, without that, there was but an imperfect violation of the law, confined to the breast and intention of the plaintiff; it is, in no sense, a new *or separate pro- [*475 ceeding; it is like the purchase of the bills of credit, after they had been created by a law of Missouri; like the sale of the silk goods, after they had been smuggled; like the agreement to divide the proceeds of the capture with those who were not entitled to it; like the bargain for the bricks made contrary to the provisions of the statute.

If any doubt could remain, whether or not the illegal act, the violation of the constitution of Mississippi, was, in fact, the consideration of this contract—this promise on the part of the maker of the note—that doubt would be removed, by applying to it the test of Lord Mansfield, and reversing

the application and the parties to the contract. If it be not a violation of the prohibition, to enforce the payment of the sum for which these slaves were sold, it would be lawful to have enforced their delivery to the purchaser, had the importer stopped short in his course of illegal proceeding, and refused to consummate it, by completing the sale. Who will assert this? Who will suggest, that any court would lend its power for such a purpose? Yet if each side of the contract has, as it must have, equal weight, we must admit the propriety of enforcing the delivery of the slaves, or we must refuse to aid in compelling the payment of the sum for which they were sold.

But suppose, that the actual violation of the law ended with the introduction of the slaves, and that the act of selling them did not fall within the letter of its prohibition. Is it necessary that the improper act should be a direct and literal violation of a statutory provision? Certainly not! It was not so, in any of the cases cited. It was not so, in that of *Bartle* v. *Coleman*, decided by this court. It is not held to be so, in the annunciation of the principle anywhere. If the act be "against the policy of justice," it vitiates the bargain as fully as if it is contrary to the letter of the law. In *Jones* v. *Randall*, 1 Cowp. 39, it was admitted, that the contract was against no law, but against morality and sound principles, and it was held to give no ground for recovery. In *Nerot* v. *Wallace*, 3 T. R. 24, where there was no violation of the bankrupt law, but an act infringing its spirit, the same rule was laid down. In *Hunt* v. *Knickerbacker*, 5 Johns. 333, it was held, that when any contract will lead to a violation of law, in its execution, it is void; and in **Seidenbender* v. *Charles*, 4 Serg. & Rawle 173, the court said, no form of contract could prevent an examination of its real nature.

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To argue, that to sell slaves, known to be introduced in direct violation of the constitution of a state, and especially to permit that sale to be made by the person so introducing them, is "against the policy" of that constitution, seems to be a work of supererogation. What can better indicate the general policy of a state, in regard to such an act, than the positive prohibition of the previous step necessary for its accomplishment? What could show the policy of the constitution of the United States, in regard to selling bills of credit by a state, more clearly than the prohibition to issue them? Would this court, then—even if the sale of these slaves were not prohibited—would it interpose to protect an act, to secure a profit from an act which is indisputably at variance with the settled and avowed policy of the state, and known to be so by the plaintiff below, when he made his bargain?

In conclusion, then, it is submitted, that the judgment of the court below was wrong; because the transaction which formed the consideration of the note sued on, was contrary to the letter of the constitution of Mississippi, and contrary to the policy of its constitutional and legal provisions; and because, in such a case, courts of justice will not interfere to enforce the contract, for one party or the other.

Walker, of Mississippi, also argued for the plaintiff in error. His argument will be found in the appendix.

Jones, for the defendant in error.—This case is of much importance in principle, and it is also so, because of the very large amount of property

which depends for its safety on the decision of this court. Millions of dollars have been laid out in the purchase of slaves, carried into the state of Mississippi, from other states, for sale ; without an idea on the part of the sellers or the buyers, that there was any law or constitutional provision which affected the transactions. When the obligations given for these purchases, in good faith, became due, after the lapse of long credits, a latent objection was found to the contract. The purchasers set up a provision in the constitution of Mississippi, which they said prohibited the dealing into which they had entered ; that the obligations given by them were, therefore, void ; and they hold, and will hold, the slaves they purchased, without making payment for them.

The magnitude and importance of the case are stated by the *counsel for the plaintiffs in error. The dangers of interference with the [*477 prohibitions of the constitution of a state of the confederacy ; of opposing the decisions of the courts of the state, giving a construction to the constitution, which will be produced by this court sustaining the judgment of the court below, are represented in strong and eloquent terms. All this is to arise from the legitimate action of the court, which has the case properly before it ; and which will decide it according to their judgment, without regard to consequences.

Two cases are before the court ; and the counsel engaged for the defendant in error have agreed to divide the points in the cause between them. No discussion of the constitutional question, the right of congress to regulate the trade in slaves between the states, is now proposed. This question will be left to the able counsel, also representing the defendant ; "the Ajax and the Achilles of the bar" will sustain the true interpretation of this provision in the constitution of the United States.

The case presents two heads for inquiry. 1. Whether there was, at the time of the contract, an efficient prohibition against the introduction of slaves, as merchandise, into the state of Mississippi ; and which can overturn a practice, universally prevailing in the state, and which had the confidence of every one, and the doubt of no one as to its legality? 2. Whether, if the constitution of Mississippi did prohibit the introduction of slaves, as merchandize, after the period named in it, the construction of the provision is to be carried so far as to abrogate contracts for the purchase of that description of property, made after the slaves had been introduced into the state ?

The clause in the constitution is very short ; and it is to be decided, whether it is to be considered as an enacting provision, or one enjoining legislation on the part of the legislative body ; whether it is a fundamental law, or one only organic. The practice, under the constitution of the United States, and under the constitutions of the states, has been to leave to the legislature to enact laws to carry the principles adopted in the constition into operation. To assume, that a constitution is to be construed to carry into action the provisions it contains, without the aid of special enactments by the legislative body, is out of the usual examples. At the time of the revolution, a different practice *prevailed ; for then an old and [*478 established government was to be set aside, and new and extensive provisions were necessarily to be made, which would go into immediate operation. The assumption in this case is, that the constitution of Missis-

sippi took on itself the exclusive right of providing for the subject, and made a perfect and complete system, which was not to be altered. It will be shown, in the course of the argument, how imperfect and inadequate the provision was for the attainment of its design.

Look at the provision, and inquire if it is an enactment to carry out the object it had in view. No penalty is fixed for the violation of its injunction; no forfeiture is imposed by it; it stands, a naked provision, an unsupported and unaided prohibition. We find no such form of provision in the English system of laws; no prohibition is found among those laws, without forfeitures and penalties to secure their being executed, if they are to operate immediately.

It is said by the counsel for the plaintiffs in error, that this is not a command to the legislature to make laws which will carry the prohibition into effect. If this is admitted, the question is settled. The provision in the constitution is, *proprio vigore*, in operation; and it is to be aided by its own weakness. What are the means of enforcing the provision in the constitution, without legal enactments to carry it into effect? An indictment at common law, and the party bringing the slaves as merchandize, to be punished by fine or imprisonment. To state these modes of executing the constitutional provision, is to show its inefficiency. It is said, the prohibition in the constitution was made independent of legislative aid, from a distrust of the legislature; and yet the whole execution of the constitutional declaration is to be left to the independent discretion of the courts. This will not be admitted, unless there shall be shown in the constitution a positive inhibition of legislative action.

The first constitution of Mississippi contained restrictions on the introduction of slaves. It prohibited the bringing in of slaves who were convicts; and there was legislation on the subject. The circumstance that the provision was imperfect, is evidence that it was intended by the new constitution that the legislature should make complete regulations on the whole
*479] subject. If any *other view of the matter is admitted to be correct, nothing remained to be done by the legislature; and the object of the framers of the constitution would, in a very great measure, be defeated from the entire inadequacy of the provision. The act of the legislature of Mississippi of 1837, shows that the view taken by the counsel for the defendant in error upon this subject is correct. Under the constitution, the legislature were to act, and this was considered as enjoined on them. They did so, and imposed heavy penalties on the introduction of slaves for sale. This is evidence of the opinion of the legislature that they were to carry out the provision of the constitution; and that without their aid, it could have no operation. The defendant in error sustains the constitution of Mississippi; he seeks to give it efficiency, and not to set up an empty pageant, without a capacity to carry the object of its provisions into effect.

The present constitution of Mississippi alters the situation of the legislature from that in which it stood under the provisions of the former constitution. Before, the legislature had a discretion to prohibit the introduction of slaves; now, a mandate to them is given, and laws must be passed containing prohibitions, and imposing all the penalties and forfeitures which may be necessary to carry the purpose into full effect. Upon all the prin-

ciples of legal construction and propriety, the construction of the provision in the constitution looks to future acts of the legislature, and not to immediate effect. It shows, that legislative provisions were anticipated. The purpose was, to impose and enjoin on the legislature that laws should be passed which would prevent the introduction of slaves as merchandize, or for sale. The policy of the state was thus solemnly settled ; and can it be supposed, that the carrying out that policy would have been left in the imperfect situation, as to its enforcement, in which the adoption of the constitutional prohibition placed it.

Let us inquire, whether the provision in the constitution has been construed in Mississippi, by the legislature, and by the courts of the state, so as to enjoin on this court the affirmance of the construction? It might be assumed, that at the time the slaves were sold for which the notes were given, there had been a general construction *of the constitution, in accordance with that which is now claimed by the defendant in error. [*480
This was the condition of public opinion from 1833 to 1837, when the legislature acted, and carried the provision into effect. The act of 1837 shows, that in the opinion of the legislature, a law was required to carry the constitution into force. The intermediate period, from 1833 to 1837, was employed in efforts to obtain a repeal of the constitutional enactment, and to restore the provision in the first constitution. It was not ascertained, whether these efforts had been successful, until 1837. A vote had been taken by the people of the state on the proposition to restore the first provision ; and the effect of the vote had been misunderstood, and continued so for some time. During all the intervening time, the importation of slaves as merchandize, or for sale, went on without interruption. The court will look with respect to the opinion thus manifested by the people and authorities of the state, if a doubt as to the construction existed. The legislature acted on this construction. The slaves thus introduced were made the special subject of taxation, by legislative enactment.

The decisions of the courts of the state of Mississippi have been contradictory, and the construction by those courts of the constitutional provisions, on the subject of the introduction of slaves, has not been conclusively settled. The cases cited by the counsel for the plaintiffs in error, when examined by the court, will be found to sustain these positions. It is the established principle of this court, that when there have been a series of decisions of the courts of a state, on its local law, those decisions will be regarded and respected. But the decisions must be those of the highest courts of the state ; and, without exception, giving the same construction of the constitution and laws of the state. Such have not been the decisions cited in this case.

On the second point of inquiry, whether the provision in the constitution of Mississippi was to be considered as operating and in full force, six months after it was adopted, so as to make invalid contracts for the purchase of slaves, after their introduction ; Mr. Jones said, no question is more involved in difficulties than that which arises upon the effect of prohibitory statutes to avoid *contracts made in opposition to them. There has been a great diversity of opinion among judges on this question. Whether [*481
the property introduced against the constitutional prohibition was such as that a contract for its sale could not be made, seems to depend on the

character of the property in Mississippi, after its introduction. The slaves so introduced did not become free; they could not be so, by the laws and constitution of Mississippi. They did not belong to the state; no such regulation had been made; they were made the subjects of taxation. Could they not be sold, and the penalties attach to the importers; leaving the slaves the subjects of sale? Nothing is seen in the laws or constitution of Mississippi to prevent this. Buying and selling the slaves, when they are in this situation, seems to be a right not to be denied. The authorities cited to sustain the position that the contract is void, because of the prohibition of the introduction of the slaves, are all cases in which the forfeiture of the property was a necessary attendant of a violation of the law. They make the forfeiture a part of the penalty. But, as has been remarked, the constitution of Mississippi did not make any such provision; all the cases turn on the construction to be given to the provisions of the statutes, on the violation of which they have arisen. No general rule can be deduced from them. The policy which may have induced the statutes, may require the forfeiture of the property, and thus take from its previous owner the right or power to sell it. The final cause of the law could only be obtained by the prevention of the use of the property, and therefore, of its sale. But it was not the policy of Mississippi, to prevent the introduction of slaves as property, but only to limit their being brought into the state by those who resided, or proposed to reside in the state. Cases cited in this part of the argument, 11 East 108; 5 Taunt. 181; 1 Mass. 5; 1 Maule & Selw. 593; 4 T. R. 416; 5 Ibid. 599; 3 Barn. & Ald. 221; 4 Esp. 183; 2 Str. 1247; 2 Burr. 1077; 3 T. R. 419; *Armstrong* v. *Toler*, 11 Wheat. 259; 1 Mass. 138; *Hunt* v. *Knickerbacker*, 5 Johns. 327; 4 Dall. 279.

Clay, for the defendant in error, said, the questions to be decided in this case, involved more than $3,000,000, *due by citizens of the state *482] of Mississippi, to citizens of Virginia, Maryland, Kentucky and other slave states. The magnitude of the cause is shown by the increase of slaves in the state of Mississippi, from 1830 to 1840. In 1830, the slave population was about 65,000. In 1840, it had increased to upwards of 190,000. The greater portion of this increase took place about the time the contracts on which these suits were brought were made. Within the period of seven years, from 1830 to 1837, the increase had been more than 74,000. A large portion of this number had been introduced into the state, as merchandize, or for sale, by non-residents. The universal habit of all the planting states has been, to buy slaves on credit, leaving the product of planting to pay for them. Tens of thousands of slaves have been introduced, and contracts made by citizens of Mississippi to pay for them on time; and now the question is, whether these contracts shall be extinguished, by an *ex post facto* construction of the constitution of the state?

What is the case, briefly? In 1832, the constitution of Mississippi was altered, and a provision was made in it, declaring that the introduction of slaves, as merchandize, or for sale, should be prohibited after May 1833. No legislation took place to carry out the prohibition. From 1832 until 1837, no one questioned the right to introduce slaves for sale; all concurred in opinion, that the constitution did not, *proprio vigore*, prohibit their introduction. The defendants in error, acting in conformity with this

universal understanding of the constitution, introduced slaves for sale; paid the tax laid upon them by an act of the legislature of the state, after the alteration of the constitution; and the purchase of them was made by the maker of the notes, under a full belief, that the contract was valid and obligatory on the parties who entered into it. The slaves thus purchased are now held in hereditary bondage, and those who purchased them are in the full enjoyment of the property: no offer has been made by them to deliver them back to the defendant in error; on the contrary, this has been positively refused. In this state of the case, this court is *called upon to ratify a violation of the contract, and to allow its violators to hold [*483 the property. What are the grounds on which this claim is founded?

1. According to the interpretation of the provision in the constitution of Mississippi, the plaintiffs in error say, the words "shall be prohibited after the 1st of May 1833," are addressed to the people of Mississippi; and being so, all slaves introduced after that time cannot form the consideration of a legal and binding contract. Is this a binding and operating prohibition, without calling on the legislature to carry it into effect?

It will be shown, from the constitution of Mississippi, and from the practical construction given to that constitution, by contemporaneous expositions of the provision in the constitution, that an absolute prohibition of the introduction of slaves, to go into effect after May 1st, 1833, was not intended. The same construction of provisions of a similar character has been given to the constitution of the United States, and to those of the individual states. A simple perusal of the constitution will show and satisfy all, that its object was to direct what was to be done, and not to do it. The nature of constitutions is to establish and declare principles; and, except in some particular casee, to leave to the legislature the enactment of laws, to carry out the principles thus declared. The constitution of the United States uses the terms, "shall be," in the sense claimed by the defendant in error. So does the constitution of Mississippi. "Slaves" are a separate head in this instrument, and the constitution addresses itself to the legislature. The court will find many passages in that constitution which support this position. In some parts of the constitution, a discretion on the subject of slaves is given to the legislature; but as to the introduction of slaves as merchandize, after May 1st, 1833, a duty is imposed; and the legislature are commanded to enact prohibitions, and effectually to accomplish the object. If the convention had intended this as legislation, would they not have affixed sanctions to the violation of it? Can it be supposed, that the legislature intended to give it this operation, and to leave it naked, and unsupported by forfeitures and penalties?

Compare the constitution of Mississippi with that of Kentucky. *They are nearly the same. That of Mississippi is copied from the [*484 constitution of Kentucky. No decision can be found, that similar provisions of a constitution operate without the action of the legislature. So, in reference to the provisions in treaties, a similar construction has been given. "Shall be" has been interpreted to enjoin legislation: and this was the view of the supreme court, in the case of *Foster* v. *Neilson*, when the Spanish treaty was first under its consideration. Afterwards, when it was found that the Spanish words of the treaty had a present effect, different views of the subject were adopted; but this did not alter the decision of

the court interpreting the English words of the instrument, as prospective, and requiring legislative aid.

Mr. Clay then went into an examination of the proceedings of the legislature of Mississippi, after 1832, on the subject of an alteration of this provision of the constitution. The proposition for an alteration, which would have given the legislature powers to postpone the operation of the interdict, was submitted to a vote of the people of the state. It was afterwards discovered, that a sufficient number of votes in its favor had not been obtained In the meantime, nothing was done to carry the provision into effect by law. In 1836, the legislature was called upon by the governor to pass a law, which was not done. A law was passed in 1837. In 1837, the governor proposed again to the legislature to pass a law prohibiting by penalties and. other sanctions, the introduction of slaves as merchandize ; or in other terms, to execute the provision in the constitution as the declared and fixed policy of the state. The legislature finding that the alteration which had been proposed could not be made, and to prevent the drawing out of the state large sums of money for the purchase of slaves, enacted the law which is now in force. Before the law was passed, between May 1st, 1833, and 1837, the introduction of slaves as merchandize had the implied ratification of the legislature. A tax was specially imposed on slaves so introduced. This is plain and unquestionable proof of the opinion of the legislature on this provision of the constitution. The act declares that the introduction of slaves as merchandize, shall be "hereby *prohibited," and imposes sanctions for the violation of this statute. Fines are to be imposed, and the imprisonment of importers is directed. If, now, another construction is to be given to the constitution, the conduct of Mississippi has been to lay snares for the citizens of Virginia, Maryland and of other states.

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Upon what construction of the constitution, is the court called on to act? Not on their own ! Upon the decisions of the courts of the state, where this outrage on justice is sought to be perpetrated. In this court a Mississippi court, or a court of the twenty-six states ? Is this court to decide for itself, or to take the decision of Judge TROTTER of Mississippi for their rule of decision? This is a court of the Union—of the whole Union—of the confederacy of the states of the United States ; and it is bound to construe the constitution of the state of Mississippi, not by the construction given in times of passion, not on decisions given which may have been biassed by the large interests of the state, supposed to be benefited by the decisions of the state court, but on great principles, and on those of justice and truth.

It may be admitted, that this court is bound by a series of decisions of courts of a state, settling the construction of the constitution and laws of the state. This principle has been declared frequently by this court. But a single decision of a state court, and contradictory opinions of the judges of the court, will have no such weight or influence. Who are the judges of the courts of Mississippi, and what is the tenure of their offices? They are elected by the people ; and the judges so elected form the court of errors ; and a court thus constituted are called upon to decide a case affecting a large portion of the citizens of the state, in which strangers to the state, and who have no influence in their appointment, are the claimants ! The judges of Mississippi are sitting in their own cause ; in the cause of those around

them ; of those who gave and can take away their offices ! The object of the constitution of the United States, in establishing the courts of the United States, and giving to those courts the decision of cases in which citizens of other states than those in which a controversy arises, was to have such controversies *decided impartially, and without the influence of local bias, or that of local courts. [*486

"I hope," said Mr. Clay, "never to live in a state where the judges are elected, and where the period for which they hold their offices is limited, so that elections are constantly recurring." The 18th number of the Federalist shows the purposes for which the tribunals of the United States were established. It was intended to provide for the very case now before the court—for cases arising under a peculiar state of circumstances. By the courts of the United States, deciding independently upon true principles, and according to the just interpretation of the constitution and laws of the state, the harmony and union of the states would be preserved. The occupying claimant law of Kentucky presented a case, on which the principles now contended for were applied by this court. The law had been in force for twenty years ; it had received the repeated sanctions of the courts of the state of Kentucky ; but this court set aside that law as between citizens of other states.

Mr. Clay went into a particular examination of the cases cited by the counsel for the plaintiffs in error : and he contended, that the question of the construction of the proviso in the constitution of Mississippi was not, by those cases, shown to have been established. The judges of the courts had not agreed in opinion. Some of the cases had been decided by the inferior courts ; and some of the cases had been brought before the courts of Mississippi, while the whole of the people of the state were involved in great pecuniary embarrassments. He repeated his reliance on the position, that such decisions should not govern the supreme court of the United States. While he positively and explicitly asserted these views, he had no wish or intention to cast a shade on the integrity of the judges of the courts of Mississippi. The security of the slave states rests on the security and preservation of the Union. Isolated, what would be the situation of Mississippi ? A sketch of the frightful future will be avoided. Thousands, millions would now rush to the rescue of that state from a servile war. The genius of Fulton has given the means of protection to the slave states : and in steamboats, on the beautiful rivers of Ohio and Mississippi, the people of the Union, "armed *in proof," would hasten to the preservation of their brethren of Mississippi, and of every state exposed to intestine commotion. [*487

Mississippi has not abandoned the introduction of slaves. The citizens of that state may go into other states and buy slaves. The only change which has been made is, that instead of the slave-trade by strangers, the planter buys the slaves he requires, and carries them into the state for his own use. After they have been thus introduced, after they are thus in the state, no objection to their sale can be sustained. The number of slaves in the state may be increased by these means, indefinitely. The right thus to introduce slaves is recognised by the act of assembly of 1837.

Is a contract made with a concurrent opinion of its legality (as was the case between the defendant in error and the plaintiffs here ; where the prop-

erty acquired by such a contract is retained, and the same property sold has, before sale, been taxed by an act of the legislature, recognising its introduction into the state for the purposes of sale) to be set aside? This appears to be an outrage on the principles of common justice. It is admitted, that when contracts are immoral, they are void. This is a general principle of all laws. The laws of Heaven enjoin the avoidance of such contracts. All are bound to avoid *malum prohibitum;* but the law must be known from the authorities of the state. If, by a new construction of the law, persons are involved in penalties not before known, not before claimed, the law is *ex post facto.* It is a violation of right. This ground is taken, supposing the construction set up to be a just one; yet if the course has been different, if the authorities of the state have acted on different principles, the proceeding is *ex post facto;* the law, thus applied, is *ex post facto.*

What is prohibited by the constitution of Mississippi? In considering this question, it is necessary to look at the situation of the slaves of Mississippi, carried into the state after May 1833, for sale as merchandize. Are they free? If they were free, it would be some consolation. But there is no freedom for such persons in Mississippi; and those who purchased them, and seek now to escape from paying for them, continue to hold them; and against moral rectitude, insist on their ownership, acquired by a *violation of the constitution of Mississippi. It would be gratifying to those who love freedom, if the negroes were free. And who does not love freedom? They remain slaves by the constitution of Mississippi. By that constitution, there can be no emancipation but that which is provided by law. A reference to the laws of Mississippi, and to the decisions on them, will fully sustain this position. Laws of Miss. 166, 154.

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The offence of introducing slaves, as merchandize, or for sale, may be considered as complete, under the prohibition of the constitution, if the construction given by the plaintiff in error is correct, as soon as the introduction took place. If the slaves continued to be property, and were not made free, by their illegal introduction, contracts for their sale and purchase could be made. This is an incident to property. It is, necessarily, a right which the owner of the property has, to sell it—to bequeath it. The slaves would have been liable for the debts of the defendant in error, while in his hands unsold. It is a well-established principle, that if no forfeiture of property for an offence committed by its owner, has been declared by the legislature, the judiciary cannot impose a forfeiture. *Cooper* v. *Telfair,* 4 Dall. 16. The judiciary cannot make laws. When the statues declare forfeitures, no sales of the prohibited articles are valid. Silks, by the express terms of an act of the parliament of England, might be seized "while rustling on the fair form of beauty, in the mazes of the dance." 2 Car. & Payne 427. The case of *Armstrong* v. *Toler,* 11 Wheat. 258, establishes the principle, that a contract may be enforced, which grew out of an illegal transaction, but which was no part of it. There, money paid for duties on goods, illegally brought into the United States, was recovered from the owner of the goods.

The last question in the case is, whether the provision of the constitution of the United States, which gives to congress, exclusively, the right to regulate commerce between the states, is opposed by the constitution of Mis-

sissippi. The argument for the plaintiffs in error, is on the abolition side of the question. The counsel for the defendant sustain the opposite principle. The object of prohibition in the constitution of the United *States is to regulate commerce; to sustain it, not to annihilate it. [*489
It is conservative. Regulation implies continued existence—life, not death; preservation, not annihilation; the unobstructed flow of the stream, not to check or dry up its waters. But the object of the abolitionists is to prevent the exercise of this commerce. This is a violation of the right of congress under the constitution.

The right of the states to regulate the condition of slaves within their borders, is not denied. It is fully admitted. Every state may, by its laws, fix the character and condition of slaves. The right of congress to regulate commerce between the different states, which may extend to the regulation of the transportation of slaves from one state to another, as merchandize, does not affect these rights of the states. But to deny the introduction of slaves, as merchandize, into a state, from another state, is an interference with the constitution of the United States. After their introduction, they are under the laws of the states. Nor is the power, given by the constitution of the United States, to regulate commerce, one in which the states may participate. It is exclusive. It is essentially so: and its existence in this form is most important to the slave-holding states.

Webster, also for the defendant in error, contended, that the construction of the constitution of Mississippi had not been settled by the courts of the state, and was yet an open question. Contradictory opinions are entertained by the judges of the courts of Mississippi upon the construction of the provision relative to the introduction of slaves, before the act of 1837. In the cases cited by the counsel for the plaintiffs in error, this is apparent. While this court pays great attention to the settled construction of the laws and constitution of a state, as the same is shown by the uniform and settled decisions of the courts of the state, it cannot admit the authority of cases not of this character. The case before the court is recent. It was depending here, before any decision had been made, in the courts of the state, of the points involved in it. Such decisions have not the same authority as those of a fixed and established character. When the contract on which this suit was brought was made, *no construction like that now claimed had [*490
been given to the provision in the constitution. The contract was made, in the belief of all the parties to it, that it was valid and legal. The attempt to avoid it, is to give a retroactive effect to new views of the provision.

For what purpose, but for such as is exhibited in this case, was the judicial power given to the courts of the United States, to be exercised in controversies between the citizens of different states? This was the very object. It was intended to give the citizens of one state a power to sue citizens of another state, in an independent tribunal. Now, it is contended, that when a citizen of Virginia sues in a court of the United States, he is to be bound by the decisions of the state tribunals. This defeats the provision in the constitution of the United States. It is a mockery, if this is to be the law. Under the circumstances of this case, it may safely be said, that, in the matter now before the court, the decisions of the courts of Mississippi

should have less weight than those of any other court. It was from a distrust of state tribunals, that the provision of the constitution of the United States was introduced. The constitution looks to principles, not to persons. It creates an independent tribunal, where, without its provisions, it would not exist. The opinions of the courts of Mississippi are justly entitled to high respect, as arguments; and the personal character of the judges of those courts entitle them to great consideration; but beyond these concessions to them, this court will not go.

1. What is the true meaning of the constitution of Mississippi, as to the introduction of slaves, as merchandize, for sale?

2. Is that provision conformable to the constitution of the United States?

I. As to the first question, it is contended, that the words of the provision in the constitution of Mississippi are injunctions on the legislature; and until the legislature shall act, there is no prohibition of the introduction of slaves into the state, as merchandize, or for sale. The words are, "shall be prohibited." There are three modes or forms in which "shall be," may or ought to be understood. Each is according to the subject-matter. 1. They
*491] may *impose legislative enactments. 2. Enjoin a duty. 3. They may be promissory as to future action, under the constitution.

Different interpretations are given to these words in the same constitution. The constitution of the United States declares there shall be universal toleration of religion; there shall be provisions for education; the boundaries of states shall be ascertained; the judicial power of the United States shall be vested in certain courts. Thus, the terms impose duties on the legislature to carry into operation the principles established; regulate and fix the extent of legislative powers; and prescribe the manner, in some instances, in which the legislature shall act. It is repeated: the meaning of the constitution is to be found out by the context, and the subject-matter.

1. It is contended that everything on the subject of slaves, is left, by the constitution of Mississippi, to the legislature. Take the words of the section together, and the sense is clear. Does the section prohibit, by its own terms, the introduction of slaves, by settlers, in 1845? The words are, that actual settlers "shall not be prohibited" introducing slaves, until after 1845. Is not this a plain injunction on the legislature not to enact laws interfering with the rights of settlers, before 1845? It is not in itself an enactment. Why was the provision as to the introduction of slaves, as merchandize, for sale, put six months forward; six months from the adoption of the constitution? It was to allow time for the legislature to act; it was to give the legislature one session in which laws might be passed. This was the only reason. In the intervening period, the legislature was to be in session. In that session, the legislature took up the subject; and what was done? An amendment of the constitution was proposed. No law was passed to carry the provision into operation. So much for the words of the provision in the constitution of Mississippi.

2. As to the subject-matter. Does it appear that the constitution supposed it was completing its own end, by its own authority; or does it look to legislation? Does it execute itself? It is clear, that if it was intended to be in itself a law which would carry into effect the principle declared by
*492] it, that it would have *gone further; it would have made provisions which would secure its execution. Now, in itself, as it stands in the

constitution, it is entirely powerless and nugatory. The importation of slaves as merchandize, for sale, was to be prohibited after a fixed period. How prohibited? How prevented? Forfeited, if brought into the state? No such provision! Emancipated? No such provision! The slaves were not to be set free. Neither of these results would follow; and the constitutional declaration, without penalties and further provisions, was a dead letter—a nullity. It could have no operation, when the sale of the slaves was made by the defendant in error; far less could it affect a sale on credit, as was the case before the court. Slaves might be sold for cash, if brought into the state as merchandize, *ad libitum*. Thus, the provision in the constitution could have no operation, but in cases where the confidence between the seller and the purchaser would seem to give them greater protection from its influence. If the construction of the words of the constitution claimed by the plaintiffs in error, standing alone, produces these results, another interpretation should be adopted; one of a practical character; one which will execute the purposes of the same; one which will not be at war with honesty and just principles.

How did the people of Mississippi understand the provision in the constitution? This is a proper method of interpretation. They made the instrument; how did they construe it? A constitution stands on different ground, as to its interpretation, from a statute; a statute is to be construed by the courts, which are intrusted with its execution. A constitution is to stand as it is adopted by the people, from whom it has all its weight and authority. If we have clear evidence to show how the people of Mississippi understood this provision, this should prevail. Suppose, a constitution will bear two constructions, may not that in which it was understood by the people prevail, and be received as the best, and as the true construction?

3. The constitution of Mississippi was adopted on the 26th of October 1832; and it provided, that the introduction of slaves, as merchandize, for sale, should cease on the 1st of May 1833. *Instead of legislative enactments to carry the provision into execution, at the succeeding [*493 session of the legislature, opinions were strongly against the prohibition. An amendment to the constitution, abrogating it in reference to the subject, was introduced, and two-thirds of the legislature concurred in it. It was submitted to the people. It was not adopted, because a sufficient number of the citizens of the state did not vote upon it; but it was approved of by a majority of those who did vote. The constitution required that an amendment should be made by a majority of all the voters in the state. In December 1833, the legislature passed a law, laying a tax on slaves introduced for sale. The law required, that a bond for the tax should be given by all transient persons, who were the vendors of slaves. This law is an acknowledgment of the legality of their introduction—of the sale of them by those who may have introduced them; provided, the bond to pay the tax was given. This law was passed, when it was well known the proviso in the constitution existed; it was passed after May 1st, 1833; and when the defendant in error, a non-resident, was notorious for the introduction of slaves, as merchandize, for sale.

Under this law, it is submitted, that it was competent for any person to bring in slaves for sale, paying the tax on them. It was under this law, the defendant in error acted. The act was an invitation to bring slaves

into the state, as merchandize, for sale; they were brought; the tax was paid; the slaves were sold, and notes taken for the payment of a part of the purchase-money: and after this, the prohibition in the constitution is set up, making it declare the contract for the payment of the note void! The slaves are held by the purchaser, and no offer is made to return them; they are held under the purchase, and not paid for! An attempt is made to give the prohibition blood and muscle, to hold the slaves without paying the debt contracted for their purchase!

In 1837, the governor of the state submitted to the legislature the propriety of prohibiting the sale of slaves by non-residents. In his message, he expresses doubts of the operation of the constitutional prohibition, and suggests that a law should be passed to give it effect. The law was passed in 1837. The law is "to prohibit the introduction of slaves, as merchandize, for sale." *This was carrying into execution the constitution. No opinion was expressed, that the legislature thought the constitution had made the prohibition effectual. This act recognises the construction of the provision contended for by the defendant in error. The act provides, that if any one shall hereafter introduce slaves for sale, &c. The act proves, that the people or the state did not understand the provision in the constitution as operative, until the legislature should act upon it. That it imposed a duty upon the legislature to act. That all persons had gone on as if no prohibition was in force, until the legislature should pass a law; slaves having been constantly introduced for sale and sold; the provisions of the law of 1833, as to the payment of taxes, having been complied with by those who introduced them as merchandize for sale.

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II. Is the provision of the constitution of Mississippi conformable to the constitution of the United States? The constitution confers on congress the right to regulate commerce. The extent and effect of this grant of power has often been discussed in this court; but all questions upon it are now fully settled. In the case of *Gibbons* v. *Ogden*, it was decided, that it extends to all commerce between state and state. It was held, that the whole subject of commercial regulation was taken from the states, and placed in the hands of congress. This must be so, or the whole provision would be inoperative. Nothing, which is a regulation of commerce, can be affected by state laws. Regulation is in what it is considered best to leave free and exempt from rule. Freedom of regulation, is regulation. Not declaring how action shall take place, allows the action to be performed. But interior rights, not commercial, may be regulated by the states. If there was no provision in the constitution of the United States giving to congress the power to regulate commerce, and an act was passed by a state prohibiting the introduction of slaves for sale, would it not be an interference with commerce between the states.

The powers conferred on congress, are duties; and they are to be exercised for the good of the states. What is the foundation of the right to slaves? There is no law declaring slaves property *any more than land. Slaves are property by the term "slaves." The master has a right to their services and labor. This is property. The constitution recognises slaves as property. Slaves escaping from the state in which they are held to service and labor may be arrested in other states, and carried back to the state from which they escaped. The right to take them

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up, is an acknowledgment of the right of property in them. The constitution was adopted, during the existence of slavery in more than one-half of the states; and thus the protection of this right of property in the intercourse between the states, became a duty under the constitution. While the right and duty in congress, under its power and duty to regulate commerce between the states, extends to slaves, as articles of commerce between the states, so long as slavery exists in the states, when slavery is abolished in a state, congress has no privilege to interpose; in such states, congress has no power to interfere with the state regulations as to slavery. If the right in states recognising slavery exists, to prohibit trading in them, it will allow non-intercourse between the states of the Union by the legislative enactments of the states; and will authorize retaliation. This is negatived by the decision of this court in *Gibbons* v. *Ogden;* and the question is closed. The New York law gave an exclusive right of navigating the waters of the state, by steamboats, to certain persons. The law of New York was made void by the decision of that case. The same result will attend the proviso against the introduction of slaves in the constitution of Mississippi, when the constitutionality of the same shall be brought, necessarily, before this court.

The court are called upon to say that the state of Mississippi may prohibit the transportation into that state of any particular article. The court will be obliged to find out something in the introduction of slaves, different from trading in other property. This will be difficult. Suppose, under some excitement, the introduction of cotton into the state of Massachusetts had been prohibited, and this was retaliated by a prohibition of the introduction into a cotton-planting state of cotton fabrics. Would not this be an interference with the power of congress to regulate commerce? Slaves *are as much property in Mississippi and in Carolina, as cotton. All the states have not slaves, nor do all the states plant cotton. Can [*496 states interfere with the introduction of articles which congress have left free? There are exceptions; such as quarantine regulations, pilotage; but the subject of this inquiry is different. The prohibition of the constitution of Mississippi is a regulation of commerce, intercourse, merchandize.

The strongest motives to establish the constitution of the United States, was the regulation of commerce and intercourse between the states, and with foreign states; to make the United States, in this respect, a unit. It may not be easy to draw the line, so as to distinguish what may, and what may not, be an interference with the provisions of the constitution of the United States. But this is not such a case. This is a clear case. In any matters of the sale and purchase of property, the states cannot interfere.

Thompson, Justice, delivered the opinion of the court.—On the 5th of April 1838, a suit was commenced by the defendant in error, against the plaintiffs in error, in the circuit court of the United States for the eastern district of Louisiana, upon a note, a copy of which is set out in the record as follows:

Natchez, December 20th, 1836.

Twelve months after date, I promise to pay to R. M. Roberts, or order, the sum of seven thousand dollars, for value received, payable and negotiable at the Commercial Bank of Natchez, state of Mississippi.

John W. Brown.

Indorsed by—R. M. Roberts, Moses Groves, James Graham.

In the course of the proceedings in the cause, the following agreement, or admitted statement of facts, was entered into between the parties.

*497] *"In this case, it is consented, that the question of fraud is waived by the defendants, except as hereinafter reserved. The case is to be defended solely on the question of the legality and validity of the consideration for which the note sued on was given. It is admitted, that the slaves for which said note was given, were imported into Mississippi, as merchandize, and for sale, in the years 1835 and 1836, by the plaintiff; but without any previous agreement or understanding, express or implied, between the plaintiff and any of the parties to the note; but for sale, generally, to any person who might wish to purchase. The slaves have never been returned to the plaintiff, nor tendered to him by any of the parties to the note sued on."

Whereupon, the court gave judgment for the plaintiff below for $7000, with the interest and costs. And this judgment is brought here by writ of error, for revision.

It will be seen, from this statement of the case, that the defence rested entirely upon the alleged illegality of the consideration in the note. And the validity of the defence must turn upon the construction and operation of the following article in the constitution of Mississippi, adopted on the 26th of October 1832. "The introduction of slaves into this state, as merchandize, or for sale, shall be prohibited, from and after the first day of May 1833: provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any state of this Union, and bringing them into this state, for their own individual use, until the year 1845."

It has been urged on the argument, by way of preliminary objection to an examination of the construction of the constitution, that this article has received a judicial interpretation in the courts of Mississippi, which, according to the doctrine of this court, with respect to state decisions upon their own laws and constitutions, will control the judgment of this court upon this question. It becomes necessary, therefore, to look into those decisions, to see whether there has been such a fixed and settled construction given to the constitution as to preclude this court from considering it an open question.

*498] The case chiefly relied upon is that of *Glidewell* v. *Hite*, a newspaper report of which has been *furnished to the court.[1] It was a bill in equity, filed some time in the year 1839, since the commencement of the suit now before this court, and the decree of the chancellor, affirmed in the court of appeals by a divided court, since the judgment was affirmed in this cause. But if we look into that case, and the points there discussed, and the diversity of opinion entertained by the judges, we cannot consider it as settling the construction of the constitution. It was a bill filed in the court of chancery, to enjoin a judgment recovered at law, upon a bond for the purchase of slaves introduced in that state after the 1st of May 1833. The chancellor refused to continue the injunction, on the ground, that the matter relied upon to obtain the injunction should have been set up as a defence in the suit at law; and this view of the case, he adds, might be decisive; bnt another question of some moment is raised, which must

[1] Since reported in 6 Miss. 110.

frequently arise in our courts, and which it is well to put in a train for ultimate decision; clearly announcing that the question he was about to discuss was not involved in the decision of the case before him, and of course, all opinion which he might express would be extra-judicial. He then proceeds to examine the constitution, in reference to its operation on the bond upon which the judgment at law had been obtained; and concludes, that the violation of the constitution consisted in the introduction of the slaves, and not in the sale, and that, therefore, a subsequent sale, after the introduction, was not unlawful, and of course, the bond given for the purchase was not void, on the ground of illegal consideration; and he adds, if the contract should be considered void, the defendants would be entitled to the negroes; for, although their introduction might be illegal, and subject the party to criminal prosecution, yet the title to the negroes would not be forfeited. And to show more fully, he says, his understanding of the constitution: "I mean to declare, that the moment the negroes were introduced as merchandize, or for sale, the offence was at once complete; no further step was necessary to bring it within the intent and meaning of the prohibiting clause of the constitution; that it was perfectly immaterial, whether the negroes were or were not sold, or offered for sale afterwards; such act would not, in any way, affect its legal character." *The case went up to the court of appeals, and was there affirmed, by a divided court, two only of the judges being present: Judge TROTTER concurring with the chancellor, that the defence should have been made in the suit at law; but the other judge dissented upon this point. This was, of course, the only question in judgment in that case; and whatever opinions might have been expressed upon other questions, they were extra-judicial. Judge TROTTER went into an examination of the questions suggested by the chancellor, and differed entirely from him as to the effect and operation of the prohibition in the constitution. He considered the sale of the slaves the great object intended by the prohibition, with a view to suppress the slave-trade in that state. But he thought it immaterial, to inquire whether the constitution be considered merely directory, or containing within itself an absolute prohibition. In either case, he thought it fixed the policy of the state on the subject, and rendered illegal the practice designed to be suppressed. Had Judge TROTTER concurred with the chancellor in his views of the constitution, the decree of the chancellor must have been reversed. Thus, we see the different views taken by the courts in Mississippi, as to the object, policy and effect of this article in the constitution. And as the whole of this discussion arose upon points not necessarily involved in the decision of the case before the court, it may well be considered as extra-judicial. It is unnecessary for this court to express any opinion, as to the correctness of one or the other of the views taken by the different judges. But this difference of opinion is certainly sufficient to justify this court in considering that the construction of the constitution in that state is not so fixed and settled as to preclude us from regarding it an open question. [*499

The question arising under the constitution of Mississippi is, whether this prohibition, *per se*, interdicts the introduction of slaves as merchandize, or for sale, after a given time; or is only directory to the legislature, and requiring their action, in order to bring it into full operation, and render

unlawful the introduction of the slaves for sale, at any time prior to the act of the 13th of May 1837.

The language of the constitution is, "the introduction of slaves into this state, as merchandize, or for sale, shall be prohibited, from *and after the 1st day of May 1833;" with an exception, as to such as may be introduced by actual settlers, previous to the year 1845. This obviously points to something more to be done, and looks to some future time, not only for its fulfilment, but for the means by which it was to be accomplished. But the more grammatical construction ought not to control the interpretation, unless it is warranted by the general scope and object of the provision. Under the constitution of 1817, it is declared, that the legislature shall have power to prevent slaves being brought into the state, as merchandize. The time and manner in which this was to be done, was left to the discretion of the legislature. And by the constitution of 1832, it was no longer left a matter of discretion, when this prohibition is to take effect; but the 1st day of May 1833, is fixed as the time. But there is nothing in this provision which looks like withdrawing the whole subject from the action of the legislature. On the contrary, there is every reason to believe, from the mere naked prohibition, that it looked to legislative enactments to carry it into full operation. And, indeed, this is indispensable. There are no penalties or sanctions provided in the constitution for its due and effectual operation. The constitution of 1832 looks to a change of policy on the subject, and fixes the time when the entire prohibition shall take effect. And it is a fair and reasonable conclusion, that this was the only material change from the constitution of 1817. It will not answer, to say, this arose from any distrust of the legislature. Such a supposition would be entirely gratuitous, and a reflection that could not be justified. And besides, if any such conjecture is to be indulged, it is inconceivable, why some further provision was not made in the constitution, to insure obedience to the prohibition, by declaring the effect of a violation thereof. Admitting the constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect upon the construction of this article. Legislative provision is indispensable to carry into effect the object of this prohibition. It requires the sanction of penalties to effect this object. How is a violation of this prohibition to be punished? Admitting, it would be a misdemeanor, punishable by fine, this would be entirely inadequate to the full execution of the object intended to be accomplished. What would *become of the slaves thus introduced? Will they become free, immediately upon their introduction, or do they become forfeited to the state? These are questions not easily answered. And although these difficulties may be removed by subsequent legislation, yet they are proper circumstances to be taken into consideration, when we are inquiring into the intention of the convention, in thus framing thus article. It is unreasonable, to suppose, that if this prohibition was intended, *per se*, to operate without any legislative aid, that there would not have been some guards and checks thrown around it, to insure its execution. But if it is considered merely directory to the legislature, it is open to all necessary provisions to accomplish the end intended. The proviso in this article, that actual settlers "shall not be prohibited" from bringing in slaves for their own use, until the year 1845, must necessarily be considered as addressed to the legislature,

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and must be construed as a restriction upon their power. The enacting part of the article, "shall be prohibited," is also addressed to the legislature; and is a command to do a certain act. The legislative enactments on this subject strongly fortify the conclusion, that this provision in the constitution was not understood as a prohibition *per se*, but only directory to the legislature. On the 2d of March 1833, which was previous to the time when this prohibition was to go into operation, a law was passed to alter and amend this article, as follows: "The legislature of this state shall have, and are hereby vested with, power to pass, from time to time, such laws, regulating or prohibiting the introduction of slaves in this state, as may be deemed proper and expedient." This required, under the constitution, the concurrence of two-thirds of each branch of the legislature. Notice was accordingly given, as required by the constitution, to take the sense of the qualified electors of the state upon the proposed amendment. It certainly could not have been the understanding of the legislature, that the prohibition in the constitution was actually in full force and operation from the 1st of May 1833, whilst these proceedings to obtain an amendment of the constitution were going on; and especially, when, in December 1833, a law was passed laying a tax on slaves so brought in. This would be an unreasonable construction, and would be holding out false and deceptive colors to those engaged in that traffic. It is more reasonable *to conclude, that the legislature supposed some legislative action on their part was necessary, to carry into operation the prohibition; assuming on themselves to postpone such legislation, until the sense of the people could be taken on the proposed amendment. That such must have been the understanding of the legislature, is obvious, from the provisions of the act of December 1833, laying a tax on slaves thus brought in for sale. If the constitution, *per se*, operated as an absolute prohibition to bring in slaves as merchandize, after the 1st of May 1833, the law of December 1833 would be laying a tax upon slaves illegally introduced. This would be impliedly sanctioning the illegal introduction of the slaves; and would present an incongruity in legislation that never ought to be presumed. But to construe the constitution as directory only to the legislature, the whole will be consistent and stand together. Although the legislature may have omitted to do what the constitution enjoined upon them, this is a matter with which this court can have no concern. [*502

But if anything more can be wanting to show that the legislative interpretations of the constitution, from the year 1832 to 1837, has been, that this article does not, *per se*, operate as a prohibition to the introduction of slaves, as merchandize, but required legislative action to bring it into complete operation; it will be found in that act of the 13th of May 1837. Until that time, it is manifest, from the whole current of legislation upon that subject, and the proposition to amend the constitution in that particular, that there was great diversity of opinion in relation to this matter. But the act of 1837 purports to carry into effect the injunctions in the constitution. It adopts the words of the constitution, and declares that, "hereafter, the business of introducing or importing slaves into this state, as merchandize, or for sale, be and the same is hereby prohibited." Here, then, is a compliance with the injunction in the constitution, by a direct prohibition. This

law does not assume that such prohibition was in force, by virtue of the constitutional provision. Upon such hypothesis, this prohibition in the law would be entirely superfluous, and the act would have proceeded to provide for enforcing the constitutional prohibitions. But to consider the article in the constitution as directory to the legislature to prohibit the introduction
*503] of slaves, *this law is a literal compliance with the injunction ; and not only enacts a prohibition, but provides the necessary penalties for a violation of that prohibition, and declares all contracts made in relation thereto to be void. This is carrying into full execution the injunction of the constitution ; and affords a strong and irresistible conclusion, that, in the opinion of the legislature, that prohibition had not been in operation, until the passage of that law. To declare all contracts made for the purchase of slaves introduced, as merchandize, from the 1st of May 1833, until the passage of this law, in 1837, illegal and void, when there was such an unsettled state of opinion and course of policy pursued by the legislature, would be a severe and rigid construction of the constitution, and one that ought not to be adopted, unless called for by the most plain and unequivocal language. It is said by Judge Trotter, that he considers it immaterial, whether the constitution be construed as merely directory, or as containing within itself an absolute prohibition. In either case, it fixes the policy of the state. His idea, however, of the policy of the state upon this subject, differs essentially from that of the chancellor. We do not mean to say, that if there appeared to have been a fixed and settled course of policy in that state, against allowing the introduction of slaves, as merchandize, or for sale, that a contract, made in violation of such policy, would not be void. But we cannot think that this principle applies to this case. When the sale of the slaves in question was made, there was, certainly, no fixed and settled course of policy which would make void or illegal such contracts.

The judgment of the circuit court is accordingly affirmed. And this view of the case makes it unnecessary to inquire whether this article in the constitution of Mississippi is repugnant to the constitution of the United States ; and indeed, such inquiry is not properly in the case, as the decision has been placed entirely upon the construction of the constitution of Mississippi.

McLean, Justice.—As one view of this case involves the construction of the constitution of the United States in a most important part, and in regard to its bearing upon a momentous and most delicate subject, I will state in a
*504] few words my own views on that branch *of the case. The case has been argued with surpassing ability on both sides. And although the question I am to consider, is not necessary to a decision of the case ; yet, it is so intimately connected with it, and has been so elaborately argued, that under existing circumstances, I deem it fit and proper to express my opinion upon it.

The second section of the constitution of Mississippi, adopted the 26th of October 1832, declares, that the introduction of slaves into that state, as merchandize, or for sale, shall be prohibited, from and after the first day of May 1833 : provided, that the actual settlers shall not be prohibited from purchasing slaves in any state in the Union, and bringing them into that state, for their own individual use, until the year 1845: and the question is,

whether this provision is in conflict with that part of the constitution of the United States, which declares that congress shall have power "to regulate commerce with foreign nations, and among the several states."

In the case of *Gibbons* v. *Ogden*, 9 Wheat. 186, this court decided, that the power to regulate commerce is exclusively vested in congress, and that no part of it can be exercised by a state. The necessity of a uniform commercial regulation, more than any other consideration, led to the adoption of the federal constitution. And unless the power be not only paramount, but exclusive, the constitution must fail to attain one of the principal objects of its formation. It has been contended, that a state may exercise a commercial power, if the same has not been exercised by congress. And that this power of the state ceased, when the federal authority was exerted over the same subject-matter. This argument is founded upon the supposition, that a state may exercise a power which is expressly given to the federal government, if it shall not exert the power, in all the modes, and over all the subjects to which it can be applied. If this rule of construction were generally adopted and practically enforced, it would be as fatal to the spirit of the constitution, as it is opposed to its letter. If a commercial power may be exercised by a state, because it has not been exercised by congress, the same rule must apply to other powers expressly delegated to the federal government. *It is admitted, that the power of taxation is common to the state and federal governments; but this is not, in its nature or [*505 effect, a repugnant power; and its exercise is vital to both governments. A power may remain dormant, though the expediency of its exercise has been fully considered. It is often wiser and more politic, to forbear, than to exercise a power. A state regulates its own internal commerce, may pass inspection and police laws, designed to guard the health and protect the rights of its citizens. But these laws must not be extended so as to come in conflict with a power expressly given to the federal government. It is enough to say, that the commercial power, as it regards foreign commerce, and commerce among the several states, has been decided by this court to be exclusively vested in congress.

Under the power to regulate foreign commerce, congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property. Here is an ample range, extending to the remotest seas where the commercial enterprise of our citizens shall go, for the exercise of this power. The power to regulate commerce among the several states is given in the same section, and in the same language. But it does not follow, that the power may be exercised to the same extent.

The transportation of slaves from a foreign country, before the abolition of that traffic, was subject to this commercial power. This would seem to be admitted in the constitution, as it provides "the importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by congress, prior to the year 1808: but a tax or duty, may be imposed on such importation, not exceeding ten dollars for each person." An exception to a rule is said to prove the existence of the rule; and this exception to the exercise of the commercial power, may well be

considered as a clear recognition of the power in the case stated.[1] The United States are considered as a unit, in all regulations of foreign commerce. *506] But this cannot be the case, *where the regulations are to operate among the several states. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several states; nor impose an embargo that shall affect only a part of them. Navigation, whether on the high seas, or in the coasting trade, is a part of our commerce; and when extended beyond the limits of any state, is subject to the power of congress. And as regards this intercourse, internal or foreign, it is immaterial, whether the cargo of the vessel consists of passengers, or articles of commerce.

Can the transfer and sale of slaves from one state to another, be regulated by congress, under the commercial power? If a state may admit or prohibit slaves at its discretion, this power must be in the state, and not in congress. The constitution seems to recognise the power to be in the states. The importation of certain persons, meaning slaves, which was not to be prohibited before 1808, was limited to such states, then existing, as shall think proper to admit them. Some of the states, at that time, prohibited the admission of slaves, and their right to do so was as strongly implied by this provision, as the right of other stares that admitted them.

The constitution treats slaves as persons. In the second section of the first article, which apportions representatives and directs taxes among the states, it provides, "the numbers shall be determined, by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." And again, in the third section of the fourth article, it is declared, that "no person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." By the laws of certain states, slaves are treated as property; and the constitution of Mississippi prohibits their being brought into that state, by citizens of other states, for sale, or as merchandize. Merchandize is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which *507] *is properly embraced by a commercial regulation. But if slaves are considered in some of the states, as merchandize, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities; but the constitution acts upon slaves as persons, and not as property.

In all the old states, at the time of the revolution, slavery existed in a greater or less degree. By more than one-half of them, including those that have been since admitted into the Union, it has been abolished or prohibited. And in these states, a slave cannot be brought as merchandize, or held to labor. in any of them, except as a transient person. The consti-

[1] The meaning of this maxim is greatly misapprehended; that an exception *proves* the rule, properly interpreted, means, that an exception *tests* or *tries* the rule. For this, see Worcester's Dict. verb. Prove; as in 1 Thess. v. 21, "*Prove* all things; hold fast that which is good."

tution of Ohio declares, that there shall be neither slavery nor involuntary servitude in the state, except for the punishment of crimes. Is this provision in conflict with the power in congress to regulate commerce? It goes much further than the constitution of Mississippi. That prohibits only the introduction of slaves into the state, by the citizens of other states, as merchandize; but the constitution of Ohio not only does this, but it declares that slavery shall not exist in the state. Does not the greater power include the lesser? If Ohio may prohibit the introduction of slaves into it altogether, may not the state of Mississippi regulate their admission? The constitution of the United States operates alike on all the states; and one state has the same power over the subject of slavery as every other state. If it be constitutional in one state, to abolish or prohibit slavery, it cannot be unconstitutional in another, within its discretion, to regulate it. Could Ohio, in her constitution, have prohibited the introduction into the state, of the cotton of the south, or the manufactured articles of the north? If a state may exercise this power, it may establish a non-intercourse with the other states. This, no one will pretend, is within the power of a state. Such a measure would be repugnant to the constitution, and it would strike at the foundation of the Union. The power vested in congress to regulate commerce among the several states, was designed to prevent commercial conflicts among them. But whilst Ohio *could not proscribe the productions [*508
of the south, nor the fabrics of the north, no one doubts its power to prohibit slavery. And what can more unanswerably establish the doctrine, that a state may prohibit slavery, or, in its discretion, regulate it, without trenching upon the commercial power of congress? The power over slavery belongs to the states respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it. Each state has a right to protect itself against the avarice and intrusion of the slave-dealer; to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil, rests upon the law of self-preservation; a law vital to every community, and especially to a sovereign state.

Taney, Ch. J.—I had not intended to express an opinion upon the question raised in the argument, in relation to the power of congress to regulate the traffic in slaves between the different states, because the court have come to the conclusion, in which I concur, that the point is not involved in the case before us. But as my brother McLean has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine.

In my judgment, the power over this subject is exclusively with the several states; and each of them has a right to decide for itself, whether it will, or will not, allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose; and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories: and the action of the several states upon this subject cannot be controlled by congress, either by virtue of its power to regulate commerce, or by vir-

tue of any power conferred by the constitution of the United States. I do not, however, mean to argue this question; and I state my opinion upon it,
*509] on account *of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the court has delivered his opinion, might be misconstrued.

Another question of constitutional law has also been brought into discussion, that is to say: whether the grant of power to the general government, to regulate commerce, does not carry with it an implied prohibition to the states to make any regulations upon the subject, even although they should be altogether consistent with those made by congress. I decline expressing any opinion upon this question, because it is one step further out of the case really before us; and there is nothing in the character of the point that seems to require a voluntary declaration of opinion by the members of the court.

It is admitted on all hands, that if a state makes any regulation of commerce, inconsistent with those made by congress, or in any degree interfering with them, the regulation of the state must yield to those of the general government. No one, I believe, doubts the controlling power of congress in this respect; nor their right to abrogate and annul any and every regulation of commerce made by a state. But the question upon which different opinions have been entertained, is this: would a regulation of commerce, by a state, be valid, until congress should otherwise direct; provided such regulation was consistent with the regulations of congress, and did not, in any manner, conflict with them? No case has yet arisen, which made it necessary, in the judgment of the court, to decide this question. It was treated as an open one, in the case of the *City of New York* v. *Miln*, 11 Pet. 102, decided at January term 1837, as will appear by the opinions then delivered; and since that time, the point has never, in any form, come before the court. Nor am I aware, that there is any reason for supposing that such a case is likely to arise. For the states have very little temptation to make a regulation of commerce, when they know it may be immediately annulled by an act of congress, even if it does not, at the time it is made by the state, conflict with any law of the general government. Besides, the regulations of congress, already made, appear to cover the whole, or very nearly the whole,
*510] ground; and in the very few *instances in which the laws of states have been held to be regulations of commerce, and on that account declared to be void, the state regulation was found to be in conflict with some existing regulation of the general government; and consequently, the question above stated did not arise. The point in dispute, therefore, would seem to be but little more than an abstract question which the court may never be called on to decide; and perhaps, like other abstract questions, it is destined, on that very account, to be more frequently and earnestly discussed. But until some case shall bring it here for decision, and until some practical purpose is to be answered by deciding it, I do not propose to engage in the discussion, nor to express an opinion.

Story, Thompson, Wayne and McKinley, Justices, concurred with the majority of the court in opinion, that the provision of the constitution of the United States, which gives the regulation of commerce to congress, did

not interfere with the provision of the constitution of the state of Mississippi, which relates to the introduction of slaves, as merchandize, or for sale.

BALDWIN, Justice.—As this case has been decided on its merits, and the opinion of the court covers every point directly involved, I had not thought that any merely collateral question would have been noticed; for I cannot believe, that in the opinion of any of the judges, it is at all necessary to inquire, what would have been the result, if the court had held that the contract on which this suit was brought, was void by the laws or constitution of Mississippi. The questions which would have arisen, in such an event, are of the highest importance to the country; and in my opinion, ought not to be considered by us, unless a case arise in which their decision becomes indispensable, when too much deliberation cannot be had, before a judgment is pronounced upon them. But since a different course has been taken by the judges who have preceded me, I am not willing to remain silent; lest it may be inferred, that my opinion coincides with that of the judges who have now expressed theirs.

That the power of congress "to regulate commerce among the several states," is exclusive of any interference by the states, has [*511 been in my opinion, conclusively settled by the solemn opinions of this court, in *Gibbons* v. *Ogden*, 9 Wheat. 186–222, and in *Brown* v. *Maryland*, 12 Wheat. 438–46. If these decisions are not to be taken as the established construction of this clause of the constitution, I know of none which are not yet open to doubt; nor can there be any adjudications of this court, which must be considered as authoritative upon any question, if these are not to be so on this.

Cases may, indeed, arise, wherein there may be found difficulty in discriminating between regulations of "commerce among the several states," and the regulations of "the internal police of a state;" but the subject-matter of such regulations, of either description, will lead to the true line which separates them, when they are examined with a disposition to avoid a collision between the powers granted to the federal government, by the people of the several states, and those which they have reserved exclusively to themselves. "Commerce among the states," as defined by the court, is "trade," "traffic," "intercourse," and dealing in articles of commerce between states, by its citizens or others, and carried on in more than one state. Police, relates only to the internal concerns of one state, and commerce, within it, is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to congress; and that those regulations which affect only the commerce carried on within one state, or which refer only to subjects of internal police, are within the powers reserved. The opinion of this court in *New York* v. *Miln*, 11 Pet. 130, &c., draws the true line between the two classes of regulations; and gives an easy solution to any doubt which may arise on the clause of the constitution of Mississippi, which has been under our consideration. It does not purport to be a regulation of police, for any defined object connected with the internal tranquillity of the state, the health or morals of the people—it is general in its terms, it

is aimed at the introduction of slaves, as merchandize, *from other states, not with the intention of excluding diseased, convicted or insurgent slaves, or such as may be otherwise dangerous to the peace or welware of the state. Its avowed object is, to prevent them from being the subjects of commercial intercourse with other states, when introduced for the purpose of sale; while the next clause expressly legalizes their introduction, by settlers within the state, for their own use, leaving them at liberty to sell the slaves so introduced, immediately afterwards. It was not intended to affect the condition of the slaves, for there is no provision for their emancipation, or other disposition, when introduced into the state for sale; so that the only effect which the broadest construction could give to the constitution of Mississippi, would be, to prohibit the introduction into that state, of slaves from other states, as articles of commerce, without the least reference to any object of internal police. Their introduction was legal or illegal, according to their disposition when introduced; if intended for sale, it was illegal; if for use by settlers in the state, it was legal, whatever might be the condition of the slave as to health, or his character as to morals. If we adopt the construction contended for by the plaintiffs in error, that it operates by its own force, the constitution of Mississippi must be taken to be a law of that state in relation to the regulation of the traffic or dealing in slaves brought there for the purpose of sale; in other words, a regulation of commerce among the several states, if slaves are the subjects of such commerce, according to the true meaning of the constitution of the United States, as expounded by this court.

Other judges consider the constitution as referring to slaves only as persons, and as property, in no other sense than as persons escaping from service; they do not consider them to be recognised as subjects of commerce, either "with foreign nations," or "among the several states;" but I cannot acquiesce in this position. In other times, and in another department of this government, I have expressed my opinion on this subject; I have done it in judgment in another place (1 Bald. 576, &c.); and feel it a duty to do it here, however unexpectedly the occasion may have arisen; and to speak plainly and explicitly, however unsuited to the spirit of the times, or prevalent opinions anywhere, *or by any persons, my views may be. *513] That I may stand alone among the members of this court, does not deter me from declaring that I feel bound to consider slaves as property, by the law of the states, before the adoption of the constitution, and from the first settlement of the colonies; that this right of property exists independently of the constitution, which does not create, but recognises and protects it from violation, by any law or regulation of any state, in the cases to which the constitution applies.

It was a principle of the revolution, and the practical construction of the Declaration of Independence, that "necessity or expediency" justified "the refusal of liberty, in certain circumstances, to persons of a particular color;" and that those to whom their services and labor were due, were their owners." (1 Laws U. S. 24–5.) In the 7th article of the preliminary treaty of peace with Great Britain, there is this expression, "negroes, or other property" (Ibid. 198); also, in the 7th article of the definitive treaty (Ibid. 204); which conclusively shows the then accepted understanding of the country. And that it was not different, after the adoption of the constitution, appears

as conclusively, by the 1st article of the treaty of Ghent, which refers to "any slaves, or other private property." (Ibid. 694.) It would be a strange position, indeed, if we were to consider slaves as persons merely, and not property, in our commercial relations with foreign nations; and yet declare them to be "private property," in our diplomatic relations with them, and in the most solemn international acts, from 1782 to 1815.

At the adoption of the constitution, slaves were as much the subjects and articles of "commerce with foreign nations," and among "the several states," as any other species of merchandize; they were property for all purposes, and to all intents; they were bought and sold as chattels; the property in them passed by a bill of sale, by descent, or by will; and they were sold on execution, wherever slavery existed. Their importation was lawful; and all power was taken from congress to prohibit it, prior to 1808, so long as the states should think proper to admit them; though a duty or tax might be imposed on such persons, not exceeding ten dollars for each. Art. 1, § 9.

This clause of the constitution has been held to be an exception *to [*514
the power of congress to regulate commerce; the word "migration" applying to those persons who come voluntarily, and "importation" applying to those persons who are brought involuntarily (9 Wheat. 216); so that if this clause had not been introduced, the power to prohibit the importation would have resulted, from the general grant of power to regulate commerce. For no rule is better settled, than that the effect of an exception is to take the case excepted out of the general provision, thereby excluding what would otherwise be embraced. 12 Wheat. 440. The conclusion, therefore, is inevitable, that slaves were embraced by the constitution, as the subjects of commerce and commercial regulations, to the same extent as other goods, wares or merchandize. On no other construction can the ninth section of the first article be taken as an exception to the third clause of the eighth section: and when so taken, there is no escape from the construction declared in the opinion of the court, in *Gibbons* v. *Ogden*. Besides, if the power to regulate commerce does not include the power to prohibit the importation of slaves into the United States, after 1808, when the exception in the ninth section of the first article does not operate, such power is not to be found in any other grant by the constitution; the consequence of which will be, that all the existing laws for abolishing the slave-trade are unconstitutional; or, at the best, their power will rest entirely on the remote and doubtful implication of a new grant, by the ninth section, of a power, after 1808, which would not have existed had not that section been introduced. This would be a dangerous rule by which to construe the constitution, and as inconsistent with its whole scope, as it would be hazardous to its permanency. On the other hand, by holding the power to regulate commerce to be the grant of a power to abolish the foreign slave-trade, by taking the ninth section as a temporary exception, and the exception to be inoperative after 1808, the slave-trade laws since passed are clearly constitutional, under an expressly granted power; which is a much more satisfactory position on which to plant them, than any implication or inference.

Slaves, then, being articles of commerce with foreign nations, up to 1808, and until their importation was prohibited by congress, they were also

articles of commerce among the several states, which recognised them as
*515] property capable of being transferred *from hand to hand as chattels. Whether they should be so held or not, or what should be the extent of the right of property in the owner of a slave, depended on the law of each state ; that was and is a subject on which no power is granted by the constitution to congress ; consequently, none can be exercised, directly or indirectly. It is a matter of internal police, over which the states have reserved the entire control ; they, and they alone, can declare what is property capable of ownership, absolute or qualified ; they may continue or abolish slavery at their pleasure, as was done before, and has been done since the constitution ; which leaves this subject untouched and intangible, except by the states.

As each state has plenary power to legislate on this subject, its laws are the test of what is property ; if they recognise slaves as the property of those who hold them, they become the subjects of commerce between the states which so recognise them, and the traffic in them may be regulated by congress, as the traffic in other articles ; but no further. Being property, by the law of any state, the owners are protected from any violations of the rights of property by congress, under the fifth amendment of the constitution; these rights do not consist merely in ownership; the right of disposing of property of all kinds, is incident to it, which congress cannot touch. The mode of disposition is regulated by the state of common law ; and but for the first clause in the second section of the fourth article of the constitution of the United States, a state might authorize its own citizens to deal in slaves, and prohibit it to all others. But that clause secures to the citizens of all the states, "all privileges and immunities of citizens" of any other state, whereby any traffic in slaves or other property, which is lawful to the citizens or settlers of Mississippi, with each other, is equally protected when carried on between them and the citizens of Virginia. Hence, it is apparent, that no state can control this traffic, so long as it may be carried on by its own citizens, within its own limits ; as part of its purely internal commerce, any state may regulate it according to its own policy ; but when such regulation purports to extend to other states or their citizens, it is limited by the constitution, putting the citizens of all on the same footing as their
*516] own. It follows, likewise, that any power *of congress over the subject is, as has been well expressed by one of the plaintiffs' counsel, conservative in its character, for the purpose of protecting the property of the citizens of the United States, which is a lawful subject of commerce among the states, from any state law which affects to prohibit its transmission for sale from one state to another, through a third or more states.

Thus, in Ohio, and those states to which the ordinance of 1787 applies, or in those where slaves are not property, not subjects of dealing or traffic among its own citizens, they cannot become so, when brought from other states ; their condition is the same as those persons of the same color already in the state ; subject in all respects to the provisions of its law, if brought there for the purposes of residence or sale. If, however, the owner of slaves in Maryland, in transporting them to Kentucky or Missouri, should pass through Pennsylvania or Ohio, no law of either state could take away or affect his right of property ; nor, if passing from one slave state to another, accident or distress should compel him to touch at any place within a state,

where slavery did not exist. Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several states, which none can prohibit or regulate, which the constitution protects, and congress may, and ought, to preserve from violation. Any reasoning or principle which would authorize any state to interfere with such transit of a slave, would equally apply to a bale of cotton, or cotton goods; and thus leave the whole commercial intercourse between the states liable to interruption or extinction by state laws, or constitutions. It is fully within the power of any state to entirely prohibit the importation of slaves, of all descriptions, or of those who are diseased, convicts, or of dangerous or immoral habits or conduct; this is a regulation of police, for purposes of internal safety to the state, or the health and morals of its citizens, or to effectuate its system of policy in the abolition of slavery. But where no object of police is discernible in a state law or constitution, nor any rule of policy, other than that which gives to its own citizens a "privilege," which is denied to citizens of other states, it is wholly different. The direct tendency of all such laws is partial, anti-national, subversive of the harmony which should exist among the states, as well as inconsistent with the most *sacred principles of the constitution; which on this subject have prevailed through all time, in [*517 and among the colonies and states, and will be found embodied in the second resolution of the Virginia legislature, in 1785. (1 Laws U. S. 53.) For these reasons, my opinion is, that had the contract in question been invalid by the constitution of Mississippi, it would be valid by the constitution of the United States. These reasons are drawn from those principles on which alone this government must be sustained: the leading one of which is, that wherever slavery exists, by the laws of a state, slaves are property in every constitutional sense, and for every purpose, whether as subjects of taxation, as the basis of representation, as articles of commerce, or fugitives from service. To consider them as persons merely, and not property, is, in my settled opinion, the first step towards a state of things to be avoided only by a firm adherence to the fundamental principles of the state and federal governments, in relation to this species of property. If the first step taken be a mistaken one, the successive ones will be fatal to the whole system. I have taken my stand on the only position which, in my judgment, is impregnable; and feel confident in its strength, however it may be assailed in public opinion, here or elsewhere.

Catron, Justice, having been indisposed, did not sit in this case. McKinley, Justice, dissented from the opinion of the court, as delivered by Thompson, Justice; and Story, Justice, also dissented; both these justices considering the notes sued upon void. Barbour, Justice, died before the case was decided.

These causes came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and were argued by counsel: On consideration whereof, it is now here 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.

*The Amistad.

UNITED STATES, Appellants, *v.* The LIBELLANTS AND CLAIMANTS of the SCHOONER AMISTAD, her tackle, apparel and furniture, together with her cargo, and the AFRICANS mentioned and described in the several libels and claims, Appellees.

Slave-trade.—Spanish treaty.—Ships' papers.—Salvage.

The Spanish schooner Amistad, on the 27th day of June 1839, cleared out from Havana, in Cuba, for Puerto Principe, in the same island, having on board, Captain Ferrer, and Ruiz and Montez, Spanish subjects; Captain Ferrer had on board Antonio, a slave; Ruiz had forty-nine negroes; Montez had four negroes, which were claimed by them as slaves, and stated to be their property, in passports or documents, signed by the governor-general of Cuba; in fact, these African negroes had been, a very short time before they were put on board the Amistad, brought into Cuba, by Spanish slave-traders, in direct contravention of the treaties between Spain and Great Britain, and in violation of the laws of Spain. On the voyage of the Amistad, the negroes rose, killed the master, and took possession of the vessel; they spared the lives of Ruiz and Montez, on condition that they would aid in steering the Amistad for the coast of Africa, or to some place where negro slavery was not permitted by the laws of the country; Ruiz and Montez deceived the negroes, who were totally ignorant of navigation, and steered the Amistad for the United States; and she arrived off Long Island, in the state of New York, on the 26th of August, and anchored within half a mile of the shore; some of the negroes went on shore, to procure supplies of water and provisions, and the vessel was then discovered by the United States' brig Washington; Lieutenant Gedney, commanding the Washington, assisted by his officers and crew, took possession of the Amistad, and of the negroes on shore and in the vessel, brought them into the district of Connecticut, and there libelled the vessel, the cargo and the negroes, for salvage; libels for salvage were also presented in the district court of the United States for the district of Connecticut, by persons who had aided, as they alleged, in capturing the negroes on shore, on Long Island, and contributed to the vessel, cargo and negroes being taken into possession by the brig Washington. Ruiz and Montez filed claims to the negroes as their slaves, and prayed that they, and parts of the cargo of the Amistad, might be delivered to them, or to the representatives of the crown of Spain. The attorney of the district of Connecticut filed an information, stating that the minister of Spain had claimed of the government of the United States that the vessel, cargo and slaves should be restored, under the provisions of the treaty between the United States and Spain, the same having arrived within the limits and jurisdiction of the United States, and had been taken possession of by a public armed vessel of the United States, under such circumstances as made it the duty of the United States to cause them to be restored to the true owners thereof; the information asked that the court would make such order as would enable the United States to comply with the treaty; or if it
*519] should appear that the negroes had been *brought from Africa, in violation of the laws of the United States, that the court would make an order for the removal of the negroes to Africa, according to the laws of the United States. A claim for Antonio was filed by the Spanish consul, on behalf of the representatives of Captain Ferrer, and claims are also filed by merchants of Cuba, for parts of the cargo of the vessel, denying salvage, and asserting their right to have the same delivered to them under the treaty. The negroes, Antonio excepted, filed an answer, denying that they were slaves, or the property of Ruiz or Montez; and denying the right of the court, under the constitution and laws of the United States, to exercise any jurisdiction over their persons; they asserted, that they were native free-born Africans, and ought of right to be free; that they had been, in April 1839, kidnapped in Africa, and had been carried, in a vessel engaged in the slave-trade, from the coast of Africa to Cuba, for the purpose of being sold; and that Ruiz and Montez, knowing these facts, had purchased them, put them on board the Amistad, intending to carry them, to be held as slaves for life, to another part of Cuba, and that on the voyage, they rose on the master, took possession of the vessel, and were intending to proceed to Africa, or to some free state, when they were taken possession of by the United States' armed vessel, the Washington. After evidence had been given by the parties, and all the documents of the vessel and cargo, with the alleged passports, and the clearance from Havana, had been produced, the district court made a decree, by which all claims to salvage of the negroes were rejected, and salvage amounting to one-third of the

vessel and cargo was allowed to Lieutenant Gedney, and the officers and crew of the Washington. The claim of the representatives of Captain Ferrer, to Antonio, was allowed; the claims of Ruis and Montez being included in the claim of the Spanish minister, and of the minister of Spain, to the negroes as slaves, or to have them delivered to the Spanish minister, under the treaty, to be sent to Cuba, were rejected; and the court decreed, that the negroes should be delivered to the president of the United States, to be sent to Africa, pursuant to the act of congress of 3d March 1819. From this decree, the district-attorney of the United States appealed to the circuit court, except so far as the same related to Antonio; the owners of the cargo of the Amistad also appealed from that part of the degree which allowed salvage on their goods; Ruiz or Montez did not appeal, nor did the representatives of the owner of the Amistad. The circuit court of Connecticut, by a *pro formâ* decree, affirmed the decree of the district court, reserving the question of salvage on the merchandise on board the Amistad; the United States appealed from this decree. The decree of the circuit court was affirmed; saving that part of the same which directed the negroes to be delivered to the president of the United States, to be sent to Africa; which was reversed, and the negroes were declared to be free.

The sixth article of the treaty with Spain, of 1795, continued in full force, in this particular, by the treaty ratified in 1821, seems to have had principally in view, cases where the property of the subjects of either state, had been taken possession of, within the territorial jurisdiction of the other, during war. The eighth article provides for cases where the shipping of the inhabitants of either state are forced, through stress of weather, pursuit of pirates or enemies, or any other urgent necessity, to seek shelter in the ports of the other. There may well be some doubts entertained, whether the case of the Amistad, in its actual circumstances, falls within the purview of this article.

The ninth article of the treaty provides, that all ships and merchandize, which shall *be rescued out of the hands of any pirates and robbers, on the high seas, which shall [*520 be brought into some port of either state, shall be delivered to the officers of the port, in order to be taken care of, and "restored, entire, to the proprietary, as soon as due and sufficient proof shall be made concerning the property thereof." To bring the case of the Amistad within this article, it is essential to establish: 1st. That the negroes, under all the circumstances, fall within the description of merchandize, in the sense of the treaty. 2d. That there has been a rescue of them on the high seas, out of the hands of pirates and robbers. 3d. That Ruiz and Montez are the true proprietors of the negroes, and have established their title by competent proofs. If those negroes were, at the time, lawfully held as slaves, under the laws of Spain, and recognised by those laws as property, capable of being bought and sold, no reason is seen, why this may not be deemed within the intent of the treaty, to be included under the denomination of merchandize, and ought, as such, to be restored to the claimants; for upon that point, the laws of Spain would seem to furnish the proper rule of interpretation. But admitting that to be the construction of the treaty, it is clear, in the opinion of the court, that neither of the other essential facts and requisites has been established by proof, and the *onus probandi* of both lies upon the claimants, to give rise to the *casus fœderis*.

The negroes were never the lawful slaves of Ruiz or Montez, nor of any other Spanish subjects; they were natives of Africa; and were kidnapped there, and unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and of the most solemn edicts and declarations of that government.

By the laws, treaties and edicts of Spain, the African slave-trade is utterly abolished; the dealing in that trade is deemed a heinous crime; the negroes thereby introduced into the dominions of Spain, are declared to be free.

There is no pretence to say, the negroes of the Amistad are "pirates" and "robbers;" as they were kidnapped Africans, who, by the laws of Spain itself, were entitled to their freedom.

Although public documents of the government, accompanying property found on board of the private ships of a foreign nation, are to be deemed *primâ facie* evidence of the facts which they state, yet they are always open to be impugned for fraud; and whether that fraud be in the original obtaining of those documents, or in the subsequent fraudulent and illegal use of them, where once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof.

Fraud will vitiate any, even the most solemn, transactions; and any asserted title founded upon it, is utterly void.

The language of the treaty with Spain of 1795, requires the proprietor "to make due and suffi-

cient proof" of his property; and that proof cannot be deemed either due or sufficient, which is stained with fraud.

Nothing is more clear, in the laws of nations, as an established rule to regulate their rights and duties, and intercourse, than the doctrine that the ship's papers are *primâ facie* evidence of what they state; and that if they are shown to be fraudulent, they are not to be held proof of any valid title whatever. This rule is applied in prize cases; and is just as applicable to the transactions of civil intercourse between nations in times of peace.

In the solemn treaties between nations, it never can be presumed, that either state intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended to be applied to *bonâ fide* transactions.

*521] *The 17th article of the treaty with Spain, which provides for certain passports and certificates, as evidence of property on board of the ships of both states, is, in its terms; applicable only to cases where either of the parties is engaged in war. This article required a certain form of passport to be agreed upon by the parties, and annexed to the treaty; it never was annexed, and therefore, in the case of The Amiable Isabella, 6 Wheat. 1, it was held inoperative.

Supposing the African negroes on board the Amistad not to be slaves, but kidnapped and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights, as much as those of Spanish subjects. The conflict of rights between the parties, under such circumstances, becomes positive and inevitable, and must be decided upon the invariable principles of justice and international law.

The treaty with Spain never could have been intended to take away the equal rights of all foreigners, who should assert their claims to equal justice before the courts of the United States; nor to deprive such foreigners of the protection given to them by other treaties, or by the general laws of nations.

There is no ground to assert, that the case of the negroes who were on board of the Amistad comes within the provisions of the act of congress of 1799, or of any other of the prohibitory slave-trade acts. These negroes were never taken from Africa, or brought to the United States, in contravention of these acts. When the Amistad arrived, she was in possession of the negroes, asserting their freedom; and in no sense could possibly intend to import themselves into the United States as slaves, or for sale as slaves.

The carrying of the Amistad and her cargo into Connecticut, by Lieutenant Gedney, and the officers and crew of the Washington, was a highly meritorious and useful service to the proprietors of the ship and cargo, and such, as by the general principles of the maritime law, is always deemed a just foundation for salvage. The rate allowed by the court (one-third) does not seem beyond the exercise of a sound discretion, under the very peculiar and embarrassing circumstances of the case.

Appeal from the Circuit Court of Connecticut. On the 23d day of January 1840, Thomas R. Gedney and Richard W. Meade, officers of the United States surveying brig Washington, on behalf of themselves and the officers and crew of the brig Washington, and of others interested and entitled, filed a libel in the district court of the United States for the district of Connecticut, stating, that off Culloden Point, near Montauk Point, they took possession of a vessel which proved to be a Spanish schooner, called the Amistad, of Havana, in the Island of Cuba, of about 120 tons burden; and the said libellants found said schooner was manned by forty-five negroes, some of whom had landed near the said point for water,

*522] *and there were also on board, two Spanish gentlemen, who represented themselves to be, and as the libellants verily believed, were, part owners of the cargo, and of the negroes on board, who were slaves belonging to said Spanish gentlemen; that the schooner Amistad sailed, on the 28th day of June, A. D. 1839, from the port of Havana, bound to a port in the province of Principe, both in the island of Cuba, under the command of Raymon Ferrer, as master thereof; that the schooner had on board and was laden with a large and valuable cargo, and provisions, to the amount, in all, of $40,000, and also money to the sum and amount of about $250;

and also fifty-four slaves, to wit, fifty-one male slaves, and three young female slaves, who were worth $25,000; and while on the voyage from Havana to Principe, the slaves rose upon the master and crew of the schooner, and killed and murdered the master and one of the crew, and two more of the crew escaped and got away from the schooner; that the two Spaniards on board, to wit, Pedro Montez and Jose Ruiz, remained alive on board the schooner, after the murder of the master, and after the negroes had taken possession of the vessel and cargo; that their lives were spared, to assist in the sailing of the vessel; and it was directed by the negroes, that the schooner should be navigated for the coast of Africa; and Pedro Montez and Jose Ruiz did, accordingly, steer as thus directed and compelled by the negroes, at the peril of their lives, in the day-time, and in the night, altered their course and steered for the American shore; but after two months on the ocean, they succeeded in coming round Montauk Point, when they were discovered and boarded by the libellants, and the two Spanish gentlemen begged for and claimed the aid and protection of the libellants. That the schooner was accordingly taken possession of, and re-captured from the hands and possession of the negroes who had taken the same: that the schooner was brought into the port of New London, where she now was; and the schooner would, with great difficulty, exposure and danger, have been taken by the libellants, but for the surprise upon the blacks who had possession thereof, a part of whom were on shore; and but for the aid and assistance and services of the libellants, the vessel and cargo would have been wholly lost to the respective owners thereof. That the cargo *belonged to divers Spanish merchants and others, resident in the island of Cuba, and to Pedro Montez and Jose Ruiz, the latter owning most of the slaves. The libellants stated, that having saved the schooner Amistad and cargo, and the slaves, with considerable danger, they prayed that process should be issued against the same, and that the usual proceedings might be had by the court, by which a reasonable salvage should be decreed out of the property so saved. [*523

Afterwards, Henry Green and Pelatiah Fordham and others, filed a petition and answer to the libel, claiming salvage out of the property proceeded against by Thomas R. Gedney and others, and stating, that before the Amistad was seen or boarded by the officers and crew of the Washington, they had secured a portion of the negroes who had come on shore, and had thus aided in saving the vessel and cargo.

On the 29th of August 1839, Jose Ruiz and Pedro Montez, of Cuba, filed claims to all the negroes on board of the Amistad, except Antonio, as their slaves. A part of the merchandize on board the vessel was also claimed by them. They alleged, that the negroes had risen on the master of the schooner, and had murdered him; and that afterwards, they, Ruiz and Montez, had brought her into the United States. They claimed, that the negroes and merchandize ought to be restored to them, under the treaty with Spain; and denied salvage to Lieutenant Gedney, and to all other persons claiming salvage. Afterwards, Ruiz and Montez each filed in the district court, a separate libel, stating more at large the circumstances of the voyage of the Amistad, the murder of the master by the negroes, and that the negroes afterwards compelled them to steer the vessel towards Africa, but that they contrived to bring her to the coast of the United States, where

she was captured by the United States brig Washington. Ruiz, in his libel, stated the negroes belonging to him to have been forty-nine in number, "named and known at Havana, as follows: Antonio, Simon, Jose, Pedro, Martin, Manuel, Andreo, Edwards, Celedonia, Burtolono, Ramia, Augustin, Evaristo, Casamero, Merchoi, Gabriel, Santorin, Escolastico, Rascual, Estanislao, Desidero, Nicholas, Estevan, Tomas, Cosme, Luis, Bar-
*524] tolo, Julian, Federico, Salustiano, *Ladislao, Celestino, Epifanio, Eduardo, Benancico, Felepe, Francisco, Hipoleto, Berreto, Isidoro, Vecente, Deconisco, Apolonio, Esequies, Leon, Julio, Hipoleto and Zenon; of whom several have died." Their present names, Ruiz stated, he had been informed, were, "Cinque, Burnah 1st, Carpree, Dammah, Fourrie 1st, Shumah, Conomah, Choolay, Burnah 2d, Baah, Cabbah, Poomah, Kimbo, Peea, Bang-ye-ah, Saah, Carlee, Parale, Morrah, Yahome, Narquor, Quarto, Sesse, Con, Fourrie 2d, Kennah, Lammane, Fajanah, Faah, Yahboy, Faquannah, Berrie, Fawnu, Chockammaw and Gabbow." The libel of Pedro Montez stated, that the names of three negroes on board the Amistad, belonging to him, were Francisco, Juan and Josepha; the Spanish name of the fourth was not mentioned; and the four were now called Teme, Mahgra, Kene and Carria. All these were stated to be slaves, and the property of the claimants, purchased by them at Havana, where slavery was tolerated and allowed by law; and they and the merchandize on board the vessel, the claimants alleged, by the laws and usages of nations, and of the United States of America, and according to the treaties between Spain and the United States, ought to be restored to the claimants, without diminution, and entire.

The vessel, negroes and merchandize were taken into his possession, by the marshal of the district of Connecticut, under process issued by order of the court.[1]

On the 19th of September 1837, William S. Holabird, Esq., attorney of the United States for the district, filed a suggestion in the district court, stating, that since the libel aforesaid of Thomas R. Gedney, Esq., was filed in this court, viz: within the present month of September, in the year of our Lord 1839, the duly accredited minister to the United States of her Catholic Majesty, the Queen of Spain, had officially presented to the proper department of the United States government, a claim, which was then pending, upon the United States, setting forth, that "the vessel aforesaid, called the Amistad, and her cargo aforesaid, together with certain slaves on board the said vessel, all being the same as described in the libel aforesaid, are the property of Spanish subjects, and that the said vessel, cargo and slaves, while
*525] so being the property of the said Spanish subjects, arrived *within the jurisdictional limits of the United States, and were taken possession of by the said public armed brig of the United States, under such circumstances as make it the duty of the United States to cause the same vessel, cargo and slaves, being the property of said Spanish subjects, to be restored to the true proprietors and owners of the same, without further hindrance or detention, as required by the treaty now subsisting between the United States and Spain." The attorney of the United States, in behalf of the United States, prayed the court, on its being made legally to appear

[1] For a narrative of the circumstances of this case, see 1 Haz. U. S. Reg. 177, 244.

that the claim of the Spanish minister was well founded, and was conformable to the treaty, that the court make such order for the disposal of the said vessel, cargo and slaves as might best enable the United States in all respect to comply with their treaty stipulations, and preserve the public faith inviolate. But if it should be made to appear, that the persons described as slaves, were negroes and persons of color, who had been transported from Africa, in violation of the laws of the United States, and brought within the United States, contrary to the same laws, the attorney, in behalf of the United States, claimed, that in such case, the court would make such further order in the premises, as would enable the United States, if deemed expedient, to remove such persons to the coast of Africa, to be delivered there to such agent or agents as might be authorized to receive and provide for them, pursuant to the laws of the United States, in such case provided, or to make such other order as to the court might seem fit, right and proper in the premises.

On the same day, September 19th, 1839, the negroes, by their counsel, filed an answer to the libel of Lieutenant Gedney and others, claiming salvage, and to the claim of Ruiz and Montez, claiming them as slaves, as also to the intervention of the United States, on the application of the minister of Spain; in which they said, that they were natives of Africa, and were born free, and ever since had been, and still of right were and ought to be, free and not slaves; that they were never domiciled in the island of Cuba, or in the dominions of the Queen of Spain, nor subject to the laws thereof. That on or about the 15th day of April 1839, they were, in the land of their nativity, unlawfully kidnapped, and forcibly and wrongfully, by certain persons to them unknown, *who were there unlawfully and piratically engaged in the slave-trade between the coast [*526 of Africa and the island of Cuba, contrary to the will of these respondents, unlawfully, and under circumstances of great cruelty, transported to the island of Cuba, for the unlawful purpose of being sold as slaves, and were there illegally landed for that purpose. That Jose Ruiz, one of the libellants, well knowing all the premises, and confederating with the persons by whom the respondents were unlawfully taken and holden as slaves, and intending to deprive the respondents severally of their liberty, made a pretended purchase of the respondents, except the said Carria, Teme, Kene and Mahgra; and that Pedro Montez, also well knowing all the premises, and confederating with the said persons, for the purpose aforesaid, made a pretended purchase of the said Carria, Teme, Kene and Mahgra; that the pretended purchases were made from persons who had no right whatever to the respondents, or any of them, and that the same were null and void, and conferred no right or title on Ruiz or Montez, or right of control over the respondents, or either of them. That on or about the 28th day of June 1839, Ruiz and Montez, confederating with each other, and with one Ramon Ferrer, now deceased, master of the schooner Amistad, and others of the crew thereof, caused respondents, severally, without law or right, under color of certain false and fraudulent papers by them procured and fraudulently used for that purpose, to be placed by force on board the schooner, to be transported, with said Ruiz and Montez, to some place unknown to the respondents, and there enslaved for life. That the respondents, being treated on board said vessel, by said Ruiz and Montez and their confederates,

with great cruelty and oppression, and being of right free, as aforesaid, were incited by the love of liberty natural to all men, and by the desire of returning to their families and kindred, to take possession of said vessel, while navigating the high seas, as they had a right to do, with the intent to return therein to their native country, or to seek an asylum in some free state, where slavery did not exist, in order that they might enjoy their liberty under the protection of its government; that the schooner, about the 26th of August 1839, arrived, in the possession of the respondents, at Culloden Point, near Montauk, and was there anchored near the shore of Long Island, *527] within *hailing distance thereof, and within the waters and territory of the state of New York; that the respondents, Cinque, Carlee, Dammah, Baah, Monat, Nahguis, Quato, Con, Fajanah, Berrie, Gabbo, Fouleaa, Kimbo, Faquannah, Cononia, otherwise called Ndzarbla, Yaboi, Burnah 1st, Shuma, Fawne, Peale, Ba and Sheele, while said schooner lay at anchor as aforesaid, went on shore, within the state of New York to procure provisions and other necessaries, and while there, in a state where slavery is unlawful and does not exist, under the protection of the government and laws of said state, by which they were all free, whether on board of said schooner or on shore, the respondents were severally seized, as well those who were on shore as aforesaid, as those who were on board of and in possession of said schooner, by Lieutenant Gedney, his officers and crew, of the United States brig Washington, without any lawful warrant or authority whatever, at the instance of Ruiz and Montez, with the intent to keep and secure them as slaves to Ruiz and Montez, respectively, and to obtain an award of salvage therefor from this honorable court, as for a meritorious act. That for that purpose, the respondents were, by Lieutenant Gedney, his officers and crew, brought to the port of New London; and while there, and afterwards, under the subsequent proceedings in this honorable court, taken into the custody of the marshal of said district of Connecticut, and confined and held in the jails in the cities of New Haven and Hartford, respectively, as aforesaid. Wherefore, the respondents prayed, that they might be set free, as they or right were and ought to be, and that they be released from the custody of the marshal, under the process of this honorable court, under which, or under color of which, they were holden as aforesaid.

Jose Antonio Tellincas, and Aspe and Laca, subjects of Spain, and merchants of Cuba, presented claims for certain merchandize which was on board the Amistad, when taken possession of by Lieutenant Gedney; denying all claims to salvage, and asking that the property should be restored to them.

On the 23d day of January, the district judge made a decree, having taken into his consideration all the libels, claims and the suggestion of the district-attorney of the United States, and the claim preferred by him that *528] the negroes should be delivered to *the Spanish authorities, the negroes to be sent by them to Cuba, or that the negroes should be placed under the authority of the President of the United States, to be transported to Africa. The decree rejected the claim of Green and others to salvage, with costs. The claim of Lieutenant Gedney and others to salvage on the alleged slaves, was dismissed. The libels and claims of Ruiz and Montez, being included under the claim of the minister of Spain, were

ordered to be dismissed, with costs taxed against Ruiz and Montez respectively. "That that part of the claim of the minister of Spain which demands the surrender of Cinques and others, who are specifically named in the answer filed as aforesaid, be dismissed, without cost." That the claim of the vice-consul of Spain, demanding the surrender to the Spanish government of Antonio, a slave owned by the heirs of Captain Ferrer, should be sustained ; and ordered that Antonio should be delivered to the government of Spain, or its agent, without costs. The claims of Tellincas, and Aspe and Laca, for the restoration of the goods specified by them, being part of the cargo of the Amistad, was sustained, and that the same goods be restored to them, deducting one-third of the gross appraised value of them, which was allowed as salvage to the officers and crew of the Washington. A like salvage of one-third of the gross value of the Amistad, and the other merchandize on board of her, was also adjudged to the salvors. The costs were to be deducted from the other two-thirds.

"And whereas, the duly-accredited minister of Spain, resident in the United States, hath, in behalf of the government of Spain, for the owners of said schooner, and the residue of said goods, claimed that the same be restored to that government, for the said owners, they being Spanish subjects, under the provisions of the treaty subsisting between the United States and Spain : And whereas, it hath been made to appear to this court, that the said schooner is lawfully owned by the subjects of Spain, as also the residue of said goods, not specifically claimed : And whereas, the aforesaid Don Pedro Montez and Jose Ruiz have in person ceased to prosecute their claim as specified in their respective libels, and their said claims fall within the demand *and claim of the Spanish minister, made as aforesaid, And whereas, the seizure of the said schooner and goods by the said [*529 Thomas R. Gedney and others, was made on the high seas, in a perilous condition, and they were first brought into the port of New London, within the district of Connecticut, and libelled for salvage." The decree then proceeded to adjudge to Lieutenant Gedney and others, as salvage, one-third of the gross proceeds of the vessel and cargo, according to an appraisement which had been made thereof ; and, if not paid, directed the property to be sold, and that proportion of the gross proceeds of the sale to be paid over to the captors, the residue, after payment of all costs, to be paid to the respective owners of the same.

Upon the answers of the negroes, and the representations of the district-attorney of the United States, and of Montez and Ruiz, the decree proceeded : "This court having fully heard the parties appearing, with their proofs, do find, that the respondents, severally answering as aforesaid, are each of them natives of Africa, and were born free, and ever since have been, and still of right are free, and not slaves, as is in said several libels claims or representations alleged or surmised ; that they were never domiciled in the Island of Cuba, or the dominions of the Queen of Spain, or subject to the laws thereof ; that they were severally kidnapped in their native country, and were, in violation of their own rights, and of the laws of Spain, prohibiting the African slave-trade, imported into the island of Cuba, about the 12th June 1839, and were there unlawfully held and transferred to the said Ruiz and Montez, respectively ; that said respondents were, within fifteen days after their arrival at Havana, aforesaid, by said

Ruiz and Montez, put on board said schooner Amistad, to be transported to some port in said island of Cuba, and there unlawfully held as slaves ; that the respondents, or some of them, influenced by the desire of recovering their liberty, and of returning to their families and kindred in their native country, took possession of said schooner Amistad, killed the captain and cook, and severely wounded said Montez, while on her voyage from Havana, as aforesaid, and that the respondents arrived, in possession of said schooner, at Culloden Point, near Montauk, and there anchored *said schooner *530] on the high seas, at the distance of half a mile from the shore of Long Island, and were there, while a part of the respondents were, as is alleged in their said answer, on shore, in quest of water and other necessaries, and about to sail in said schooner for the coast of Africa, seized by said Lieutenant Gedney, and his officers and crew, and brought into the port of New London, in this district. And this court doth further find, that it hath ever been the intention of the said Montez and Ruiz, since the said Africans were put on board the said schooner, to hold the said Africans as slaves ; that at the time when the said Cinque and others, here making answer, were imported from Africa, into the dominions of Spain, there was a law of Spain prohibiting such importations, declaring the persons so imported to be free ; that said law was in force when the claimants took the possession of the said Africans and put them on board said schooner, and the same has ever since been in force."

The decree of the district court recited the decree of the government of Spain, of December 1817, prohibiting the slave-trade, and declaring all negroes brought into the dominions of Spain by slave-traders to be free ; and enjoining the execution of the decree on all the officers of Spain in the dominions of Spain.

The decree of the district court proceeded : "And this court doth further find, that when the said Africans were shipped on board the said schooner, by the said Montez and Ruiz, the same were shipped under the passports signed by the governor-general of the Island of Cuba, in the following words, viz :

Description.
Size.
Age.
Color.
Hair.
Forehead.
Eyebrows.
Eyes.
Nose.
Mouth.
Beard.
Peculiar signs.

Havana, June 22d, 1839.

I grant permission to carry three black *ladinos*, named Juana, Francisco, and Josefa, property of Dr. Pedro Montez, to Puerto Principe, by sea. They must present themselves to the respective territorial judge with this permit.

Duty, 2 reals. ESPLETA.

(Indorsed)—Commander of Matria.

Let pass, in the schooner Amistad, to Guanaja, Ferrer, master. Havana, June 27th, 1839.

MART. & Co.

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*Havana, June 26th, 1839.

I grant permission to carry forty-nine black *ladinos*, named Antonio, Simon, Lucas, Jose, Pedro, Martin, Manuel, Andrios, Edwardo, Celedernnio, Bartolo, Raman, Augustin, Evaristo, Casimero, Meratio, Gabriel, Santome, Ecclesiastico, Pasenal, Stanislao, Desiderio, Nicolas, Estevan, Tomas, Cosme, Luis, Bartolo, Julian, Federico, Saturdino, Ladislas, Celestino, Epifano, Fronerie, Venaniro, Feligre, Francisco, Hypolito, Benito, Isdoro, Vicente, Dioniceo, Apolino, Esequiel, Leon, Julio, Hipolito y Raman, property of Dr. Jose Ruiz, to Puerto Principe, by sea. They must present themselves with this permit to the respective territorial judge.

Description.
Size.
Age.
Color.
Hair.
Forehead.
Eyebrows.
Eyes.
Nose.
Mouth.
Beard.
Peculiar signs.

ESPLETA.

Duty, 2 reals.

(Indorsed) Commander of Matria.

Let pass, in the schooner Amistad, to Guanaja, Ferrer, master. Havana, June 27th, 1839.

MART. & Co.

"Which said passports do not truly describe the said persons shipped under the same. Whereupon, the said claim of the minister of Spain, as set forth in the two libels filed in the name of the United States, by the said district-attorney, for and in behalf of the government of Spain and her subjects, so far as the same relate to the said Africans named in said claim, be dismissed. And upon the libel filed by said district-attorney, in behalf of the United States, claiming the said Africans libelled as aforesaid, and now in the custody of the marshal of the district of Connecticut, under and by virtue of process issued from this court, that they may be delivered to the president of the United States to be transported to Africa: It is decreed, that the said Africans now in the custody of said marshal, and libelled and claimed as aforesaid (excepting Antonio Ferrer), be delivered to the president of the United States, by the marshal of the district of Connecticut, to be by him transported to Africa, in pursuance of *the law of congress, [*532
passed March 3d, 1819, entitled 'an act in addition to the acts prohibiting the slave-trade.'"

After the decree was pronounced, the United States, "claiming in pursuance of a demand made upon them by the duly-accredited minister of her Catholic Majesty, the Queen of Spain, to the United States, moved an appeal from the whole and every part of the said decree, except the part of the same in relation to the slave Antonio, to the circuit court" of Connecticut. Antonio Tellincas, and Aspe and Laca, claimants, &c., also appealed from the decree to the circuit court, except for so much of the decree as sustained their claims to the goods, &c.

The Africans, by their African names, moved in the circuit court, in April 1840, that so much of the appeal of the district-attorney of the United States, from so much of the decree of the district court as related to them severally, might be dismissed; "because they say, that the United States

do not claim, nor have they ever claimed, any interest in the appellees, respectively, or either of them, and have no right, either by the law of nations, or by the constitution or laws of the United States, to appear in the courts of the United States, to institute or prosecute claims to property, in behalf of the subjects of the Queen of Spain, under the circumstances appearing on the record in this case; much less to enforce the claims of the subject of a foreign government, to the persons of the said appellees, respectively, as the slaves of the said foreign subjects, under the circumstances aforesaid." The circuit court refused the motion.

The circuit court affirmed the decree of the district court, *pro formâ*, except so far as respected the claims of Tellincas, and Aspe and Laca.

After this decree of the circuit court, the United States, claiming in pursuance of a demand made upon them by the duly-accredited minister of her Catholic Majesty, the Queen of Spain, to the United States, moved an appeal from the whole and every part of the decree of the court, affirming the decree of the district court, to the supreme court of the United States, to be holden at the city of Washington, on the second Monday of January, A. D. 1841; and it was allowed.

*533] *The court, as far as respected the decree of the district court allowing salvage on the goods on board the Amistad, continued the case, to await the decision of the supreme court, on that part of the decree appealed from.

The circuit court, in the decree, proceeded to say, that "they had inspected certain depositions and papers remaining as of record in said circuit court, and to be used as evidence, before the supreme court of the United States, on the trial of said appeal." Among the depositions, were the following:

"I, Richard Robert Madden, a British subject, having resided for the last three years and upwards, at Havana, where I have held official situations under the British government, depose and say, that I have held the office of superintendent of liberated Africans, during that term, and still hold it; and have held for the term of one year, the office there, of British commissioner, in the mixed court of justice. The duties of my office and of my avocation, have led me to become well acquainted with Africans recently imported from Africa. I have seen and had in my charge many hundreds of them. I have also seen the Africans in the custody of the marshal of the district of Connecticut, except the small children. I have examined them and observed their language, appearance and manners; and I have no doubt of their having been, very recently, brought from Africa. To one of them, I spoke, and repeated a Mohammedan form of prayer, in the Arabic language; the man immediately recognised the language, and repeated a few words of it, after me, and appeared to understand it, particularly the words '*Allah akbar*,' or God is great. The man who was beside this negro, I also addressed in Arabic, saying, '*salaam alikoem*,' or peace be to you; he immediately, in the customary oriental salutations, replied, '*alikoem salaam*,' or peace be on you. From my knowledge of oriental habits, and of the appearance of the newly-imported slaves in Cuba, I have no doubt of those negroes of the Amistad being *bonâ fide* Bozal negroes, quite newly imported from Africa. I have a full knowledge of the subject of slavery—slave-trade in Cuba; and I know that no law exists, or has existed, since the year 1820, that sanctions the

introduction of negroes into the island of Cuba, from Africa, for the purpose of making slaves, or being held in slavery; and that *all such Bozal negroes, as those recently imported are called, are legally free; [*534 and no law, common or statute, exists there, by which they can be held in slavery. Such Africans, long settled in Cuba, and acclimated, are called *ladinos*, and must have been introduced before 1820, and are so called, in contradistinction to the term *creole*, which is applied to the negroes born in the island. I have seen, and now have before me, a document, dated 26th June 1839, purporting to be signed by Ezpeleta, who is captain-general of the island, to identify which, I have put my name to the left-hand corner of the document, in presence of the counsel of the Africans; this document, or "*traspasso*," purporting to be a permit granted to Don I. Ruiz, to export from Havana to Puerto Principe, forty-nine negroes, designated by Spanish names, and called therein *ladinos*, a term totally inapplicable to newly-imported Africans. I have seen, and now have before me, another document, dated 22d June 1839, and signed in the same manner, granted to Don Pedro Montez, for the removal of three negro children from Havana to Puerto Principe, also designated by Spanish names, and likewise called '*ladinos*,' and wholly inapplicable to young African children, who could not have been acclimated, and long settled in the island; which document, I have identified in the same manner as the former. To have obtained these documents from the governor, for *bonâ fide* Bozal negroes, and have described them in the application for it, as *ladinos*, was evidently a fraud; but nothing more than such an application and the payment of the necessary fees would be required to procure it, as there is never any inquiry or inspection of the negroes, on the part of the governor, or his officer, nor is there any oath required from the applicant. I further state that the above documents are manifestly inapplicable to the Africans of the Amistad I have seen here and in New Haven; but such documents are commonly obtained by similar applications at the Havana, and by these means, the negroes recently and illegally introduced, are thus removed to the different ports of the island, and the danger obviated of their falling in with English cruisers, and then they are illegally carried into slavery. One of the largest dealers and importers of the island of Cuba, in African slaves, is the notorious house of Martines & Co., of Havana; and for years past, as at present, they have *been deeply engaged in this traffic; and the Bozal Afri- [*535 cans, imported by these and all other slave-traders, when brought to the Havana, are immediately taken to the barracoons, or slave-marts; five of which are situated in the immediate vicinity of the governor's county house, about one mile and a half from the walls of Havana; and from these barracoons, they are taken and removed to the different parts of the island, when sold; and having examined the indorsements on the back of the *traspasso*, or permits for the removal of the said negroes of the Amistad, the signature to that indorsement appears to be that of Martines & Co.; and the document purports to be a permit or pass for the removal of the said negroes. The handwriting of Martines & Co., I am not acquainted with. These barracoons, outside the city walls, are fitted up exclusively for the reception and sale of Bozal negroes; one of these barracoons or slave-marts, called *la miserecordia*, or 'mercy,' kept by a man, named Riera, I visited the 24th September last, in company with a person well acquainted with

this establishment; and the factor or *major domo* of the master, in the absence of the latter, said to me, that the negroes of the Amistad had been purchased there; that he knew them well; that they had been bought by a man from Puerto Principe, and had been embarked for that place; and speaking of the said negroes, he said, '*che lastima*,' or what pity it is, which rather surprised me; the man further explained himself, and said, his regret was for the loss of so many valuable Bozals, in the event of their being emancipated in the United States. One of the houses most openly engaged, and notoriously implicated in the slave-trade transactions, is that of Martines & Co.; and their practice is, to remove their newly-arrived negroes from the slave ships to these barracoons, where they commonly remain two or three weeks, before sold, as these negroes of the Amistad, illegally introduced by Martines & Co., were, in the present instance, as is generally reported and believed in the Havana. Of the Africans which I have seen and examined, from the necessity which my office imposes on me at the Havana, of assisting at the registry of the newly-imported Bozals, emancipated by the mixed court, I can speak with tolerable certainty of the ages of these people, with the exception of the children, whom *have not seen. Sa, about 17; Ba, 21; Luckawa, 19; Tussi, 30; Beli, 18; Shuma, 26; Nama, 20; Tenquis, 21; the others, I had not time to take a note of their ages. With respect to the mixed commission, its jurisdiction extends only to cases of captured negroes brought in by British or Spanish cruisers; and notwithstanding the illegalities of the traffic in slaves, from twenty to twenty-five thousand slaves have been introduced into the island, during the last three years; and such is the state of society, and of the administration of the laws there, that hopeless slavery is the inevitable result of their removal into the interior."

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On his cross-examination, the witness stated, that he was not acquainted with the dialects of the African tribes, but was slightly acquainted with the Arabic language. Lawful slaves of the island are not offered for sale generally, nor often placed in the barracoons, or man-marts. The practice in Havana is to use the barracoons "for Bozal negroes only." Barracoons are used for negroes recently imported, and for their reception and sale. The native language of the Africans is not often continued for a long time, on certain plantations. "It has been to me a matter of astonishment, at the shortness of time in which the language of the negroes is disused, and the Spanish language adopted and acquired. I speak this, from a very intimate knowledge of the condition of the negroes in Cuba, from frequent visits to plantations, and journeys in the interior; and on this subject, I think I can say, my knowledge is as full as any person's can be." "There are five or six barracoons within pistol-shot of the country residence of the captain-general of Cuba. On every other part of the coast where the slave-trade is carried on, a barracoon or barracoons must likewise exist. They are a part of the things necessary to the slave-trade, and are for its use only, for instance, near Matanzas, there is a building or shed of this kind and used for this purpose. Any negroes landed in the island since 1820, and carried into slavery, have been illegally introduced; and the transfer of them under false names, such as calling Bozal, *ladinos*, is, necessarily, a fraud. Unfortunately, there is no interference on the part of the local authorities; they connive at it, and collude with the slave-traders; the governor alone,

at the Havana, receiving a *bounty or impost on each negro thus illegally introduced, of $10 a head. As to the mixed commission, once the negroes clandestinely introduced are landed, they no longer have cognisance of the violation of the treaty; the governor has cognisance of this and every other bearing of the Spanish law, on Spanish soil. This head-money has not the sanction of any Spanish law for its imposition; and the proof of this is, it is called a voluntary contribution."

Also, a statement, given by the district-attorney, W. S. Holabird, Esq., of what was made to him by A. G. Vega, Esq., Spanish consul, January 10th, 1840: "That he is a Spanish subject; that he resided in the island of Cuba several years; that he knows the laws of that island on the subject of slavery; that there was no law that was considered in force in the island of Cuba, that prohibited the bringing in African slaves; that the court of mixed commissioners had no jurisdiction, except in cases of capture on the sea; that newly-imported African negroes were constantly brought to the island, and after landing, were *bonâ fide* transferred from one owner to another, without any interference by the local authorities or the mixed commission, and were held by the owners, and recognised as lawful property; that slavery was recognised in Cuba, by all the laws that were considered in force there; that the native language of the slaves was kept up on some plantations, for years. That the barracoons are public markets, where all descriptions of slaves are sold and bought; that the papers of the Amistad are genuine, and are in the usual form; that it was not necessary to practise any fraud, to obtain such papers from the proper officers of the government; that none of the papers of the Amistad are signed by Martines, spoken of by R. R. Madden in his deposition; that he (Martines) did not hold the office from whence that paper issued."

Also, a deposition of James Ray, a mariner on board of the Washington, stating the circumstances of the taking possession of the Amistad, and the Africans, which supported the allegations in the several libels, in all essential circumstances.

The documents exhibited as the passports of the Spanish authorities at Havana, and other papers relating to the Amistad, and her clearance from Havana, were also annexed to the decree of the circuit court, in the original Spanish. Translations of all *of these which were deemed of importance in the cause, are given in the decree of the district court. [*538

Sullivan Haley stated in his deposition, that he heard Ruiz say, that "none of the negroes could speak Spanish; they are just from Africa."

James Covey, a colored man, deposed, that "he was born at Berong-Mendi country; left there seven and a half years ago; was a slave, and carried to Lumboko. All these Africans were from Africa. Never saw them until now. I could talk with them. They appeared glad, because they could speak the same language. I could understand all but two or three. They say, they from Lumboko; three moons. They all have Mendi names, and their names all mean something; Carle, means bone; Kimbo, means cricket. They speak of rivers which I know; said they sailed from Lumboko; two or three speak different language from the others; the Timone language. Say-ang-wa rivers spoken of; these run through the Vi country. I learned to speak English, at Sierre Leone. Was put on board a man-of-war, one year and a half. They all agree as to where they sailed

form. I have no doubt they are Africans. I have been in this country six months; came in a British man-of-war; have been in this town (New Haven) four months, with Mr. Bishop; he calls on me for no money, and do not know who pays my board. I was stolen by a black man, who stole ten of us. One man carried us two months' walk. Have conversed with Sinqua; Barton has been in my town, Gorang. I was sailing for Havana, when the British man-of-war captured us." The testimony of Cinque and the negroes of the Amistad, supported the statements in their answers.

The respondents also gave in evidence the "treaty between Great Britain and Spain, for the abolition of the slave-trade, signed at Madrid, 23d September 1817."

The case was argued, for the United States, by *Gilpin*, Attorney-General; and by *Baldwin* and *Adams*, for the appellees; *Jones*, on the part of Lieutenant Gedney and others, of the United States brig Washington, was not required by the court to argue the claims to salvage.

*539] *Gilpin*, Attorney-General, for the United States, reviewed the evidence, as set out in the record, of all the facts connected with the case, from the first clearance of the schooner Amistad, at Havana, on the 18th May 1838, down to the 23d January 1840, when the final decree of the district court of the United States for the district of Connecticut, was rendered.

The attorney-general proceeded to remark, that on the 23d January 1840, the case stood thus: The vessel, cargo and negroes were in possession of the marshal, under process from the district court, to answer to five separate claims; those of Lieutenant Gedney, and Messrs. Green & Fordham for salvage; that of the United States, at the instance of the Spanish minister, for the vessel, cargo and negroes, to be restored to the Spanish owners, in which claim those of Messrs. Ruiz and Montez were merged; that of the Spanish vice-consul, for the slave Antonio, to be restored to the Spanish owner; and that of Messrs. Tellincas, and Aspe and Laca, for the restoration of a part of the cargo belonging to them. The decree of the district court found, that the vessel and the goods on board, were the property of the Spanish subjects, and that the passports under which the negroes were shipped at Havana, were signed by the governor-general of Cuba. It denied the claims of Lieutenant Gedney, and Messrs. Green and Fordham, to salvage on the slaves, but allowed the claims of the officers and crew of the Washington to salvage on the Amistad, and on the merchandize on board of that vessel. It also decreed, that the residue of the goods, and the vessel, should be delivered to the Spanish minister, to be restored to the Spanish owners; and that the slave Antonio should be delivered to the Spanish vice-consul, for the same purpose. As to the negroes, claimed by Ruiz and Montes, it dismissed the claims of those persons, on the ground, that they were included under that of the minister of Spain. The libel of the United States, claiming the delivery of the negroes to the Spanish minister, was dismissed, on the ground, that they were not slaves, but were kidnapped and imported into Cuba; and that at the time they were so imported, there was a law of Spain declaring persons so imported to be free. The alternative prayer of the United States, claiming the delivery of the negroes, to be transported to Africa, was granted.

As soon as this decree was made, an appeal was taken by the *United States to the circuit court, from the whole of it, except so far as it related to Antonio. At the succeeding term of the circuit court, the negroes moved that the appeal of the United States might be dismissed, on the ground, that they had no interest in the negroes; and also, on the ground, that they had no right to prosecute claims to property in behalf of subjects of the Queen of Spain. That motion, however, was refused by the circuit court, which proceeded to affirm the decree of the district court, on the libel of the United States. It is from this decree of the circuit court, that the present appeal to the supreme court is prosecuted. [*540

Was the decree of the circuit court correct? The state of the facts, as found by the decree, and not denied, was this: The vessel and the goods on board, were the property of Spanish subjects, in Havana, on the 27th June 1839. At that time, slavery was recognised and in existence in the Spanish dominions. The negroes in question are certified, at that time, in a document signed by the governor-general of Cuba, to be *ladinos* negroes —that is, slaves—the property of Spanish subjects. As such, permission is given by the governor-general, to their owners, to take them by sea, to Puerto Principe, in the same island. The vessel, with these slaves, thus certified, on board, in charge of their alleged owners, regularly cleared and sailed from Havana, the documentary evidence aforesaid, and the papers of the vessel being also on board. During this voyage, the negroes rose, killed the master, and took possession of the vessel. On the 26th August, the vessel, cargo and negroes were rescued and taken on the high seas, by a public officer of the United States, and brought into a port of the United States, where they await the decision of the judicial tribunals.

In this position of things, the minister of Spain demands that the vessel, cargo and negroes be restored, pursuant to the 9th article of the treaty of 27th October 1795, which provides (1 Laws U. S. 268), that "all ships and merchandize of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered into the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due *and sufficient proof shall be made concerning the property thereof." The only inquiries, then, that present themselves, are: 1. Has "due and sufficient proof concerning the property thereof" been made? 2. If so, have the United States a right to interpose in the manner they have done, to obtain its restoration to the Spanish owners? If these inquiries result in the affirmative, then the decree of the circuit court was erroneous, and ought to be reversed. [*541

I. It is submitted, that there has been due and sufficient proof concerning the property, to authorize its restoration. It is not denied, that, under the laws of Spain, negroes may be held as slaves, as completely as they are in any of the states of this Union; nor will it be denied, if duly proved to be such, they are subject to restoration, as much as other property, when coming under the provisions of this treaty. Now, these negroes are declared, by the certificates of the governor-general, to be slaves, and the property of the Spanish subjects therein named. That officer (1 White's New Rec. 369, 371; 8 Pet. 310) is the highest functionary of the government in Cuba;

his public acts are the highest evidence of any facts stated by him, within the scope of his authority. It is within the scope of his authority, to declare what is property, and what are the rights of the subjects of Spain, within his jurisdiction, in regard to property.

Now, in the intercourse of nations, there is no rule better established than this, that full faith is to be given to such acts—to the authentic evidence of such acts. The question is not, whether the act is right or wrong; it is, whether the act has been done, and whether it is an act within the scope of the authority. We are to inquire only whether the power existed, and whether it was exercised, and how it was exercised; not whether it was rightly or wrongly exercised. The principle is universally admitted, that, wherever an authority is delegated to any public officer, to be exercised at his discretion, under his own judgment, and upon his own responsibility, the acts done in the appropriate exercise of that authority, are binding as to the subject-matter. Without such a rule, there could be no peace or comity
*542] among nations; all harmony, all mutual *respect, would be destroyed; the courts and tribunals of one country would become the judges of the local laws and property of others. Nor is it to be supposed, that so important a principle would not be recognised by courts of justice. They have held, that, whether the act of the foreign functionary be executive, legislative or judicial, it is, if exercised within its appropriate sphere, binding as to the subject-matter; and the authentic record of such act is full and complete evidence thereof. In the case of *Marbury* v. *Madison*, 1 Cranch 170, this court held, that a commission was conclusive evidence of an executive appointment; and that a party from whom it was withheld might obtain it through the process of a court, as being such evidence of his rights. In the case of *Thompson* v. *Tolmie*, 2 Pet. 167, this court sustained the binding and sufficient character of a decision, made by a competent tribunal, and not reversed, whether that decision was in itself right or wrong. In the case of the *United States* v. *Arredondo*, 6 Ibid. 719, the whole doctrine on this subject is most forcibly stated. Indeed, nothing can be clearer than the principles thus laid down; nor can they apply more directly to any case than the present. Here is the authentic certificate or record of the highest officer known to the Spanish law, declaring, in terms, that these negroes are the property of the several Spanish subjects. We have it countersigned by another of the principal officers. We have it executed and delivered, as the express evidence of property, to these persons. It is exactly the same as that deemed sufficient for the vessel and for the cargo. Would it not have been complete and positive evidence in the island of Cuba? If so, the principle laid down by this court makes it such here.

But this general principle is strengthened by the particular circumstances of the case. Where property on board of a vessel is brought into a foreign port, the documentary evidence, whether it be a judicial decree, or the ship's papers, accompanied by possession, is the best evidence of ownership, and that to which courts of justice invariably look. In the case of *Bernadi* v. *Motteux*, Doug. 575, Lord MANSFIELD laid down the rule, that a decree of a foreign court was conclusive as to the right of property under it. In that of *The Virgilantia*, 1 Rob. 3, 11, the necessity or propriety of producing the
*543] ship's papers, as the first *evidence of her character and property, and of ascertaining her national character from her passport, is expressly

recognised. In that of *The Cosmopolite*, 3 Rob. 269, the title of the claimant, who was a Dane, to the vessel, was a decree of a French court against an American vessel; the court refused to inquire into the circumstances of the condemnation, but held the decree sufficient evidence for them. In that of *The Sarah*, 3 Rob. 266, the captors of a prize applied to be allowed to give proof of the property being owned by persons other than those stated in the ship's documents, but it was refused. In that of *The Henrick and Maria*, 4 Rob. 43, the very question was made, whether the court would not look into the validity of a title, derived under a foreign court of admiralty, and it was refused.

These principles are fully sustained by our own courts. In the case of *The Resolution*, 2 Dall. 22–3, possession of property on board of a vessel is held to be presumptive evidence of ownership; and the ship's papers, bills of lading, and other documents, are *primâ facie* evidence of the facts they speak. It is on this evidence that vessels are generally acquitted or condemned. In that of *The Ann Green*, 1 Gallis. 281–84, it is laid down as the rule, that the first and proper evidence in prize cases is the ship's papers; and that only in cases of doubt, is further testimony to be received. The court there say, that as a general rule, they would pronounce for the inadimissibility of such further evidence. So, in that of *The Diana*, 2 Gallis. 97, the general rule laid down is, that no claim is to be admitted in opposition to the ship's papers; the exceptions stand upon very particular grounds. In that of *Ohl* v. *Eagle Insurance Company*, 4 Mason 172, parol evidence was held not to be admissible to contradict a ship's papers. In that of *McGrath* v. *The Candelero*, Bee 60, a decree of restitution in a foreign court of admiralty was held to be full evidence of the ownership, and such as was to be respected in all other countries. In that of *Catlett* v. *Pacific Insurance Company*, 1 Paine 612, the register was held to be conclusive evidence of the national character of the vessel; and a similar rule was held to exist in regard to a pass, in the case of *Barker* v. *Phœnix Insurance Company*, 8 Johns. 307.

Similar principles have been adopted in this court. *The decree of a foreign court of admiralty, on a question of blockade, was [*544 allowed in the case of *Croudson* v. *Leonard*, 4 Cranch 434, to be contradicted in the court below; but this court reversed that decision, and held it to be conclusive. In that of *The Mary*, 9 Cranch 142, this court sustained the proof of property founded on the register, against a decree of a foreign court of admiralty. In that of *The Pizarro*, 2 Wheat. 227, the court look to the documentary evidence, as that to be relied on to prove ownership; and although the papers were not strictly correct, they still relied on them, in preference to further extraneous proof. Add to all this, the 12th article of the treaty with Spain (1 Laws U. S. 270) which makes passports and certificates evidence of property; and the principle may be regarded as established beyond a question, that the regular documents are the best and primary evidence in regard to all property on board of vessels. This is, indeed, especially the case, when they are merely coasting vessels, or such as are brought in on account of distress, shipwreck or other accident. The injustice of requiring further evidence in such cases, is too apparent, to need any argument on the subject. Nor is it a less settled rule of international law, that when a vessel puts in by reason of distress or any

similar cause, she is not to be judged by the municipal law. The unjust results to which a different rule would lead are most apparent. Could we tolerate it, that if one of our own coasters was obliged to put into Cuba, and had regular coasting papers, the courts of that country should look beyond them, as to proof of property?

If this point be established, is there any difference beetween property in slaves and other property? They existed as property, at the time of the treaty, in, perhaps, every nation of the globe; they still exist as property in Spain and the United States; they can be demanded as property, in the states of this Union to which they fly, and where by the laws they would not, if domiciliated, be property. If, then, they are property, the rules laid down in regard to property extend to them. If they are found on board of a vessel, the evidence of property should be that which is recognised as the best in other cases of property—the vessel's papers, accompanied by pos-
*545] session. In the cases of *The Louis*, *2 Dods. 238, slaves are treated of, by Sir WILLIAM SCOTT, in express terms, as property, and he directed that those taken unlawfully from a foreigner should be restored. In the case of *The Antelope*, 10 Wheat. 119, the decision in the case of *The Louis* is recognised, and the same principle was fully and completely acted upon. It was there conceded (10 Wheat. 124), that possession on board of a vessel was evidence of property. In the case of *Johnson* v. *Tompkins*, 1 Bald. 577, it was held, that, even where it was a question of freedom or slavery, the same rules of evidence prevailed as in other cases relative to the right of property. In the case of *Choat* v. *Wright*, 2 Dev. 289, a sale of a slave, accompanied by delivery, is valid, though there be no bill of sale. And it is well settled, that a title to them is vested by the statute of limitations, as in other cases of property. 5 Cranch 358, 361; 11 Wheat. 361. If, then, the same law exists in regard to property in slaves as in other things; and if documentary evidence, from the highest authority of the country where the property belonged, accompanied with possession, is produced; it follows, that the title to the ownership of this property is as complete as is required by law.

But it is said, that this evidence is insufficient, becase it is, in point of fact, fraudulent and untrue. The ground of this assertion is, that the slaves were not property in Cuba, at the date of the document signed by the governor-general; because they had been lately introduced into that island from Africa, and persons so introduced were free. To this it is answered, that if it were so, this court will not look beyond the authentic evidence under the official certificate of the governor-general; that, if it would, there is not such evidence as this court can regard to be sufficient to overthrow the positive statement of that document; and that, if the evidence were even deemed sufficient to show the recent introduction of the negroes, it does not establish that they were free at the date of the certificate.

1. This court will not look behind the certificate of the governor-general. It does not appear to be alleged, that it is fraudulent in itself. It is found by the district court to have been signed by him, and countersigned
*546] by the officer of the customs. *It was issued by them, in the appropriate exercise of their functions. It resembles an American register or coasting license. Now, all the authorities that have been cited

show, that these documents are received as the highest species of evidence, and that, even if there is error in the proceedings on which they are founded. The correction must be made from the tribunal from which it emanates. Where should we stop, if we were to refuse to give faith to the documents of public officers? All national intercourse, all commerce, must be at an end. If there is error in issuing these papers, the matter must be sent to the tribunals of Spain for correction.

2. But if this court will look behind this paper, is the evidence sufficient to contradict it? The official declaration to be contradicted is certainly of a character not to be lightly set aside in the courts of a foreign country. The question is not, as to the impression we may derive from the evidence; but how far is it sufficient to justify us in declaring a fact, in direct contradiction to such an official declaration. It is not evidence that could be received, according to the established admiralty practice. Seamen (1 Pet. Adm. 211) on board of a vessel cannot be witnesses for one another, in matters where they have a common interest. Again, the principal part of this evidence is not taken under oath. That of Dr. Madden, which is mainly relied upon, is chiefly hearsay; and is contradicted, in some its most essential particulars, by that of other winesses. Would this court be justified, on evidence such as this, in setting aside the admitted certificate of the governor-general? Would such evidence, in one of our own courts, be deemed adequate to set aside a judicial proceeding, or an act of a public functionary, done in the due exercise of his office? How, then, can it be adequate to such an end, before the tribunals of a foreign country, when they pass upon the internal municipal acts of another government; and when the endeavor is made to set them aside, in a matter relating to their own property and people?

3. But admit this evidence to be competent and sufficient; admit these negroes were brought into Cuba, a few weeks before the certificate was given; still, were they not slaves, under the Spanish laws? It is not denied, that negroes imported from *Africa into Cuba, might be slaves. If they are not, it is on account of some special law or decree. [*547
Has such a law been produced in the present case? The first document produced is the treaty with England, of 23d September 1817. But that has no such effect. It promises, indeed, that Spain will take into consideration the means of preventing the slave-trade, and it points out those means, so far as the trade on the coast of Africa is concerned. But it carefully limits the ascertainment of any infringement to two special tribunals, one at Sierra Leone, and the other at Havana. The next is the decree of December 1817, which authorizes negroes, brought in against the treaty, to "be declared free." The treaty of 28th June 1835, which is next adduced, is confined entirely to the slave-trade on the coast of Africa, or the voyage from there. Now, it is evident, that none of these documents show that these negroes were free in Cuba. They had not been "declared free," by any competent tribunal. Even had they been taken actually on board of a vessel engaged in the slave-trade, they must have been adjudicated upon at one of the two special courts, and nowhere else. Can this court, then, undertake to decide this question of property, when it has not even been decided by the Spanish courts; and make such decision, in the face of the certificate of the highest functionary of the island?

It is submitted, then, that if is this court does go behind the certificate of the governor-general, and look into the fact, whether or not these persons were slaves on the 18th June 1839, yet there is no sufficient evidence on which they could adjudge it to be untrue. If this be so, the proof concerning the property is sufficient to bring the case within the intention and provisions of the treaty.

The next question is, did the United States legally intervene to obtain the decree of the court for the restoration of the property, in order that it might be delivered to the Spanish owners, according to the stipulations of the treaty? They did! because the property of foreigners, thus brought under the cognisance of the courts, is, of right, deliverable to the public functionaries of the government to which such foreigners belong; because those functionaries have required the interposition of the United States on their behalf; and because the United States were authorized, *on
*548] that request, to interpose, pursuant to their treaty obligations. That the property of foreigners, under such circumstances, may be delivered to the public functionaries, is so clearly established, by the decisions of this court, that it is unnecessary to discuss the point. In the case (2 Mason 411–12, 463) of *La Jeune Eugenie*, there was a libel of the vessel, as in this case, and a claim interposed be the French consul, and also by the owners themselves. The court there directed the delivery of the property to the public functionary. In that of *The Divina Pastora*, 4 Wheat. 52, the Spanish consul interposed. In that of *The Antelope*, 10 Ibid. 68, there were claims interposed, very much as in this case, by the captain as captor, and by the vice-consuls of Spain and Portugal, for citizens of their respective countries; and by the United States. The court directed their delivery, partly to the consul of Spain, and partly to the United States. It is thus settled, that the public functionaries are entitled to intervene in such cases, on behalf of the citizens of their countries. In the present one, the Spanish minister did so intervene by applying to the United States to adopt, on his behalf, the necessary proceedings; and, upon his doing so, Ruiz and Montez withdrew their separate claims. The United States, on their part, acted as the treaty required. The executive is their agent, in all such transactions, and on him devolved the obligation to see this property restored entire, if due proof concerning it was made. The form of proceeding was already established by precedent and by law. The course adopted was exactly that pursued in the case of *McFadden* v. *The Exchange*, 7 Cranch 116, where a vessel was libelled in a port of the United States. Being a public vessel of a foreign sovereign, which the government was bound to protect, they intervened exactly in the same way. The libel was dismissed, and the vessel restored to the custody of the public officers of France.

It is, therefore, equally clear, that the United States, in this instance, has pursued the course required by the laws of nations; and if the court are satisfied, on the first point, that there is due proof concerning the property, then it ought to be delivered entire, so that it may be restored to the Spanish owners. If this be so, the court below has erred, because it has not decreed any part of *the property to be delivered entire, except
*549] the boy Antonio. From the vessel and cargo, it has deducted the salvage, diminishing them by that amount; and the negroes it has entirely refused to direct to be delivered.

The Amistad.

Baldwin, for the defendants in error.—In preparing to address this honorable court, on the questions arising upon this record, in behalf of the humble Africans whom I represent—contending, as they are, for freedom and for life, with two powerful governments arrayed against them—it has been to me a source of high gratification, in this unequal contest, that those questions will be heard and decided by a tribunal, not only elevated far above the influence of executive power and popular prejudice, but, from its very constitution, exempt from liability to those imputations to which a court, less happily constituted, or composed only of members from one section of the Union, might, however unjustly, be exposed.

This case is not only one of deep interest in itself, as affecting the destiny of the unfortunate Africans whom I represent, but it involves considerations deeply affecting our national character in the eyes of the whole civilized world, as well as questions of power on the part of the government of the United States, which are regarded with anxiety and alarm by a large portion of our citizens. It presents, for the first time, the question, whether that government, which was established for the promotion of justice, which was founded on the great principles of the revolution, as proclaimed in the Declaration of Independence, can, consistently with the genius of our institutions, become a party to proceedings for the enslavement of human beings cast upon our shores, and found, in the condition of freemen, within the territorial limits of a free and sovereign state?

In the remarks I shall have occasion to make, it will be my design to appeal to no sectional prejudices, and to assume no positions in which I shall not hope to be sustained by intelligent minds from the south as well as from the north. Although I am in favor of the broadest liberty of inquiry and discussion—happily secured by our constitution to every citizen, subject only to his individual responsibility to the laws for its abuse; I have ever been of the opinion, that the exercise of that liberty, by *citizens of one state, in regard to the institutions of another, should always be [*550 guided by discretion, and tempered with kindness. Mr. Baldwin here proceeded to state all the facts of the case, and the proceedings in the district and circuit courts, in support of the motion to dismiss the appeal. As no decision was given by the court on the motion, this part of the argument is, necessarily, omitted.

Mr. Baldwin continued, if the government of the United States could appear in any case as the representative of foreigners claiming property in the court of admiralty, it has no right to appear in their behalf, to aid them in the recovery of fugitive slaves, even when domiciled in the country from which they escaped; much less the recent victims of the African slave-trade, who have sought an asylum in one of the free states of the Union, without any wrongful act on our part, or for which, as in the case of the Antelope, we are in any way responsible. The recently-imported Africans of the Amistad, if they were ever slaves, which is denied, were in the actual condition of freedom, when they came within the jurisdictional limits of the state of New York. They came there, without any wrongful act on the part of any officer or citizen of the United States. They were in a state where, not only no law existed to make them slaves, but where, by an express statute, all persons, except fugitives, &c., from a sister state, are declared to be free. They were under the protection of the laws of a state,

which, in the language of the supreme court, in the case of *City of New York* v. *Miln*, 11 Pet. 139, "has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered or restrained by the constitution of the United States."

The American people have never imposed it as a duty on the government of the United States, to become actors in an attempt to reduce to slavery, men found in a state of freedom, by giving extra-territorial force to a foreign slave law. Such a duty would not only be repugnant to the feelings of a large portion of the citizens of the United States, but it would be wholly inconsistent with the fundamental principles of our government, and the purposes *for which it was established, as well as with its *551] policy in prohibiting the slave-trade and giving freedom to its victims. The recovery of slaves for their owners, whether foreign or domestic, is a matter with which the executive of the United States has no concern. The constitution confers upon the government no power to establish or legalize the institutition of slavery. It recognises it as existing, in regard to persons held to service by the laws of the states which tolerate it; and contains a compact between the states, obliging them to respect the rights acquired under the slave laws of other states, in the cases specified in the constitution. But it imposes no duty, and confers no power, on the government of the United States, to act in regard to it. So far as the compact extends, the courts of the United States, whether sitting in a free state or a slave state, will give effect to it. Beyond that, all persons within the limits of a state are entitled to the protection of its laws.

If these Africans have been taken from the possession of their Spanish claimants, and wrongfully brought into the United States by our citizens, a question would have been presented similar to that which existed in the case of *The Antelope*. But when men have come here voluntarily, without any wrong on the part of the government or citizens of the United States, in withdrawing them from the jurisdiction of the Spanish laws, why should this government be required to become active in their restoration? They appear here as freemen. They are in a state where they are presumed to be free. They stand before our courts on equal ground with their claimants; and when the courts, after an impartial hearing, with all parties in interest before them, have pronounced them free, it is neither the duty nor the right of the executive of the United States, to interfere with the decision.

The question of the surrender of fugitive slaves to a foreign claimant, if the right exists at all, is left to the comity of the states which tolerate slavery. The government of the United States has nothing to do with it. In the letter of instructions addressed by Mr. Adams, when secretary of state, to Messrs. Gallatin and Rush, dated November 2d, 1818, in relation to a proposed arrangement with Great Britain, for a more active co-operation in the suppression of the slave-trade, he assigns as a *reason for *552] rejecting the proposition for a mixed commission, "that the disposal of the negroes found on board the slave-trading vessels, which might be condemned by the sentence of the mixed courts, cannot be carried into effect by the United States." "The condition of the blacks being, in this Union, regulated by the municipal laws of the separate states, the government of the United States can neither guaranty their liberty in the states where they

could only be received as slaves, nor control them in the states where they would be recognised as free." Doc. 48, H. Rep. 2 sess. 16th Cong. p. 15.

It may comport with the interest or feelings of a slave state, to surrender a fugitive slave to a foreigner, or, at least, to expel him from their borders. But the people of New England, except so far as they are bound by the compact, would cherish and protect him. To the extent of the compact, we acknowledge our obligation, and have passed laws for its fulfilment. Beyond that, our citizens would be unwilling to go. A state has no power to surrender a fugitive criminal to a foreign government for punishment; because that is necessarily a matter of national concern. The fugitive is demanded for a national purpose. But the question of the surrender of fugitive slaves concerns individuals merely. They are demanded as property only, and for private purposes. It is therefore, a proper subject for the action of the state, and not of the national authorities. The surrender of neither is demandable of right, unless stipulated by treaty. See, as to the surrender of fugitive criminals, 2 Brock. 493; 2 Sumn. 482; 14 Pet. 540; Doc. 199, H. R. 26 Cong. p. 53–70; 10 Am. State Pap. 151–153, 433; 3 Hall's Law Jour. 135. An overture was once made by the government of the United States to negotiate a treaty with Great Britain, for the mutual surrender of fugitive slaves. But it was instantly repelled by the British government. It may well be doubted, whether such a stipulation is within the treaty-making power under the constitution of the United States. "The power to make treaties," says Chief Justice TANEY, 14 Pet. 569, "is given in general terms," "and consequently, it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects *of negotiation and treaty; and which are consistent with the [*553
nature of our institutions, and the distribution of powers between the general and state government." See *Holmes* v. *Jennison*, 14 Pet. 569. But however this may be, the attempt to introduce it is evidence that, unless provided for by treaty, the obligation to surrender was not deemed to exist.

We deny that Ruiz and Montez, Spanish subjects, had a right to call on any officer or court of the United States to use the force of the government, or the process of the law, for the purpose of again enslaving those who have thus escaped from foreign slavery, and sought an asylum here. We deny that the seizure of these persons by Lieutenant Gedney for such a purpose was a legal or justifiable act. How would it be—independently of the treaty between the United States and Spain—upon the principles of our government, of the common law, or of the law of nations? If a foreign slave vessel, engaged in a traffic which by our laws is denounced as inhuman and piratical, should be captured by the slaves, while on her voyage from Africa to Cuba, and they should succeed in reaching our shores, have the constitution or laws of the United States imposed upon our judges, our naval officers, or our executive, the duty of seizing the unhappy fugitives and delivering them up to their oppressors? Did the people of the United States, whose government is based on the great principles of the revolution, proclaimed in the Declaration of Independence, confer upon the federal, executive or judicial tribunals, the power of making our nation accessories to such atrocious violations of human rights? Is there any principle of international law, or law of comity, which requires it? Are our courts bound,

and if not, are they at liberty, to give effect here to the slave-trade laws of a foreign nation ; to laws affecting strangers, never domiciled there, when, to give them such effect, would be to violate the natural rights of men ?

These questions are answered in the negative by all the most approved writers on the laws of nations. 1 Burg. Confl. 741 ; Story, Confl. 92. By the law of France, the slaves of their colonies, immediately on their arrival in France, become free. In the case of **Forbes* v. *Cochrane*, 2 Barn. & Cres. 463, this question is elaborately discussed and settled by the English court of king's bench. By the law of the state of New York, a foreign slave escaping into that state becomes free. And the courts of the United States, in acting upon the personal rights of men found within the jurisdiction of a free state, are bound to administer the laws as they would be administered by the state courts, in all cases in which the laws of the state do not conflict with the laws or obligations of the United States. The United States, as a nation, have prohibited the slave-trade, as inhuman and piratical, and they have no law authorizing the enslaving of its victims. It is a maxim, to use the words of an eminent English judge, in the case of *Forbes* v. *Cochrane*, 2 Barn. & Cres. 448, "that which is called *comitas inter communitates*, cannot prevail in any case, where it violates the law of our own country, the law of nature, or the law of God." 9 Eng. C. L. 149. And that the laws of a nation, *proprio vigore*, have no force beyond its own territories, except so far as respects its own citizens, who owe it allegiance, is too familiarly settled, to need the citation of authorities. See *The Apollon*, 9 Wheat. 366 ; 2 Mason 151–8. The rules on this subject adopted in the English court of admiralty are the same which prevail in their courts of common law, though they have decided in the case of *The Louis*, 2 Dods. 238, as the supreme court did in the case of *The Antelope*, 10 Wheat. 66, that as the slave-trade was not, at that time, prohibited by the law of nations, if a foreign slaver was captured by an English ship, it was a wrongful act, which it would be the duty of the court of admiralty to repair, by restoring the possession. The principle of *amoveas manus*, adopted in these cases, has no application to the case of fugitives from slavery.

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But it is claimed, that if these Africans, though "recently imported into Cuba," were, by the laws of Spain, the property of Ruiz and Montez, the government of the United States is bound by the treaty to restore them ; and that, therefore, the intervention of the executive in these proceedings is proper for that purpose. It has already, it is believed, been shown, that even if the case were within the treaty, the intervention of the executive, as a party before the judicial tribunals, was unnecessary and improper, *since the treaty provides for its own execution by the courts, on the application of the parties in interest. And such a resort is expressly provided in the 20th article of the treaty of 1794 with Great Britain, and in the 26th article of the treaty of 1801, with the French republic, both of which are in other respects similar to the 9th article of the Spanish treaty, on which the attorney-general has principally relied.

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The 6th article of the Spanish treaty has received a judicial construction in the case of *The Santissima Trinidad*, 7 Wheat. 284, where it was decided, that the obligation assumed is simply that of protecting belligerent vessels from capture, within our jurisdiction. It can have no application, therefore, to a case like the present. The 9th article of that treaty provides,

"that all ships and merchandize, of what nature soever, which shall be rescued out of the hands of pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietors, as soon as due and sufficient proof shall be made concerning the property thereof." To render this clause of the treaty applicable to the case under consideration, it must be assumed, that under the term "merchandize" the contracting parties intended to include slaves; and that slaves, themselves the recent victims of piracy, who by a successful revolt, have achieved their deliverance from slavery, on the high seas, and have availed themselves of the means of escape of which they have thus acquired the possession, are to be deemed "pirates and robbers," "from whose hands" such "merchandize has been rescued." It is believed, that such a construction of the words of the treaty is not in accordance with the rules of interpretation which ought to govern our courts; and that when there is no special reference to human beings, as property, who are not acknowledged as such by the law or comity of nations, generally, but only by the municipal laws of the particular nations which tolerate slavery, it cannot be presumed, that the contracting parties intended to include them under the general term "merchandize." As has already been remarked, it may well be doubted, *whether such a stipulation would be within the treaty-making power of the United States. It is to be remembered, [*556 that the government of the United States is based on the principles promulgated in the Declaration of Independence, by the congress of 1776; "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; and that to secure these rights, governments are instituted."

The convention which formed the federal constitution, though they recognised slavery as existing in regard to persons held to labor by the laws of the states which tolerated it, were careful to exclude from that instrument every expression that might be construed into an admission that there could be property in men. It appears by the report of the proceedings of the convention (3 Madison Papers 1428), that the first clause of § 9, art. 1, which provides for the imposition of a tax or duty on the importation of such persons as any of the states, then existing, might think proper to admit, &c., "not exceeding ten dollars for each person," was adopted in its present form, in consequence of the opposition by Roger Sherman and James Madison to the clause as it was originally reported, on the ground, "that it admitted, that there could be property in men;" an idea which Mr. Madison said, "he thought it wrong to admit in the constitution." The words reported by the committee, and striken out on this objection, were: "a tax or duty may be imposed on such migration or importation, at a rate not exceeding the average of the duties laid upon imports." The constitution as it now stands will be searched in vain for an expression recognising human beings as merchandize, or legitimate subjects of commerce. In the case of *New York* v. *Miln*, 11 Pet. 104, 136, Judge BARBOUR, in giving the opinion of the court, expressly declares, in reference to the power "to regulate commerce" conferred on congress by the constitution, that "persons are not the subjects of commerce." Judging from the public sentiment

which prevailed at the time of the adoption of the constitution, it is probable, that the first act of the government, in the exercise of its power to regulate commerce, would have been to prohibit the slave-trade, if it had not been restrained, until 1808, from prohibiting the importation of such
*557] persons as any of the states, *then existing, should think proper to admit. But could congress have passed an act authorizing the importation of slaves as articles of commerce, into any state, in opposition to a law of the state, prohibiting their introduction? If they could, they may now force slavery into every state. For no state can prohibit the introduction of legitimate objects of foreign commerce, when authorized by congress. The United States must be regarded as comprehending free states as well as slave states; states which do not recognise slaves as property, as well as states which do so regard them. When all speak as a nation, general expressions ought to be construed to mean what all understand to be included in them; at all events, what may be included consistently with the law of nations.

The ninth article of the Spanish treaty was copied from the 16th article of the treaty with France, concluded in 1778, in the midst of the war of the revolution, in which the great principles of liberty proclaimed in the Declaration of Independence were vindicated by our fathers. By "merchandize rescued from pirates," the contracting parties must have had in view property, which it would be the duty of the public ships of the United States to rescue from its unlawful possessors. Because, if it is taken from those who are rightfully in possession, the capture would be wrongful, and it would be our duty to restore it. But is it a duty which our naval officers owe to a nation tolerating the slave-trade, to subdue for their kidnappers the revolted victims of their cruelty? Could the people of the United States, consistently with their principles as a nation, have ever consented to a treaty stipulation which would impose such a duty on our naval officers? a duty which would drive every citizen of a free state from the service of his country? Has our government, which has been so cautious as not to oblige itself to surrender the most atrocious criminals, who have sought an asylum in the United States, bound itself, under the term "merchandize," to seize and surrender fugitive slaves?

The subject of the delivery of fugitives was under consideration before and during the negotiation of the treaty of San Lorenzo; and was purposely omitted in the treaty: § 10, Waite's State Papers, 151, 433. Our treaties with Tunis and Algiers contain similar expressions, in which both
*558] parties stipulate *for the protection of the property of the subjects of each, within the jurisdiction of the other. The Algerine regarded his Spanish captive as property; but was it ever supposed, that if an Algerine corsair should be seized by the captive slaves on board of her, it would be the duty of our naval officers, or our courts of admiralty, to re-capture and restore them? The phraseology of the entire article in the treaty, clearly shows that it was intended to apply only to inanimate things, or irrational animals; such as are universally regarded as property. It is "merchandize rescued from the hands of pirates and robbers on the high seas" that is to be restored. There is no provision for the surrender of the pirates themselves. And the reason is, because the article has reference only to those who are "*hostes humani generis*," whom it is lawful for, and

the duty of, all nations to capture and to punish. If these Africans were "pirates" or sea robbers, whom our naval officers might lawfully seize, it would be our duty to detain them for punishment; and then what would become of the "merchandize?"

But they were not pirates, nor in any sense *hostes humani generis.* Cinque, the master-spirit who guided them, had a single object in view. That object was—not piracy or robbery—but the deliverance of himself and his companions in suffering, from unlawful bondage. They owed no allegiance to Spain. They were on board of the Amistad, by constraint. Their object was to free themselves from the fetters that bound them, in order that they might return to their kindred and their home. In so doing, they were guilty of no crime, for which they could be held responsible as pirates. See Bee 273. Suppose, they had been impressed American seamen, who had regained their liberty in a similar manner, would they in that case have been deemed guilty of piracy and murder? Not! in the opinion of Chief Justice MARSHALL. In his celebrated speech in justification of the surrender by President Adams of Nash, under the British treaty, he says: "Had Thomas Nash been an impressed American, the homicide on board the Hermione would most certainly not have been murder. The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death *committed within the United States, in resisting such violence, [*559 would not have been murder." Bee 290.

The United States, as a nation, is to be regarded as a free state. And all men being presumtively free, when "merchandize" is spoken of in the treaty of a free state, it cannot be presumed, that human beings are intended to be included as such. Hence, whenever our government have intended to speak of negroes as property, in their treaties, they have been specifically mentioned, as in the treaties with Great Britain of 1783 and 1814. It was on the same principle, that Judge DRAYTON, of South Carolina, decided, in the case of *Almeida,* who had captured, during the last war, an English vessel with slaves, that the word "property" in the prize act, did not include negroes, and that they must be regarded as prisoners of war, and not sold or distributed as merchandize. 5 Hall's Law Jour. 459. And it was for the same reason, that it was deemed necessary, in the constitution, to insert an express stipulation in regard to fugitives from service. The law of comity would have obliged each state to protect and restore property belonging to a citizen of another, without such stipulation; but it would not have required the restoration of fugitive slaves from a sister state, unless they had been expressly mentioned.

In the interpretation of treaties, we ought always to give such a construction to the words as is most consistent with the customary use of language; most suitable to the subject, and to the legitimate powers of the contracting parties; most conformable to the declared principles of the government; such a construction as will not lead to injustice to others, or in any way violate the laws of nature. These are, in substance, the rules of interpretation as given by Vattel, lib. 2, ch. 17. The construction claimed in behalf of the Spanish libellants, in the present case, is at war with them all.

It would be singular, indeed, if the tribunals of a government which

has declared the slave-trade piracy, and has bound itself by a solemn treaty with Great Britain, in 1814, to make continued efforts "to promote its entire abolition, as a traffic irreconcilable with the principles of humanity and justice," should construe the general expressions of a treaty which, since that period, *has been revised by the contracting parties, as obliging this nation to commit the injustice of treating as property, the recent victims of this horrid traffic; more especially, when it is borne in mind, that the government of Spain, anterior to the revision of the treaty in 1819, had formally notified our government, that Africans were no longer the legitimate objects of trade; with a declaration that "His Majesty felt confident that a measure so completely in harmony with the sentiments of this government, and of all the inhabitants of this republic, could not fail to be equally agreeable to the president." Doc. 48, 2 sess. 16 Cong. p. 8. Would the people of the United States, in 1819, have assented to such a treaty? Would it not have furnished just ground of complaint by Great Britain, as a violation of the 10th article of the treaty of Ghent?

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But even if the treaty, in its terms, were such as to oblige us to violate towards strangers the immutable laws of justice, it would, according to Vattel, impose no obligation. Vattel, c. 1, § 9; lib. 2, c. 12, § 161; c. 17, § 311. The law of nature and the law of nations bind us as effectually to render justice to the African, as the treaty can to the Spaniard. Before a foreign tribunal, the parties litigating the question of freedom or slavery, stand on equal ground. And in a case like this, where it is admitted, that the Africans were recently imported, and consequently, never domiciled in Cuba, and owe no allegiance to its laws, their rights are to be determined by that law which is of universal obligation—the law of nature. If, indeed, the vessel in which they sailed had been driven upon our coast by stress of weather, or other unavoidable cause, and they had arrived here, in the actual possession of their alleged owners, and had been slaves by the law of the country from which they sailed, and where they were domiciled, it would have been a very different question, whether the courts of the United States could interfere to liberate them, as was done at Bermuda by the colonial tribunal, in the case of *The Enterprise*. But in this case, there has been no possession of these Africans by their claimants, within our jurisdiction, of which they have been deprived, by the act of our government or its officers; and neither by the law of comity, nor by force of the treaty, are the *officers or courts of the United States required, or by the principles of our government permitted, to become actors in reducing them to slavery.

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These preliminary questions have been made on account of the important principles involved in them, and not from any unwillingness to meet the question between the Africans and their claimants, upon the facts in evidence, and on those alone, to vindicate their claims to freedom. Suppose, then, the case to be properly here; and that Ruiz and Montez, unprejudiced by the decree of the court below, were at liberty to take issue with the Africans upon their answer, and to call upon this court to determine the question of liberty or property, how stands the case on the evidence before the court?

The Africans, when found by Lieutenant Gedney, were in a free state, where all men are presumed to be free, and were in the actual condition of

freemen. The burden of proof, therefore, rests on those who assert them to be slaves. 10 Wheat. 66 ; 2 Mason 459. When they call on the courts of the United States to reduce to slavery men who are apparently free, they must show some law, having force in the place where they were taken, which makes them slaves, or that the claimants are entitled in our courts to have some foreign law, obligatory on the Africans as well as on the claimants, enforced in respect to them, and that by such foreign law they are slaves. It is not pretended, that there was any law existing in the place where they were found, which made them slaves, but it is claimed, that by the laws of Cuba, they were slaves to Ruiz and Montez; and that those laws are to be here enforced. But before the laws of Cuba, if any such there be, can be applied, to affect the personal *status* of individuals within a foreign jurisdiction, it is very clear, that it must be shown that they were domiciled in Cuba.

It is admitted and proved, in this case, that these negroes are natives of Africa, and recently imported into Cuba. Their domicil of origin is, consequently, the place of their birth, in Africa. And the presumption of law is, always, that the domicil of origin is retained, until the change is proved. 1 Burge's Conflict 34. *The burden of proving the change is cast on him who alleges it. 5 Ves. 787. The domicil of origin prevails, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and acquiring another, as his sole domicil. As it is the will or intention of the party which alone determines what is the real place of domicil which he has chosen, it follows, that a former domicil is not abandoned, by residence in another, if that residence be not voluntarily chosen. Those who are in exile, or in prison, as they are never presumed to have abandoned all hope of return, retain their former domicil. 1 Burge 46. That these victims of fraud and piracy—husbands torn from their wives and families—children from their parents and kindred—neither intended to abandon the land of their nativity, nor had lost all hope of recovering it, sufficiently appears from the facts on this record. It cannot, surely, be claimed, that a residence, under such circumstances, of these helpless beings, for ten days, in a slave barracoon, before they were transferred to the Amistad, changed their native domicil for that of Cuba. [*562

It is not only incumbent on the claimants to prove that the Africans are domiciled in Cuba, and subject to its laws, but they must show that some law existed there, by which "recently imported Africans" can be lawfully held in slavery. Such a law is not to be presumed, but the contrary. Comity would seem to require of us to presume, that a traffic so abhorrent to the feelings of the whole civilized world, is not lawful in Cuba. These respondents having been born free, and having been recently imported into Cuba, have a right to be everywhere regarded as free, until some law obligatory on them is produced, authorizing their enslavement. Neither the law of nature, nor the law of nations, authorizes the slave-trade ; although it was holden in the case of *The Antelope*, that the law of nations did not at that time actually prohibit it. If they are slaves, then, it must be by some positive law of Spain, existing at the time of their recent importation. No such law is exhibited. On the contrary, it is proved by the deposition of Dr. Madden, one of the British commissioners resident at Havana, that

since the year 1820, there has been no such law in force there, either statute or common law.

*563] *But we do not rest the case here. We are willing to assume the burden of proof. On the 14th of May 1818, the Spanish government, by their minister, announced to the government of the United States, that the slave-trade was prohibited by Spain; and by express command of the king of Spain, Don Onis communicated to the president of the United States, the treaty with Great Britain of September 23d, 1817, by which the king of Spain, moved partly by motives of humanity, and partly in consideration of 400,000*l.* sterling, paid to him by the British government, for the accomplishment of so desirable an object, engaged that the slave-trade should be abolished throughout the dominions of Spain, on the 30th May 1820. By the ordinance of the king of Spain, of December 1817, it is directed, that every African imported into any of the colonies of Spain, in violation of the treaty, shall be declared free in the first port at which he shall arrive. By the treaty between Great Britain and Spain, of the 28th of June 1835, which is declared to be made for the purpose of "rendering the means taken for abolishing the inhuman traffic in slaves more effective," and to be in the spirit of the treaty contracted between both powers on the 23d of September 1817, "the slave-trade is again declared, on the part of Spain, to be henceforward totally and finally abolished, in all parts of the world." And by the royal ordinance of November 2d, 1838, the governor and the naval officers having command on the coast of Cuba, are stimulated to greater vigilance to suppress it.

Such, then, being the laws in force in all the dominions of Spain, and such the conceded facts in regard to the nativity and recent importation of these Africans, upon what plausible ground can it be claimed by the government of the United States, that they were slaves in the island of Cuba, and are here to be treated as property, and not as human beings? The only evidence exhibited to prove them slaves, are the papers of the Amistad, giving to Jose Ruiz permission to transport forty-nine *ladinos* belonging to him, from Havana to Puerto Principe; and a like permit to Pedro Montez, to transport three *ladinos*. For one of the four Africans, claimed by Montez (the boy Ka-le), there is no permit at all.

It has been said in an official opinion by the late attorney-general *564] *(Mr. Grundy), that "as this vessel cleared out from one Spanish port to another Spanish port, with papers regularly authenticated by the proper officers at Havana, evidencing that these negroes were slaves, and that the destination of the vessel was to another Spanish port, the government of the United States would not be authorized to go into an investigation for the purpose of ascertaining whether the facts stated in those papers by the Spanish officers are true or not"—"that if it were to permit itself to go behind the papers of the schooner Amistad, it would place itself in the embarrassing condition of judging upon Spanish laws, their force, effect and application to the case under consideration." In support of this opinion, a reference is made to the opinion of this court, in the case of *Arredondo*, 6 Pet. 729, where it is stated to be "a universal principle, that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will

not be disturbed collaterally, for anything done in the exercise of that discretion within the authority conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer, and fraud in the party." The principle thus stated, was applicable to the case then before the court, which related to the validity of a grant made by a public officer; but it does not tend to support the position for which it is cited in the present case. For, in the first place, there was no jurisdiction over these newly-imported Africans, by the laws of Spain, to make them slaves, any more than if they had been white men. The ordinance of the king declared them free. Secondly, there was no intentional exercise of jurisdiction over them for such a purpose, by the officer who granted the permits. And thirdly, the permits were fraudulently obtained, and fraudulently used, by the parties claiming to take benefit of them. For the purposes for which they are attempted to be applied, the permits are as inoperative as would be a grant from a public officer, fraudulently obtained, where the state had no title to the thing granted, and the officer no authority to issue the grant. See 6 Pet. 730; 5 Wheat. 303.

*But it is said, we have no right to place ourselves in the position of judging upon the Spanish laws. How can our courts do otherwise, when Spanish subjects call upon them to onforce rights which, if they exist at all, must exist by force of Spanish laws? For what purpose did the government of Spain communicate to the government of the United States, the fact of the prohibition of the slave-trade, unless it was, that it might be known and acted upon by our courts? Suppose, the permits to Ruiz and Montez had been granted for the express purpose of consigning to perpetual slavery, these recent victims of this prohibited trade, could the government of Spain now ask the government or the courts of the United States, to give validity to the acts of a colonial officer, in direct violation of that prohibition; and thus make us aiders and abetters in what we know to be an atrocious wrong? It may be admitted, that even after such an annunciation, our cruisers could not lawfully seize a Spanish slaver, cleared out as such by the governor of Cuba; but if the Africans on board of her could effect their own deliverance, and reach our shores, has not the government of Spain authorized us to treat them with hospitality, as freemen? Could the Spanish minister, without offence, ask the government of the United States to seize these victims of fraud and felony, and treat them as property, because a colonial governor had thought proper to violate the ordinance of his king, in granting a permit to a slaver? [*565

But in this case, we make no charge upon the governor of Cuba. A fraud upon him is proved to have been practised by Ruiz and Montez. He never undertook to assume jurisdiction over these Africans as slaves, or to decide any question in regard to them. He simply issued, on the application of Ruiz and Montez, passports for *ladino* slaves from Havana to Puerto Principe. When, under color of those passports, they fraudulently put on board the Amistad, Bozals, who by the laws of Spain could not be slaves, we surely manifest no disrespect to the acts of the governor, by giving efficacy to the laws of Spain, and denying to Ruiz and Montez the benefit of their fraud. The custom-house license, to which the name of Espeleta in print was appended, was not a document given or intended to be used as

evidence of property between Ruiz and Montez, and the *Africans; any more than a permit from our custom-house would be to settle conflicting claims of ownership to the articles contained in the manifest. As between the government and the shippers, it would be evidence, if the negroes described in the passport were actually put on board, and were, in truth, the property of Ruiz and Montez, that they were legally shipped; that the custom-house forms had been complied with; and nothing more. But in view of facts as they appear, and are admitted in the present case, the passports seem to have been obtained by Ruiz and Montez, only as a part of the necessary machinery for the completion of a slave-voyage. The evidence tends strongly to prove, that Ruiz, at least, was concerned in the importation of these Africans, and that the re-shipment of them, under color of passports obtained for *ladinos*, as the property of Ruiz and Montez, in connection with the false representation on the papers of the schooner, that they were "passengers for the government," was an artifice resorted to by these slave-traders, for the double purpose of evading the scrutiny of British cruisers, and legalizing the transfer of their victims to the place of their ultimate destination. It is a remarkable circumstance, that though more than a year has elapsed, since the decree of the district court denying the title of Ruis and Montez, and pronouncing the Africans free, not a particle of evidence has since been produced in support of their claims. And yet, strange as it may seem, during all this time, not only the sympathies of the Spanish minister, but the powerful aid of our own government have been enlisted in their behalf!

It was the purpose of the reporter to insert the able and interesting argument of Mr. *Adams*, for the African appellees; and the publication of the "reports" has been postponed in the hope of obtaining it, prepared by himself. It has not been received. As many of the points presented by Mr. Adams, in the discussion of the cause, were not considered by the court essential to its decision: and were not taken notice of in the opinion of the court, delivered by Mr. Justice STORY, the necessary omission of the argument is submitted to with less regret.

*567] *Gilpin*, Attorney-General in reply.—The judiciary act, which gives to this court its powers, so far as they depend on the legislature, directs that, on an appeal from the decree of an inferior court, this court shall render such judgment as the court below did, or should have rendered. It is to obtain from it such a decree in this case, that the United States present themselves here as appellants.

At the threshold of their application, the right so to present themselves is denied. They are to be turned away, as suitors having no claim to such interposition. The argument has gone a step farther; it seems now to be contended, that their appearance in the court below, which was not then objected to, is to be regarded as destitute of right, equally with their present appearance here. They are not even mere interlopers, seeking justice without warrant; they are dictators, in the form of supplicants, and their suggestions to the court, and their application for its judgment, upon solemn and important questions of fact, are distorted by an ingenious logic, which it is difficult to follow. Applications, made without the slightest expression of a wish, except to obtain that judgment, and in a form which, it might

be supposed, would secure admission into any court, are repudiated, under the harsh name of "executive interference." Yet in what single respect do the facts of this case sustain such allegations? How can it be justly said, that there has been any "executive interference," not resulting from the adoption of that course which public duty made incumbent; and conducted in the manner, and in that manner only, which was required by that sense of public duty, from which, no officer, possessing a due regard for the obligations of his trust, will ever shrink?

In what situation is the case, when it is first presented to the notice of the government of the United States? On nearly, if not exactly, the same day, that the secretary of state receives from the minister of Spain an official communication, dated at New York, and stating the facts connected with the schooner L'Amistad, then just brought within the territory of the United States; stating also, that the vessel is a Spanish vessel, laden with merchandize, and with sundry negro slaves on board, accompanied with all the documents required by the laws of Spain, for navigating a vessel, and for proving ownership of *property; and then making an application to [*568
the government of the United States to interpose, so that the property thus within our territory, might be restored to its owners pursuant to the treaty; and asserting also, that the negroes, who were guilty, as he contended, of a crime for which they ought to be punished, ought to be delivered up on that account, too, pursuant to the law of nations—on or about the same day, the letter of the district-attorney, which, though dated a day earlier, is written in Connecticut, also reaches the department of state, conveying the information that this same property and these same negroes are already within the custody and authority of the judicial tribunals of the United States, by virtue of process, civil and criminal, issued by a judge of the United States, after solemn and deliberate inquiry. The vessel, the cargo and the negroes, had been all taken possession of, by a warrant issued by the court, "as property;" they were then, at that very time, in the custody, keeping and possession of the court, as property, without the slightest suggestion having been made by the executive branch of the government, or even a knowledge of the fact on its part; and when its interposition is formally solicited, its first information relative to the case received, it finds the subject of the demand already under the control of the judicial branch.

In this situation, the executive government, thus appealed to, and thus informed, looks to its treaty stipulations, the most solemn and binding compacts that nations know among each other, and the obligations of which can never be treated lightly, so long as good faith forms the first duty of every community. Those stipulations, entered into in 1795 (1 Laws U. S. 266), provide, in the first place (article 6), that each party to the treaty, the United States and Spain, shall "endeavor, by all means in their power, to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of the jurisdiction." Again, in the eighth article, it is declared, that "in case the subjects or inhabitants of either country shall, with their shipping, be forced, through stress of weather, or any other urgent necessity for seeking shelter, to enter any port of the other, they shall enjoy all favor, protection and help." Again, in the ninth article, it is provided, that "all ships and

merchandize, of what nature soever, *which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered into the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof." In the 16th article, it is further declared, that the liberty of navigation and commerce meant by the treaty, shall extend to all kinds of merchandize, excepting those only which are contraband, and they are expressly enumerated; and in the 22d article, the object of the treaty is declared to be "the extension of mutual commerce." When these stipulations were thus made, slaves were a notorious article of merchandize and traffic in each country; not only were they so in the United States, but there was a constitutional provision, prohibiting congress from interfering to prevent their importation, as such, from abroad. This treaty, with these provisions thus solemnly and carefully framed, was renewed in 1819; was declared to be still in existence and force. It is declared (7 Laws U. S. 624), that every one of the articles above quoted "remains confirmed." It stands exactly as it stood in 1795; and, in the year 1821, after both governments had abolished the slave-trade, the provisions adopted in 1795 are thus, as to "every clause and article thereof," so renewed, solemnly ratified and confirmed by the president and senate of the United States. No clause is introduced to vary the nature or character of the merchandize; none to lessen or change the obligations, as would have been the case, had any such change been contemplated; but the two treaties, having the final date of 1821, bear the character of a single instrument.

Now, these are stipulations too clear to be misunderstood; too imperative to be wantonly neglected. Could we not ask of Spain the fulfilment of every one of them towards our own citizens? If so, were we not bound, at least, to see that, through some public functionary, or by some means in which nations fulfil mutual obligations, they were performed by us to the subjects of Spain, whenever the *casus fœderis* should arise? Did it arise in this case? Here were, unquestionably, as the representative of Spain believed and stated, a vessel and effects *of subjects of that country, *570] within our jurisdiction; here was a vessel and merchandize, rescued, as he alleged, from the hands of robbers, brought into one of our ports, and already in the custody of public officers. Did not a treaty stipulation require the United States to "endeavor by all means in their power to protect and defend this property?" Did not a treaty stipulation require us to "extend to them all favor, protection and help?" Did not a treaty stipulation bind us to "restore, entire, the property, to the true proprietors, as soon as due and sufficient proof should be made concerning the same?" If not, then is there no force and meaning in language; and the words of solemn treaties are an idle breath, of which nations may be as regardless as of the passing wind.

The case then had arisen, where it was the duty of the United States, as parties to this treaty, to interfere and see that its stipulations were performed. How were they to interfere? Certainly, at the instance of the executive, through the medium of the judiciary, in whose custody and under whose control the property claimed already was. The questions incident to due and sufficient proof of property are clearly judicial ques-

tions; but when that property is already in the custody and under the jurisdiction of a court, they are so, from necessity, as it is desirable they always should be, from choice. This position, never denied, was eloquently urged by the counsel of these negroes, when they first addressed the executive on the subject (Cong. Doc. No. 185, p. 64), and to that view they added the request that he "would submit the question for adjudication to the tribunals of the land." He did so! He interposed, at the instance of the Spanish minister, to fulfil a treaty stipulation, by causing a suggestion to be filed in the court which had already taken cognisance of the subject-matter, and which had the property in its custody. That suggestion stated the allegation of the Spanish minister, that this was property which ought to be restored under the treaty; prayed in effect an inquiry of the court into that fact; and requested such a decree, after such inquiry, as might enable the United States, as a nation, to fulfil their treaty obligations to the Spanish nation. This has been called "executive interference" and "executive dictation." To answer such a charge in *any other way than by appealing to the facts, would be to trespass on the patience of the court. [*571

As if such charges were felt to be insufficient, an attempt is made, by argument, to prove that the government of the United States had no right thus to interpose—no right to make this suggestion to the district court. And why not? It is said, because there is no law giving this power, and it cannot be implied; because in a question of private property, it must be left to the parties alone to prosecute their rights, and the parties in this case were already doing so for themselves; and because it was an interference and encroachment of the executive on the province of the court, not sanctioned by any precedent. These are the grounds that have been taken, and it might be sufficient to say, that although every one of them existed in as full force, when the case was tried in the district court, none of them were there taken; although every one of them was known, before the plea and answer of the respondents, they started none of these objections. After the decree and judgment of the court below, it is too late to start them. But there is nothing in them, whenever made.

I. The executive government was bound to take the proper steps for having the treaty executed, and these were the proper steps. A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed; no branch of this duty is more usual or apparent, than that which is executed in connection with the proceedings and decrees of courts. What special assignment, by act of congress, has been made of the executive duties, in the fulfilment of laws, through the decrees and judgments of the judiciary? Yet it is matter of daily occurrence. What gives the district-attorney a right to file his libel against a package of goods, which the law says shall be forfeited, on proof being made that they are falsely invoiced, any more than to file his libel against a vessel and her cargo, which a treaty (a still higher law) declares shall be restored, on proof concerning the property thereof? In the one case, it is the execution of a law, by an executive officer, through the medium or in connection with the courts; in the other case, it is the execution of a treaty in a similar manner. But in the latter, the duty is, if possible, more imperative, since the execution of treaties, *being connected with public [*572

and foreign relations, is devolved upon the executive branch. These principles are clearly stated by this court in the case of *The Peggy*, 1 Cranch 103; and more fully in that of *Williams* v. *Suffolk Insurance Company*, 13 Pet. 420.

As to its being a question of private property, which the parties might themselves prosecute, it is not perceived how this impairs the right, or even lessens the obligation, of the United States to interfere, to the extent and in the manner they did, especially, when solicited by the minister representing these parties; they appear on behalf, or at the instance, of a foreign sovereignty in alliance with them, which assumes itself the rights and interests of the parties; those parties withdraw, as this record expressly shows, when they so appear; no act of theirs occurs, after the interposition of the United States, at the instance of the Spanish minister, and it is expressly stated, that they so withdrew, because their claims were merged in that which was thus presented. This appearance of the United States is not, as has been argued, a substitution of themselves as parties in interest; it is a substitution, under a treaty obligation; a substitution assumed in their public character to perform a public duty, by means of which the further prosecution of the individuals is (as the treaty intended it should be) rendered unnecessary. Besides, what is there to show that all the parties having an interest in this property were before the court? It is nowhere so stated; and if they were not, the objections totally fail.

How this proceeding is an interference by the executive with the court; how it is an encroachment on the judicial department; how it is a dictation to the court, or advice to it to do its duty, it is difficult to conceive; and therefore, difficult to reply to such constructions of an act, analogous to the conduct of every proceeding in a court, rendered necessary to, or imperative upon, the executive, in the execution of the laws. If this libel, so definite in what it alleges and what it asks, founded on the official request of a public functionary, and intended to obtain the execution of a definite treaty obligation, be an infringement of judicial authority, it will be scarcely possible for a district-attorney, hereafter, to file an information, or present an indictment.

*573] *Nor is it, as is alleged, without precedent. In fact, every case of a libel filed by the United States, soliciting the examination and decree of a court *in rem*, is a precedent, so far as any principle is concerned. But the cases of *The Exchange*, *The Cassius*, and *The Eugenia*, are not to be distinguished on any ground. They were cases of property in court, under libels of private suitors; the United States interposed, under their obligations to foreign powers. That those obligations were general, not arising by special treaty provisions, makes the cases less strong. It is said, that the property in litigation in those cases, was to be delivered to the sovereign; is this property less in that position, when it is asked for by the representative of the sovereign? It is said, they were not delivered up as property; the Exchange and Cassius were so delivered, as public property of "the Emperor Napoleon," so stated in terms, and of the French republic. The Eugenia was delivered to the consul of France, that it might be proceeded against *in rem*, if desired. In the forms of proceeding by the United States, and in the decrees, everything resembles what has been done or sought for in this case. But, in fact, every instance of interposition of

foreign functionaries, consuls and others, affords a precedent. They have no right of property. They are no parties in interest. They interpose in behalf of the citizen. Did not this court, in the case of *The Bello Corrunes*, 6 Wheat. 152, where the express point was made, and the interposition of the Spanish consul, on behalf of his fellow-citizens, was resisted, sustain his right, as a public functionary, although it was admitted, he could show no special authority in the particular proceeding? So, in the case of *The Antelope*, 10 Wheat. 66, the consul was allowed to interpose for Spanish subjects, who were actually unknown. It will hardly be denied, that where the foreign functionary may thus come into our courts, to prosecute for the party in interest, our own functionaries may do the same. As to the case of *Nash*, Bee 266, it clearly sustains, so far as the course of proceeding, by means of the judiciary, is concerned, the right and duty of the executive thus to interpose. This was an application for the restoration of a criminal under treaty stipulations. The main question was, whether this surrender belonged exclusively to the executive, or was to be effected through the medium of the judiciary, *and while Chief Justice MARSHALL sustained the authority of the executive, as founded on the *casus* [*574
fœderis, he admitted, that the aid of the judiciary might, in some cases, be called in. If this were so, as to persons, it is at least equally so, in regard to property. In respect to both, proof is to be made; without proof, neither the restoration of the one nor the other can be effected; that proof is appropriately made to, and passed upon by, the judicial tribunals; but as the execution of the treaty stipulation is vested in the executive, if the case is proved to the satisfaction of the judiciary, its interposition, so far as is necessary to that end, forms a proper part of the judicial proceedings.

It seems clear, then, that these objections to the duty of the executive to interpose, where the property to be restored is in the custody of the court, cannot be sustained, either by principle or authority. And such appears to be the sentiment of the counsel for the appellees, from the zeal with which they have pressed another argument, to reach the same end. That argument is, that the United States could not interpose, because the Spanish minister never had asked for the restoration of the slaves as property; and because, if he had, he had sought it solely from the executive department, and denied the jurisdiction of the court. Now, suppose this were so, it would be a sufficient answer to say, that, independent of the request of the foreign functionary, the United States had a treaty obligation to perform, which they were bound to perform; and that, if a request in regard to its performance was made, upon grounds not tenable, this did not release the United States from their obligation, on grounds which, as they knew, did properly exist. But, in point of fact, the Spanish minister did, from the first, demand these negroes, as property belonging to Spanish subjects, which ought to be restored as property, under the treaty of 1795. Passages have been culled from the letters of Mr. Calderon, and Mr. Argaiz, to show that their surrender, as criminals, was only sought for; but the correspondence, taken together, bears no such construction. It is true, they were demanded as criminals; the alleged crime had been committed on Spanish subjects, and on board of a Spanish ship; by the law of nations and by the judgment of this court, such a case was within Spanish juris- [*575
diction. Whether a nation has a right, by the public law, *under such

circumstances, to require the extradiction of the criminal, is a point on which jurists have differed ; but most independent nations, if not all, have properly assumed and maintained the right to determine the question for themselves; denying the existence of any such obligation. To make the request, however, is a matter of constant occurrence ; to sustain it by appeals to the law of nations, as conferring a right, is usual ; we have, in our own government, asked for such extradition, at the very time we have denied the existence of the obligation. That the Spanish minister should, therefore, request the delivery of these persons as criminals ; that he should sustain his request as one consonant to the law of nations, is not in the least a matter of surprise But did that interfere with his demand for them also, as property ? There is no reason why it should do so, and the correspondence shows that it did not, in point of fact.

The very first letter of Mr. Calderon, that of 6th September 1839, quoted and commented upon by the counsel for the appellees, commences with a reference to the treaty stipulation, as one of the foundations and causes of his application. It is his imperious duty, he says, to claim an observance of the law of nations, and of the treaties existing between the United States and Spain. Then follow, throughout the letter, repeated references to the double character of the demand for the slaves ; references which it seems scarcely possible to misconceive. He declares, officially declares, that the vessel, "previous to her departure, obtained her clearance from the custom-house, the necessary permit from the authorities for the transportation of the negroes, a passport, and all the other documents required by the law of Spain for navigating a vessel, and for proving ownership of property ; a circumstance particularly important," in his opinion. So Mr. Argaiz, in his letter of the 26th November 1839, evidently pursues the same double demand; that they should be surrendered under the treaty, as property, and that they are also subject to delivery, as criminals. If there were a doubt as to his meaning, it must be removed, by observing his course on the passage of the resolutions adopted unanimously by the American senate, on the 15th of April last. Those resolutions declared :

1. That a ship or vessel on the high seas, in time of peace, engaged in a lawful voyage, is, according to the law of nations, *under the exclu- *576] sive jurisdiction of the state to which the flag belongs ; as much so, as if constituting a part of its own domain.

2. That if such ship or vessel should be forced, by stress of weather, or other unavoidable cause, into the port and under the jurisdiction of a friendly power, she and her cargo, and persons on board, with their property, and all the rights belonging to their personal relations, as established by the laws of the state to which they belong, would be placed under the protection which the laws of nations extend to the unfortunate under such circumstances.

On the passage of these resolutions, so evidently referring to the slaves as property, adopted in relation to the slaves carried into Bermuda and there set free, Mr. Argaiz claimed, for the owners of the slaves on board the Amistad, the application of the same rules. To complete the chain of evidence derived from the correspondence, we have a letter addressed by him to the secretary of state, on the first moment that the allegation of the request being for their delivery as criminals, was made official, by the mo-

tion of the appellees lately filed in this court—we have a note to the secretary of state, explicitly renewing his demand in the double relation.

It is evident, then, that there was a clear, distinct and formal request, on the part of the Spanish minister, for the delivery of these negroes, by virtue of the treaty, as the property of Spanish subjects. This fact, it has been endeavored to establish from the correspondence, because it has been alleged, that the executive of the United States has given a construction to the request of the Spanish minister, at variance with that stated in the libel of the district-attorney. As to any legal bearing on the case, it does not appear to be material. So far as the courts of justice are concerned, no principle is better settled, than that, in relation to the political operations of the government, the judiciary adopts the construction given to their own acts and those of foreign representatives, by the proper executive departments. The opinion of this court to that effect, is apparent in the decisions, already cited, in the cases of *The Peggy* and the *Suffolk Insurance Co.;* and when, in the case of *Garcia* v. *Lee*, the whole matter was received, with special reference to the construction of treaties, it was solemnly and deliberately affirmed. That the department *of state regarded this request as one for the delivery of property, is evident, [*577 not merely from the libel of the district-attorney, but from the whole correspondence. To obtain a different view, we must, indeed, pick out sentences separate from their context, and give to particular phrases a meaning not consistent with the whole scope of the documents in which they are found.

But as if the allegation, that the Spanish minister never required the restoration of these slaves as property, under the treaty, was not to be clearly established by the correspondence, it is endeavored to be sustained by the fact, that he refused to submit to the judgment of the court, as definitive of the rights of Spain and her subjects, under the treaty. How this refusal changes the character of his demand, on the one hand, or the proper mode of proceeding by the executive, on the other, it is not easy to perceive. No nation looks, in its intercourse, under a treaty, with another to any but the executive government. Every nation has a right to say with what act she will be satisfied as fulfilling a treaty stipulation, the other party to the treaty reserving the same right. Has not our executive, over and over again, demanded redress for acts sanctioned by decrees of foreign tribunals? Have we not sought that redress, by applications made directly to their executives? Has it ever been heard, that the claims of American citizens for redress from foreign governments, are precluded, because foreign courts have decided upon them? Such has not been the case, in point of fact, and such is not the course authorized by the law, and adopted in the intercourse, of nations. To say, therefore, that Spain would not recognise a decree of a court, which should award her less than the treaty, in her opinion, stipulated she should receive, does not, as it must appear, affect, in any manner whatever, the rights under it, or the mode of proceeding to be adopted by our own executive. With the latter, the course was plain. The matter was already before the judiciary, a component and independent branch of the government to which it appropriately belonged. Its action is calmly waited for, as affording the just and only basis of ultimate decision by the executive.

Viewed, then, on every ground of treaty obligation, of constitutional duty, of precedent, or of international intercourse, the *interposition
*578] of the executive in the mode adopted, so far from being "unnecessary and improper," was one of duty and propriety, on receiving from the Spanish minister his official representation, and from the district-attorney the information that the matter was already in charge of the court.

And now it may be asked, whether there is anything in these facts to justify the censure so largely cast upon the executive for the course which it was deemed a duty to pursue; anything that authorizes "its arraignment," to use the language of the counsel for the appellees, before the judicial tribunals, "for their judgment and censure?" Performing cautiously an international obligation; passing upon no rights, private or public; submitting to the courts of justice the facts made known officially to it; seeking the decrees of the legitimate tribunals; communicating to foreign functionaries, that by these decrees its course would be governed—it is these acts which are argued upon, as ground for censure and denunciation. With what justice, may be well tested, by placing another government in the position of our own. Let us recollect, that there is among nations, as among men, a golden rule; let us do to them, as we wish them to do to us; let us ask how we would have our own minister and representative in a foreign land to act by us, if we were thrown in like manner on a foreign shore—if a citizen of South Carolina, sailing to New Orleans with his slaves, were thus attacked, his associates killed, himself threatened with death, and carried for months in a vessel scarcely seaworthy, beneath a tropical sun. Should we blame the American minister who had asked the interposition of the courts? Should we blame the foreign government that facilitated that interposition? Look at the case of the negroes carried to Bermuda; have we there—as we are now denounced for not doing—have we there gone as private suitors into the courts, or have we sought redress, as nations seek it for their citizens? The question of freedom or slavery was there brought, exactly as it was here, before the judicial tribunals, at the instance of persons who took up the cause of the slaves; the owners did not pursue their claims as a mere matter of private right; the government of the United States, through its minister, appealed to the executive government of Great Britain; sought redress from *that quarter; and received
*579] it. The value of the slaves was paid, not to the individuals, but to our own government, who took their business upon themselves, exactly as the Spanish minister has assumed that of Ruiz and Montez. Let us then be just; let us not demand one mode of proceeding for ourselves, and practise another towards those who have an equal right to claim similar conduct at our hands.

II. The attorney-general then proceeded to reply to the position of the counsel for the appellees, that whatever might be the right of the United States as parties to the proceedings in the district and circuit courts, they had yet no authority to appeal, in such a case, from the decrees of those courts, to this tribunal, and that, therefore, the present appeal should be dismissed. As no decision was given by the court on this point, and the argument in support of the motion, and on behalf of the appellees, has not been reported, that in reply, and in behalf of the United States, as appellants, is also necessarily omitted. The position contended for by the

attorney-general was, that the case was before this court—*coram judice ;* and that the case itself, the parties to it, and the mode of bringing it up, were all in accordance with the law authorizing appeals. If so, he submitted, that this court had jurisdiction of it, and would revise the decree that had been pronounced by the circuit court, which was all that was solicited. That the highest judicial tribunal should pronounce upon the facts set out in this record, was all that the executive could desire ; they presented questions that appropriately belonged to the judiciary, as the basis of executive action ; they related to the rights of property, and the proofs concerning it ; and when the decision of that co-ordinate branch of the government, to which the examination of such questions appropriately belonged, should be made, the course of executive action would be plain.

III. The only question, then, that remains to be considered, is, was the decree erroneous? The decree, as it stands, and as it now comes up for examination, is, that this vessel and her cargo shall be delivered up to the Spanish minister, for the Spanish owners, not entire, but after deducting one-third for salvage, to be given to Lieutenant Gedney and his associates ; and that the negroes, except Antonio, shall be delivered to the president of the United States, to be *sent to Africa, pursuant to the provisions of the act of 3d March 1819, § 2. (2 Story's Laws 1752.) Now, it is [*580 submitted, that this decree is erroneous, because the vessel, cargo and negroes were all the property of Spanish subjects, rescued from robbers, and brought into a port of the United States, and due proof concerning the property in them was made ; that, therefore, the decree should have been, that they be delivered to the Spanish owners, or to the Spanish minister, for the owners, according to the stipulations of the ninth article of the treaty of 1795.

The vessel and cargo are admitted to be merchandize or property, within the meaning of the treaty. Are slaves also property or merchandize, within its meaning? That they are not, has been very elaborately argued by the counsel for the appellees ; yet, it is confidently submitted, that both by the laws of Spain and of the United States, slaves are property ; and a fair construction of the treaty shows, that it was intended to embrace every species of property recognised by the laws of the two contracting nations. We are asked for a law to this effect ; a law establishing the existence of slavery in the Spanish dominions. It might be sufficient to say, that what is matter of notorious history will be recognised by this court, without producing a statutory regulation ; but the royal decree of 1817, which promulgates the abolition of the foreign slave-trade, refers throughout to the existence of slavery in the Spanish Indies, and this court, in many of its adjudications, has recognised its existence.

If slaves, then, were property by the laws of Spain, it might be justly concluded, that even if they were not so recognised by the United States, still they are property, within the meaning of the treaty, because the intention of the treaty was to protect the property of each nation. But, in fact, slaves were, and are, as clearly recognised by them to be property, as they ever were by Spain. Our citizens hold them as property ; buy and sell them as property ; legislate upon them as property. State after state has been received into this Union, with the solemn and deliberate assent of the national legislature, whose constitutions, previously submitted to and sanc-

tioned by that legislature, recognise slaves as merchandize; to be held as such, carried as such from place to place, and bought and sold as such. It has been argued, that this government, as a government, never has
*581] *recognised property in slaves. To this it is answered, that if no other proof could be adduced, these acts of the national government are evidence that it has done so. The constitution of the United States leaves to the states the regulation of their internal property, of which slaves were, at the time it was formed, a well-known portion. It also guarantied and protected the rights of the states to increase this property, up to the year 1808, by importation from abroad. How, then, can it be said, that this government, as a government, never has recognised this property? But if slaves be not so regarded, by what authority did the general government demand indemnity for slaves set free in Bermuda, by the British government? Is not this an act, recent in date, and deliberate in conduct, showing the settled construction put upon slaves as property. Is not the resolution of the senate (the unanimous resolution) a declaration, that slaves, though liberated as persons, and so adjudged by a foreign court, are, in fact, by the law of nations, property, if so allowed to be held in the country to which the owner belongs?

But it is contended, that although they may have been recognised as property by the two nations, they were not such property as was subject to restoration by the treaty. Now, to this it may be answered, in the first place, that every reason which can be suggested for the introduction of the treaty stipulations to protect and restore property, applies as fully to slaves as to any other. It is, in states where slavery exists, a valuable species of property; it is an object of traffic; it is transported from place to place. Can it be supposed, that the citizen of Virginia, sailing to New Orleans with his slaves, less needs the benefit of these treaty stipulations for them, than for any other property he may have on board, if he is carried into a port of Cuba, under any of the adverse circumstances for which the treaty was intended to provide? But again, is not the treaty so broad and general in its terms, that one of the contracting parties has no right to make an exclusion of this property, without the assent of the other? The 16th article of the treaty says, it is to extend to "all kinds" of merchandize, except that which is contraband. Was not a slave a kind of merchandize, then recognised as such by each nation, and allowed to be imported into each nation, by their respective laws?

The treaty of 1819, which was ratified in 1821, after the slave-trade
*582] *was abolished, but while slave property was held in both countries' renews this article as it stood in 1795. Is it possible to imagine, that if a new policy was to be adopted, there would not have been an express stipulation or change in regard to this, as there was in regard to other articles of the old treaty? If further proof were wanting, it would be found in the fact, that the executive authorities of both nations, at once and unequivocally, considered the terms of the treaty as extending to slave property. Independently of the authority which this decision on the political construction of a treaty will have with this court, upon the principles it has laid down, it may be regarded as strong evidence of the intentions of the contracting parties; and when we see our own government and the senate of the United States, seriously examining how far a similar case is one

that falls within the class of international obligations independent of treaty, we may give to its deliberate judgment, in the proper construction of this treaty, the highest weight.

The next inquiry is, whether the property in question was "rescued out of the hands of any pirates or robbers, on the high seas, and brought into any port of the United States?" That the vessel was at anchor, below low-water mark, when taken possession of, and consequently, upon the high seas, as defined by the law of nations, is a fact not controverted; but it is objected, that the negroes by whom she was held were not pirates or robbers, in the sense of the treaty, and that if they were, its provisions could not apply to them, because they were themselves the persons who were rescued. That the acts committed by the negroes amount to piracy and robbery, seems too clear to be questioned. Piracy is an offence defined and ascertained by the law of nations; it is "forcible depredation on the sea, *animo furandi*." *United States* v. *Smith*, 5 Wheat. 153. Every ingredient necessary to constitute a crime, thus defined, is proved in the present case. It was the intention of the treaty, that whenever, by an act of piracy, a vessel and property were run away with—taken from the owners, who are citizens of the United States or Spain—it should, if it came into the possession of the other party, be kept by that party and restored entire. Slaves differ from other property, in the fact, that they are persons as well as property; that they may be actors in the piracy; but it is not perceived, how *this act, of itself, changes the rights of the owners, where they exist and [*583 are recognised by law. If they are property, they are property rescued from pirates, and are to be restored, if brought by the necessary proof within the provisions of the treaty.

What are those provisions? That "due and sufficient proof must be made concerning the property thereof." The first inquiry "concerning property," is its identity. Is there any doubt as to the identity of these slaves? There is clearly none. Are they proved to have been slaves, owned by Spanish subjects? They are negroes, in a country where slavery exists, passing from one port of the Spanish dominions to another, in a regularly documented coasting vessel; and they are proved to be, at the time they leave Havana, in the actual possession of the persons claiming to be their owners. So far as all the *primâ facie* evidence extends, derived from the circumstances of the case at that time, they may be regarded as slaves, as much as the negroes who accompany a planter between any two ports of the United States. This, then, is the first evidence of property—their actual existence in a state of slavery, and in the possession of their alleged owners, in a place where slavery is recognised, and exists by law.

In addition to this evidence derived from possession, Ruiz and Montez had, according to the statement of the Spanish minister, which was read by the counsel for the appellees, "all the documents required by the laws of Spain for proving ownership of property." They have a certificate, under the signature of the governor-general, countersigned or attested by the captain of the port, declaring that these negroes are the property of the Spanish citizens who are in possession of them. It has already been shown, by reference to the laws of Spain, that the powers of a governor-general in a Spanish colony are of a most plenary character. That his powers are judicial, was expressly recognised by this court, in the case of *Keene* v.

McDonough, 8 Pet. 310. If such are the powers of this officer, and if this be a document established as emanating from him, it must be regarded as conclusive, in a foreign country. The cases already cited, establish the two positions, that, as regards property on board of a vessel, the accompanying documents are the first and best evidence, especially, when attended with
*584] possession; and that a *decree or judgment, or declaration of a foreign tribunal, made within the scope of its authority, is evidence, beyond which the courts of another country will not look. These rules are essential to international intercourse. Could it be tolerated, that where vessels, on a coasting voyage, from one port of a country to another, are driven, without fault of their own, to take refuge in the harbor of another country, the authentic evidences of property in their own country are to be disregarded? That foreign courts are to execute the municipal laws of another country, according to their construction of them? Can it be, that the courts of this country will refuse to recognise the evidence of property, which is recognised and deemed sufficient in the country to which that property belongs? We have unquestionable evidence, that such documents as these are regarded as adequate proofs of property in Cuba. But it is said, this certificate is a mere passport, and no proof of property. To this it is replied, that it is recognised as the necessary and usual evidence of property, as appears by the testimony referred to. It is true, it is a passport for Ruiz, but it is not a mere personal passport; it is one to take property with him, and it ascertains and describes that property.

But we are told, it must be regarded as fraudulent by this court; and the grounds on which this assertion is made, are the evidence adduced to show that these negroes have been imported into Cuba from Africa, since the treaty between Great Britain and Spain. Is this evidence legal and sufficient to authorize this court to declare the particular fact for which it is vouched—that the negroes were imported into Cuba contrary to law? If it be sufficient for this, does such illegal importation make the negroes free men in the island of Cuba? If it does, will this court declare the certificate to be null and void, or leave that act to the decision of the appropriate Spanish tribunals?

In the argument submitted on the part of the United States, in opening the case, the nature of this evidence has been commented upon. It is such chiefly as is not legal evidence in the courts of the United States. Now the question is not as to the impression derived from such evidence, but it is whether, on testimony not legally sufficient, the declaration of a competent foreign functionary will be set aside? As if there were doubt, whether a court of the United States would so do, the admissions of Ruiz,
*585] and *of the attorney of the United States are vouched. Yet it is apparent, that these were admissions, not of facts known to themselves, but of impressions derived from evidence which is as much before this court as it was before them. To neither one nor the other was the fact in question personally known. It was inferred by them, from evidence now for the most part before this court.

But, admitting the fact of the recent importation from Africa, still, nothing has been adduced to controvert the position, taken in opening, that the laws of Spain required, in such a case, and even in the case of negroes actually seized on board of a Spanish vessel, on her voyage from Africa, a

declaration by a court expressly recognised by Spain, to establish their freedom. However much we may abhor the African slave-trade, all nations have left to those in whose vessels it is carried on, the regulation and punishment of it. The extent to which Spain was willing to permit any other nation to interpose, where her vessels or her subjects were concerned, is carefully determined in this very treaty. The principal witness of the appellees expressly admits, that when negroes are landed, though in known violation of the treaty, it is a subject to be disposed of by the municipal law. Now, it is not pretended here, that, even if these negroes were unlawfully introduced, they have been declared free. Can, then, this court adjudge that these negroes were free in the island of Cuba, even if the fact of their recent importation be proved? Much more, can they assume to do it, by putting their construction on a treaty, not of the United States, but between two foreign nations; a treaty which those nations have the sole right to construe and act upon for themselves?

But, if satisfied that the governor-general has been imposed upon, and the documents fraudulently obtained, still, is the fraud to be punished and the error to be rectified in our courts, or in those of Spain? What says Sir William Scott, in the case of *The Louis*, when asked what is to be done, if a French ship, laden with slaves, in violation of the laws of that country, is brought into an English port: "I answer," says he, "without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country." Can a rule more directly applicable to the present case be found? "The courts of no *country," says Chief Justice [*586
Marshall, in the case of *The Antelope*, "execute the penal laws of another." In the case of *The Eugenia*, where a French vessel was liable to forfeiture, under the laws of France, for violating the laws prohibiting the slave-trade, Judge Story directed, not that she should be condemned in our own courts, but that she should be sent to France. "This," says he, "enables the foreign sovereign to exercise complete jurisdiction, if he shall prefer to have it remitted to his own courts for adjudication." "This," he afterwards adds, "makes our own country, not a principal, but an auxiliary, in enforcing the interdict of France, and subserves the great interests of universal justice."

Are not these the true principles which should govern nations in their intercourse with each other; principles sanctioned by great and venerated names? Are not these the principles by which we would require other nations to be governed, when our citizens are charged, in a foreign country, with a breach of our own municipal laws? And is it not productive of the same result? Do we doubt, that the courts and officers of Spain will justly administer her own laws? Will this court act on the presumption, that the tribunals of a foreign and friendly nation will fail to pursue that course which humanity, justice and the sacred obligations of their own laws demand? No nation has a right so to presume, in regard to another; and notwithstanding the distrust that has been repeatedly expressed in the progress of this cause, in regard to the Spanish tribunals and the Spanish functionaries; yet a just respect towards another and a friendly nation; the common courtesy which will not suppose in advance, that it will intentionally do wrong; oblige us to believe, and warrant us in so doing, that if the laws of Spain

have been violated ; if its officers have been deceived ; and if these negroes are really free ; these facts will be there ascertained and acted upon, and we shall as "auxiliaries," not principals, best "subserve the cause of universal justice."

If this view be correct, and if the evidence is sufficient to prove the property of the Spanish subjects in the island of Cuba, the only question that remains to be considered is, whether the acts of the slaves during the voyage changed their condition. It has been argued strongly, that they were free ; that they were "in the actual condition of freedom ;" but how
*587] can *that be maintained ? If slaves by the laws of Spain, they were so on board of a Spanish vessel, as much as on her soil ; and will it be asserted, that the same acts in the island of Cuba would have made them free ? This will hardly be contended. No nation, recognising slavery, admits the sufficiency of forcible emancipation. In what respect, were these slaves, if such by the laws of Spain, released from slavery by their own acts of aggression upon their masters, any more than a slave becomes free in Pennsylvania, who forcibly escapes from his owner in Virginia ? For this court to say, that these acts constituted a release from slavery, would be to establish for another country municipal regulations in regard to her property ; and not that only, but to establish them directly in variance with our own laws, in analogous cases. If the negroes in this case were free, it was because they were not slaves, when placed on board the Amistad, not because of the acts there committed by them.

It is submitted, then, that so far as this court is concerned, there is sufficient evidence concerning this property, to warrant its restoration pursuant to the provisions of the treaty with Spain ; and that, therefore, the judgment of the court below should be reversed, and a decree made by this court for the entire restoration of the property.

Story, Justice, delivered the opinion of the court.—This is the case of an appeal from the decree of the circuit court of the district of Connecticut, sitting in admiralty. The leading facts, as the appear upon the transcript of the proceedings, are as follows : On the 27th of June 1839, the schooner L'Amistad, being the property of Spanish subjects, cleared out from the port of Havana, in the island of Cuba, for Puerto Principe, in the same island. On board of the schooner were the master, Ramon Ferrer, and Jose Ruiz and Pedro Montez, all Spanish subjects. The former had with him a negro boy, named Antonio, claimed to be his slave. Jose Ruiz had with him forty-nine negroes, claimed by him as his slaves, and stated to be his property, in a certain pass or document, signed by the governor-general of Cuba. Pedro Montez had with him four other negroes, also claimed by him as his slaves, and stated to be his property, in a similar
*588] pass or document, also signed by the governor-general *of Cuba. On the voyage, and before the arrival of the vessel at her port of destination, the negroes rose, killed the master, and took possession of her. On the 26th of August, the vessel was discovered by Lieutenant Gedney, of the United States brig Washington, at anchor on the high seas, at the distance of half a mile from the shore of Long Island. A part of the negroes were then on shore, at Culloden Point, Long Island ; who were seized by Lieutenant Gedney, and brought on board. The vessel, with the negroes

and other persons on board, was brought by Lieutenant Gedney into the district of Connecticut, and there libelled for salvage in the district court of the United States. A libel for salvage was also filed by Henry Green and Pelatiah Fordham, of Sag Harbor, Long Island. On the 18th of September, Ruiz and Montez filed claims and libels, in which they asserted their ownership of the negroes as their slaves, and of certain parts of the cargo, and prayed that the same might be "delivered to them, or to the representatives of her Catholic Majesty, as might be most proper." On the 19th of September, the attorney of the United States for the district of Connecticut, filed an information or libel, setting forth, that the Spanish minister had officially presented to the proper department of the government of the United States, a claim for the restoration of the vessel, cargo and slaves, as the property of Spanish subjects, which had arrived within the jurisdictional limits of the United States, and were taken possession of by the said public armed brig of the United States, under such circumstances as made it the duty of the United States to cause the same to be restored to the true proprietors, pursuant to the treaty between the United States and Spain; and praying the court, on its being made legally to appear that the claim of the Spanish minister was well founded, to make such order for the disposal of the vessel, cargo and slaves, as would best enable the United States to comply with their treaty stipulations. But if it should appear, that the negroes were persons transported from Africa, in violation of the laws of the United States, and brought within the United States, contrary to the same laws; he then prayed the court to make such order for their removal to the cost of Africa, pursuant to the laws of the United States, as it should deem fit.

On the 19th of November, the attorney of the United States filed a second information or libel, similar to the first, with the exception [*589 of the second prayer above set forth in his former one. On the same day, Antonio G. Vega, the vice-consul of Spain for the state of Connecticut, filed his libel, alleging that Antonio was a slave, the property of the representatives of Ramon Ferrer, and praying the court to cause him to be delivered to the said vice-consul, that he might be returned by him to his lawful owner in the island of Cuba.

On the 7th of January 1840, the negroes, Cinque and others, with the exception of Antonio, by their counsel, filed an answer, denying that they were slaves, or the property of Ruiz and Montez, or that the court could, under the constitution or laws of the United States, or under any treaty, exercise any jurisdiction over their persons, by reason of the premises; and praying that they might be dismissed. They specially set forth and insisted in this answer, that they were native-born Africans; born free, and still, of right, ought to be free and not slaves; that they were, on or about the 15th of April 1839, unlawfully kidnapped, and forcibly and wrongfully carried on board a certain vessel, on the coast of Africa, which was unlawfully engaged in the slave-trade, and were unlawfully transported in the same vessel to the island of Cuba, for the purpose of being there unlawfully sold as slaves; that Ruiz and Montez, well knowing the premises, made a pretended purchase of them; that afterwards, on or about the 28th of June 1839, Ruiz and Montez, confederating with Ferrer (master of the Amistad), caused them, without law or right, to be placed on board of the Amistad, to

be transported to some place unknown to them, and there to be enslaved for life ; that, on the voyage, they rose on the master, and took possession of the vessel, intending to return therewith to their native country, or to seek an asylum in some free state ; and the vessel arrived, about the 26th of August 1839, off Montauk Point, near Long Island ; a part of them were sent on shore, and were seized by Lieutenant Gedney, and carried on board ; and all of them were afterwards brought by him into the district of Connecticut.

On the 7th of January 1840, Jose Antonio Tellincas, and Messrs. Aspe and Laca, all Spanish subjects, residing in Cuba, filed their *claims, *590] as owners to certain portions of the goods found on board of the schooner L'Amistad. On the same day, all the libellants and claimants, by their counsel, except Jose Ruiz and Pedro Montez (whose libels and claims, as stated of record, respectively, were pursued by the Spanish minister, the same being merged in his claims), appeared, and the negroes also appeared by their counsel ; and the case was heard on the libels, claims, answers and testimony of witnesses.

On the 23d day of January 1840, the district court made a decree. By that decree, the court rejected the claim of Green and Fordham for salvage, but allowed salvage to Lieutenant Gedney and others, on the vessel and cargo, of one-third of the value thereof, but not on the negroes, Cinque and others; it allowed the claim of Tellincas, and Aspe and Laca, with the exception of the above-mentioned salvage ; it dismissed the libels and claims of Ruiz and Montez, with costs, as being included under the claim of the Spanish minister ; it allowed the claim of the Spanish vice-consul, for Antonio, on behalf of Ferrer's representatives ; it rejected the claims of Ruiz and Montez for the delivery of the negroes, but admitted them for the cargo, with the exception of the above-mentioned salvage ; it rejected the claim made by the attorney of the United States on behalf of the Spanish minister, for the restoration of the negroes, under the treaty ; but it decreed, that they should be delivered to the president of the United States, to be transported to Africa, pursuant to the act of 3d March 1819.

From this decree, the district-attorney, on behalf of the United States, appealed to the circuit court, except so far as related to the restoration of the slave Antonio. The claimants, Tellincas, and Aspe and Laca, also appealed from that part of the decree which awarded salvage on the property respectively claimed by them. No appeal was interposed by Ruiz or Montez, nor on behalf of the representatives of the owners of the Amistad. The circuit court by a mere *pro formâ decree*, affirmed the decree of the district court, reserving the question of salvage upon the claims of Tellincas, and Aspe and Laca. And from that decree, the present appeal has been brought to this court.

The cause has been very elaborately argued, as well upon the *merits, as upon a motion of behalf of the appellees to dismiss the *591] appeal. On the part of the United States, it has been contended : 1. That due and sufficient proof concerning the property has been made, to authorize the restitution of the vessel, cargo and negroes to the Spanish subjects on whose behalf they are claimed, pursuant to the treaty with Spain, of the 27th of October 1795. 2. That the United States had a right

to intervene in the manner in which they have done, to obtain a decree for the restitution of the property, upon the application of the Spanish minister. These propositions have been strenuously denied on the other side. Other collateral and incidental points have been stated, upon which it is not necessary at this moment to dwell.

Before entering upon the discussion of the main points involved in this interesting and important controversy, it may be necessary to say a few words as to the actual posture of the case as it now stands before us. In the first place, then, the only parties now before the court on one side, are the United States, intervening for the sole purpose of procuring restitution of the property, as Spanish property, pursuant to the treaty, upon the grounds stated by the other parties claiming the property in their respective libels. The United States do not assert any property in themselves, nor any violation of their own rights, or sovereignty or laws, by the acts complained of. They do not insist that these negroes have been imported into the United States, in contravention of our own slave-trade acts. They do not seek to have these negroes delivered up, for the purpose of being transferred to Cuba, as pirates or robbers, or as fugitive criminals found within our territories, who have been guilty of offences against the laws of Spain. They do not assert that the seizure and bringing the vessel, and cargo and negroes, into port, by Lieutenant Gedney, for the purpose of adjudication, is a tortious act. They simply confine themselves to the right of the Spanish claimants to the restitution of their property, upon the facts asserted in their respective allegations.

In the next place, the parties before the court, on the other side, as appellees, are Lieutenant Gedney, on his libel for salvage, and the negroes (Cinque and others), asserting themselves, in their answer, not to be slaves, but free native Africans, kidnapped *in their own country, and illegally transported by force from that country ; and now entitled to [*592 maintain their freedom.

No question has been here made, as to the proprietary interests in the vessel and cargo. It is admitted, that they belong to Spanish subjects, and that they ought to be restored. The only point on this head is, whether the restitution ought to be upon the payment of salvage, or not? The main controversy is, whether these negroes are the property of Ruiz and Montez, and ought to be delivered up ; and to this, accordingly, we shall first direct our attention.

It has been argued on behalf of the United States, that the court are bound to deliver them up, according to the treaty of 1795, with Spain, which has in this particular been continued in full force, by the treaty of 1819, ratified in 1821. The sixth article of that treaty seems to have had, principally in view, cases where the property of the subjects of either state had been taken possession of within the territorial jurisdiction of the other, during war. The eighth article provides for cases where the shipping of the inhabitants of either state are forced, through stress of weather, pursuit of pirates or enemies, or any other urgent necessity, to seek shelter in the ports of the other. There may well be some doubt entertained, whether the present case, in its actual circumstances, falls within the purview of this article. But it does not seem necessary, for reasons hereafter stated, absolutely to decide it. The ninth article provides, "that all ships and

merchandize, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored, entire, to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof." This is the article on which the main reliance is placed on behalf of the United States, for the restitution of these negroes. To bring the case within the article, it is essential to establish : 1st, That these negroes, under all the circumstances, fall within the description of merchandize, in the sense of the treaty. 2d, That there has been a rescue of them on the high seas, out of the hands of the pirates and robbers ; which, in the present case, can only be, by showing that they *themselves are pirates and robbers : and 3d, That Ruiz and Montez, the asserted proprietors, are the true proprietors, and have established their title by competent proof.

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If these negroes were, at the time, lawfully held as slaves, under the laws of Spain, and recognised by those laws as property, capable of being lawfully bought and sold ; we see no reason why they may not justly be deemed, within the intent of the treaty, to be included under the denomination of merchandize, and as such ought to be restored to the claimants ; for upon that point the laws of Spain would seem to furnish the proper rule of interpretation. But admitting this, it is clear, in our opinion, that neither of the other essential facts and requisites has been established in proof ; and the *onus probandi* of both lies upon the claimants to give rise to the *casus fœderis*. It is plain, beyond controversy, if we examine the evidence, that these negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws and treaties, and edicts, the African slave-trade is utterly abolished ; the dealing in that trade is deemed a heinous crime ; and the negroes thereby introduced into the dominions of Spain, are declared to be free. Ruiz and Montez are proved to have made the pretended purchase of these negroes, with a full knowledge of all the circumstances. And so cogent and irresistible is the evidence in this respect, that the district-attorney has admitted in open court, upon the record, that these negroes were native Africans, and recently imported into Cuba, as alleged in their answers to the libels in the case. The supposed proprietary interest of Ruiz and Montez is completely displaced, if we are at liberty to look at the evidence, or the admissions of the district-attorney.

If then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board the Amistad ; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts by which they asserted their liberty, and took possession of the Amistad, and endeavored to regain their native *country ; but they cannot be deemed pirates or robbers, in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself ; at least, so far as those laws have been brought to our knowledge. Nor do the libels of Ruiz or Montez assert them to be such.

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This posture of the facts would seem, of itself, to put an end to the whole inquiry upon the merits. But it is argued, on behalf of the United States, that the ship and cargo, and negroes, were duly documented as belonging to Spanish subjects, and this court have no right to look behind these documents; that full faith and credit is to be given to them; and that they are to be held conclusive evidence in this cause, even although it should be established by the most satisfactory proofs, that they have been obtained by the grossest frauds and impositions upon the constituted authorities of Spain. To this argument, we can, in no wise, assent. There is nothing in the treaty which justifies or sustains the argument. We do not here meddle with the point, whether there has been any connivance in this illegal traffic, on the part of any of the colonial authorities or subordinate officers of Cuba; because, in our view, such an examination is unnecessary, and ought not to be pursued, unless it were indispensable to public justice, although it has been strongly pressed at the bar. What we proceed upon is this, that although public documents of the government, accompanying property found on board of the private ships of a foreign nation, certainly are to be deemed *primâ facie* evidence of the facts which they purport to state, yet they are always open to be impugned for fraud; and whether that fraud be in the original obtaining of these documents, or in the subsequent fraudulent and illegal use of them, when once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof. Fraud will vitiate any, even the most solemn, transactions; and an asserted title to property, founded upon it, is utterly void. The very language of the ninth article of the treaty of 1795, requires the proprietor to make due and sufficient proof of his property. And how can that proof be deemed either due or sufficient, which is but a connected and stained tissue of fraud? This is not a mere rule of municipal jurisprudence. Nothing is more clear in the law of nations, as an established rule to regulate their rights and duties, *and intercourse, than the doctrine, that the ship's papers are but *primâ facie* evidence, and that, if they are shown to be fraudulent, [*595 they are not to be held proof of any valid title. This rule is familiarly applied, and, indeed, is of every-day's occurrence in cases of prize, in the contests between belligerents and neutrals, as is apparent from numerous cases to be found in the reports of this court; and it is just as applicable to the transactions of civil intercourse between nations, in times of peace. If a private ship, clothed with Spanish papers, should enter the ports of the United States, claiming the privileges aud immunities, and rights, belonging th *bonâ fide* subjects of Spain, under our treaties or laws, and she should, in reality, belong to the subjects of another nation, which was not entitled to any such privileges, immunities or rights, and the proprietors were seeking, by fraud, to cover their own illegal acts, under the flag of Spain; there can be no doubt, that it would be the duty of our courts to strip off the disguise, and to look at the case, according to its naked realities. In the solemn treaties between nations, it can never be presumed, that either state intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended to be applied to *bonâ fide* transactions. The 17th article of the treaty with Spain, which provides for certain passports and certificates, as evidence of property on board of the ships of both states, is, in its terms, applicable only to cases

where either of the parties is engaged in a war. This article required a certain form of passport to be agreed upon by the parties, and annexed to the treaty; it never was annexed; and therefore, in the case of *The Amiable Isabella*, 6 Wheat. 1, it was held inoperative.

It is also a most important consideration, in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects. The conflict of rights between the parties, under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and international law. If the contest were about any goods on board of this ship, to which American citizens asserted a title, which was *denied by the Spanish claim-
*596] ants, there could be no doubt of the right of such American citizens to litigate their claims before any competent American tribunal, notwithstanding the treaty with Spain. *A fortiori*, the doctrine must apply, where human life and human liberty are in issue, and constitute the very essence of the controversy. The treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest ther claims before any of our courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights.

There is another consideration, growing out of this part of the case, which necessarily rises in judgment. It is observable, that the United States, in their original claim, filed it in the alternative, to have the negroes, if slaves and Spanish property, restored to the proprietors; or, if not slaves, but negroes who had been transported from Africa, in violation of the laws of the United States, and brought into the United States, contrary to the same laws, then the court to pass an order to enable the United States to remove such persons to the coast of Africa, to be delivered there to such agent as may be authorized to receive and provide for them. At a subsequent period, this last alternative claim was not insisted on, and another claim was interposed, omitting it; from which the conclusion naturally arises, that it was abandoned. The decree of the district court, however, contained an order for the delivery of the negroes to the United States, to be transported to the coast of Africa, under the act of the 3d of March 1819, ch. 224. The United States do not now insist upon any affirmance of this part of the decree; and in our judgment, upon the admitted facts, there is no ground to assert, that the case comes within the purview of the act of 1819, or of any other of our prohibitory slave-trade acts. These negroes were never taken from Africa, or brought to the United States, in contravention of those acts. When the Amistad arrived, she was in possession of the negroes, asserting their freedom; and in no sense could they
*597] possibly intend to import themselves here, as *slaves, or for sale as slaves. In this view of the matter, that part of the decree of the district court is unmaintainable, and must be reversed.

The view which has been thus taken of this case, upon the merits, under

the first point, renders it wholly unecessary for us to give any opinion upon the other point, as to the right of the United States to intervene in this case in the manner already stated. We dismiss this, therefore, as well as several minor points made at the argument.

As to the claim of Lieutenant Gedney for the salvage service, it is understood, that the United States do not now desire to interpose any obstacle to the allowance of it, if it is deemed reasonable by the court. It was a highly meritorious and useful service to the proprietors of the ship and cargo ; and such as, by the general principles of maritime law, is always deemed a just foundation for salvage. The rate allowed by the court, does not seem to us to have been beyond the exercise of a sound discretion, under the very particular and embarrassing circumstances of the case.

Upon the whole, our opinion is, that the decree of the circuit court, affirming that of the district court, ought to be affirmed, except so far as it directs the negroes to be delivered to the president, to be transported to Africa, in pursuance of the act of the 3d of March 1819 ; and as to this, it ought to be reversed : and that the said negroes be declared to be free, and be dismissed from the custody of the court, and go without day.

Baldwin, Justice, dissented.

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 Connecticut, and was argued by counsel : On consideration whereof, it is the opinion of this court, that there is error in that part of the decree of the circuit court, affirming the decree of the district court, which ordered the said negroes to be delivered to the president of the United States, to be transported to Africa, in pursuance of the act of congress of the 3d of March 1819 ; and that, as to that part, it ought to be reversed : and in all other respects, that the said decree of the *circuit court ought to be affirmed. It is, [*598
therefore, ordered, adjudged and decreed by this court, that the decree of the said circuit court be and the same is hereby affirmed, except as to the part aforesaid, and as to that part, that it be reversed ; and that the cause be remanded to the circuit court, with directions to enter, in lieu of that part, a decree, that the said negroes be and are hereby declared to be free, and that they be dismissed from the custody of the court, and be discharged from the suit, and go thereof quit, without day.

APPENDIX.

Argument of Mr. Walker, of Mississippi, on the opening and concluding of the case of Groves et al. *v.* Slaughter, *ante*, p. 449.

Mr. *Walker* said, he appeared only for Moses Groves, of Louisiana, whose defence was meritorious as well as legal. He was a mere accommodation indorser, who had been made a party to this illegal contract, without his knowledge or consent, through an indorsement in blank for the accommodation of the maker of the note. This is evident from the record; but as the question resolved itself into a decision upon the validity of the contract, the following agreement was filed in the case below. "The case is to be defended solely on the question of the validity and legality of the consideration for which the notes sued on were given. It is admitted, that the slaves, for which said notes were given, were imported into Mississippi, as merchandise, and for sale, in the year 1835-36, by plaintiff, but without any previous agreement or understanding, express or implied, between plaintiff and any of the parties to the note; but for sale, generally, to any person who might wish to purchase. The slaves have never been returned to plaintiff, nor tendered to him by any of the parties to the notes sued on." It must be observed, that it is not alleged or pretended, that my client, Moses Groves, ever had the possession or control of any of these slaves, or that it ever was in his power to tender or return them. The notes sued on were dated December 20th, 1836, and were given and made payable in Mississippi; and the validity of the contract depends upon the following clause in the amended constitution of Mississippi, adopted October 26th, 1832. That clause is in these words. "The introduction of slaves into this state, as merchandise, or for sale, shall be prohibited, from and after the first day of May 1833: provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any state of this Union, and bringing them into this state for their own individual use, till the year 1845."

The question arises only on the first branch of this clause; which, it is said, is but a mandate to the legislature to prohibit the introduction of slaves for sale from and after the 1st of May 1833. But the clause is not directed to the legislature, and is not a mandate, in substance or in form, but an absolute prohibition, operating *proprio vigore*. It requires no legislation to give it efficacy to avoid this contract; and none such could prevent or postpone its operation; to declare it a mandate, is to interpolate into this provision words of solemn import. No court can introduce into a law, or exclude from it, words not used by the legislature; unless it be clearly necessary to give effect to the law, *ut res magis valeat quam pereat*. Now the clause, "the introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May 1833," is complete of itself, as a prohibition, operating by force of the constitution itself, from and after the day designated by that instrument; and to change it into a mandate, the words "by the legislature," must be interpolated. It was an operative fundamental law, ordained by the sovereign power of the state, which called the legislature itself into being; and though that body might prevent the violation of this prohibition, by more effectual guards and penalties, as they *have done in 1837; yet as the prohibition could not be repealed by the legislature by positive enactments, neither would their omission to act, [*600

expunge this prohibition from the fundamental law. This court, through Chief Justice MARSHALL, have said, that the nature of a constitution "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the objects themselves." "The constitution unavoidably deals in general language;" it does not "enumerate the means" by which its provisions shall be carried into operation. 4 Wheat. 407–8; 1 Ibid, 326. Baldwin's Const. Views, 99–100, 192. So also, the constitution of Mississippi contained only the important objects and great outlines of the government, written and ordained by the people, acting in their highest sovereign capacity, by their delegates in convention assembled; and all the details of legislation were left to that branch and department of the government to whom that duty appropriately belonged. The legislature, in regarding the objects designated, might well surround a constitutional interdict with appropriate penalties; but they could not render it inoperative, either by positive or negative action; and whatever course they might pursue, all laws and contracts repugnant to the prohibition would be void.

When was this prohibition of the constitution to go into effect? That instrument assigns the day; it is "from and after the first day of May 1833;" not *after* the 1st of May 1833, but *from* and after that day and no other. From and after a day specified, fixes absolutely the very day when this prohibition would commence to operate; and to postpone its operation to any future, unknown, indefinite period, at the discretion of the legislature, would be to disregard the plain language and manifest intent of the constitution. Nor were these words, "from and" after the day fixed, introduced by accident. On the contrary, the clause, as originally proposed, was, "the introduction of slaves into this state, as merchandise, shall be prohibited after the —— day," &c., page 57 of Journal; and the provision was amended subsequently by introducing the words "*from* and" after, &c. Why thus cautiously designate the very day for the commencement of the operation of this prohibition, unless it was certainly to go into effect on that very day, by force of the constitutional interdict? To postpone, then, the operation of this prohibition to any day subsequent to that named in the constitution, is to expunge the time altogether, and leave it dependent upon the fluctuating will of the legislature, obeying or disregarding, at pleasure, this constitutional provision, and giving or refusing operation to it, from time to time, by enacting or repealing laws upon the subject, and thus changing a fixed, permanent, established, fundamental law, into a mere directory provision, operative or inoperative, as the legislature might act or refuse to act, or repeal its action upon the subject. But this provision was not only designed to operate of itself, from a day fixed and certain, but unchangeably, through all time to come, or to be changed only by the same sovereign power which framed the constitution. The convention have said, "the introduction of slaves for sale shall be prohibited," &c. This language is general; it is addressed to every one, and to all the departments of government; and why should it, by implication or interpolation, be limited to a direction to the legislature? It was competent for the convention itself to prohibit this trade; and if they have used language which, in a statute, all admit would be a prohibition, why shall it receive a different construction in the organic law? Is a state constitution merely a mandate to the legislature? Is it so, in its prohibitions, and especially in those which are contained in general provisions, as in this case, and not in the article creating the legislative department, and assigning its appropriate powers and duties? If this construction be adopted by implication, in regard to other clauses equally imperative in the constitution of Mississippi, it will be rendered, in many of its most important provisions, absurd and incongruous, nugatory and repugnant.

These words "from and after the 1st of May 1833," have received a settled construction by this court, in 9 Cranch 104, 119, where they say "The act 1st July 1812, provided, that an additional duty of 100 per cent. upon the permanent duties now imposed by law, &c., shall be levied and collected upon all goods, wares and merchandise which shall, *from and after* the passing of this act, be imported
*601] *into the United States, from any foreign port or place. It is contended, that

this statue did not take effect until the 2d day of July; nor indeed, until it was formally promulgated and published. We cannot yield assent to this construction;" and the court exacted the double duties upon an importation on the 1st July. Here it is decided, that these words, *from and after*, included the day named, and such was the settled legal construction, when the words were used in our constitution; and in such cases, it is conceded, that the construction is adopted with the words. Why then introduce the word *from*, by an amendment in this case, unless the prohibition was to commence on that very day named, and in all time thereafter? Thus to designate by an amendment the very day when this prohibition "shall" commence to operate, clearly proves that this should be an absolute prohibition; and never to put it into operation, unless the legislature acted upon the subject, or at such indefinite and distant period as they might designate, is to defeat the meaning of the constitution. Here, then, the precise date is fixed, and the words are "shall be prohibited" from and after that date. In 2 Wheat. 148, 152–3, it was decided by this court, that "under the embargo act of the 22d Dec. 1807, the words 'an embargo shall be laid' not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels, on a foreign voyage, but, consequently, rendered them liable to forfeiture under the supplementary act of the 9th Jan. 1808." In this case, the court said, this vessel was "libelled for a violation of the embargo act of the 22d Dec. 1807, and the supplementary act of the 9th Jan. 1808, the former of which enacts 'that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage' and the latter forfeits the vessel that shall proceed to any foreign port or place 'contrary to the provisions of this act, or of the act to which this is a supplement." "Was then the sailing to a foreign port, a prohibited act, under the embargo law, to a registered or sea-letter vessel? If so, the commission of such an act was a cause of forfeiture under the act of Jan. 9th, 1808. And here the only doubt is, whether the words 'an embargo *shall be laid*,' operate any further than to impose a duty on the public officers to prevent the departure of a registered or sea-letter vessel on a foreign voyage. The language of the act is certainly not very happily chosen; but when we look into the definition of the word *embargo*, we find it to mean 'a prohibition to sail;' substituting this periphrasis for the word embargo, it reads 'a prohibition to sail shall be imposed, &c.,' or in other words, 'such vessels shall be prohibited to sail,' which words, had they been used in the act, would have left no scope for doubt."

Here, too, the question raised is, whether the words "shall be prohibited," operate any further than "to impose a duty" on the legislature to "prevent the introduction, or amount to a prohibition. Now, the words "an embargo shall be laid" operated *in præsenti*, as an embargo, and not merely as directory to the public officers; the words "a prohibition to sail shall be imposed," operated in the like manner, as also did, beyond all doubt, the words "such vessels shall be prohibited to sail." The words, then, "shall be prohibited," operated as a prohibition, and *in præsenti*, and if the words "shall be prohibited to introduce" would so operate, what difference is there in the words "the introduction shall be prohibited?" The case, then, is clear in point, and that, too, on the construction of a penal statute inflicting a forfeiture; and the construction of these words "shall be prohibited," had thus been settled when our convention adopted them in 1832. And here it was a traffic that was prohibited. Now, what is the meaning of the terms *prohibited* traffic? It is an *unlawful* traffic, for the past participle is thus repeatedly used as an adjective. The clause would then read, the introduction of slaves for sale, shall be *unlawful*, from and after the 1st of May 1833, and the proviso would then read, Provided, that it shall not be unlawful for the actual settler or settlers to purchase slaves, in any state in this Union, and bring them into this state for their own individual use, until the year 1845. But if the proviso, from the different terms used, and failure to designate the day upon which the prohibition should commence to operate, was susceptible of a different construction, it would only render still more imperative the main provision, by which the traffic was prohibited, from and after the day named in the constitution.

*Grants of legislative power, mandatory and permissive, frequently occur in the constitution, and the convention well knew how to make such grants, and to distinguish between those which were mandatory or permissive. The first section contains three distinct grants of power, permissive to the legislature, in relation to slaves; and one of these was a power to prohibit the introduction of a certain description of slaves. This power to prohibit the introduction of slaves of one class, by all persons, and the positive prohibition in this case of the introduction of slaves as merchandise, demonstrates, that the convention well understood the difference between a power to prohibit, and an absolute prohibition. Throughout the same instrument, numerous grants of power occur, mandatory to the legislature. Thus, in the 26th section of the 4th article, it is declared, that "the legislature shall provide by law for determining contested elections of judges and other officers." The 10th section of the 7th article, declares, "the legislature shall direct by law in what manner, and in what courts, suits may be brought against the state." These and many other grants in the constitution are mandatory injunctions to the legislature to pass certain laws. Whenever, then, the convention designed to address the legislature, in the language either of permission or command, they used invariably appropriate words for that purpose, and differing entirely from those provisions or prohibitions designed to operate by their own authority; and in this, as in many other similar cases, operating by virtue of the constitution itself. If the terms in the constitution "shall be" are mere directions to the legislature, mandatory or permissive, and inoperative until the legislature shall have obeyed the constitutional injunction, then much the most important part of the constitution, which went into operation immediately, would have remained suspended, until the legislature acted upon the subject. Thus, the 1st section of the 2d article declared, that "the powers of the government of the state of Mississippi *shall be* divided into three distinct departments;" thus seeming to contemplate a future distribution of these powers; yet we know, that this division was made and operated by virtue of the constitution itself. § 9, art. 1, declares: "The people shall be secure in their persons, houses," &c. § 17, "All persons shall, before conviction, be bailable," &c. § 2, art. 3, "Electors shall, in all cases, except, &c., be privileged from arrest, during their attendance on elections." § 4, "The legislative power of this state shall be vested in two distinct branches," &c. § 19, "Senators and representatives shall, in all cases except, &c., be privileged from arrest," &c.; not by future legislation, but by this provision of the constitution. § 1, art. 5, "The chief executive power of this state shall be vested in a governor," &c. § 2, art. 6, "All impeachments shall be tried by the senate." "The governor, &c., shall be liable to impeachment." In all these cases, and throughout this constitution, the terms "shall be," operate *proprio vigore*. The terms "shall be secure," "shall be bailable," "shall be privileged," "shall be vested," mean are secure, are bailable, are privileged, are vested. This is the settled meaning of these terms "shall be," in the constitution; they operate *proprio vigore*, and should receive the same construction in the clause now under consideration.

The terms "shall be" operated immediately, in all these clauses, and present a much stronger case than the one now under consideration. Here the terms "shall be" are the appropriate and proper terms, requiring no construction by which they shall be made to operate in *præsenti;* but operating from and after a future day, fixed unchangeable by the constitution. The day too, thus fixed, was but six months distant, a time barely sufficient to give full and fair notice throughout the state and Union, of the existence of this prohibition, conforming in this particular to many similar laws on the same subject in other states, quoted in the concluding branch of this argument. Why name a day at all, and especially a day fixed and certain, and so near at hand, if this clause were merely directory to the legislature? If any doubt could still remain, it must vanish, upon an investigation of the legislation of the state on this subject. By the act of the territorial legislature of Mississippi, of the 1st of March 1808, certain restrictions are imposed upon the introduction of slaves as merchandise, but chiefly designed to prevent the introduction of dangerous or convict

slaves. (Turn. Dig. 386.) Thus stood the law, when, *in 1817, we formed our first constitution, which contained the following clause: "They (the legislature) shall have full power to prevent slaves from being brought into this state as merchandise;" but there was no prohibition of the traffic. By the act of June 18th, 1822, the territorial law, before quoted, was substantially re-enacted. Revised Code 369.

Thus stood the statutes and the organic law when the convention assembled which adopted the new constitution of 1832. The first contained the fullest grant of power on this subject to the legislature. Why, then, this important change in this provision from a mere grant of power to the legislature, into the prohibitory terms of the constitution of 1832, unless an absolute prohibition was designed by the framers of that instrument? The one was a grant of power to the legislature, the other was a prohibition. The reason of the change is obvious. The legislature, during the intervening period of fifteen years between the adoption of the old and of the new constitution, had never fulfilled the trust confided to them, by prohibiting the introduction of slaves as merchandise; and therefore, the framers of the new constitution determined to confide this trust no longer to the legislature, but to prohibit this traffic themselves, by an absolute constitutional interdict, operating of itself, upon a day very near at hand, fixed and certain, and placed, as were many other subjects by the constitution, above the control of the legislature. The history of that period will also furnish other reasons why the constitution of 1817 was changed, by that of 1832, from a direction to the legislature, into a prohibition. Events had occurred in Southampton, Virginia, but a few months preceding the period when the convention of 1832 assembled, which had aroused the attention of the southern states to the numbers and character of the slave population. The influence of that insurrection is nowhere more clearly demonstrated than in the extraordinary votes and speeches in the legislature of Virginia, assembled shortly after that catastrophe. If insurrection had not appeared in Mississippi, there had been many apprehensions upon the subject; and looking at the tragedy just enacted in our sister state, the convention introduced this provision, to produce, among other good effects, additional security to the people of Mississippi. Whilst, in this constitution, they gave to the governor power to call forth the militia of the state "to suppress insurrection," they guarded against the supposed danger of that event, by this important constitutional interdict. If Virginia had been driven to the very verge of the abandonment of her ancient institutions, by the events which had occurred within her limits, was there not some reason that the convention to which was intrusted the security of the people of Mississippi, should interpose some guards for their protection? In looking at the general census of 1830, then recently published, they saw, that whilst in Virginia the whites outnumbered the slaves 224,541, in Mississippi, the preponderance of the whites was but 4784, and that the slave population was increasing in an accelerated ratio over the whites, the former now greatly outnumbering the latter. In looking beyond the aggregates of the two races in the state, to particular counties, they found, that in an entire range of adjacent counties, the preponderance of the slave over the white population was three to one; in many of the contiguous patrol districts, more than ten to one, and in many plantations, more than one hundred to one. In looking at the policy adopted by our conterminous and sister state of Louisiana, they found that, in that state, the legislature, by laws passed the 19th November 1831, and 2d April 1832, had, under severe penalties, prohibited the introduction of slaves as merchandise, and declared the slaves so introduced to be free. Such was the legislation of Louisiana immediately preceding the assembling of our convention, and such the circumstances and example under which we acted. We acted as Louisiana had just done, by introducing a provision designed to operate, after the short notice of six months, as an absolute prohibition. The subject had attracted great attention, when the delegates were elected to the convention; and the people fully expected and required final and definitive action by the convention itself on this question, and they were not disappointed.

Such was the opinion which prevailed, when the first legislature assembled under the

new constitution, in Jan. 1833. This legislature was assembled at the time specified by
*604] the convention, by virtue of writs issued by that body, to organize *the government under the new constitution. If this clause be in itself a prohibition, then it did not operate as a command to the legislature. But if it be not a prohibition, then it is conceded to be a mandate, directed specifically to the legislature, commanding them to prohibit the introduction of slaves as merchandise, from and after the 1st of May 1833. If that legislature adjourned, without fulfilling this injunction, it must have remained for ever unfulfilled in one most important particular, namely, the time fixed by the convention from which the prohibition should commence to operate ; for, under the provision of the constitution, no other legislature could convene until November 1833, a period long subsequent to the time designated for the commencement of the operation of this prohibition.

The legislature was a department of the government, created by the convention, and assembled in pursuance of its authority. Under the 7th article of the new constitution, every member of this legislature has taken a solemn oath to support that instrument, and had they conceived the provision in controversy to be a mandate directed to the legislature, they would have disregarded those oaths, if they had failed to make any prohibitory enactment in pursuance of this injunction of the constitution. Had even this mandate been in opposition to their views of public policy, it would still have been obligatory upon them. But this legislature passed no laws in pursuance of this provision, because they did not conceive this clause to be a mandate directed to them, but an operative prohibition of the constitution ; and that the omission was not casual, is proved by the fact, that they proposed for the consideration of the people, at the next November election, an amendment to the constitution, striking out this 2d section in regard to slaves, and introducing in lieu thereof, the following provision : " The legislature of this state shall have, and are hereby vested with, power to pass, from time to time, such laws regulating or prohibiting the introduction of slaves into this state as may be deemed proper and expedient." (Laws of Mississippi 478, March 2d, 1833.) The legislature thus endeavored to change a prohibition, by their proposed amendment, into a mere discretionary authority, which they might, or might not, exercise at their pleasure. This attempt on the part of the legislature to obtain for themselves this discretionary power failed, as they conceded, at the succeeding session of 1833. The amendment, in order to be incorporated into the constitution, must have been voted for by "a majority of the qualified electors voting for the members of the legislature ;" and it is obvious, that 4500 votes given for this amendment, must have constituted a small fraction of the voters of the state at that period. The vote of the state for governor, in November 1839, was 34,532. I have not the vote of Nov. 1833, but 4500 could not have been one-third of the vote then actually given for members of the legislature. A very small vote was given against the amendment, and it is surprising that so many votes were given, as no vote on the question was a vote against the amendment. The legislature, in December 1833, acknowledged, that their proposed amendment had failed. The subject was then again before them. They had renewed their oaths to obey the mandate of the constitution, and why was obedience again refused ? Because this legislature, like its predecessor, did not view this provision as a mandate directed to them, but as a prohibition. It is said, that at the date of this note, the validity of such a contract was not disputed in Mississippi ; but this is entirely erroneous, and the mistake is proved by the very quotation made by our opponents, from the message of Governor Lynch, of the 1st Monday in January 1837. That message declares, at that date, that "it has now become a mooted question, under this clause of the constistitution, whether contracts for that description of property can be enforced." Now, the date of this contract is the 20th of December 1836, but two weeks preceding the admission thus made in the executive message, that the validity of these contracts was then "a mooted question." There is no fact more notorious in the state, than that the legality of these transactions was disputed at the date of this contract ; and the suggestion that this illegality is an *ex post facto* discovery, when bankruptcy became universal, is entirely erroneous. This message shows no embarrassments at that date.

The legislature were then engaged in making banks and paper money. We were then careering onward upon the tide of a delusive prosperity ; and the explosion of the succeeding spring, came upon us like *some of those tropical hurricanes, whose only warning consists in one sudden overwhelming sweep of ruin and desolation. It [*605 is true, Governor Lynch did, afterwards, in his message of May 1837, recommend the enforcement of this prohibition. It is true also, that the legislature did then guard against the violation of this prohibition, by punishing the transgressors of it with fine and imprisonment ; but all this implies no admission of the previous validity of these contracts, for this court have said, that a constitution is not the place in which the minor details of legislation, these pains and penalties, are to be found. But if this question was mooted, as we have seen, at the date of this contract, it was not on the ground that this was a mandate; but that, as a prohibition, it interdicted only the importation and not the sale. The proof on this point is ample; but we need only refer to the opinion of Chancellor Buckner, so much relied on by our opponents, in which he recites all the grounds assumed in behalf of the negro traders, namely : "1st. That though the introduction of the negroes may have been illegal, yet that the consequences of that act could not be communicated to the contract of sale and purchase, which was a separate and distinct transaction between themselves and the complainants. 2d. If the reverse of the first proposition were true, it is contended, that the illegality of the contract was a matter of pure defence in the court of law."

Here, even at that late day in this controversy, neither these wealthy and powerful traders, nor their learned counsel, deemed it even a point in the controversy, that this provision was not a constitutional interdict, but that the only question was, whether that interdict affected the sale or the introduction only. Chancellor Buckner also takes up fully the constitutional question, and declares his determination "to put it in train for ultimate decision." In that opinion, which is very elaborate, he does not pretend, that this clause in the constitution was not of itself prohibitory; but on the contrary, he says : "Thus, we intend to prohibit the multiplication of slaves in this state, but as we do not intend to extend it so far as to prohibit our own citizens from bringing them in, for their own use, in order to render the introduction illegal, it must appear as a part of the act, that the intention existed to use the slave so introduced, as an article of merchandise, or for sale. If the framers of the constitution intended anything beyond this construction, instead of the language employed, we should expect to find them declaring that the sale of negroes in this state, which were introduced as merchandise, or for sale, shall be prohibited, from and after the first day of May 1833. Such a construction would fully sustain the construction contended for by the complainant's counsel; there the 'sale' not the 'introduction' would be the thing prohibited. To show my understanding of it more clearly, I mean to declare, that the moment the negroes were 'introduced as merchandise or for sale,' the offence was at once complete. No further step was necessary to bring it within the meaning of the prohibitory clause of the constitution." Here, it is most distinctly conceded, that the act of importation, with intent to sell, is rendered illegal by "the prohibitory clause of the constitution ; and that the contract, by virtue of the true construction of that clause, would have been illegal, if the sale had been embraced in the provision. And not only is this point thus clearly conceded in this case, but no decision, so far as my knowledge extends, has ever been made by any judge, against us, on this point

Upon this point, then, we have the decision of the district judge of the United States for the state of Mississippi (Mr. Gholson); the decision of Chancellor Buckner so much relied on by our opponents ; and finally, the decision of the highest court of the state of Mississippi, after the most elaborate argument, the question being sent up for the express purpose of obtaining a final adjudication. That opinion, too, was delivered by a gentleman distinguished at the bar and on the bench, as a statesman and jurist ; who had repeatedly served with distinction in the legislature of the state, upon the bench of the circuit court, in the convention which framed this very constitution, in the senate of the United States, and finally, as a member of the highest court of the state. He was not only a member of the convention which framed the constitu-

tion, but chairman of the very committee to which this clause was referred. He was a witness of all that transpired in that committee and in that convention; he partici-
*606] pated in all the debates upon the question, observed *all the modifications of this provision, from the imperfect form in which it was originally presented, until it was perfected as it now stands; and his opinion as to the intention of the convention, is the testimony of a witness, as well as the decision of a judge. Concurring with him, was the able and learned chief justice of the state, and there was no dissenting opinion. As authority merely, such a decision, under such circumstances, pronounced by the highest court of the state, upon a question regarding the construction of a clause in their own constitution, upon a local question with which, and all the proceedings relating to it in the convention and in the legislature, they must be more familiar than this court can be, ought to be conclusive.

In delivering, after solemn argument, the deliberate opinion of the high court of errors and appeals of Mississippi, Judge TROTTER says—"Two questions present themselves for the consideration of this court: 1st. Whether the consideration of the note for which the judgment was given is illegal, and renders it void. 2d. Whether a court of chancery can give relief. The constitution of 1832 provides, that 'the introduction of slaves into this state, as merchandise, or for sale, shall be prohibited, from and after the first day of May 1833.' That it is competent for the people in convention, to establish a rule of conduct for themselves, and to prohibit certain acts deemed inimical to their welfare, is a proposition which cannot be controverted. And such rule, and such prohibition, will be as obligatory as if the same had been adopted by legislative enactment. In the former case, it is endowed with greater claims upon the approbation and respect of the country, by being solemnly and deliberately incorporated with the fundamental rules of the paramount law, and thus placed beyond the contingency of legislation. It has been argued, that this provision in the constitution is merely directory to the legislature. This interpretation is opposed, as I conceive, to the plain language of the provision itself, as well as to the obvious meaning of the convention. It cannot surely be maintained, that this provision is less a prohibition against the introduction of slaves, as merchandise, because it is not clothed with the sanction of pains and penalties expressed in the body of it. That belonged appropriately to the legislature. Their neglect or refusal to do so, might lessen the motives to obedience, but could not impair the force of the prohibition."

Here, then, is the question made for the final adjudication of the court, and clearly determined by them, and with an ability worthy of their high reputation. It was, too, a decision in favor of the trader in slaves, upon the doubtful question of chancery jurisdiction, and he was permitted, for want of a defence at law, to reap the fruits of his unlawful contract; thus vindicating the court, in this very decision, from the charge of any bias, as judges, in favor of our own citizens, so unjustly urged by our opponents, as a reason why that decision should have no weight with this court. The judges of that court, for integrity and impartiality, are universally esteemed by the bar and by the people, and by all men and all parties in the state; any insinuation that these judges, or any one of them, ever had been, or ever could be, governed by an unworthy bias, could only subject to just suspicion those by whom such a suggestion could be made, and those upon whom it could have the slightest operation. I am restrained, by my respect for this court, from expressing here my indignation at the assault made upon the functionaries and people of Mississippi. It is true, as stated, that great embarrassments pervade the state, and that it is strewed with the wrecks of broken hopes and bankrupt fortunes. But has the honor of the state been tarnished, have the laws been disregarded, the courts overthrown or corrupted, or the constitution subverted? Has rebellion arrested for a time the progress of justice, as it once did from similar causes, in the great state of Massachusetts? Have we followed the evil example of another great state of the west, by enacting laws permitting a tender of worthless paper upon executions, for debts payable in gold and silver? Have we, to enforce these enactments, trampled upon the fundamental law of the state and of the Union? Have we entered the sacred halls of justice, and by the strong arm of legisla-

tive and popular power, expelled from the bench the highest judicial functionaries, and placed usurpers there upon the broken fragments of the constitution? Have we—but even in retaliation, I will darken no more, with *the pencil of truth, those scenes of misfortune, delusion and folly, which a thousand glorious deeds and [*607 ennobling sacrifices, in war and in peace, should expunge from the history of that patriotic commonwealth. But from that state at least, if not from all the Union, though we have never asked their sympathy for our sufferings, might we not justly challenge their respect for the fortitude with which they are borne. Again and again, has the stern mandate of the law entered the dwelling of the husband and wife, and driven forth from it, them and their children, without a roof to shelter or a home to receive them. Again and again, have indorsers and sureties for others suffered the fate of the principals, and stood by in silence, whilst the sheriff or marshal proclaimed the sale, for the debts of others, of the last remnant of that property, which years of honest industry had accumulated. And was the law resisted? No! These gloomy scenes have been marked, almost universally, by a quiet endurance of suffering, and virtuous submission to the laws of the land. I regret the occasion that has extorted these remarks upon a subject which should never have been introduced into this argument; but, when Mississippi is thus arraigned before this high tribunal, this vindication is just and proper.

But, if this clause be not a prohibition, it is conceded to be a mandate to the legislature, requiring from them implicit obedience. It is admitted, that if the legislature had passed an act repugnant to this provision, that act would have been as clear a violation of their oaths and of the constitution, and as utterly void as if this clause had been an absolute prohibition. The mandate, then, established a policy which the legislature could not overthrow; and being binding upon the legislature, was obligatory on the judiciary. The government itself, in all its branches, was created by the convention; they were all creatures of the constitution, and no one department of that government could violate any mandate or provision of that constitution. The time was not indefinite, but fixed on the 1st of May 1833; from which very day, in all time to come, this mandate should be made to operate; and if the legislature neglected to enforce this mandate by penal sanctions, did it, therefore, follow, that the judiciary should decree a performance of a contract, thus required to be prohibited from and after a certain day fixed by the constitution? A contract contrary to the public policy of a state will not be enforced by the judiciary. This policy may arise from the common unwritten law of a state, from its peculiar situation and institutions, or expressly or by implication, from a statute or constitutional provision. Now, the convention had promulgated it as the policy of the state, that from and after the 1st of May 1833, slaves should not be introduced, as merchandise; and was the will of the convention, or of the legislature, to be obeyed by the courts, in regard to this policy? It was the will of the convention, that this traffic should cease on a day certain and fixed by the constitution; and if the legislature, which could not change this policy, failed to discharge their duty, that was no reason why the courts should follow their evil example. The courts might well say, and it was their duty to say, that although we cannot act affirmatively against the violators of this policy, they shall not make the judiciary the instruments, by a decree in their favor, to overthrow a great constitutional mandate, designed to accomplish important purposes. The courts of a country will often ascertain, without a statute, and often from the mere implication of a statute, or merely from the situation of the country, what is contrary to the policy of a state, and they will enforce no contract repugnant to that policy. To no higher source, then, could the courts of a state go, in order to ascertain what was the true policy of a state, than to a mandatory clause in the constitution. Had the clause in question been a mere grant of power to the legislature, the courts might have waited the action of that body; but, when the clause was mandatory, it promulgated the policy of the state, from an authority paramount to that of the legislature, and which policy, the legislature, neither by acting nor declining to act, could expunge from the constitution.

If the will of the legislature were ascertained to be one way in regard to this policy, and that of the convention the other, which should be obeyed by the judiciary, when required to act by decree affirmatively upon the question? Can there be a doubt, that the true answer to such a question should be, in the language of this court, in 4 Wheat. 408, "If, indeed, such be the mandate of the constitution, *we have only to obey." This view of the subject is sustained by a late unanimous decision of the supreme court of Tennessee, in which they say: "In the precise state above supposed, stood the matter, when the convention in 1834 adopted the 5th section of the 11th article of the reformed constitution, in which they provide, that the legislature 'shall pass laws to prohibit the sale of lottery-tickets in this state.' This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants." Bass *v.* Mayor, Meigs 421. Upon this ground alone, the court pronounced the contract invalid, which was dated March 3d, 1835, and no law was passed till the 13th February 1836, when a law was enacted, prohibiting lotteries; as a law was passed in 1837 by the legislature of Mississippi prohibiting the introduction of slaves as merchandise. But independent of the subsequent law in Tennessee, their courts pronounced the contract invalid, in a case where many thousand dollars had been advanced to the city of Nashville, upon the sale of this lottery, for the useful purpose of improving the streets of that city, and which money would be entirely lost, if the contract were declared invalid. But it was so pronounced, upon the sole ground that the constitutional mandate to pass laws prohibiting lotteries "was itself a prohibition;" because, by this mandate, the policy of the state "was announced to the complainants, before the formation of their contract with the defendants," and they had no right to ask the court to disregard that policy, upon the ground, that the legislature had failed to provide the proper penalties. The court could not supply those penalties, but they might well declare, that they would not become instrumental in defeating this great public policy, by decreeing the performance of contracts repugnant to it. If such a construction of the constitution of Tennessee, upon a mere mandate to prohibit lotteries, was proper, how much stronger is the case before us? Here, the subversion by the courts of the policy promulgated in the constitution, might involve not merely the property, but the lives of the people of Mississippi. Had not the people, then, in such a case, a right to require that their courts should not become auxiliary in encouraging the subversion of this policy, by the enforcement of contracts repugnant to it? The legislature might never agree upon the details of a bill for the punishment of the transgressors of this policy; and must this mandate, therefore, be expunged by the courts from the constitution, or changed into a grant of discretionary power to the legislature? If so, this clause might as well never have been inserted in the constitution. It is sufficient for courts to know, in any case, that the enforcement of a contract will be dangerous to the peace and prosperity of a state; and they have invariably refused, from a regard to the public good, to enforce such contracts. What better evidence could the courts of Mississippi desire, that the enforcement of this contract would be subversive of the true policy of the state, and dangerous to its peace and prosperity, than the prohibitory mandate of the constitution? If, as a consequence of a refusal of the courts to maintain this cardinal policy, the state had been filled with insurgent slaves, or with slaves in an excess too far beyond the white population, and the scenes of Southampton had been re-enacted within our limits, would the judicial ermine be unstained with the blood of the innocent victims, who had appealed to them in vain, to discharge their duty, by denying their aid to all these contracts thus clearly repugnant to the prohibitory policy of the constitution? Why should the judicial sanction be given to the violation of a constitutional mandate; and the legislature, thus encouraged by a co-equal and co-ordinate department of the government, to persist in refusing to discharge the duty imposed by the constitution? It is clear, then, to my mind, that whether the clause in question be of itself an absolute prohibition, or a prohibitory mandate, the contract is alike invalid, in accordance with reason and argument, as well as upon the authority of the unanimous decisions of the supreme courts of Mississippi and Tennessee.

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Such was the view which those courts took of their duty to the people, under these clauses in their respective state constitutions; and it would be strange indeed, if this court should now inform those tribunals, that they had erred in this respect, and direct them to retrace their steps on this question. The people of Mississippi in convention, when creating a government, had said, this traffic "shall be prohibited, from and after the 1st of May 1833." Was it then competent or proper for the judiciary, [*609 *who are but agents for the people, under this government, deriving their existence and authority from the constitution, and bound by all its injunctions, to say this trade shall *not* be prohibited on the day fixed by the convention, but shall continue upheld by our decrees, until certain other agents of the people superadd legislative penalties? A "law" against the mandate would be "void," and so must be declared by the courts; and yet negative action, or a failure to act in pursuance of the mandate, it is contended, is obligatory upon the judicial tribunals. These tribunals are not created by, nor do they derive their appointment or authority from, the legislature; nay more, they are expressly authorized to restrain that department within the constitution, by invalidating all their acts repugnant to that instrument; and it would be strange, indeed, if, when that paramount law which all were bound to obey, declared this traffic shall be prohibited on a day certain, that the courts who are the guardians and interpreters of the constitution, should say, it shall not be prohibited on that day named by the convention, but only on such other future day, as may be designated by the legislature. Even if legislation, additional and penal, was contemplated by the convention, does it therefore follow, that the trade was lawful and proper for judicial sanction? On this second point also, our highest court, in the case above quoted, declare it immaterial whether it be a mandate or a prohibition. They say, "in either case, it fixes the policy of the state on this subject, and renders illegal the practice designed to be suppressed."

These views, thus declared unanimously by the supreme courts of two of the states of this Union, are in accordance with just views of constitutional liberty. The formation of the constitution of a state is an act of sovereign power, emanating directly from the people. Legislation is not an act of sovereign power. The legislature is not sovereign. It is but a co-ordinate department of the government, created by the constitution, from which it derives all its powers; and when the people have inserted therein a mandate, declaring that from and after a day named by them, such a thing shall be prohibited, would it not be strange, because one department of the government, to whom this mandate was addressed, had disobeyed it, that it should, therefore, be considered a dead letter by another co-equal and co-ordinate department of the government, sworn to support the constitution, to maintain inviolate all its provisions, to repudiate all contracts repugnant to its spirit or policy, and to declare void, and render inoperative, all acts of any department or persons opposed to its provisions? The legislature could pass no act of grace or indulgence, dispensing with this mandate, and legalizing contracts repugnant to it; nor would their disobedience and failure to act constitute a just cause of disobedience by that very department which was not only sworn to support the constitution, but whose peculiar duty it was to expound that instrument, and to keep all persons and departments within its limits, whenever a case arose for the exercise of their judicial functions. What is the meaning of the oath taken by the judges of our high court to "*support* the constitution?" It is, to maintain the supremacy of the constitution, and to enforce no laws or contracts repugnant to any of its mandates. And if an act giving bounties for the violation of this mandate would have been void, why is a contract repugnant to it, unsanctioned by any law, valid? the first being a legislative enactment, the second a confederacy of individuals to disregard the mandate. Suppose, this mandate had been addressed to the executive, could the legislature, with his concurrence, or without it, by the constitutional majority of two-thirds, have passed a valid law in opposition to such a mandate; and would the judiciary, by affirmative decrees, have enforced such an enactment? Or, if the mandate had been addressed to the judiciary, would an opposing law have been valid? Surely not! And the reason in all these cases is the same, because no one

of the departments of the government, when required to act affirmatively, can disregard any mandate of the constitution. The policy of a state may be announced in the constitution, as the will of the people, either in a mandate, or in any other form; and however announced, no court can disregard that will, or subvert that policy. The supremacy of the constitution is the great cardinal principle of American liberty, from which there is no appeal but to force; and to subvert its principles, or disregard its mandates, is anarchical and revolutionary. If the clause in question be converted into a mandate to the legislature, by interpolation and implication, *why is it not *610] declaratory by construction, as well as mandatory; declaratory of the policy of the state on a day fixed and certain, and mandatory to the legislature to enforce that policy by appropriate legislation? This clause, marking the will of the convention as to this policy, upon the day named by them, was declaratory of that policy; not a policy to be established hereafter, by grants of discretionary power to the legislature, but declared in a mandate, imperative upon that body, and announcing to all the will of the convention. The words "shall be prohibited" on a day named by the convention, did announce the policy designed by them to be established on that very day; and if, by interpolation and implication, we change these words into a mandate addressed to the legislature, shall we also so interpret these words, thus interpolated by conjectural construction, as to subvert the policy thus announced, in terms clear and explicit, and render the whole clause dependent, from time to time, upon the fluctuating will of the legislature, inoperative without their action, changeable at their pleasure, and amounting to nothing more than the mere grant of discretionary power to the legislature, commencing when they legislate, and ceasing when they repeal the present or any future enactment on the subject?

In 2 Dall. 304, Judge Paterson, of this court, said: "Every state in the Union has its constitution reduced to written exactitude and precision. What is a constitution? It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. What are the legislatures? Creatures of the constitution." "The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move." "It is a rule and commission by which both legislators and judges are to proceed;" and "the judiciary in this country is not a subordinate, but co-ordinate branch of the government." Was not the prohibition of the introduction of slaves, as merchandise, from and after a day "certain and fixed" by the constitution, one of those "first principles" announced in that instrument, as "the permanent will of the people," "paramount to the power of the legislature," and furnishing the "rule and commission by which both legislators and judges are to proceed?" Now, by disregarding this mandate, the courts would make an act, or the absence of an act, of legislation, paramount to the fundamental law; they would exalt the legislature above the people, the creature above the creator, and elevate the policy of the legislature above that of the constitution.

It is admitted, that if this clause were in a law, it would be a prohibition, but as it is in a constitution, it is said to be a mere direction to the legislature. Now, the constitution is a law, the sovereign law, the paramount law, the fundamental, the supreme law, the permanent law, the law of highest obligation, the *lex legum*, the law of laws. The constitution of Mississippi of 1817, of which that of 1832 is an amendment, declares, that therein and thereby the people "do ordain and establish;" which is quite as strong as "do enact;" and all laws contrary to any of its provisions are declared "void." It is, then, an act of sovereign legislation, ordaining and establishing certain permanent rules and fundamental principles of public policy, of universal obligation throughout the state, and not mere directions to any one department of government.

In England, their early and fundamental laws, and especially their Magna Charta, were called constitutions; and before the revolution, these were called by our ancestors, "the constitution," "English constitution," "the constitution venerable to Britons and Americans." 1 Journ. Am. Cong. 60, 65, 138, 148, 149, 163. Many of the fundamental principles of public liberty contained in Magna Charta are copied into the constitution of Mississippi and of the other states. How, then, is this great constitutional law regarded and construed in England? In the first place, then, it was a law, and is thus described in Dwarris on Statutes 801: "Magna Charta, 9 Hen. III. is the earliest statute *we have on record"—"it contains 37 chapters." Among the rules of construing this fundamental law here laid down was this, that "no [*611 sanction was wanting to enforce its obligations," that no judgment could be given by any court "contrary to any of its points," but that it should be observed with "the the most scrupulous care." Lord Coke says in regard to it, "As the gold-finer will not out of the dust, threads or shreds of gold, let pass the least crumb, in respect of the excellency of the metal, so ought not the learned reader to let pass any syllable of this law, in respect of the excellency of the matter." But here, in our Magna Charta, the fundamental law of the state, consecrated as the act of the people in their highest sovereign capacity, we are to give less effect to its provisions than to subordinate legislative enactments. In a statute, it is admitted, these words would be a prohibition, but in this fundamental law, these same words are not so to operate, but are to be changed by implication and interpolation, or rather by what Coke calls "divination," guessing, or judicial astrology, into a mere direction to the legislature. Was Magna Charta ever regarded as a mere direction to parliament? No, it was universally interpreted as addressed to the courts, and to be enforced by them with the most "scrupulous observance" of all its provisions. And if, by implication or interpolation, we shall construe one portion as addressed to the legislature for their direction, where is the rule to stop? Parts of this constitution are addressed in words to the legislature, and other portions are not so addressed; and when the framers of the constitution intended merely to give directions to the legislature, they so declared, and not otherwise. No British court would so construe any clause of Magna Charta as to defeat any of its fundamental principles, or to change them into mere directions to the legislature; and shall an American court regard as less sacred the prohibitory enactments of the constitution? Among the canons for construing Magna Charta is the maxim "*verba ita sunt intelligenda, ut res magis valeat quam pereat;*" but here we are asked so to construe this provision that it may perish and be treated as a dead letter. Indeed, this clause is asked to be expounded as the young interpret dreams, by contraries; and when our fundamental law says, this traffic "shall be prohibited, from and after the first May 1833"—this is to be construed, "shall not be prohibited," on that or any other day but such as the legislature may or may not think proper to designate.

The act of December 1833, it is said, taxes the sale of these slaves, and therefore, this clause is not prohibitory. But this act is merely an amendatory and declaratory statute, passed in pursuance of the auditor's report of November 1833, to remove "any ambiguity" in the act of 1825. Under the last proviso of the 5th section of the act of 1825, citizens of the state who sold slaves, as merchandize, contended that they were not liable to pay the tax. The auditor thought otherwise, and justly so, but to remove all "ambiguity," he recommends the legislature to "declare the liability of every person bound to pay the said tax." The first three sections of the amendatory act of December 1833, merely enforced the collection of the tax authorized by the act of 1825, and both acts would embrace a tax on sales of slaves, provided they had been introduced prior to the first of May 1833. Now, many slaves introduced for sale remained, like all other merchandize, for years unsold; and to enforce the collection of the tax already authorized by the act of 1825, on these lawful sales, was the intention of the first three sections of the act of 1833. The fourth section of the act of 1833, if it be a substantive provision, going beyond the act of 1825, applies exclusively to any "citizen of this state." From the construction of our opponents, it would follow, that by this act, the legislature intended to discriminate between residents of the state and non-

residents, by imposing upon the former only, and not upon the latter, a tax on the sale of all slaves introduced as merchandize, after the date of the act of 1833. Such was not the intention of the legislature. The fourth section was declaratory only, and was a legislative construction, not of the constitution of 1832, but of the fifth section of the act of 1825. That section commences as follows: "And whereas, it is provided, in the fifth section of the act to which this is an amendment, that nothing in that act shall authorize a tax to be collected on the sale of any slave or slaves, sold by one citizen of this state to another citizen thereof; therefore, and for the better understanding whereof, *be it enacted, that when any citizen of this state, residing
*612] permanently therein, shall bring into this state any slave or slaves," &c. That section, then, upon its face, was enacted solely for the "better understanding" of the 5th section of the act of which it was an amendment, and with the view only to obviate all "ambiguity" as regards that section by a legislative construction, applying the act of 1825 to residents as well as non-residents. There is not one word in the act of 1833, demonstrating that the legislature were placing any construction on the prohibition or prohibitory mandate of the constitution; much less, that they were engaged in the unholy purpose of enacting laws repugnant thereto. The declaratory and amendatory act of 1833, can well expend the whole force of all its provisions, in aiding the collection of the tax authorized by the act of 1825, and applicable only to such cases, as those to which that act could well apply, consistently with the provisions of the constitution. No new tax was authorized by the act of 1833, but only more adequate provisions to insure the collection of the tax authorized by the act of 1825, and declaratory enactments for the "better understanding thereof."

This court is asked to repose upon a legislative construction of our constitution; and to do so, they must give a construction to the very enactment in question, never intended by its framers. Construction is to be based upon construction. And not only was this act of 1833 never intended as a construction of the constitution, but only of the act of 1825; but such has been its practical interpretation. The journals of the convention and legislature of Mississippi not being here, I am driven to the printed book of our opponents, consisting of such extracts from journals and messages, as they deem favorable to their cause, but which show that this act of 1833 has never been applied to slaves introduced after the 1st of May 1833, although it may properly have applied to the cases, comparatively few in number, of slaves introduced for sale, prior to the 1st of May 1833, but sold, as they lawfully might be, in such cases, subsequent to that period. Thus, at page 29 of this pamphlet, is quoted the statement of the auditor.

Amount received on account of slaves sold as merchandize from the 1st of Jan. 1833, to 3d March 1833, inclusive, .	$1065.17
Do. do., from 4th March 1833, to 19th Nov. 1833, . .	2625.13½

Does this show, that any of these slaves, thus sold, were introduced subsequent to the 1st of May 1833? The slaves introduced prior to that date, though sold afterwards, were clearly liable to the tax; and if the tax continued to be collected on all slaves imported afterwards, why this decrease in the revenue from that source, when the sales were increasing? Why was $1000 collected in two months from these sales, prior to the 4th of March 1833, and but $2625 in nearly nine months afterwards? As the importations and sales were increasing so rapidly, why this decreasing revenue? Can any other reason be assigned than this, that no tax was collected on the sales of slaves introduced after the 1st of May 1833, but only on such sales, after that period, as were made of slaves before introduced? But again, our opponents allege that the principal importations and sales were made in the years 1835 and 1836, and consequently, the revenue in those years should have greatly increased from that source. Now, at page 45 of their pamphlet, the auditor's report shows that the amount of tax was as follows:

Amount received on account of slaves sold as merchandize, from 20th Jan. 1835, to 28th Feb. 1835, inclusive, . . .	$ 20 00
Do. do., from 18th March 1835, to 4th Jan. 1836, . . .	166 40
	$186 40

Here is a prodigious decrease in the revenue this year, showing, that the tax must have been confined to the few slaves sold within the period above mentioned, introduced prior to the first of May, 1833.

On looking at the next year, at page 45 of the pamphlet, we find, by the auditor's report:

*Amount received on account of slaves sold as merchandize, from 5th Jan. 1836, to 29th Feb. 1836, inclusive, . . .	[*613 $68 50
Do., from 1st March 1836, to 4th Jan. 1837, ...	82 00
	$150 50

Thus, we find the tax reduced the last twelve months to $150.50, and the last ten months to $82; thus continually decreasing, when it should have been so vastly augmenting. No reason can be assigned for this, except that the unsold slaves, introduced as merchandize, prior to 1st May 1833, became fewer every year, until, in the last ten months, the sale of four slaves, at less than $1000 each, would have yielded, at the legal rate of tax of 2½ per cent. on the sales, more than the whole amount of the whole tax received of $82. Now, this was the period within which the plaintiffs made their sales of these slaves, the amount of which sales on 20th Dec. 1836, according to the notes sued on, being $14,875, the tax on which sales alone, would, at the lawful rate, have amounted to $371, being not only more than the whole tax on all the sales in 1836, but more than on all the sales, by our opponents' own showing, from 20th Jan. 1835 to 4th Jan. 1837; the totality of which was, as we have seen, but $347.50, which would show taxes received on but sixteen slaves in these two years, rated at less than $1000 each.

Here, by their own book, it is shown, that no tax was paid by the plaintiff on the sales in this case, and that their counsel in this court have been greatly deceived in their conjecture to the contrary. From 1st May 1833, till May 31st, 1837, at least 40,000 slaves were introduced and sold. The average price for working slaves was then $1000 each, on a credit, and such generally were introduced by the traders; and the total price would thus be $40,000,000, the tax on which, under the act of 1833, had it applied, would have been $1,000,000, whereas the amount really received, we have seen, as shown by our opponents, was less than $4000. If, then, this tax was payable under the act of 1833, the negro-traders (for by law they were to pay the tax) have defrauded the state of Mississippi, in four years, of $1,000,000.

From 1830 till 1840, the slaves, by our census, increased 130,000, and as the importation commenced chiefly in 1833, and was prohibited in May 1837, the tax should have much exceeded $1,000,000. Now, is it credible, that if this tax were due under the act of 1833, that it would never have been assessed, and that less than $4000, out of $1,000,000 would have been collected? And why was not the prohibition enforced by proper pains and penalties? In 1833, we find the legislature endeavoring to amend the constitution, so as to get clear of this prohibition to a certain extent. The sessions of our legislature are biennial. The next session was in 1834–5, but it failed on account of a disagreement between the two houses, as to the alleged illegal organization of one house, and was prorogued by the governor. The next legislature did prohibit, in May 1837; the meeting in May 1837, being of the same legislature which first assembled in 1836. On the 14th Jan. 1836, the following entry appears on the journal of the house: "The committee of revisal and unfinished business, have requested me to report as part of the unfinished business of last session, the following bills and resolutions namely: 'A bill to be entitled an act to prohibit the introduc-

tion of slaves into this state as merchandise.'" Page of Pamphlet, 42. At page 48 (436 of Journal), Mr. Gholson called up this bill, but no final and direct action was then had on it. In January 1837, the bill was again brought up, and at page 53 of the pamphlet (102 of the Journal), a motion to postpone it indefinitely failed, by ayes 13, noes 56, thus showing a very large majority to be in favor of the bill, although they could not agree on the details until May 1837, when the present prohibitory statute was passed by the same legislature which convened in 1836. And here, it is worthy of remark, that Mr. Gholson, our federal judge, who has represented the state with so much ability, both at the capitol of the state, and of the Union, served throughout all these successive sessions of the legislature, from 1833 till 1837, and took a leading part in all these bills connected with this subject, at all these periods; namely, the tax bills, the bill to amend the constitution, and the *prohibition bill, repeatedly serving as chairman in all these sessions. Who, then, more competent to understand all these bills, and to decide with full knowledge of all these questions? Yet this learned judge of our federal court was the first to decide this entire question in our favor, as quoted in the Free Trader Gazette, produced by our opponents. Here, then, is a practical construction of this question, by a refusal of all the authorities of Mississippi to demand or receive any portion of that immense revenue, which might have been derived from these sales, had they been regarded as legal, and it is a construction which embraces both points of the controversy, namely, the absolute character of the prohibition, and the illegality of the sale, as well as of the introduction for sale. Must not all, then, have known, that by declining to receive these taxes, the state proclaimed the illegality of the sales; and was not the plaintiff, when he made the sales in this case, without the payment of any tax, a wilful transgressor of this great constitutional interdict?

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But independent of this practical construction in our favor, it is settled, that an act passed for "the better understanding" of a previous law, and declaratory of its meaning, must be connected with the previous act of 20th February 1825, whose true meaning it expounds, and be considered as though inserted in that law, and at that date. In this view of the case, the terms "shall bring" need not be construed "shall have brought," although such construction has been repeatedly given, to prevent a repugnance between a statute and a constitution, or between two statutes, or to obviate injustice or a violation of fundamental principles; but these words "shall bring," in the declaratory 4th section of the act of 1833, must be referred to the 20th February 1825, the date of the act expounded so as to impose a tax, under that law, on all sales by citizens (as well as non-residents,) or slaves lawfully introduced, after that date, for sale, before the 1st May 1833, and not yet sold, or on which sales the taxes had not been paid. This was the obvious intention of the legislature, for they were expounding the meaning of the act of 1825, and not interpreting the constitution. Thus, in the case of Pouget, 2 Price 381, where the act of 53 Geo. III., c. 33, imposed a duty on hides, of 9*s.* 4*d.*, meaning that much per 100 weight, but neglecting to say so, when a subsequent act amendatory of the former law, declared that the duty of 9*s.* 4*d.* shall be chargeable on every 100 weight of such hides, it was decided, that the new declaratory provision must be taken as a part of the former law, and as then passed, and operating from that date. The court said, "the duty, in this instance, was, in fact, imposed by the first act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent act; but that had reference to the former statute as soon as it passed, and they must be taken together, as if they were one and the same act, and the first must be read as containing in itself, in words, the amendment supplied by the last."

Now, let the act of 1825, which really did impose this tax on citizens as well as non-residents, be read as "containing in itself, in words, the amendment supplied, for the better understanding thereof," by the 4th section of the act of 1833, and the whole difficulty disappears. Perceiving the difficulty in which they would involve

the legislature, by asserting that they had violated their oaths, by passing a law opposed to the prohibition or prohibitory mandate of the constitution, our opponents have suggested, that when this tax law passed through the two houses, they believed, that their amendment proposed at the preceding session to change this mandate or prohibition into a grant of discretionary power to themselves, had been adapted by the people. If this be so, and the legislature acted under this erroneous impression, how could a law thus passed be regarded as a legislative construction of this clause of the constitution? But if this law did authorize the introduction of slaves for sale, after the 1st May 1833, why had the legislature sought to change the mandate or interdict of the constitution into a mere grant of discretionary power, if as is urged, they already possessed that power; and if having failed to effect this change in the constitution, they had, nevertheless, by this law, authorized the introduction of slaves, as merchandize, could such an act be called a legislative exposition of the constitution?

The framers of our state constitution have withheld all judicial power from the legislature. *They have declared, "the judicial power of this state shall be vested" in the courts of the state; and that "the powers of the government of [*615 the siate of Mississippi shall be divided into three distinct departments, and each of them confided to a separate body of magistracy; to wit, those which are legislative to one, those which are judicial to another, and those which are executive to another. No person or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." If, then, as all admit, to expound a constitution be a judicial power, the legislature was forbidden to exercise it, and so was the executive. It was confided to the judiciary, we have their construction; and an imaginary and conjectural legislative or executive construction is set up, in opposition to an exposition of the constitution, by the very tribunal to whom its interpretation was confided by its framers. If, then, a construction by the legislature could be quoted, I deny their jurisdiction; and pointing to the constitution of our state, declare that it is there expressly withheld. But an executive construction is relied on by our opponents. None such exists; but what think our three distinguished opponents of executive construction? Shall I quote their eloquent denunciations of such abuse of power? No! I will spare them the contrast with their present argument; but I will say, that the government which deliberately supersedes judicial by legislative or executive construction, has already sunk into despotism. It has combined in one department two out of the three great powers of government; the third will assuredly follow; and the centralization of all these powers in the legislature or executive, in the opinion of Mr. Jefferson, in his Notes on Virginia, page 195, "is precisely the definition of a despotic government." We shall see, in the progress of this discussion, that, by the highest courts of England, no regard is paid to a construction of the laws by the king, or the king in council. But at one time, a British judge declared from the bench, "all power centres in the king," and the laws were overthrown by "twelve men in scarlet," taking "royal auricular opinions" for their guide; but for more than a century, executive construction has had no weight with British judges. I need scarcely appeal to this court, to disregard executive construction; nor say to them, that if they do not, the day will have arrived, when congressional or presidential construction will trample down the high powers of this tribunal, in exercising its great constitutional function of expounding in the last resort the laws and constitution of the Union. The volumes of your decisions will be thrown aside, and the exposition of the law and the constitution will be looked for in executive messages and congressional enactments. If, then, there were a legislative and executive construction on the one side, and that of the highest court of the state on the other, which shall prevail? To whom is the power assigned by the constitution of the state? And this court will not disregard the distribution of powers as therein delegated to the several departments of government.

The next question is, can the contract for the sale of these slaves be maintained, if the clause in question be a prohibition of the introduction for sale? Assuming this as established, the clause in question would prohibit the introduction of slaves, as mer-

chandize, or for sale. The introduction being thus prohibited, if the sale be sanctioned, the clause would read thus: You shall not introduce slaves into this state, as merchandize, or for sale, but you, the importer, may make merchandize of them, or sell them to any one, as soon as they are landed. Would not such language be strangely repugnant and contradictory? Would it not seem as though the convention had designed to render their own provision inoperative and nugatory? Could the importer sell the thing he was forbidden to introduce for sale? Could he make merchandize of the very thing he was prohibited from introducing as merchandize? The object prohibited was not merely the introduction of slaves, but their introduction, as merchandize, or for sale. Now, was the object prohibited, and yet the sale permitted? To introduce the slaves, with intent to sell, is criminal, but to carry that criminal intention into effect, is declared to be authorized and invited by the constitution. Can the intent be criminal, and yet the fulfilment of the evil intention perfectly lawful? To maintain this position, is to reverse the rule of law and morals, which always regards the execution of the evil intention, as more *criminal than the intention itself. If the sale crowns and completes the unlawful purpose, if it executes the illegal intention, if it consummates the violation of the law, if it enables the transgressor to obtain the end and object prohibited, and reap the fruits of his transgression, it must be unlawful. To effectuate the object and intention of the law is the great rule in expounding laws and constitutions.

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Now, the inter-state slave-trade, as carried on by traders in slaves as merchandize, was the thing designed to be prohibited. And yet this very prohibited traffic, by a verbal criticism on the words, overlooking the object of the constitution, is in fact encouraged, if the trader may sell the slaves introduced as merchandize. This court have said, that a fraud upon a statute, is a violation of the statute; that an evasion of the constitution, is a violation of the constitution; and is not this construction an evasion by the slave-traders of the constitution of Mississippi? Lord Coke, in Heydon's Case, 3 Co. 7, declares, that the true rule in construing statutes is so to interpret as "to suppress inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*." The clauses of a statute are to be construed in their popular signification, and this is more pre-eminently the great rule in regard to a state constitution. Who, then, but an astute critic, on reading this clause, would doubt as to the object designed to be prohibited? To whom of the people at large would the subtle distinction occur, that slaves could not be introduced as merchandize, or for sale, but that the importer was authorized to sell at once these slaves that could not thus be introduced for sale? The terms of the constitution are peculiar and comprehensive. These slaves are not only forbidden to be introduced "for sale," but also "as merchandize." Merchandize means vendible articles. These slaves, then, cannot be imported as vendible articles. How, then, can they be rendered vendible articles within the state, when they cannot be landed as such within its limits? In Brown *v.* State of Maryland, 12 Wheat. 439, the question was, whether a state could impose a tax upon the sale by the importer of articles imported into a state for sale. The court decided, that the right of the importer to introduce the goods, free of a state tax, did embrace the subsequent right of sale free of such tax by the importer. In delivering the opinion of the court, Chief Justice Marshall says: "There is no difference in effect between a power to prohibit the sale of an article, and the power to prohit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold." The mere prohibition then of the introduction of slaves into a country, would render the subsequent sale invalid, and if so, how much stronger is the inhibition of he sale, when the prohibition is of the introduction for sale. Why prohibit the introduction for sale, if the subsequent sale is authorized? The sale is the avowed object of the introduction in this case, and without the authority to sell, there would be no introduction for sale, and thus the law prohibiting the introduction would be enforced; but by the construction of our opponents, the sale

is authorized, and the importation for sale so far encouraged and invited. But no such interpretation must be given as will defeat the object of the law, or tend to prevent its practical operation. 1 Story's Com. 411. And Chief Justice MARSHALL declares, 6 Cranch 314, that "the spirit as well as the letter of the statute must be respected, and where the whole context of the law shows a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." The rule is, that "the words of a statute are to be taken in their ordinary signification and import, and regard is to be had to their general and popular sense." Dwarris on Statutes 702. "The sense and spirit of an act, however, its scope and intention, are primarily to be regarded in the construction of statutes, and it matters not, that the term used by the legislature in delivering its commands are not the most apt to express its meaning, provided the object is plain and intelligible, and expressed with sufficient distinctness to enable the judges to collect it from any part of the act. The object once understood, judges are so to construe an act as to suppress the mischief and advance the remedy." Ib. 703–4, 707, 718. And the author adds, "a statute may be extended by construction to other cases within the same mischief and occasion of the act, though not expressly within the words." If the legalizing of the sale *would encourage the introduction for sale, it is within "the mischief and occasion of the act;" it is within its "spirit," "scope" and "object;" and therefore, as much prohibited, as though "expressly within the words of the act." "No construction of a given power is to be allowed which plainly defeats or impairs its avowed objects." Story's Com. 411. "A statute made *pro bono publico* shall be construed in such a manner that it may as far as possible attain the end proposed." Dwar. 722. As to a question, that was within the prohibition of a certain law, the court say, "It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief" (Dwar. 634; Yo. & Jerv. 196, 215) and the principle is extended to enlarge the policy of a penal statute, not so as to inflict the penalty, but to avoid the contract. Dwar. 752. "Wherever a statute gives or provides anything, the common law provides all necessary remedies and requisites." Ibid. 662. "Everything necessary to the making it effectual is given by implication." Ibid. 652; 2 Inst. 306; 12 Co. 130–1. "*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.*" Dwar. 663. "Whenever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law." Ibid. 663; 1 Inst. 235; 2 Ibid. 222; Bacon, tit. Stat. "Whatever enters into the reason of the law, enters into the law itself." Dwar. 665. *Ratio est anima legis.* "Laws and acts which tend to public utility should receive the most liberal and benign interpretation to effect the object intended or declared, *ut res magis valeat quam pereat.*" Bald. Const. Views, 8; 1 Bl. Com. 89. "Courts will look to the provisions of a law to discern its objects, to meet its intentions at the time it was made; it will be sought in the cause and necessity of making the law; the meaning thus extracted, will be taken to be the law intended, as fully as if expressed in its letter." Bald. Const. Views 9; 1 Wheat. 121; 4 Pet. 432. If, then, as is obvious, "the object of the law," namely to prevent the introduction of slaves for sale, will be frustrated by legalizing the sale, the court "will not suffer the law to be defeated" by adopting such a construction, but will so expound the law as to "suppress the mischief and advance the remedy." Bald. Const. 9, 11; Co. 72; 1 Bl. Com. 87.

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The clause which prohibited the introduction of slaves for sale, never could have intened to defeat itself, by legalizing the sale of slaves thus unlawfully introduced for sale, and thus encouraging and inviting the violation of the law, by making it profitable to disregard its provisions. But it has been said, this prohibition must be strictly construed. Why so? It is not a penal statute, and if it were, it should only be construed strictly, when operating on the offender, in exacting the penalty; but when it acts upon the contract, it must be liberally construed, so as to vacate the contract, if within the mischief designed to be remedied, though not within the letter of the law. Thus, it is declared by Blackstone: "But this difference is here to be taken, when the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is there

to be taken strictly, but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Chitty's Bl. 60. In a note, it is stated as follows, with a reference to the highest authority: "As the statute against gaming, which enables a loser at play, to the amount of ten pounds at one sitting, to recover it back within three months; the act also provides a penalty against gaming to the same amount at one sitting. And the court has said, in a case where the play was only interrupted by the dinner-hour, for the purpose of recovering the money lost, they would hold this to be one sitting, but as against a common informer, suing for the penalty, they would hold it to be two sittings." 1 Chit. Black. 60 note, and 2 W. Bl. 1226. Here, even in a penal law, the same words are construed strictly, when they act on the offender, and liberally when they act on the contract. So, in this case, were a penalty even annexed to the prohibition, the law would be construed strictly, when the penalty was demanded, but liberally, when a contract is sought to be enforced against the spirit or object of the prohibition. But how much stronger is the present case? If the first point be with us, the constitution prohibited the introduction of these slaves for sale or as merchandize, and as no penalty was attached to the prohibition, would not the provision be entirely inoperative, if the contract of sale could and must be enforced by the judicial tribunals? The *object of the *618 constitutional prohibition was to render the traffic unlawful, so that no contract could be enforced in violation of the prohibition, but the penal sanctions by fine and imprisonment might well be left to subsequent legislation. In the case of the U. S. Bank *v.* Owens, 2 Pet. 537, it is expressly decided by this court, that laws must be strictly construed, when the penalty is exacted, but liberally in vacating the contract.

The doctrine which repudiates contracts against public policy or good morals, long preceded the common law of England, and was incorporated into that system from the civil law. In the note *s*, to 1 Fonbl. Eq. B. I. § 4, page 186, it is stated, *Pacta quæ contra leges constitutionosque vel contra bonos mores nullam vim habere, indubitati juris est.* Code, lib. 2, tit. 3, 1, 6. This rule of the civil law is drawn from the principles of universal justice; which, aiming at the prevention of wrong, prohibits agreements which would lead to or encourage it. To introduce, then, slaves into Mississippi for sale, was prohibited by the constitution, and was, therefore, wrong, unlawful and immoral; and none will deny, that to legalize the contract of sale, for slaves thus unlawfully introduced, would encourage the introduction for sale; and if so, upon the authority above quoted, such contract would be void. "Considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity." Ibid. note *y*, p. 189. And here I maintain, that where a contract is against the policy of a state, or against good morals, or detrimental to the public interest, or against the peace, security or welfare of a state, or tending to encourage a violation of the laws or policy of a state, or the prohibition of a statute, it is void; and if it is within the spirit, scope or intention of the act (though not within its words), or within the object designed to be promoted or mischief suppressed, it is also void; and the most liberal construction will be given to the law, and every fair implication will be allowed, to prevent a defeat of the full operation of the statute. Thus it is declared by the court, in the leading case of Mitchell *v.* Smith, 1 Binn. 110; 4 Yeates 84, that contracts are void which "tend to defeat the legislative provisions for the security and peace of the community, though not made void by statutes;" or which tend "to encourage unlawful acts or omissions," or which are against principles of sound policy; "so a contract about a matter prohibited by statute is unlawful and a void contract, although the act does not expressly say so." Courts "will not assist an illegal transaction in any respect." It is "immoral to violate the laws of a country," and the contract will not be enforced, if illegal, though to refuse to enforce it is "contrary to real justice as between the parties;" or if the contract "militate" against the "rights" or "peace" of a state, or if against the policy of "self-preservation," or if "against the maxims of sound policy" though "not against

the rules of morality," or if "repugnant to the welfare of the state;" so, if against "political arguments" or "public benefit and convenience." So, the court declared, that "none of the acts against smuggling transactions declare any of the contracts for goods purchased for the purpose of smuggling, to be void; the decisions are grounded on principles of public policy alone," and, although it be "the case of a just debt as between the parties." 4 Yeates 34. The court decided, that a note given for the sale of land, under the Connecticut title, was void, although the act of 1795 only inflicted a penalty on a combination or conspiracy to convey or settle lands under such a title, but did not declare the contract void, or prohibit the sale, as did the subsequent act of 1802, although the defendant was in the occupancy of the land under the sale, and every argument was urged which has been used in this case. And if the purchase-money unpaid by the vendor can be recovered, could not the vendee, on tender of the purchase-money on a contract for sale, enforce the delivery to him of the slaves introduced for sale? Surely he could, "for the remedies must be mutual or not at all." 1 Binn. 118. In Seidenbender *v.* Charles, 4 Serg. & Rawle 151, a land sale by tickets, without blanks, was held to be within the policy of the law against lotteries, and a note given for the sale of a lot of ground, under such a lottery, was held void, although the title to the lot was conceded to be valid, and the justice of the case with the plaintiff, and the sales had not been declared void by the law. In 3 T. R. 17, it was decided, that a promise of a *friend of a bankrupt, on his examination, to pay all sums he, the bankrupt, had not accounted for, if not [*619 examined as to those sums, is void, as against the policy of the bankrupt laws, though not so declared by those laws, nor embraced within their provisions, on the ground, that to enforce such contracts would be "contrary to the spirit of the bankrupt laws," and that by such enforcement "one of the great objects of the bankrupt laws would be defeated," by preventing full examination of all bankrupts on oath. In Craig *v.* State of Missouri, 4 Pet. 410, it was decided by this court, that a note given for bills of credit of a state, loaned to the defendant, was void, although the defendant may have realized full value for the bills; the contract being within the prohibitory policy of that clause of the constitution of the United States, which declares that no state shall emit bills of credit. There was nothing in this constitutional prohibition, declaring such contracts void, nor anything, in words, forbidding the loan of such bills; but, as upholding a contract for their loan would encourage their emission by the state, the contract was declared invalid. In delivering the opinion of the court in this case, Chief Justice Marshall asked the following question: "Had the issuing or circulation of certificates of this or any other description been prohibited by a statute of Missouri, could a suit have been maintained in the courts of that state, on a note given in consideration of the prohibited certificate? If it could not, are the prohibitions of the constitution to be held less sacred than those of a state law?" And if such a clause in the constitution of the Union rendered void a contract for the loan of those certificates, how much stronger the implication against the sale in this case? And here, upon the first branch of the question, let me ask, if the language in a statute of Mississippi "shall be prohibited, from and after the 1st of May 1833," would be a prohibition, are the same terms and words "of the constitution, to be held less sacred than those of a state law?"

In the case of Hunt *v.* Knickerbacker, 5 Johns. 327, it was decided, that a contract for the sale, in New York, of tickets in a public lottery of Connecticut, authorized by the laws of that state, was illegal, and the money not recoverable, though a valuable consideration may have passed to the defendant, because it was against the policy of the law of New York, forbidding private lotteries. Here was a case, clearly not within the words of the act, but it was regarded against the policy and spirit of the act, "and to legalize the sale would be productive of many of the mischiefs contemplated by the legislature;" and the court also say, that "a contract which, in its execution, contravenes the policy and spirit of a statute, is equally void as if made as against its positive provisions."

In Sharp *v.* Teese, 4 Halst. 352, the court held, that "a note given by an insolvent

debtor to two of his creditors, in consideration of their withdrawing their opposition to his discharge under the insolvent act, is void, it being against the policy of the insolvent law." In this case, the debt for which the note was given, was justly due, and there was not one word in the law, declaring such a contract void, as will appear in the reasons given by the court, at page 354. They say, the policy of the law favors a full and fair disclosure, and equal division of the property among all the creditors, and add, "any transaction or arrangement which tends to defeat either of these purposes, is inconsistent with the policy of the law. The attempt to contravene the policy of a public statute, is illegal. Nor is it necessary to render it so, that the statute should contain an express prohibition of such attempt; it always contains an implied prohibition." The same court decided, that no action can be maintained on a contract which "contravenes the policy of an act of congress." 5 Halst. 89. The court say, "many contracts which are not against morality, are still void, as being against the maxims of sound policy;" that "if the consideration be against the public policy, it is insufficient to support the contract;" "it is a general principle, that all obligations for any matter, operating against the public policy and interests of the nation are void." See also, 2 South. 756, 763.

In Nichols *v.* Ruggles, 3 Day 145, it was decided, that "a contract to reprint any literary work in violation of a copyright secured to a third person is void: and the printer who executes such contract, with a knowledge of the rights of such third person, can recover nothing for his labor." The contract between the two *persons in this case, was regarded as repugnant to the policy of the copyright law of congress, though nothing in that act avoided such a contract. And in Marchant *v.* Evans, 8 Taunt. 142, it was held, that no recovery can be had for printing a newspaper, whose publisher does not first make the affidavit directed by the act, though the act does not avoid the contract. And in Stephens *v.* Robinson, 2 Cromp. & Jerv. 209, the court decided, under the same statute, that there could be no recovery by the printer, where the affidavit as to the proprietorship was false, either for work and labor done, for money paid, or even "for printing and circulating cards advertising the paper." The court said, if we permitted a recovery, it would defeat the policy of the law, by enabling "irresponsible persons to stand forward as publishers," instead of the real proprietors. See Roby *v.* West, 4 N. H. 285.

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In the late case of Spurgeon *v.* McElwain, 6 Ohio 442, it was decided, that "keeping nine-pin alleys in a town, by a keeper of a public house, being unlawful, the (carpenter) builder of such alley cannot recover therefor on general *assumpsit*." There, it was urged, as was the fact, that the carpenter had no interest in the alley, nor in its profits, keeping or use, and there was not a word in the law avoiding the contract, or declaring the building such a house unlawful, but only the keeping of it. The court said, "the statute forbids, under a penalty, any tavern-keeper or retailer, from keeping, or permitting to be kept, a nine-pin alley, in the building occupied for that purpose; can a carpenter, knowing the object, recover the price of erecting it?" "The principle is of general application, that contracts contrary to sound morals, public policy, or forbidden by law, will not be executed by courts of justice." And upon these principles, and the policy of this statute, the court decided, that there could be no recovery, because the plaintiff had violated the policy of the law, in building a nine-pin alley for a third person, in a state where no such alley could be kept, and therefore, could not recover: —as here, in our case, the plaintiff had violated the policy of the law, in selling these slaves in a state where they could not be introduced for sale, and therefore, cannot recover. The keeping the slaves for sale, in the state, is an adherence to the unlawful intention with which they were introduced, and when kept till sold, the very act of sale is a continuation and consummation of the unlawful purpose, and aggravation of the guilt of the offender; yet it is asked to be received as perfectly lawful, and worthy the sanction and encouragement of judicial tribunals. Nor would the pretended misapprehension of the law avail the plaintiff, for in the case of Craig *v.* United States Insurance Company, Pet. C. C. 410, Justice Washington, of this court, said, in deciding against a contract of insurance, on the ground that it was against the policy

of the law, "I mean not to impute crime, or even intentional impropriety, to either of these parties. I have no doubt, that they acted with the most perfect innocence, mistaking the law, as many legal characters did, at a later period than that when this contract was entered into."

In Belding *v.* Pitkin, 2 Caines 146, it was decided, that "an action will not lie upon a contract to pay over half the proceeds of an illegal contract, though the money arising from it has been received by the defendant." This was a case of a sale by an agent of land, in Pennsylvania, under a Connecticut title, which sale we have seen was void, as contrary to the policy of the law. The principal received the money on the sale, and refused to pay the agent the portion he was to receive for effecting the transaction, but a recovery was refused, and the defendant permitted to retain the money. The court said, "it is too salutary and well-settled a principle to be in any measure infringed, that courts of justice ought not assist an illegal transaction in any respect. To sustain the present action, would be in some degree ratifying, countenancing and sanctioning an illegal contract." "If the consideration, money for this pretended claim had been paid to the plaintiff, neither a court of law, or equity, would have aided the defendant in recovering it from him." By this doctrine, even an agent who receives money for a principal on an unlawful sale, can retain the money, the contract to pay the money to the principal being void, as growing out of the unlawful sale, yet such a contract is distinct and independent of the original transaction, and in every respect collateral. In Parsons *v.* *Thompson, the sale of an office not within the words of the statute, was declared void, though in the language of Lord Loughborough, "it was the practice" to sell such offices. 1 H. Bl. 322, 324. In Bryan *v.* Lewis, 1 Ry. & Moo. 386, it was stated as a general rule, that where, to sanction the sale of goods, "would be attended with the most mischievous consequences;" such sales will not be upheld by the courts, though no statute declares the sale void. See 7 Mass. 112. In Fennell *v.* Ridler, 5 Barn. & Cres. 406, it was decided, that a horse-dealer could not recover the price of a horse sold by him on Sunday, such sale being contrary to the policy and spirit of the act, declaring that no persons "shall do or exercise any worldly labor, business or work of their ordinary calling, on the Lord's day." And see 4 Bing. 84; 2 C. & P. 544; 12 Moore 266. A mercer who sells ribands to a candidate for parliament, if he knew that the candidate intended them as presents for voters, which is forbidden by law, could not recover the price. Richardson *v.* Webster, 3 Car. & Payne 128. There is no statute forbidding such sales to candidates, but as to sanction the sales would encourage candidates to violate the law which prohibits them from making presents to voters, such sales are held void. See 3 Taunt. 6; 1 Ash. 68; 9 Vt. 23,310; 7 Greenl. 113. [*621

In Fales *v.* Mayberry, 2 Gallis. 560, it was decided, "that no action can be maintained against master and part-owner of a ship engaged in the slave-trade, by his partners in the concern; nor against an agent, with the proceeds in his hands;" nor even by an assignee of the note growing out of such transactions; and "if a ship be sold in a foreign port, to evade a forfeiture incurred in the United States, no action can be maintained for the proceeds." Here, the offence had been committed, long before the sale, by the voyage for slaves, from Boston to Georgia, thence to Africa, and thence with the slaves to the West Indies—after all which, the ship was sold at St. Bartholomews. The sale was subsequent to the illegal voyage, but as it was a consummation, by the plaintiff, as in this case, of the original unlawful purpose, the sale was held to be unlawful, though there was no law declaring it so, and there could be no forfeiture at St. Bartholomews; and besides, the case did not proceed on a failure of consideration, for the vessel was delivered and held under the sale, but upon the illegality of the voyage preceding the sale. In Morel *v.* Legrand, 1 How. (Miss.) 150, it was decided, by the high court of Mississippi, that a sale by a settler, of his improvement made on the public lands, in expectation of a pre-emption, was void, as contrary to the policy of the intrusion act of congress, though nothing in that act declared such sale to be void. The opinion of the court was delivered by Chief Justice Sharkey, the same judge who decided in our favor in this case; and the case is chiefly cited as

evidence of the impartiality and independence of the court, for, in giving judgment against the sale of this inchoate prospective pre-emption, the court was pronouncing an opinion against their wishes as citizens, and against a system of sales by settlers, universally and deservedly popular in the state of Mississippi. In Blachford *v.* Preston, 8 T. R. 89, it was held, that "a sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the company, is illegal; and the contract of sale cannot be the foundation of an action." Lord KENYON, Chief Justice, said, "a plaintiff who comes into a court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed, whatever the private wishes of the court may be. In this case, the plaintiffs have relied on the practice that (as it is said) has so long prevailed of selling the commands of ships; but that practice is in violation of the laws and regulations of the East India Company." LAWRENCE, Justice, after stating the sale, said, "subsequent to this, the East India Company came to a resolution, for the purpose of abolishing the practice of selling the commands of ships, and of making compensation to some of the officers in their service, who had paid for their commands; but this resolution was not made in approbation of the practice that had prevailed before; but feeling that they were blamable for not having put a stop to it sooner, they came to the resolution of abolishing the practice that had obtained in defiance of the by-laws of the company." This case shows how unavailing any practice, however long established and universal, is, to give validity to any contract repugnant to the policy of the law.

*622] *Whenever the introduction of any article into a country, generally, or for sale, is prohibited, or its use or manufacture forbidden, or its offer for sale—in all these cases, the sale is illegal, although thelaw does not, in terms, prohibit the sale. We have seen, that the maxims applicable to this question were borrowed from the civil law, as principles of universal justice. One of the most distinguished writers on this subject says: "*In certo loco, merces quædam prohibitæ sunt. Si vendantur ibi, contractus est nullus; verum si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia contractus inde ab initio validus fuit.*" Huberus, tit. de Conflictu Legum, Vol. 2, page 539: which, as translated, reads—"In a certain place, the introduction of some articles is prohibited. If these are sold there, the contract is void. But if the same articles are sold elsewhere, where their introduction is not interdicted, there the purchaser shall be condemned to pay the price, because the contract was valid from the beginning:" and Lord MANSFIELD, in 1 Cowp. approves this doctrine, and applies it to render void the sale, in England, of goods on which the duties have not been paid.

The same doctrine is laid down in Erskine's Inst. 478, as follows: "Things, the importation or use of which is absolutely prohibited, cannot be the subject of commerce, nor, consequently, of sale. But where the importation of particular goods is only burdened with a duty, a contract may be effectually entered into concerning them; for though the law enacts penalties, if they should not be regularly entered, it allows the use of them to all the community, and so leaves them as a subject of commerce. (Kames 40.) Yet even in the sale of run goods, no action for damages lies against the seller for non-delivery, if the buyer knew that they were run." Home 34; Ersk. 478. Here, the law is distinctly laid down by those two great jurists, Home and Erskine, that where the importation or use of any article is prohibited, the sale is void. In 1 Kames' Equity 357, referring to the Scotch decisions on sales of smuggled goods, he says, "they are not sustained, at present, nor, I hope, will be." In which he has been fully supported by the subsequent decisions in Scotland. In speaking of this subject, this able writer says, "the transgression of a prohibitory statute is a direct contempt of legal authority, and consequently, a moral wrong, which ought to be redressed; and where no sanction is added, it must necessarily be the purpose of the legislature to leave the remedy to a court of law:" and the author adds, that in such cases, the true mode "of redressing the wrong, is to void the act." Here, we find this great jurist avowing the true principle, that there is no distinction in the rule for

enforcing contracts, between *malum prohibitum* and *malum in se*. And if, in a despotic or monarchical government, it be a "moral wrong" to violate a prohibitory law, how much more strongly should this principle apply to laws proceeding, not from a monarch's will, but from the free consent of the governed, from the people of a state themselves. To violate such laws is not only a "moral wrong," but an assault upon the sovereignty of the people. We find here, also, a full answer to the difficulty suggested as to the want of any sanction to this clause. The true sanction in all such cases, we here see, "is to void the act."

This subject is discussed with great ability by Mr. Bell, professor of law in the University of Edinburgh. Having treated of contraband of war, he then proceeds to consider "contraband of trade, or smuggling contracts." 1 Bell's Com. 306. He says, "the contempt and breach of those laws is called smuggling; the goods as to which the evasion is attempted, contraband; and the great rule is, that no action is maintainable on the contract, or for the price of the goods purchased in contempt of those laws. In the one case, '*potior est conditio possidentis;*' in the other, if an action is brought for money, '*potior est conditio defendentis.*'" "When the goods have come into this country, the criterion of decision to sustain or dismiss the action, is knowledge of the contraband nature of the goods. The decisions have varied; but it would seem, that when the goods are prohibited, no *bona fides* can justify the contract; that when the goods are not prohibited, but may lawfully be sold, provided the duties have been paid, action is denied, where the party knows the duties to be unpaid: that after the goods are in the circulation of this country, the *bonâ fide* purchaser has action for the delivery, although *smuggled. And he gives it as the settled law, that there can be no action "on bills for the price of contraband [*623 goods," the bills "being in the hands of the original parties, or of their trustees." Ibid. 307. In 3 Brown's Synopsis Scotch Cases, page 1437, it is laid down as the settled law, that although there can be no recovery of the price on a sale "of smuggled goods," "in a question between the importer and purchaser," yet other *bonâ fide* vendors can recover, "where the goods said to have been smuggled have passed from hand to hand on shore."

Having shown that the law in Scotland and upon the continent of Europe is in our favor, let us now examine the English cases. Law *v.* Hodson, 2 Camp. 147, which has been repeatedly recognised in England and America, was an action by a brickmaker for the price of certain brick made and sold by him, and used and retained by defendant, in a house erected by him. The defence was founded solely on the allegation that the bricks were not of the size required by the statute 17 Geo. III., c. 42, § 1. The first section of this act declares, that "all bricks which shall be made for sale, in any part of England, shall, when burnt, be not less than 2½ inches thick and not less than 4 inches wide." The second section enacts, "that if any person shall make bricks for sale, of less dimensions, he shall forfeit the sum of 20 shillings for every 1000 bricks so made." The defendant contended, that the act only prohibited "the *making* of smaller bricks, under a penalty, but did not declare contracts void." That even if liable to the penalty for the offence of making bricks, the subsequent sale was valid. He argued the impossibility of compliance with the statute, "as bricks made in the same mould, shrunk very differently in the burning," and that the "honest intention of the brickmaker was not to be doubted in the present case;" and that the defendant, having "himself selected" and used the bricks, could not make the objection. Lord Ellenborough said: "The first section of this statute absolutely forbids such bricks to be made for sale; therefore, the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value." On re-argument, the court adhered to its decision, declaring "that the best way to enforce an observance of the statute, was to prevent the violation of it from being profitable." There, the offence was the making the bricks for sale, not the sale; and the offence was complete, when the bricks were thus made, and the subsequent sale just as distinct a transaction as in this case. There, too, the bricks had been selected and used by the defendant, and constituted

part of a house, which was his property, and could be sold by him. It was also a very hard case, which this is not; but, as the making the bricks for sale was illegal, therefore, the subsequent sale was avoided; as here, the introduction for sale was illegal, therefore, the subsequent sale was void, both sales having been made by the offender himself. The additional reason for the decision was, that "the best way to enforce an observance of the statute, was to prevent the violation of it from being profitable."

In Brown *v.* Duncan, 10 Barn. & Cres. 93, Lord TENTERDEN says: "These cases (breaches of revenue regulations) are very different from those where the provisions of acts of parliament have had for their object the protection of the public. Such are the acts against stock-jobbing, and the acts against usury. It is different also, from the case where a sale of bricks required by act of parliament to be of a certain size, was held to be void, because they were under the size. There, the act of parliament operated as a protection to the public, as well as the revenue, securing to them bricks of the particular dimensions. Here, the clauses of the act of parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods." Here, the case of Law *v.* Hodson is recognised and distinguished from the class of breaches of revenue regulations, and is classed with those cases, "where an attempt is made to recover the price of prohibited goods." Even, then, if the sale of goods imported and on which the duty is not paid, were lawful, because the object in that case only was to guard the revenue, we see it is entirely different from the case of the sale "of prohibited goods," where revenue is not the *object, but the intention *624] is "to protect the public," by forbidding the introduction of such goods, and especially, if the introduction for sale is prohibited.

In Little *v.* Poole, 9 Barn. & Cres. 192, where the law directed, in the sale of coals, that "the vendor of coals, by wharf measure, deliver a ticket to the carman employed to cart the coal, and the carter is to deliver it to the purchaser," under a penalty for non-delivery, the sale of the coal was held void; because, such ticket did not accompany the delivery of the coals, although the sale was fair, the coals of the proper quality and measure, and although there was nothing in the act declaring the sale void, and the defendant had received and still retained the coals. Here, the coal was property, and retained as such, and yet the sale was avoided; and the case of Law *v.* Hodson again expressly recognised, and in both cases, the sale was avoided by implication only; there was no forfeiture of the property, and nothing in the statute declaring the sale void.

In Forster *v.* Taylor, 5 Barn. & Ad. 887, the question arose under the act which declared, that, "every dairyman and farmer, who shall pack any butter for sale, shall pack the same in vessels (marked as prescribed by law), and shall brand his name on the vessel and butter, upon penalty for every default of five pounds." The court admitted the sale was fair and the weight proper, and the butter sold by the farmer received and retained, yet the sale was declared void; because the vessel was not marked according to the direction of the statute; and although there was not one word in that statute prohibiting the sale, it was decided, that the act "indirectly prohibited" any sale of butter in vessels not properly marked; and the court, after approving Law *v.* Hodson, and reviewing the cases, and referring to those "arising out of transactions connected with smuggling," declared the "general principle" to be, "that where the provisions of an act of parliament have been infringed, no contract can be supported arising out of it." The court affirm the doctrine previously laid down (3 Barn. & Ad. 221), that where the contract "is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect."

In Tyson *v.* Thomas, 1 McLellan & Young 119, sale of corn by the hobbet, an unlawful measure, was declared void, although the court admitted, "that the statute had not been acted on for nearly a century," and that there was "great inconvenience from enforcing it;" but the court said, "no act of parliament is lost by desuetude;" and the court annulled the contract of sale, although they declared, "there is no doubt these parties dealt *bonâ fide* with each other in making the contract." And this

case, sustained by many others, is also a complete answer to the argument urged on this as well as the first branch of the case, that this prohibition as to slaves, was "inoperative," or had not been enforced, or was a "mooted question" in Mississippi, and that the plaintiff acted in good faith. No one of these statements as to the plaintiff in this case is correct, out were it otherwise, we perceive how unavailing it would be to uphold this contract.

In Billiard *v.* Hayden, 2 Car. & Payne 472, it was decided, that "if the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who indorses a bill of exchange to him in payment, the plaintiff cannot recover on that bill, against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods." That is a much stronger case than this. It would be the same as if Slaughter, the importer, had left these slaves with some commission or auction house in Mississippi, and they had sold the slaves in their name, and taken the acceptance of some other house for the price, and indorsed it to Slaughter, and the suit had been against the acceptors, as in the above case "by the plaintiff, as indorsee." That case was the sale, in England, of silks imported from France, against the prohibition of such importation by the statute 50 Geo. III., c. 55. The plaintiff contended, "the statute only prohibits the importation of foreign silk, and it does not at all appear, that the silks were imported by the plaintiffs. The statute does not make the sale of them void ; and as there is no evidence that the plaintiff imported them, they are entitled to recover on the bill." Abbott, Chief Justice:—"This transaction arose before the late act ; the statute of the 50 Geo. III., c. 55, prohibits the importation of all foreign silks, and I have no hesitation in saying, that if these were foreign silks, and the *bill was given in payment of them, the plaintiff cannot recover." The reporters, in their note, refer to this "late act," by which the [*625 former act, prohibiting the importation of foreign silks, was repealed, and say, "although this case is thus rendered less important, as to foreign silks, it appears equally to apply to any other species of goods, the importation of which is prohibited." The court as well as the reporters place this case upon the sole ground, that if a statute "prohibits the importation" of any article into England, its sale there, when imported, is void. Here also it was urged, that the importation only was prohibited, and not the sale; but the sale was regarded as impliedly forbidden by the prohibition of the importation.

In Langton *v.* Hughes, 1 Maule & Selw. 593, "where the plaintiff, a druggist, after the 42 Geo. III., c. 38, but before the 51 Geo. III., c. 87, sold and delivered ginger and other articles, knowing that they were to be used in brewing beer; held, that he could not recover the price." By the act of 42 Geo. III., under which the question arose, the brewer is prohibited from "using anything but malt and hops, in the brewing of beer;" and the act of 51 Geo. III., c. 87, prohibits the sale of such drugs to brewers. It was contended, that although the sale under the last act would be void, it was not so under the first, as it did not prohibit the sale of the ginger to the brewer, but only its use by him in making beer. They contended, that ginger was an innocent article, and might be lawfully bought and sold, and that the improper use subsequently made of it by the defendant, did not avoid the previous sale. But the court held, that as the law was for the protection of the public health, and as to uphold such a sale would be "against the policy of the law," that the sale, though not prohibited expressly, was unlawful, as tending to encourage a violation of the law.

In *Ex parte* Mather, 3 Ves. 373, it was decided, that in the case of a bill indorsed to a broker, in consideration of money advanced by him, in effecting an illegal insurance, no recovery by the broker can be had against any of the parties to the bill. The cases of Faikney *v.* Reynous, and Petre *v.* Hannay, so much relied on by the other side, but now so entirely exploded, were cited in this case, but the Lord Chancellor said: "I am perfectly aware of both the cases cited, but I cannot perfectly accede to them. What is called a consent in these cases, is a confederacy to break a positive law. I have often had occasion to think of these cases upon lottery insurances, &c., and it never occurred to me to be possible to state a distinction between them,

and a case repeatedly adjudged; if a man is employed to buy smuggled goods, if he paid for the goods, and the goods come to the hands of the person who employed him, that person shall not pay for the goods." Here, in this case, the broker was not the insurer, he made no illegal contract, but he advanced the money to the man who did make the illegal issurance; and yet he could not recover that money so advanced. That case was two removes from the direct illegality, and yet, as it grew out of it, there could be no recovery. First, "the voyage from Ostend to the East Indies" was declared to be illegal; and therefore, as a consequence, the insurance of that unlawful voyage was illegal, not as declared so by statute, but as contrary to the policy of the law forbidding such voyages. Then came the contract to pay the broker the money advanced by him, to effect the insurance, the broker having no interest in the voyage or insurance, but being merely a lender of money; but this loan and second contract, being connected with the insurance, was void, and there could be no recovery. Is there not a more direct connection between the act of sale in this case, by the original offender, and the unlawful introduction of the slaves for sale, than in the advancing of the money in this case by the broker? and yet it could not be recovered, as against the policy of the law. Here, too, the chancellor put a case, which he declares has been "repeatedly adjudged" as to smuggled goods, which is directly in point. A. employs B. to buy smuggled goods; B, with his own money, purchases the goods for A., and A. retains them; yet B. cannot compel A. to pay for the goods thus purchased at his instance, and for his benefit, and received and retained by him. Why is this? The purchase of the smuggled goods is illegal, and therefore, the person advancing the purchase-money for another, cannot recover the money so advanced, because in *that case, as in this, to sustain such contracts, would be to encour- *626] age the smuggling of goods into the country, and would, therefore, be against the policy of the law. The ground on which insurances on cargoes illegally exported is void, is stated in 11 East 502. That was an insurance on naval stores, and the objection was, that under the act of 33 Geo. III., c. 2, naval stores were forbidden to be exported, but the act did "not avoid the contract of insurance." The court said, "the statute having made the exportation of and trade in naval stores contrary to the king's proclamation illegal, impliedly avoids all contracts made for protecting the stores so exported."

In Bensley *v.* Ringold, 3 Barn. & Ald. 335, where the act directed every printer of every book or paper to affix his name to it, under a penalty of 20*l.* for every default, it was decided, that the printer who had not complied with the law, could not recover for the labor furnished, or for the paper used, in printing the book. It was urged, as was the fact, that the law contained "no prohibitory clause whatever, but merely a particular regulating clause protected by a penalty;" and upon the ground of a distinction, also, "between a prohibition and a penal enactment," as well as upon the ground, that the act was not *malum in se*, and "that there was no clause whatever making the contract illegal," it was contended, that they were entitled to recover. It was especially urged, that they could recover for "the paper provided by them for printing." But the claim was overruled both as to the labor and materials. The court said, as to statutes, "if there be an omission to do the thing required, it is not any excuse that the party did not intend to commit a fraud." "The public have an interest that the thing shall not be done, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public." Now, the prohibitory clause in the constitution of Mississippi, is inserted "for public purposes;" the framers of that instrument considered "that the public have an interest that the thing shall not be done;" that is, that slaves should not be introduced, as merchandize, or for sale; and if so introduced and sold by the importer, must not the objection to the sale prevail, not for the sake of the defendant, but for that "of the public?" And it is the strongest possible case, when the contract is against the prohibitory policy of the constitution of a state. The court also declared, that "the distinction between *mala prohibita* and *malum in se*, has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what

the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state." If, then, the introduction of slaves into Mississippi from another state, as merchandize and for sale, would be *malum in se*, none will maintain, that the sale of the slaves by the guilty transgressor would be valid, and yet it is just as valid where the importation is *malum prohibitum*, as where it is *malum in se*. It has been decided, in England, that no action can be maintained for the copyright, or for the loss or destruction of the book by another, or for the sale or for the profits of the sale, in whole or in part, or for the printing or labor furnished in printing any book of an indecent or immoral or libellous character, or "injurious to the government of the state," or "slanderous," or for caricature prints or pictures of a similar character. 2 Car. & Payne 136–71, and notes; Ibid. 198–201; 2 Merw. 437; 7 Ves. 1; 4 Esp. 97; 2 Camp. 29; 7 D. & R. 625; 5 B. & C. 173. There was no prohibitory statute in these cases, but all such contracts were held void, as against the policy of the law.

In Wheeler *v.* Russell, 17 Mass. 258, it was decided, that "no action lies on a promissory note, the consideration whereof was the sale of shingles, not of the size prescribed by the statute." "The statute provided, that no shingles, under certain dimensions, shall be offered for sale, in any town in this commonwealth." The act was passed in 1783, and had remained "inoperative" until 1821, the date of this decision. It was contended for the plaintiff, that there might be "an offer to sell," by which alone the penalty was incurred, and "yet no sale be made;" "the offer to sell must precede the sale, and is a distinct and separate act. The sale might follow or might not. Why, then, should the previous commission *of the offence, by which the penalty is incurred, vitiate the subsequent sale?" The arguments in that case [*627 are the same now urged, that the introduction for sale must "precede the sale;" that is the thing forbidden, and that the "previous commission of this offence" does not "vitiate the subsequent sale," which is "a distinct and separate act." An actual sale is no more within the words "offer to sell," than it is within the words "introduce as merchandize and for sale;" and in both cases, the offence, in a technical sense, may be completed, and no sale take place; but although such technicalities and adherence to the letter, against the spirit of the act, may be the rule on indictments for the penalty or offence, yet we have seen it is far otherwise, when the court acts upon the contract, which is always void, though not within the letter, if against the policy of the act.

And here let me examine the case on which the counsel rely on the other side, of Armstrong *v.* Toler, 11 Wheat. 258. The facts were, that Toler, the plaintiff in the court below, paid a sum of money, for which the suit was brought, for Armstrong namely, the appraised value of certain goods of Armstrong, in which, or the importation of which, Toler had no interest or concern, and which goods were condemned to the United States as illegally imported in time of war, by a pretended and collusive capture, and Toler paid the appraised value of the goods thus condemned, and other charges, and the expenses of the prosecution, for Armstrong. When the goods were libelled by the United States, they were delivered up by them to the claimant, De Koven, on a bond for the appraised value, Toler becoming responsible for the appraised value, in case of condemnation; and they were delivered afterwards to Armstrong, on his agreeing to pay Toler such sums as he would be compelled to pay for Armstrong. By a reference to the Appendix to 2 Wheat. 51, it will be seen, that this sale for the appraised value, on such bond as was given in this case, is made by the marshal, and is the legal and proper method. Now, if a man is the owner of certain goods illegally imported, is that any reason why a just and legal contract, to be refunded the money which he might have legally advanced on account of other goods of another person, under a lawful contract, should not be fulfilled? Surely not! for the offence of Toler, as to his goods, was a distinct offence, and unconnected with the other offence committed by Armstrong in importing his goods, and with which latter offence, as the jury found, Toler had no connection whatever, direct or indirect. The case, then, was reduced simply to this: that A. illegally imports goods, and they are

libelled by the United States, to whom B., at the request of A., pays the appraised value, and other charges and costs incident to the prosecution, having agreed to do so at the request of B., before the condemnation, and become liable to do so, in the event of the condemnation. This was the contract to recover these advances, on which the court decided, and nothing more. The contract made by Toler "with the government," under which he paid the money, was, in the language of the court, "a substantive independent contract, entirely distinct from the unlawful importation;" "it is the payment of a debt due in good faith to the government;" and "if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons, who are separately engaged in an unlawful trade, can make no contract with each other." "This would be to connect distinct and independent transactions which have no connection with each other." The court say, "it is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him, with his privity, that he might protect and defend them for the owner, a bond or promise given to repay any advance made in pursuance of such understanding or agreement would be utterly void." The court add, "the point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made; provided he was not interested in the goods, and had no previous concern in their importation." "Provided he was not interested in the goods, a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation." Had the plaintiff in this case no interest in these slaves? Why, *he was the owner of them! Had he "no previous concern in their importation?" Why, he was the guilty importer himself, and for a guilty purpose, which is to be consummated only by allowing the sale! And here let it be observed, that the whole charge of the court below was not reviewed by this court, but only that part quoted by the court in 11 Wheat. 268–9. The *obiter dictum in arguendo*, by the court below, as to the validity of certain sales by an importer, had no necessary connection with the facts of the case, and could have no influence on the decision, and was not reviewed by this court, it not being necessary, as the court said, that all the arguments of the court below, in arriving at their conclusions, should be correct, but that "to entitle the plaintiff in error to a judgment of reversal, he must show that some one of these principles (of the charge) is erroneous, to his prejudice;" and the court declared, that it was "unnecessary to review" the charge further than was done in the case.

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Now, as to the *obiter dictum* in this case, in 4 W. C. C. 297, found in the charge to the jury, in the hurry of a trial at *nisi prius*, and not affirmed by this tribunal, that *dictum* is: "So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason; but it cannot safely be pushed farther. If, for example, the man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction, for the value or freight of the goods, or for other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant, who buys these goods from the importer; that of the tailor, who purchases from the merchant; or for the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of those persons at the time he contracted." Now, if the court designed to say, that upon the facts of that case, the importer, except under his subsequent repurchase from the United States at the appraised value, could recover on his contract of sale of goods imported as were these goods, during war, aud against the war policy, by a collusive capture, it is against the well-established law of the land. These goods were "condemned to the United States, upon the ground of a collusive capture by the Fly." They were then confiscable and confiscated goods, because

"shipped at St. Johns," a town in a British colony, "in December 1813," during the war with England, and shipped for this country for "the defendant," and attempted to be illegally introduced by a collusive capture. From the moment, then, of their importation, being property from an enemy's port, they were forfeited, by the laws of war, to the United States, and no sale of these goods by the importer, without a repurchase from the United States, would be valid.

One case only I will cite on this subject, a decision of Justice STORY, subsequently affirmed by this court. In the case of The Rapid, 1 Gallis. 295, in the case of the property of a "native citizen of the United States," owned by him, previous to the war, and then in New Brunswick, and for which he sent, immediately after the war commenced, an American vessel to bring home for him to Boston, it was declared, that even this was a trading with the enemy, and that the property on its way, on the 7th July 1812, to Boston, in an American vessel, was confiscated as being imported against the laws of war. The court said, "the contamination of forfeiture is consummate, the moment that the property becomes the medium, or the object of illegal intercourse." In confirming this decision in 8 Cranch 163, this court said, "we are aware that there may exist considerable hardship in this case; the owners both of vessel and cargo may have been unconscious that they were violating the duties which a state of war imposed on them." Nevertheless, the property was forfeited. To speak, then, in the case of Toler *v.* Armstrong of a valid sale by the importer of the goods in regard to which "the contamination of forfeiture was consummate," preceding any sale in Boston, never could have been the intention of Judge WASHINGTON, for he was one of the judges who concurred in the opinion of this court in the above cited case of The Rapid. But if we look at the facts of this case, and apply them to the sale by the importer of the goods in this case, we will see why such sale of these goods *might be valid. They were, as is stated, "delivered to De Koven, the owner and commander of the Fly, who brought in the George (and these goods [*629 as part of her cargo) upon admiralty stipulations given by De Koven," and it was after this, that De Koven, the importer, sold and delivered the goods, for $5000, to Armstrong. These admiralty stipulations are known to every admiralty lawyer, and described in the note quoted from 2 Wheaton, by which the claimant (De Koven) receives the goods from the United States, to whom they are claimed to be forfeited, and with a right to sell them, upon giving bonds, with adequate security, to the government, for the appraised value, in case of a decision against the claimant. But in any other case than this waiver and repurchase from the government, I call for the production of a single case in which a sale by the importer of prohibited goods has been held valid. And here I will state that our chancellor, Mr. BUCKNER, though a very able and upright judge, never has, I believe, tried or heard the trial of a single case in admiralty, and it is evident, from a reference to his opinion as to the validity of this sale, that he was misled by the general phraseology of Judge WASHINGTON in this case, as to the sale by De Koven, the importer in that case, without reflecting that this sale, thus held valid, was, after the importer had paid the penalty by his bond, and repurchased at the appraised value from the government. The court say, in regard to the rule which avoids the contract as unlawful, that "so far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason." Now, if the importer cannot sell the slaves, and in the language of Chief Justice MARSHALL, in 12 Wheat. 439, "no (slaves) would be imported, if none could be sold" by the importer, would it not then "discourage the perpetration of the immoral or illegal act" of importation for sale? Would such a construction "extend the sale beyond the policy which introduced it?" Would it "lead to the most inconvenient consequences?" What inconvenience is it, except to the violator of the law, that he cannot recover the price of the slaves unlawfully introduced for sale. Judge WASHINGTON admits, that the contract cannot be enforced, where it "grows immediately out of, and is connected with, an illegal or immoral act;" so, also, he says, "if the contract be in part only connected with the illegal act, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." Now, does

the subsequent sale grow out of the importation for sale, or has it no connection with it? Chief Justice MARSHALL, in 12 Wheat. 447, says, "Sale is the object of importation, and it is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself." Now, if the right of sale constitutes a part of the right of importation for sale, and is an essential ingredient of that right, how can it be said, that the sale had no connection with the illegal introduction for sale, for though the sale by the importer "be in fact a new contract, it is equally tainted" by the unlawful importation by him for sale. And recollect, that Chief Justice MARSHALL was speaking, in the case cited, of the introduction of foreign goods for sale, by the importer, and that the decision was confined to him only; it being declared, that the right of sale by the importer was considered "as a component part" of the right of importation. We may then safely consider it an established rule, that wherever "sale is the object of importation," it is essentially connected with and grows immediately out of the importation; and that as a consequence, wherever the introduction for sale is prohibited, the sale by the importer will be unlawful.

In the case *Ex parte* Bell, 1 Maule *v.* Selw. 751, it was decided, that money advanced by S. to B. one of several partners, out of the partnership funds, on account of payments to be made (on unlawful insurances), in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, was held not provable under the commission of S., who became bankrupt, by the surviving partners of B., "although the surviving partners were ignorant of the illegal character of the advances." In this case, it was strongly contended, that this was a contract collateral to and indepedent of the original transaction. "But the court decided, that there could be no recovery, and established the principle, that "money advanced for the purpose of carrying on a smuggling transaction, or any other illegal traffic," could
630*] *not be recovered. And see 8 T. R. 715; 6 Ibid. 423; and Sullivan *v.* Greaves, 1 Park. on Ins. 8.

In Mitchell *v.* Cockburne, 2 H. Bl. 336, the court decided, that, where A. and B. are engaged in a partnership in insuring ships, &c., which is carried on in the name of A., and A. pays the whole of the losses, such a partnership being illegal, A. cannot maintain an action against B., to recover a share of the money that has been so paid. The alleged illegality of the partnership was founded on the before-mentioned statute, forbidding insurances by partnerships; but it was alleged, that this only extended to public partnerships, and that the collateral contract might be valid by one partner to pay over to his copartner his share of the profits recovered. The court said, "the cases which have been cited, were one step removed from the illegal contract itself, and did not arise immediately out of it. Thus, in Faikney *v.* Reynous, the bond was given to secure the repayment by a third person, of his proportion of the money paid by the plaintiff, in stock-jobbing; and in Petrie *v.* Hannay, the money had been paid to the broker by Keeble, and the action was brought to reimburse his executors for the defendant's share. In that case, indeed, Lord KENYON seemed to be of opinion, that the action could not be maintained, and it was decided expressly on the authority of Faikney *v.* Reynous. But, perhaps, it would have been better if it had been decided otherwise; for when the principle of a case is doubtful, I think it better to overrule it at once, than build upon it at all. But be that as it may, it is sufficient now to say, that those cases are one step short of the direct illegal transaction, but that the present case arises immediately out of it." HEATH, J.—I am of the same opinion. It seems to me, that the object of the statute would be totally defeated, if it were to extend only to those policies in which the names of all the partners were inserted. With respect to the case of Petrie *v.* Hannay, one judge there (ASHHURST) hinted, that his opinion might have been different, if the question had been *res integra;* and Lord KENYON dissented."

But, if this case of Petrie *v.* Hannay were the law, it would only establish the principle, that an innocent third person, from whom a loan is made, to pay a debt in which he had no connection or participation, arising out of an illegal transaction, that this third person can recover, even although the borrowed money is applied by the bor-

rower to pay a debt arising out of such unlawful transaction. There, the party whose right was upheld, had no participation in the illegal transaction; here, the plaintiff is the guilty transgressor: there, the person, Portis, through whose rights the recovery was had, in the language of Justice Ashhurst, "was not concerned in the use which the other made of the money, it was a fair and honest transaction, as between those parties." And Faikney *v.* Reynous proceeds on the the same principle. Was this a fair and honest transaction on the part of the plaintiff? Was it fair and honest, for the slave-trader in this case, with intent to sell, to introduce the slaves, in defiance of law, and consummate that unlawful intention by the sale? The case, then, of Petrie *v.* Hannay would prove nothing against us, but as it has been repeatedly disregarded, and the distinction between *malum prohibitum* and *malum in se*, exploded in England and America, the decision in such a case against the plaintiff, would go far beyond the present; for, if a broker, who, at the winding up of a partnership, paid debts due third persons, arising out of illegal transactions, in which he had no participation, interest or concern, could not recover the money thus advanced, after the conclusion of all these unlawful transactions, on the subsequent, new, distinct and independent contract, on the part of an innocent third person, what hope could the slave-trader plaintiff have of a recovery in this case? And yet the English law is now settled, that such third person could not recover. In the case of Booth *v.* Hodgson, 6 T. R. 409, it was expressly conceded, that under no case, not even that of Faikney *v.* Reynous, was it ever supposed, "that one delinquent can maintain an action against another."

Difficulties arose as to the pleadings on the bond, in the case of Faikney *v.* Reynous, upon the ground, that the defence was not properly before the court, and therefore, in Petrie *v.* Hannay, Lord Kenyon, did not expressly overrule this case *of Faikney *v.* Reynous; but if not determined on the form of the plea, he did most expressly dissent from it, especially the distinction between *malum prohibitum* and *malum in se*, saying, "if one of two partners advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited; and yet smuggling is not *malum in se*, as contradistinguished from *malum prohibitum*." The rest of the court who did not think Faikney *v.* Reynous was decided on the pleadings, said, in that case, "Lord Mansfield and the whole court proceeded on the ground, that as it was not *malum in se*, but only *malum prohibitum*, and as the plaintiff was not concerned in the use which the other made of the money, it was a fair and honest transaction, as between those parties." 3 T. R. 422. Now, if the distinction between *malum prohibitum* and *malum in se*, be now entirely exploded, as these two cases of Faikney and Petrie proceeded on that distinction, they must both fall to the ground. [*631

In Aubert *v.* Maze, 2 Bos. & Pul. 371, it was decided, that "money paid by one of two parties for the other, on account of losses incurred by them in partnership insurances, cannot be recovered, in an action brought by him against the other partner; and, if this, with other causes of dispute, be referred to an arbitrator, who awards a sum due from one to the other for money so paid, the court will set aside that part of the award." In deciding this case, Lord Eldon, Chief Justice, said, "some of the cases on this subject, especially that of Petrie *v.* Hannay, have proceeded on a distinction, the soundness of which I very much doubt." Referring again to the two cases of Faikney *v.* Reynous and Petrie *v.* Hannay, Lord Eldon, after quoting the statement of Ch. J. Eyre, in Mitchell *v.* Cockburne, that "it would have been better, if they had been decided otherwise," adds, as his own opinion, "Indeed, it seems to me, that if the principle of those cases is to be supported, the act of parliament will be of very little use." After giving it as his opinion that the cases of Booth *v.* Hodgson, and Mitchell *v.* Cockburne, were opposed to those of Faikney *v.* Reynous, and Petrie *v.* Hannay, he states: "In addition to this, the cases of Steers *v.* Lashley, and Brown *v.* Turner, 7 T. R. 630, stand in opposition to Petrie *v.* Hannay, Faikney *v.* Reynous, and Watts *v.* Brooks. With respect to Petrie *v.* Hannay, very great weight is due to the opinion of Lord Kenyon, who dissented from the rest of the court." Heath, Justice, concurred, and disapproved the distinction between *malum in se* and *malum*

prohibitum. YORKE, Justice, said, "I perfectly agree with my brother Heath, in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature." CHAMBRÉ, Justice, concurred, and expressed his dissent from the cases of Faikney and of Petrie. See 3 East 222.

In Steers *v.* Lashley, 6 T. R. 61, "A. being employed as a broker for B., in stock-jobbing transactions, paid the differences for him ; a dispute arising between them as to the amount of A.'s demand, the matter was referred to C., who awarded 300*l.* to be due ; on which, A. drew on B. for 100*l.* part of the above, and indorsed the bill to C., after B. had accepted it ; held, that C. could not recover on the bill:" Lord KENYON being of opinion, that as "the bill grew out of a stock-jobbing transaction, which was known to the plaintiff, he could not recover." It was urged, on the authority of Petrie *v.* Hannay, that "as the broker had actually paid the differences for his employer, the bill in question, which was to secure him repayment of what he had paid, was not vitiated by the original transaction between the defendant and those with whom he dealt." It was said, that "this is not an action to recover the differences of the stock-jobbing, nor is it brought by either of the parties to those transactions ; but by an innocent person, on a bill of exchange, drawn by the broker on his principal, for sums of money actually paid by the broker, and for the balance of his account ;" but the plaintiff was not permitted to recover. Here, the broker had no interest in the stock-jobbing transactions, but simply advanced the differences arising out of these transactions, as due by the defendant, for which advances he received from the defendant the bill in question. In Brown *v.* Turner, *7 T. R. 626, it
*632] was ruled, that "if a broker draw on his employer for difference paid for him in stock-jobbing transactions, and the employer accept the bill, and then the broker indorse it to a third person, after it is due, the latter cannot recover on the bill."

In Cannan *v.* Bryce, 3 Barn. & Ald. 179, it was adjudged, that "money lent and applied by the borrower, for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him." In this case, A., who was not a broker, and not concerned in any of the illegal transactions, after all these transactions were closed, loaned money to B., to enable him to pay the losses which he had sustained in those transactions, and B. gave his bond for repayment, and yet it was ruled, that no recovery could be had on the bond. We had seen it decided, in Langton *v.* Hughes, which is affirmed here, that however it may be as to sales abroad, where the parties know that the goods are bought with a view to evade the revenue laws of another country, which the courts decline to notice, yet that sales made in England, of an innocent article, such as ginger to a brewer, to be used in making beer, against a prohibition of the use of ginger by brewers in making beer, is void. And here we find, that money loaned by an innocent third person, to enable another to pay losses which he had sustained in illegal transactions, cannot be recovered. Here, when the money was loaned, the offence of stock-jobbing had been committed ; the loan of the money to pay the losses was a new, subsequent, distinct and independent contract, and yet even such contract was void, as against the policy of the law. The court said, "On the part of the plaintiff, it was contended, that, as he was not a party to the illegal transaction, the loan was not illegal." "The authorities principally in favor of the plaintiff, are those of Faikney *v.* Reynous, and Petrie *v.* Hannay. The propriety, however, of these decisions, has been questioned in the several subsequent cases, that were quoted on the part of the defendant; and the distinction taken in the former of them, between *malum prohibitum* and *malum in se*, was expressly disallowed in the case of Aubert *v.* Maze. Indeed, we think no such distinction can be allowed in a court of law; the court is bound in the administration of the law, to consider every act to be unlawful, which the law has prohibited to be done :" and the bond for the money loaned was held void. It was not pretended, that the statute in this case declared loans, or notes or bonds for money loaned, to pay the losses in this case, unlawful, or that it inflicted any penalty on such loans, or that such lender could be fined or punished in any way;

but to engage in such stock-jobbing transactions was illegal, and therefore, to prevent the violation of the statute, even the lender could not recover money loaned to pay losses arising out of such transactions, even after these losses had all been incurred. The case arising out of a bankruptcy, I have transposed the words, plaintiff and defendant, in the text, to avoid a periphrasis. And now, since this case, decided in 1819, I call upon the opposing counsel to show a single case, in which the authority of either of these decisions of Faikney *v.* Petrie have been recognised.

In Camden *v.* Anderson, 6 T. R. 723, 1 Bos. & Pul. 271, it was adjudged, that "the exclusive right of trading to the E. Indies, granted to the E. I. Company, by 9 & 10 Wm. III., has never been put an end to, and any infringement of it is a public wrong. Though such parts of that act as inflicted penalties, &c., were repealed by 33 Geo. III., c. 52, and though the latter act says, that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c., it is competent to underwriters who have subscribed policies on ships trading to the E. Indies, in contravention of 9 & 10 Wm. III., to avail themselves of the illegality of such trading, in an action on the policies." The court, in that case, said, these plaintiffs "may still insist, that the exclusive trade of the company is no more than their private right, the infringement of which may perhaps give a right of action to the company, as for a civil injury, over and above the several parliamentary provisions which have been made for securing it, but can have no other effect, and particularly, cannot taint with illegality, transactions and contracts which are collateral to it." "When this point was suggested in the course of the argument, Mr. Rous answered, that the exclusive trade of the company was a public regulation of the national commerce, and this was a very good general answer; but I will enter a little further *into the discussion of it. The exclusive trade of the E. I. Company, is now so interwoven with the general [*633 interests of the state, that it is no longer to be considered as the private right of a corporation, but is become a great national concern, and the infringement of it a public mischief, and as such is prohibited by the common law; the principle and the effect of that prohibition, as applied to the present case, may be collected from the case of a bond given to the sheriff, to indemnify him against the voluntary escape of his prisoner, which is pronounced to be void by the common law." Here, then, it was contended, that the law "cannot taint with illegality, transactions and contracts which are collateral to it;" and the court deemed Rous's answer to this position good, that even the collateral contract was illegal "where it concerned a public regulation of the national commerce." Was not this "a public regulation," by the constitution itself, of the traffic in slaves? But again, the court considered the collateral contract void, where it arose out of a prohibited traffic, and also, that the infringement of the statute was "a public mischief and a public wrong." And was not the slave-trade, as prohibited by the framers of the constitution of Mississippi, considered by them "a public mischief, and a public wrong," endangering, as they conceived, the welfare and security of the people of Mississippi; and if so, was the transgressor of such a fundamental law on such a subject permitted to say that the contract was collateral? The court add, in this case, "If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign spirits, bought or sold in the course of a contraband trade, we say, without hesitation, this is a contract against law, and no action can be maintained upon it." And in Farmer's Case, Chief Justice Eyre went still further, and declared, "that violating a prohibition of a species of commerce in which the interest of the country was concerned, was not merely *malum prohibitum*, but *malum in se*." Apply that principle to this case.

The high court of errors and appeals of our state have said, in regard to the case above cited, as to the inter-state slave-trade, as follows: "The convention deemed that the time had arrived, when the traffic in this species of property, as merchandize, should cease. They had seen and deplored the evils connected with it. The barbarities, the frauds, the scenes so shocking, in many instances, to our feelings of humanity, and the sensibilities of our nature, which generally grow out of it; they, therefore, determined to prohibit it in future. Another alarming evil grew out of it, which was

highly dangerous to the moral and orderly condition of our own slaves, and that was the introduction of slaves from abroad, of depraved character, which were imposed upon our unsuspecting citizens, by the artful, and too often unscrupulous, negro-trader. This was intended to be suppressed. Perhaps, another object was to prevent a too rapid increase of the slave population in our state. The cardinal policy of the state was then to suppress this trade; and this is what is prohibited." And who will deny the truth of this statement? Did not the entire South, with perfect unanimity, unite with the North, in making the African slave-trade piracy, and punishing those engaged in that trade with death? And this inter-state slave-trade is prohibited, as highly criminal, by the slave-holding states; and in Georgia, the guilty transgressors of the law must take their place for years with felons in the cells of a penitentiary.

These traders have filled many of the states with insurgents and malefactors, and who will deny the "barbarities," "the frauds," the "shocking scenes," "the alarming evils," which grew out of this traffic? who will deny, that the disproportionate augmentation of the slave over the white population, so rapidly progressing prior to this prohibition, was, if not arrested, endangering the lives of many of our citizens, and that to arrest this traffic, was "the cardinal policy of the state?" If, then, the slave-traders subjected the state to all these dangers, why was not this traffic *malum in se?* and if so, no collateral contract arising out of such a traffic shall be maintained by the guilty offender, much less the very contract of sale, by the slave-trader, of the slaves thus illegally introduced for sale. If, as a consequence of the prosecution of this traffic, the scenes of Southampton had been re-enacted within our limits, would not the blood of every innocent victim have crimsoned the hands and stained the soul of the trader, whose prosecution of this prohibited traffic *had produced these dreadful consequences. And if the vigilance of the state and final enforcement of the prohibition have prevented these consequences, the trader was no more free from crime, than is he who throws the torch of insurrection among us, because it has not yet exploded any of the combustible materials within our limits. These traders have offended against the majesty of the laws and the sovereignty of the people of Mississippi; they have put in jeopardy the lives of our citizens, disregarded our cardinal policy, and trampled under their feet the sacred prohibitory enactments of the constitution. And shall such offenders come into a court of justice, and through its decrees, reap the fruits of their transgressions?

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In Wilkinson *v.* Lousondack, 3 Maule & Selw. 117, it was decided, that "the stat. 47 Geo. III., which repeals so much of the statute of Anne, as vests in the South Sea Company the exclusive privilege of trading to parts within certain limits, extends only to such places within those limits, as were, at the time of passing the act, or at any time since, in the possession of, or under the dominion of, his majesty; and therefore, an action was held not to lie against the defendant, for not safely stowing and conveying goods of the plaintiff from London to Buenos Ayres, which place was captured by his majesty's forces, but afterwards re-captured before the passing of the act, and the shipment of the goods; although the goods were shipped under the sanction of an order in council, purporting to authorize the voyage, and the recapture was unknown when the goods were shipped and the voyage commenced." The case states, that the goods were shipped at London, October 26th, 1806, and the freight there paid, for transportation to Buenos Ayres, to which port the ship sailed. Buenos Ayres was re-captured from the British "by the Spaniards, in August 1806; but that fact was not known in England, at the time of the shipment of the goods and commencement of the voyage." It was agreed, "that his majesty's order in council, dated Sept. 17th, 1806, purporting to legalize the trade, should be read as part of the case, by either party." This order in council is given in the case, and reciting that Buenos Ayres had been conquered by the British, and "was then in his majesty's possession," authorized full and free trade there by the plaintiff and all others. Immediately after the order, and with a view to legalize it, the stat. 47 Geo. III., c. 23, was passed, repealing, after the date of the order in council (17th Sept. 1806), as was conceded, everything in that of Anne, making voyages illegal to all places to which it was heretofore forbidden,

"which now are, or at any time hereafter shall, or may be, belonging to, or in possession of, his majesty." The intention of parliament was to confirm the order, the act going into effect at the date of the order. But the king in council was mistaken, and the parliament was mistaken, and the parties were mistaken, when they entered, as was admitted, *bonâ fide* into this contract; for in August 1806, Buenos Ayres had been most unexpectedly taken by the Spaniards, and therefore, the words of the act of parliament did not reach the case. Yet, the counsel, in that case, did not venture to contend, that even the royal mandate by the king in council could render nugatory a preceding prohibition of an act of parliament, as it seems to be urged upon the court in this case, and that the supposed tax law may render imperative a provision of our constitution; but they did contend, that the language of the act of parliament, of 47 Geo. III., reciting, as it did, the very date of the order in council, and to go into effect from that date, did legalize and adopt that order. The plaintiff also contended, that the case arising out of a "collateral damage" to the goods, by the negligence and improper conduct of the defendant, by having been "torn and perforated by iron bolts, and otherwise damaged and spoiled," the illegality of the voyage, even were it illegal, did not affect this collateral claim, which was distinct and independent. But the court decided, that the plaintiff did well to admit that an order of the king in council could not render inoperative a preceding act of parliament; that the claim for the damages to the injury of the goods grew out of the contract of freight; and that the contract was invalid, because it related to a voyage that was illegal. The court said, "the only remaining argument in favor of the plaintiff was, that there had been no wilful contravention of the law; both parties thought they were acting legally; but their misapprehension of the fact, *or the law, cannot alter the character of the contract, which the court is called upon by this action to enforce." [*635

In the case of Griswold *v.* Waddington, 15 Johns. 57; 16 Ibid. 438, it was decided, that where there was a partnership existing before the late war with England, one partner residing here and the other in England, and where a balance arose in a partnership account on bills upon England, remitted there from this country, during the war, there could be no recovery, even after the peace, on such account; all trading between our citizens and British citizens being contrary to the war policy of the country, and although it was distinctly proved as part of the case, that such remittances were impliedly sanctioned by the executive branch of the government of the Union; that they were innocent in intention, being remittances not of money or specie, but of bills, and the government itself having remitted, during the war, bills drawn on England. But the practice or sanction of the executive, nor the innocence of the intention of the parties would avail, even after peace was declared, to induce the court to give validity to any contract, express or implied, repugnant to the policy of the law. In deciding this case, Chancellor Kent said: "An objection to the perfidious character of the defence is not to be endured." Lord Hardwicke disregarded it in the case in 7 Ves. 317. 'Several cases,' says he, 'at common law and in equity, have gone upon this, that if the contract relates to an illicit subject, the court will not so encourage an action as to give a remedy. Nor is it any answer, that the defendant knew of this illegality, for this answer would serve in all these cases.' The plaintiff must recover upon his own merits; and if he has none, or if he discloses a case founded upon illegal dealing, and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be. There is, to my mind, something monstrous in the proposition, that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience, and giving to disloyalty its unhallowed fruits." If the contract "arise from a transgression of a positive law of the country," or if it relates "to an illicit subject," to allow a recovery would be "encouraging disobedience" and giving it "its unhallowed fruits." And in these two cases, there was no doubt of the sanction of the contracts by the king in council, in the one case, and the executive department of the government of the Union in the other; but all this, nor "any misapprehension of the fact or law," could avail to maintain the contract.

In the case of the Bank of the United States *v.* Owens, 2 Pet. 527, it was decided by this court, that as the bank charter "forbids the taking a greater interest than six per cent.," but does not declare the contract void; "such a contract is void upon general principles;" and there could be no recovery, not merely of the usurious excess of interest, or of six per cent. interest, but also no recovery of any part of the principal of the money loaned. In this case, most of the authorities as to illegal contracts are reviewed by the court, and they settle the principle, that when the construction of a statute regards the policy of the law as to the validity of contracts, the statute is to receive a liberal construction so as to uphold the policy of the law; and that reserving interest beyond six per cent. may be considered as embraced within the spirit of a law rendering it illegal "to take more than six per cent. interest." They say, "courts are instituted to carry into effect the law of a country; how, then, can they become auxiliary to the consummation of violations of law?" Is not this sale by the importer of the slave that he could not introduce for sale, a "consummation of the violation of the law?" They thus recognise the great case of Aubert *v.* Maze, exploding the distinction between *malum prohibitum* and *malum in se*. "In the case of Aubert *v.* Maze, it is expressly affirmed, that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum*. And that case is a strong one to this point, since the contract there arose collaterally out of transactions prohibited by statute." "And so, in another case of great hardship, 3 Bos. & Pul. 35, where the insurance was upon a trading in the East Indies, prohibited by an obsolete statute, the plaintiff could not even recover his premium, although admitted that the risk never commenced, because the policy was void in its inception, on the ground of illegality;" and the court say, *the principle extends to any other contract, where the prohibition arises by the common, statute or maritime law; and they add, "nor is the rule applicable only to contracts expressly forbidden, for it is extended to such as are calculated to affect the general interest and policy of the country." See also 1 Pet. 37; 4 Ibid. 184.

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In Thompson *v.* Thompson, 7 Ves. 470, 473, it was held, that "a contract for the sale of the command of an East India ship is illegal, and therefore, cannot be enforced by suit upon the equity against the fund paid by the company as a compensation, under the regulation of 1796, to restrain the practice in future." The court said, "the defence is very dishonest; but in all illegal contracts, it is against good faith, as between the individuals, to take advantage of that. A man procures smuggled goods, and keeps them, and refuses to pay for them; so in the underwriters' case, an insurance contrary to act of parliament, the brokers had received the money and refused to pay it over, and it could not be recovered." Here, the illegality of a sale of smuggled goods retained by the vendee is recognised. In Amay *v.* Meryweather, 4 Dow. & Ry. 86; 2 Barn. & Cres. 573, it was ruled, that where W., as agent for defendant, voluntarily paid 500*l.* to compound differences, that to secure to W. repayment of that sum, defendant gave his note to W., which W. indorsed to plaintiff after due, that on threat of suit by the plaintiff, defendant gave his bond in lieu of the note to plaintiff; held, there could be no recovery on the bond, as it grew out of an illegal transaction. Here, the doctrine of Faikney *v.* Reynous is overruled, in form and substance, this being the case of a bond given to an innocent person, wholly unconnected with the original transaction. It was decided, in the St. Jago de Cuba, 9 Wheat. 409, that no wages could be recovered by seamen, nor money for supplies by material-men, when they knew that the voyage of the ship was unlawful. And the principle was extended, in the case of a vessel engaged in the slave-trade, to supplies furnished after her return to Baltimore, by those who knew of the illegal voyage, and that she was remaining in port under false colors.

We have, then, numerous cases here cited, declaring the distinction between *malum in se* and *malum prohibitum*, exploded; and such also is the opinion of all the elementary writers. 1 Leigh's Nisi Prius, 6–7; Collyer on Partn. 28; Chit. on Cont. 231; Paley on Agency, ch. 2, § 2, p. 103–4; 1 Kaimes 355. And Chancellor Kent says: "The distinction between statutory offences which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law in either case, is equally unlaw-

ful and equally a breach of duty." 1 Kent's Com. 467–8. See 7 Wend. 276, 280. Mather's Case, 3 Ves. 372, has been before quoted, in which this distinction was denounced and the cases of Faikney and of Petrie overruled; and subsequently, in the case *Ex parte* Daniels, 14 Vess. 172, Lord Chancellor ELDON "expressed his disapprobation of the doctrine of Faikney *v.* Reynous, and Petrie *v.* Hannay." Such is the law of the continent of Europe, of Scotland, of England and of America, on this subject, and the decisions in Ireland are to the same effect. In Ottley *v.* Brown, 1 Ball & Beatty 360, the chancellor decided, that a "bill by a banker for an account of shares held in trust for him in a mercantile establishment" could not be maintained, because the statute 29 Geo. III., c. 16, "prohibited bankers from being traders," though the statute does not avoid the contract, nor does it extend in terms to a trust; yet a recovery was refused, because to permit it would be against the policy of the law. In referring to the case of Petrie *v.* Hannay, he expressed his concurrence in the views of Lord KENYON in that case, and against the case itself; and also declared the strongest disapprobation of the case of Faikney *v.* Reynous, remarking, that "Lord KENYON, Lord ROSLYN and Lord ELLENBOROUGH all differ from Lord MANSFIELD, and I am quite satisfied with the principles laid down in *Ex parte* Mather." To these he might have added Lord LOUGHBOROUGH, Lord ELDON, Chief Justice EYRE and many other distinguished British judges before quoted by me, as overruling these cases and disapproving the distinction between *malum prohibitum* and *malum in se*. In this case of Ottley *v.* Brown, 1 Ball & Beat. 360 the chancellor expressly declared, that whether the illegal contract was the original transaction, or only collateral and resulting from it, was equally void "on principles of policy." And in Knowles *v.* Haughton, 11 Ves. 168, the court refused proof of any items in an account growing *out of an illegal partnership, and overruled Watts *v.* Brooks; and in Ruth *v.* Jackson, 6 Ves. 30, 35, [*637 even when no guilt attached to plaintiff or defendant, the court declared, that no contract could be enforced contrary to "considerations of general policy." The distinction between *malum prohibitum* and *malum in se*, is denounced by Emerigon, vol. 1, p. 210, 542, § 5, 31. He says, this doctrine of distinguishing between breaches of the law "is reproved by St. Paul in his Epistle to the Romans. It is necessary, says the Apostle, to obey the laws; not merely through fear of punishment, but also as a duty of conscience. A Christian obeys the laws from a conscientious obligation, and as an indispensable duty of religion." And as concurring with him, he cites Pothier, Denisart, Burlamaqui, Wolffs, Vattel, Grotius, Guidon de la Mer. And Denisart denounces the introduction of articles into a country against its laws as a crime. Tom. 1, page 714. If it be then a crime, as now recognised in England, and Ireland and Scotland, and upon the continent of Europe, to introduce prohibited articles into a country, who can contend, that the guilty criminal shall obtain for his offence the sanction and encouragement of courts of justice, by enabling him, through its decrees, to sell the very article it is a crime for him to introduce for sale?

Our opponents have cited the following sentence from Chitty on Contracts 217: "A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground, unless it expressly and unquestionably contravene public policy and be injurious, beyond all doubt, to the interests of the state." Now, Mr. Chitty was here speaking, as the very preceding sentence shows, "of contracts void at common law, as affecting public policy," and not of contracts repugnant to the policy of a statutory or constitutional provision. We have seen, in the numerous cases already cited, where the question is, whether a contract is repugnant to the policy of the statute, that so far from the rule being that the agreement must expressly contravene the statute, it must receive the most liberal construction to prevent a defeat of the policy of the statute, and that if it be within the spirit or scope, intention or object of the law, by implication or otherwise, the agreement is void. Did Mr. Chitty also mean to say, that the contract must be "injurious, beyond all doubt, to the interests of the state," in order to declare it void, when the question arose upon a statute? Why, if the statute, by any fair and just construction, avoided the contract, we have seen the courts, in repeated instances, some of which have been cited, declare

the contract invalid, as contrary to the policy of a statute, whilst at the same time, they announced their disapprobation of the policy of the statutes, and declared that in their judgments, the contract was not injurious to the interests of the state. It is, then, when in the absence of a statute or constitutional provision, a court, upon its own judgment, is refusing its aid to a contract, upon the ground that it is against the public policy, and injurious to the interest of the state, that it must be a clear case, and not "a doubtful matter of public policy." That such was Mr. Chitty's meaning, is evident, from the fact, that in this chapter, which is headed "of contracts void at common law, as affecting public policy," he enumerates only cases void at common law, as injurious to the public interest, and not cases depending upon the construction of a statute; and then, in a separate chapter, he speaks "of contracts void by statute," and enumerates many instances under which contracts not within the words of the statute, are declared void, as repugnant to its intention, scope and spirit. In his notes to this chapter, he refers to a treatise on the same subject, in the third volume of his Commercial Law, page 83, from which I quote: "But a distinction has been introduced into our law books, under the two several denominations of *mala prohibita* and *mala in se*." He denies and denounces this distinction; and then says, where "an act is prohibited generally by statute, the punishment which the law annexes to the offence is, in general, by indictment, and this is that species of crime which our law writers usually understand by the term *malum in se*." "And the circumstance of both parties being ignorant of the law, and being innocent of any intention to violate, will not constitute any distinction." "And the illegality affects all contracts calculated to violate the law; and therefore, where a voyage has been declared illegal, a person cannot be sued for carelessly stowing goods to proceed upon it." The authority, then, of Chitty is in our favor, on all the contested points. Here, Mr. *Chitty says, *638] when the introduction of slaves for sale, (to specify the case) is "prohibited generally by a statute," and not the implied prohibition by a penalty, "this is that species of crime which our law-writers usually understand by the term *malum in se*." The words here, then, are, "the introduction of slaves, as merchandize, or for sale, shall be prohibited, from and after the first day of May 1833." The prohibition, then, being general, after the day fixed, and without a penalty, the introduction of the slaves in this case for sale was a crime, it was *malum in se;* it was punishable by indictment, with fine and imprisonment; and all the argument that has been made to show that this is not a prohibition, but merely directory to the legislature, because there is no penalty, falls to the ground.

And now, then, I approach the grave subject really referred to in the quotation made by our opponents from Chitty, and that is, whether the introduction of these slaves for sale, and the subsequent sale, would be so clearly repugnant to the true policy of the state, and so injurious to its interests, that such a contract of sale would be void, on general principles, had there been no provision on the subject in the constitution or statutes of Mississippi. The power and duty of the court to declare such contracts void, in clear cases of repugnance to the policy or interest of a state, even where there is no statutory or constitutional enactment, is admitted in the clause quoted by our opponents from Chitty; and upon reading that chapter, numerous instances of the application of the principle will be found, in cases less clear, in my judgment, than the present, and to these cases I refer the court. The same doctrine is thus laid down by Lord Mansfield, in 1 Cowp. 39: "It is admitted by the counsel for the defendant, that the contract is against no positive law. It is admitted, too, that there is no case to be found, which says it is illegal; but it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science, indeed, if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them. The

question, then, is, whether this wager is against principles? If it be contrary to any, it must be contrary either to principles of morality; for the law of England prohibits everything which is *contra bonos mores;* or it must be against principles of sound policy; for many contracts which are not against morality, are still void as being against the maxims of sound policy." This doctrine has been repeatedly recognised as the law, in England and America, and this very principle is quoted and recognised by the supreme court of New Jersey, in 5 Halst. 91, and by the supreme court of Pennsylvania, in 1 Binn. 123; and in the concluding opinion in that case, as to a sale of lands, the court say, "Exercising jurisdiction, the state is bound to preserve the peace and aid contracts, but not such as militate against her own rights. It would be unnatural and against reason, which is a ground of the common law. It is against public policy. Self-preservation forbids it. So that, independent of any act of the legislature, I must hold the transfer illegal, and the obligation, given under such consideration, void." Does it, then, in this case, independently of any constitutional or statutory enactment, clearly appear to the court, that at the date of this contract, the introduction and sale of slaves, as merchandize, was against the true policy, was dangerous to "the peace" of the state, or "injurious to its interests," it was the duty of the court not to maintain the action on the contract. No court is called upon to lend its assistance to contracts encouraging a traffic detrimental to the interests, or repugnant to the policy, or dangerous to the peace of the state. It is true, that this is a power of judicial tribunals, where they act merely on general principles, without precedents, which must be exercised only in clear cases; but where the case is clear, it is a great protective and conservative power, which no court can refuse to exercise, without a gross dereliction of duty. Is this a clear case?

The views of our highest court, of the dreadful consequences of this traffic, have been already quoted; and if they are correct, as no reasonable man can doubt, then *is there not strong ground upon which to contend, that this contract was void [*639 on general principles, in the absence of all provisions in the constitution or statutes of the state? But suppose it not to be, merely on general principles, a case sufficiently clear for the court to refuse its aid by enforcing the contract, who can doubt what was their duty, when there was a constitutional mandate on the subject, supposing it only to be a command of the constitution, that on the 1st of May 1833, the traffic shall be prohibited, was it not the declared policy of the state that the traffic should cease on that day; was it not the will of the convention, as announced in the fundamental law, that it should then cease; and was the court, in defiance of this annnuciation, in defiance of the mandate of the convention, in defiance of the will of the people declared in convention, and again at the polls, in 1833, by refusing to change this mandate into a grant of discretionary power to the legislature, to maintain contracts repugnant to that policy, because the legislature had not acted on the subject? We have seen, that, in clear cases, it is the duty of a court to refuse its aid to contracts repugnant to the policy or interest of the state, or dangerous to its peace, even in the absence of all legislative or constitutional prohibitions; but where there is a mandate of the constitution on the subject, announcing the will, or, if you please, merely the opinion of the people of the state, that the traffic shall be prohibited on a day certain, must not all doubt cease, and the duty of the court become clear and obvious?

But if this clause of the constitution does not of itself render the sale unlawful, it is insisted, that it does so, when taken in connection with the preceding act of the legislature, of the 18th June 1822, Rev. Code 369. It is declared by the 1st section of that act, "that all persons lawfully held to service for life, and the descendants of the females of them, within this state, and such persons and their descendants, as hereafter may be brought into this state, pursuant to law, being held to service for life, by the laws of the state or territory from whence they were removed, and no other person or persons whatever, shall henceforth be deemed slaves." Now, if this clause of the constitution prohibits the introduction for sale, would these slaves have been introduced "pursuant to law?" That will not be contended. Then this section declares, that they shall not "be deemed slaves;" that is, they shall not be deemed

so, in Mississippi, for the purpose of lawful sale there, by the importer, because the subsequent sections of this act explain its meaning, by imposing a penalty on the sale or purchase of all slaves not imported pursuant to law; and it will not be denied, that a penalty on the sale implies a prohibition of the sale, and renders that sale unlawful. Dwarris on Stat. 678; Carth. 251; 1 Binn. 118; 3 Chit. C. L. 84. For the purposes, then, of a lawful sale by the importer, negroes not "brought into the state pursuant to law" cannot "be deemed slaves," and if so, the sale must be unlawful.

What, then, it is asked, becomes of these slaves? In reply, I answer, what became of the slaves introduced against the provisions of the act of 1808 or 1822, and what becomes of the slaves unlawfully introduced since the act of 1837? In all these cases, it is conceded, that the sale is invalid, by the importer, although no further provision is made in any of these cases in regard to the future condition of the slaves. In all these cases, however, as in this, the sale by the importer was invalid, and for that purpose they could not "be deemed slaves." So, in the numerous cases cited in this argument, the land in Pennsylvania, the ginger sold to make beer, the butter, corn and coal vended by unlawful measures, the ribbands bought as presents for voters, the vessels transferred contrary to the policy of the navigation or registry laws, the horses purchased on Sunday; in all these cases, the property remained property, and a subject of lawful traffic, but the sale by the violator of the law was held invalid. Now, this first section of the act of 1822 was in full force, at the date of the framing of the constitution of 1832, and the 4th section of the schedule of that instrument declares, "All laws now in force in this state, not repugnant to this constitution, shall continue to operate, until they shall expire by their own limitation, or be altered or repealed by the legislature." Now, this constitution prohibits the introduction of slaves, as merchandize, or for sale, and this section of the act of 1822 declares, that such slaves as shall be unlawfully introduced hereafter, shall not "be *deemed slaves," for the purpose of a lawful sale by the importer. There *640] is no repugnance whatever in the law to this constitutional prohibition; on the contrary, it is, if not clearly implied in the prohibition itself, certainly not repugnant to it, and conformable to its expressed object. This section, then, of that act, so far from being repealed, was re-enacted and continued in operation by the 4th section of the schedule of the constitution of 1832, and must be construed in conjunction with that instrument. This section, then, of the act, must be regarded as within the view of the framers of the constitution of 1832; for it was then continued in operation by them; and that section having rendered illegal the sale by the importer, of all slaves that should thereafter be unlawfully introduced, rened it unnecessary for the convention to declare the sale illegal. This also is a strong argument to show that this clause of the constitution was a prohibition, when we see, that this section of the act of 1822 was thus, by that instrument, connected with, and made a part, and continued in operation thereby; and even if this were regarded as a new and distinct prohibition from that of the acts of 1808 and 1822, but only so far differing as this, that by these laws the prohibition of this traffic was special add partial, and here it was general and total, would it not be a most extraordinary construction, to suppose, that whilst the convention substitued a total for a partial prohibition, it should intend to depart from the policy of a quarter of a century, by which, under the acts of 1808 and 1822, wherever the importation was illegal, the sale also by the importer was void?

Perceiving the force of these arguments, our opponents meet them by asking, would you emancipate all these slaves introduced from 1833 until 1837? Were they emancipated under the act of 1808, of 1822 and of 1837, when unlawfully imported? and if not, the question presents no difficulty. Under the early acts of congress, prohibiting the introduction of slaves from Africa, they were not emancipated; yet the sale by the importer was absolutely void. Laws *in pari materia* are to be construed together, and as one code; and when a code of laws has been compiled by the legislature, and by an amendment of the constitution, that instrument, whilst it expressly continues in force every portion of that law not repugnant to the constitution, introduces any new provision or modification of the pre-existing system, the whole is to be construed together; and the new provision or modification is to be regarded as incorporated in the former system,

as constituting a part of it, and as substituted for any particular section of that system to which the new provision may be repugnant, or in which it may affect a change. Now, this act of 1822, before cited, was a complete code of laws in regard to slaves, consisting of eighty-six sections, nearly every one of which is now in undisputed operation. Every section of that law which is repugnant to the constitution of 1832, is thereby repealed, and the new provision substituted in place of the repealed clauses as a part of the system. The doctrine is thus laid down in Dwarris 699–700, and is sustained by numerous authorities. "As one part of a statute is properly called in, to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. In applying the maxims of interpretation, the object is throughout, first, to ascertain, and next to carry into effect, the intentions of the framer. It is to be inferred, that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is, therefore, an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law; and they are directed to be compared, in the construction of statutes, because they are considered as framed upon one system, and having one object in view. If one statute prohibit the doing of a thing, and another statute be afterwards made, whereby a forfeiture is inflicted upon the person doing that thing, both are considered as one statute. When an action founded upon one statute, is given by a subsequent statute, in a new case, everything annexed to the action by the first statute is likewise given. Indeed, the latter act may be considered as incorporated with the former."

Here, it is expressly declared, that the latter provision is considered as "incorporated *with the former." Now, in place of the 2d, 4th and 5th sections of this act of 1822, read, as a part of that act, the provision of the constitution of 1832, [*641 declaring that, "the introduction of slaves as merchandize or for sale, shall be prohibited, from and after the 1st of May 1833." And then, by the 1st section of the act, no such negroes thus introduced shall, for the purposes of lawful sale, by the importer, be "deemed slaves," and this is enough to decide this question. But this is not all, for I contend, that as this provision was thus incorporated by the new constitution, in place of §§ 2, 4, 5, as part of the act of 1822, the other provisions remaining in force, then the penalties attaching upon the sale of slaves imported as merchandize, contrary to the provisions of the law under the 6th section of the act of 1822 would apply. That section was not repugnant to the clause in question of the constitution, but remained in force, and in aid thereof, until the legislature attached other penalties. This we have seen is the principle cited, that all acts *in pari materia* are to be taken together, "as if they were one law." Thus, "if one statute prohibits the doing a thing, and another statute be afterwards made, whereby a forfeiture is inflicted on the person doing that thing, both are considered as one statute." Thus, a new forfeiture attaches to an old prohibition as part of it; so, "when an action founded upon one statute, is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given. Indeed, the latter act may be considered as incorporated with the former." Here, then, was a penalty on the sale of slaves unlawfully introduced as merchandize; a subsequent act of sovereign legislation extends this provision by forbidding the introduction of all slaves as merchandize; does not the penalty under the old law clearly attach under the new provision, especially, when everything not repugnant to that provision in the former law is expressly continued in force by the last enactment? If this were a second supplemental act, there could be no doubt; and is it not more important, to apply the principle to modifications of the former system introduced by a prohibitory provision of a new constitution?

It has been decided, that "if a statute prohibit contraband goods under a penalty, a subsequent statute declaring goods contraband, will draw the penalty after it. "The statute of Anne, c. 7, § 17, imposing a penalty of treble the value on the importation of foreign goods, prohibited to be imported into this country, extends to all such goods

as have been or may be prohibited subsequently to that statute, as much as if they had been prohibited at the time of making that statute." Dwarris on Stat. 706, 743-4; Attorney-General *v.* Saggers, 1 Price 182. Thus, by the 8 Anne, c. 7, certain penalties are imposed on the importation of such goods as were prohibited, foreign gloves not being among the articles then prohibited. The 6 Geo. III. c. 3, an independent, not a supplemental act, passed several years subsequently, prohibited the importation of foreign gloves, and inflicted penalties on the concealment of them. The statute of Anne inflicted a different penalty on persons knowingly having possession of such goods as were then prohibited. And the question was, whether the double penalties under both statutes could be recovered. The court decided, that they could. They say, "the two statutes may well stand together; the one requires merely a possession of the goods, with a knowledge of their prohibition; the other, a possession with intent to conceal from forfeiture or seizure." And both penalties were enforced, though these gloves were "not prohibited by the first act." This is a much stronger case than the present, where only one penalty would be exacted; but the principle applies, that where certain classes of goods (or slaves) are prohibited to be imported, under a penalty, and by subsequent legislation, the prohibition is extended to another class of goods (or slaves), the penalty under the first act attaches to the goods (or slaves) enumerated in the second, although it be not a supplemental act, and not referred to in the second act. And Lord Mansfield upholds the same principle of considering as one act, statutes in *pari materia*, although the first act is "not referred to" in the last statute; and in aid of the construction of a late statute, he declares it a proper rule "to look into the policy of a former act *in pari materia*, although that act may have expired." Dwarris 700-1; 1 Burr. 449; Bac. Abr. tit. Stat. 1, 3; 1 Vent. 246; Wallis *v.* Hudson, Chan. Rep. 276. *And it is even competent to call in aid a "repealed statute," to assist in the construction of another statute *in pari materia*.

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Now, if, under the strict construction given to penal statutes, the penalty of the first statute on the importation of certain prohibited goods, will be inflicted as to other goods prohibited by a second statute, and even double penalties will be exacted, can there be a doubt, that where the same acts are most liberally expounded, when the penalty is not demanded, but the act is only asked to operate so as to render the contract unlawful, that the 1st section of the act of 1822, which had that effect on the sale of all slaves that should not "hereafter be brought into this state pursuant to law," must expressly apply to such slaves as were prohibited to be introduced by the constitution? And is it not incredible, that when the constitution of 1832 prohibited the introduction of slaves, as merchandize, it was intended to change the settled policy of the state, for a quarter of a century, by which, under all acts *in pari materia*, the sale was always made unlawful, whenever the importation was forbidden? This act, then, of 1822 is a part of this provision of the constitution of 1832, expressly continued in force thereby, and demonstrates that this was a prohibition; for why, by implication, is this clause to be rendered merely directory for future legislation, when there was already legislation full and complete upon the subject, and expressly continued in force by the constitution?

I have before quoted the decision in our favor of the highest court of our state; and here I contend, that the decision of the highest court of a state, expounding its constitution, is obligatory on this court in all cases when that construction involves no repugnance to the constitution of the United States. Could congress give to this court an appeal from the decisions of state tribunals in questions, not involving a repugnance to the constitution of the United States? Surely not! And because it has jurisdiction, not on account of the question, but of the parties, between citizens of different states, shall it, therefore, assume the power of disregarding the construction of their own constitution, and of their own statutes, by the highest courts of a state? If so, and it possesses this power in one case and in one state, it possesses the same power in every state and in all cases, and may overrule any number of decisions upon all their statutes, and all their constitutions, by all their courts; and thus establish two rules of property under the same state statute or state constitution, and both to be enforced within the state, the one by the state, and the other by the federal tribunals. Let us take the case

of Maryland, and suppose, that under their laws, their courts not only invalidate the sale of slaves introduced for sale, but declare the negro free. If, in a case between citizens of different states, this court should give a different construction to the laws of Maryland, and declare the sale valid, and the negro a slave, what would be the result? Why! whilst the slave-trader of another state, aided by this court, should collect the money for the sale of the slave, that same slave might be declared, upon his petition, a freeman, by the courts of Maryland; and no one pretends, that from that decision there could be any appeal to this court. And to reverse the picture, whilst the state courts held the sale valid and the negro a slave, as between their citizens, in expounding their laws, this court, in a case in which a citizen of another state was a party, might pronounce such sales invalid and the negro free, and thus emancipate the slaves of a state against her will.

This is but one case out of a thousand, of conflicting decisions that would constantly occur, bringing the state courts and state officers into constant conflict, often as to the same money or property, real or personal, and yet neither bound to acquiesce in the decision of the other, and of course, resulting in contests of force or anarchy. Under our form of government, there must be some tribunal, in the last resort, to expound laws and constitutions. That tribunal, in cases involving the construction of the constitution of the Union, is this court; and in all other cases, involving only a construction of a state constitution, the highest court of the state is the expounding power, to whose decisions all must submit, or two opposite and contradictory constructions and rules of property must prevail and be enforced in the same state. No powers are retained by any state, if this court, in all cases, though not involving a construction of the constitution of the Union, may demand obedience, in every state and from all their courts, to all their decisions upon questions *merely local, and embracing only an exposition of state laws and state constitutions. Over these local questions, it is conceded, that this government has no control. The constitution itself declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." These local questions, upon which congress cannot legislate, are conceded to be cases of power reserved to the states, and not delegated to the United States. And yet, upon all these local questions, over which the governments of the states have exclusive power, and this government has no power, it may, upon this principle, nay, it must, sweep them all within the controlling sway of one of the departments of this government. Especially, over slavery, or any other local question, the states would have no power, and it would all be concentrated in one of the departments of this government. [*643

If, in construing, in the last resort, the constitution of a state, this tribunal may decide, that upon their construction of that instrument, all the slaves within the limits of the state are free men, in vain may all the state tribunals have decided differently; in vain may we urge, and the opposing counsel concede, that no power over the "question," was delegated by the constitution of the Union to this government—that it is a power admitted to be exclusively reserved to the states; but if the question arises on the construction of a state constitution, in a case between citizens of different states, and comes into this court, its construction of that constitution (if the state interpretation be not binding) is to be the supreme law of the land, and obligatory on the same question on all the state tribunals. There is no escape from these consequences, but in the concession, that the state tribunals are not bound by the construction placed on local questions, arising under state laws and state constitutions. And is there to be no final and peaceful arbiter of any such question? Must the conflicting decisions of the state and federal courts both be executed, without the power of appeal from either tribunal, and force decide between the marshal on the one hand, and the sheriff on the other, in carrying into effect these contradictory decrees? Such a system would be the reign of anarchy and civil war. Are we to be told, change your state constitutions, and we will expound them differently? So you will, the constitution as changed; but that will not recall or change the past decree as made, whether for emancipation or any other purpose, under the old constitution. Besides, it is no easy matter to change the constitution of a state. In most of the states,

a majority of at least two-thirds is required to effect this change. In some states, for instance, in Maryland, as to slavery, it requires the unanimous consent of both branches of the legislature; and in many cases, the proposed remedy of changing our state constitutions, might prove quite ineffectual, and in no case, could it recall the past, or obliterate the rights accrued under your construction of the old constitution.

In the case of the Bank of Hamilton *v.* Dudley, 2 Pet. 492, the question was, whether the court of common pleas of Ohio had authority, as a court of probate, under the constitution of that state, to order the probate sale of certain property. The case was argued at one term; but the court hearing that the same question was "depending before the highest judicial tribunal of the state," Chief Justice MARSHALL announced, that "the case was held under advisement," to receive that opinion. The counsel opposed to the Ohio decision, contended, that, "this court will never follow the law as decided by the local tribunals, unless it be settled by a series of decisions, and is acquiesced in by the profession. But it is asked, in this case, to yield implicit obedience to an isolated case, in the decision of which the court was divided; a decision, too, as it is solemnly believed, fraught with the most pernicious and ruinous consequences; and which, unless the learning and justice of the profession are greatly mistaken, will never meet its approbation." The same counsel also contended, that the order of the court of common pleas, to sell the property, must be considered *res judicata* and conclusive, till reversed, and not to be reversed in a collateral issue. In reply to this last position, as to the order of this inferior court of common pleas, the court regarded it as to "be treated with great respect, but not as conclusive authority." In regard, however, to the decision of the highest court of the state, expounding their state constitution, Chief Justice MARSHALL thus announced the opinion of this court: "It is also contended, that the *juris
*644] diction of the court of common pleas in testamentary matters, is established by the constitution; and that the exclusive power of the state courts, to construe legislative acts, does not extend to the paramount law, so as to enable them to give efficacy to an act which is contrary to the constitution. We cannot admit this distinction. The judicial department of any government is the rightful expositor of its laws; and emphatically of its supreme law. If, in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted, that the court must exercise its judgment on both, and that the constitution must control the act. The court must determine, whether a repugnancy does or does not exist, and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which the court can perceive no reason." Such was the view of this court, of a decision of the highest court of a state, expounding its state constitution; not a series of decisions, but a single decision just pronounced by a divided court. It was regarded as conclusive, because the final construction of its state laws was a question within "the exclusive power of the state courts;" they were "the rightful expositor of its laws, and emphatically of its supreme law."

In Coates *v.* Muse, 1 Brock. 539, 543, in a case overruling a decree for money, not land, growing out of a construction of a state statute, Chief Justice MARSHALL said: "It is always with much reluctance that I break the way in expounding the statute of a state, for the exposition of the acts of every legislature is, I think, the peculiar and appropriate duty of the tribunals created by that legislature." In Gardner *v.* Collins, 2 Pet. 89, this court say, in regard to the construction of an act of the legislature of Rhode Island, that "if this question had been settled by any judicial decision in the state where the land lies, we should, upon the uniform principles adopted by this court, recognise that decision as part of the local law." In the case of the United States *v.* Morrison, 4 Pet. 124, where the question arose on the construction of a statute of a state, in regard to the interpretation of which it was admitted by the court, that "different opinions seem to have been entertained at different times;" under which state of the facts, the circuit court of the United States for the eastern district of Virginia, made a decision and construction one way (Chief Justice MARSHALL presiding); subsequently to this, the same question was decided differently by the highest court of Virginia; and the case not yet reported, was quoted in manuscript, when this court, Chief Justice MARSHALL pronouncing the opinion,

reversed his own judgment below, upon this single decision just made by the state court, on a construction of their statute in regard to which much difference of opinion had before prevailed. In delivering the opinion of the court, Chief Justice MARSHALL, after referring to the decision by the circuit court, said: "A case was soon afterwards decided in the court of appeals, in which this question on the execution law of the state was elaborately argued, and deliberately decided. That decision is, that the right to take out an *elegit* is not suspended by suing out a writ of *fieri facias*, and consequently, that the lien of the judgment continues pending the proceedings on that writ. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state."

In Green *v.* Neal, 6 Pet. 291, when this court had twice decided in a certain manner the construction of a law of Tennessee, and the highest court of that state, by a single decision, ruled the same point differently, this court, in 1832, overruled its own two former decisions of this question, and adopted the last and recent decision of the supreme court of Tennessee. The very question raised was, whether the state decision was merely entitled to high consideration or was conclusive; and the court expressly decided, that "where a question arises under a local law, the decision of this question by the highest judicial tribunal of a state should be considered as final by this court." This was a strong case, especially as the state decision adopted in that case, was a single decision and of recent date, and opposed to previous and contrary decisions of the same question by the same state tribunals. But the court recognised the obligatory character of the state decision, even in a case "where the state tribunals should change the construction," *although in such a case of contradictory decisions by the same state court, of the same question, they might possibly not consider a "single adjudication" as [*645 conclusive. In such a case, we have seen, Chief Justice MARSHALL's course was, to wait, if possible, for further proceedings in the state courts; but where, as in the cases in 4 and 2 Peters, there was a single decision on the construction of a state law, by the highest court of a state (conflicting with no previous adjudication of the same tribunal), and a decision just made, and in one case not yet reported, and contrary to a previous decision of the same question by the chief justice himself, he at once adopted these single decisions of a state court, and one of them made by a divided court, as settling the law of the state, and as conclusive and obligatory, and "emphatically" so, as regards a construction by the highest court of a state of its state constitution.

And here, I would urge respectfully, although it is unnecessary to go so far in this case, is not the last decision of the supreme court of a state, expounding a state law, absolutely obligatory, even although it may conflict with a previous decision of the same tribunal? The court, in the above case, say: "Are not the injurious effects on the interest of the citizens of a state, as great in refusing to adopt the change of construction, as in refusing to adopt the first construction. A refusal in the one case, as well as in the other, has the effect to establish in the state two rules of property. Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court?" Chief Justice MARSHALL, in 10 Wheat. 159, says: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is

received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States." Why, then, should this court presume, that the highest judicial tribunal of our state "had misunderstood" their own constitution, and therefore, that this court "should correct that misunderstanding." Is this court more familiar than the highest court of our state, with the policy of the state, as regards the introduction of slaves as merchandize; are they as likely to know the true intention of the framers of the constitution of our state, as regards the clause in controversy, as the distinguished judge who delivered the opinion of the court in our favor in this case, and who may be said to have framed and moulded into its present form that very clause, as a member of the convention which framed the constitution, and as chairman of the very committee to whom the clause was confided? Chief Justice MARSHALL did not feel himself "at liberty to depart" from the construction of the state courts, and surely, that truly great man has never been accused of endeavoring to press too far the powers of the state authorities. Here, too, is a complete answer to the position that the federal court has jurisdiction of the case between citizens of different states, and therefore, may disregard the state decisions; and have not the tribunals of all the states of the Union jurisdiction in the same manner, where a contract made in one state, is sued on in another state, or even in another country, if the defendant or his property can be found there; yet in all these cases, it is conceded, that the construction of the state law or constitution, by the state court, is conclusive in all other state courts or courts of other nations.

*646] This, says Chief Justice MARSHALL, is an universal principle; and it *is known to extend to all cases, whether involving controversies as to real, or only as to personal property; and Judge MARSHALL considers it as more "emphatically" the rule, in all csaes of the construction of a state constitution. But if there be any one case, more than all others, in which the rule should be rigidly applied, it is in local questions as to slavery, a question in itself so peculiarly local, so entirely dependent upon state laws, and in regard to which to establish "two rules of property" in the same state, the one by this court, and the other by the state tribunals, would be attended with such fatal consequences. See 6 Wheat. 127; 5 Pet. 280. And now, for the first time, after the lapse of more than half a century, is a different rule asked to be applied to the highest judicial tribunal of Mississippi, and the state itself to be humiliated by a discrimination so odious and unjust?

But the decision upon which we rely is said to be extra-judicial. Is not this, as regards this case, a mere formal distinction? The chancellor, in the case cited by our opponents, and sent up to the supreme court, gave "briefly" his views on this question, for the express and important purpose as he declared, "to put it in train for ultimate decision." Such was his desire, such the wish of the profession, and the true interest of all parties, that an "ultimate decision" should be made by the highest court of the state, so as to settle the law upon the question. The court expressly declare, in their opinion, that this question was involved in that case, and presented by it "for their consideration." They did hear, consider and dertermine it; and now such a decision is called extra-judicial! It is called so, because the question arose in a case in chancery, and not at law, and one of the judges who delivered the opinion permitted the slave-trader to reap the fruits of his unlawful contract, because the defence was not made at law; but he decided, that it was a good defence at law. Chief Justice SHARKEY pronounced it a good defence, both in law and equity, as certified in this very case, under the seal of the court; and so far, then, as he was concerned, his opinion was, both in form and substance, a decision of the very question, and against the trader, both as a question of law and equity. Call it by what name you may, it is a solemn and deliberate exposition, unanimously made, upon the fullest consideration, by the highest court of the state, of this very clause of our constitution, for the express purpose of settling the law upon the question; and it has so settled it, in Mississippi.

Chief Justice MARSHALL, in the case in Brockenbrough, expressed his deep regret that he was compelled from necessity to construe a state statute in advance of a state

construction. In the case in 4 Peters, he revoked his own decision a few months after it was delivered, upon a single unreported case, decided in the meantime by the highest court of a state, expounding their own statute upon a moneyed and not a landed controversy. What said he, in the case in 10 Wheaton, of the impropriety of accusing the judicial tribunals of a state of misunderstanding and misconstruing their own state laws? What said he, in the case from 2 Peters? Hearing that the question in that case, of the construction of a clause of the constitution of Ohio was pending before the highest court of that state, he waited for a year to hear that decision; and then conformed to it, though delivered by a divided court. What would he do, in this case? conform to the exposition of their own constitution by the highest court of the state! Desiring, as he did, not a formal, but an actual and *bonâ fide* compliance with the exposition of their own constitution by its rightful expositors, the highest court of the state, would be, in the face of so solemn and deliberate a decision, rush headlong, now, at this term, without a moment's delay, into certain conflict with the highest courts of a state, upon a question regarding the construction of their own constitution? And if this great man, with all his learning, experience and unsurpassed intellectual power, would make no such experiments, and enter into no such conflicts, what other judge will venture?—*Quis pereat; ubi non dux erit Achilles.*

I approach now the final question raised by our opponents in their printed brief, as follows: "But assuming that the constitution of Mississippi does contain a clear and incontestible prohibition of the introduction of slaves as merchandize *within its limits; then there remains, in the last place, to be considered, fourthly, a [*647 grave and important question, which this court will have to decide; and that is, whether it is competent to any state in the Union, by its separate authority, either in its constitution or its laws, to regulate commerce among the several states, by enacting and enforcing such a prohibition? The constitution of the United States vests in congress the power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' That power must be regarded as exclusively possessed by congress. The municipal laws of a state may, perhaps, decide what shall be the subjects of property; but when they have so decided, when they have stamped the character of property on any particular movables, they cannot interdict the removal of similar movables, as merchandize, from any other state, whose laws also recognise them as property. Such an interdiction would be a regulation of commerce among the states; and if a state can make it, it may prohibit the introduction of any produce from another state. South Carolina may prohibit the introduction of live-stock from Kentucky, and Kentucky may prohibit the introduction, within her limits, of the cotton or rice of South Carolina. It is not intended to argue, that a state, which does not tolerate slavery, is bound to admit the introduction of slaves, to be held as property, within its limits, and the reason for excluding them is, that, by the laws of the free states, slaves cannot be held in bondage. The case before the court is, that of the transportation of slaves from one slave state to another slave state."

I concur with our opponents, that this is, indeed, "a grave and important question;" the most so, in my judgment, which has ever been brought up for the determination of this court. The power to regulate commerce among the states is "supreme and exclusive," it is vested in congress alone; and if, under it, congress may forbid or authorize the transportation of slaves from state to state, in defiance of state authority, then, indeed, we shall have reached a crisis in the abolition controversy, most alarming and momentous. In their petitions to congress, by the abolitionists, they assert the power here claimed, and call upon that body to exercise it, by legislative enactments, in regard to the sale and transportation of slaves from state to state. These petitions have been repeatedly rejected or laid on the table, as seeking an object beyond the constitutional power of congress, by overwhelming majorities of both houses; but if this court, as the interpreter of the constitution of the Union, in the last resort, now inform congress that this power is vested in congress alone, no one can predict the consequences. Let it be observed also, that whilst all these laws of all the slave-holding slates on this subject are asked to be pronounced unconstitutional, the laws on the same subject, of the

"free states," as they are designated by our opponents, are sought to be placed above the power of congress on this question. A distinction is thus directly made, by our opponents, between the "free states" and the "slave states," as contradistinguished in their brief on this question; and the "free states" are asked to be regarded as sovereign, and the "slave states" as subject states, upon all the points involved in this controversy. Thus, it follows, that the contract sought to be enforced in this case, could not be enforced, if made in Massachusetts, because prohibited by her constitution; but that the same identical contract can be enforced, if made in the state of Mississippi, although expressly prohibited by the constitution of that state. Massachusetts, then, possesses sovereign and absolute power over this subject, and Mississippi no power whatever.

The constitution is, then, not to have the same uniform effect throughout all the states, as regards the supreme and exclusive power of congress to regulate commerce among the states; but this power is to range undisturbed throughout all the "slave states," striking down all their laws and constitutions on this subject, whilst the same power is arrested at the limits of each one of the "free states" of this Union. Such is the degrading attitude in which every slave-holding state is placed by this position. But let me ask, is not the admission of our opponents, that this power of congress cannot enter the limits of the "free states," conclusive? The history of the constitution of the Union shows, that the want of uniformity, as regards regulations of commerce, was the great motive leading to the formation of *that instrument. It *648] was the sole cause assigned in the resolutions of Virginia (of Mr. Madison), of 1785 and 1786, as a consequence of which was assembled the convention which framed the constitution of the Union. 9 Wheat. 225. To Mr. Madison and to Virginia belong the undisputed honor of assembling that convention; and the sole object avowed in the Virginia resolutions was, by the adoption of the constitution, to procure for all the states "uniformity in their commercial regulations." Virginia had endeavored, prior to the adoption of the constitution, to regulate commerce between her ports and those of other states and nations, but she found that these regulations only drove this commerce to the rival ports of Maryland. She negotiated with Maryland to adopt similar regulations; but Maryland ascertained, that she could not adopt them without driving her commerce to Pennsylvania, nor Pennsylvania without New York, nor New York without New England. Absolute and perfect uniformity was required to give due effect to regulations of commerce among all the states; and hence the call of the convention which formed the constitution of the Union, at the instance of Virginia, to establish this uniformity. If, then, this power to regulate commerce among all the states, upon the principle of perfect uniformity, cannot, as regards the transportation and sale of slaves, have the same uniform effect in all the states, but can be exerted in and between some states only, and not in others, it is a conclusive argument, that as regards this local and peculiar question of slaves, and their sale and transportation from state to state, it was never designed to be embraced under the authority of congress to regulate commerce among the states. The power to regulate commerce among the states, is a power to regulate commerce among all the states; and by regulations of perfect uniformity, applying to all, and exempting none. But Massachusetts, it is conceded, may, as regards the transportation into, and sale of slaves in, that state, exempt herself from the operation of the power of congress to regulate commerce, and from all laws of congress on that subject. Yet this power is not only to operate with perfect uniformity, but is declared by our opponents to be "supreme and exclusive." And may this power be thus struck down, as regards a single state, by the operation of state laws and state authority? Does any one state possess the authority to exempt herself from a power vested in congress alone, and prohibited to the states? Is this the tenure, at the will of a state, by which congress holds its powers, and especially, those which are "supreme and exclusive?"

It is said, Massschusetts may exempt herself from the operation of this power, by declaring slaves not to be property within her limits. But is there any way in which a state may exempt itself from the operation of a power vested in congress alone; or

does this exempting power depend on the mode in which it is exercised by a state? But Massachusetts, it is said, may exempt herself from the operation of this power of congress, by declaring slaves not to be property within her limits; and if so, may not Mississippi exempt herself in a similar manner, by declaring, as she has done, that the slaves of other states shall not be merchandize within her limits? Cannot the state say, you may take back these slaves from our limits, but they shall not be an article of merchandize here; or may she not say, your slaves in other states shall not be introduced for sale here, or if so, our laws will emancipate them; or as Maryland now does, send them to Africa, if they will go, and if not, continue them as slaves in the state, but annul the sale by the importer? And must the state have previously emancipated all negroes who had been slaves within her limits, in order that she may be permitted to emancipate or forbid the sale of other negroes, introduced as slaves from other states? A certain number of negroes are now slaves in Mississippi, and articles of merchandize, by virtue of state laws and state power, within her limits. Now, it is conceded, that the state may declare all these not to be slaves, or not to be merchandize, within her limits Yet it is contended, she may not make the same declaration as to the negroes of other states when introduced into the state.

A state may, it is conceded, establish or abolish slavery within her limits; she may do it immediately, or gradually and prospectively; she may confine slavery to the slaves then born and living in the state, or to them and their descendants, or to those slaves in the state, and those introduced by immigrants, and not for sale, *or to those to be introduced within a certain date. All these are exercises of the unquestionable power of a state, and over which congress has no control or supervision. Or, may congress supervise the state laws in this respect, and say to Massachusetts, and the other six states, who with her have abolished slavery, slaves from other states shall not, against your laws, be sold within your limits; but in all the remaining nineteen statess where slavery does still exist, your laws against the sale of slaves from other states, shall be nugatory. Or may congress, again, as between these nineteen states, say to New Jersey, Pennsylvania, &c.; you have confined slavery to the slaves already within your limits, and make all born after a certain date free; slaves from other states shall not, therefore, be sold in your states, but in all the other states, where the existing slaves, as well as their offspring, are held in bondage, all other slaves may be sold within your limits, from other states; if this be not so, slaves from other states may be sold in Pennsylvania, Connecticut, Rhode Island and New Jersey. Negro men who are held as slaves elsewhere, cannot be imported and sold as slaves in these states; because although negro men now there, are held and may be sold as slaves, yet the descendants of the female slaves, if there be any born hereafter, are to be free. And can it be seriously contended, that this is so, and that upon an examination of the various conflicting provisions of state laws in this respect, as to slavery within their limits, shall depend the question whether congress, against the consent of the states shall force upon some states, and not upon others, the sale of slaves, within their limits, under a general comprehensive, uniform, supreme and exclusive power to regulate commerce among all the states? The power to declare whether men shall be held in slavery in a state, and whether those only of a certain color, who are already there, shall be held in slavery, or be articles of merchandize, and none others, or whether others introduced from other states shall also be held in slavery, or be articles of merchandize, within her limits, is exclusively a state power, over which it never was designed by the constitution, that congress should have the slightest control, to increase or decrease the number who should be held as slaves, within their limits, or to retard or postpone, or influence in any way, directly or indirectly, the question of abolition. Such a power, in all its effects and consequences, is a power, not to regulate commerce among the states, but to regulate slavery, both in and among the states. It is abolition in its most dangerous form, under the mask of a power to regulate commerce. It is clearly a power in congress, to add to the number of slaves in a state against her will, to increase, and to increase indefinitely, slavery and the number of slaves in a state, against her authority. And if congress possess the power to increase slavery in a

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state, why not also the power to decrease it, and to regulate it at pleasure? Now, it is a power as conceded, to increase slavery against the will of a state, within its limits; whence it would follow, that if a state desires more slaves, congress, under the same power may forbid the transportation of slaves from any state to any other state, and thus decrease slavery as regards any state, against her will and pleasure. The truth is, if congress possess this power to "regulate" the transportation and sale of slaves, from state to state, as it may all other articles of commerce, and slaves are to be placed on the same basis, under this supreme and exclusive power to regulate commerce, authority over the whole subject of slavery between and in the states, would be delegated to congress. And yet how strangely inconsistent are the arguments of the abolitionists; they say men are not property, and cannot be property, by virtue of any laws of congress or of the states; and yet, that as such, commerce in them among the states may be regulated by congress, and by congress alone. We say, the character of merchandize or property, is attached to negroes, not by any grant of power in the constitution of the United States, but by virtue of the positive law of the states in which they are found; and with these states alone rests the power to legislate over the whole subject, and to give to them, or take from them, either the whole or from any part or number of them, those already there, or those that may be introduced thereafter, in whole or in part, the character of merchandize or property, at their pleasure, and over all which state regulations congress has not the slightest power whatever.

That this is so, follows, from the admission, that a state can abolish slavery, and *650] *make all the slaves within her limits cease to be property. Massachusetts, it is said, may do this; and may, when done, prevent the sale of slaves within her limits. But may she, therefore, declare that horses, or cattle or cotton, or any other usual article of commerce, shall not be property, within her limits, and thereby prevent the sale by the importer of similar articles, introduced from abroad, or from any state in the Union, within her limits? Not unless she can abolish property and commerce, so far as she is concerned with all foreign nations, and with all her sister states, or regulate it at her pleasure, or prescribe the articles in regard to which it shall exist. As to these universal articles of commerce, known and recognised in all the states, and bought and sold in all the states, and the importation and exportation of which could be prohibited by no state; it was right and proper, that the power of congress to regulate commerce among the states should apply, operating as such regulations would, with perfect equality and uniformity upon all. But as regards slavery, which was a local matter, existing only in some states, and not in others, regarded as property in some states, and not in others, it would have been most unjust, that that very majority which did not recognise slaves as property in their own states, should, by acts of congress, regulate the transfer of them, and sale in and among other states, which did regard them to a certain extent as property.

That the very states which refused, within their limits, to recognise slaves as property, should claim the power, by their votes in congress, to regulate their transportation and sale in other states, is preposterous. They claim the power, first, to exempt themselves from the alleged power of congress, to authorize or forbid commerce in slaves, and then assume the authority to apply this very power to other states, which prohibit the traffic, because they have not emancipated all other slaves already within their limits. Nay, the claim is still more preposterous; it is, that this power may be thus applied, by these states in congress, in Mississippi, but negro male slaves shall not be imported or sold in Pennsylvania, or New Jersey, Connecticut and Rhode Island, because, although the negro male slaves already there are continued as slaves, and may be sold as such, yet the descendants, should there be any, of the female slaves, are emancipated. Slavery exists, as shall be shown, and slaves are property, and may be sold, in these and other states, that are called "free states;" and if the law of Mississippi, prohibiting the introduction and sale of slaves from other states is void, so is a similar law in all the states above enumerated, and slaves may now be lawfully imported and sold there. Mississippi has said, these slaves shall not be merchandize within her limits. Can congress say, they shall be merchandize? Can congress create, in any state, the relation of master and slave, not only in cases in which it does not

exist, but in cases forbidden by the laws of the states? Can it make more masters and more slaves, than the state desires to have within her limits? And if it can create the relation of master and slave in a state, in cases forbidden by the state laws, why not in the same cases forbid the creation of the relation, or dissolve it, when it already exists? If congress can increase and extend slavery in a state, against its wishes, why not limit it or abolish it; or can it create and not destroy, enlarge but not diminish? The commerce to be regulated, was that universal commerce in articles of merchandize, regarded as such in all the states, and throughout the nation, and which existed in every state, and which commerce was not to be created or abolished by state laws, but was subject, between all the states, to the supreme, exclusive and uniform regulation of congress. It was commerce in merchandize, and regarded as such by all the states, and not commerce in persons, that was thus designed to be regulated by congress. Commerce, if it may be so called, in persons, was not the thing intended to be regulated by congress, for it was local and peculiar, and not national; but commerce in the broad and comprehensive sense of that term, embracing all the states by uniform regulations, and designed not to depend on state laws, but to be as eternal as the existence of the Union, and co-extensive with the operation of the constitution, which embraced in all its power the whole Union, and all its parts.

This power as to commerce being "supreme and exclusive," it would recognise no conflicting or concurrent state legislation, and being a power to authorize and *enforce this commerce, in and among all the states, and from state to state, it [*651 could compel, as this court have decided, every state to permit the sale by the importer of all these articles of commerce within her limits. If slaves are articles of commerce, in view of this power, congress can force their sale by the importer in every state; for no state, if these be articles of commerce, in view of this power, can remove them from this list, by declaring them not to be property, within her limits. And if a state may so defeat this clause of the constitution, as to one class of articles embraced within the commercial power, by declaring them not to be property, within her limits, she may make the same declaration as to any or all other articles embraced by this power of the constitution; forbid their importation or sale, within her limits, and thus regulate, at her pleasure, or annihilate, the commerce between that state and all the other states. It follows, then, as a consequence, either that each state, at its pleasure, may, as to that state, annihilate the whole commercial power of congress, by declaring what shall or shall not be property, within her limits, or that slaves were designated by the constitution as "persons," and as such, never designed to be embraced in the power of congress to regulate commerce among the states. The commerce to be regulated was among the several states. Among what states? Was it among all, or only some of the states? Was it a national or sectional commercial code, which congress was to adopt? Was it to operate between Virginia and Mississippi, but not between Virginia and Massachusetts? Was it a regulation that would operate only between two states; but not as between one of these states, and another remote or adjacent state? Was it a regulation confined to particular states, and to be changed by those states, as, from time to time, they might change their policy upon any local question, and was it a local or a general commerce? Could it regulate, by compulsory enactments, an inter-state commerce in particular articles between certain states, because those states permitted an internal commerce in similar articles; but be authorized to extend no similar regulations to other states forbidding such internal commerce? If so, congress must look to state laws, to see what articles are vendible in a state, or what internal commerce is authorized by it, within its limits, before it can apply a general regulation of commerce to that state. Or does the authority of congress to regulate the external or internal state commerce, depend upon the manner in which a state exercises its own power of regulating its internal commerce? If so, and this be the rule as to slaves, as embraced in the commercial power, it must be the same as to all other articles embraced in the same power; and the power of congress in regulating commerce among the states will depend upon the permission of each state in regulating its internal commerce. But not only was this uniformity in regulations of commerce required by the nature and

national object of the grant; but the constitution, in the same article in which the power is given to congress to regulate commerce among the states, expressly declares, that "No preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another." Now, if Massachusetts and Mississippi both forbid by law the introduction of slaves as merchandize, and congress enact a law, or this court make a decree, by virtue of which, slaves are forced into the ports of Mississippi, for sale, but cannot be forced, for the same purpose of sale, into the ports of Massachusetts, a direct preference is given by a "regulation of commerce," to the ports of one state over those of another. It is a preference, if one state may be permitted to exclude from introduction for sale within her ports, what another state is compelled to receive for sale. It is a preference which is asked in this case, to follow as a "regulation of commerce," by virtue of this very provision in the constitution itself, and in the absence of all congressional enactments, as if the constitution created these very preferences as to commerce, which it was the very object of that instrument to prohibit.

As, then, it is conceded by our opponents, that the laws of Massachusetts do prohibit the introduction of slaves in her ports, and are constitutional, the same admission must follow, as to the laws of Mississippi, forbidding the introduction of slaves in her ports; *652] or a preference will be given by the constitution *itself, by "a regulation of commerce," to the "ports of one state over those of another."

But these state laws are not regulations of commerce, but of slavery. They relate to the social relations which exist in a state; the relation of master and slave; they define the "persons" to whom that relation shall be extended, and how and under what circumstances it shall be further introduced into the state. Each state has exclusive power over the social relations which shall exist, or be introduced within her limits, and upon what terms and conditions, and what persons or number of persons, shall be embraced within these regulations. The condition of master and slave is a relation; it is universally designated as the relation of master and slave; and whether this relation shall be confined to the slaves already within the limits of the state, or be extended to others to be introduced in future, is a matter exclusively within the power of each state. The relation of master and slave, of master and apprentice, of owner and redemptioner, of purchaser and convict sold, of guardian and ward, husband and wife, parent and child, are all relations depending exclusively on the municipal regulations of each state; and over which, to create or abolish, limit or extend, introduce or exclude, or regulate in any manner whatever, congress has no authority; and congress can no more say that a state shall have forced upon her more slaves than she desires, because there are slaves there, than that a state shall have more apprentices than she desires, because there are apprentices within her limits. I speak as a question of law, and not as instituting any moral comparison between slaves and apprentices; for from the ranks of the latter have risen some of the greatest and best men, and purest patriots. The master has the right, not created by the constitution of the United States, or to be regulated by it, but created and regulated by state laws, to the services of the slave for life, the time prescribed by the laws of the state. The master has the right to the services of the apprentice for the time prescribed by the laws of the state; and both, if the state permits, may assign to others their right to these services, under the directions of state laws. Can, therefore, the right to the services of an apprentice, assignable in one state, be assigned in another state, against her will, with the introduction of the apprentice there, because the services of other apprentices already there are assignable in that state?

Under the laws introduced into at least two of the free states of this Union, malefactors might have been sold for a term as long as life, and their services might be assignable for life, by the purchaser at public sale, to any third person whatever; these malefactors, in the language of the constitution of the Union in regard to slaves, were "persons bound to service" for life, and their services for life assignable by their masters; and yet could these malefactors, thus assignable, be introduced into, and be lawfully transferred in, any other state, against her laws, because other malefactors

already there were there assignable: yet, a malefactor bound to service for life, purchased by his master at public sale, and liable to be sold by his owner, is as much his property, in contemplation of law, as the slave can be of his master. He is, in fact, a slave, having forfeited his liberty, and subjected himself to perpetual services by his crimes; a manner in which the most rigid moralists admit, that servitude may be justifiably established. Yet such slaves cannot be transported and sold from state to state; though, by the very constitution of Ohio and other of the free states, "slavery" is expressly authorized therein, "for the punishment of crimes." It does not exist in Mississippi, as in the free states, only as a "punishment for crimes," but from a state necessity, equally strong and powerful—the necessity of self-government, and of self-protection, and as best for the security and welfare of both races.

Slavery, in Mississippi, is a relation of perpetual pupilage and minority, and of contented dependence on the one hand, and of guardian care and patriarchal power on the other, a power essential for the welfare of both parties. With us, the slaves greatly preponderate in numbers, and it is simply a question, whether they shall govern us, or we shall govern them; whether there shall be an African or an Anglo-American government in the state; or whether there shall be a government of intelligent white freemen, or of ignorant negro slaves, to emancipate whom *would not be to endow them with the moral or intellectual power to govern themselves or others, but [*653 to sink into the same debasement and misery which marks their truly unhappy condition in the crowded and pestilent alleys of the great cities of the north, where they are called free, but they are, in fact, a degraded caste, subjected to the worst of servitude, the bondage of vice, of ignorance, of want and misery. And if such be their condition, where they are few in number and surrounded by their sympathising friends, how would it be, where there are hundreds of thousands of them, and how in states where they greatly preponderate in number? Their emancipation, where such is the condition of the country, would be to them the darkest abyss of debasement, misery, vice and anarchy. And yet to produce this very result, is the grand object of that party in the north that demands of congress to regulate the slave-trade among the states, not really with the view to prohibit that traffic, for it is prohibited by the slave-holding states, but with an ultimate view to emancipation, as an incidental consequence from the action of congress over this subject. And here let me observe, that an adherence by the south to the policy in which they are now united, in abolishing, as states, the inter-state slave-trade, and the support of that power and of that policy on the part of the states, by the decree of this court, and the denial of the power of congress, will do much to secure the continuance of that policy, and to silence the most powerful of the batteries of abolition.

Another great mistake, maintained in the north, by this party, is the ground now assumed in claiming this regulating commercial power of congress, that by the law of the slave-holding states, slaves are merely chattels and not persons, and therefore, are subjected to the power of congress to regulate commerce among the states. If it be intended to convey the idea, that slaves are designed to be deprived, by the laws of the south, of the qualities and character of persons, and of the rights of human beings, and to degrade them in all things to the level of chattels, of inanimate matter, or of the brutes that perish, it is a radical error, and one that has been too long circulated, uncontradicted, by the abolitionists. In some of the states, they are designated as real, as immovable property. Is it, therefore, designed to deprive them of the power of locomotion, or to convert them into a part of the land or soil of a state? Far otherwise! Nor does their designation as personal property convert them into mere chattels, and deprive them of the character of human beings. In the south, this is well understood, and no such meaning is attached to these terms; but in the north, they are seized on and perverted, as if slaves were regarded and treated by us as inanimate matter. No! they are, in everything essential to their real welfare, regarded as persons; as such they are responsible and punishable for crimes; as such, to kill them in cold blood, is murder; to treat them with cruelty or refuse them comfortable clothing and food, is a highly penal offence; as such, they are nursed in sickness and

infancy, and even in old age, with care and tenderness, when the season of labor is past. To call them chattels or real estate, no more makes them in reality land, or merely inanimate matter, than to call the blacks of the north freemen, makes them so in fact. When the constitution of Mississippi, and laws made in pursuance thereof, require that slaves shall be treated with humanity, command that they shall be well clothed and fed, and that unreasonable labor shall not be exacted, are these provisions applicable to a mere chattel, which the owner may mutilate or destroy at pleasure? No! The master has no right to the flesh and blood, the bones and sinews of any man, under the laws of the south; this is an abolition slander, and the right is to the services of the slave, so declared expressly in the laws of the south, and so recognised in the constitution of the United States, where slaves are described as "persons bound to service or labor," and so unanimously decided by the highest court of our state. Jones's Case, Walker 83. The right of the master is to the services of the slave—a right accruing only by virtue of the law of the state, and upon the terms therein prescribed. The rights of the master and slave are reciprocal, under the laws of the south; the right of the master is to the services of the slave for life, and the right of the slave, as secured by law, to humane and proper treatment, to comfortable lodging, food and clothing, and to proper care in *infancy, sickness and old age. These *654] are the wages paid, and that must be paid by the master; and if the doctrine of the abolitionists be correct, that slave labor is dearer than free labor, then higher wages are thus paid in the south than in the north for the same amount of labor; and that it is much higher wages than is paid to the toiling and starving millions of Europe, no candid man will deny. Let me be accused of making no comparison between slaves and my countrymen, the free white laborers of all the states. No! they are fitted morally and intellectually for self-government, and the slaves are not so fitted; and therefore, even for their own benefit, must be controlled by others.

In truth, then, slavery is a condition of things; it is a relation, the relation of master and slave, the *status servi* of the Roman and Grecian law, so designated and recognised as a relation, in the days of the Jewish theocracy, as well as under the Christian dispensation. By all these laws, it was designated as a relation, and as such we have seen it is expressly recognised in the constitution of the United States, where slaves are called "persons held to service or labor." How far they shall be so bound is exclusively a question of state authority, and over which the congress of the Union possesses not the slightest authority. The states, and the states only, can say, what persons shall be so bound to service, and when they shall be released, and to what persons this relation shall be extended, and whether it shall be confined to those slaves already within the limits of a state, or be enlarged so as to include all others who may be introduced within their limits; and it is the abolitionists who must wholly deprive the slaves of the character of persons, and reduce them in all respects to the level of merchandize, before they can apply to them the power of congress to regulate commerce among the states.

If a state or states chose to degrade, not malefactors only, but a large portion of the present white or colored race, to the name and condition of slaves, could they, therefore, force them as slaves upon other states of the Union, under the power of congress to regulate commerce? Has congress any right to say slavery shall or shall not exist within the limits of the state of Mississippi; that slaves from other states shall or shall not be introduced within her limits? Has Virginia, or Pennsylvania, or any other state, a right to say slavery shall be abolished or established within the limits of Mississippi, and slaves shall or shall not be imported by her citizens for sale, within her limits? Each state must legislate for itself alone on this subject, nor has congress, or any other state, a right to interfere in any manner whatever. And if Virginia can call upon congress, or upon this court, to compel Mississippi to receive or reject any or all of her slaves for sale, the states of Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, Indiana and Illinois, can compel the states to receive all their slaves, still amounting under the last census to many thousands, notwithstanding they may all have been indoctrinated for years in the principles of abolition, surrounded

with its teachers and disciples, and driven by force into our state, would come there, prepared by theory, and stimulated by revenge, to diffuse their emancipating creed among our slave population; to render them for ever dangerous, worthless, sullen and discontented, and to excite successive insurrections, from time to time, within our limits. And yet, by the argument of our opponents, the state possesses no power to guard her citizens against these evils, for if we cannot exclude, at our pleasure, the slaves of all the states, we can exclude the slaves of no one of the states, and are deprived of the power of self-preservation. And let me ask, are not the slaves whom the doctrines and principles of abolition have now reached, upon those counties of Maryland, Virginia and Kentucky, bordering for more than a thousand miles upon the adjacent states of Pennsylvania, Ohio, Indiana and Illinois, unfit for a residence as slaves in Mississippi; and would it not be most dangerous to permit slave-traders to drive them also in any number within our limits? Would they not contaminate our slave population, and diffuse among them the same doctrines and principles, which, from these bordering counties, have already peopled Canada with a colony of thousands of runaway slaves? In every point of view, the power to prohibit this traffic, is vital to the security and welfare of the people of Mississippi, and cannot be abandoned, without surrendering the right of self-preservation. And yet, to deprive the state of this authority has been called by our opponents a great conservative *power of the constitution. Conservative of what? Of the power of the traders [*655 in slaves to drive thousands and hundreds of thousands of dangerous and discontented slaves, from any or all of these states, as merchandize, within our limits. And what must follow? Who will dare predict the result, or write the prophetic history of that drama which would soon be enacted within our borders?

The only clauses under which congress can legislate as to slaves, are the 2d clause of § 9, art. 1, of the constitution, § 2, art. 4, and the taxing power; in each of which they are spoken of, not as merchandize, but as persons. It is as persons they are enumerated under the census, and as such taxation and representation apportioned according to three-fifths of their numbers, not their value. In that section, they are described as "three-fifths of all other persons;" in the 9th section, they are designated only as "persons;" and in the 2d section of the 4th article, they are described as "persons held to service or labor in one state, under the laws thereof." Yes, "under the laws thereof!" and not by virtue of any authority of congress to force them within the limits of a state. If slaves are merchandize merely, under the power of the constitution of the Union, why is it that merchandize taken, or horses or cattle escaping from any one state into any other state, cannot be surrendered under the laws of congress, upon the "claim" of the owner? Are articles of merchandize persons, or persons articles of merchandize, in view of any of the powers granted to congress in these provisions? It is as "persons" they are surrendered in one state, when fugitives from another; and it is as "persons" they are enumerated for apportioning taxation and representation. If the constitution had slaves in view, when power was granted to regulate commerce among the states, how is it, that in none of the debates on that clause, either in the convention which framed the constitution of the Union, or in the state conventions which ratified it, is there the slightest allusion to the existence of any such power? The journal of the convention shows that this clause, to regulate commerce with foreign nations and among the states, was proposed by Charles Pinckney, of South Carolina, and that it was adopted as proposed by him, with the addition of the words, as to the Indian tribes. Did South Carolina, and did Mr. Pinckney, intend to give thereby this supreme and exclusive power under this article to congress as to slaves? No! The votes of Mr. Pinckney and of South Carolina in that convention, show conclusively that, that state and Mr. Pinckney were opposed to granting to congress any power, even over the African slave-trade, even under specified and limited provisions on that subject, in a different article. Fortunately, Mr. Pinckney has lived to declare his meaning, and that of the convention, in a speech made by him in congress, on the Missouri question, in 1820, and reported in 18 Niles' Register, p. 352; when, as a surviving witness of the views and deliberations of the

convention in which he had acted so prominent a part, he bears testimony, specifically, to this very point, that under no clause of the constitution, was any such power granted to congress. He says: "I have, sir, smiled at the idea of some gentlemen, in supposing that congress possessed the power to insert the amendment, from that which is given in the constitution to regulate commerce between several states; and some have asserted that, under it, they not only have the power to inhibit slavery in Missouri, but even to prevent the migration of slaves from one state to another—from Maryland to Virginia. The true and peculiarly ludicrous manner in which a gentleman from that state lately treated this part of the subject, will, no doubt, induce an abandonment of this pretended right; nor shall I stop to answer it, until gentlemen can convince me that migration does not mean change of residence from one country or climate to another; and that the United States are not one country, one nation, or one people: if the word does mean, as I contend, and we are one people, I will then ask, how it is possible to migrate from one part of a country to another part of the same country? Surely, sir, when such straws as these are caught at to support a right, the hopes of doing so must be slender indeed."

We have, then, here, at least, one positive and uncontradicted witness in our favor, and that the very man who proposed this clause in regard to this power of congress to regulate commerce. Did South Carolina intend, in proposing this power, to give *to congress immediate authority to prevent the transportation of slaves from all other states to that state, when she was then even opposed to the specific and prospective power to be exercised, at the end of twenty years, as to slaves from Africa? South Carolina has always viewed such a power as is now claimed for congress in regard to slaves, with absolute abhorrence; yet, by a new interpretation, this power is given, by implication, from that very clause in the constitution of the Union, which was proposed in the convention by South Carolina, and adopted on her motion. The source from which the power emanated, independent of the uncontradicted testimony of Mr. Pinckney, who proposed this clause, ought to be conclusive with every unprejudiced mind, that no such authority was designed to be thereby vested in congress. No one can believe, that South Carolina, or the other slave-holding states, would ever have consented to the constitution, if by that instrument this supreme and exclusive power had been therein granted to congress; and it would be a fraud on those states, a fraud upon the constitution, a fraud in morals as well as law, now to interpolate, by a new construction, at the end of half a century, a power which we all know would never have been granted, by at least six out of the twelve states which formed the constitution.

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In 9 Wheat. 194, Chief Justice MARSHALL declares: "That commerce, as the word is used in the constitution, is a unit;" but it is a cipher, if dependent on state regulations as to internal commerce, or state regulations as to what is property or merchandize; or, if not a cipher, and different regulations as to the same articles, or operating differently in the several states can be made by congress, it is not a unit, but separated into as many fractions as there are states or sections. Chief Justice MARSHALL tells us, that the commerce designed to be regulated by congress, extends to all "those internal concerns which affect the states generally" (9 Wheat. 195); but as viewed by our opponents, it is not confined to that commerce which affects the states, generally, but extends to that which affects only particular states or sections, and not the states generally, and might extend only to two states out of twenty-six, if there were but two slave-holding states in the Union. But again, at page 196, Chief Justice MARSHALL expressly declares the power to regulate commerce among the states, to apply to the one state in which the voyage by land or water begins, through any other state, and into still another state, in which the voyage terminates; and he instances the regulation of transportation between Baltimore and Providence "by land," which must pass into and through at least seven states, and that the power, he says, is to enforce this passage of these articles of commerce through all these states. What then follows? That a trader in slaves, purchased at Baltimore, to be sold in Wheeling, Virginia, may transport them in chains through Pennsylvania, the only practicable route by land,

to Wheeling, and no law of Pennsylvania can forbid it. Again, a trader in slaves, purchased in Wheeling, Virginia, for Missouri, may drive them through Ohio, Indiana and Illinois; or from Maryland for Missouri, by taking them through New York and the Lake route, across to that state; or he might take them by sea, from Baltimore for Missouri, to Boston, then to pass them through Massachusetts, by the railroad to Buffalo, for the western route. The slave-trader might, in this way, if slaves are embraced in the commercial power, encamp them in chains at Boston, Lexington, Concord, or Bunker Hill, and drive them on to their destined market, and no state law can prevent it; and this can be done now, without any act of congress, and the state could not prevent it. This the abolitionists would regard with horror and dismay; but to all this they subject their own states; nay, as will be shown, they establish not only the slave-trade, but slavery there, in their efforts to force their doctrines upon the southern states.

At page 196 (9 Wheat.), Chief Justice MARSHALL says, this power in congress as to commerce, is "supreme and exclusive;" and that the power to regulate "is to prescribe the rule by which commerce is to be governed." At page 197, he says, the power to regulate "commerce with foreign nations, and among the several states, is vested in congress, as absolutely as it would be in a single government." So far as regards, then, this commercial power, the court distinctly declare, that the government of the Union is to be viewed as a single government; that state boundaries *and state jurisdiction, and the states themselves disappear, so far as this power [*657
is concerned, and that so far, the nation is a "Unit." The authority, then, of Massachusetts disappears, as regards the exercise of this commercial power by this single government. She ceases to exist as a separate state, so far as this power is concerned, and stands, so far as regards the power, towards this single government, in the same relation in which a county stands towards a state. Such is the decision of the court, in the very case upon which our opponents rely. As, then, the power to regulate the sale and transportation of slaves from state to state is insisted by our opponents to be a commercial power, the states, by this decision, so far cease to exist as states; their separate state jurisdiction and boundaries so far disappear; the states become a "unit," and this power operates in and among all the states, as much as if the state governments had ceased to exist. What, then, becomes of the law of Massachusetts prohibiting the slave-trade there, or the introduction from other states for sale there, as merchandize, when brought in conflict with this commercial power? Why, not only would the sale be valid, and transportation throngh the state valid, by authority of an act of congress; but now, at this moment, on the principle contended for by our opponents, and heretofore adopted by this court, that, that commerce which congress leaves free and unforbidden, it authorizes as much as by an express law; the statutes of Massachusetts are unconstitutional, and slaves can now be transported from any state into Massachusetts, and sold there, or carried through there, for sale in some other state to which they are destined, these laws of the state being expressly declared by Chief Justice MARSHALL to be void, if the commercial power extends to this case; because the state "is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do." 9 Wheat. 199–200. And at page 209, the court say: "To regulate, implies, in its nature, full power over the thing to be regulated; it excludes, necessarily, the action of all others, that would perfrom the same operation, on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated."

The exercise of this power, then, as well as the failure to exercise it, by leaving free what is not regulated, "produces a uniform whole," which the state law cannot disturb; and yet this uniformity, thus required in all the states, by the mere absence of congressional legislation, is completely subverted, as regards these slaves, which are embraced, it is said, in the commercial power, and that commerce in them, which con-

gress alone could regulate, and which it does regulate, by leaving free as to all the states where it does not legislate, is, in point of fact, regulated at its pleasure by each state of the Union, and is dependent entirely on state laws. This power, we are told, is not now asked to be called forth, to oppress the slave-holding states of the Union; but the authority once established, it will recoil upon the free states with a force and power which was little dreamed of by the abolitionists; and will avail to establish slavery and the sale of slaves from other states in every state, and the traffic in slaves in and through all the states, by the mere inaction of congress. Nay, if the argument of our opponents be correct, it is established and exists at this moment. At page 224 (9 Wheat.), the court declare, that the constitution originated in the Virginia resolutions, which, they say, were intended to produce among the states "an uniform system in the commercial regulations;" and Mr. Madison's resolutions, which led to that measure, declare the object to be, as regards all the states, "to require uniformity in the commercial regulations," and prevent the states adopting "partial and separate regulations." These regulations then must be uniform; this was the very object in granting the power, and the total impossibility of such uniformity as to slaves, shows that the power was never intended to extend to them; and surely, Virginia never designed to include them in the commercial power.

By the constitution, the rights that were delegated to congress, were delegated *658] *by all the states; the rights that were prohibited to the states, were prohibited to all the states; and the rights that were not delegated or prohibited, were reserved to all the states; but by the position of our opponents, the right to regulate the transportation and sale of slaves from state to state, was granted to congress only by the slave-holding states; the prohibition to that regulation by a state, was a prohibition only to the slave-holding states, and the reserved power over the regulation, was a power reserved by the non-slave-holding and not by the slave-holding states: and yet they all entered the confederacy as equals, and sovereigns, in every respect; and all granted, surrendered and retained the same power. Upon these terms only of perfect equality, and of subjection, or exemption of all the states from the national power, was the constitution framed; and to maintain the distinction now assumed between the slave-holding and non-slave-holding states, by which the last are sovereign, and the first are subject states on this question, is to place the former in an attitude of degradation, to which no one of these states ever would have assented in forming the constitution. No! The constitution of the Union was one constitution, with one uniform operation and construction in all the states, and all its powers were to be enforced in all or none of the states; and not two constitutions, with two constructions, one for the North, and the other for the South, changing, with geographical limits, lines and sections. If it be a constitution to be enforced by the Northern against the Southern states, rendering nugatory their laws upon this question, unless they will abandon their local institutions, and conform their policy in this respect to the will of the North, whilst the same powers of the government are to have no operation within the limits of the Northern states; the constitution would be a memorial of fraud and treachery, and would soon be broken into as many fragments as there are states or sections of the Union.

The whole power as to regulations of commerce being granted by each and every state, and vested by them exclusively in congress; no state can legislate or exercise any authority over the subject; and there can be no discrimination between the relative powers, in this respect, of the several states or sections of the Union. At page 227 (9 Wheat.) the court say, that this provision as to commerce "carries the whole power, and leaves nothing for the state to act on;" that it is "the same power which previously existed within the states," which included the power of prohibition; that it is an authority as to commerce, "to limit or restrain it at pleasure." They expressly declared, that it extended to an "embargo," which they had previously defined to be a "prohibition," and as a "branch of the commercial power." If, then, this power extends to this case, this very decision so much relied on by our opponents, proves that if congress may regulate, it may "limit or restrain at pleasure," "embargo," or

"prohibit" this traffic; this being the same power pre-existing in the states, and wholly taken from them, and vested exclusively in the nation, as a "single government." How, then, can any state exempt herself from the operation of this power, by declaring such "subjects of commerce" as were within this clause of the constitution, and traffic in which was left free by the only power which can regulate it, shall not be subjects of commerce, within her limits, and shall not be imported or sold therein?

At page 228 (9 Wheat.), the court say, speaking of acts of congress on this subject: "Were every law on the subject of commerce repealed to-morrow, all commerce would be lawful;" and there being no act of congress declaring this traffic unlawful, from the argument of our opponents, it follows, that this commerce in slaves between the states is now lawful in all the states of the Union. It follows also, that there being no power, either in the government of the states of the Union, to prohibit this slave-trade between the states, it is consecrated and perpetuated by the constitution.

The whole difficulty is solved by Mr. Madison, who tells us, in the 54th number of the Federalist, page 236, that the case of slaves under the constitution, was "a peculiar one; and that the constitution "regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants."

*Did then the constitution of the United States design to give to congress power to regulate commerce in "inhabitants," in and between the states? To [*659 regulate, this court said, means "to prescribe the rules by which commerce is to be governed," and that "to regulate, implies full power over the thing to be regulated." Then, the framers of the constitution, although a majority were said to have been so much opposed to slavery, that they would not, and did not, put the word slave in that instrument, yet, by the position on which our opponents rely, congress was to subscribe the rules and the only rules by which commerce in slaves between the states should be regulated; that they were to authorize and direct this traffic, and that they were to keep open the markets in all the slave-holding states against their consent for this traffic; or, in other words, that congress was to perpetuate the slave-trade between the states, and render it eternal in all the slave-holding states of the Union. That congress were ever intended to take the charge, much less the exclusive charge of the slave-trade between the states, and regulate it at their pleasure, was a power never intended to be granted in the constitution. But if it be a power to perpetuate, it must be a power to destroy, and if not to destroy, at least, to prescribe all the rules upon which the trade is to be conducted. Who is to judge of these rules? Congress, and congress only, by the argument of our opponents, have the full, supreme and exclusive power. They may, then, say, how and by whom slaves shall be taken from state to state, and in what numbers, and of what age and sex, and how and to whom they shall be sold by the importer, and on what conditions, and in fact regulate everything that relates to the transportation and sale. The power, if it exists at all, is plenary; and in the language of this court, in 12 Wheaton, "the power does not depend on the degree to which it may be exercised; if it may be exercised at all, it must be at the will of those who held it." Who, then, shall set bounds to this unlimited power; who shall restrain it—the states? Why, we have seen that they have surrendered all power over the subject, and that it is vested as completely in congress as if this were a single government."

We are, then, a single government, by the argument of our opponents, as regards the slave-trade between the states, and every vestige of state authority is abolished. On the 9th of January 1838, our able and distinguished opponent(Mr. Clay) read in his place in the senate, and sustained by a speech, the following, among other resolutions; "Resolved, that no power is delegated by the constitution to congress, to prohibit, in or between the states tolerating slavery, the sale and removal of such persons as are held in slavery by the laws of those states." Nat. Intelligencer 18; January 7th, 1838. Here, it is conceded, that this government cannot prohibit this traffic. But why not, upon the case so much relied on by our opponents? It is true, congress can impose no tax on exports from any state, but this, the court say, is an exception from the taxing power, and that the power to tax imports is entirely distinct from that to regulate com-

merce. Although, then, congress, may not tax exports from the states, by the authority of this case, they may prohibit, without a tax. What is an embargo, but a prohibition, not a tax; and in this case, the court say, that an embargo is an "universally acknowledged power" of congress; and they expressly declare, that it is a commercial power. As, then, the prohibition to tax exports from any state, is a limitation only on the taxing power, and affects and limits, as the court expressly declares, in no way, the power to regulate commerce among the states, congress may, if the position of our opponents be sound, and this is a case within the commercial power, lay an embargo on this slave-trade between the states, or, in other words, prohibit it altogether. Grant but the first position of our opponents, and the case on which they rely, and that the commercial power extends to the sale and transfer of slaves from state to state, and all the consequences above stated must follow. But if neither the governments of the states, nor of the Union, possess the power to prohibit this trade, the power must be annihilated, and this without any grant of the power to congress, or prohibition to the states, and although it is admitted to have existed in every state, before the adoption of the constitution. But the concession that congress cannot prohibit this trade, admits the whole case, by conceding that it is not within the meaning of the clause, which authorizes congress to regulate commerce. Why, *then, may not the states exercise
*660] this power? They are nowhere prohibited to exercise it, in any clause of the constitution, unless it be as an inference from the authority of congress to regulate commerce. Now, if that inference follows, it would be because, in the language of this court (9 Wheat. 199), "the state is exercising the very power that is granted to congress;" but if this prohibition of the importation of slaves be neither the "very power" that is granted to congress, nor included in that power, how is the state prohibited from exercising it? It is not prohibited to the state, unless included in the commercial power of congress; it is not delegated to congress, unless in that clause; hence, then, being a power neither delegated to congress, nor prohibited to the states, it is, by the constitution, expressly reserved to the state in which it pre-existed before the constitution was framed.

But again, this power to regulate commerce is an active power, a power "to prescribe the rules" by which that commerce may be conducted, and to enforce those rules; but here it is said, no rule can be prescribed by congress on this subject, or enforced, no law can be passed by congress, to regulate this trade, but nevertheless, that the states cannot regulate nor prohibit this trade, because congress has the exclusive power. This is a strange contradiction, congress cannot legislate as to this case, although it may as to all other commerce among the states; but notwithstanding, the state law is void, because the power is vested in congress. The power is vested in congress, but nevertheless, it has no power to pass any law on the subject. But who is it that has the power? The constitution says, congress shall have the power to regulate; and yet it is contended, congress have no power to regulate this trade, but nevertheless, the state law is void, in the absence of all power in congress to legislate on the subject. It is rendered, then, a judicial power, to be put in force by this court, and not by legislation; and yet have the judiciary any power to regulate commerce among the states? It is a sullen, dog-in-the-manger, power, that can neither act itself, nor permit action by any other authority. In the 32d number of the Federalist, Mr. Hamilton, who was the boldest opponent of state power, tells us, there are but three cases under the constitution, in which a state cannot exercise a power, "where the constitution, in express terms, granted an exclusive authority to the Union. Where it granted, in one instance, an authority to the Union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant." It is conceded, that there is no express grant of exclusive power to congress, or express prohibition to the states; but it is contended, that the prohibition of the state power follows, in this case, because its exercise would be the exercise of the same power granted exclusively to congress; and therefore, the possession of such a power by the state, would be "absolutely and totally contradictory and repugnant" to the posses-

sion of the same power by congress. This is the argument in favor of this implied prohibition on state authority; but how is the power of a state to prohibit this traffic, "absolutely and totally contradictory and repugnant" to the possession of the same power by congress, when congress can make no such prohibition? Congress cannot prohibit; then, there is no repugnance in a state prohibition. It is conceded, the power existed in each state, prior to the adoption of the constitution; that instrument, it is admitted, grants no such prohibitory authority to congress; it prohibits the power nowhere to the states; how, then, have the states lost or alienated the power? The power to prohibit, or limit, or restrain the admission of slaves into any state, is conceded not to be vested in congress, then it must be vested in the states, or the power is annihilated; not by a grant of the power to congress, not by a prohibition to the states, but by some new rule of interpretation, under which, by a conjectural implication, the power has disappeared, without a grant, or without a prohibition. But these are the only modes by which a pre-existing state power can be annihilated.

By the 10th article, Amendments of the constitution, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." This power, then, never having been either delegated to the United States, nor prohibited to the states, is one of the reserved powers of the states, unless this amendment can be rendered a dead *letter, by a broader construction than any heretofore maintained, even by the boldest adversaries of [*661 state authority, and the most latitudinous interpreters of the constitution. Nor was there any necessity or propriety, that congress should have this power to regulate the sale and transportation of slaves from state to state. It was not one of the difficulties which Mr. Madison, or Virginia, had in view, when they proposed calling the convention to create this government, for the express and only purpose of adopting uniform regulations of commerce, operating alike in all the states. No one complained of the want of such a power, as to slaves, as a reason for adopting the constitution; and no such uniform regulations on that subject, as between the states, were ever anticipated or proposed. The convention was called at the instance of a slave-holding state, Virginia, under Mr. Madison's resolution, for the only express purpose of giving to congress power to adopt "uniform regulations" as to commerce; and the power in question was inserted in the constitution, on the motion of South Carolina. But did either of those states, or any other state, complain of the non-existence of such a power, as to slaves, or desire that it should be granted to the general government? The power which Virginia and South Carolina, and all the states, desired to be vested in congress, concerned only that universal commerce, extending to foreign nations, and among all the states, and effecting all that Virginia and South Carolinia, or any other state, desired to be regulated by the general government, and not the local and delicate subject of slavery; and neither in the debates or proceedings and resolutions of the various states, when delegates were chosen to form their constitution, nor in the resolutions, proceedings and debates of the congress of the old confederacy, on the same subject, nor in the general convention which framed, or the various state conventions which ratified it, nor in the contemporaneous commentaries of the great men who expounded it, at the period of its adoption, is there one word showing that the sale or transportation of slaves from state to state, was one of the grievances to be remedied by the convention, or that any power over that subject was to be delegated to congress. Nor is it less remarkable, that in the various publications of the day, and arguments in and out of the various conventions which ratified it, did any one of its able opponents imagine, that such a power was conferred by this clause on congress. Where was the argus-eyed vigilance of Patrick Henry, and George Mason, of Virginia, who so ably opposed the adoption of the constitution? Where the watchfulness of the other great statesmen of the south, so many of whom, as well as George Mason, Luther Martin and others, had been members of the convention which framed the constitution, and opposed its adoption, by so many arguments in the state conventions which ratified it, that they never discovered, that under this power, congress might regulate or prohibit the transportation and sale of slaves from state to state, and that all state power over that subject was annihilated?

It is true, some of them did fear that for want of a bill of rights, similar to that subsequently adopted by the ten amendments to the constitution, and especially the tenth, implied powers might be exercised, under the general welfare and other clauses, but all which apprehensions were for ever removed, afterwards, by the adoption of these amendments, the want of which was the cause of their opposition.

We are asked to admit the following propositions: 1st, that congress was vested with power, supreme and exclusive, to authorize and enforce the slave-trade among the states, against their prohibition; 2d, that congress was denied all power to prohibit the slave-trade among the states; 3d, that the states themselves were prohibited from arresting or regulating this trade. If this be so, it follows as a consequence, that the framers of the constitution intended to perpetuate, under their authority, the slave-trade among the states, and to annihilate all power, either in the states, or in the general government, to arrest this traffic. To prohibit the slave-trade among the states, by the authority of congress, would be most dangerous; but how infinitely more dangerous is the power now claimed for congress, by our opponents, to force all the slaves of eight or ten states into two or three states, as merchandize, against the consent of those states, and thus accumulate the disproportion in those states, between the whites and the slaves, and thus force upon those states revolt and insurrection on the one hand, or emancipation upon *the other, extorted by the superiority of numbers. Who believes that the framers of the constitution ever intended to force such an alternative upon any of the states of the Union; or that all, or any, of the states, would ever have consented to the vesting of such powers in the government of the Union?

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It may be contended, however, that this power to regulate the transportation of slaves from state to state, arises by implication, under the 9th section of the 1st article of the constitution. That section is in these words: "§ 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress, prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding $10 for each person." Now, if this section be only an exception to the power of congress to regulate commerce, and I have shown that that power does not apply to this case; then this section would have no operation whatever upon the present question. As, however, it is impossible for me to anticipate the views of the court in regard to this section, it is my duty to consider it, which shall be done, in the only two aspects in which it could apply: first, as a substantive power; and secondly, as an exception to the power of congress to regulate commerce. This section has never received a construction from this court, although there are some *obiter dicta*, in which it is regarded as an exception to the power to regulate commerce. Now, although it may not be material to the determination of this question, and probably, will not be so considered by the court; yet I do regard this clause of the 9th section as a substantive power, and not an exception to a power already granted. Exceptions to granted powers are usually inserted in a proviso to the grant of those powers. When a power is delegated, and the grantors desire to reserve from those powers something by way of exception, that otherwise would follow from the grant, it is done by a proviso, designating the exception, and declaring that it shall not be included in the granted power. If this is not done by a proviso, it is done by language to the same effect, following immediately the words of the granted power, and designating the exception to it; and we might as well look to a subsequent section of a constitution to find an enlargement of a granted power, as exceptions to it. When the power is granted, there is the appropriate place to enlarge or diminish the sphere of its operation, and not in a different section of the constitution. Now, this clause is wholly unconnected with the granted power to regulate commerce. It is in a different section of the constitution, entirely separated from the clause or section in relation to commerce, and disconnected from it, not only by position, but by no less than fourteen distinct and substantive grants of power, wholly unconnected with the authority to regulate commerce. Such is the separation in position of these two powers in the constitution; but when we look beyond that in-

strument, to the journal of the convention which formed the constitution, and the debates in that body, we will find the same separation in the order of time, when these two sections were adopted.

At page 746, vol. 2, of the Madison papers, we will find this commercial power first proposed in the following words: "To regulate commerce with all nations and among the several states." This clause was afterwards modified, by inserting "foreign nations," instead of "all nations," and by enlarging the power, by the addition of the words, "and with the Indian tribes." Here, then, was the place and the time when the convention was modifying and enlarging this power, to designate the exceptions to it. The date of this original proposition in regard to the commercial power, was the 29th of May 1787. I find, that on the 6th of August following (pp. 1226, 1232, 1233, 1234, of the same book), that this commercial power was again proposed by the committee of detail, in the following words, in the 1st section of the 7th article of the constitution. "To regulate commerce with foreign nations, and among the several states." The 3d section fixes the proportions, in which "taxation shall be regulated," and the 4th section, which follows, is in the following words: "§ 4. No tax or duty shall by laid on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited." Here, this clause first appears, in a *distinct section, in relation to the taxing power, and with a declaratory proviso to that power. On the 15th of August 1787 (page 1343), we find the convention adopting unanimously, the clause for regulating commerce, as before quoted. Now, if the power to prohibit the importation of slaves had been considered as included in the power to regulate commerce, we know, and no one denies, that at least two states, instead of voting for this clause as they did, would have opposed it, as they did all power to prohibit this importation; finally yielding to a compromise, by which the importation should not be prohibited until 1808. Is it not, then, inconceivable, that this prohibition, thus opposed by at least two states, should have been regarded as included in the clause to regulate commerce, thus unanimously adopted; when, if such a prohibition had been supposed to be included, these two states had declared that they could not become parties to the constitution? Mr. Pinckney, of South Carolina, had proposed this very clause to regulate commerce, and he, and his state, and all the states we have seen voted for it; but (at page 1389) we find Mr. Pinckney declaring, "South Carolina can never receive the plan, if it prohibits the slave-trade;" in which he was joined by Georgia. Yet, Georgia and South Carolina had both voted for this very commercial power, which is now asked to be regarded as including, by implication, a prohibition to which they could not assent. [*663

On the 21st of August, this section as to migration and importation, as before quoted, was taken up (page 1382), and it was discussed at length, in connection with the taxing power. At page 1388, "Mr. L. Martin proposed to vary art. 7, § 4, so as to allow a "prohibition or tax on the importation of slaves." Mr. Ellsworth, of Connecticut opposed it; he said, "Let every state import what it pleases." Mr. Pinckney and Mr. Rutledge, of South Carolina, opposed it; Mr. Sherman opposed it, and Gen. Pinckney, Mr. Baldwin, Mr. Garry, Mr. Williamson. Here, very many of the states opposed it; two states declared that such a prohibition would prevent their becoming parties to the constitution; and yet all had voted for this very clause as to commerce, from which the prohibitory power is now asked to follow by implication. Such is the history of this matter, as now furnished by Mr. Madison, and it appears to me conclusive on the question.

We have seen the order in which this clause stood in the constitution, as reported by the committee of detail; and after undergoing various modifications, we have seen the order in which it now stands in that instrument. Separated as it was by the committee from the clause in relation to commerce, why, in the transposition which took place afterwards, was it not connected with that clause, as a proviso, or in some other manner, if it was adopted by the convention, as an exception to the commercial power? But there are other reasons, still stronger, against this position. The clause in question,

gives to congress power to tax the importation of negroes, not exceeding $10 for each person. Now, is this a modification of, or exception to, the commercial power? In 9 Wheat. 200–1, Chief Justice MARSHALL, in delivering the opinion of this court, declares, that duties or taxes on importation are branches of the taxing power, and wholly distinct and separate from the commercial power; and he expressly declares, that exceptions from, or modifications of, this power of imposing duties or taxes on importation and exportation, are exceptions to, or modifications of, the taxing, and not of the commercial power. But again, the whole of this clause applies to persons; and this court have decided, that in contemplation of the constitution of the Union, persons "are not the subject of commerce," so as to be included in the construction of a power given to congress, to regulate "commerce." 11 Pet. 136–7. Now, this clause speaks of persons, and of persons only; and it includes negro freemen, as well as negro slaves, as is expressly declared by Chief Justice MARSHALL, in 9 Wheat. 216–7; the term migration embracing the free, and the term importation, the slaves; and upon this principle, congress has legislated on the subject. However, then, it may have been disputed, whether slaves, as articles of commerce, were embraced in the commercial power; no one can pretend, that free negroes were articles of sale or commerce, and embraced *in the commercial power. This appears to me conclusive against the position, that this clause is an exception from the power of congress to regulate commerce. If, then, this clause be a substantive power, does it confer the authority claimed in this case, to prohibit the transportation of slaves from state to state? It is conceded, that the term importation applies only to slaves introduced from abroad; but it has been contended, that the term migration does apply to the transportation of slaves from state to state. Now, this is against the opinion of Chief Justice MARSHALL, on the point last quoted—upon the ground, that migration applies to free negroes, and to voluntary removal, or change of residence by them, and therefore, can have no application to slaves. But independent of this decision, is it not clear, that the term migration applies to persons coming from abroad, and not a removal from state to state? This is the true grammatical meaning of the term; but there is still higher authority not heretofore referred to.

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In the Declaration of American Independence, we find the following clause: "He has endeavored to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither; and raising the conditions of new appropriations of lands." Here, the term migration, in its true American sense, as applicable to our peculiar position as states and as a nation, is used, as embracing only persons coming from abroad, and no other. Now, when we reflect, that many of the persons who signed the Declaration of Independence, were also members of the convention which framed the constitution of the United States, did these same distinguished statesmen use the term in one instrument as applicable only to persons coming from abroad, and in the other, as only applicable to persons passing from state to state: thus using the same term, to express a totally different thing, in the two cases? But when the great statesmen of that day designed to designate a passing or removing from state to state, they used very different and appropriate terms to express that object. In the articles of confederation, they say: "The people of each state shall have free ingress and regress to and from any other state." Here, where they intend to designate a passing or removing from state to state, the terms "ingress and regress" are used, and not the term migration. Now, very many of those who framed the articles of confederation, were also framers of the Declaration of Independence, and of the constitution of the United States; and is it conceivable, that had they designed to regulate the ingress or regress, from state to state, they would not have used the language of the articles of confederation, and not a word to which they had given a very different meaning in the Declaration of Independence. When looking beyond the words themselves, to the debates in the convention which framed the constitution, we find the construction universally confined to persons from abroad, and Gouverneur Morris and Col. Mason both stated, without contradiction in the convention, the fact, that the clause extended to "freemen," and

no one suggested the possibility of its being extended to the transportation of slaves from state to state. If, then, this clause be a substantive grant of power, and not an exception to the commercial power, and if, as we have seen, it does not extend to the transportation of slaves from state to state, there is an end to the question; for here, if anywhere, the power would have been given. But, suppose it to have been an exception or proviso to the commercial power, is it anything more than a declaratory proviso, to prevent, by a provision, added to this power, *ex abundanti cautela*, any construction, by which congress could prohibit the migration or importation of certain persons? This was the form in which it was first introduced, and the designation of the year 1808, as well as the taxing authority, were added by subsequent amendments.

The convention grant to congress the commercial and taxing powers; but to prevent these powers being construed to extend to an authority to prohibit the introduction of certain persons, such a proviso is proposed, which, by a compromise as to time and taxation, is made to assume its present shape; and this is all that was intended by the *obiter dicta* before referred to, in which this clause is spoken of as an exception to the commercial power. Such language cannot imply that *the powers granted in this clause would have been included in the commercial power; for we have seen, [*665
that this power did not embrace an authority to lay duties or taxes on importation, nor extend to persons of any description, much less to freemen, as articles of commerce. But, even if this clause, as an exception to the commercial power, would, but for this proviso, have been embraced in that power, then the extent of the power, as thus indicated by implication, would not go beyond the exception itself; and this, we have seen, did not embrace the transportation of slaves from state to state. Such being the case, what would be the extraordinary implication to which we are asked to resort? Why! that although the clause in question does not extend to the transportation of slaves from state to state; yet, as it does extend, after a certain date, to the importation of slaves from abroad, and as, but for this exception, congress, even prior to that date, would have possessed this power, as to such importation from abroad, under the authority to regulate commerce, therefore, congress always possessed the authority, under the commercial power, to prohibit the transportation of slaves from state to state. Hence, it would follow, that by this construction, congress, immediately on the adoption of the constitution, without waiting till 1808, could at once prohibit the introduction of slaves from state to state, and yet a power so tremendous, now extracted by implication, was never even alluded to in the convention, nor would the constitution ever have been formed, if such a power had been asked to be vested in congress. Would the slave-holding states have consented that congress should forbid the importation or exportation of slaves from state to state, and that congress alone should regulate their policy in this respect? Especially, would Georgia and South Carolina, that would not join the Union, unless the African slave-trade were kept open from 1787 to 1808, ever have agreed to a constitution, by which, immediately on its adoption, they could not introduce, either for sale or use, slaves from an adjoining state? no, not even when acquired by gift, devise or inheritance! And now, let it be observed, that, as, it is shown, the power to prohibit the transportation of slaves from state to state, does not follow from this 9th section, and to commence in 1808; that if it existed at all, it was as an inference from the commercial power which went into effect immediately. No one then can believe, that any such power was ever designed to be vested in congress. It never could have been directly granted, and now to interpolate it by implication, would be a fraud on the parties to the constitution.

But there is another reason why this clause is not a mere exception to the commercial power. That power this court have declared is vested exclusively in congress, and no portion of it can be exercised by any state, even though congress may not have legislated on the subject. Now, this clause of the 9th section was admitted, in the convention, to extend to the prohibition of the admission of convicts from abroad. Madison Papers, 1430, 1436. Yet this court have declared, that the states do possess the power to prohibit the introduction of foreign convicts. 11 Pet. 148–9. If, then, the states possess this power, and it is also vested in the general government, it must

be a case of concurrent powers, and of course, is not embraced in the commercial power, which, we have seen, is not the case of a concurrent authority, but of an authority denied altogether to the states, and vested in congress alone. When the constitution was formed, we became, as to all powers conferred exclusively on congress by that instrument, as this court have decided, one country; especially, as regards this commercial power, we were, in the strong language of this court, "a single government," recognising, as regarding this power, no state boundaries. And yet, in relation to this very power, migrate, which means a removal from one country to another country, is asked to be construed to mean a removal from one part of a country to another part of the same country; and that, too, when, as to this clause, considered as an exception to the commercial power, the whole country in that respect was as this court have declared, a "unit," a "single government," knowing no separate state jurisdiction or boundaries.

It has been shown, that this law is not embraced within the power of congress to regulate commerce, and this would be sufficient; but I will go further, and prove that it is a power reserved to the states. The reserved powers of the states comprise *all those not delegated to the general government, or prohibited to the states. *666] The states were the fountain-springs of all the powers vested in congress, and this is a case which goes to the source of all power, and never was, and perhaps never could be, abandoned, without a total surrender of all sovereignty. It is the power of self-preservation; it is a matter of the police of a state, regarding its internal policy; a municipal regulation, to preserve the tranquillity, or promote the prosperity of the state, and guard the lives of its inhabitants. It is similar in principle to the quarantine and health laws of a state, its pauper and inspection laws, and many others of a similar character. It is a local provision for the internal peace and security of the state, growing out of the inherent and inalienable right of self-preservation, and operating exclusively within the limits of the state. It is a power to guard the state, "against domestic violence," which not only was reserved to the state, but to the state exclusively, unless upon its "application" for aid to the government of the United States. The 4th section, 4th article, of the constitution, declares: "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." It is, then, within the clearly-reserved power of a state to "protect" itself, "against domestic violence;" and it may do so, by the means of the state itself; or congress, upon the application of the state, and not otherwise, may come to its aid in such an emergency. In the state, then, alone resides the power to pass all laws, designed to protect its people against domestic violence. It is not to wait until the apprehension of domestic violence shall have been realized, it is not to wait until that violence shall have assumed the form of an "insurrection," but looking forward to the possibility of such an event, it may enact all laws calculated to prevent such a catastrophe. It is true, that congress, under the 8th section of the first article of the constitution, have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." But this clause has no application to this case, and even if it had, could not interfere with the state law upon this subject. But what is this power of congress in this section? It is peculiar and specific: 1st, it relates wholly to insurrections to subvert "the laws of the Union," an insurrection against the government and authority of the United States, and not a case of "domestic violence," which applies peculiarly to a movement against the laws and government of a state. 2d, it is a power only to call forth the militia, and the purpose is to "suppress" the insurrection. But it will not be contended, that this power applies to a case of "domestic violence," confined to the limits of a state, and conflicting only with its own laws, and its own authority. Each state then possesses the sole power of protecting its citizens, "against domestic violence;" the general government protects a state against invasion from abroad, without waiting for any application from the state. But desirable as such protection might be, in case of domestic violence, the states

were not willing that in such a case, the government of the Union should act, except upon the "application" of the state. What, then, is a case of domestic violence? Can any one doubt, that a rising of the slaves to assume the government of a state, or to take the lives of its citizens, or oppose or subvert its laws, would be a case of "domestic violence," to guard against which, before it occurred, as well as to suppress it afterwards, is one of the powers clearly reserved by every state. Now, may not a state, as a means of accomplishing this object, prevent the introduction of dangerous, or convict or insurgent slaves, whose importation might produce domestic violence? This court determined, upon a construction contemporaneous with the formation of the constitution, that a state may prevent the introduction of malefactors. 11 Pet. 148. This is permitted, as a measure of internal police, to guard the peace of the state, and promote the tranquillity and happiness of its people. This is all the slave states have ever done, and in pursuance of such a policy, and to effectuate the same object, might they not prevent the introduction of wicked or dangerous slaves, although not yet condemned as convicts by the tribunals of a sister state? Suppose, insurgent slaves had been reserved as informers, and never tried or condemned, within the limits of a sister state, *none can doubt the power of any state to prevent their introduction, and especially as slaves, within their limits. In carrying out the same policy of [*667 self-preservation, might not a state have said, after the Southampton massacre, that no slaves from that region, whether witnesses or participators in that transaction, should be brought within their limits; or if particular classes of persons, importing slaves for sale, had been in the habit of introducing into a state, wicked or dangerous, insurgent or convict slaves, might not a state prohibit the introduction of slaves for sale, by such person altogether, especially, if the state had endeavored (as we have seen Mississippi had done for years) to prevent, by various requisitions, the introduction, by negro-traders, of slaves of this description, all which had proved unavailing; might not the state, as the most, or the only, effectual remedy, exclude the introduction of slaves, by such traders or classes of persons altogether, embracing thus, in the exclusion, all slaves introduced as merchandize? Engaged as these traders were in this inhuman traffic; transporting these slaves in chains from state to state, for the sole purpose of a sale for profit, desirous of increasing this profit by purchasing the cheapest slaves, which would always be the most wicked and dangerous, reckless of the moral qualities and character of the slaves whom they bought, not for their own use, but to sell for speculation; tempted to buy the most wicked slaves, because always to be purchased at the lowest price, and sold in a distant state at the highest price, to those who would be ignorant of their dangerous character; inured as these traders were to scenes of wretchedness and cruelty, and entirely regardless of the means by which they reaped a profit from this traffic, why might we not, as a means of self-protection, arrest this traffic, by forbidding the introduction of slaves as merchandize? Especially, when a state had tried all other means to arrest the introduction of dangerous slaves, and had found the state, notwithstanding her previous restrictions, inundated, by these traders, with the wicked and abandoned slaves, the insurgents and malefactors, the sweepings of the jails of other states, might they not wholly exclude the traffic, as the only effectual means of self-preservation?

If experience had demonstrated that it was unsafe to trust with slave-traders the introduction for sale of slaves, why might not the state arrest the importation by them of slaves, as merchandize? But even if they could repose, for the character of the slaves, upon the traders, there was that, in the very mode and purpose of introduction, which rendered nearly all such slaves most dangerous to the tranquillity of the state. The very manner in which these slaves were forced from one state, and driven into another, would introduce them with hearts overflowing with bitterness, and stimulated to revenge, the most deadly, against the seller and the purchaser. Such slaves would seek for vengeance, not only by their own deeds, but they would endeavor to inflame the passions of all other slaves in the state, who, but for their contaminating influence, would have remained useful and contented. Who can deny, that there was danger arising from such transactions? The legislation of all the slave-holding states demon

strates that it is so; and our own courts have so declared the fact; and did the state possess no adequate power to prevent these dangers, by the exclusion of all such slaves, and the arresting of all such traffic? Nor was it only succeeding the sale, but whilst these negroes are encamped by thousands throughout the state for sale, that the danger was imminent. And if any state might, for her own safety, thus interfere to guard the state against these dangers, from wicked or convict slaves, introduced for sale from other states, and stimulated to revenge by the mode of their introduction; why might not the state, in addition to these evils, from the character of the slaves, perceive new and greater sources of alarm, in the overwhelming preponderance in numbers, thus inevitably given to the slave over the white population; and might not Mississippi, situated as she was, find in this rapidly-increasing disproportion, a sufficient reason upon the same principles of self-protection, to prevent the introduction of slaves as merchandize? In looking at the condition of the state, it was obvious, that the disproportion was increasing in an alarming ratio, that the slaves already outnumbered the whites of the whole state, and in many adjacent counties, three to one; and in many patrol districts, more than twenty to one. Who will dare to say, that there was no danger in permitting this disproportion to go on rapidly augmenting, and that *self-preservation might not demand the prohibition of the traffic? And who was to judge of this internal danger, and to guard against it, except the state in which it existed?

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If a state cannot prevent its becoming a refuge of insurgents, the Botany Bay of the slave malefactors of other states; if it cannot prevent the introduction of slaves of a class, and under circumstances, and in a disproportion inviting the overthrow of its laws, and the massacre of its freemen; if it must become one vast negro quarter, with only great and extensive plantations, superintended by one overseer, and owned too often by absentee masters; it does not possess the power to guard the state against domestic violence or maintain internal tranquillity, and it is not a state, and possesses no one reserved right, or attribute of sovereignty, if it is thus despoiled of the power of self-preservation. The cases of comparative danger, above cited, may differ in degree, but in degree only, and not in principle. If, then, internal tranquillity and self-protection be legitimate ends of state legislation, and if such prohibition of the introduction of slaves as merchandize, be one of the means to effect these ends and purpose, if the purpose is lawful, as an object of state legislation, who can say, that these means are not adapted to the end, and calculated to secure the object? Is it not, perhaps, the only means suitable to the case, or at all events, where there is a choice of means by the state, is it not one of those means within the range of state authority, to effect the legitimate purpose of guarding against domestic violence?

These principles are settled in our favor, in Miln's Case, 11 Pet. 102, when this court decided, that an act of New York, excluding paupers, was constitutional. In giving the opinion of the court, Judge Barbour said: "But how can this apply to persons? They are not the subjects of commerce, and not being imported goods, cannot fall within a train of reasoning, founded on the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods." "The power to pass inspection laws involves the right to examine articles which are imported, and are, therefore, directly the subjects of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed, or even destroyed." "We think it as competent, and as necessary, for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease." Judge Thompson said: "The power to direct the removal of gunpowder, is a branch of the police power, which unquestionably remains, and ought to remain, with the states. The state law here is brought to act directly on the article imported, and may even prevent its landing, because it might endanger the public safety." "Can anything fall more directly within the police power, and internal regulation of a state than that which concerns the care and management of paupers, or convicts, or any other class or description of persons, that may be thrown into the country, and likely to

endanger its safety?" And he adds, the state may exclude all persons whose admission would "endanger its safety or security." Judge BALDWIN, in his concurring opinion, says, "On the same principle, by which a state may prevent the introduction of infected persons, or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers, who will add to the burdens of taxation, or convicts, who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease." He adds, "if there is any one case to which the following remark of this court is peculiarly applicable, it is this: It does not appear to me a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach." (4 Wheat. 195.) "But if the state (inspection) law imposes no tax on imports or exports, the prohibition does not touch it, either by requiring the consent of congress, or making the law subject to its revision or control." "The state (in excluding paupers or convicts), asserts a right of self-protection." "Poor laws are analogous to health, quarantine and inspection laws, all being parts of a system of internal police, to prevent the introduction of what is dangerous to the safety or health of the people."

*Here are important principles established, and many of them cited from the previous opinions of Chief Justice MARSHALL. First, a state law, excluding the [*669 introduction of convicts or paupers from other states, is constitutional; so are health laws, and inspection laws, and all laws of an analogous character, excluding dangerous articles or persons. The principles on which these laws are founded, are directly applicable to the case before us; and although the laws may have a "considerable influence on commerce," or "operate directly on the subjects of commerce," they do not spring from that, but from a higher source, the pre-existing and undelegated power of a state, and are not an exercise of the power to regulate commerce among the states. That they are founded on the right of "self-protection" in each state; the right to guard against "moral or physical pestilence;" to "destoy," "remove," or "prevent the landing" of gunpowder and other dangerous articles; to exclude anything which "might endanger the public safety;" to prevent the introduction not only of paupers and convicts, but that "the principle involved in it, must embrace every description which may be thought to endanger the safety and security of the country," or that may "threaten" a state "with more evils than gunpowder or disease," and to "all regulations of internal police." We find, too, that under the power of a state to "regulate pauperism therein," is embraced the power to exclude paupers from other states; and upon the same principle, the right of a state to regulate slavery therein, would include the right to exclude slaves from other states; and if the power to exclude exists, it carries the power to prescribe the terms of admission. And the principle of the law is the same in all these cases.

We have seen, too, that the power of congress to regulate commerce does not extend to "persons;" and it has been shown, that slaves are so regarded and described in the constitution. But even if they were "the subjects of commerce," if their introduction "might endanger the public safety," the state has the power to exclude them. Thus, infected articles or vessels can be excluded, even where it is only apprehended that there may be danger. So also, to exclude gunpowder or similar articles; yet they are certainly articles of commerce; but the power of the state to guard the public safety being a higher power than that of the government to regulate commerce, all such state laws are of paramount authority, although they may have a "considerable influence on commerce." Here, too, it is established, that inspection laws, where no tax is imposed, although they may act both on importation and exportation, are not an exception from the power of congress to regulate commerce, but rights pre-existing in every state, and not granted by the constitution. Here, too, the principle which Chief Justice MARSHALL conceded, in 4 Wheat. 195, that it is a proper rule "to consider the power of the states as existing over such cases as the laws of the Union may not reach," is quoted and affirmed by Justice BALDWIN. If, then, as at least one of our opponents admits, the power to prohibit this transportation and sale of slaves from

state to state does not exist in congress, it must remain in the states. If not, it is annihilated, and the slave-trade perpetuated by the constitution.

No matter in what fearful numbers the slaves of very many states may be, in the course of introduction from many into one of the slave-holding states by the slave-traders; no matter how imminent the danger, there is no power anywhere to prevent it, unless, indeed, a state where the slaves preponderate, rushes upon her own destruction, and emancipates at once all the slaves within her limits. And was such the provision made in the constitution of the Union, and assented to by the slave-holding states? Did they consent to the alternative? you must at once emancipate all your slaves, or perpetuate the slave-trade within your limits! you must either have no slaves, or all that may be introduced by traders! No one would have dared to make such a proposition in the convention which framed the constitution; no one of the slave-holding states would have assented to it; and had such a proposition been seriously entertertained, it would have dissolved the convention. Indeed, such an idea is now for the first time announced; for I have called in vain for the production of a single suggestion to that effect, by any one preceding the argument of this case. It is a dis-
*670] covery made by our opponents, and *is even more preposterous and humiliating, and no less dangerous to the south, than the power of absolute prohibition claimed by the abolitionists to be vested in congress. Indeed, that is the consequence of this very extraordinary position, for if congress can thus nullify the state law, under the power to regulate commerce among the states, we have seen it settled, on the very authority relied on by our opponents, that this power is "supreme and exclusive," as "full and plenary" as if vested in "a single government;" that it is a power to "prescribe the rules" by which commerce shall be conducted, the power to "limit and restrain" it, and to "embargo," which is to prohibit.

If we will look at the nature of the institution of slavery, we will see conclusive reasons against the extension of the commercial power to this subject. Slavery is a local institution, existing not by virtue of the law of nations, or of nature, or of the common law, but only by the authority of the municipal law of the state in which it exists. It is secured by the supreme, exclusive, pre-existing and undelegated power of each state, and not by the feeble tenure or any dependence upon the authority of congress. In the case of Harvey *v.* Decker, Walker 36, the supreme court of Mississippi declare, that slavery does not exist by "the laws of nature;" and they add, "it exists and can only exist through municipal regulations." The same court, in Jones's Case, Ibid. 83, say: "In the constitution of the United states, slaves are expressly designated as persons;" and they add, "the right of the master exists, not by force of the law of nature or nations, but by virtue only of the positive law of the state." Such is the settled law of Mississippi, twice unanimously pronounced by her supreme tribunal. The same doctrine has been pronounced by the supreme court of all the states where the question has been determined. Thus, in the case of Lunsford *v.* Coquillon, 14 Mart. (La.) 404, the supreme court of Louisiana declare, "the relation of owner and slave in the states of this Union in which it has a legal existence, is a creature of the municipal law." See Law of Slavery 368; Story's Conflict of Laws, 92, 97. The supreme court of Kentucky have declared, that "slavery is sanctioned by the laws of this state, but we consider that as a right existing by a positive law of a municipal character, without foundation in the law of nature." Rankin *v.* Lydia, 2 A. K. Marsh. 470. And this is an acknowledged doctrine of the common law. 2 Barn. & Cres. 448; 3 Dow. & Ry. 679; 20 State Tr. 1; 10 Wheat. 120; Commonwealth *v.* Aves, 19 Pick. 357, 363, 367, 368. This court have said, that "the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." 6 Wheat. 469; 4 Pet. 564; Bald. Const. Views 14. Slavery exists only by the authority of a state, it is introduced only by its permission; and to contend that it may not be introduced, but may be extended against the will of a state, is strangely incongruous. The principle here quoted has been applied in restriction of the commercial power.

In 1824, it was attempted to apply the commercial power of congress to the New

York canals, in relation to boats passing through them, or entering them from state to state, by requiring tonnage duties and entrance fees. That this power could have extended to voyages commencing in one state, and touching at, or terminating in another, is decided by this court; but it does not extend to canals created by the state authority. New York Leg., Res. 8th Nov. 1824; Debate U. S. Senate, 19th May 1826; 3 Cow. 755. Now, the only reason for this distinction is, that canals are, and rivers are not, created by a state; otherwise the power to regulate commerce, which embraces navigation as well as traffic, must have included them. Now, this power is "supreme and exclusive," and if it extends to slaves, made so only by state authority, it must embrace all the canals, and perhaps all the railroads of every state. Property in slaves, so far as it exists, is created, not by the law of nature or of nations, but solely by the power of the state, and may be abolished at its will; differing in these essential particulars from other property. So, as was said, as to other property created by the authority of a state, in state or bank-stocks, or bank-notes or lottery tickets. It is a principle recognised in all the states, and by this court, that their introduction from other *states, for sale or circulation, may be prohibited by any state, notwithstanding she may have state or bank-stocks, or bank-notes, or [*671 lotteries of her own, and these may be the subjects of lawful ownership and commerce in the state.

This power being claimed under the authority of congress to regulate commerce, the first congress which assembled in 1789, as well as every subsequent congress, would have possessed plenary, supreme and exclusive power over the whole subject of regulating the transportation of slaves from state to state. Why, then, during the lapse of more than half a century, has congress never exercised this power, which was an exclusive and not a concurrent power? Many of the great men who formed the constitution, were members of congress, for many years succeeding its adoption. Why, then, did they never exercise, nor even propose to exercise the power in question? They were called upon by petitions, immediately after the organization of the government, to exercise, both as among the states and as to foreign nations, the entire power which they possessed on this subject. Why did they not then exercise this power? Because, it was then universally acknowledged that congress possessed no such power. In 1794, petitions were again transmitted by the Quakers and others to congress, calling on that body to exercise all its constitutional powers over the subject; and these memorials were referred to a committee of the house, consisting of Mr. Turnbull, Mr. Ward, Mr. Giles, Mr. Talbot and Mr. Groves, all members from non-slave-holding states, except Mr. Giles, of Virginia; the select committee, according to parliamentary rule, being favorable to the object of the memorialists to the extent of the powers vested in congress. This committee, thus composed, clearly repudiated the power now claimed by our opponents, but brought in an act "to prohibit the carrying on the slave-trade from the United States to any foreign place or country," which act became a law on the 22d March 1794. (1 U. S. Stat. 347.)

These proceedings, corroborated by Mr. Giles's statement as a member of the committee, ought to be conclusive. In the debates of the Virginia convention of 1829–30, page 246, we find Mr. Giles using the following language on the 10th Nov. 1829: "Mr. Giles then referred to a memorial, which was presented to congress by the representatives of several societies of Quakers. He happened to be a member of the committee to whom the subject was referred. He had relied on the declaratory resolution, in the negotiation which he had to carry on with the Quakers. All the committee were, in principle, in favor of the measure; but it was his duty to satisfy these persons, that congress had no right to interfere with the subject of slavery at all. He was fortunate enough to satisfy the Quakers, and they agreed, that if congress would pass a law, to prohibit the citizens of the United States from supplying foreign nations with slaves, they would pledge themselves, and the respective societies they represented, never again to trouble congress on the subject. The law did pass, and the Quakers adhered to their agreement. He did not know, whether or not the documents, on the subject of this negotiation, were still in existence; but he believed they had been filed away with

other papers. Subsequently, an act was passed prohibiting the introduction of slaves into the United States, in which this principle was again touched, in a more specific, but a different form. It was again his fortune to be on the committee to whom that subject was referred, and he drew up two provisoes to a bill then pending before congress, for prohibiting the introduction of slaves into the United States after the year 1807; the object of which was to draw a distinct line of demarcation between the powers of congress, for prohibiting the introduction of slaves into the United States, and those of the individual states and territories. It was then decided, by a unanimous vote, that when slaves were brought within the limits of any state, the power of congress over them ceased, and the power of the state began, the moment they came within those limits." Here is the clearest testimony on the subject, that as to the slaves "brought within the limits of any state," congress had no power whatever; and that such was the "unanimous" opinion of the house of representatives, in 1794 and 1807.

*672] The act of the 10th of May 1800 (2 U. S. Stat. 70) prohibits citizens or residents *of the United States from owning or serving in vessels engaged in the foreign slave-trade, forbidden by the act of 1794. The act of 28th February 1803 (Ibid. 205) prohibits the bringing of any negroes, mulattoes, or other persons of color, not being native citizens or registered seamen of the United States, into any state where the laws of the state prohibited such importation. This act extended to free negroes as well as slaves, and was a practical construction of the 1st clause of the 9th section of the 1st article of the constitution, applying that clause to such states as did not "think proper to admit" the persons prohibited by that act, the term "migration" being applied to free negroes, and "importation" to slaves. Then came the act of 2d March 1807, Ibid. 426 (to go into effect on the 1st of January 1808, the time designated in the 9th section of the 1st article of the constitution), which prohibits the introduction from abroad into the United States of slaves, under various penalties. The act of 20th April 1818 (3 Ibid. 450), enforces the last act, chiefly by devolving the proof on the party accused, that the colored persons had not been brought in, in contravention of that law. The act of 3d March 1819 (Ibid. 532), authorizes the employment of the armed vessels of the United States in enforcing the previous acts. The act of 15th May 1820 (Ibid. 600), makes the foreign slave-trade, before prohibited, piracy, and inflicts upon all concerned in it, the punishment of death; and no less than nineteen various laws, enforcing or providing money to enforce this act, have been since passed by congress down to the present period. No less than thirty laws have been passed by congress on the subject of the slave-trade, and no less than fifty reports made in the two houses of congress, from 1791 to the present period; yet no one act embraces the slave-trade between the states, except such as acknowledge the binding force of state laws, and require conformity on the part of vessels of the United States and their owners, to those laws (as they do to the health laws of the states), nor in any one of these numerous reports, was it ever pretended, that congress possessed the power now claimed by our opponents, but in all these acts or reports, it is either repudiated directly, or by implication. And if congress did not act in 1791, or 1794, or 1803, on this subject, why not in 1807–8, or in 1818, 1819, 1820, or on the numerous occasions upon which they have since legislated on this subject? Not only, why did they not act by the passage of laws regulating or prohibiting this slave-trade between the states, but why no proposal, by any member of congress, to act, and this universal concession that the power was not vested in the general government? Such has been the negative action of congress in regard to a power which is claimed to be vested exclusively in the general government. But not only has congress declined the exercise of this power, now claimed to be vested exclusively in the government of the United States, but congress has repeatedly recognised the existence of this power as vested in the states alone.

On the 19th April 1792, the constitution of the state of Kentucky was formed. On the 6th November 1792, Gen. Washington, then president of the United States, delivered his annual address to the two houses of congress, in which he said: "The

adoption of a constitution for the state of Kentucky has been notified to me; the legislature will share with me in the satisfaction which arises from an event interesting to the happiness of the part of the nation to which it relates, and conducive to the general order." And on the succeeding day, he transmitted to the two houses of congress, in a special message, "a copy of the constitution formed for the state of Kentucky." On the 9th of November 1792, the senate of the United States responded to the address of the president, in which they say, "the organization of the government of the state of Kentucky, being an event peculiarly interesting to a part of our fellow-citizens, and conducive to the general order, affords us peculiar satisfaction." On the 10th of November 1792, the house of representatives responded, through a committee, of which Mr. Madison was chairman, to the address of the president, in which they say, "the adoption of a constitution for the state of Kentucky, is an event on which we join in all the satisfaction you have expressed. It may be considered as particularly interesting, since, besides the immediate benefits resulting from it, it is another auspicious demonstration of the facility and *success with which an enlightened people is capable of providing, by free and deliberate plans of government, for their own [*673 safety and happiness."

Such were the solemn forms and sanctions under which this constitution of the state of Kentucky, the first of the new states, was then received by the president and two houses of congress, and the two members subsequently admitted under it as representatives of the state. Now, this very constitution contains provisions as to slaves precisely similar to those embodied in the constitution of Mississippi, and among others, after prohibiting emancipation of slaves by the legislature, they say, "they (the legislature) shall have full power to prevent slaves from being brought into this state as merchandize." 1 Litt. Laws 52. Here is this constitution, with this clause, thus solemnly sanctioned at that early period, almost contemporaneous with the organization of the government, by George Washington, the president of the convention which formed the constitution of the Union, and by John Langdon and Nicholas Gilman, of New Hampshire; Rufus King and Elbridge Gerry, of Massachusetts; Roger Sherman and Oliver Ellsworth, of Connecticut; Jonathan Dayton, of New Jersey; Robert Morris and Thomas Fitzsimmons, of Pennsylvania; George Read, John Dickinson and Richard Bassett, of Delaware; James Madison, of Virginia; Hugh Williamson, of North Carolina; Pierce Butler, of South Carolina; William Few and Abraham Baldwin, of Georgia; all members of the congress which received and sanctioned this constitution of Kentucky, and all members of the convention which framed the constitution of the Union; thus constituting, in that congress, a representation from ten of the twelve states which formed the constitution. And yet this constitution, thus received and sanctioned, contains a clause directly repugnant to the constitution of the United States, and authorizes that state to violate that instrument, by an authority, as maintained by our opponents, to exercise that commercial power as to slaves, which was vested exclusively in congress, and prohibited to the states. But no one entertained that opinion in 1792, when ten of the twelve states which formed the constitution of the Union were represented in congress. Suppose, in lieu of this clause to prohibit the introduction of slaves as merchandize, the constitution of Kentucky had contained a delegation of power to the legislature of that state, to "regulate commerce between that state and all other states," or "to coin money," or to "declare war," or to exercise any other power vested exclusively in congress; who believes that such a constitution could ever have received the sanction of Gen. Washington, Mr. Madison, James Monroe, and all the other great men of the congress of 1792, or that the state could ever have been admitted, prepared and organized to subvert the constitution of the Union, by that very executive and congress which was solemnly sworn to preserve and maintain that instrument? And yet, by the argument of our opponents, this very constitution of Kentucky, in this clause as to slaves, contains a delegation to the state of the power vested exclusively in congress to regulate commerce among the states. To every unprejudiced mind, this authority ought to be conclusive.

On the 1st March 1817, an act of congress was passed, to enable the people of the

western part of the territory of Mississippi "to form a constitution and state government." (3 U. S. Stat. 348.) By which act it was required, as a condition precedent of admission, that this constitution should not be "repugnant" to the "constitution of the United States." On the 4th December 1817, this constitution was submitted to both houses of congress (Sen. Journ. 21; House Journ. 21), and on the 10th December 1817, this constitution being declared to be in "pursuance" of the act before quoted, was admitted not to be repugnant to the constitution of the United States, and the state received as a member of the Union; yet, this very constitution contained the clause, that "they (the legislature) shall have full power to prevent slaves from being brought into this state, as merchandize." Here, then, the very power under which Mississippi now acts, was thus deliberately conceded by congress not to be "repugnant to the constitution of the United States."

On the 26th August 1818, the constitution of the state of Illinois was formed, and although slaves and slavery were, by the 6th article, prohibited to be "hereafter introduced into the state," yet the slaves already there were not emancipated, although it was provided, that their "children, hereafter born, shall be free," and *the introduction of slaves from any other state, even "to be hired," was prohibited. By the official census of 1820, 907 slaves were enumerated and returned from the state of Illinois, and in 1840, 184 slaves are enumerated and returned from the same state. Illinois, then, under her constitution of 1818, was, to a limited extent, a slave-holding state; the slaves already there not being emancipated, but the future importation being prohibited, andthe *post-nati* being liberated. This subject is thus referred to in a speech delivered by the Hon. Henry Baldwin, then a representative in congress from the Pittsburgh district of Pennsylvania, and now one of the judges of this court. In that speech, Judge Baldwin said: "When the constitution of Illinois was presented to us, it was found not to conform to the ordinance of 1787, in the exclusion and abolition of slavery; on comparing their provisions, they were inconsistent; the gentleman from New York, who moved this amendment last year, objected to the admission of Illinois on this account; there was a short but an animated discussion; it was contended, that the ordinance did not extend to states, and was not binding on them, and so this house decided by a majority of 117 to 34 (54 from the non-slave-holding states). In the senate, there was no objection. Illinois was admitted, she and Indiana now have slaves, and always have had them. Here is a precedent in point, and I hope will not be without its weight in the body which made it, at least with those members whose names are recorded in the journal." Niles' Reg. vol. 19, page 30. In 1818, as well as at this moment, the prohibition of the introduction of slaves for sale, is void in that state, if it be void in Mississippi; for the validity of the prohibition, as a question of power, surely cannot depend upon the number of slaves in a state.

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On the 2d March 1819, an act passed to enable the people of the territory of Alabama to form a constitution and state government. (3 U. S. Stat. 489.) By this act one of the conditions precedent, on which this constitution was authorized to be formed, was, that it should not be "repugnant" to the "constitution of the United States." On the 7th Dec. 1819, a copy of this constitution was submitted to the house, and referred to a select committee (H. J. 8); and on the 6th Dec. 1819, it was also presented to the senate of the Union, and referred to a select committee (S. J. 6); and by a joint resolution of both houses of congress, of the 14th Dec. 1819, the constitution of Alabama, being conceded to be "in pursuance" of the act before quoted, and of course, "not repugnant to the constitution of the United States," Alabama was admitted as a member of the Union. Yet the constitution of that state contains the clause, that "they (the legislature) shall have full power to prevent slaves from being brought into the state as merchandize." And here again, the constitutionality of this provision was distinctly admitted by the congress of the United States.

In the case of Missouri, the question was decided in our favor, after a severe conflict. But let it not be supposed, that all who opposed the admission of Missouri as a state of the Union, did it upon the ground, that as a slave-holding state, she could not prohibit the introduction of slaves as merchandize; for the number who maintained any

such doctrine, did not exceed half a dozen members, at any period of this discussion, and it was eventually abandoned, and the objection was, 1st, to admit Missouri as a slave-holding state at all, and 2d, to that clause of the constitution, which prevented "free negroes and mulattoes from coming to and settling in this state, under any pretext whatsoever." As to the first, it was contended, that the authority to admit new states into the Union, was a discretionary power vested in congress; and that in the exercise of a sound discretion, congress might make it a condition of admission, that slavery should be abolished. As to the 2d point, it was urged, that the power to exclude free blacks, some of whom might be citizens and voters in the several states, conflicted with that provision of the constitution of the Union, in the first clause of the 2d section of the 4th article, which declared, that "the citizens of each state shall have the same privileges and immunities as citizens in the several states." The first question was decided in favor of Missouri, by the congress of 1819–20, and the second question was not then decided. By the act of congress of the 6th March 1820, the people of the Missouri territory *were authorized to "form a constitution and [*675
state government." (3 U. S. Stat. 545.) By this act, slavery was to be prohibited in the territory ceded by France, under the name of Louisiana, north of lat. 36° 30′, not included in the state of Missouri. By this act, the people of Missouri territory were authorized to form "a constitution and state government: provided, that the same, when formed, shall be republican, and not repugnant to the constitution of the United States;" and the 7th section of this act was as follows: "That in case a constitution and state government shall be formed for the people of the said territory of Missouri, the said convention or representatives, as soon thereafter as may be, shall cause a true and attested copy of such constitution, or frame of state government, as shall be adopted or provided, to be transmitted to congress." This constitution, "in pursuance of this act," was formed on the 19th of July 1820, and contained the following, among other provisions: 26. The general assembly shall not have power to pass laws:—1st. For the emancipation of slaves, without the consent of their owners: They shall have power to pass laws, "to prohibit the introduction of any slave for the purpose of speculation, or as an article of trade or merchandize." It shall be their duty, as soon as may be, to pass such laws as may be necessary: 1. To prevent free negroes and mulattoes from coming to, and settling in this state, under any pretext whatever: and—

The constitution thus formed, was submitted to both houses of congress, and referred, in Nov. 1820, to special committees, who reported in its favor, and that it was not repugnant to the constitution of the United States. And now, then, it is believed, not a single member, upon the discussion which had taken place, did suppose that this clause prohibiting the introduction of slaves as merchandize, was unconstitutional, but it was contended by many, that the 4th clause of the 26th section of the 3d article, preventing "free negroes" coming into the state, was repugnant to the 1st clause af the 2d section of the 4th article of the constitution of the Union, before quoted, as to the reciprocal rights of citizens in all the states, it being contended, that free negroes were citizens in some of the states. The great difficulty then arising out of this clause, the whole question, on the 2d February 1821, was, on motion of Mr. Clay, of Kentucky, referred to a select committee of thirteen, of which he was chairman, but eight of whom were from non-slave-holding states. On the 10th of February, Mr. Clay reported from this committee, declaring that they had "limited their inquiry to the single question, whether the constitution which Missouri had formed for herself, contained anything in it, which furnished a valid objection to her incorporation in the Union. And on that question, they thought that there was no other provision in that constitution, to which congress could of right take exception, but that which makes it the duty of the legislature of Missouri to pass laws to prevent free negroes and mulattoes from going to, and settling in, the said state." After stating, that part of the committee believed this clause "liable to an interpretation repugnant to the constitution of the United States, and the other thinking it not exposed to that objection," they proposed, that Missouri should be admitted, on her passing a law exempting

this clause from any supposed interpretation, which would prevent citizens of any of the states from settling in Missouri. On the 2d March 1821, congress passed a joint resolution, providing for the admission of the state of Missouri into the Union, "upon the fundamental condition, that the 4th clause of the 26th section of the 3d article of the constitution, submitted on the part of said state to congress, shall never be construed to authorize the passing of any law, and that no law shall be passed in conformity thereto, by which any citizens of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities, to which such citizen is entitled under the constitution of the United States." (3 U. S. Stat. 645.) The assent of Missouri was required to this condition, which being afterwards given, the state was admitted into the Union.

Now, the power to prohibit the introduction of slaves as merchandize, was just as clearly granted in the constitution of Missouri, as the power to prevent the ingress *676] *of free negroes or mulattoes. It had been expressly provided by congress, that the constitution of Missouri should not be repugnant to the constitution of the United States. That constitution was discussed in three committees, and in the two houses of congress, for more than three months, and the whole subject, from 1818 till 1821, and after this full discussion, with an ardent desire on the part of a portion of congress, approaching an actual majority, to exclude Missouri, if any clause in her constitution should be found repugnant to the constitution of the United States, this clause as to the introduction of slaves as merchandize, was distinctly, and it may be truly said, almost unanimously conceded to be constitutional, and the only proviso required by congress from the state, was in relation to the clause in regard to free negroes. Surely, this ought to be conclusive, so far as the authority of the almost unanimous voice of congress, on full deliberation, can go to settle any question. Amongst those who stand most conspicuously committed on the record, in favor of the validity of this clause in the constitution of Missouri, is Mr. Clay, of Kentucky, now one of my distinguished opponents in this case, for whose opinion as a statesman and a jurist, as then recorded, I ask from this court all the consideration to which it is so justly entitled. Of all the members of that congress, which admitted Missouri as a state of the Union, no one contributed more to that result, than the Hon. Henry Baldwin, now one of the judges of this court, and then the representative from the district of Pittsburgh, Pennsylvania. And here I trust that I may be indulged in stating that I was one of his constituents, at that period, and as he well recollects, one of the most ardent and active of the supporters of his course on this great question. At first, public sentiment seemed to be almost overwhelmingly against him in his district; the legislature of Pennsylvania had passed unanimous resolutions against the admission of Missouri as a slave-holding state, and but one member of congress from the state had then dared to follow his bold and daring lead upon this subject, and that member was driven, for a long time, most unjustly, into disgrace among his constituents. He was burnt in effigy, and it is said, barely escaped from violence! Well do I recollect that momentous crisis, and the obloquy to which Mr. Baldwin was doomed for a time, at that period. But he stood on the rock of the constitution; he stood unmoved by the surges of popular commotion; he was a leader who fought in the advanced guard of that great conflict, and although for a time he seemed like Curtius taking the fatal leap for the salvation of his country, he was saved by the returning justice and intelligence of a magnanimous people, triumphantly re-elected to congress, and elevated to higher and higher honors. The constitution of the state of Missouri, which, by his vote, he thus declared not to be repugnant to the constitution of the United States, contained this very clause for the prohibition of the introduction of slaves as merchandize, and I claim the full influence of his vote, under these imposing circumstances.

On the 30th January 1836, the people of the territory of Arkansas formed a constitution which contained the following clause: "They (the legislature) shall have power to prevent slaves from being brought to this state, as merchandize." On the 10th March 1836, this constitution was "submitted to the consideration of congress," in a

special message by the president (Senate Journal 210). On motion of Mr. Buchanan, of Pennsylvania, in the senate, on the same day, it was referred to a select committee. On the 22d March 1836, Mr. Buchanan, as chairman from the select committee, reported a bill for the admission of Arkansas as a state, under the constitution submitted by the president, and after considerable debate, tho bill passed the senate by a vote of 31 to 6, fifteen of the ayes being from non-slave-holding states and from both political parties, and four of the noes being from non-slave-holding states; namely, Messrs. Knight, Prentiss, Robbins, Swift, and two from slave-holding states, namely, Messrs. Clay and Porter, both of whom placed their negative on this ground alone, that Arkansas had formed her constitution without asking, as was usual, the previous assent of congress. Having participated in that debate, and taken a deep interest as a senator from Mississippi, in the admission of Arkansas, and successfully opposed an adjournment till the bill was engrossed, I recollect well all the proceedings, and that but a single senator based his objection on the ground of the particular clause in question, as to slaves. Such *then was the view of the senate as to the constitution of Arkansas; and that they felt constrained to oppose any clause in the constitution of a state, [*677 which they deemed repugnant to the constitution of the Union, is clearly proved, by a reference to the proceedings and debates on the confirmation by the senate, at the same time, of the constitution of Michigan. On the 1st April 1836, when the adoption of the constitution of Michigan, and the bill for the admission of that state (as well as of Arkansas) was pending before the senate, the following proceedings will be found at page 259. "The motion by Mr. Clay, to amend the bill, by inserting 2, line 4, after "confirmed," except that provision of the said constitution, by which aliens are admitted to the right of suffrage," yeas 14, nays 22; a reference to these proceedings and debates will show that the senate considered it its duty not to confirm any clause of the constitution of a state, repugnant to the constitution of the United States, but to strike out such clause, before the admission of the state; and the clause in question, as I well recollect, and as the printed debates will show, was not stricken out, because, after a very prolonged argument, it was not considered repugnant to the constitution of the United States, the question as to the qualification of voters in a state being decided to be a matter exclusively belonging to the states. Arkansas was admitted at the same time with Michigan, and under this view of the subject, why was not the clause in question as to slaves stricken out? For the most obvious of all reasons; because but a single senator considered it repugnant to the constitution of the United States. Such were the proceedings in the senate; and in the house, the constitution of Arkansas was submitted, and she was admitted as a state, on the 13th June 1836, by a vote of 143 to 50 (House Journal 1003), several of the members from the slave-holding states voting in the negative, on the same ground as that assumed in the senate. Nor was the matter passed by in silence, for whilst this bill was pending, Mr. Adams moved to strike out from the bill, that portion of it in regard to slaves and slavery (page 997), but it was not seconded; and the constitution of Arkansas was confirmed and accepted with this clause included.

Here, then, in 1792, 1817, 1818, 1819, 1821 and 1836, are six states, whose constitutions were expressly regarded by congress to be conformable to the constitution of the United States, admitted, at all these periods, with clauses in all of them, as to the exclusion of slaves as merchandize, precisely similar to that now under consideration. One of these was the state of Mississippi, whose right thus to prohibit the introduction of slaves as merchandize, was, in the act of admission and confirmation of her constitution, expressly conceded by congress. Such has been the uninterrupted, positive, as well as negative, action of congress on this subject for half a century, from the organization of the government to the present period, repudiating their own power, and admitting, again and again, the possession of this power by the states, and by the slave-holding states proper, as well as in the case of Illinois, where slavery existed when it became a state, and still exists, but is disappearing on the death of the slaves now living. Now, let it never be forgotten, that the case upon which our opponents rely, establishes the doctrine, that this power to regulate commerce, is not a concurrent

power, but one vested exclusively in congress; and therefore, to show that the clause in question embraces an authority that can constitutionally be exercised by a state, demonstrates that congress has no power over the subject.

Having examined the action of congress on this question, let us now investigate that of the states. We have before referred to the clause in the original constitution of the state of Kentucky, authorizing the legislature to prohibit the introduction of slaves as merchandize. At the November session 1794, the legislature of Kentucky passed a law, declaring, "that no slave or slaves shall be imported into this state as merchandize." This act inflicted a penalty of $300 for each slave so illegally imported, but did not emancipate the slave; and it permitted emigrants and citizens to bring in slaves for their own use. The act then was almost precisely similar to the provisions in Mississippi. 1 Litt. Laws, 246. By the amended constitution of the state of Kentucky, adopted August 17th, 1799, the clause authorizing the legislature to prohibit the introduction of slaves as merchandize, is retained and adopted. Const. 237. By the act of
*678] Feb. 8th, 1815, 5 Litt. *Laws, 293, a penalty is inflicted on the importation of slaves as merchandize, but the slave is not emancipated. The act of 12th Feb. 1833 (2 Ky. Stat. 1482) continues the restriction as to importation for sale, and introduces further restrictions with special exceptions as to emigrants, but the slave is not emancipated. During this very session of the legislature of Kentucky, in 1840 and 1841, an attempt was made to repeal this act and failed. These laws have been invariably enforced by all the judicial tribunals in Kentucky. I will refer only to a few decisions. Commonwealth *v.* Griffin (Oct. 7th, 1832), 7 J. J. Marsh. 588; Lane *v.* Greathouse, Ibid. 590. It was decided in these cases, that either the importation or sale of slaves introduced for sale, was an indictable offence. See further, 5 A. K. Marsh. 481; 1 Bibb 618; Barrington *v.* Logan, 2 Dana 432.

In Virginia, there are numerous laws, before and since the adoption of the constitution, prohibiting the introduction of slaves from other states, except under special exceptions, one of which was an oath that the owner did not introduce them for sale. Act of 1778, preventing further importation of slaves, ch. 1, Cha. Rev. p. 80; Act of 1785, ch. 77, p. 60; Act of 1788, ch. 53, p. 24; Act of 1789, ch. 45, p. 26; Act of 1790, p. 7, ch. 11; Act 17th Dec. 1792, Pleas. & Pace; 1 Rev. Code, 186, § 13, 1794, 1800, 1803, 1814, 1805, 1810, 1812, 1816, 1819; see 1 vol. Rev. Code Va. 421, and notes. Generally, by these laws, the slaves introduced against their provisions were declared free, and these laws have been uniformly enforced by all the courts of Virginia, by the highly respectable court for the district of Columbia, and by the supreme court of the United States. 1 Leigh 172; Gilm. 143; 2 Munf. 393; 2 Marsh. 467; Law of Slavery, 329; 5 Call 425; 6 Rand. 612; 3 Cranch 324, and note, 326; 8 Pet. 44. The acts of Virginia of 1788, 1789, 1790 and 1792, contemporaneous with and shortly after the adoption of the constitution, and passed by some of the very men who had either been in the convention which formed the constitution of the United States, or in that of Virginia, which ratified it, are entitled to high respect.

Tennessee, it is understood, took with her, on the separation from North Carolina, laws of that state, restricting the introduction of slaves for sale, and on the 21st October 1812, that state passed a law prohibiting the introduction of slaves as merchandize; but permitting emigrants or citizens to bring in their own slaves for their own use. The penalty for the violation of the law was the seizure for the state of the slaves illegally introduced, and sale to the highest bidder. 2 Scott's Laws of Tennessee 101. In 1798, the legislature of Georgia passed a law, forbidding the importation of slaves from any other state into Georgia, except by persons removing into the state, or citizens who became owners of slaves in other states by last will or otherwise. Marbury & Crawford's Dig. p. 440; and see also, Act to same effect, Dec. 1793, Prince's Dig. p. 455. By act of 1817, Prince's Dig. 373, the importation of slaves from any state, for sale in Georgia, was made a high misdemeanor, and punished with imprisonment for three years in the penitentiary. By act 3d February 1789, S. & J. Adams' Laws of Del. p. 942, not only the importation of slaves into that state, but their exportation from Delaware to other states, without license from five justices, was prohibited, under

a severe penalty. This act is referred to and confirmed by act June 24th, 1793, c. 22, p. 10, 94; June 14th, 1793, c. 20, and by act January 18th, 1797, L. Del. 13, 21. To forbid by a state law the exportation of slaves, if they be articles of merchandize, under the commercial power, is still more clearly to violate the constitution, than to prohibit their importation; yet such laws have been passed and enforced by Delaware and many other states.

By the act of Pennsylvania, of the 29th March 1788, and the act of 1st March 1780, explained and amended by the last act, all negroes born after the passage of the act were to be free; but the slaves then born and living in the state were continued in slavery, and to be registered. No slaves could be introduced for sale or exported for sale, and all who were brought in, except by sojourners, for six *months, and members of congress for temporary residence during the session of congress, [*679 were declared free. Purdon's Dig. 595,597; 1 Dall. L. 838; 1 Smith 692; 2 Dall. L. 586; 2 Smith 443. At an early period, the question of the existence of slavery in Pennsylvania was considered, and that slaves were property there, was unanimously pronounced, after the most elaborate arguments, by the highest judicial tribunals of that state. In January 1795, a suit for freedom under the operation of the general provisions of the constitution of Pennsylvania, was instituted, in the case of Negro Flora *v.* Greensberry. On the 15th December 1797, a special verdict was found, and at the March term 1798, the case was sent to the supreme court, and by them decided, that slaves were property in Pennsylvania. It was then taken to the high court of errors and appeals of that state, and after four days argument, it was announced by the court "that it was their unanimous opinion, slavery was not inconsistent with any clause in the constitution of Pennsylvania," and conformably to this opinion, the entry of record is, "the court is unanimously of opinion, that Negro Flora is a slave, and that she is the property of defendant in error, and the judgment of the supreme court is affirmed."

Pennsylvania, we have seen, had slaves in 1780, and in 1788 and in 1790, when the laws of 1780 and 1788, were continued in force by her constitution, and she still has slaves, recognised as such in the state, and returned under the present and every preceding census, and as to these slaves, they are as much the property of their owners, and the subject of sale within the state, as the slaves of Mississippi. On this subject, we have not only the decision of their highest tribunal before quoted, but an uninterrupted series of decisions to the same effect from the earliest date down to the present period. I will now cite a decision of the circuit court of the United States for the eastern district of Pennsylvania, at April term 1835, Judges Hopkinson and Baldwin of the supreme court of the United States presiding. The case is reported in 1 Bald. 571. At page 589, Judge Baldwin, in delivering the opinion of the court, says: "While the abolition act put free blacks on the footing of free white men, and abolished slavery for life, as to those thereafter born, it did not otherwise interfere with those born before, or slaves excepted from the operation of the law; they were then, and yet are, considered as property; slavery yet exists in Pennsylvania, and the rights of the owners are now the same as before the abolition act; though their number is small, their condition is unchanged." Now, we have seen that Pennsylvania prohibited both the importation and exportation of slaves for sale; and her supreme tribunals, as well as the circuit court of the United States, have uniformly maintained and enforced these laws, yet upon the position assumed by our opponents, they are null and void, and slaves can be both exported from Pennsylvania for sale into other states, and introduced from other states into Pennsylvania for sale, and the sale is valid; and the purchasers may hold property in any number of slaves thus introduced and sold. See the following decisions of the highest judicial tribunals of Pennsylvania, affirming the existence of slavery there, and the validity of the laws forbidding the exportation of slaves for sale in Pennsylvania, and their importation from other states into Pennsylvania for sale. 4 S. & R. 218, 425; 4 Yeates 115, 109, 240; 1 Dall. 167, 475, 469; 2 Yeates 234, 449; Addison 284; 7 S. & R. 386, 378; 3 Ibid. 4-6, 396; 6 Binn. 213, 204, 297; 1 W. C. C. 499; 1 Bro. 113; 5 S. & R. 62, 333; 2 Ibid. 305; 1 Yeates 365, 368, 235, 220, 480; 4 Binn

186; 1 S. & R. 23; 3 Binn. 301; 2 Dall. 224, 227; 4 Ibid. 258, 260; 4 W. C. C. 396; 1 Watts 155.

I will call attention but to one of these cases, decided in 1806, by the circuit court of the United States for the Pennsylvania district, by Judge PETERS, of the district court, and Judge WASHINGTON, one of the judges of the supreme court of the United States, both experienced and eminent jurists, and both familiar with the proceedings of the convention which formed the constitution of the United States, and both distinguished contemporaries with, and associates of, its framers. This was the case of a suit for freedom by a slave imported from South Carolina into Pennsylvania, in 1794, contrary to the prohibitory act of that state. The *facts were embraced in a special verdict, and time taken for the court to deliberate, when the decision was pronounced by Judge WASHINGTON, as follows: "To dispose at once of an objection to the validity of this law, which was slightly glanced at, I observe, that the 9th section of the 1st article of the constitution of the United States, which restrains congress from prohibiting the importation of slaves, prior to the year 1808, does not, in its words or meaning, apply to the state governments. Neither does the 2d section of the 4th article, which declares, that 'no person, held to labor or service in one state under the laws thereof, escaping into another, shall, in consequence of any law therein, be discharged from such service,' extend to the case of a slave voluntarily carried by his master into another state, and there leaving him under the protection of some law declaring him free. The exercise of this right of restraining the importation of slaves from the other states, under different limitations, is not peculiar to Pennsylvania. Laws of this nature, but less rigid, exist in most of the states where slavery is tolerated." 1 W. C. C. 560–1. Although the constitutional objection to the prohibitory law of Pennsylvania was but slightly glanced at in the argument, it seems to have been maturely considered by the court, and the very question decided, that the law was constitutional, and that the clause in the constitution of the United States, restraining congress, until 1808, from prohibiting the introduction of slaves, "does not in its words or meaning apply to the state governments;" when we recollect, that this was the case of a slave imported from one state to another, the importance of the above decision becomes obvious, and especially, as the court recognises in the same decision the constitutionality of the laws of other states, and of the states where slavery is tolerated, restraining the importation of slaves from other states; and this very case, and the doctrine contained in it, were solemnly re-affirmed by the same court, in the case *Ex parte* Simmons, 4 W. C. C. 396, and applied to the case of a slave introduced from South Carolina into Pennsylvania in the year 1822.

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In Maryland, by acts of 1796, variously modified in 1797, 1798, 1802, 1804, 1805, 1806, 1807, 1809, 1812, 1819, 1820, 1821, 1822, 1823, 1824, 1828, 1831, 1832, 1833, 1834, 1836, 1837 (see 1 Dorsey's Laws of Maryland, page 334, &c.), the importation of slaves for sale into Maryland was prohibited; and in most of the laws, the slaves so imported were declared free, and importation, except by emigrants, though not for sale, was generally prohibited. These laws have been invariably enforced by repeated decisions of the judicial tribunals of that state, as well as of the adjacent states, and by the supreme court of the United States. 5 Har. & Johns. 86, 99, 107, and note; Law of Slavery, 381–2, 388–9; 5 Rand. 126; 4 Har. & McHen. 418; 4 Har. & Johns. 282; 3 Ibid. 564; 6 Cranch 1; 1 Wheat. 1; 8 Pet. 44.

In New York, slavery existed to the same extent, as regards the rights of the master, as in most of the slave-holding states proper, until very recently. By the colony laws of New York, prior to the revolution, slavery was as firmly established in that state as in any of the Southern states, and the importation of slaves into New York encouraged by law. See acts of 1730 and 1740, et al., 1 Colony Laws, 72, 193, 199, 283, 284. The act of 20th March 1781, c. 32, 56, recognised slavery as in full force in New York as also did the act of 1st May 1786, c. 58, 29, 30. The act of the 22d of February 1788, c. 40, enacted contemporaneously with the adoption of the constitution of the United States, recognised and continued the existence of slavery in New York, but prohibited the importation of slaves for sale, and the act was continued by subsequent

laws. 1 Rev. Stat. 656; K. & R. 1; R. L. 614, cited 14 Johns. 269. By the act of 4th July 1799, c. 62, slaves born in the state after that date were declared free at 28 years of age, but all others were continued as slaves. By act 30th March 1810, the importation of slaves, except by the owner, for nine months residence, was prohibited; and most of the former laws were incorporated into the act of 9th April 1813; and finally, on the 4th of July 1827, slavery was in fact abolished; except, perhaps, as to the very few slaves born before 4th July 1799, and subsequently lawfully introduced as slaves.

*By the official census by the United States, of the population of New York, the following slaves were returned from that state. In 1790, 21,324 slaves; [*681
in 1800, 20,613 slaves; in 1810, 15,017 slaves; in 1820, 10,088 slaves; in 1830, 76 slaves; in 1840, 3 slaves. Let it be remembered also, that by the constitution of New York, the statutes of that state, enacted by the legislature, received the sanction of a council of revision, before they became laws, which council consisted of the governor, the chancellor, and judges of the supreme court. Const. 181. These laws, forbidding the importation of slaves for sale, received a judicial sanction before their enactment; and let it be remembered, that many of them passed with the sanction of many of the distinguished statesmen of New York, who had participated either in the convention which formed, or which ratified, the constitution of the United States. Whilst by the act of 1788, and other laws of a subsequent date, slaves subsequently imported into the state could not be sold by the master or owner; yet, even these slaves were property in all other respects; they were assets for the payment of debts; they could be sold by a trustee or assignee of an insolvent; by an administrator or executor, or by a sheriff under an execution; and all other slaves were subject to the sale by their owners as all other property. 2 Johns. Cas. 79, 488, 89; 11 Johns. 68, 415; 17 Ibid. 296; 3 Caines 325; 8 Johns. 41; 14 Ibid. 263, 324; 9 Ibid. 67; 15 Ibid. 283; 19 Ibid. 53. The first case in which the law was settled under these statutes in New York, was decided in 1800, and will be found reported in 2 Johns. Cas. 79, 488.

In 1794, A., the owner of a slave in New Jersey, removed to New York with the slave, and put the slave to service with B., until they or their executors should annul their agreement: Held, that a sale of the slave was prohibited by act of February 1788; but that a sale of the slave by executors, trustees, assignees, &c., would be valid. Chancellor KENT declared, "The act (of 1788) was hostile to the importation and to the exportation of slaves, as an article of trade, not to the existence of slavery itself; for it takes care to re-enact and establish the maxim of the civil law, that the children of every female slave shall follow the state and condition of their mother." And he adds, that "sales made in the ordinary course of the law, and which are free from any kind of collusion, are not within the provisions of the act." "By considering the sale mentioned in the act, as confined to a voluntary disposition of the slave for a valuable consideration, by the owner himself, we are enabled effectually to reach the mischief in view, the importation of slaves for gain, and we take away every such motive to import them." In the same case, BENSON, Justice, says: "By the law of this state, slavery may exist within it. One person can have property in another, and the slave is part of the goods of the master, and may be sold, or otherwise aliened by him; or remaining unaliened, is, on his death, transmissible to his executors; but by the act under consideration, a slave imported, or brought in, is not to be sold," &c. As to all other slaves in New York, the court decide: 1st. That they may be sold by the owner as other property, but as to imported slaves, that they cannot be sold by the owner; but 1st, that he may give them away, and the title of the donor be valid. 2d. That their issue may be sold, even by the owner who imported their mother. 3d. That the imported slaves are liable to sale by sheriffs, assignees, trustees, executors or administrators, as all other property. In these opinions, the court was unanimous, and the case is in point in every particular, and was subsequently recognised in all succeeding cases.

The same court, in 2 Johns. Cas. 89, held, that as to a slave imported in 1795, from New Jersey to New York, the sale was void, under the act of 1788; and this case also

was affirmed in 1802, and the principle of the two cases, and especially of the former, was expressly recognised by the supreme court of New York, in 1820; and that a note given for the purchase of a slave so imported and sold, was void. 17 Johns. 295. In 1803, the supreme court of New York enforced the act of 1788 as well as of 1801, rendering void the sale of imported slaves. 3 Caines 325. Now, slaves already in the state of New York, stood on the same footing as slaves in *Mississippi, and it was only as to slaves imported into either state, after a certain date, that the sale is sought to be invalidated; and if the law is void in Mississippi, under the argument of our opponents, it must have been equally void in New York, during all this period, notwithstanding these repeated decisions to the contrary of the courts of that state, upholding the rights of property and of sale of all the slaves in New York, upholding the right of property and the sale for debts, or in course of distribution, even of these imported slaves, but rendering void the sale by the importer.

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By the law of North Carolina, of 1794, Haywood's Man. 533–4, c. 2, the introduction of slaves, after the 1st of May then next, for sale or hire, was prohibited, and an oath was required, that the slaves were not introduced for traffic, with an exception in favor of emigrants bringing in their own slaves for their own use, and an exception in favor of travellers. The penalty was 100*l.* for each slave so illegally introduced. Upon the general revisal of the laws of this state, at the September session 1836–7, the importation of slaves from certain states was altogether interdicted. 1 Turner & Hughes' Dig. 571–4. The acts of South Carolina, of 1800 and of 1801, prohibited the importation into that state of slaves from any place "without the limits of this state," under penalty of $100 for each slave so illegally imported, and forfeiture of the negro, to be sold by the state. The act of 1802 excepts from former act, persons bringing into or through the state any slaves, on taking oath that they were not intended for sale; and if imported contrary to the law, they were declared free.

By the act of Missouri of 19th March 1835, digesting former laws, various restrictions were imposed on the introduction of slaves; and nearly similar provisions were adopted by Arkansas, on the 24th of February 1838. Rev. Stat. Missouri, 581; Ibid. Arkansas, 730. In Missouri, the validity of laws restricting or totally prohibiting the importation of slaves, has been repeatedly affirmed by the supreme court of that state (1 Mo. 472; 2 Ibid. 214; 3 Ibid. 270), and several of these decisions recognise and enforce the provision, before quoted, of the constitution of Illinois, prohibiting the introduction of slaves into that state. By territorial laws, before referred to, adopted in 1808, restrictions were imposed in the territory embracing the present states of Mississippi and Alabama, on the introduction of slaves as merchandize. By the constitutions of each of these states, adopted in 1817 and 1819, full power is given to the legislatures to prohibit this traffic. By the amended constitution of Mississippi of 1832, this traffic was entirely prohibited, and by the act of 13th of May 1837, such importation for sale into that state, is declared a high misdemeanor, punishable with imprisonment, with a fine of $500 for each slave so introduced, and the nullity of the contract of sale, and forfeiture of the purchase-money. In Louisiana, by the acts of 1826; of the 19th of November 1831; 2d of April 1832; before referred to, the introduction of slaves into that state for sale, was prohibited under severe penalties, and the slaves so illegally introduced declared free.

By the act of Rhode Island, of 1784, subsequently continued and still in force, so far as shown by their most recent digests, the importation of slaves into the state was forbidden, with the exception of domestic slaves of "citizens of other states travelling through the state or coming to reside therein;" and the slaves illegally imported declared free. The slaves then in the state, or imported under the above exceptions, were continued as slaves, but their children born after the date of the law became free. Laws of Rhode Island, 441. By the laws of Connecticut, of 1774 and of 1784, since three times re-enacted, and revised and continued in 1797 and 1821, slavery was continued as to the slaves already in the state, but all born after the 1st of March 1784, were declared free. See Stat. 428, 440; 1 Swift's Syst. 220; 12 Conn. 45, 59, 60, 64. These laws declared "that no Indian, negro or mulatto slave shall, at any time hereafter, be

brought or imported into this state, by sea or land, from any place or places whatsoever, to be disposed of, left or sold within the state." In the case of a slave brought from Georgia to Connecticut, 1835, and left there for temporary purposes, as was contended, such slave was declared free, one judge only dissenting, and he upon the sole ground that the slave was not left, *within the meaning of the act of 1784. In this case, reported in 12 Conn. 38-67, and decided in 1837, it was held, first, that [*683 slavery did exist in Connecticut as to the slaves introduced prior to a certain date; that these slaves "still continued to be held as property, subject to the control of their masters; and that numbers of them still continue so to be held, as proved by the last census of the state." 2d. The doctrine of 8 Conn. 393, was affirmed, in which it was declared, that a certain negro in Connecticut "was the slave and personal property" of his master in Connecticut. 3d. That "there is nothing in the constitution of the United States," forbidding any state from preventing slaves being voluntarily brought within their limits. 4th. That slavery is local, and must be governed entirely by the laws of the state in which it is attempted to be enforced. 5th. That the law of Connecticut, and of any other state preventing the importation of slaves from any other state for sale, are valid. 6th. That a state, retaining in servitude the slaves within its limits, may legislate "to prevent the increase of slavery by importation." This case was very elaborately argued, and the opinion prepared with great care and ability; and upon these points, evolved by me from the decision, the court was unanimous. The case is precisely in point, on the principles decided; and if slaves can be imported, for sale, into Mississippi, they can be imported, for sale, into Connecticut; for the slaves already in the latter are just as much "the property of their masters," as in the former. See also similar decisions in Connecticut on most of these points. 2 Root 335, 517; 2 Conn. 355; 3 Ibid. 467; 8 Ibid. 393.

By the act of New Jersey of 14th March 1798, Elmer's Dig. 520, slaves already within the state, it is expressly enacted, shall remain slaves for life; and their sale by their owners is permitted, except collusive sales of decrepit slaves. The importation of slaves, for sale, is prohibited under a pecuniary penalty, but certain persons are permitted to bring in certain slaves for their own use. By the act of 27th of February 1820, Elmer 525, slaves born after 4th of July 1804, are declared free; the males at 25, and the females at 21 years of age. The importation of slaves into the state for sale, or exportation for sale, is forbidden, and also generally, with some exceptions; and the slave unlawfully imported or exported is declared free. The law of New Jersey, of 1798, differs in no respect from the present provision in Mississippi, and these laws have been universally recognised in New Jersey. See 2 Halst. 253; 3 Ibid. 219, 275; 1 Penning. 10; 4 Halst. 167; 1 Ibid. 374. In Indiana, no slave can be imported under their laws. 1 Blackf. 60; 3 Am. Jurist, 404. Nor in Ohio, Maine, Massachusetts, New Hampshire or Vermont, under their constitutions. See Book of Const. pages 273, 19, 38, 62, 81. See Commonwealth *v.* Aves, 19 Pick. 357; 4 Mass. 123, 128, 129; 2 Tyler 192.

When the constitution of the Union was formed, all the states were slave-holding states, except Massachusetts; and by the doctrine of our opponents, none of them but that state could have prohibited the introduction of slaves, for sale, and yet they all exercised the power. That there may be no mistake on the subject, I refer the court, to Senate Document 505, containing the census of each state, compiled by the department of state, under the resolution of congress of February 26th, 1833 (and the supplement returned this year), showing the number of slaves in those states generally denominated free states.

	1790.	1800.	1810.	1820.	1830.	1840.
New Hampshire	158	8				
Rhode Island,	952	381	108	48	17	5
Connecticut,	2,759	951	310	97	25	54
Vermont,	17					
New York,	21,324	20,343	15,017	10,088	75	3
New Jersey,	11,423	12,422	10,851	7,557	2,254	658
Pennsylvania,	3,737	1,706	795	211	403	31
Delaware,	8,887	6,152	4,177	4,509	3,292	2,613
Illinois,			168	917	747	184

*684] *And yet, all these nine states, now denominated free states, did, so far as they existed in 1790, hold slaves, and acknowledge property in slaves, and the sale of slaves within their limits was valid; and according to the argument of our opponents, all their laws, prohibiting the importation of slaves for sale, then were, and still are, unconstitutional; and slaves always could, and now can be, lawfully imported and sold, and held as slaves there; for the doctrine is, that so long as a single slave is held as such in any state, any number of slaves may be imported into and sold and held as slaves, within its limits, the alternative being between total, immediate and absolute emancipation of all slaves, on the one hand, and the perpetuity of the slave-trade on the other.

But the acts of 1792, of Virginia, and of 1796, as well as previous laws, of Maryland, prohibiting in effect the introduction of slaves from other states for sale, have been repeatedly and unanimously recognised as valid, and enforced by the supreme court of the United States, and also by the highly respectable court for the district of Columbia. By act of congress, the laws in force in Virginia and Maryland, at the date of the cession by those states of their respective portions of the district of Columbia, were continued in force, after the cession, meaning thereby, of course, only such laws of those states as were not repugnant to the constitution of the United States, for such laws only could have been previously in force in those states, and such laws only could have been continued in force in the district. These laws, then, under the declaratory act of congress, as has been universally conceded, continued in force by virtue of their previous operations over those parts of the district formerly included in the ceding states, and not by virtue of any act of congress re-enacting their provisions; and here let it be remarked, that even as to those laws of any state adopted prior to the constitution of the United States, but which were repugnant to powers granted exclusively to congress by that instrument, it is an admitted principle, and all such laws became null and void, after the adoption of the constitution, and all subsequent decisions enforcing any laws of a state, even prior to 1788, forbidding the introduction of slaves for sale, proclaim the consistency of those laws with the constitution of the United States, as fully as though they had been subsequently enacted.

In 1802, a claimant of a slave, without the consent of the true owner, brought him from Maryland into Alexandria, in the district of Columbia (formerly Virginia), where he remained more than a year, and the circuit court for the district of Columbia decided, that being a slave imported contrary to the law of Virginia, of 1792, manumitting slaves imported from any other state, and held twelve months in that state, unless upon oath made within a certain time, that the importer did not bring them in "with an intention of selling them"—and this oath not having been taken by the claimant who introduced the slave, he was free. Scott *v.* Negro London, 3 Cranch 326. The decision was reversed by this court, upon the ground, that although the prescribed oath was not made in due time by the claimant, who introduced the slave as his, yet such oath having been made within the proper time by the owner, on that ground the slave was not free; but the validity of the Virginia law was fully recognised. 3 Cranch 324. In 6 Ibid. 1, this court also admitted the validity of the law of Maryland of 1783, prohibiting the introduction of slaves into that state. In 1 Wheat. 1, this court again unanimously admitted the validity of the Maryland act of 1796, before quoted, pro-

hibiting the importation of slaves for sale, or also to reside, except as to emigrants. the court expressly declare, that, that "act of the state of Maryland," "is in force in the county of Washington (district of Columbia)." In 8 Pet. 44, Lee *v.* Lee, the case is thus stated by the reporter, and the unanimous decision of this court, as pronounced by Justice THOMPSON, is also given. "The plaintiffs in error filed a petition for freedom in the circuit court of the United States for the county of Washington, and they 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 [*685 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." The court said: "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."

Here, the law of Maryland, of 1796, prohibiting the introduction of slaves from other states into that state, was enforced by the unanimous opinion of the supreme court of the United States. This is not an extra-judicial opinion, but a decision directly in point, enforcing a law of Maryland, which involved this very question now to be decided by this court. And here let me observe, that if it is lawful and must be permitted, under the commercial power, to introduce slaves from one state into another, for sale, it cannot be lawful in any state to emancipate them as a consequence of such introduction, any more than to forbid the sale. And here let it be remarked, that our opponents concede that each state may emancipate all the slaves within their limits, by a state law, where there is no opposing provision of the state constitution, and where there is, then by an amendment of her state constitution, to be adopted by the state. Each state may dissolve, at pleasure, or establish, the relation of master and slave, within her limits, and that congress can neither dissolve nor establish that relation in a state. But to add to the number of slaves in a state against her will, by the authority of congress, is so far to establish and extend the relation of master and slave, within her limits, by the authority of congress. But by the concession of our opponents, a state may emancipate all the slaves within her limits, by declaring them not to be property within her limits, and then this commercial power they say will not extend to that state. As, however, a state cannot do this, as to goods and merchandize, by declaring them not to be property, within her limits, so as to exempt them, when imported, from the operation of the commercial power, this very distinction shows, that goods and merchandize are, and slaves are not, within the operation of the commercial power. But this admission of our opponents, that a state may emancipate all or any portion af the slaves within her limits, concedes, as it seems to me, the whole case, for if the state may emancipate, must she not have the power, the moment the slaves are brought within her limits? for they are then within her territory and jurisdiction, and subject to her exclusive power; and if a state may not thus emancipate, as soon as the slaves are landed, must she wait for days or years, or who is to prescribe the time when the state laws shall begin to operate, or the number of slaves that shall

be embraced within the provision, whether it shall include the *ante-nati* or *post-nati*, or extend only to those that may be hereafter introduced, or include also all those already in a state? and no one will deny, that if to emancipate slaves introduced for sale be not forbidden by the commercial power, it cannot be forbidden by that power to declare the sale unlawful.

We have seen in the course of this argument, that ten of the twelve states which formed the constitution, have passed laws, many of them contemporaneous with the *686] *formation of the constitution, or almost immediately after, prohibiting the introduction from other states, of slaves for sale, and have enforced these laws. That similar provisions have been made in effect by all the states, in their laws or constitutions, and that these provisions have all been enforced; that the supreme judicial tribunal of every state (where the question has been made) have, again and again, during a period of more than fifty years, declared these laws to be valid; and that the supreme court of the United States have, again and again, unanimously recognized their constitutionality, and carried them into execution; that at least six of the new states have affirmed in their constitutions the power to pass those laws, and that congress (sometimes by a unanimous vote) have, on all these occasions, commencing in 1792, and terminating in 1836, conceded, that these constitutions, affirming this power, were "not repugnant to the constitution of the United States."

Does not all this settled action of all the departments of the governments of the states, and of the United States, fix the construction of the constitution in this respect, and leave it no longer an open question for the investigation of this court? This court have declared, that "a contemporary exposition of the constitution, practised and acquiesced under for a period of years, fixes the construction, and the courts will not shake or control it." 1 Cranch 299. And now, will this court, by a single decree, overthrow the law as settled, for more than fifty years, by all the departments of the governments of the states, and of the Union? If so, it must sacrifice at once a hecatomb of acts and decisions, and change the structure of the government itself. It would be a judicial revolution, more sudden and overwhelming in its effects, than the last great revolutions in France and England, which were little more than changes of dynasty. I have called it a revolution, not a usurpation; but the most daring usurper never effected so sudden and extensive a change in the civil and political rights, and settled internal policy of a nation. These have been generally spared by conquerors and usurpers, or if not spared, they were not subverted by a single decree, to be at once proclaimed and executed. But here, the moment this decree shall be recorded, the revolution will have commenced and terminated, and this court will re-assemble among the fragments of laws subverted, and decisions overthrown. The constitutions of six of the states; the laws of all upon this subject, and a series of uninterrupted judicial decisions for more than half a century, will be at once obliterated. With them will fall the acts of congress upon this question, from the admission of the first, to the last of the new states, and many confirmatory decisions of this tribunal. This decree affects the past, the present and the future. Reaching back to 1788, it annuls all the state laws forbidding the introduction of slaves, and re-enslaves all, and the descendants of all, that were liberated by those statutes. And all this is to be effected by a single decree, no time allowed to prepare for the mighty change, but it is to be the work of an instant.

So much for the past and present, and now for that dark and gloomy future, when this court, having annulled all the state laws on this subject, shall announce that it is a question over which the power of congress is supreme and exclusive. Could the Union stand the mighty shock, and if it fell, shall we look upon the victims of anarchy and civil war, resting wearied for the night from the work of death and desolation, to renew in the morning the dreadful conflict? Throwing our eyes across the Atlantic, shall we behold the consequences, when the overthrow of this Union, this second fall of mankind, shall be there promulgated? Shall we there see those daring men, now pleading the cause of self-government around the thrones of monarchs, sink despairing from the conflict, amid the shouts of tyrants, exulting over the prostrate liberties of man? And who can expect such a decree from this tribunal? No! this court will now prove, that

however passion or prejudice may sway for a time any other department of this government, here the rights of every section of this Union are secure. And when, as I doubt not, all shall now be informed, that over the subject of slavery congress possesses no jurisdiction; the power of agitators will expire, and this decree will be regarded as a re-signing and re-sealing of the constitution.

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PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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ADMINISTRATION.

ADMIRALTY.

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AFRICANS OF THE AMISTAD.

1. The Spanish schooner Amistad, on the 27th day of June 1839, cleared out from Havana, in Cuba, for Puerto Principe, in the same island, having on board, Captain Ferrer, and Ruiz and Montez, Spanish subjects; Captain Ferrer had on board Antonio, a slave; Ruiz had forty-nine negroes: Montez, had four negroes, which were claimed by them as slaves, and stated to be their property, in passports or documents, signed by the governor-general of Cuba; in fact, these African negroes had been, a very short time before they were put on board the Amistad, brought into Cuba, by Spanish slave-traders, in direct contravention of the treaties between Spain and Great Britain, and in violation of the laws of Spain. On the voyage of the Amistad, the negroes rose, killed the master, and took possession of the vessel; they spared the lives of Ruiz and Montez, on condition that they would aid in steering the Amistad for the coast of Africa, or to some place where negro slavery was not permitted by the laws of the country; Ruiz and Montez deceived the negroes, who were totally ignorant of navigation, and steered the Amistad for the United States; and she arrived off Long Island, in the state of New York,

CASES CITED.

CHANCERY.

1. In the case of Livingston *v.* Story, which came before this court in 1835 (9 Pet. 655), the court took occasion to examine the various laws of the United States, establishing and organizing the district court of Louisiana, and to decide whether that court had equity powers; and if so, what should be the mode of proceeding in the exercise of such powers. The various cases which had been before the court, involving, substantially, the same question in relation to the states where there were no equity state courts, or laws regulating the practice in equity causes, were referred to; and the uniform decisions of the court have been, that there being no equity state courts, did not prevent the exercise of equity jurisdiction in the courts of the United States; and it was, accordingly, decided, that the district court of Louisiana was bound to proceed in equity causes, according to the principles, rules and usages which belong to the courts of equity, as contradistinguished from courts of common law. *Gaines* v. *Relf*.....*9
2. The supreme court has not the power to compel the circuit court to proceed according to established rules in chancery cases; all that the court can do, is to prevent proceedings otherwise, by reversing them, when brought here on appeal.....*Id.*
3. It is one of the most familiar duties of a court of chancery to relieve against mistake; especially where it has been produced by the misrepresentations of the adverse party. *Rhode Island* v. *Massachusetts*.....*233

See STATUTE OF LIMITATIONS, 1, 2.

COMPENSATION OF PUBLIC OFFICERS.

1. Samuel W. Dickson was appointed a receiver of public money for the Choctaw district, Mississippi, entered on the duties of his office on the 22d November 1833, and continued to hold the office until the 26th July 1836, when he resigned; he received more than $250,000 of public money, in each year, during the two years of his continuance in office; and also more than $250,000 during the portion of the year commencing on the 22d November 1835, and ending on the 26th July 1836. He claimed, under the act of congress, relating to the compensation and salaries of receivers, a compensation of one per cent. on the sum of $250,000 in each year; and also a commission of one per cent. on the money received during the fraction of the year, not exceeding, with the salary of $500, $3000, in the fraction of the last year; the United States claimed to limit the commissions and salary to the fiscal year, from January 1st to December 31st, annually; and denied his right to more than a portion of the commissions on the money received by him, limiting the same to the proportion of the year he was in office: *Held*, that the receiver was entitled to charge his commissions on the whole sum received by him in the part of the year he was in office; the same not exceeding, with his salary, the amount of $3000. *United States* v. *Dickson*.....*141
2. The receiver was entitled to calculate his yearly commission on the amount of public money received by him during a year, commencing from the date of his appointment, instead of calculating it by the fiscal year, which commences with the calendar year, on the first day of January in every year. He had a right to charge the whole yearly maximum of commissions, for the fractional portion of the year in which he resigned. *Id.*
3. The United States instituted a suit against Charles Gratiot to recover a balance alleged to be due by him for money paid to him as "chief engineer in the service of the United States," as shown by two treasury transcripts; the claims of General Gratiot against the United States, as off-sets to the demand against him, which had been exhibited to the accounting officers of the treasury, were for commissions on disbursements of public money at Fortress Monroe and Fort Calhoun,

CONSTITUTIONAL LAW.

DEMURRER.

DEPARTMENTS.

DISTRICT JUDGE OF LOUISIANA.

DISTRICT OF COLUMBIA.

DOWER.

ENGINEER CORPS.

See COMPENSATION OF PUBLIC OFFICERS, 3–9.

ERROR

See APPEAL.

EVIDENCE.

1. A *certiorari* had been issued by the supreme court to the circuit court, on an allegation of diminution, and the judgment in the replevin suit certified to the supreme court, under the *certiorari*, substantially differed from the judgment described in the declaration on the replevin bond, in a suit in the circuit court, brought after the judgment was rendered. In the circuit court, on the suit on the replevin bond, the judgment was used in evidence, without objection: *Held*, that the judgment was properly given in evidence, to show the amount of damages which the plaintiffs in the replevin suit had sustained; and the defendants in the suit on the replevin bond, had no right to go into any inquiry as to the evidence on which the verdict was rendered. *Gorman* v. *Lenox's Executors* *115
2. Although public documents of the government, accompanying property, found on board of the private ships of a foreign nation, are to be deemed *primâ facie* evidence of the facts which they state, yet they are always open to be impugned for fraud; and whether that fraud be in the original obtaining of those documents, or in the subsequent fraudulent and illegal use of them, where once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof. Fraud will vitiate any, even the most solemn, transactions; and any asserted title founded upon it, is utterly void. *The Amistad*..... ..... *519
3. Nothing is more clear in the laws of nations, as an established rule to regulate their rights, and duties and intercourse, than the doctrine that the ship's papers are *primâ facie* evidence of what they state; and that if they are shown to be fraudulent, they are not to be held proof of any valid title whatever; this rule is applied in prize cases; and is just as applicable to the transactions of civil intercourse between nations, in times of peace..... *Id.*

See SET-OFF, 1.

EXECUTOR.

1. An executor has not, ordinarily, any power over the real estate; his powers are derived from the will, and he can do no valid act beyond his authority. Where a will contains no special provision on the subject, the land of the deceased descends to his heirs; and this right cannot be divested or impaired, by the unauthorized acts of the executor. *Brush* v. *Ware*..... *93

FLORIDA LAND-CLAIMS.

1. A claim to land in East Florida, founded on a grant by Governor Kindelan, to Robert McHardy, dated November 8th, 1814, confirmed by the supreme court. *United States* v. *Rodman*..... *130
2. The supreme court, in the case of the United States *v.* Clarke, 8 Pet. 48, say, "that if the validity of the grant depends upon its being in conformity with the royal order of Spain of 1790, it cannot be supported;" but immediately proceeds to show, "though the royal order is recited in the grant, that it was, in fact, founded on the meritorious consideration of the petitioner having constructed a machine of great value for sawing timber; the recital of the royal order of 1790, in this grant, is entirely immaterial, and does not affect the instrument:" *Held*, the recital of the royal order, in this case, was quite immaterial..... .....*Id.*
3. The case of the United States *v.* Wiggins, 14 Pet. 325, which decided, that certain proof of the certificate of Aguilar, secretary of East Florida, was sufficient, cited; and the decision on that point affirmed.....*Id.*
4. The Spanish governors of Florida had, by the laws of the Indies, power to make large grants to the subjects of the crown of Spain; the royal order of Spain, of 1790, applied to grants to foreigners. These grants, before the cession of Florida to the United States, had been sanctioned for many years by the king of Spain, and the authorities representing him in Cuba, the Floridas and Louisiana. This authority has been frequently affirmed by the supreme court.....*Id.*
5. An application was made to the governor of Florida, in 1814, stating services performed by the petitioner for the government of Spain, and the intention of the petitioner to invest his means in the erection of a water saw-mill, and marking the place where the lands were situated, which were asked for. The governor granted the land, referring to the merits and services of the applicant, and in consideration of the advantages which would result to the home and foreign trade by the use proposed to be made of the land: *Held*, that this was not a conditional grant; and that no evidence of the erection of a water saw-mill was required to be given, to maintain its validity, or induce its confirmation..... .....*Id.*
6. John Forbes, by memorial to governor Kindelan, the governor of East Florida, set forth, that in 1799, there had been granted to Panton, Leslie & Company, for the purpose of pasturage, 15,000 acres of land which they were obliged to abandon, as being of inferior

PRACTICE.

PROMISSORY NOTES.

PUBLIC ACCOUNTS.

See COMPENSATION OF PUBLIC OFFICERS, 1, 2.

PUBLIC MONEY.

PUBLIC OFFICERS.

1. The United States proceeded on the official bond of Boyd, a receiver of public moneys for the district of lands subject to sale at Columbus, Mississippi; Boyd had been appointed receiver for four years, from the 27th December 1836; and the bond was for the faithful performance of the duties of his office, and was executed on the 15th of June 1837. The breaches assigned by the United States were, 1st. That after the 27th day of December 1836, Boyd received, in his official capacity, $59,622, which he failed to pay over to the United States, as he was bound to do by law. 2d. That Boyd, on the 27th day of December 1836, and at divers days between that and the 30th of September 1837, received $59,622, as receiver, which sum remained in his hands on the 30th day of September 1837; and that he failed to pay the same, pursuant to his instructions from the secretary of the treasury, and the duties of his office, &c. It matters not at what time the moneys had been received by the officer, if received after his appointment; they were held in trust for the United States, and so continued to be held, at and after the date of the bond; and the sureties are liable to the United States. *United States* v. *Boyd* *187

See CONTRACT.

RHODE ISLAND.

See BOUNDARIES OF STATES.

RULES OF COURT.

See PRACTICE, 3.

SALVAGE.

1. The schooner North Carolina, bound from Appalachicola to Charleston, with a cargo of cotton, part on account of the consignees, and part the property of the shipper, struck on a reef about 95 miles from Key West; and the next morning 110 bales of cotton were taken from her by the wrecking schooner Hyder Ally, when she floated; and she sailed with the Hyder Ally to Indian Key, and arrived there the same evening; The Hyder Ally was one of those wrecking schooners in the profits of which Houseman was a participator; he became the consignee of the North Carolina; and salvage being claimed by the master of the Hyder Ally, a reference was made by the master of the North Carolina, and the master of the wrecker, and by an award, 35 per cent. was allowed as salvage; and 102 bales of cotton were put into the stores of Houseman, in part payment of the salvage; $100 was paid in cash, and a draft for $600 was given by the master of the North Carolina, in further satisfaction of the salvage, and the commissions of Houseman, with the vessels expenses. Afterwards, the consignees of the cotton sent an agent to Key West, who proceeded, by a libel in his name, as agent, in the superior court of the United States of Monroe county, in Florida, alleging the facts; and by process issued by the court, 72 bales of the cotton of the North Carolina were attached in the hands of Houseman. The court decreed, that the libellant should recover the 72 bales of cotton; and Houseman appealed to the court of appeals; in that court, a supplemental libel was filed by the appellee, claiming damages for the taking and the detention of fifty other bales of cotton, making the whole number of 122 bales, which had gone into the possession of Houseman; the court of appeals gave a decree in favor of the appellee, for the value of 122 bales. The supreme court affirmed the decree as to the 72 bales, and set aside that part of the decree which allowed the value of the 50 bales; leaving the consignees or owners of the 50 bales to proceed in the superior court of East Florida, by a new libel, for the recovery of the same or the value thereof. *The North Carolina*....*41
2. There are many cases in which the contract of the master, in relation to the amount of salvage to be paid to the salvors, or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster, it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of both the vessel and cargo; and when, from his situation, he is unable to consult them, or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage; and he is not bound in all cases to wait for the decision of a court of admiralty.... *Id.*
3. So too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners, that the amount should be settled at once by the master; and the vessel proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases, unless the acts of the master are ratified by the owners, his conduct will be carefully watched

SET-OFF.

See COMPENSATION OF PUBLIC OFFICERS, 5–7.

SLAVES.

See CONSTITUTIONAL LAW.