REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1842.

By RICHARD PETERS,

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

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

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OBITUARY.

PHILIP PENDLETON BARBOUR.

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

THE family from which Judge Barbour was descended, was one of the oldest and most respectable in Virginia. His great-grandfather was a merchant of Scotland, who immigrated to this country. His grandfather was the pioneer and first settler of the country lying between the eastern base of the Blue Ridge, and the South-west mountains. His father, Thomas Barbour, inherited considerable wealth, and was a member of the old House of Burgesses, from the then very large county of Orange. He was one of those who, in 1769, signed the "non-importation act" between this country and Great Britain. After the formation of the Union, he was elected to the legislature. Richard Henry Lee, in a letter to his brother, Arthur Lee, bore testimony to his worth, to the effect, "that he was glad that Thomas Barbour was in our state councils, for he was a truly intelligent and patriotic man."

On the maternal side, as his name indicates, Judge Barbour was related to the Pendleton family, his grandmother having been the aunt of the distinguished Judge Pendleton. Philip Pendleton Barbour was born on the 25th of May 1783. Owing to his great hospitality, and a long series of disasters, his father was unable to afford him that liberal education which his talents and early promise would have justified. He was, however, sent early to school, where he soon developed many of those qualities for which he was afterwards so justly distinguished. He exhibited great aptitude for the acquisition of languages; and with a correct taste and strong memory, sought out and retained through life, the beauties of the Greek and Roman classics. Even in the performance of the tasks of a country-school, he manifested that precision of information and depth of search, which on a broader theatre, and carried to higher subjects, won for him a wide-spread and enduring reputation. He remained at school, until the end of 1799. During the early part of 1800, he studied law at home; but, in October, determined to visit Kentucky, where, under great difficulty and embarrassment, he commenced the practice of law. In the summer of 1801, he yielded to the persuasions of his friends, to return to Virginia; and having borrowed the necessary funds, spent one session at William and Mary college. In 1802, he resumed the practice of law in Virginia. In October 1804, he was

united to Frances T. Johnson, daughter of Col. Benjamin Johnson, of Orange county, Virginia. During the next eight years, he applied himself unceasingly to his profession. In 1812, he was elected to the assembly, where he continued two sessions. In 1814, he was elected to congress, where he continued until 1825. Whilst there, he was chairman of the naval and judiciary committees; and in 1821, was chosen speaker of the House of Representatives. About the year 1825, the University of Virginia went into operation. He was offered the professorship of law in that institution, and was pressed by Mr. Jefferson to accept it. He refused this station, however, and was appointed a judge of the General Court of Virginia. In 1827, at the written request of a majority of his old constituents, he resigned his seat on the bench, and was re-elected, without opposition, to congress. In 1829, together with the illustrious Madison, he was chosen to represent the county of Orange, in the convention called to amend the constitution of Virginia. He presided over the deliberations of this body, in a manner which elicited the approbation of its members. He was also president of the anti-tariff convention which met in Philadelphia. In 1830, he retired from the practice of a profession which had yielded him considerable wealth, and of which he had been one of the brightest ornaments, and accepted the station of federal judge for the eastern district of Virginia. The chancellorship was offered to him and declined; as was also the post of attorney-general. He refused the nominations for a seat in the court of appeals, the gubernatorial chair, and the senate of the United States. As federal judge, he won new honors, and showed himself worthy of the high and enviable station to which, in 1836, he was called, that of associate judge of the supreme court of the United States. Having thus reached the height of the profession which he had chosen, he was unweariedly striving, with a virtuous ambition, to win that fame which great ability can only give, when joined with pure principles, when death cut him off in his useful career, and robbed our country of one of its most distinguished sons.

It remains for us to take a brief notice of the professional attainments and judicial character of Mr. Justice Barbour. It has been already seen, that no inconsiderable portion of his life was employed in active political duties and pursuits, which, if not incompatible with, are (to say the least) by no means favorable to the cultivation of judicial knowledge, or to found a solid reputation in the law. He did not, however, at any time, relax his vigilance in his professional studies, or become indifferent to professional success. On the contrary, he had the ambition to acquire all the knowledge which might be useful in his practice at the bar, and the persevering firmness to surmount all intervening obstacles. His mind was, in a remarkable degree, acute, sound and discriminating, inclining to subtility in disquisition, but not misled by it. He was earnest, candid, patient and laborious in all his investigations; quick to discern the real points and merits of a case; but slow in arriving at his own conclusions. His talents were of a high order; but he was distinguished less for brilliancy of effort, than for perspicacious, close and vigorous reasoning. He sought less to be eloquent

than to be accurate ; less to persuade by declamatory fervor, than to convince by clear and logical deduction. The learning, therefore, that he brought to the discussion of every cause, was pertinent, exact and illustrative. It had point and force, and not merely remote or loose analogies to give it effect. When he was elevated to the bench, he felt a deep and conscientious sense to his new duties ; and was solicitous to master all the appropriate learning, to discharge them in the best manner ; and especially, after his appointment to the bench of the supreme court, he devoted his leisure, with strenuous diligence, to attain all the various knowledge demanded for eminence in that station. Few men ever labored with more entire success in such a noble pursuit. During his brief career in that court, he widened and deepened the foundations of his judicial learning to an extraordinary extent ; his reputation constantly advanced with a steady progress, and his judgments were listened to with increased respect and profound confidence. If he had lived many years, with good health, he could not have failed to have won the highest distinction for all the qualities which give dignity and authority to the bench. It might be truly said of him, that he was not only equal to all the functions of his high station, but above them. *Par negotiis ; et supra*——. His country has lost, by his death, a bright ornament, and a pure and spotless patriot.

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,
" John Catron.
" John McKinley.
" Peter V. Daniel,

} Associate Justices.

Hugh Swinton Legaré, Esq., Attorney-General.

William T. Carroll, Clerk.

Alexander Hunter, Marshal.

Richard Peters, Reporter.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The References are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The References are to the Star *pages.

A

B

C

J

K

L

V

W

Y

RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

ORDERED, that printed arguments will not be received under the fortieth rule of the court, unless filed within forty days from the commencement of the term, except in cases which are reached in the regular call of the docket.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1842.

JOHN SWIFT *v.* GEORGE W. TYSON.

Bills of exchange.—Bonâ fide holder.—State decisions.

Action in the circuit court of New York on a bill of exchange, accepted in New York, instituted by the holder, a citizen of the state of Maine. The acceptance and indorsement of the bill were admitted, and the defence was rested on allegations that the bill had been received in payment of a pre-existent debt; that the acceptance had been given for lands which the acceptor had purchased from the drawer of the bill, to which lands the drawer had no title; that the quality of the lands had been misrepresented; and the purchaser imposed upon by the fraud of the drawer, and those who were co-owners of the land, and co-operators in the sale. The bill accepted had been received *bonâ fide*, and before it was due.

There is no doubt, that a *bonâ fide* holder of a negotiable instrument for a valuable consideration without any notice of the facts which implicate its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by those facts; and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity.[1]

The holder of negotiable paper, before it is due, is not bound to prove that he is a *bonâ fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proof: and therefore, it is incumbent on a defendant, to establish by way of defence, satisfactory proofs of the contrary, and thus overcome the *primâ facie* title of the plaintiff.[2]

The 34th section of the judiciary act of 1789, which declares, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise recognise or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," has uniformly been supposed by the supreme court to be limited in its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to *things having a permanent locality, such as the rights and titles to real estates, and other matters immovable and intra-territorial in their nature and character. The section does not extend to contracts or other instruments of a commercial nature; the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.[3] [*2

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[1] Goodman *v.* Simonds, 20 How. 343; Murray *v.* Lardner, 2 Wall. 121; Brown *v.* Spofford, 95 U. S. 481. A past consideration is sufficient to constitute one a *bonâ fide* holder for value. Sawyer *v.* Prichett, 19 Wall. 166; Railroad Co. *v.* National Bank, 102 U. S. 23. And see Tilden *v.* Blair, 21 Wall. 241.

[2] Collins *v.* Gilbert, 94 U. S. 753.

[3] Carpenter *v.* Providence Washington Ins. Co., *post*, p. 495; Oates *v.* National Bank, 100 U. S. 239; Railroad Co. *v.* National Bank, 102 Id. 14.

CERTIFICATE OF DIVISION from the Circuit Court for the Southern District of New York. This action was instituted in the circuit court, upon a bill of exchange, dated at Portland, in the state of Maine, on the first day of May 1836, for $1536.30, payable six months after date, drawn by Nathaniel Norton and Jairus S. Keith, upon and accepted by the defendant; the bill having been drawn to the order of Nathaniel Norton, and by him indorsed to the plaintiff. The principal and interest on the bill, up to the time of trial, amounted to $1862.06.

The defence to the action rested on the answers to a bill of discovery filed by the defendant against the plaintiff; by which it appeared, that the bill had been received by him from Nathaniel Norton, with another draft of the same amount, in payment of a protested note made by Norton & Keith, and which had been paid by him to the Maine Bank. When the draft was received by the plaintiff, it had been accepted by the defendant who resided in New York. The plaintiff had no knowlege of the consideration which had been received for the acceptance, and had no other transaction with the defendant. He had received the drafts and acceptances in payment of the protested note, with a full belief that the same were justly due, according to their tenor; and he had no other security for the payment of the protested note, except the drafts, nor had he any knowledge of any contract or dealing between the defendant and Norton, out of which the said draft arose. The defendant then offered to prove that the bill of exchange was accepted by him as part consideration for the purchase of certain lands in the state of Maine, of which Keith & Norton, the drawers of the bill, represented themselves to be the owners, and represented them
*3] to be of great value, made certain estimates *of them which were warranted by them to be correct, and also contracted to convey a good title to the land; all of which representations were in every respect fraudulent and false; and that said Keith & Norton had never been able to make a title to the lands; whereupon, the plaintiff, by his counsel, objected to the admission of said t stimony, or any testimony, as against the plaintiff, impeaching or showing the failure of the consideration on which said bill was accepted, under the facts aforesaid admitted by the defendant, and those proved by him, by reading said answers in equity of the plaintiff in evidence. And the judges of the court divided in opinion on the point or question of law, whether, under the facts last mentioned, the defendant was entitled to the same defence to the action, as if the suit was between the original parties to the bill, that is to say, the said Norton, or the said Norton & Keith, and the defendant? And whether the evidence so offered in defence, and objected to, was admissible as against the plaintiffs in this action? And thereupon, the said point or question of law was, at the request of the counsel for the said plaintiff, stated as above, under the direction of the judges of the court, to be certified under the seal of the court to the supreme court of the United States, at the next session thereof to be held thereafter; to be finally decided by the said last-mentioned court.

The case was submitted to the court, on printed arguments, by *Fessenden*, for the plaintiff; and by *Dana*, for the defendant.

Fessenden argued, that the evidence offered and objected to was no

defence as against the plaintiff in this action. The right of the plaintiff to recover, resting, in the first place, on admissions and proof, is established *primâ facie*. The defendant, by his course of proceeding, has admitted: 1. That the bill in suit was indorsed to the plaintiff, during its course, as negotiable paper, about five months before it became due, according to its tenor. 2. That when it was received by the plaintiff, he had no notice, or knowledge, or intimation, of any fact to the dishonor of the bill; on the contrary, he was assured by his debtor, it would *be paid promptly [*4
at maturity, and that previous acceptances given in payment of the sale of land had been paid at maturity. 3. That the acceptance was taken in payment of a pre-existent debt, and that the plaintiff had no other security for the debt due to him by Norton & Keith but this acceptance, and an acceptance of the same character for the residue of his claim on Norton & Keith; and that on receiving the acceptance, he had given up the note of Norton & Keith, which had been indorsed by one Child.

By the cases of *Bank of Salina* v. *Babcock*, 21 Wend. 499, and *Bank of Sandusky* v. *Scoville*, 24 Ibid. 115, it distinctly appears, that the latest opinion of the supreme court in New York is (and seemingly as if that court had never decided otherwise), that receiving negotiable paper in payment of an antecedent debt, is the same thing, in all respects, as regards the rights of the recipient indorsee of such paper, as if he had paid money, or any other valuable consideration for it, at the time, on the credit of the paper. But if these cases cannot be reconciled with the plaintiff Swift's side of the present question, are they, unsustained as they are by like decisions in any other of the states in this Union; resting, as they do, on an obvious misinterpretation of the case of *Coddington* v. *Bay*; and contradicting, as they do, the earlier decision of the same court, on the very point, in the case of *Warren* v. *Lynch*, which has been referred to; and tending, as they do, to drive commercial negotiable paper out of one of the paths of its greatest utility—are they still to overthrow the decisions of this court in the cases of *Coolidge* v. *Payson*, and *Townsley* v. *Sumrall?* It is contended, on the part of the defendant, that they are, and that this high court is bound to follow them with unreasoning submission, because the bill in question was drawn on the city of New York, in the state of New York; and on account of the 34th section of the judiciary act of 1789, which provides, that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in cases where they apply."

In answer to this, it is urged, that, in the first place, after observing, *that it is not pretended, that the decisions of the supreme court of [*5
New York referred to, are founded on, or are in exposition of, the constitution or any statute of that state, that the phrase "laws of the several states," in the 34th section of the judiciary act, means nothing else than the written constitutional system and statutes of such states; and that, if the framers of the act of congress had not known that all the states had such written constitutions of government, laws of paramount authority in those states; and had not wished to frame their enactments in language popular and comprehensive, as well as accurate, they would have used the word "statutes," the appropriate technical word for laws framed by the

legislature, instead of the word "laws." If they had intended to embrace in the section, the traditionary, or otherwise derived, common law of such states, as expounded by the decisions of the state courts; being, as they were, scholars as well as lawyers, they would have incorporated in the section, by way of substitute or addition, some such general phrase as "systems of law." In common parlance, the word "laws," in the plural, means, and did mean in 1789, legislative enactments. The same word also embraces, popularly and technically, when speaking of the regulations of the respective United States, their constitutions of government, as well as their legislative enactments; and the former, as well the latter, were doubtless included in the 34th section. For these reasons, the word "laws," instead of the word "statutes," makes part of the section.

It is admitted, that if the bill had been delivered to the plaintiff by Norton, for value delivered to him, Norton, at the time, on the strength or credit of the bill, the defence should be rejected. But it is contended on the part of the defendant, that inasmuch as the bill was received by the plaintiff in payment, though it were absolute payment, of a pre-existing debt; and though he has no evidence of, or security for, such debt, except the new security in his hands, received in payment of the old; the bill in question was not indorsed to him in the usual course of trade, so as to give him any rights, as the holder of it, different from those of the person who transferred it to him; however he may have received it fairly and in good faith, and without notice of anything which would disenable the party transferring it to him, to *recover it of the acceptor; and however the fact may be, as to its original lawfulness. This is the question for the court to decide: and it is contended, that the bill being so transferred and received in payment of a pre-existing debt, gives the indorsee all the rights, as against the acceptor, which he would have had, if, at the time he received it, he had paid the amount of it, in money, to the indorser. It certainly should be so. The use of negotiable paper has hardly been of greater service to civilized man, in facilitating the transmission of the equivalent of money, and thus, in answering, in some respects, the purposes of money itself, than in preventing hostile proceedings in courts of law for the collection of money due. Indeed, one of the principal good effects of the former is, that it tends to prevent suits at law. In point of fact, thousands of suits have been prevented, by receiving a bill of exchange or promissory note, with an additional name upon it, payable at a future day, in discharge of a debt, which, although due, the debtor, at the moment, could discharge in no other way. But if it comes to be settled by law, that the creditor, upon such an occasion, must, at his peril, ascertain that the additional party, whose name is upon the paper, has no good defence to its payment as against the person proposing to transfer it to such creditor, it will deter him from receiving it, in lieu of the money he demands; and will, in many instances, lead to suits, which otherwise would not have been commenced.

*6]

This high court has once and again decided the very question involved in this case, in the case of *Coolidge* v. *Payson*, 2 Wheat. 66–73, and in *Townsley* v. *Sumrall*, 2 Pet. 170–80. The general rule as to negotiable paper is, that where it is not unlawful and void in its inception, he to whom it is transferred, while current, in due form, and who receives it in good faith, and for a valuable consideration, without notice of anything which

would exonerate the maker or acceptor of it from paying it to the one from whom he receives it, can recover its amount from such maker or acceptor, although the party from whom he received it could not. 1 Ld. Raym. 738 ; 1 Salk. 126 ; 3 Ibid. 71 ; *Grant* v. *Vaughan*, 3 Burr. 1516. But surely, the discharge of a just debt is a valuable consideration. 1 Com. *Dig. (New York ed. of 1824) 300, tit. "Action on the Case upon Assumpsit," B. 3, "Discharge of a debt a good consideration to raise an *assumpsit*." In *Baker* v. *Arnold*, 3 Caines 279, it was decided by the supreme court of New York, that in an action by the indorsee of a note, not void in its creation, and indorsed before it became due, the consideration, as between the previous parties to the note, could not be inquired into. In *Russell* v. *Ball*, 2 Johns. 50, a decision upon similar principles will be found. Cited also, *Warren* v. *Lynch*, 5 Johns. 239. [*7

But it is contended on the part of the defendant, that later decisions by the supreme court of New York have established an opposite principle ; and that receiving a note in payment of a pre-existing debt, is not receiving it in the usual course of trade, nor on a consideration which gives the indorsee any rights on the paper, beyond those of the indorser. The phrase, "usual course of trade," is rather vague and indefinite. It was once the usual course of trade to pay debts, and it should still be so. Most of the notes discounted at banks are given for the renewal of notes to fall due, or for the payment of pre-existing debts. The later decisions of the supreme court of New York, referred to, are professedly founded on principles alleged to be decided in the case of *Bay* v. *Coddington*, 5 Johns. Ch. 54, and the same case, under the name of *Coddington* v. *Bay*, decided in the court for the correction of errors of that state, on appeal. 20 Johns. 637. This case does not sustain the position of the defendant. It was decided by Chancellor KENT, expressly on the ground, that "the defendant did not receive the notes in the course of business," nor in payment, in part or in the whole, of any then existing debt. In the court for the correction of errors, the decision of Chancellor KENT was affirmed. In the case of *Wardell* v. *Howell*, 9 Wend. 170, the note was not received in payment, but as a security. The other cases referred to, *Rosa* v. *Brotherson*, 10 Wend. 85; *Ontario Bank* v. *Worthington*, 12 Ibid. 593 ; and *Payne* v. *Cutler*, 13 Ibid. 605, are all founded on the principle laid down by SAVAGE, Chief Justice, in the *Ontario Bank* v. *Worthington*, "if the plaintiff fails, he loses nothing, he is in the same situation as before he took the paper, *and it was his fault, if he did not inquire into the value of the paper, and the defence against it ; and all the cases assume that the case of *Coddington* v. *Bay* decided what it did not decide." Whensoever a person receives a note or bill, in payment of a pre-existing debt, he does lose something, if he cannot collect the substitute he receives. He loses the debt. He does not stand in the same situation as before he took the note or bill. The same parties holden on the old and extinguished evidence of debt, may be on the new which he receives, and they may not. If, then, these decisions of the supreme court of New York rest essentially on the principle stated by Chief Justice SAVAGE, they are not at war with the law which is contended for in the present case. [*8

For these reasons, it is contended, that the 34th section of the judiciary act does not render it obligatory upon this court to disregard its own decis-

ions, and follow those of any court of the state of New York, upon a general question like the present, not affected by any statute of that state; although the bill of exchange in question was drawn on the city of New York.

But if law is otherwise, it is submitted, that the decisions of the highest court of the state is the court for the correction of errors. *Gelston* v. *Hoyt*, 3 Wheat. 248. In the court of errors of New York, the decision in *Bay* v. *Coddington*, has been spoken of with disapprobation.

If there is any question of law, not local, but widely general in its nature and effects, it is the present question. It is one in which foreigners, the citizens of different states, in their contests with each other, nay, every nation of the civilized commercial world, are deeply interested. By all without the United States, this court is looked to as the judiciary of the whole nation, known as the United States, whose commerce and transactions are as widely diffused as is the use of bills of exchange. The obvious and admitted wisdom of the 34th section of the judiciary act, in reference to our excellent, but delicate and complex system of government, if the section does not receive the construction contended for, and which it is believed, the framers of that act designed, will lose its nature and become folly; and the section will, as it seems, be productive of mischiefs, in the experience and remembrance of which its benefits will be lost sight of, if the principle urged on the part of the defendant shall prevail. *How can this court preserve its control over the reason and affections of the people of the United States; that control in which its usefulness consists, and which its own untrammelled learning and judgment would enable it naturally to maintain; if its records show that it has decided (as it may be compelled to decide, if the construction of the section referred to, advocated on the part of the defendent, be established) the same identical question, arising on a bill of exchange, first one way, and then the other, with vacillating inconsistency? In what light will the judicial character of the United States appear abroad, under such circumstances?

*9]

In cases in which the courts of the United States have jurisdictiou, by the constitution and laws of the United States, the common mercantile law of the respective states applying to and governing those cases, is as much submitted to the actual consciences and judgments of the minds of the judges who constitute those courts, to be considered and declared, without respect to the decision of any state court, as binding authority, as the same law, in cases where the United States courts have not jurisdiction, is to the best judgment of the state courts, without respect to the decision of any court of the United States, as binding authority. Congress, and congress alone, has power to regulate commerce between the states. But it will be impossible for congress to regulate commerce between the states, if it be left to state courts to declare authoritatively, in the absence of any statute upon the point, the force, and meaning of, and the right of parties under, that most important instrument of such commerce—the bill of exchange, when drawn and held in and by a citizen of one state, and accepted and payable in and by a citizen of another state.

Dana, for the defendant.—The first part of the argument of Mr. Dana was upon the question, whether the acceptance of the bill of exchange by

the defendant having been given in New York, the contract was not to be regulated by the laws of that state. This question was not brought before the court by the certificate of division, and the discussion of the point by the counsel of the defendant is therefore omitted.

Mr. Dana declined arguing the question, whether, by the laws *of the state of New York, the defence set up by the defendant would [*10 have been admissible, as he did not suppose it arose, properly, upon the certificate of division. He thought the judges did not in fact divide upon that point; but on the contrary, they gave judgment on a case made by the plaintiff, to set aside the verdict for defendant; and upon elaborate examination of all the decisions of the courts of the state of New York, that the defence was good; and the verdict ought not to be set aside, if the laws of that state applied to the case.

Upon the question, whether, by the 34th section of the judiciary act of 1789, the law of the state of New York must be the rule of decision of this case; he argued, that under the injunctions of the section, that "the laws of the several states, except where the constitution, treaties or statutes shal otherwise provide or require, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," imposed on the supreme court an obligation, as well to apply the decisions of the courts of this state, as the statutes, to cases which come before this court.

It was necessary to adopt some system or code of law for the administration of justice, by the newly-erected courts of the United States. These courts were anomalous in character, created by statute; under the general provision of the constitution of the United States, limited in jurisdiction to certain subjects; and without rules of decision in the cases that would arise. To have attempted to create a code of laws by legislative enactment, would have been without present avail to the courts; and even with the aid of future experience, and after years of labor, could not be expected to be perfect. The alternative was to adopt an existing system of laws. The common law was sufficiently complete, and would have furnished rules of decision for all cases, as well as modes of judicial proceedings; but it would have then been one system of law in the federal courts for the whole United States. It may be questioned, whether the law of the place of the contract, although a principle recognised by the common law, would have had effect in reference to the several states. That principle has reference to a foreign contract. But the territorial limit of the jurisdiction of *the federal courts would be one country and [*11 subject to one law. Wherever within that limit the cause of action might arise, it would be subject to the same administration of law by these courts, when resorted to for the purpose of enforcing the right. This would have led to perpetual confliction between the state and federal courts.

Another objection would be, that the common law, however perfect in its structure, still had many pecularities not adapted to the condition of things in this country, and requiring to be modified to meet the exigencies of an enterprising people. Such modification had in fact taken place in all the states, in all of which, at least, those having an English origin, the common law had been adopted, or rather inherited. Instead, therefore, of the

entire body of the common law, with all its pecularities, it could be adopted as modified by the states, and by so doing, the federal courts would be made to harmonize with the state tribunals, and the law of the place of contract be preserved.

If the phraseology of the section in question be examined, with reference to the whole subject that congress was to provide for, it will be found substantially to express all that was necessary for the adoption of the state laws to the extent and for the purpose we have supposed to have been had in view. It is all the provision there is upon the subject: and in so far as it falls short of the adoption of laws for the direction of the courts, the defect is still unprovided for. The common law has never been otherwise adopted, nor have the courts power to create or adopt laws—they must administer the law as existing. In support of this position, it would be sufficient perhaps, to refer to the cases of the *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Burr* (opinion delivered by the Chief Justice, Sept. 3d, 1807; 2 Burr's Trial 48); *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Coolidge*, 1 Wheat. 415. In these cases, it is true, the question was, whether the courts of the United States had jurisdiction of crimes and offences at common law, which had not been provided for by the constitution or laws of the United States; but they involved the general question, whether the common law had been adopted; for if it could be referred to at all, it was equally a source of jurisdiction, as it would be the rule of decision. Accordingly, in the discussion *of the question, it was thought *12] necessary to assume, in the utmost latitude, that the common law was the basis of our federal jurisprudence, as it was of the several states; and the decision ought to be regarded as co-extensive with the ground upon which the jurisdiction was asserted, and to have finally disposed of it. Yet, as the court were not unanimous, and the subject has been since debated with much learning and zeal by distinguished writers (see Du Ponceau on the Jurisdiction of the Courts of the United States; 1 Kent's Com. 411, 322; North American Review, July 1825; 1 Story's Com. on the Const. 141), it may not be superogatory to examine it anew; and the question is now presented in a form that calls for a specific and final decision of the whole matter.

It would seem to be a self-evident proposition, that the adoption of the common law must have been by the constitution or legislative enactment. Surely, the courts could not, of their own authority, establish as the law of the land, a foreign code or system, no matter how consonant with our political character, or how familiar its principles. By the same authority, they could as well have adopted the civil law, as existing in France or Holland,, as the English law. But although it is conceded, that there is no express recognition or adoption of the common law, either in the constitution or laws of the United States; it is contended, that the constitution pre-supposes, and is predicated upon the existence of the common law. Justice Story, in the *United States* v. *Coolidge*, 1 Gallis. 488; Bayard's Speech, Debates on the Judiciary, in 1802, p. 372; North American Review, before cited. Mr. Justice Story refers to the provisions in the constitution and laws, in respect to trial by jury, the writ of *habeas corpus*, &c., as instances when recourse must be had to the common law for the interpretation of terms. 1 Gallis. 488.

These observations are just; but what is the conclusion therefrom? Because we have used the terms, have we thereby appropriated the entire common law, and become subject to its authority? Do we not borrow terms in science and arts, without being pledged to the principles to which they may have been applied? The physician derives his nomenclature from the Greek language; but is his practice controlled by the false notions which *those terms often indicate, or the theories of those who invented them? The common law itself has borrowed terms of pleadings and [*13 processes, and familiar proverbs, from the civil law, but do we look to the original for any supposed obligation? Our law idiom is essentially of common-law origin, yet not foreign; it is the language familiar to us in the jurisprudence of the respective states; it is there assimilated and modified by our own circumstances and usages. In coming together from the respective states, the framers of the constitution, and our representatives in congress after them, must be regarded as having had in view the language, laws and institutions of the states which they represented. If, therefore, in the organization of the federal judiciary, a system of laws is pre-supposed, it is the American law, which is now as distinct in its character as the English or French; yet, as it is not uniform in the states, the adoption of it in the federal courts would be necessarily subject to some legislative provision, as to the cases and circumstances to which the law should be applicable. The general language of the law would, however, obviously occur, and be used in any legislation upon the subject, without the necessity of definition as might be required, if some foreign code or any of its provisions were to be transferred and appropriated, like the Athenian law, which was transmuted in a mass, by the Romans, into the twelve tables.

But it is said, that some of the provisions of the constitution can take effect only by recourse to the common law, as the clause in art. III., § 2, extending the judicial power to all cases in law and equity, arising under the constitution, &c., and to admiralty and maritime jurisdiction. The laws and practices of the states, it is argued, cannot be referred to here, because, in many of them, no equity jurisprudence existed, and the maritime law of the states is supposed to have been too imperfect and unsettled to furnish any basis for that department of law. 1 Gallis. 488. To this it may be answered, that although in some of the states, there were no equity tribunals, distinct from the common-law courts, yet the principles of equity as distinguished from those of common law, were perfectly understood in every state, and were in fact administered, although in some of them without the aid of a court of chancery. The present organization of the federal courts, in fact, conforms with the usage of those very *states where [*14 this defect of equity power is supposed to exist—there is an equity jurisprudence fully carried into effect, without separate courts of equity. As to the maritime jurisdiction and course of proceeding, it was sufficiently settled; for the proceedings of our courts, in the exercise of that jurisdiction are regulated now, not by the English admiralty law, but by the practice in our own country, engrafted on the English. 10 Wheat. 473.

Mr. Dana cited the debates on the constitution of the United States, in the convention of Virginia, and in other states, to show that without the aid of a statute, the common law cannot be called in aid of the jurisdiction of the courts, or for rules of decision; as to the necessity of legislation for the

authority and manner of proceeding in the courts of the United States, he cited the opinion of Mr. Justice IREDELL, in *Chisholm's Executors* v. *State of Georgia*, 2 Dall. 432. That the provisons of the 34th section are not confined to "statutes," he cited, as decided in this court, *Jackson* v. *Chew*, 12 Wheat. 153 ; *Henderson* v. *Griffin*, 5 Pet. 151 ; *Green* v. *Neal*, 6 Ibid. 291 ; *United States* v. *Wonson*, 1 Gallis. 5 ; *Van Reimsdyk* v. *Kane*, 1 Ibid. 371.

STORY, Justice, delivered the opinion of the court.—This cause comes before us from the circuit court of the southern district of New York, upon a certificate of division of the judges of that court. The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May 1836, for the sum of $1540.30, payable six months after date, and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the aceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared, *15] that Swift took the bill, before it *became due, in payment of a promissory note due to him by Norton & Keith ; that he understood, that the bill was accepted in part payment of some lands sold by Norton to a company in New York ; that Swift was a *bonâ fide* holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record ; but it does not seem necessary further to state them. The defendant then offered to prove, that the bill was accepted by the defendant, as part consideration for the purchase of certain lands in the state of Maine, which Norton & Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto ; and that the representations were in every respect fraudulent and false, and Norton & Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration, on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of plaintiff to the bill of discovery. The judges of the circuit court thereupon divided in opinion upon the following point or question of law—Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action, as if the suit was between the original parties to the bill, that is to say, Norton, or Norton & Keith, and the defendant ; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt, that a *bonâ fide* holder of a negotiable instrument, for a valuable consideration, without any notice of facts which impeach its validity, as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these

facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought *in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bonâ fide* holder for a valuable consideration, without notice; for the law will presume, that, in the absence of all rebutting proofs, and therefore, it is incumbent upon the defendant to establish by way of defence, satisfactory proofs of the contrary, and thus to overcome the *primâ facie* title of the plaintiff. [*16

In the present case, the plaintiff is a *bonâ fide* holder, without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration, in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore, to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the judiciary act of 1789, ch. 20. And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren* v. *Lynch*, 5 Johns. 289, the supreme court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a *bonâ fide* holder, without notice, to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor KENT, in *Bay* v. *Coddington*, 5 Johns. Ch. 54. Upon that occasion, he said, that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner, as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to *them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming, that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries. (3 Kent, Com. § 44, p 81.) The decision in the case of *Bay* v. *Coddington* was afterwards affirmed in the court of errors (20 Johns. 637), and the general reasoning of the chancellor was fully sustained. There were, indeed, peculiar circumstances in that case, which the court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under suspicious circumstances, the [*17

transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders; and others again insisting, that a pre-existing debt was not sufficient. From that period, however, for a series of years, it seems to have been held by the supreme court of the state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the court of errors. The cases cited at the bar, and especially *Rosa* v. *Brotherson*, 10 Wend. 85; *Ontario Bank* v. *Worthington*, 12 Ibid. 593, and *Payne* v. *Cutler*, 13 Ibid. 605, are directly in point. But the more recent cases *Bank of Salina* v. *Babcock*, 21 Ibid. 490, and *Bank of Sandusky* v. *Scoville*, 24 Ibid. 115, have greatly shaken, if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can, at the present time, be treated as finally established; and it is certain. *that the court of errors have not pronounced any positive opinion upon it.

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But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable, that the courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the 34th section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning, the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles

to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or *local usages of a fixed and permanent operation, as, for example, to the construction of ordinary [*19 contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD in *Luke* v. *Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration, in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of, or as security for, a pre-existing debt, *is according to the known usual course of trade and business. And [*20 why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and

antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuity, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably, more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held, that it makes no difference whatsoever, as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of *Coolidge* v. *Payson*, 2 Wheat. 66, 70, 73, and *Townsley* v. *Sumrall*, 2 Pet. 170, 182, are directly in point. In England, the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans* v. *Van Mierop*, 3 Burr. 1664, the very point was made, and the objection was overruled.

*21] That, indeed, was a case of far more stringency *than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept, before the bill was actually drawn. Upon that occasion, Lord MANSFIELD, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already advanced, as well as for money to be advanced in future: and the whole court held the plaintiff entitled to recover. From that period downward, there is not a single case to be found in England, in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental *dicta* have been sometimes relied on, to establish the contrary, such as the *dictum* of Lord Chief Justice ABBOTT, in *Smith* v. *De Witt*, 6 Dow. & Ryl. 120, and *De la Chaumette* v. *Bank of England*, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "*in toto* or in part, cannot be insisted on, if the plaintiff, or any intermediate party between him and the defendant took the bill or note *bonâ fide* and upon a valid consideration." Bayley on Bills, p. 499–500 (5th Lond. edit. 1830). It is observable, that he here uses the words "valid consideration," obviously intended to make the distinction, that it is not intended to apply solely to cases, where a present consideration for advances of money, on goods or otherwise, takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid and valuable consideration. Thus, in the case of *Bosanquet* v. *Dudman*, 1 Stark. 1, it was held by Lord ELLENBOROUGH, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill

he holds of that customer's, *bonâ fide*, he is to be considered as holding for value ; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. *The same doctrine was affirmed by Lord ELDON, in *Ex parte Bloxham*, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of *Heywood* v. *Watson*, 4 Bing. 496, and *Bramah* v. *Roberts*, 1 Bing. (N. C.) 469, and *Percival* v. *Frampton*, 2 Cr. M. & R. 180, are to the same effect. They directly establish, that a *bonâ fide* holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English courts upon the subject. [*22

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail In *Brush* v. *Scribner*, 11 Conn. 388, the supreme court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bonâ fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts ; and certainly, there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed, that whatever constitutes a valid and valuable consideration, in other cases of contract, to support titles of the most solemn nature, is held *à fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a *bonâ fide* holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same, before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the circuit court for our consideration, ought to be answered in the negative ; and we shall, accordingly, direct it so to be certified to the circuit court.

*CATRON, Justice, said :—Upon the point of difference between the judges below, I concur, that the extinguishment of a debt, and the giving a post consideration, such as the record presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction into the opinion of this court, a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain, that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade ; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise ; and that they will yield to a mere expression of opinion of this court, or change their course [*23

of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court, probably, would, and I think ought to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore, I am not prepared to give any opinion, even was it called for by the record.

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 New York, and on the point and question 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, that the defendant was not, under the facts stated, entitled to the same defence to the action as if the suit was between the original parties to the bill; that is to say, the said Norton, or the said Norton & Keith and the defendant; and that the evidence *offered in defence, and objected to, was not admissible as against the plaintiff in this action. Whereupon, it is now here ordered and adjudged by this court, that an answer in the negative be certified to the said circuit court.

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*25] *Richard J. Watkins, Plaintiff in error, *v.* The Lessee of Oliver Holman *et al.*

Constitutional law.—Riparian owners.—Evidence.—Lex loci rei sitæ. Jurisdiction of chancery.—Decedents' estates.

Ejectment to recover possession of a lot in the city of Mobile, Alabama. The defendants, in the circuit court, claimed title to the land, under Lucy Landry, who was the devisee of one Geronio; who having been in possession of the lot at the corner of St. Francis and Royal streets, occupied it until his death. On the arrival of Lucy Landry at age, she occupied the lot as her own property; and in 1818, she sold and conveyed it by deed to certain persons, stating the eastern boundary in the deed to be the Mobile river; these persons, on the same day, conveyed the premises to Oliver Holman, who entered on it and improved it, by erecting houses and a wharf upon it; and continued to occupy it, as a merchant, in copartnership with one Charles Brown, who lived in Boston, until December 1822, when he died; leaving, as his heirs, the lessors of the plaintiff. The possession of Lucy Landry, of the lot, commenced in 1800, and extended on Royal street, and on the east, followed the high-water mark on the river; the land was not subject to inundation, though in many places the water ran across it; until the improvements made by Holman, the lot was not susceptible of occupancy. There was a ridge of high land, formed of shells and artificial deposits, to the east of which, to the river, the lot was situated; and the ridge was protected by the Spanish authorities, no person being permitted by them to improve on the ground, or to remove the earth; it was called "The King's highway," or landing-place. Questions as to the title of the proprietors of the adjacent lots, above Water street, to the lots extending to the river, prevailed until 1824; when, on the 26th May 1824, a law was passed, which granted the lots known as water-lots under the Spanish government, to the owners of the adjacent grounds; the improvements were made by Holman in 1819 or 1820. The defendants below gave in evidence, to maintain their title, the title to them from Lucy Landry, through her grantees, to Oliver Holman; a title-bond from Holman to Brown for half of the lot in controversy, by which a deed was to be executed two years after the date of the bond; and an act of the legislature of Alabama, passed in December

1823, after the decease of Holman, authorizing the administratrix of Holman, then residing in Boston, where administration of the estate of the deceased had been granted to her, to sell the real estate of which he died seised, in the city of Mobile, for the payment of his debts, the estate being insolvent; a deed made in pursuance of a sale of the premises, under the act of assembly and in conformity to the provisions thereof; and also the record of certain proceedings in the supreme court of Massachusetts, wherein a license was given to the administratrix to make a deed, in pursuance of the title-bond to Brown, and the deed made under this authority. The questions which arose in the case, and on which the court decided, were: 1st, whether the act of the legislature of Alabama, authorizing the sale of the estate of Holman, was constitutional and valid; 2d, whether the proceedings in the supreme court of Massachusetts were operative, and authorized the administratrix to convey the title; 3d, whether a volume of state papers published under the authority of congress was evidence; 4th, whether the lessors of the plaintiff below had established a legal title; 5th, *whether the defendants in the circuit court had not established a title in themselves, independent of and adverse to the title they had derived under Oliver Holman. [*26

The relation of landlord and tenant in nowise exists between vendor and vendee; and this is especially the case, where a conveyance has been executed.[1]

A mere intruder on land is limited to his actual possession; and the rights of a riparian proprietor do not attach to him. Mayor of New Orleans *v.* United States, 10 Pet. 662, cited.

The act of congress of 26th May 1824, relinquished the rights of the United States, whatever they were, in the lot in question, to the proprietor of the front lot.

A volume of state papers published under the authority of an act of congress, and containing the authentication required by the act, is legal evidence. In the United States, in all public matters, the journals of congress, and of the state legislatures, are evidence, and also the reports which have been sanctioned and published by authority; this publication does not make that evidence, which intrinsically is not so; but it gives in a most authentic form certain papers and documents. The very highest authority attaches to state papers published under the sanction of congress.

The deed executed by the administratrix of Holman, in pursuance of the license given by the supreme court of Massachusetts, by which nearly a moiety of the property of Holman, in Mobile, described in the title-bond to Brown, was conveyed to Brown, was inoperative. The deed was executed under a decree or order of the supreme court in Massachusetts, and by virtue of a statute of that state; it is not pretended, that it was authorized by any law of Alabama; and no principle is better settled, that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the laws of the state where the land is situated.

A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant; but neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court.

It is not perceived, why a court of law should regard a resulting trust more than any other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty. Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere.

The act of the legislature of Alabama, which authorized Sarah Holman, resident in Boston, the administratrix of Oliver Holman, to sell the estate of which Holman died seised in the city of Mobile, was a valid act; and the deed made under that statute, according to its provisions, was legal and operative, and was authorized by the constitution of Alabama.

On the death of the ancestor, the land owned by him descends to his heirs; they hold it subject to the payment of the debts of the ancestor, in those states where it is liable to such debts. The heirs cannot alien the land to the prejudice of creditors; in fact, and in law, they have no right to the real estate of their ancestors, except that of possession, until the creditors shall be paid.

No objection is perceived to the power of the legislature to subject the lands of a deceased person to the payment of his debts, to the exclusion of the personal property. The legislature regulates descents, and the conveyance of real estate; to define the rights of debtor and creditor, is their common duty; the whole range of remedies lies within their province.

[1] See Robertson *v.* Pickrell, 109 U. S. 615.

*Error to the Circuit Court for the Southern District of Alabama. This was an action of ejectment, brought by the defendants, who were plaintiffs in the courts below, to recover possession of stores and a lot of ground in the city of Mobile. The declaration was in the common form ; the plea, the general issue. A verdict was rendered in the circuit court for the plaintiffs, and the defendant prosecuted this writ of error.

Upon the trial, the plaintiffs below proved, that one Geronio was in possession of a lot, in the city of Mobile, at the corner of St. Francis and Royal streets ; that he occupied the same till his death, when he gave the same to one Lucy Landry ; that about the year 1788, Simon Landry took charge of the lot for his daughter Lucy, and when she came to woman's estate, she used and occupied the same as her property. The plaintiff further proved, that in 1818, Lucy Landry conveyed the lot to McKinzie and Swett, by a deed, in which the eastern boundary was laid down as the Mobile river, and included the premises in question in this case. On the same day, McKinzie and Swett conveyed the property to Oliver Holman, who took possession in 1818, and erected houses and a wharf upon the lot, and occupied the same as a merchant, in copartnership with one Charles Brown ; Brown residing in Boston, and Holman in Mobile. Holman died in December 1822, leaving three children. Oliver, with a grandchild of Holman, were the legal heirs of Oliver Holman, deceased, and the lessors of the defendants in error.

The defendants in the circuit court, in order to show title in them to one equal undivided moiety of the premises in question, exhibited a bond, executed by Oliver Holman, the ancestor of the plaintiffs in the ejectment, on the 29th September 1821, to Charles Brown ; by which Oliver Holman bound himself to give to Charles Brown a quit-claim deed of one half of the land he had purchased from McKinzie and Swett—the ground in question ; the deed to be executed two years from date, if Charles Brown requested. Oliver Holman died soon afterwards, without executing the deed.

Sarah Holman, the widow of Oliver Holman, removed to Boston,
*28] *Massachusetts, and there took out letters of administration on the estate of her deceased husband. Charles Brown presented a petition to the supreme judicial court of Massachusetts, setting forth, that Oliver Holman had executed to him the bond before stated, by which he bound himself to convey certain property in Mobile to him, being the part of the premises for which this suit was instituted; and that he was prevented conveying the same by death ; and praying the court would grant license to, and would empower, Sarah Holman, the widow and administratrix of Oliver Holman, to execute to him such conveyance of the premises, as Oliver Holman would have been obliged to make and execute, if he were then living. The widow and administratrix, Sarah Holman, certified to the court, that "she had read and had notice of the petition, and had no objections to offer why the prayer thereof should not be granted ; and signified her consent to the same." Elisha Read, guardian of Sarah Holman and Oliver Holman, minors, and Catharine Holman, daughter of Oliver Holman, certified, that they had read and had notice of the petition, and believed the statement therein to be correct, and had no cause to show why the prayer of the petitioner should not be granted, and signified their consent to the same. The court

thereupon ordered, that Sarah Holman should be licensed to make and execute a deed to Charles Brown of the premises: and accordingly, on the 10th of March 1824, a deed was executed to the petitioner for the property described in the title-bond.

The defendants in the circuit court, also gave in evidence an act of the legislature of Alabama, in the following terms:

"An act to authorize the administratrix of Oliver Holman, deceased, late of the county of Mobile, to sell real estate.

"§ 1. Be it enacted, &c., That the administratrix of the late Oliver Holman, resident in the city of Boston, in the state of Massachusetts, be and she is hereby authorized to sell, by Nathaniel Littlefield and Gorham Davenport, her attorneys in fact, the real estate of which the said Oliver Holman died seised, in the city Mobile, on such terms and in such manner as may be deemed most advantageous to the estate of the deceased.

"§ 2. And be it further enacted, that the said administratrix be and she is hereby authorized, by her attorneys aforesaid, on *the sale of the said [*29
estate, to make and deliver to the purchaser or purchasers, as the case may be, a legal conveyance of the same, which shall be as binding as if the same had been made by the said Oliver Holman in his lifetime.

"§ 3. And be it further enacted, that Nathaniel Littlefield and Gorham Davenport, before the sale of the estate aforesaid, shall enter into bond, with sufficient security, payable to the judge of the county court of Mobile county, for the true and faithful payment of the money arising from the sale of the said estate into the hands of the administratrix thereof, to be appropriated to the payment of the debts due by the said decedent."

On the 24th day of April 1824, by a deed executed in conformity with the law, in consideration of the sum of $15,000 paid to the administratrix of Oliver Holman, the other moiety of the property was conveyed to Charles Brown. The defendants in the circuit court claimed to hold all the premises in controversy by conveyances from the grantee of Charles Brown, made under the license of the supreme court of Massachusetts, and the act of the assembly of Alabama. It was further in evidence, that Oliver Holman erected stores on the lot, and used them for four years, when he died.

The lot, which was proved to have been in the actual possession of Geronio, was inclosed, there being a line of fence running from the street on the north, to the southern boundary of the lot, and followed by the meanders of high tide water-mark. There was no person who ever inclosed to the east of this lot, or who had ever set up any claim upon it, except so far as the facts disclosed the claim of Lucy Landry, under Geronio. The ground in dispute was more than one hundred feet distant from the inclosure of Lucy Landry, and was at all times subject to the influx of the tide, prior to the improvements of Holman. It was in evidence, that all the land east of Lucy Landry's inclosure, before the improvements of Holman, had been used, as all the land on the same line from St. Francis street to Government street, on the same line, had been used, as a public landing-place, by the people, under the Spanish government: and that no improvements or obstructions had been erected upon that tract of land.

The circuit court decided, that the bond from Holman to *Brown, [*30
and the proceedings of the supreme court of Massachusetts, and the deed under those proceedings, were not sufficient to confer any legal title

upon the defendants; these proceedings were without authority and of no effect, and they were admissible as evidence, only to show the nature of the defendants' claim of possession. The court also charged the jury, that the act of the legislature, and all proceedings under it, were void, and the evidence was competent only to show the defendants' claim and possession; to which decision, as well as to the charge, the defendants' counsel excepted.

The defendants then offered in evidence a map obtained from the general land-office at Washington city, purporting to have been made in 1761, and which was certified to have been on file there, made by one —— ——, surveyor. This map indicated, that the city was then laid off unto regular squares, and bounded by streets; that there was a space between the front square and the margin of the river, not divided, and that this space was marked in the two halves, with the word *quai*. The defendant gave evidence, conducing to prove that the lands sued for were embraced within that space, and that it continued to be public and open, till Holman's possession and improvements in 1818; and so contended before the jury. The defendants further gave evidence, that Holman & Brown were merchants, and that the carpenters who built the houses on the lands in dispute were sent out by the said Brown; that Brown & Holman were in partnership as merchants, and that in carrying on their business, these buildings were used as store-houses; that Brown resided in Boston, and had never been in Mobile, and that Holman resided in Mobile; that the store-houses were reputed to be Holman's, and not Holman & Brown's. After the death of Holman, agents of Holman went into possession; whether instantly, or after the execution of the deeds aforesaid, his agents or vendees had enjoyed entire and exclusive possession of the premises. It was further in evidence, that the house in possession of defendants, fronted on Water street, one of the streets of the city.

Whereupon the court charged the jury, that if they believed from the evidence, that Geronio claimed title to the premises in question, and was in actual possession of a part of the lot of land to which they were then *attached and remained in possession, claiming title, from and prior to the year 1785, till the time of his death; and that before his death, he gave the whole of said lot to Lucy Landry; and that her father thereupon took and held possession of it for her, until she arrived at full age, when she took possession, and claimed title to the full extent of the boundaries in the deed from her to McKinsie and Swett; and that since the possession of Mobile by the United States, the streets and *quai* had been so altered by the municipal authorities of said city, that the said *quai* had been discontinued or otherwise abolished, and the said Water street erected in lieu of it; and that the premises in question were within the boundaries of the said lot conveyed, as aforesaid, by Lucy Landry to McKinsie and Swett, and by them to Oliver Holman; and that said Holman entered upon and remained in possession of the said premises from the date of his purchase, until the time of his death; the plaintiffs were entitled to a verdict, unless the jury believed, from the evidence, that actual possession was delivered by said Holman to Brown, under said bond for title; and that said Brown had remained in possession, and that the possession had been regularly transmitted, through those claiming under him, to the defendant. The defend

*31]

ant contended, that the premises in question were not embraced within the claim of Lucy Landry, but formed a portion of the public *quai;* that the entry of Holman under the title derived from Lucy Landry, and the building of stores on the lot, gave him no title, and that his heirs could not maintain an ejectment for the lot, against those claiming under his partner, Brown. This the court overruled, and the counsel for the defendant excepted.

The defendant's counsel contended, that from the bond, the proof in the cause, and the admission of Catharine Holman in the record of the supreme judicial court of Massachusetts, thereto attached, it appeared, that Holman & Brown were jointly interested in the premises, at the period of his entry. That although Brown never was upon the land, the same was held by Holman for their joint benefit; and that though no actual possession was delivered under the bond for title, if those facts were found, Brown, or those claiming under him, could not be sued for the moiety in the bond, without a demand and notice to quit. This the court overruled.

*The case was argued by *Ogden* and *Legare*, for the plaintiffs in error; and by *Crittenden* and *Key*, for the defendants. [*32

Ogden contended, that in the court below, the plaintiffs in error had proved their title to the premises in dispute, and the court should have nonsuited the defendants, the plaintiffs in the ejectment; or charged the jury that they were not entitled to a verdict in their favor. The plaintiffs in error, and those under whom they claim, had been in possession, under a paper title, since 1822, claiming the premises as their own; fifteen years before the commencement of this suit. Before being turned out of possession, the defendants in error are called upon to show a valid subsisting title to the premises. Possession is a valid title against all the world, until a better title is shown.

The first question now arises: we claim the property under a title derived from Oliver Holman, the ancestor of the defendants in error, his heirs-at-law. Can we be permitted to question and deny the title of the ancestor under whom we claim? This point seems to be settled in this court, in the cases of *Blight's Lessor* v. *Rochester*, 7 Wheat. 535; *Bradstreet* v. *Huntington*, 5 Pet. 402, and *Willison* v. *Watkins*, 3 Ibid. 43.

It is denied, that Holman ever had a title to the lot in controversy. It is asserted to have been derived from a Spaniard, Geronio; but no paper title is shown to have been in him. All the title set up as having existed in him, was that of possession of a lot at the corner of St. Francis and Royal streets, to which Lucy Landry afterwards became entitled under him, and which, when of age, she conveyed to the grantors of Oliver Holman. No grant from Spain was made to Geronio; none is asserted to have been given. The inclosure ran down to and along high-water mark, on the line of which there was a fence. The premises in dispute in this case are more than one hundred feet distant from the inclosure of Lucy Landry, and were all open, until improved by Holman. Geronio having had no paper title, and pretending to no title but possession, nothing can be clearer, than that his title extended no further than the actual possession; and he gave no more to Lucy Landry. The law upon this point is entirely settled. [*33
**Lessee of Clarke* v. *Courtney*, 5 Pet. 354; 2 Johns. 230; 4 Mass.

416 ; 3 W. C. C. 475. The title set up by the heirs of Holman not having any other foundation than that of Lucy Landry, it is manifest, that against the holder of the lot by possession and improvement by Holman, and now with the improvements held by the plaintiffs in error, that title cannot be sustained.

There is another view to be taken upon this question of possession, to which the attention of the court is requested. The fence, including the lot occupied by Geronio, and Landry under him, ran down to high-water mark, and followed the meanders of high-water mark. No person had an inclosure to the east of this lot, or had a claim on it, except Landry ; it was more than one hundred feet from her inclosure, and was at all times subject to the influx of the title, prior to the improvements of Holman, in 1818. It had been used as a part of a public highway, and as a public landing-place, by the people, under the Spanish government. These facts clearly prove that there never was even an assertion of title by any one to this lot, before Holman improved it.

Again, the property now in dispute is one hundred feet below what in 1818 was the high-water mark. Now, by the common law, all land beyond ordinary tide-water mark belongs to the crown. It is not necessary to cite cases to prove this as a general principle. The principle is of universal prevalence in the states of the Union, bordering on tide waters. It is admitted, that the right to the shores of tide-water may be acquired by grants from the crown or government. *Sir Henry Constable's Case*, 5 Co. 107 ; Angel on Tide Waters 140. Although a grant from the crown may be presumed after long possession. But this only shows that by grant alone the title can be acquired. App'x to Angel on Tide Waters 43, and the cases cited. The evidence of such a grant would be the embanking against the sea, and using the ground. Hale, *de Jure Maris*, part 1, ch. 6, p. 27. But the evidence in this case shows no such state of facts ; and if there is any law of Spain which differs on this point from the common law, it should have been shown, and, as a foreign law, should have been proved.

*34] There is another fact appearing on the record, which should *have great influence on the court in considering the point now under examination. The map gave in evidence has the word "*quai*," marked upon it, showing that this lot was considered as a *quai*. *City of New Orleans* v. *United States*, 10 Pet. 715. This shows that the defendants in error have not and never had any legal title to this lot. It was a public landing, and was always so considered while Spain had possession of the country.

The plaintiffs in error, defendants in the circuit court, had a sufficient title to give them a right to a verdict in their favor, under instructions from the court. Oliver Holman, the ancestor of the defendants in error, died in Mobile, before March 1823. He died intestate, and administration was granted to his widow. Some time after which, the legislature of Alabama passed the act authorizing the administratrix to sell the estate of Oliver Holman ; under the provisions of this act, and in full conformity with them, the administratrix sold the estate, and conveyed it to Charles Brown, under whom, and by virtue of the conveyance authorized by this act, the plaintiffs in error held a moiety of the property. There is nothing in the record to impeach the fairness of this sale, or to show that the property was not sold for its full value.

The circuit court held this act of the legislature of Alabama void. The reasons for this decision are not given, but it is presumed they were: 1. It is supposed, that the law interfered with and took away the vested rights of the heirs-at-law of Oliver Holman; or, 2. That this was a judicial act, which it was not competent for the legislature of Alabama to perform.

Does this law take away the vested rights of the heirs of Oliver Holman? If the law is void on this ground, it must be because the legislature had no power to pass this law; for, if constitutional, the law can nowhere be questioned. It cannot be objected to the law, that it infringes the obligation of contracts, and is, therefore, void, under the constitution of the United States. The law authorized the sale of the lot, for the purpose of paying the debts of Holman, and thus enabling the administratrix to keep his contracts. How, then, can it be incompatible with the obligation of contracts? But it has been declared by this court, in the case of *Satterlee* v. *Matthewson*, 2 Pet. 414, that it has nowhere been *said, that a state statute which divests a vested right, is incompatible wtth the constitution of the United States. [*35

Nor is the law inconsistent with the constitution of Alabama. By the laws of Alabama, upon the death of Holman, his real estate descended to his heirs; but in their hands, it was subject to the payment of his debts. A law which authorizes the sale of such lands for the payment of the debts, cannot be exceptionable. In the constitution of Alabama, there is nothing which, in terms, prohibits the passage of such a law; nor is the law a judicial act, thus trenching on the other constitutional departments. The law does nothing in its special provision, but what had been done in effect by the general laws of Alabama, authorizing the sale of the estates of decedents for the payment of debts. But as, from the particular local situation of the administratrix of Oliver Holman, she could not be proceeded against, under the general law, this special enactment is made. The same responsibilities for the payment of the debts are continued; and security is required for the performance of the duties to pay the debts out of the proceeds of the sales. No vested rights of the heirs of Holman were impaired, for all their rights were subject to the debts of their ancestor. In support of these principles, cited, *Stoddart* v. *Smith*, 5 Binn. 355; *Wilkinson* v. *Leland*, 2 Pet. 627; *Bank of Hamilton* v. *Dudley's Heirs*, Ibid. 523; 16 Mass. 326; 13 Serg. & Rawle 435; 2 Vern. 711; 4 Cruise's Dig. 520.

Toulman's Digest of the laws of Alabama contains a number of private acts similar to this, on pages 344–6. The constitution was formed in 1819, and this act passed in 1824. It was a contemporaneous exposition of the constitution. The act was no doubt passed on the application of the administratrix of Oliver Holman, and was enacted to enable her to pay the debts. It does not direct the sale, but authorizes it. The presumption is, that it was passed to enable the administratrix to do her duty. He who seeks to avoid an act, upon the ground that it was procured upon false suggestions, must prove, affirmatively, that the suggestions were false. There is not only no proof in this case, that Holman's estate was not in debt, at the time of his death; but the contrary, is nowhere pretended. The law will, therefore, be presumed to have passed in good faith.

*But it is said, this law is against the constitution of Alabama, [*36

because it is a judicial act; and thus invades one of the branches of government, which can alone exercise judicial powers. Without the express prohibition of the constitution of Alabama, limiting to each department its special duties, the separation of the government into legislative, executive and judicial, was sufficient to prohibit each branch from invading the constitutional powers of the other. But the act under examination is not a judicial measure. Judicial power is the right to decide between different parties; the power to declare what the law is between conflicting parties, and to carry judgments or decrees into effect. How, then, can the act in question be considered judicial? It does not decide between the administratrix and the creditors; it leaves all question as to the distribution of the proceeds open; and they must be decided by the judicial tribunals, if the parties cannot adjust them. Cited, *Wilkinson* v. *Leland*, 2 Pet. 660.

The courts of the United States, sitting in the states, adopt the construction of the constitutions of the states, which have been given by the decisions of the highest judicial tribunals of the states. This is essential to harmony between the courts of the Union, and of the states. What would be the confusion, if one construction were given to the constitution of the state, in the courts of the states, and in the courts of the United States a different construction? So too, as to the laws of the states. It must be very plain, that an act of the legislature is a violation of the constitution, to justify a court to pronounce it void. 5 Mass. 534; 12 Ibid. 417. In this case, we have the uniform legislation of Alabama, since the state was organized, in corroboration of the constitutionality of this act; and titles to lands to an immense value are held under special acts of assembly similar to this. A decision here against the validity of this law, would shake the titles to a large amount of property within the state. The early passage of laws of a similar character with this now under examination, is a contemporaneous exposition of the constitution; for they were passed within a very few years after the constitution was adopted. In Alabama, the question was at rest, until disturbed by the decision of the circuit court in the case now before the court.

*37] *The title of the plaintiffs in error to one moiety of the property, has never been shown. As to the other moiety, it is seen from the evidence in the case, that after the death of Holman, Brown, his partner, went into possession of the whole property. The buildings and wharf were called Holman & Brown's wharf, and Holman & Brown's buildings; and Holman promised by a title-bond to convey one-half to Brown.

Mr. Ogden then proceeded to refer to the proceedings in the supreme court of Massachusetts, and to show that they are in entire conformity with the laws of Massachusetts; and that the deed executed by the administratrix to Brown, for the property described in the bond of Holman, was so executed, under the decree of the court, after notice, and with the knowledge and consent of the administratrix and of the heirs of Oliver Holman, acting personally, or represented by their guardian. The application to the supreme court of Massachusetts was similar to a prayer for a decree of specific performance. The court are asked to permit the administratrix to make a deed in conformity with the contract stipulated in the bond. A deed was made in execution of this decree of the court. This presents the

question whether, under these circumstances, the defendants below have shown a legal title to this moiety of the property.

The legal estate is considered as so vested in the mortgagee, as that he may maintain ejectment against the mortgagor, and turn him out of possession. The legal estate is in the mortgagee, and yet, after his death, the administrator of the mortgagee may recover the amount due on the mortgage and by entering satisfaction, destroy the legal estate in the mortgagee. This is so, not only in equity, but in law. Why is this? Because the mortgage mere evidence of a debt, which the administratrix has a right to recover, and, of course, to acknowledge satisfaction for it; and the heir-at-law is not injured, for his ancestor never had any interest in the land mortgaged, other than as a security for a debt; which being paid, that interest has ceased. Now, in this case, the act of the administrator destroys the legal estate of the mortgagor, and of his heirs. Let that reasoning be applied to the case before the court.

*An administrator is bound to perform all the contracts entered into by the testator, whose estate he represents; or to incur damages for the non-performance of them, so far as the assets in his hands will enable him to do so. If the testator gave a bond or note, the administrator must pay it; and so in reference to any other contract. The assets in his hands are answerable for the non-performance of the contracts of the intestate. If he contracted to sell lands, the assets in the hands of the administratrix are liable for damages for non-performance. Holman was bound by his bond to convey the moiety of the property to Brown, and Brown could have maintained an action for damages on the non-performance of this contract by the administratrix. The real estate of Holman could have been sold for the payment of damages. Holman held this moiety of the property in trust for Brown. He had a bare naked trust, without any beneficial interest whatever in it. As in the case of a mortgage, the receipt of the money by an administrator extinguishes the estate of the heirs of the mortgagee; so, in such a case as this, the administratrix of Holman, by satisfying the claim of Brown, by a conveyance of the estate, divested the estate of the heirs of Holman. What may be done, on compulsion, by an administrator, it is contended, may be done voluntarily. [*38

It is contended, that the estate descended to the heirs of Holman at trustees, Brown and his grantees being *cestuis que trust*, and in possession of the estate. It is then a case in which trustees, having no beneficial interest in the estate, proceed by ejectment against the *cestuis que trust* for the estate. This cannot be. 3 Burr. 1898, 1901; Doug. 695; 1 T. R. 600.

The whole proceedings in the case before the supreme court of Massachusetts were regular. The facts were truly stated in the petition; notice was given to all the parties in interest, and no objection made by any one of them. The administratrix conveyed according to the decree. If the decree had been, that the heirs should convey, there could have been no objections to their deed. The question then is, not on the validity of the proceedings in Massachusetts, but on the validity of the deed.

In the circuit court, it was held, that the plaintiffs in error had shown no valid title to the lot. *It is to be observed, that, independent of the proceedings in Massachusetts, the heirs of Holman never had any beneficial estate in this moiety of the lot. Brown's money had paid [*39

for it, and their ancestor had promised to convey it. They had no equitable title to it. With the strictly legal estate, they had a barren sceptre in their hands; liable to be taken from them, at any moment, by Brown. A bill in equity, filed by Brown, or by the plaintiffs in error, would compel them to part with their legal estate, which they now rely upon in this action. This they cannot do. The whole property had been improved by the joint funds of Holman and Brown; and a moiety was held by Holman as trustee. There was a clear resulting trust in favor of Brown, by the appropriation of his money to the purchase and improvement of the property. Cited, Story's Equity, 439, 443, 444.

It was for some time doubted, whether, to raise this resulting or implied trust, it should not appear on the face of the deed passing the estate, that the consideration was paid by another. This doubt no longer exists. (Note to Story's Equity, 443, § 1201). In *Wray* v. *Steele*, 2 Ves. & B. 388, it is expressly ruled, that where a joint advance is made, and the deed is taken in the name of one only, there is a resulting trust in favor of the other. Holman then held this property, as to one moiety, in trust for Brown. Was this trust executed by the statute of uses? This has not been so held in the case in 1 P. Wms. 112; but without questioning this decision of Lord Chancellor COWPER, it may be safely urged, that the language of English statute of uses, and the statute of Alabama, are different. By the statute of Alabama, the trust is executed. Aikin's Digest, 94, note 37.

It is contended, that under the law of Alabama, the original deed to Holman conveyed to Brown one moiety of the lot; he being entitled to the same, in consequence in having paid one-half of the purchase-money. But if this position is doubted, it is not essential to the case of the plaintiffs in error to maintain it. We have a bond from Holman, under his hand and seal; and this is a good declaration of trust. 2 P. Wms. 314. Thus,

*40] Holman acknowledged that *he held one-half of this property in trust for Brown, and here is not an implied, but an express declaration of the trust.

It is contended, that the proceedings in Massachusetts were equivalent to a decree by a court of equity for a specific performance; but if this was not the fact, they did not render invalid the rights of Brown under the laws of Alabama; which it is claimed were such as could not be disturbed by the heirs of Holman, who were no more than trustees.

Key, for the defendants in error.—The heirs of Oliver Holman, who were plaintiffs in the ejectment in the circuit court, are charged with an attempt to recover lands which have been sold for the payment of the debts of their ancestor; and the proceeds of that sale justly applied to that purpose. But the plaintiffs below have no disposition to defeat the rights of creditors. If they recover the land, they will hold it subject to the debts; and they will be liable to the purchasers, if the debts of their ancestor were paid out of the proceeds of the sale.

It is said, the defendants in the circuit court could have impeached the sale for fraud; and that not having attempted this, its fairness is to be presumed. It is contended, that it was the duty of the plaintiffs in error to have proved the fairness of the proceedings. Their course was unusual; they went out of the established mode of proceeding. The general law of

Alabama was open to them. The property of Holman might have been sold for the payment of his debts, in the usual manner of proceeding. The bond of Holman to Brown might have been the subject of a suit in the courts of Alabama. A presumption of unfairness is warranted by the unusual mode of proceeding. Had the courts of Alabama been resorted to, all would have been legally done. Proof that Holman owed debts, which his personal estate could not pay, would have been given; and all parties would have had notice.

The objections to the title to Lucy Landry have no foundation. The evidence showed, that she had in her possession and claimed title to the land to the river; and all she had was conveyed by those who conveyed to Holman. But the plaintiffs in error cannot contest this title, because they *claim in no other way than under the same title. 10 Johns. 223, 293, 358; 2 Wend. 14. [*41

But it is said, the title of the defendants in error is only a legal title; that the plaintiffs have the equity; that the defendants in error are trustees, and the plaintiffs are *cestuis que trust.* How is this made ont? Brown and Holman were partners, as merchants. There must be a clear trust made out, before a court of equity will decree a trust. Here, there is nothing; certainly, as to all the property, except the part mentioned in the bond to Brown. They were not partners as to the land.

Then their title as to that portion, and the effect of the Massachusetts license, and the deed under it, must be considered. Suppose, these Massachusetts proceedings regular, the order of court gives no title. The deed was executed in March 1824; and before this time, in 1823, the act of the legislature of Alabama had ordered all the real estate of Holman to be sold. Could part of the estate be conveyed, subsequently to this law, to Brown, and another part sold under the law? But the proceeding is a nullity. Laws of Massachusetts, vol. 1; 2 Pet. 655; 8 Ibid. 144. If this proceeding is a nullity, the bond, and the admissions of the widow, and of the infant heirs of Holman, are not evidence; and they cannot be used to set up a trust, or a declaration of trust, and nothing can be claimed under them.

The main question in this case is the validity of the law of Alabama. The act authorizes the sale of the real estate of Oliver Holman, by his administratrix, through her attorneys, "on such terms and in such manner," &c., and gives no direction for the payment of the debts; nor was it shown that his personal estate was not sufficient to pay his debts. Who were the parties to the transaction; Who applied for the law? Was it Sarah Holman or her attorneys? She was a non-resident; she administered in Massachusetts, and it nowhere appears that she had administered in Alabama.

1. The first objection to the validity of this law is, that it is a private act, and can bind none but the parties to it. Consequently, it did not bind the creditors or the heirs. 2 Bl. Com. 346; 16 Mass. 330–2; 5 Cruise 8; 8 Johns. 520, 555–6; Anstr. 288, 291, 294; 7 Johns. 555. Therefore, no matter how *far the powers of the legislature of Alabama are unrestricted; this law could not bind either creditors or heirs, [*42 because they were not parties to it nor named in it.

2. But the legislature of Alabama had no power to pass this law. It would be contrary to a law of congress. Toulmin's Dig. 911–12, 453. If

it deprived any one of a trial by jury, or of "judicial proceedings," it would violate the constitution.

3. It is prohibited by the constitution of Alabama. The powers of government are carefully distributed by the constitution of Alabama. Each department is to exercise its functions exclusively. The judicial power is vested in the courts, but this was an act of the judicial power exercised by the legislature. 2 Bl. Com. 346; 6 Cranch 135; 11 Mass. 396; 3 Yerg. 269, 557, 605–6; 4 Ibid. 202; 5 Ibid. 320; 1 N. H. 204; 3 Ibid. 493; 4 Ibid. 19, 109; Bald. 219. It is judicial power. *Ogden* v. *Blackledge*, 2 Cranch 272; 3 Dall. 386; *Wilkinson* v. *Leland*, 2 Pet. 633; *Crane* v. *Meginnis*, 1 Gill & Johns. 475; 10 Yerg. 69–70. It is judicial, because given to courts. Aikin's Digest, 180–1. It is also retrospective. 2 Gallis. 139; 7 Johns. 477, 493; 11 Mass. 396. It impairs vested rights, and puts aside the standing laws. 11 Mass. 396; 4 Wheat. 441; 4 N. H. 572.

The act does not proceed on the allegation that there are debts due by the intestate, Holman, for which the estate is to be sold. Suppose, there were no debts, yet the estate has been sold. If it be said, the question as to there being debts is left to the courts; then this is but a declaratory act, and the administratrix should have applied to the court, and a sale without such application is a nullity. The vested rights of the heirs were taken away by this act. They had such rights. They might have entered on the land; and although, by the laws of Alabama, it was liable for the debts of their ancestor, yet this law takes all these rights away, without their knowledge or consent. But it is not true, that the heirs held the land subject to the debts of their ancestor. This liability did not exist, until it had been ascertained that the personal estate of Holman was sufficient to discharge his debts. This should have been judicially decided, in due course of law, where they *would have been represented and heard. 3 Pet. 10. Before the land could have been sold by judicial proceedings, it should have been proved, that there was no personal assets, or, if any, that the administratrix and her sureties were insolvent. The legislature having committed this subject to the courts, it had no power over it. To show that the interference of the legislature on the subject of the sale of the estates of intestates, was deemed unconstitutional, in Alabama, Mr. Key referred to reports of committees of the legislature in 1823, against the exercise of such a power.

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It is denied, that the proceeding in the supreme court of Massachusetts could authorize the sale of the other moiety of the land. The laws of Massachusetts do not authorize such a proceeding for the sale of land out of the state; and if they did, they would be invalid as to land not within that commonwealth. All the regulations for the sale of land are necessarily local; and in every state, titles to land within the state can only be made or acquired by its own laws, or proceedings authorized by it.

Crittenden, also for the defendants in error.—The principal questions in the case are upon the validity of the conveyance under the decree of the supreme court of Massachusetts, and the validity of the act of the legislature of Alabama, authorizing the sale of the estate by the administratrix of Oliver Holman.

As to the first, the court determined, that the bond, the decree, and

deed made under it, conferred no legal title, and were "admissible only to show the nature of the defendant's claim and possession." This decision is supposed to be correct, because there is no law of Massachusetts authorizing such a decree, if the subject was within her jurisdiction; secondly, because the subject is extra-territorial to her, and over which she has no jurisdiction; and thirdly, because the parties, whose title was divested, were not before the court. And it is against the first principles of law, to affect a party who has had no opportunity of defence.

As to the second question, concerning the sale and conveyance under the act of assembly, the court decided, that this evidence * " was not sufficient to maintain the defendant's title;" and "that the act, &c., [*44 and all the proceedings under it, were void." This act, considered as an authority to sell, ought, from its own nature, and especially from the circstances of the case, to be construed strictly. It was evidently the intention of the legislature, to annex this authority to the official character of the administratrix; and the term administratrix cannot be regarded as mere *descriptio personæ*, because the money to arise from the sale is to be paid into her hands, "to be appropriated to the payment of the debts due by the said estate." It was essential, therefore, that the person selling under this law should have been the lawful administratrix; and as such, bound to make the directed appropriation of the proceeds of the sale. There is no proof that Sarah Holman was the administratrix; or that she was administratrix within the state of Alabama. If administratrix anywhere, it was in Massachusetts. Proof that she was administratrix, and that administration was granted to her in Alabama, was essential to the validity of the sale and deed under the act. And for that cause, if no other, the decision of the court was correct, in denouncing the deed as "insufficient to maintain defendant's title."

But we contend further, that the act of the assembly of Alabama is contrary and repugnant to the constitution of the state of Alabama, as decided by the circuit court. By a general statute of the legislature of Alabama, passed long before the special act in question (Toulmin's Dig. 327–8, 338), provision is made for the sale of the real estate of decedents, where their personal estate is insufficient for the payment of their debts, by certain proceedings before the orphans' court, in which the heirs of all persons interested are to be cited, and a full exhibit of the condition of the estate made by the executor or administrator; and thereupon, if it appear proper, the court may direct the executor or administrator to sell so much of the real estate as may be necessary, &c. In the proceedings directed by this statute, the most careful regard is had to the interest of heirs, and the preservation of their rights. To this law, enacted in 1803, the heirs of Holman, and their inheritance, were properly subject; and by "due course of law," the land descended to them might, on the application of the *executor [*45 or administrator of their ancestor, have been sold for the satisfaction of their ancestor's debts. The special act in question usurps, as to this particular case, the judicial function assigned by the existing general law to the orphans' court; and without notice, hearing or defence on the part of the heirs (in whom the title was as fully vested as ever it was in their father), authorizes an administratrix to make sale of their inheritance. We say, that the legislature could not take from them their property, nor their

right of defending their title, in a "due course of law;" which, as we understand, can only be had before some judicial officer or tribunal.

By the constitution of Alabama, the powers of government are divided into three distinct departments, and each confided to a separate body of magistracy; to wit, the legislative, executive and judicial; and each is forbidden to exercise any power properly belonging to either of the others. This general provision, we suppose, is violated by the power exercised in this act. We suppose also, that the act is repugnant to several provisions of that constitution. By the tenth section of the first article, no one accused even of crime can be deprived of his life, liberty or property, "but by due course of law." He cannot, in such case, be deprived by an act of legislation. Is a man accused of debt in a worse situation then one accused of crime; and may he be deprived of his property by the legislative power, and without "due course of law?" The 19th section of the same article, when taken in connection with the latter part of the eleventh section of that article, seems to authorize and require that the terms "*ex post facto*" should extent to cases of this description as well as to criminal cases; and be construed as equivalent to a prohibition of retrospective laws of all descriptions. To confine it to criminal cases, would be to express in very untranslatable Latin, what had been before expressed in the eleventh section, in very plain English. By the 29th section of the same article, it seems to be clearly intended, that every one, in every "civil cause," in which his interests are involved, shall have the privilege of defending himself before "any tribunal in this state;" and shall not be "debarred" therefrom. It is asked, if the legislature have not "debarred" the heirs of Holman of this constitutional right, in the *most effectual of all possible modes; by dispensing with a suit that would otherwise have been necessary, and deciding the "civil cause" by legislative act?

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We are further justified, in concluding this act to be unconstitutional, by the controlling authority of the construction, in which all the functionaries of the government of Alabama have for a long time past concurred and settled down. It is now the settled doctrine of that state, that all such laws as this are contrary to the constitution; this is the rule of decision in her judicial tribunals. And her legislature has, in the most solemn and explicit manner, announced the same opinion, and for years past have acted upon it, by refraining from passing any such laws. House Journal of 1833, pages 27, 28, of petitions for such laws, and report thereon by Mr. Hopkins, chairman, &c., 35, 36; and report concurred in by a vote of fifty-six to five, p. 36. See also pages 35, 45, for petition of McLoskey, and report thereon. Senate Journal of 1833, the case of Raney's administrator, &c., 57, 68, and report, &c., 73. House Journal of 1834, petition of Carr's administrator to sell the land in his intestate, p. 65, and report thereon, p. 92. These documents and records show the opinion and course of decision in Alabama, in respect to the constitutionality of this and similar acts of legislation.

The lot, as originally held by Geronio, fronted on the river as its eastern boundary. The river has receded to the west, considerably, in the lapse of many years, and by deposits made by ebb and flow of the tide, there has been a gradual formation of land all along the shore of the river. On the trial, the defendant gave in evidence a map, &c., conducing to prove that the city was laid off in squares, and that there was a space between the

front square and the margin of the river, marked "*quai*;" and gave evidence conducing to show that the premises now in question were embraced in that space, and that it continued to be public and open, till Holman entered and improved in 1818. It was in proof, that the house and premises in question front on Water street. On this, the court instructed the jury, that if they believed from the evidence, "that Geronio claimed title to the premises in question, and was in actual possession of a part of the lot of land to *which they were then attached," &c.; and that since the possession of Mobile by the United States, "the streets and *quai* [*47 have been so altered by the municipal authorities of said city, that the said *quai* has been discontinued, or otherwise abolished, and the said Water street erected in lieu of it, &c., and that the premises in question are within the boundaries of the lot conveyed as aforesaid to Holman, and by him occupied and improved as aforesaid, &c.; that the plaintiff was entitled to a verdict, &c." The defendant can have no cause to complain of this instruction. If it was not correct, the defendant, to entitle himself to a reversal, ought to have set out all the evidence, to show this court that it had operated to his prejudice. Here no such thing appears. He has not set out all the evidence; and it may well be, that all that the evidence that is set out conduced to prove was clearly disproved by other testimony. And everything is to be presumed in favor of the verdict. Besides, if all the facts were as the defendant's evidence conduced to prove them, no instruction that the court could have given on them, would have entitled him to a verdict; because the defendant held and claimed under Holman's title, and that alone, and is concluded from denying that title; and because Holman's possession is evidence enough of title against all the world, except the rightful owner; and if he could have been permitted to make out that the premises in question were not parcel of Holman's lot, it follows, that the defendant shows that he has no title; and is a mere intruder into the houses and possessions of Holman, and his heirs.

Whether the premises in question were parcel of the lot originally belonging to Geronio, and afterwards conveyed to Holman, was purely a mattor of fact for the jury; and the verdict has settled it. If a question of law could have arisen out of the facts of the case, as to the rights of the owners of lots fronting on the river, to alluvial accretions gradually made to them by the action of the river, &c., that question, plain enough on general principles and rules of law, is authoritatively settled in this case by the act of congress of the 26th May 1824. (4 U. S. Stat. 66.)

*_Legare_, for the plaintiffs in error.—The plaintiffs in error are [*48 *bonâ fide* purchasers, who bought under the solemn sanction of an act of the legislature of one of the most enlightened states of the Union. Against rights so acquired, the claims of the heirs-at-law have been set up. These rights were regarded, when other principles in reference to real estate prevailed; when it was the policy to secure the realty to the heir, in preference to satisfying the demands of creditors. But now, no such policy, and no such injustice prevails. Real estate, like personal property, is subjected to debts; and the rights of heirs-at-law are inferior to those of just creditors. Certain facts are undisputed in this case: 1. There is no paper title to the lot The right of Geronio to the same was by long possession,

and this right only, and no more was held by Lucy Landry. 2. The ground in dispute was one hundred feet from the inclosure of Lucy Landry. 3. Lucy Landry conveyed, in 1818, to those under whom the plaintiffs in error held, and now hold the property. 4. All the land up to the time of the possession and improvements of Holman was open, and used as a public landing, as a "*quai.*" 5. The proceedings in the supreme court of Massachusetts, and the act of the legislature of Alabama, and the conveyances under the same to the plaintiffs in error.

1. As to the title set up by the defendants in error, who were plaintiffs below. Are we at liberty to contest that title? or are we estopped, because the conveyances to the plaintiffs in error are derived from Holman's possession, whose heirs-at-law the defendants in error are? Estoppels are of things certain. Courts do not lean in favor of them. Vendor and vendee do not stand in the same relations as landlord and tenant. The same rules do not govern them. The condition of vendor and vendee is different. Cited, *Blight* v. *Rochester*, and other cases referred to by Mr. Ogden.

2. The title of Lucy Landry does not cover the land in dispute. Accretion does not apply to limited possession. The title was by possession, and possession extends no farther than the actual *pedis possessio*. The title was limited to the fence which ran to *high-water mark. Cited, 2 Johns. 230; 6 Cow. 617; 1 Ibid. 276. The law of alluvion applies only to possession. 1 Justinian's Inst., book 2, tit. 1, par. 20; Heineccius 158; Grotius, book 2, ch. 8, p. 12. The law of accretion should give the ground which is thus raised from the water to the public. It ought not to become private property. If the court decide that the plaintiffs in error come in to the question of the title of those who claim the property from them, they will decide against any right which they may set up as accretion.

*49]

3. This statute of 1824 was intended only to confirm the title of those who were in the actual possession of the ground on the river; and cannot be construed to sustain a title which denies the right of possession. Under the circumstances exhibited in the case, the purchase and improvement of this property was out of the joint funds of the partnership of Holman & Brown, Brown had a resulting trust in one moiety of this property, which will be protected in a court of law. The estate of a *cestui que trust* may be set up in a court of law. To the case already cited to sustain this position are to be added, 3 Johns. 216; 16 Ibid. 199; 10 Ibid. 97; 7 Wend. 379. Resulting trusts are excepted out of the statute of frauds, and may be proved by parol. 4 Kent's Com. 306; 2 W. C. C. 441; 2 Atk. 71. If it be proved that this property was purchased with partnership money, the plaintiffs in errors were owners in law. This is fully proved.

4. The proceedings in the supreme court of Massachusetts are *res adjudicata*. The court proceeded on the ground that there was a trust; and they directed the administratrix to convey, after all the notice required by the law of Massachusetts had been given to the infants, and to the heirs-at-law. The contract of Holman was a personal contract, and it was, therefore, proper that the administratrix should convey.

5. The act of the legislature of Alabama, under which the other moiety of the property was sold, makes the land equitable assets for the payment of the debts. This is no more than leaving to the courts to settle all other questions. The statutes of Alabama *allow a foreign adminis-

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trator to represent the estate of a deceased person. The heir-at-law is a bare trustee for creditors. Lands are sold for the payment of the debts of a decedent, without making his heirs parties to the proceedings. 2 Cranch 407 ; 1 McCord Ch. 294 ; 4 Ibid. 128 ; 4 Kent's Com. 429. The law of Alabama does no more than authorize that to be done at once, which by a long course of proceedings in the courts should have been effected. It is impossible to lay down the limits between legislative and judicial powers. It is not in the power of the courts to interfere, and say this was not legislative power ; and thus to assume a control over the legislature which will destroy it. This court will not sustain such an interference. The only objection to this law is, that it was passed in a particular case ; but this does not annul the law. The proceedings in the legislature of Alabama, subsequent to this act, may have been proper, but they do not show that the power to pass the law did not exist.

The result of this reasoning is, that the legislature have the power ; and the exception must be made out fully by the language of the constitution. It must be clearly shown, that the law was against the constitution. There is no pretence to say, this was a judicial act. The law does not affirm that there were debts. All it did was to declare the land subject to the debts. The existence of the debts, and their amount, are to be made out before the court. The constitution of Alabama says no more than is said by all the constitutions of the states. The powers of the government are divided in every state. No objections can be made to the law, on the ground that it was *ex post facto*. *Ex post facto* laws prohibited by the constitution of the United States are laws relating to crimes. None of the cases cited sustain the position that this act is unconstitutional. Cited, 1 Gill & Johns. 474 ; 2 Kent's Com. 104 ; 2 Gallis. 100 ; 1 Kent's Com. 455–6.

Has the law of Alabama been executed ? This question was not made below ; but if it had been, it would have been shown that the law was entirely complied with. The administratrix did what she was allowed to do, by converting the land into *assets to pay the debts ; the security required by the law having been given. [*51

McLean, Justice, delivered the opinion of the court.—This cause is brought before this court, by a writ of error to the circuit court of the United States for the southern district of Alabama. The heirs of Holman commenced an action of ejectment againts the plaintiffs in error, to recover possession of a certain lot in the city of Mobile. On the trial, the lessors of the plaintiffs proved, that before the year 1785, one Geronio was in possession of a lot in the city of Mobile, at the corner of St. Francis and Royal streets, which he continued to occupy until his death. Previous to his death, he devised the lot to Lucy Landry, whose father, Simon Landry, took charge of it for his daughter, until she became of age, when she occupied it as her own property. In 1818, she conveyed the lot to McKinsie and Swett, by deed, in which the eastern boundary was stated to be the Mobile river ; and it is admitted that the deed embraced the lot in dispute. McKinsie and Swett conveyed the premises on the same day to Oliver Holman ; and in 1818, he took possession of the lot in controversy, erected houses and a wharf on it, and continued to occupy it as a merchant, in copartnership with one Charles Brown, who lived in Boston, Massachusetts,

until December 1822, when Holman died. He left, as his heirs, the lessors of the plaintiffs.

There was no proof of any paper title in Lucy Landry, or her father, except the will above stated. Her possession commenced in the year 1800, or prior to that time; and it was proved, that her inclosure extended on Royal street, the whole distance claimed in the declaration; and on the east, it followed the high-water mark of the Mobile river. It was proved, that Water street, which runs parallel with Royal street and the Mobile river, was an irregular bank, reaching from St. Francis street southerly, the length of the city, formed by a deposit of shells and earth, and was higher than any land east of it, or any land to which the water extended. This land was not subject to inundation, though in many places the water ran across it.

*52] *Until the improvements by Holman, the lot in controversy was not susceptible of occupancy. Water street was laid out in 1817 or 1818, and the lot in dispute lies east of that street and east of the high land above described. The ridge or high land was protected by the Spanish authorities; no person was permitted to remove the earth or improve on the ground. It was called the king's highway and landing-place. And after the American authorities took possession, the general impression seemed to be, that the ground east of Water street did not belong to the proprietors of lots west of it. But these proprietors in some instances made entries on this ground; and in others, entries were made by the corporate authorities of the city. Under this state of doubt, the act of congress of the 26th of May 1824, was passed. Holman, it seems, built a wharf and warehouse on the lot, in 1819 or 1820, and these were among the earliest improvements made east of Water street.

The defendants proved, that since the year 1823, they, or those under whom they claim, have had the exclusive possession of the lot; and that they made valuable improvements thereon. They gave in evidence copies of deeds from Lucy Landry to McKinsie and Swett, and from them to Oliver Holman. They also exhibited in evidence a title-bond, dated the 29th of September 1821, from Holman to Brown, for half of the land conveyed to him by McKinsie and Swett, excepting certain parts described. The deed was to be executed in two years. A map was also in evidence, purporting to have been made in 1760, by a French surveyor. The map represented the land lying near the river as divided into oblong squares, bounded by streets, and that the vacant space between the river and the front line of the square had the word "*quai*" written upon it. But it is not shown by what authority this map was made, or that it governed in the sale of lots. Until the year 1817, the king's wharf was the only one in the city.

To explain the nature and extent of Lucy Landry's claim and possession, certain documents from the land-office at St. Stephen's, Alabama, were offered in evidence; and also an act of the legislature of Alabama, passed the 21st of December 1823, authorizing the administratix of Oliver Holman to sell the real estate of which he died seised in the city of Mobile. It was

*53] proved, *that Holman's estate was insolvent; and it was admitted, that the attorneys of the administratrix, named in the act, had given the bond required, before the premises in question were sold. The deed made in pursuance of the sale under the act of the legislature was read;

also a record of certain proceedings in the supreme court of Massachusetts, wherein a license to the administratrix was given to make a deed in pursuance of the title-bond to Brown and the deed that was made under this authority.

The court instructed the jury, that the act of Alabama was unconstitutional and void, and that no title passed under it; and that the proceedings in the Massachusetts court were inoperative, and did not authorize the administratrix to convey the title. The court also overruled, as evidence, the documents above offered, contained in a volume of state papers published under the authority of congress. Exceptions were taken to the rulings of the court, and to their instructions to the jury; and on these, the questions for consideration arise. The plaintiff in error asks a reversal of these judgments, on two grounds. 1. Because the lessors of the plaintiff showed no legal title. 2. Because the defendant established a title in himself.

On the part of the defendant's counsel, it is contended, that, as the plaintiff in error claims under Holman, he cannot question his title; and in support of this position the cases of *Jackson* v. *Bush*, 10 Johns. 223; and *Jackson* v. *Hinman*, 16 Ibid. 292, 293, are relied on. But these are cases in which the lessors of the plaintiff claimed under sheriffs' sales; and the defences set up were under the defendants in the judgments. The court say, "the rule, excluding a defendant against whom there has been a judgment and execution from defeating the purchaser's recovery of his possession, by setting up a title in some third person, is founded on justice and policy; and the reason of the rule equally applies, where such defendant has, in the meantime, delivered up his possession to another." The case of *Brant* v. *Livermore*, cited from the same volume, arose between landlord and tenant. And the decision relied on in *Schauber* v. *Jackson*, 2 Wend. 14, does not sustain the ground assumed. *The relation of landlord and tenant in no sense exists between the vendor and vendee; and this is especially [*54 the case, where a conveyance has been executed. In the language of this court, in the case of *Blight's Lessee* v. *Rochester*, 7 Wheat. 548, the vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. If the vendor has actually made a conveyance, his title is extinguished." And the court say, "the property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises." To the same effect are the cases of the *Society for the Propagation, &c.* v. *Town of Pawlet, &c.*, 4 Pet. 506; *Jackson* v. *Huntington*, 5 Ibid. 402; *Willison* v. *Watkins*, 3 Ibid. 43. In Kentucky, it is well established, that a purchaser, who has obtained a conveyance, holds adversely to the vendor, and may controvert his title. *Voorhies* v. *White's Heirs*, 2 A. K. Marsh. 27; *Winlock* v. *Hardy*, 4 Litt. 274. And this is the settled doctrine on the subject.

The plaintiff in error contends, as the lessors of the plaintiff have shown no paper title emanating from the government, they must be considered as trespassers; and that their right is strictly limited to the *pedis possessio* of the occupants under whom they claim. That a mere trespasser cannot set up the right of a riparian proprietor, unless his inclosures are extended so as to include the alluvial formations. In the case of *Ewings's Lessee* v. *Burnet*, 11 Pet. 41, this court held, that an inclosure was not necessary to

show possession, under the statute of limitations. That for this purpose, it is sufficient to show visible and notorious acts of ownership exercised over the premises. In this case, it appears, that the proprietors of the contiguous lots, by a deposit of earth and other means, contributed to the new formation on the shore of the river; so that this formation was not wholly attributable to the action of the tides. And it may well be contended, that this labor of the proprietors made their claim and possession of the water-lot as notorious as if it had been surrounded by an inclosure. It appears, too, *55] that the *wharf and warehouse were erected by Holman on the lot in dispute, as soon as it was susceptible of occupation. These facts, connected with the possession of the adjacent lot, since 1785, present a strong ground to presume a title. And so far as regards the controversy between the parties to this record, and looking only at the facts and circumstances before us, we think that the lot in dispute may be considered as included in the title of Holman. The position assumed by the plaintiff's counsel, that a mere intruder is limited to his actual possession; and that the rights of a riparian proprietor do not attach to him, is correct. He can have no rights beyond his possession. The doctrines of the common law on this subject have been taken substantially from the civil law. In the case of the *Mayor of New Orleans* v. *United States*, 10 Pet. 662, we had occasion to examine this doctrine, especially in reference to the laws of Spain.

The act of congress of the 26th May 1824, entitled "an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city," embraces the lot in controversy; whether the title be vested in the lessors of the plaintiff, the defendants in the ejectment, or in the city of Mobile. As no right to this lot is asserted on the part of the city, we can now only consider the law as affecting the title before us. At the time the law was passed, either the plaintiffs or defendant were the proprietors of the front lot, and claimed the water-lot with its improvements; and this brings them within any known construction of the act of 1824. It relinquished to the proprietor or proprietors of the front lot, under the circumstances of this case, whatever right, if any, the United States had to the water lot.

The volume of state papers offered in evidence by the defendants, we think, should have been admitted. This volume was published under an act of congress, and contains the authentication required by the act. Its contents are, therefore, evidence. The recital, in the preamble of a public act of parliament, of a public fact, is evidence to prove the existence of that fact. *Rex* v. *Sutton*, 4 Maule & Selw. 532; Stark. Evid. 197. The journals of the house of lords have always been admitted as evidence of their pro- *56] ceedings, even in criminal cases; and the *journals of the house of commons are also admissible. It is said, that the journals are not evidence of particular facts stated in the resolutions, which are not a part of the proceedings of the house; as for instance, a resolution stating the existence of a popish plot would not be evidence of the fact in a criminal case. *Jones* v. *Randall*, Cowp. 17; 5 T. R. 465; Doug. 572; Stark. Evid. 199. In this country, in all public matters, the journals of congress and of the state legislatures are evidence; and also the reports which have been sanctioned and published by authority. This publication does not make that evidence which, intrinsically, is not so; but it gives in a most authentic

form certain papers and documents. In the case under consideration, the volume of documents was offered to show the report of certain commissioners under an act of congress confirming the title in question. Now, this original report, duly authenticated by the treasury department, to which it was made, would be evidence, and it is evidence in the published volume. The very highest authenticity attaches to these state papers published under the sanction of congress.

We come now to consider the proceedings in the supreme court of Massachusetts. These proceedings took place under a statute of that state, and were founded upon the title-bond given to Brown by Holman, for nearly a moiety of the lot purchased by him from McKinsie and Swett. Brown applied to the court, by petition, setting out the title-bond, and representing that Holman had died, without making a deed; and he prayed that Sarah Holman, his administratrix, might be licensed and empowered to execute to him such a conveyance of the premises as Holman would have been obliged to make if he were living. Sarah Holman, as widow and administratrix, certified to the court that she had read, and had due notice of the petition of Brown, and that she had no objection to the prayer of it. And the guardian of Sarah Holman and Oliver Holman, minors and children of Oliver Holman, deceased, certified, that they also had notice, and that they had nothing to allege against the prayer of the petition. The court, on hearing the petition, licensed and empowered the administratrix to make the deed. And in pursuance of this *order, she executed a deed, in conformity with the bond to Brown, the 10th March 1824. [*57

That this deed is inoperative, is clear. It was executed by the administratrix, under a decree or order of the supreme court in Massachusetts, and by virtue of a statute of that state. The proceeding, it is not pretended, was authorized by any law of Alabama. And no principle is better established, than that the disposition of real estate, whether by deed, descent or by any other mode, must be governed by the law of the state where the land is situated. A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. The Massachusetts court, in granting this license to the administratrix, did not exercise chancery powers. Neither the administratrix nor the minor heirs were made parties and required to answer, as a procedure in chancery. It was a proceeding at law, informal and summary in its character. The administratrix only was required to execute the conveyance. By the laws of Alabama, she had no power to dispose of the real estate of her husband, as administratrix, except for the payment of the debts of the estate, under the sanction of law.

But the defendants insist, that the title-bond given to Brown by Holman, for a part of the premises, constituted a good defence in the action; that, the consideration having been paid, Holman and his heirs held the property in trust for Brown and his assignees; and that a court of law will give effect to the trust, at least so far as to prevent the trustees from recovering the possession against the *cestui que trust*. This doctrine seems to have been sanctioned, to some extent, in New York, in the cases of *Foote* v.

Colvin, 3 Johns. 216; *Jackson* v. *Matsdorf*, 11 Ibid. 91; *Seelye* v. *Morse*, 16 Ibid. 197. These decisions may have been influenced somewhat by the statute concerning uses in that state, which subjects the estate of the *cestui que trust* to execution. In one of the cases, *SPENCER, Justice, giving the opinion of the court, says, "without the aid of the statute, I consider James Litchfield, if he advanced the purchase-money, as having an interest liable to be sold on execution." In the case of *Jackson* v. *Leggett*, 7 Wend. 377, the court remark, "the legal estate must prevail." "The only exception to the rule is in the case of a resulting trust; in such case, the trust may be proved by parol, and the estate of the *cestui que trust* may be sold on execution, and has been so far considered the property of the *cestui que trust*, as to be a defence in an action of ejectment." This was the doctrine of the Lord MANSFIELD, in the case of *Armstrong* v. *Peirse*, 3 Burr. 1899. In *Bristow* v. *Pegge*, 1 T. R. 758, note *a*, he lays down the broad doctrine, "that a trust shall never be set up against him for whom the trust was intended;" and the other judges concurred. It is known, that that great judge had a strong leaning to the principles of equity in trials at common law. His successor seemed to be under a different influence; although he had been master of the rolls for some years. This equitable doctrine in a court of law was overruled in the case of *Hodsden* v. *Staple*, 2 T. R. 684. Lord KENYON says, "Is it possible for a court of law to enter into the discussion of such nice points of equity? We have no such authority. Sitting in this court, we must look at the record, and see whether a legal title is conveyed to the party claiming under these instruments; now, there is no color for saying, that these give any legal title. Without deciding, or presuming to think, what a court of equity would do in this case, it is enough for me to say, that we are to decide a legal question, and cannot enter into such an entangled equity." The other judges, except BULLER, concurred with the chief justice. In *Shewen* v. *Wroot*, 5 East 132, Lord ELLENBOROUGH said, "We can only look to the legal estate, and that is clearly not in the devisees, but in the heir-at-law of the surrenderer; and if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law. For as to the doctrine that the legal estate cannot be set up at *law by a trustee against his *cestui que trust*, that has been long repudiated." And this is the settled doctrine in England on this subject; and, with few exceptions, in this country. In the states where no courts of chancery are established, courts of law, in giving relief, of necessity, trench upon an equitable jurisdiction. It is not perceived, why a court of law should regard a resulting trust more than other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty. Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere. We are clearly of the opinion, that the title-bond in question, constituted no defence in the above action.

*58] *59]

Whether any title passed under the Alabama statute, is the last point to be considered. The act authorized the administratrix of the late Oliver Holman, resident in the city of Boston, Massachusetts, to sell, by Nathaniel Littlefield and Gorham Davenport, her attorneys in fact, the real estate of which the said Holman died seised, in the city of Mobile, "on such terms

and in such manner, as may be deemed most advantageous to his estate." The second section authorized the administratrix, by her attorneys, to convey the premises to the purchaser." And the third section provided, that before the sale, the attorneys should give bond, with sufficient security, for the faithful payment of the money received by them to the administratrix, "to be appropriated to the payment of the debts of the deceased." Under this law, a sale was made, and a conveyance executed to Brown, by Sarah Holman and her attorneys in fact, the 24th April 1824. This act of the legislature, it is contended, is in violation of the constitution of Alabama; and, with the proceeding under it, is consequently void.

The first section of the second article of the constitution declares, that "the powers of the government of the state of Alabama 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 executive, to another; and those which are judicial, to another." And the second *section declares, that "no person or collection of persons, being of one of those departments, shall exercise any power [*60 properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." The passage of the statute, it is insisted, was a judicial act by the legislature, which the constitution inhibits.

On the part of the plaintiffs in error, a great number of acts of this character, by the Alabama legislature, shortly after the adoption of the constitution, are cited, to show a settled construction of that instrument. The defendants in error referred to reports by committees of the legislature, which maintained the unconstitutionality of these acts. And it is asserted, and not contradicted, that since that report, under a conviction of its soundness, the legislature have passed no laws on the subject. A manuscript decision of a circuit court in Alabama, in the case of *Campbell and Havre* v. *Scales and others*, was read; but the question now under consideration seems not to have been raised. In almost all the states, laws of this description are common; and the titles to an immense amount of property depend upon their validity.

The phraseology of the constitution of Alabama, in regard to the distribution of its powers, is somewhat peculiar; but it is not substantially different from the constitutional provisions of some of the other states. The third section of the Virginia constitution declares, that "the legislative, executive and judiciary departments shall be separated and distinct, so that neither exercise the powers properly belonging to the other." Indeed, in all the state constitutions, the legislative, judicial and executive functions are vested in different functionaries; and it would seem to follow, that the powers thus specially given should be exercised under their appropriate limitations. The inhibition of the Alabama constitution contains, in terms, that which necessarily arises from the construction of the constitutions of other states. In some cases, it is difficult to draw a line that shall show with precision the limitation of powers, under our form of government. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power. And so, a court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to *legislate. A legislature, [*61

too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power.

But, whatever difficulty may arise in certain cases, in regard to the exercise of these powers, there would seem to be little or none in the case under consideration. The character of the act in question is essentially remedial. It contains no other feature. An authority is given to the administratrix to sell, in a particular manner, the property in dispute, for the payment of the debts of the intestate. The act does not determine the amount of the debts, nor to whom they are payable. It is proved, however, that the estate was insolvent. And it is conformable to the settled policy of Alabama, to apply the real estate of a deceased person in payment of his debts. The case under consideration, the administratrix residing in Massachusetts, and being desirous of selling the property through her attorneys in fact, was not embraced by the general statute on the subject; and hence the necessity of the special authority.

Now, how does this act differ in principle from the general law on the same subject? The general law was passed from a knowledge which the legislature had of its expediency and necessity. The special law was passed from a knowledge of its propriety in the particular case. The power exercised in passing the special as well as the general law, was remedial. Under the general law, application is required to be made by the executor or administrator to the county court, representing that the personal estate is not sufficient to pay the debts of the deceased; that he left real estate, particularly describing it, and praying that it may be sold, &c. A notice is required to be given to the heirs and devisees, &c., who are to answer, &c., and the court, on the hearing, are authorized to decree a sale of the estate, on the petitioner's giving bond, &c. The mode of procedure under the general law was required by the legislature, from motives of expediency; but it by no means follows, that it was the only mode they could adopt. In some of the states, the heirs or devisees are are not required to be made parties by the administrator. His application is *ex parte* to the court; which orders a sale of the real estate to pay the debts of the deceased, where the personal estate is insufficient. And

*62] *no doubt can be entertained, that the legislature may authorize the administrator, by a general or a special act, to sell lands to pay debts, where the personal assets are exhausted, without any application to the court. And in such case, the administrator would act on his own responsibility, and be accountable to the creditors and heirs for the correct performance of this trust, in this as in other parts of his duty. This is a question of power and not of policy; and on such a question we cannot test the act by any considerations of expediency. Whether the act may be open to abuse, whether it be politic or impolitic, is not a matter now before us; but whether the legislature had power to pass it.

A report in the senate of Alabama on this subject says, "Upon the death of the ancestor, the real estate owned by him descends to and vests in his heirs, and the title thus vested cannot be divested, without some proceeding to which the heir is a party. A minor could not legally assent to the passage of a law authorizing the sale of his real estate; but would have the right to affirm or disaffirm the sale when he arrived at lawful age." This is laid down on general principles, and without reference to the constitution of Alabama. As a legal proposition, it is wholly unsustainable. In the

first place, it is contrary to the general practice of many of the states, and to the received notions of the profession on the subject. Titles in Ohio and in many other states, to a vast amount of real property, rest upon sales of executors and administrators under the order of a court, without making the heirs parties; and it is believed, that a doubt of the validity of such titles, where the proceedings have been regular, has never been entertained or expressed. These titles have been contested in state courts and in this court; and a defect of power to convey a good title, in the mode authorized, it is believed, has never been objected. A course of proceeding so extensive, involving interests so great, and which has been subjected to the severest legal scrutiny, is no unsatisfactory evidence of what the law is.

But on principle, this proceeding is sustainable. On the death of the ancestor, the land owned by him descends to his heirs. Bnt how do they hold it? They hold it subject to the payment *of the debts of the ancestor, in those states where it is liable to such debts. The heirs [* 63 cannot alien the land, to the prejudice of creditors. In fact and in law, they have no right to the real estate of their ancestor, except that of possession, until the creditors shall be paid.

As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents, and the conveyance of real estate; to define the rights of debtor and creditor is their common duty; the whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant; and indeed, they may give the capacity to the infant himself to convey them. The idea that the lands of an infant which descend to him, cannot be made reponsible for the payment of the debts of the ancestor, except through the decree of a court of chancery, is novel and unfounded. So far from this being the case, no doubt is entertained, that the legislature of a state have power to subject the lands of a deceased person to execution, in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature.

The law under which the lot in dispute was sold decides no fact binding on creditors or heirs. If the administratrix and Brown have acted fraudulently in procuring the passage of this act, or in the sale under it, relief may be given on that ground. But the act does nothing more than provide a remedy, which is strictly within the power of the legislature.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings, in accordance with this opinion.

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 now here considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit *court, with directions for further proceedings to be had therein, [*64 according to law and justice, and in conformity to the opinion of this court.

Long v. Palmer.

GUSTAVUS BEALL *et al.* v. The Lessee of HOLMAN *et al.*

THIS case was also brought before the court, by a writ of error to the circuit court for the northern district of Alabama, on substantially the same grounds as those considered in the above opinion. There is no material difference in the facts on which the judgment of the court rests, between the two cases. The judgment of the circuit court in this case is also reversed; and the cause remanded for further proceedings.

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*65] *BENJAMIN LONG, Plaintiff in error, *v.* PALMER, SMITH & COMPANY, Defendants in error.

Escape.—State practice.

Action for an escape, against the sheriff of Madison county, he having received into his custody as a prisoner, the defendant, in an action in the circuit court of Mississippi, taken under execution, and having suffered and permitted him to escape.

The declaration set out the judgment obtained by the plaintiffs against Scott, the defendant in the circuit court, the execution, the arrest of Scott, and his delivery to Long, as the sheriff, who received him into his custody under the execution, and detained him until, without leave or license of the plaintiffs in the execution, and against their will, he suffered and permitted him to escape and go at large, &c. To this declaration, the defendant pleaded, that he did not owe the sum of money demanded in the declaration, "in manner and form as complained against him;" and the jury found that the defendant Long "doth owe the debt in the declaration mentioned, in manner and form as therein alleged," and assess damages for the detention thereof, at $1016.96; upon which the court gave judgment for $6356, and $1016.96 damages and costs.

The judgment of the circuit court was correct, under the provision of the statute of Mississippi of 7th June 1822; the jury were not required, in the action, to find specially that the prisoner escaped with the consent, and through the negligence of the sheriff; the plea alleged that the defendant did not owe the sum of money demanded, "in manner and form as the plaintiff complained against him;" this plea put in issue every material averment in the declaration. On this issue, on the most strict and rigid construction, the jury have expressly found all that is required to be found by the requirements of the act.

If the sheriff suffer or permit a prisoner to escape, this, both in common parlance, and legal intendment, is an escape with the consent of the sheriff.[1]

The object of the act is, to make the sheriff responsible for a voluntary or negligent escape, and that this shall be found by the jury; and if this appear from the record, by express finding or by the necessary conclusion of the law, it is sufficient.

If any particular practice has prevailed in the state courts, as to the manner of entering upon the record the finding of the jury, it is a mere matter of practice as to the form of taking and entering the verdict of the jury; and cannot be binding upon the courts of the United States.

ERROR to the Circuit Court for the Southern District of Mississippi. An action of debt was instituted by the defendants in error, against Benjamin Long, then sheriff in Madison county, in the state of Mississippi, for
*66] the recovery of $6277 and costs, the same being the amount of a *judgment obtained by Palmer, Smith & Company against Thomas S. Scott, at the January term 1833, of the district court of the United States for the district of Mississippi, with interest, &c.

The plaintiffs in the district court averred in the declaration, that they had sued out a *capias ad satisfaciendum* on the judgment against Thomas S. Scott, who was arrested by the deputy-marshal; and who, having him

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[1] Holmes *v.* Lansing, 3 Johns. Cas. 73.

in custody under the execution, committed him to the custody of Benjamin Long, the sheriff, &c. That the said Benjamin Long received Scott into his custody, and afterwards, "without the leave or license and against the will of the plaintiffs, suffered and permitted the said Scott to escape and go at large wheresoever he would, out of his custody." The defendant in the circuit court, the case having been transferred to that court, pleaded "*nil debet*;" and the jury found a verdict for the plaintiff, "in the manner and form as alleged by them;" whereupon judgment was entered for the plaintiffs, according to the verdict. The defendants sued out this writ of error to January term 1839.

The case was argued by *Coxe*, for the plaintiff in error; an by *Henderson*, for the defendant.

Coxe, for the plaintiff in error, contended, that the judgment against Benjamin Long, in the circuit court, was erroneous, upon the principles of the common law; and particularly, by the laws of Mississippi. He said, that there were no averments in the declaration of matters which, by the law of Mississippi relating to actions for an escape, were, by the express provisions of the statute, required to be found by the jury. The liability of a sheriff for an escape, was, where the plaintiff had not consented to the escape of the prisoner, and the negligence of the officer to make immediate pursuit. The only averment in the declaration in this case is, that the sheriff permitted Scott, against the will of the plaintiff, without leave or license, to escape, and suffered him to go at large wheresoever he would, out of his custody. The finding of the jury should have been upon the necessary and required averments; and the verdict should, in compliance with *the statute, have found the facts required by the statute to create the liability of the sheriff. The jury found a general verdict. [*67
No implication will be allowed. The statute expressly declares that the jury shall find the facts. The action for an escape is the pursuit of a rigid remedy; and the statute of Mississippi, looking to the hardship of the imposition of liability on the sheriff, has declared, that all the facts necessary to create it shall be expressly found.

Henderson, for the defendants in error, contended, that the entry of the judgment on the verdict of the jury, did authorize the assertion that the jury had found all the facts required by the statute. It was for the defendant below to have brought by plea before the jury, any of the requisitions of the act of assembly which should be proved to make him liable. If an issue had been tendered on such a plea, these facts would have been brought into controversy. The entry of a general judgment on a special verdict is often made, and is lawful and proper.

This is an action of debt, and the provisions of the statute of Mississippi do not apply to such actions. If the action had been on the case, for the escape under mesne process, it might have been necessary to have proved all the requirements of the statute, under proper averments in the declaration. The language of the act of Mississippi may authorize this position. The plaintiffs in this case allege a debt to be due to them for an escape. The defendant pleads *nil debet*, that he does not owe the money, and the jury find, that he did owe the same, in manner and form, &c; this

is sufficient. Cited, 4 Call 370; 1 How. (Miss.) 64; 3 Ibid. 419; 2 Gallis. 231; 3 W. C. C. 17, 558; Pet. C. C. 74; Tidd's Forms 334; 1 Arch. Pract. 205; 1 Munf. 501; 5 Pet. 190; 1 Mass. 153; 1 Paine 159; 2 Pet. 16.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the United States for the southern district of Mississippi. It is an action of debt, brought against the defendant for the escape of Thomas S. Scott, who had been duly committed to his custody by the marshal of Mississippi. The declaration sets
*68] *out the judgment obtained by Palmer, Smith & Co., against Scott; the issuing the execution thereupon; the arrest of Scott, and his delivery to the defendant, as sheriff, who received him into his custody, by virtue of the said execution, and detained him until, afterwards, to wit, on the 10th day of October 1833, when without leave or license, and against the will, of the said Palmer, Smith & Co., he suffered and permitted the said Scott to escape and go at large, wheresoever he would, out of the custody of him the said Benjamin Long, so being sheriff as aforesaid. To this declaration, the defendant pleaded that he does not owe the sum of money demanded by the plaintiffs in the declaration, or any part thereof, in manner and form as the said plaintiffs have complained against him. And the issue thereupon joined came on to be tried by a jury; who, upon their oaths say, that the defendant doth owe the debt in the declaration mentioned, in manner and form as therein alleged, and assess the damages for the detention thereof, at $1016.96.

The question presented upon this writ of error, arises under a law of the state of Mississippi, concerning escapes, passed the 7th of June 1822 (Rev. Code 318), the third section of which declares, that no judgment shall be entered against any sheriff or other officer, in any suit brought upon the escape of any debtor in his or their custody, unless the jury who shall try the issue, shall expressly find that such debtor or prisoner did escape with the consent, or through the negligence of, such sheriff or other officer; or that such prisoner might have been retaken, and that the sheriff or other officer neglected to make immediate pursuit. This latter branch of the act is not involved in the present question. The declaration contains no averment of neglect to make immediate pursuit to retake the prisoner. To this section of the act, which is general, and extends to all actions for escapes, whether the prisoner is in custody of the sheriff on mesne process or on an execution, there is a proviso, which declares, that when the sheriff or other officer shall have taken the body of any debtor in execution, and shall wilfully and negligently suffer such debtor to escape, the party suing out such execution may have and maintain an action of debt against the sheriff, for
*69] the recovery of all such sums of *money as are mentioned in the execution, and damages for detaining the same; any law, custom or usage to the contrary notwithstanding. So that when the action is for the escape of a prisoner in execution, the measure of recovery is fixed, and not left open to any mitigating circumstances. This proviso takes the case of an escape, where the prisoner is in custody on an execution, out of the provisions in the enacting clause. The action in this case is debt, and comes within the proviso. But the grounds on which the sheriff is made liable for

the escape are substantially the same. In the enacting clause, he is made liable, if the escape is with his consent, or through his negligence. And in the proviso, he is made liable, if he wilfully and negligently suffer the escape. The word "or" must obviously be here substituted for "and." Shall wilfully or negligently suffer the escape. To consent to an escape is, certainly, wilfully to suffer it. And the question which arises upon this record is, whether the case is brought within the provisions of this act.

The action is debt against the sheriff, and the averment in the declaration, on which his liability for the escape rests, is, that he, without leave or license, and against the will, of the said Palmer, Smith & Company (the plaintiffs in the execution), suffered and permitted the said Scott (the prisoner) to escape and go at large, out of the custody of him, the said Benjamin Long, so then being sheriff of the county of Madison, and the said sum of $6356.83, due for said damages and costs, being then and still wholly unpaid and unsatisfied. The error complained of in this record is, that the jury have not expressly fonnd, that the prisoner escaped, with the consent or through the negligence of the sheriff. The plea to this declaration, which contains the averment above mentioned is, that the defendant does not owe the sum of money demanded in the declaration, in manner and form as the plaintiff has complained against him. This plea puts in issue every material averment in the declaration; and the plaintiff was called upon to prove such averments. It put in issue, therefore, the inquiry, whether the sheriff suffered and permitted the escape. If he suffered and permitted the escape, this, both in common parlance and in legal intendment, was an escape with the consent of the sheriff. And the verdict or the jury is, that the defend ant *doth owe the debt in the declaration mentioned, in manner and [*70
form as therein alleged. The manner and form alleged in the declaration is, that he owed it, by reason of his having permitted the prisoner to escape. So that, upon the most strict and rigid construction of the act, the jury have expressly found that the escape was with the permission of the sheriff; which is equivalent to finding that it was with his consent, according to the requirement of the act. This act does not point out any particular form in which the finding of the jury is to be entered upon the records of the court. The object of the act is to make the sheriff responsible for a voluntary or negligent escape; and that this shall be found by the jury. And if this appears from the record, by express finding, or by the necessary conclusion of law, it is sufficient. So that, if the verdict of the jury in this case should be considered no more than the common form upon the plea of *nil debet*, all the averments in the declaration are, in judgment of law, presumed to have been proved. And if any particular practice under this statute has prevailed in the state courts, as to the manner of entering upon the record the finding of the jury, it is a mere matter of practice as to the form of taking and entering the verdict of the jury; and cannot be binding upon the courts of the United States. The judgment of the court below is accordingly affirmed.

This view of the case renders it unnecessary to consider the motion to dismiss the writ of error.

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 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.

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*71] *Stephen Cocke, for the use of the Commercial Bank of Columbus, Mississippi, Plaintiff in error, *v.* Joseph A. Halsey and others, Defendants in error.

Officer pro tem.—Effect of judgment.

The constitution of Mississippi declares, that clerks of the circuit court, probate, and other inferior courts, shall be elected by the electors of the county, for two years; the legislature of Mississippi, by statute, declared, that when, from sickness, or other unavoidable causes, the clerk of the probate court shall be unable to attend the court, the judge of probate may appoint a person to act as clerk *pro tempore*, who shall take an oath faithfully to execute the duties of the office, &c. Deeds of trust and mortgages are declared to be void against creditors and purchasers, unless they shall be acknowledged or proved, and delivered to the clerk of the proper court to be recorded; and they shall be valid only from the time they are so delivered to the clerk. Robert D. Haden was elected clerk of the court of probate for the county of Lowndes, and during the two years for which he was so elected, he went to the state of Tennessee on business; and being absent when the court of probate sat, William P. Puller was, by the judge of the court of probate, appointed to clerk *pro tempore*; and having taken the oath of office, he executed the duties of clerk, during the session of the court, and afterwards, until the return of the regularly-elected clerk. After the adjournment of the court, a deed of trust, duly executed, by which certain personal property was conveyed for the benefit of creditors, was delivered to William P. Puller, and was by him entered for record; and execution was levied on the property thus conveyed, by a creditor of the party who had executed the deed; the regularity of the recording of the deed was denied, on the ground, that the clerk of the probate court *pro tempore*, had no authority to receive the deed of trust for record after the adjournment of the court of probate: *Held*, that the clerk *pro tempore* was authorized to record the deed of trust, under the constitution and law of Mississippi.

In every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must presumed proper, and is binding until reversed by a superior tribunal; it cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. Thompson *v.* Tolmie, 2 Pet. 157; United States *v.* Arredondo, 6 Ibid. 720; Voorhees *v.* Bank of the United States, Ibid. 473; Philadelphia and Trenton Railroad Co. *v.* Stimpson, 14 Ibid. 458, cited.[1]

Error to the Circuit Court for the Southern District of Mississippi. On the 24th March 1838, James Carter & Company executed a deed of trust to William L. Moore, for the purpose of securing the payment of certain sums of money to the Commercial Bank of Columbus; by which they *72] conveyed, among other things, *certain slaves, then in Lowndes county, Mississippi, in trust to sell the said property for the benefit of the bank in Columbus. This deed was presented for record to the officer of the clerk of the court of probate for Lowndes county, on the 24th day of March 1838, the day on which it was executed; and was indorsed, "Received in my office for record, on the 24th day of March 1838, William

[1] United States' Bank *v.* Beverly, 1 How. 134; Barton *v.* Forsyth, 20 Id. 533; Jeter *v.* Hewitt, 22 Id. 352; Adams *v.* Preston, Id. 473; Randall *v.* Howard, 2 Black 585; Secrist *v.* Green, 3 Wall. 744; Tioga Railroad Co. *v.* Blossburg and Corning Railroad, 20 Id. 137. A judgment cannot be impeached collaterally for errors which do not affect the jurisdiction of the court. Cooper *v.* Reynolds, 10 Id. 308; Bragg *v.* Lorio, 1 Woods 209; The Rio Grande, Id. 279.

P. Puller, clerk *pro tem.*" And it was afterwards certified to have been recorded on the same day, under his hand and seal, by William P. Puller, clerk *pro tem.*

At the time this record and certificate were made by William P. Puller, as clerk *pro tempore*, one Robert D. Haden was the clerk of probate for the county of Lowndes, duly elected, qualified and sworn. Haden was duly elected in November 1837, for two years, and entered upon the discharge of his duties some time in the month of February 1839. Haden visited the state of Tennessee on business, and did not return in time to perform the duties of clerk at the March term 1839. In consequence of his absence, Thomas Sampson, Esquire, judge of probates, upon the opening of the court of probate, at March term 1839, appointed William P. Puller to act as clerk *pro tempore* during the absence of Haden. This deed was recorded by Puller, during the absence of Haden, but after the March term of the court of probate, not while the said court was in session. Haden afterwards returned and resumed the duties of his office. The above-described property was, by the trustee, left in the possession of James Carter & Company.

At the May term 1838 of this court, judgment in the above-entitled case was obtained against the said James Carter & Company. Execution was issued upon this judgment, and was levied on the assigned negroes, in the possession of James Carter & Company. Upon the levy being made, the trustee came forward and claimed this property, and gave the necessary bond ; and the issue was now before the court to try the right to the said slaves. If the deed of trust was properly and legally recorded, then it was admitted, that the judgment in the above case was no lien upon said slaves, and that the trustee would be entitled to the same ; otherwise, if the deed was not duly and legally recorded, the slaves were subject to the satisfaction of the said judgment.

*The court adjudged, that the trust-deed was not duly and legally recorded ; and that the said acts and proceedings of the said William P. Puller, as clerk *pro tempore*, in the recording of the said trust-deed, was without authority of law, and was altogether void ; and so instructed the jury. To this opinion, the plaintiff excepted, and the jury having found a verdict according to the opinion of the court, the plaintiff prosecuted this writ of error to the judgment of the circuit court on the verdict. [*73

The case was submitted to the court, on a printed argument, by *Cocke*, for the plaintiff ; and was argued at the bar, by *Key*, for the defendant.

Cocke, in his argument, said :—The question involved in this case is, whether the deed of trust mentioned in the record, was properly recorded. This is to be determined, mainly, by the local laws of Mississippi. There are, nevertheless, some elementary principles involved.

The statute and constitutional law of Mississippi, which is supposed to bear upon this subject most directly, may be found as hereafter pointed out. By the act of 13th June 1822, deeds of conveyance were required to be recorded by the clerk of the county court of the proper county. Alden's Revision of the Laws of Mississippi, 297, § 1. This, by the same section, is declared to be in the county in which the land is situated. By § 4, p. 298, deeds in relation to personal property shall be recorded in that county in which such personal property shall remain. Same page, § 5, provides, that

deeds of trust and mortgages shall take effect from the time they are delivered to the clerk to be recorded, and then only; but other deeds shall take effect from the time they were sealed and delivered, if recorded within three months: §§ 6–10 prescribe more in detail the duties of the clerk. By the act of the 28th June 1822, Alden's Revision, p. 183, § 7, this language is used: "During the vacancy in the office of clerk of a county court, and during the unavoidable absence of the principal clerk and his deputies, if any he have, the court, in term time, or the presiding justice thereof, in vacation, may appoint a clerk *pro tempore*, who, after taking the necessary oath of office, shall be authorized to perform *the duties of a clerk, and during his continuance in office shall be entitled to all the fees thereof." *74]
By the act of the 16th of February 1828, Alden's Revision, p. 194, the judge of probate of the county and the justices of the county court then in commission, constitute the court denominated the county and probate court; and the latter part of the same section provides, that the clerk of the county court then in office should be clerk of said court.

Thus the law on this subject stood, until the year 1833, when the revised constitution of Mississippi was adopted. At p. 39, Alden's Revision, will be found the revised constitution. § 4, title "Schedule," provides, that "all laws then 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." By art. 4 of the constitution (Judicial Department), § 19, Alden's Revision, p. 34, "the clerk of the high court of errors and appeals shall be appointed by said court for the term of four years; and clerks of the circuit, probate and other inferior courts, shall be elected by the qualified electors of the respective counties, and shall hold their offices for the term of two years."

By art. 5 of the revised constitution (Executive Department), § 13, Alden's Revision, p. 34, "all vacancies not provided for in this constitution, shall be filled in such manner as the legislature may prescribe." By the act of the 2d of March 1833, Alden's Revision, p. 198, § 70, "all vacancies, either in the office of judge or clerk of the said court, shall be filled by election, at the several precincts of the county, to be held at such time as the board of county police may prescribe, and on such public notice as may be provided for by law." By the same act of the second of March 1833, Alden's Revision, p. 199, § 73, it is provided, "that in case the clerk shall be at any time unable, from sickness or unavoidable causes, to attend said court, it shall be lawful for the judge of probates to appoint a clerk, to act as clerk *pro tempore*, who shall take an oath faithfully to discharge all the duties of his office, and for services rendered by the said clerk he shall be entitled to the fees allowed by law to the clerk of said court."

*For the purpose of reversing the opinion of the circuit court, Mr. *Cocke*, for the plaintiff in error, contended: 1. That the deed of trust was properly recorded. 2. That the appointment of William P. Puller "clerk *pro tempore*," was in conformity with the laws of Mississippi, and valid. 3. That the regularity of his appointment could not be collaterally inquired into. 4. That it was competent for the probate court to make the appointment. 5. That as Puller was clerk *de facto*, by appointment, acting under color of office, his acts were valid as respects the rights *75]

of third persons and the community; whether he was clerk *de jure* or not. 6. That it is not competent for the federal tribunals to declare a state law, regulating her local and municipal police, void or otherwise unconstitutional; unless in conformity with the decisions of state tribunals, when the constitution of the United States is in no manner contravened. 7. That Puller's right to discharge the duties of clerk continued during the absence of Haden, and until Haden took the office, and resumed the duties of it.

To ascertain the intention of the legislature, laws on analogous subjects may be safely referred to. If this is allowable, we will find a similar provision in reference to the clerks of the circuit courts. Thus (Alden's Revision, p. 118, § 13), that "during the vacancy of the office of clerk in any circuit court of law, and during the unavoidable absence of the principal clerk and his deputies, if any he have, the judge thereof, either in term-time, or in vacation, may appoint a clerk *pro tempore*, who, after taking the necessary oath of office, shall be authorized to perform the duties of a clerk, and, during his continuance in office, shall be entitled to all the fees thereof." So, if, from any cause, there be a just exception to the sheriff, the coroner may act; or, if the cause extends to the coroner, then a justice of the peace may perform the duty. Alden's Revision, p. 334, § 15.

In the case before us, the agreement shows, that Haden, the clerk elected, was absent in the state of Tennessee. It is true, there was no vacancy. Haden was the incumbent elect, *and consequently, there could be no election under the law. His absence was, however, about to create [*76
a kind of *interregnum* in the discharge of the duties of clerk. To prevent this, the statute above cited appropriately interposed itself, and provided a clerk *pro tempore*. The power of the judge of probate to do this is the question. It is contended—

1. That the appointment of William P. Puller, clerk *pro tem.* of the probate court of the county of Lowndes, was in conformity with the law of Mississippi, and in the absence of Hayden, the clerk elect, was directly required by the statute to be done. See Alden's Revision, p. 183, § 7, and p. 199, § 73, above cited.

2. The appointment of the court is itself conclusive evidence that the absence of Hayden was an unavoidable absence, and cannot now anywhere be questioned. The court which made the *pro tem.* appointment was alone competent to decide the question; and having made the appointment, its determination is conclusive, either that Hayden was sick, or absent from unavoidable causes; and the propriety of that decision cannot now anywhere be impeached, or collaterally inquired into. *Trenton Railroad Company* v. *Stimpson*, 14 Pet. 458.

If it be true, that there can be no clerk *pro tem.* of the probate court, so there could be no clerk *pro tem.* of the circuit court; nor could a coroner be allowed, in any contingency, to discharge the duties of sheriff, nor a justice of the peace to discharge the duties of coroner. The federal judiciary would thus undertake to determine that the whole system of the Mississippi legislation, in seeking to prevent an *interregnum* in the offices, and a failure of justice to her citizens in her municipal police, was invalid. It cannot be a sound construction of the constitution of Mississippi, to suppose, that if a clerk should, at any time, be unable, from sickness or other unavoidable causes, to attend to the duties of his office, the framers of the

constitution intended, that the interest and business of the country should be suspended. If the constitution is to be construed as denying legislative action as to matters of this kind, not provided for in the constitution, then it must be considered, that the convention intended, that if the clerk elect
*77] should be unable, from sickness or unavoidable causes, to *attend to the duties of his office, the citizen, for the time, should be without any power to perfect his legal rights, by having his deeds recorded ; in other words, that as a trust-deed, under the laws of Mississippi, can have no validity until it be delivered to the clerk to be recorded, the convention must have intended, that, if the clerk should be unable, from sickness or other unavoidable causes, to attend to the duties, during that time, no right could be created by way of trust-deed ; and if the sickness, or other unavoidable causes, should continue longer than three months, titles by deed should be ineffectual altogether. It is no answer to say, the clerk might have a deputy. In the case of this clerk, there was no deputy ; nor does the constitution provide any more for a deputy-clerk than it does for a clerk *pro tempore.*

3. But if it be contended, that there is no such officer as clerk *pro tem.* known to the constitution of Mississippi (as such was the opinion of the court below), then it would follow, that as the legitimate business of a constitution is to regulate the general organic law, the duties of regulating in detail the various tribunals and jurisdictions created by it, have been wisely left to legislative discretion and action. The legislature having provided for the very state of things here in controversy, the counsel has not been enabled to discover anything in the constitution of Mississippi interdicting the authority of the legislature on the subject.

4. The constitution nowhere requires deeds to be recorded at all, nor did (as it is believed) the common law. The legislature might dispense with the recording of deeds altogether ; or they might have them recorded by a notary-public, city magistrate, or by any private citizen by name, and there would certainly be nothing unconstitutional in it. But the legislature have thought proper to give the recording of deeds to the clerks of probates, and in certain contingencies, to the clerks *pro tem.* of that court, to be appointed by the judges of probates. There cannot, it seems, be anything wrong in this ; and it is certainly the manner in which the discretion of the legislature has been exercised ; and nothing is known which would justify the court below, or this court, in saying they have been wrong.

5. The recording of deeds is not an incident of any court, or its jurisdiction. If even it were not competent for the legislature to provide for a
*78] clerk *pro tem.* of the probate court, to be appointed, *as to the matters peculiar to the jurisdiction of that tribunal, yet there is nothing in the recording of deeds which can, by any possibility, enter into such considerations.

6. The terms, during the unavoidable absence of the principal clerk, as mentioned in § 7, p. 183, and that in case the clerk shall be at any time unable, from sickness or unavoidable causes, to attend said court, it shall be lawful for the judge of probate to appoint a person to act as clerk *pro tempore,* who shall take an oath faithfully to discharge all the duties of his office ; and for services rendered by said clerk, he shall be entitled to the fees allowed by law to the clerk of said court, as mentioned in § 73, p. 199 ;

cannot justly be limited to the term of the court which made the appointment. It is true, the law requires the court to make the appointment; but the last section defines the tenure of the office to continue commensurate with the causes which made it necessary to make the appointment; otherwise, he could not discharge all of the duties of his office. Again, it is the universal principle, in the construction of statutes, to regard the reason and spirit of the law, and the causes which induced the legislature to enact it. In the matter before us, it was most obviously the motive with the legislature, to prevent an *interregnum* in the offices, and to hinder a failure of justice. The business confined to the term of the court is not one-hundreth part, in interest and amount, of that which, by the laws, is allowed to be done by the clerk in vacation. If the legislature intended to provide for the matters of less importance only, it appears, they must have been guilty of extreme ignorance, folly or wickedness; the which, this court would reluctantly ascribe to them. This court will give the statute the construction claimed.

7. It is confidently believed, that the law is every way regular and proper, and that there does not exist any possible valid objection to the deed, or the time or manner of its execution, probate, or to the recording of it. But whatever may be the nature of the legal rights or liabilities of Haden and Puller, as to the office, Puller being the incumbent by appointment, discharging the duties of the office under color of title, being the clerk *de facto*, whether he were clerk *de jure* or not, all of his acts, so far as the rights of the community and third persons are concerned, *are valid. *King* v. *Leslie*, Andr. 163; *Taylor* v. *Skrine*, 2 Treadw. 696; *Jones* v. *Gibson*, 1 N. H. 268, and the authorities there; *Keyser* v. *McKissan*, 2 Rawle 139; *Bucknam* v. *Ruggles*, 15 Mass. 180; *Nason* v. *Dillingham*, 15 Ibid. 170; *Fowler* v. *Bebee*, 9 Ibid. 231; *People* v. *Collins*, 7 Johns. 550; 7 Am. Com. Law Rep. by Wheeler, 142; *Biddle* v. *County of Bedford*, 7 Serg. & Rawle 392–3. Indeed, this doctrine is now regarded as settled, as elementary in principle, and no longer open to discussion. [*79

8. The district federal court of Mississippi was not, nor is this court, competent to declare a state law unconstitutional, which is in conformity with the decisions of the state tribunals; unless some provision of the constitution of the United States has been contravened. As there is nothing in this law in the least incompatible with the constitution of the United States, it was the duty of the court below, and is now the duty of this court, to give effect to the state laws. *Jackson* v. *Lamphire*, 3 Pet. 289; *Shelby* v. *Guy*, 11 Wheat. 361. If this is not correct, it appears to involve the right of the federal tribunals to enter into the local, the municipal police of the several states, and abolish it—a doctrine unprecedented in its assumptions, and one which will find no toleration in this court.

The legitimacy of appointments, elections or qualifications of an incumbent in office, cannot be inquired into, collaterally; but their acts are valid, until they are regularly superseded. If this were not so, the naming of only two of the officers, required to be elected under the constitution of Mississippi, will show us to what infinity of confusion, and in inextricable difficulties, the doctrine contended for by the opposite party would lead. For example: by the third section of the fifth article of the constitution of Mississippi (Alden's Revision, p. 33), the governor is required to be at least

thirty years of age ; that he shall have been a citizen of the United States for twenty years, and shall have resided in the state at least five years next preceding the day of his election.

Key, for the defendants in error.

*80] 1. By the constitution of Mississippi, the act of the 2d of *March 1833, of the Mississippi legislature, is void. The case stated shows there was no vacancy in the office. If there was, the constitution shows how the vacancy was to be filled, and that the legislature could not alter it. Therefore, there was no power in the court to make the appointment ; and Puller was not clerk of probates, having authority to receive and record the deed.

2. Again, suppose the law valid, what authority did it give ? Only to meet the exigency, and act as clerk during the session of the court (one week), this being the only evil the law sought to remedy ; and as the power to appoint was only for such specific purpose, and on a particular contingency, such purpose and the occurrence of such contingency cannot be presumed, but must appear on the face of the proceedings. Mr. Justice STORY, and this court, have decided, that otherwise it is a nullity. 1 East 64 ; 8 T. Rep. 178 ; 4 Wheat. 77 ; 6 Ibid. 127 ; 2 Pet. 523.

3. Again, what authority did it give ? Only for the session of the court, *pro tempore ;* as if it had said, till the end of the term. This was all that ought to have been done ; all that was necessary ; and all that was done. If William P. Puller, therefore, on such an appointment, held over, it was the usurpation of the office, without authority, or the color of authority ; and then all his acts are nullities.

4. And this answers the argument and the authorities cited to show that Puller was clerk *de facto*, though not *de jure ;* and that his official acts, as regards third persons, are valid. He was not clerk *de facto* under color of right, but a usurper ; one holding over after his authority was gone, and there was no color for his official acts. What is an officer *de facto*, holding under color of right, to whose official acts this sanction is given ? 1. Those who hold under an authorized appointing power, but irregularly or improperly appointed, or not duly qualified. 2. Where the office is not full. But here there was no authority to appoint. And if there was, the time of his appointment was over ; and he was holding wrongfully, without any color of right. So is 15 Mass. ; 5 Yerg. 271 ; 1 East 79 ; *King* v. *Corporation of Bedford*, Andr. 163. *3. He could not be clerk *de facto*, because *81] there was then a clerk *de jure ;* and there cannot be both at the same time. Suppose, there are acts done by Haden at the same time (and *non constat*, and there were not), such acts would be valid. 4. He was not clerk *de facto*, because he did not take the name of the office clerk *pro tempore*. The recording law requires the clerk to do the act. Here, it is done by a clerk *pro tempore*. No such officer recognised by the constitution. 5. Again, if he was clerk *de facto*, he could only do necessary acts ; attend the court. This was all he need have done, and all he was in any way authorized to do, and for a limited time. It was so held in Andr. 166, 173 ; *King* v. *Lisle*, Ibid. 163.

Finally, it is settled by the Mississippi law of 1840. This shows that the legislature have recognised the rights of those with whom the official acts

of Puller interfered; have declared his acts void, where they interfered with such rights, and that such rights shall be secured. This is a Mississippi statute, and a legislative construction of it; and the courts there will, no doubt, respect this act of 1840; and this court will not interfere and advise them to nullify it.

Daniel, Justice, delivered the opinion of the court.—This cause comes before this court upon a writ of error to the circuit court of the United States for the southern district of Mississippi. The statement of the case upon which the questions presented here for decision arise, is, as agreed by the parties upon the record, substantially the following:

On the 24th of March, in the year 1838, James Carter and Lewis Grigsby, merchants, executed a deed of trust to one William L. Moore, as trustee, to secure the payment of certain sums of money to the Commercial Bank of Columbus. This deed was regularly acknowledged by the grantors, before a justice of the peace, on the 29th of March 1839, and delivered to one William P. Puller, who had been appointed clerk *pro tempore* of the probate court of the county of Lowndes, in said state, and who recorded the deed in the office of the clerk of probate for said county, and indorsed thereon a certificate of record, signed William P. Puller, *clerk *pro tempore*. That at the time this record and certificate were made by Puller, as [*82 clerk *pro tempore*, one Robert Haden was the clerk of probate for the county of Lowndes, duly elected, qualified and sworn; that Haden was elected in November 1837, for two years, and entered on the discharge of his duties in the month of February 1838; that Haden visited the state of Tennessee on business, and did not return in time to perform the duties of clerk, at the March term of 1838. In consequence of his absence, the judge of probate, upon commencing the court of probate of the March term of 1838, appointed Puller to act as clerk during the absence of Haden. The deed of trust to Moore was recorded by Puller, during the absence of Haden, but after the March term of the court. Haden afterwards returned and resumed the duties of his office.

The original trustee, William L. Moore, having died, the superior court of chancery of the state of Mississippi, at the January term 1839, duly appointed Stephen Cocke, the plaintiff in error, trustee, in lieu of Moore.

At the May term of the circuit court of the United States for the southern district of Mississippi, the defendants in error obtained a judgment against James Carter & Company. Execution was sued out upon this judgment, and levied by the marshal on the property mentioned in the trust-deed, in the possession of Carter & Company. Upon the levy being made, Stephen Cocke, the trustee, claimed the property, gave the bond required in such cases by the law of Mississippi; and an issue was duly made to try the right to the property. Upon the trial of this issue, the following question was submitted to the court for its opinion thereon, viz: That if the deed of trust was properly and legally recorded, then it was admitted, that the judgment in question was not a lien upon the property conveyed by the deed, and the trustee was entitled to the same; otherwise, if the deed was not legally recorded, the property was subject to satisfaction of the judgment. Upon this question, the court below adjudged that the trust-deed was not duly recorded; that the acts of Puller, as clerk *pro tempore*, in recording

the deed, were without authority of law, and altogether void; and so instructed the jury. To this opinion of the court, thus given, the plaintiff in error excepted; and brings that opinion before this court for examination.

*83] *The fourth article of the constitution of Mississippi, § 31, declares, that "the judicial" power of that state shall be vested in one nigh court of errors and appeals, and such other courts of law and equity as shall be afterwards provided for in that constitution. The same article, after authorizing and ordaining various superior tribunals in which the judicial powers shall be vested, at length, in § 18, declares, that there shall be established in each county in the state a court of probates, the judge whereof shall be elected by the qualified electors of the county, for a period of two years. The 19th section of the same article declares, that the clerks of the circuit, probate, and other inferior courts, shall also be elected by the qualified electors of the county, for the period of two years. See Laws of Mississippi, by Howard & Hutchinson, 24, 26.

The legislature of the state, in organizing their judiciary, as it was indispensable they should do (as the constitution had limited its own action to the direction that the courts therein named should be established, leaving their organization and distribution to the legislative authority), by a statute passed in March 1833, and by §§ 1, 2 and 3 of that statute, established a court of probates in each county of the state; provided for the election of judges and clerks of the several courts; prescribed to them the oath of office they should take, and to the clerks the bonds they should execute, before assuming their official functions. Laws of Mississippi 469. By the 8th section of the statute, the legislature declared, that in case the clerk of probate "shall be at any time unable, from sickness or other unavoidable causes, to attend said court, it shall be lawful for the judge of probate to appoint a person to act as clerk *pro tempore*, who shall take an oath faithfully to discharge all the duties of his office," &c.; *vide* p. 470, Laws of Mississippi. By the 5th section of the same statute, vacancies in the offices of judge and clerk are to be filled as the original appointments were made, viz., by election. By the fifth section of another statute of Mississippi, concerning real estate and conveyances, passed June 13th, 1822, it is declared, that deeds of trust and mortgages shall be valid as to subsequent purchasers for valuable consideration without notice, and as to all creditors, from the time when

*84] such deeds of trust or *mortgages shall have been acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded, and from that time only. From this provision, the question of priority arises.

In support of the decision of the circuit court, it has been insisted, that the power of the judge of the probate court to appoint a clerk of probate *pro tempore*, is limited to the term of the court, and to the exigencies and necessities of the term; and does not extend to a period beyond the term, nor to any acts performed by the person so appointed, out of court. From this position, claimed by counsel as a legitimate deduction from the statute, it is argued, that the clerk, having been appointed by an exercise of power wholly illegal and void, nay, even without color of authority, his acts, too, must be merely void, and not entitled to the effects properly attributable to the acts of one who may be considered as an officer *de facto*, in contradis-

tinction to him whose commission and qualification are in all respects regular, and who therefore may be called an officer *de jure* and *de facto*.

In reasoning from the language of the statute, it would seem difficult to perceive anything in it which limits the appointment *pro tempore* to the session of the court. The expression in the law is, "from sickness or unavoidable causes;" now, it is quite as probable, that these causes would operate beyond, as well as during, the continuation of the court. The only fair inference deducible from the words of the law is, that the causes requiring an appointment, should, like the appointment itself, be temporary; so that the provision of the statute should not be perverted to cover a permanent disqualification of the regular clerk, and thereby prevent his removal or the election of a successor, under proper circumstances. The precise duration of that temporary cause, it could hardly have been the intention of the law-makers to define. To ascribe to them an intention to restrict the duties of a clerk *pro tempore* to the session of the court, would be imputing to them an act of utterly useless legislation; since none can fail to perceive, on looking into the law, that the duties of the clerk of probate are as extensive and as important, during vacation, as they are during term-time; if, indeed, they are not more so.

Several authorities have been cited in argument, some from *the English and some from the American cases, in order to show that [*85
the recording of the trust-deed in question by the clerk of probate cannot be supported even as the act of the clerk *de facto*. These authorities, however, do not establish the position they have been brought to maintain; and in some instances, they operate directly against it. The first case relied on (and it is a leading case) is that of the *King* v. *Lisle*, Andr. 163, 174. This was a *quo warranto* to remove a burgess of Christ Church, on the ground, that he had been nominated by one Goldwire, calling himself mayor of the corporation, when he had never been appointed mayor. The court say, the nomination by Goldwire could not be supported, because he was not, even by any colorable title or pretext, mayor of the corporation; evidently putting his act on the same footing with an attempt at usurpation by any other private person. There is a remark by the court, in delivering its opinion, which is regarded as not without its bearing upon the present case; and that remark is this, "that supposing Goldwire was mayor *de facto*, yet the acts here found to be performed by him are not good; because they were not necessary for the preservation of the corporation." In these cases, the court say. "the proper distinction is between such acts as are necessary and for the good of the body, which comprehend judicial and ministerial acts, and such as are arbitrary and voluntary." The second case from the English books is that of *Knight and Wife* v. *Corporation of Wells*, 1 Lutw. 509, 519. This was an action of debt against the corporation, upon their bond to the wife of the plaintiff; and the objection taken to the recovery was, that the person who put the corporate seal to the bond, was not qualified by the charter to be mayor. He had been elected to the office of mayor, however. The case seems to have been much considered, for it was twice argued; and it was resolved by all the court, that although the mayor might not be qualified, according to the charter, yet he had been elected, and, in virtue of his election, was mayor *de facto*, and that, therefore, all judicial and ministerial acts performed by him were good.

The cases of the *People* v. *Collins*, 7 Johns. 549, and of *McInstry* v. *Tanner*, 9 Ibid. 135, are in strictest accordance with the authority from Lutwyche. In the *People* v. *Collins*, the *court say, in speaking of
*86] the powers exercised by the officers whose acts were impeached: "They were commissioners *de facto*, since they came into office by color of title; and it is a well-settled principle of law, that the acts of such persons are valid, when they concern the public, or third persons who have an interest in the acts done; and this rule is adopted to prevent the failure of public justice. The limitation of this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large in the case of the *King* v. *Lisle*, Andr. 263." So, too, in 15 Mass. 173, *Bucknam* v. *Ruggles*, this matter is very fully treated. The court say, that, although the officer did not comply with the requisites of the constitution, yet, having been appointed, and thus having color of title, his acts are valid in respect to third persons who may be interested in such acts; that such a rule is necessary to prevent a failure of justice. Besides, the officer's title to his office ought not to be determined in a collateral way. In addition to other authorities to this point, is quoted 3 Cruise Dig. tit. Officer, §§ 71, 75, for the principle that, by the test and corporation acts, in England, all persons are disabled in law to all intents and purposes to hold certain offices, unless they take the oaths required; yet, notwithstanding this disabling clause, it has been held, that the acts of officers, not qualified by those statutes, may be valid as to strangers. The case of *Williams* v. *Peyton's Lessee*, cited for the plaintiff in error, from 4 Wheat. 77, is thought to have no application to the question now under consideration; all that was ruled in that case was this, that where a title depends upon the acts of a ministerial officer to be performed *in pais*, proof of the performance of those acts is necessary to sustain such title: a principle which none perhaps will dispute; but, whether affirmed or denied, cannot apply to the present case. So too, the case of *Davidson* v. *Gill*, cited from 1 East 64, having been ruled exclusively upon a provision of the statute 13 Geo. III., c. 78, requiring that certain proceedings of justices should, in relation to closing and opening ways, in order to give them validity, appear on the face of those proceedings, in a prescribed schedule or form set forth in the statute; is considered as wholly inapplicable.

If, then, the appointment and the acts of the clerk of probate *de-
*87] pended for their validity upon the principles which apply to the acts of officers *de facto*, a just interpretation of the authorities adduced in behalf of the plaintiff in error, gives validity to both. That the judge had power to appoint a clerk *pro tempore*, seems never to have been questioned; that he did appoint, is equally indisputable; the irregularity alleged is in the failure to limit the appointment to the term of the court. Admit, for the present, that the appointment should have been thus limited, and that the clerk has admitted the deed to probate, after the term; yet, in his character of clerk, was he not within the very definition of the authorities, and within the concessions of the counsel, clerk *de facto*, acting *colore officii;* and must not his acts, therefore, be valid so far as regards third persons who are interested to them? An affirmative answer to this inquiry is unavoidable.

But the appointment of this officer, and his acts, when so appointed,

rest upon a foundation still broader and firmer than that which sustains the actings of an officer *de facto*. By the law of Mississippi, the judge had the power to appoint, *pro tempore*, whenever, from sickness or unavoidable causes, the clerk could not attend. By the investiture of that power, it remained with the judge, in the exercise of judicial discretion, to decide upon the propriety and necessity for the execution of the power; he did decide upon them; and he must be presumed to have decided properly. The correct legal principle applicable to such proceedings in this: That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled, to admit of doubt at this day, and has been repeatedly and expressly recognised in this court, as in the cases of *Thompson* v. *Tolmie*, 2 Pet. 157; *United States* v. *Arredondo*, 6 Ibid. 720; *Voorhees* v. *Bank of the United States*, 10 Ibid. 473, and the *Philadelphia and Trenton Railroad Company* v. *Stimpson*, 4 Ibid. 458. It cannot, then, be permitted, in this collateral inquiry, to insist, that the judge has either misapprehended or transcended his authority; he has exercised the discretion vested *in him by the statute; that discretion has led to the conclusion, that the necessity for an appointment was co-extensive with the absence of the ordinary clerk, an absence deemed by him unavoidable; and the discretion of the judge *pro hâc vice*, at any rate, must be conclusive. But beyond these legal presumptions, this court, upon a review of the constitution and statute of Mississippi, are satisfied, that the appointment of the clerk of probate *pro tempore*, was fully warranted in the manner and to the extent in which it was made. They, therefore, decide that the decision of the circuit court for the southern district of Mississippi is erroneous, and accordingly do reverse the same. [*88

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 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 reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions for further proceedings to be had therein, in conformity to this opinion, and according to law and justice.

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*Hugh M. Keary, Patrick F. Keary and Charles A. Lacoste, Plaintiffs in error, *v.* The Farmers' and Merchants' Bank of Memphis, Defendants in error. [*88

Jurisdiction.

A promissory note was drawn by Hugh M. Keary and Patrick F. Keary, dated at Pinkneyville Mississippi, in favor of Charles A. Lacoste, payable twelve months after date, at the Planters' Bank of Natchez; it was indorsed by Charles A. Lacoste to the Farmers' Bank of Memphis, Tennessee; having been protested for non-payment, the Farmers' Bank of Memphis instituted a suit in the circuit court of Mississippi, against the makers and indorser, alleging that they were citizens of Tennessee, and that the defendants were citizens of Mississippi. The action

was against the makers and indorser of the note; they being joined in pursuance of a statute of Mississippi, of 1837, which required that in all actions on bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and indorsers, resident in the state in the county where the drawers live, in a joint action; this statute had been adopted by the judge of the district of Mississippi, in the absence of the judge of the supreme court assigned to that circuit, by a rule of court; and in conformity with the rule, this suit was instituted. The defendants pleaded to the jurisdiction of the court, on the ground, that the makers and payee of the note were, when it was made, citizens of Mississippi; and this plea being overruled, on demurrer, the circuit court, on the failure of the makers to plead over, and the failure of Lacoste to appear, gave a judgment for the plaintiff.

This action cannot be sustained in the circuit court, jointly against the makers and indorser of the note; the statute of Mississippi is not in force or effect in the courts of the United States; the sole authority to regulate the practice of the courts of the United States being in congress.

So far as the acts of congress have adopted the forms of process, and modes of proceeding and pleadings, in the state courts, or have authorized the courts thereof to adopt them, and they have actually adopted them, they are obligatory, and no further; but no court of the United States is authorized to adopt, by rule, any provisions of state laws which are repugnant to, or incompatible with the positive enactments of congress, upon the jurisdiction, or practice, or proceedings of such courts.[1]

The law of Mississippi is repugnant to the provisions of the act of congress giving jurisdiction to the courts of the United States, and organizing the courts of the United States.

No suit against the makers of the note could be maintained in the circuit court; the 11th section of the judiciary act of 1789, allows suits on promissory notes to be brought in the courts of the United States in cases only where the suit could have been brought in such court, if no assignment had been made. The makers and payee of the note having been citizens of Mississippi, the circuit court had no jurisdiction of a suit against the makers; between Lacoste, the indorser, and the plaintiffs below, it was different; for on his indorsement to citizens of another state, *he was liable to a suit by them in the circuit court. But the joining of those who could not be sued in the circuit court with the indorser, made the whole action erroneous; it was founded on distinct and independent contracts.

*90]

Error to the Circuit Court for the District of Mississippi. In the district court for the southern district of Mississippi, an action was instituted by the President, Directors and Company of the Farmers' and Merchants' Bank of Memphis, citizens of Tennessee, against the plaintiffs in error, Hugh M. Keary, Patrick F. Keary and Charles A. Lacoste, citizens of the state of Mississippi, on a promissory note made by Hugh M. Keary and Patrick F. Keary, in favor of, and indorsed to the bank by, Charles A. Lacoste. The action was afterwards transferred to the circuit court of the United States for the district of Mississippi.

By a statute of Mississippi, suits on promissory notes are prohibited to be brought in any other form than against all the parties, drawers and indorsers, in a joint action; and the action must be prosecuted in the county in which the drawers reside. By a rule of the circuit court, adopted by the district judge, sitting in the circuit court, and in the absence of the judge of the supreme court assigned to sit in that circuit, the practice of the courts of Mississippi, in conformity with the statute, was adopted as the practice of the circuit court.

Process was served on all the defendants; and two of the defendants, Hugh M. and Patrick F. Keary, entered a plea to the jurisdiction of the court; averring that the cause of action, if any, accrued to the plaintiffs, by virtue of the promissory note, made payable to the order of Charles A. Lacoste, and by him, Lacoste, indorsed to the plaintiffs; and that, at the

[1] Drumgoole *v.* Farmers' and Merchants' Bank, 2 How. 241.

time of making the aforesaid note, and at the time of the commencement of the plaintiffs' action, the said defendants and Charles A. Lacoste were citizens and residents of the said state of Mississippi. The plaintiffs below, the defendants in error, demurred to this plea, and the circuit court sustained the demurrer. The defendant, Lacoste, having made default, and no further plea having been entered by the other defendants, the court rendered a joint judgment against all the defendants. The defendants prosecuted this writ of error.

*The case was argued by *Henderson*, for the plaintiffs in error; and by *Jones*, for the defendants. [*91

Henderson contended: 1. That the declaration, in joining the defendants, as makers and indorser of the note sued on, and showing the separate contracts and undertakings of the makers and indorser, nevertheless alleges and claims a joint damage only; thus setting forth a defective cause of action, not authorizing the judgment rendered. 2. The judgment of the court is rendered jointly against the defendants on separate contracts and *assumpsits*, in violation of the contracts declared on. 3. There is error in this, that the plea to the jurisdiction of the court should have been sustained; and the judgment rendered is void for want of jurisdiction.

The obvious error in the judgment of the circuit court was the want of jurisdiction over the parties. The suit, pursuing the form of action prescribed by the statute of Mississippi, is against the makers and indorser of the note, and there is a general judgment against all. Thus, while no right under the judiciary act of 1789 exists to sue in the circuit court, the parties, whose only obligations were to the indorser of the note, both citizens of Mississppi, the court allow proceedings against them, because, by the Mississippi statute, the suit must be against all the parties; and to the plaintiffs below, as citizens of Tennessee, the indorser only was answerable in the circuit court of the United States.

The rule of court which adopted the practice under the Mississippi statute, was not authorized by the judiciary act. The courts of the United States have no authority to make such rules; the power is only in congress. Cited, 2 Laws United States, § 11, p. 61. Jurisdiction cannot be given by rules of court.

There is also a defective cause of action in law, as set forth in the declaration, which can authorize no judgment thereon. The action is joint, the breach and damages complained of are joint, and a joint judgment is thereupon rendered. Whereas, the causes of action are the separate liability of makers and indorser, being contracts and *assumpsits* wholly distinct and independent, the respective obligations of which are violated by conjoining *them, and adjudging a joint responsibility, different and adverse to their several undertakings. [*92

Jones, for the defendants in error, maintained that the plea was bad, and had been properly overruled by the circuit court. That the indorsement of the note was not, like indorsements in general, a new note between the indorser and the indorsees alone, but a new note, in which the makers and indorser took the relation of joint promisors to the indorsees. That, whatever be the precise mode or form in which the statute may be held to

have operated the effect of joint liability, it has, in operating that specific effect, necessarily given to the contract of indorsement the new and enlarged effect of creating a joint obligation or promise, direct and immediate, from the makers and indorser to the indorsees. That this action, therefore, is not on a mere assignment of the original chose in action; but substantially on an original undertaking, imposed by the subsequent contract of indorsement alone. That, as the jurisdiction of the court would have been unquestionable, had a suit on the indorsement, between indorsees and indorser, been allowed, so it cannot, in any reason, be taken away by any enlargement or modification of the contract of indorsement itself, created by the local law of the state. This is the only mode in which the action would be legal in the state of Mississippi. If the point now made by the counsel for the plaintiffs in error is sustained, the jurisdiction of the courts of the United States, in commercial cases, which were the object of the judiciary act of 1789, will be defeated.

There is a plastic power in courts, over commercial instruments, under anomalous circumstances of irregularity in their frame, so as to mould them to their primary ends and purposes. Thus, an indorser is held liable as the drawer of a new bill or note, when upon no other hypothesis could any action be framed on the instrument. The indorsement, without a prior indorsement of the payee, or special indorser, of a bill payable to a fictitious payee, has been held binding. A bill, or prior indorsement, forged, or made by a *feme covert*, or an infant, has been held to bind a subsequent indorser, in the hands of a *bonâ fide* holder. To these may be added many special instances, still more anomalous. *Chitty on Bills, 109, 265, 268, 626–7, 584, 588–9; Bayley on Bills, 85; Kyd on Bills, 150; *Buller* v. *Cocks*, 6 Mod. 39; *Lambert* v. *Pack*, 1 Salk. 127; *Hill* v. *Lewis*, Ibid. 132; 1 Str. 441; *Heylyn* v. *Adamson*, 2 Burr. 674; 3 East 482; *Gibson* v. *Minet*, 1 H. Bl. 587; 1 Str. 478; *Critchlow* v. *Parry*, 2 Camp. 182; 2 Bing. N. C. 249; 4 Mass. 258; 7 Pick. 291; 16 Ibid. 533; *Brush* v. *Reeves*, 3 Johns. 439.

*93]

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Mississippi. The original action is *assumpsit* upon a promissory note, signed by Hugh M. Keary and Patrick F. Keary, dated at Pinkneyville, in the state of Mississippi, on the 13th of February 1838, whereby (as the declaration alleges) the makers promised, twelve months after date, to pay to Charles A. Lacoste, by the name and description of Briggs, Lacoste & Company, or order, $4863.55, payable and negotiable at the Planters' Bank in Natchez, and which note was indorsed by Lacoste, by the name and description of Briggs, Lacoste & Company, to the plaintiffs, the Farmers' and Merchants' Bank of Memphis. The declaration avers that the plaintiffs are citizens of Tennessee, and that the defendants are citizens of Mississippi; the makers and the indorser being joined in the suit. This joinder was in pursuance of a statute of Mississippi, of the 13th of May 1837 (Laws of Mississippi [edit. 1838] 717), whereby it is enacted, "that in all actions founded upon bills of exchange and promissory notes, the plaintiffs shall be compelled to sue the drawers and indorsers, living and resident in this state, in a joint action; and such suit shall be commenced in the county where the drawer or drawers reside, if living in the state; and if the drawer or drawers be dead, or reside out of the state,

the suit shall be brought in the county where the first indorser resides." It seems, that this statute had been adopted by the district judge of the district of Mississippi, in the absence of the judge of this court, assigned to that circuit by a rule of court; and upon the footing of that rule the present suit was brought.

The makers of the note pleaded a plea to the jurisdiction of the *court, averring that the cause of action accrued to the plaintiffs by [*94 virtue of the promissory note made payable to and indorsed by Lacoste to them; and that they, the makers, at the time of making the note, and at the time of the commencement of the action, were citizens and residents of the state of Mississippi. To this plea, there was a demurrer, which upon the hearing, was overruled, and the makers assigned to plead over; which, having failed to do, and Lacoste, the other defendant, having failed to appear, judgment was finally rendered against all the defendants; and from that judgment the present writ of error has been brought to this court.

The first and main question presented to us for consideration is, whether the present action is sustainable in the circuit court jointly against the makers and the indorser, under the circumstances disclosed in the record. In our judgment, it is not. The statute of Mississippi, *proprio vigore*, is of no force or effect in the courts of the United States, it not being competent for any state legislature to regulate the forms of suits or modes of proceeding or pleadings in the courts of the United States; but the sole authority for this purpose belongs to the congress of the United States. So far as the acts of congress have adopted the forms of process, and modes of proceeding and pleadings, in the state courts, or have authorized the courts thereof to adopt them, and they have been actually adopted, they are obligatory; but no further. But no court of the United Statess is authorized to adopt, by rule, any provisions of state laws which are repugnant to, or incompatible with, the positive enactments of congress upon the subject of the jurisdiction, or practice, or proceedings in such court.

It is obvious, that the latter clause of the statute of Mississippi already cited, which provides for the bringing of suits upon bills of exchange or promissory notes, in the county where the drawers live, or, under certain circumstances, in the county where the first indorser lives, is utterly incompatible with and repugnant to the known organization and jurisdiction of the courts of the United States. Suits in these courts are, by the judiciary act of 1789, ch. 20, § 11, to be brought in the district whereof the defendant (being a citizen of the United States) is an inhabitant, or in which he shall be found at the time of serving the writ; and the *suits are [*95 cognisable in no other places than those assigned for the regular holding of the terms of the courts. There is no pretence, therefore, to say, that the circuit court could, by any rule, adopt the state law upon this subject.

As little real ground is there for maintaining, that the court had authority to adopt the other part of the state statute, requiring that the drawers and indorsers of bills of exchange and promissory notes should be compellable to be joined by the plaintiff in a joint action. The judiciary act of 1789, ch. 20, in the 11th section, gives jurisdiction to the circuit court of suits between a citizen of the state where the suit is brought, and a citizen

of another state ; and, among other exceptions, not applicable to the present suit, it excepts "any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless the suit might have been prosecuted in such court, to recover the contents, if no assignment had been made ; except in cases of foreign bills of exchange." It is plain, upon the language of this clause, that as the makers and the payee of the promissory note in this case, were all citizens of Mississippi, no suit could have been maintained between them (the original parties) in the circuit court. But the same objection does not apply to a suit on the same note by the plaintiffs, as indorsees, against their immediate indorser, Lacoste ; for there is an immediate privity of contract between them, and they are citizens of different states. This was long since settled by the decision of this court, in *Young* v. *Bryan*, 6 Wheat. 146. So that it is manifest, that as between the makers and the plaintiffs, the present suit is not maintainable ; and as between the indorser and the plaintiffs as indorsees, it is maintainable, by the laws of the United States. The result, therfore, of giving effect to the statute of Mississippi, and the rule of the court adopting the same, would be, either that the circuit court, in contravention of the express terms of the judiciary act of 1789, ch. 20, would be obliged to maintain jurisdiction over the makers, which is prohibited by that act, or else would be compellable to surrender jurisdiction over the indorser, which the same act confers on it. Certainly, such a doctrine cannot be asserted to be well founded in law. If it were admitted, it would enable the state legislatures, by merely changing the modes of remedial justice, or requiring different parties, under
*96] different and *distinct contracts, to be joined in one and the same suit, to oust the courts of the United States of all the legitimate jurisdiction conferred upon them by the constitution and the acts of congress.

For these reasons, we are of opinion, that the present suit, so far as it respects the jurisdiction of the circuit court over the makers of this note, is ill founded ; and that the plea of the makers to the jurisdiction is good in point of law ; and that the suit being a joint action, founded upon distinct and independent contracts, is incapable of being sustained in the courts of the United States against any of the defendants. The consequence is, that the judgment must be reversed, and the cause remanded to the circuit court, with directions that the plaintiffs take nothing by their writ.

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 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 reversed and annulled ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to enter judgment for the defendants, in conformity to the opinion of this court.

*John Gordon, Plaintiff in error, *v.* James Longest, Defendant in error.

Removal from state court.

An action was instituted in the circuit court of Jefferson county, in the state of Kentucky, by a citizen of that state, under an act of the legislature of Kentucky, against a citizen of the state of Pennsylvania, to recover damages, alleging the same in the declaration to be $1000, for having taken on board of the steamboat Guyandotte, commanded by him, a slave belonging to the plaintiff, from the shore of Indiana, on the voyage of the steamboat, proceeding up the Ohio river, from Louisville to Cincinnati. The act of the legislature of Kentucky subjects the master of a steamboat to the penalties created by the law, who shall take on board the steamboat under his command, a slave, from the shore of Ohio, opposite to Kentucky, in the same manner as if he had been taken on board from the shores or rivers within the state. On entering his appearance, the defendant claimed to remove the cause to the circuit court of the United States for the district of Kentucky, he being a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky; and offered to comply with the requisitions of the judiciary act of 1789; the court refused to allow the removal of the cause; deciding that it did not appear to its satisfaction that the damages exceeded $500. The case went on to trial, and the jury gave a verdict for the plaintiff for $650; and on a writ of error to the court of appeals of Kentucky, the judgment of the circuit court on the verdict was affirmed; before the court of appeals, the plaintiff in error excepted to the jurisdiction of the court of Jefferson county, and also to the constitutionality of the law of Kentucky on which the suit was founded: *Held*, that the decision of the court of appeals was erroneous; and the judgment of that court was reversed.

It has often been decided, that the sum in controversy in a suit, is the damages claimed in the declaration; if the plaintiff recover less than $500, it cannot affect the jurisdiction of the court; a greater sum having been claimed in his writ; but in such case, the plaintiff does not recover his costs; and, at the discretion of the court, he may be adjudged to pay costs.

The damages claimed by the plaintiff in his suit, give jurisdiction to the court; whether it be an original suit in the circuit court of the United States, or brought there by petition from a state court.

The judge of the state court to which an application is made for the removal of a cause into a court of the United States, must exercise a legal discretion as to the right claimed to remove the cause. The defendant being entitled to a right to have the cause removed under the law of the United States, on the facts of the case, the judge of the state court has no discretion to withhold that right.

The application to remove the cause having been made in proper form, and no objection having been made to the facts on which it was founded, it was the duty of the state court "to proceed no further in the cause;" and every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court, or in the court of appeals, was *coram non judice*.

One great object in the establishment of the courts of the United States, and regulating *their jurisdiction, was to have a tribunal in each state, presumed to be free from local influence; and to which all who were non-residents or aliens might resort for legal redress; and this object would be defeated, if a state judge, in the exercise of his discretion, may deny to the party entitled to it, a removal of the cause. [*98

Error to the Court of Appeals of the state of Kentucky. In the Jefferson circuit court of the state of Kentucky, James Longest, of the state of Kentucky, instituted an action against John Gordon, to recover the value of a certain slave belonging to him, which John Gordon, who was commander of the steamboat Guyandotte, then proceeding from Louisville, up the Ohio river, to Cincinnati, was alleged to have taken on board the Gyandotte, from the Indiana shore or side of the Ohio, as a passenger to Cincinnati.

John Gordon was a citizen of the state of Pennsylvania; and proceeding according to the provisions of the judiciary act of 1789, he claimed before

[1] The plaintiff cannot defeat the right of removal, by an amendment reducing the amount of damages claimed. Kanouse *v.* Martin, 15 How. 198.

the circuit court of Jefferson county, to remove the cause to the circuit court of the United States for the district of Kentucky. The declaration filed in the case, in the Jefferson circuit court, claimed damages in $1000. The circuit court decided, that it did not appear that the amount in controversy in the suit exceeded $500, exclusive of costs; and refused to allow the removal of the cause to the circuit court of the United States. The case came on for trial on the 21st day of March 1838; and a jury gave a verdict for the plaintiff, for $650, on which judgment was entered for the plaintiff.

On the trial, the defendant asked the court to instruct the jury—

1. That so much of the act entitled "an act to amend an act to prevent masters of vessels and others from employing and removing persons of color from this state," approved February 12th, 1828, as is in the following words, to wit: "Be it further enacted, that the liabilities under the said act shall accrue, whenever the person of color shall be taken on board any steam-vessel, from the shore of the Ohio river, opposite the state, to the same extent as if they were taken on board from the shores or rivers within the state," is not within the constitutional power of the legislature *99] *of the state of Kentucky, under the constitution of the United States.

2. That under the constitution and laws of the United States, a steamboat-captain navigating the Ohio river, is not guilty of a breach of duty, by taking persons of color from the Indiana shore, and transporting them in their steamboats; provided such captain shall, in good faith, believe such persons of color are free; and that the act of the Kentucky legislature, if to the contrary, is unconstitutional and void.

3. If the jury believe from the evidence, that the negro was taken from the Indiana shore by the plaintiff, in good faith, believing him to be free, and that he was taken by the plaintiff as a passenger, in the navigation of his boat; that in such case, the jury ought to find for the defendant the issue in the case.

4. That although persons of color in Kentucky are in law presumed to be slaves, they are in Indiana presumed, *primâ facie*, to be free; and if the plaintiff took the slave from the Indiana shore, in good faith, and under the belief that he was free, and that he was taken by the defendant, as a passenger, in the navigation of the said boat; that in such case, the jury ought to find for the defendant.

5. That if the defendant was a citizen of the state of Ohio, residing there, and the steamboat Guyandotte, of which he was commander, did belong to the port of Cincinnati in said state; and the negro Jim did come on board said boat, at the Indiana shore of the Ohio river, and the said Gordon acted in good faith, and did not know that the said negro Jim was a slave, that then he is not liable to pay damages to the plaintiff, for having permitted the said slave to come on board the boat and having taken him on board said boat to Cincinnati, in the state of Ohio.

6. That if the jury believe from the evidence, that the slave Jim was taken on board the Guyandotte, from the state of Indiana, the plaintiff cannot recover in this action.

7. If the jury believe from the evidence, that the defendant, in the navigation of his boat, took the slave in the declaration mentioned, from

the Indiana shore, believing him to be free, and that slave was, at the time, a runaway slave of plaintiff, in that case they find for defendant.

*8. That to enable the plaintiff to recover in this action, the jury must believe that the defendant took plaintiff's slave from Louisville, or from the Kentucky shore. The court refused to give those instructions. [*100

On the motion of the counsel for the plaintiff, the court instructed the jury, that if they found from the evidence, that the defendant was master of the steamboat Guyandotte, put out his yawl, when opposite to Jeffersonville, in the state of Indiana, took the plaintiff's negro on board, and carried him to Cincinnati, in the state of Ohio, and that he was lost to the plaintiff, the defendant was liable in this action; and they ought to find for the plaintiff all the damages he had sustained.

To which opinions of the court, in refusing to give the instructions asked, and in giving the instructions for the plaintiff, the defendant excepted; and he prayed an appeal to the court of appeals of the state of Kentucky. Before the court of appeals, the appellant assigned for error, among others, the following:

1. The court erred in refusing to remove this cause to the federal court, upon the petition of the appellant, filed on his first entering his appearance to the suit. The appellant claims that he had a right to a trial in the United States court, and that the whole proceedings in this cause, subsequent to the application to remove, are against law.

2. The circuit court erred in each and every instruction given on the trial, at the instance of the plaintiff.

3. The court erred in refusing to give each and every instruction asked by the appellant, Gordon, on the last trial.

4. The circuit court has, in violation of the constitution of the United States and of an act of congress, clung to a jurisdiction that did not rightfully belong to a state court, and on the trial of the cause, given instructions in violation of the constitution of the United States, and the appellant relies upon each and every article of the constitution of the United States for a reversal.

The court of appeals affirmed the judgment of the circuit court, and the plaintiff in that court prosecuted this writ of error.

*The case was argued by *Crittenden*, for the plaintiff in error; *Benton* appeared for the defendant. [*101

The opinion of the court was given on the first exception to the decision of the court of appeals of the state of Kentucky; and on no other question in this case. The argument of the counsel for the plaintiff in error, on the other exceptions, is, therefore, omitted.

Crittenden contended, that, by the 11th and 12th sections of the judiciary act of 1789, the plaintiff in error had a right to a trial before a court of the United States. The statute gives the right to remove a cause from a state court to a federal court, if the defendant is a citizen of another state from that in which the suit may be brought; when the value in controversy exceeds $500. The plaintiff's declaration claims damages to the amount of $1000, and the verdict was for $650. The act of congress says, that when it shall appear to the satisfaction of the court, that the sum or value in

controversy exceeds $500, the cause may be removed to the circuit court; if the question of the amount in controversy is left to the decision of the court exclusively, there is an end of the case for the plaintiff in error. But if it was to be settled on evidence satisfactory to the judicial eye, here was that evidence, ample and sufficient to satisfy the judge. The damages laid in the declaration, showed the claim of the plaintiff to be $1000. This was conclusive in favor of the plaintiff in error.

McLean, Justice, delivered the opinion of the court.—This is a writ of error to the court of appeals of the state of Kentucky, under the 25th section of the judiciary act of 1789. An action was commenced in the circuit court of Kentucky, by the defendant in error, against the plaintiff, to recover the value of a certain slave which the defendant took on board a steamboat, at Louisville, of which he was master, as a passenger; and conveyed him
*102] out of the state, in violation of the statutes of Kentucky. *By an act of the Kentucky legislature of 1824, to prevent the escape and removal of slaves, the masters of vessels, &c., receiving slaves on board, and removing them from that state, were made liable to the owners of such slaves for any loss they might sustain thereby. And by a subsequent act of 1828, it was enacted, that the liabilities under the first act "shall accrue, whenever the persons of color shall be taken on board any steam-vessel from the shores of the Ohio river, opposite the state, to the same extent as if they were taken on board from the shores or rivers within the state."

On entering his appearance, the defendant filed his petition to remove the cause to the circuit court of the United States for the district of Kentucky, on the ground, that he was a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky; and the defendant offered to give bond and security according to law. The citizenship of the parties, as alleged, was admitted; but the plaintiff objected to the removal, and the court decided it did not appear to its satisfaction, that the amount in controversy exceeded $500, exclusive of costs, and on that ground refused the prayer of the petition. After the rejection of his petition, the defendant pleaded not guilty; and a jury, being called and sworn, found the defendant guilty, and assessed the plaintiff's damages at $420, on which verdict a judgment was entered.

During the trial, several exceptions were taken to the rulings of the court, which it is not necessary now particularly to notice. On these exceptions, a writ of error was taken to the court of appeals. Several errors were assigned in that court, on which a reversal of the judgment of the circuit court was prayed. Among others, was one that the court erred in overruling the application to remove the cause to the circuit court of the United States. The court of appeals reversed the judgment, on the ground that the plaintiff was only entitled to recover the damages he had actually sustained by the act of the defendant, which was not in accordance with the instruction to the jury by the circuit court. The cause was remanded to the court below for further proceedings. A jury being again called to try
*103] the cause, found the *defendant guilty, and assessed the plaintiff's damages at $650. Judgment was entered upon this verdict, and the cause was again removed to the court of appeals, by a writ of error, on certain exceptions taken at the trial. Among the other errors again assigned in the court of appeals, was the refusal, by the circuit court, to permit the

cause to be removed to the circuit court of the United States. The court of appeals affirmed the judgment; and the cause is now brought here, by a writ of error, from that court.

It is unnecessary to notice the other questions raised by the exceptions, as the judgment of this court must turn upon the overruling, by the state court, of the application of the defendant for the removal of the cause to the federal court. In their opinion, the court of appeals did not notice this point, although it was assigned for error on each of the writs of error which were prosecuted before that court.

The 12th section of the judiciary act of 1789 provides, "that, if a suit be commenced in any state court against an alien, or by a citizen of the state, is brought against a citizen of another state, and the matter in dispute exceeds the sum or value of $500, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending; and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause."

In the declaration, the plaintiff laid his damages at the sum of $1000, and this was the amount named in the writ. Under the above section, it must be made to appear to the satisfaction of the state court, that the defendant is an alien, or a citizen of some other state than that in which suit is brought; and that the matter in controversy, exclusive of costs, exceeds the sum of $500. *It being admitted on the record, that the defendant was a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky, the only question before the court was the amount in dispute. The damages claimed in the writ and declaration were, unquestionably, the sum in controversy. This is not an open question. It has been often decided, that if the plaintiff shall recover less than $500, it cannot affect the jurisdiction of the court; a greater sum being claimed in his writ. But in such case, the plaintiff does not recover his costs; and at the discretion of the court, he may be adjudged to pay costs. [*104

The damages claimed by the plaintiff in his writ, gives jurisdiction to the court, whether it be an original suit in the circuit court of the United States, or brought here by petition from a state court. From the decision of the state judge, he seemed to consider the application for the removal of the cause as a matter to be decided by his discretion. But he must exercise a legal discretion. The defendant was entitled to a right under the law of the United States; and on the facts of the case, the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it was founded. This being clear in the language of the above act, it was the duty of the state court "to proceed no further in the cause." And every step consequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the court of appeals, was *coram non judice*.

This is the first instance known to us, in which a state court has refused

to a party a right to remove his cause to the circuit court of the United States. And it is impossible to conceive of a case, in which the right of removal could be more unquestionable than in this case. One great object in the establishment of the courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence; and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated, if a state judge, in the exercise of his discretion, may deny to the party entitled to it, a removal of his cause.

*105] A more summary remedy might have been pursued by the defendant than the one which this court can now give to him. *But the cause being brought before us, through the supreme court of the state, we reverse the judgment of affirmance by that court, and direct the cause to be remanded, with instructions that it shall be transmitted to the circuit court of the state; which shall be directed to enter an allowance of the petition of the defendant for the removal of the cause to the circuit court of the United States for the district of Kentucky, *nunc pro tunc.*

Judgment reversed.

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*106] *John Tompkins, surviving partner of John Tompkins and Adam Murray, trading under the firm of Tompkins & Murray, Complainants and Appellants, *v.* Leonard Wheeler *et al.*, Defendants.

Assignment for the benefit of creditors.

A bill to set aside a deed of assignment, made by an insolvent debtor, for the purpose of securing the payment of his debts to certain enumerated creditors, to the exclusion of the complainant, also a creditor of the assignor, and of others.

A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer; and he may elect the time when it is to be done, so as to make it effectual; such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention. Marbury *v.* Brooks, 7 Wheat. 556, and 11 Ibid. 78, cited.

When a deed of assignment is absolute upon its face, without any condition whatever attached to it, and is for the benefit of the grantees, the presumption of law is, that the grantees accepted the deed.[1]

The delivery of a deed of assignment for the benefit of creditors, to the clerk, to be recorded, may be considered as a delivery to a stranger for the use of the creditors; there being no condition annexed to the assignment, making it an escrow.[2]

After the assignment, the creditors for whose benefit the same was made, neglected to appoint an agent or trustee to execute it, and the property assigned remained in the hands of the assignor; the property consisted principally of *choses in action*, which the assignor went on to collect, and divided the proceeds among the creditors, under the assignment; no one of the creditors was dissatisfied; and at any time, the creditors could have taken the property out of the hands of the assignor: *Held*, that, leaving the property in the hands of the assignor, under these circumstances, did not affect the asignment; or give a right to a creditor not preferred by it, to set it aside.

Appeal from the Circuit Court of Kentucky. In the circuit court of Kentucky, a bill was filed, on the equity side of the court, for the purpose

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[1] Halsey *v.* Fairbanks, 4 Mason 206; Lawrence *v.* Davis, 3 McLean 177.
[2] Jones *v.* Sleeper, 2 N. Y. Leg. Obs. 132.

of setting aside a deed of assignment or mortgage made by Leonard Wheeler, for the purpose of securing certain of his creditors, in preference to the complainant, who was also a creditor.

At the November term 1837, of the circuit court, the complainants had obtained certain judgments against the defendant Wheeler; and on the application of the defendant, it was agreed, that no executions should be issued upon those judgments until February 1838. The debt on which the judgments had been *obtained amounted to $12,000, which had been purchased by the plaintiffs for $1000; the defendant having failed in [*107
1814, and this being one of the debts due by him at the time of his failure. He afterwards entered into business in Kentucky, contracted a large amount of debts, and obtained some property.

Five days before the time when the complainant had a right to issue execution on the judgments, Leonard Wheeler executed a general assignment or mortgage of all his property. The assignment provided for the payment, in the first place, of all his debts contracted since his failure, in 1814, giving to them a priority or preference, "as all his means and effects had been accumulated by the credit given to him in Kentucky; the same being divided into two classes." It provided, that among his old debts, out of the surplus of his estate, which was expected to remain after the first and second class of preferred debts had been satisfied, certain debts, due by him in 1814, the judgments in favor of the plaintiffs not being among them, should be paid; and not believing the effects assigned would extend beyond the payment of these debts, no others were designated. The assignment then proceeded to assign and transfer all the property and effects to the creditors of the first and second class, in trust to pay the debts according to the preference and classification in the same; giving to the said creditors, or a majority of them, power to nominate and appoint an agent, attorney or trustee, to carry the purposes of the instrument into full effect.

On the 15th of February 1838, writs of *fieri facias* were issued on the judgments, which were returned by the marshal "*nulla bona.*" The appellant filed a bill in the circuit court, praying that the deed of assignment executed by Wheeler should be decreed fraudulent and void, as it regarded the complainant. The bill also alleged acts done by the defendant, Wheeler, for the concealment of property, and also the nominal creation or increase of debts which were included in the preferences made by the assignment, and other acts of fraudulent collusion; and also, it alleged, that the property assigned had been left in the hands of the assignor, and the creditors had never appointed an agent or trustee, who had taken charge or direction of the property assigned. In the *opinion of the court, delivered by [*108
Mr. Justice THOMPSON, other facts are stated, which were taken notice of by the court. The circuit court made a decree dismissing the bill, and the complainants prosecuted this appeal.

The case was submitted to the court, on a printed argument, by *Ogden*, for the appellant; and by *Crittenden*, who presented to the court the printed argument of *M. C. Johnson*, for the appellee.

D. B. Ogden, for the appellant.—The right and power of a debtor to give a preference to some *bonâ fide* creditors over others, is not denied. But such preferences are no favorites in a court of equity, in which "equality

is equity ;" yet, inasmuch as such a deed is good and valid at law, equity follows the law, and will support it. But a court of chancery will look narrowly into all the circumstances of the case ; and if they find the deed tainted in the smallest degree with fraud, they will declare it void. A preference may be given to some creditors over others ; but, in giving that preference, the debtor must act *bonâ fide*. Independent of the questions of law arising in this case, there are strong circumstances to show, that in making this assignment, the defendant, Wheeler, did not act with good faith towards the complainant. He obtained from him an agreement to postpone issuing any executions upon his judgments, until after the first of February ; it was in bad faith for him to avail himself of this postponement, thus obtained, to place all his property out of the reach of an execution. It is evident, that this assignment was made to defraud and injure the complainant, and to prevent his recovering his debt. Another strong circumstance against the fairness and good faith of this assignment, is the following : The assignment directs that an old debt, due from him to F. & J. Sexton, of New York, for the sum of $3120, with interest at the rate of six per cent. from August 1814, shall be paid ; and it also recites that this debt has been assigned to Norman Porter, who now holds the same. Now,
*109] this Norman Porter, it appears throughout this record *is one of the most intimate friends of Wheeler, and one of those favorites for whom he wished to provide, in preference to the complainant. Porter's answer states, that he paid $307.50, Kentucky money, for the debt of F. & J. Sexton, in January 1838. He began to negotiate for it in December 1837. He purchased it, without any arrangement with or suggestion from Wheeler. He had heard of the prosecution by Winter, and of Wheeler's intention to assign his property for the benefit of his other creditors, to prevent Winter from recovering the amount of his judgments ; and he, therefore, bought up this debt of the Sextons. The amount of principal and interest on this debt, calculating the interest at six per cent., from August 1814, to November 1837, is $7422.40 ; which this Mr. Porter receives, and for which he paid but $307.50.

The assignment purports to convey his property directly to the creditors named in it. There is no proof that it was delivered to any of them ; and it is in proof, that several of the creditors never knew of its existence. Wheeler continued in possession of the property ; it never was delivered over ; this of itself is evidence of fraud. 1 Pet. 356 ; 4 Mason 321 ; 3 Maule & Selw. 371 ; 15 Johns. 571 ; 4 Bibb 445. The assignment gives the creditors power to name a trustee to take the property ; no such trustee has ever been appointed. The sale of some property to Putnam was evidently made for the mere purpose of preventing the judgment-creditor from recovering his demand ; and is, therefore, void. Cowp. 434 ; 1 Burr. 474 ; 1 Camp. 333. This assignment, the court will recollect, was made but four or five days before the time during which execution was to be stayed expired, and the negotiation which brought about the assignment of this debt of the Sextons, was not entered upon by Porter, until December, long after the judgments were entered, and Porter himself admits, that he knew of the intended assignment by Winter, and that their debt was to be provided for. It appears, that a more fraudulent attempt than this to give a

preference *over a *bonâ fide* creditor rarely occurs. 7 Pet. 605; 2 Gallis. 557; Pick. 71.

Johnson, for the appellees.—The assignment of Wheeler to his creditors is charged to be fraudulent, because it was made by Wheeler, without the knowledge or assent of the creditors therein named, and was never delivered to, nor accepted by them.

It is contended, that the fact is otherwise. None but F. L. Turner failed to give assent to it; and the mortgage-funds can, under no contingency, pay his debt; and his interest in them amounts to nothing. As to all who do not admit that they did not assent, the presumption of law is, that they did assent, as the deed was beneficial and had no condition attached. See *Halsey* v. *Whitney*, 4 Mason 206; *Wheeler* v. *Sumner*, Ibid. 183. This presumption particularly applies to all the non-residents, as to whom the suit is dismissed. All others have answered, or by agreement are considered as having answered; assenting to the mortgage, or stating that they were paid, before process was served. It may not appear from the answers of some, when the assent was given, but according to the practice of the United States' courts, a matter alleged but not answered must be proved on final trial. See *Young* v. *Grundy*, 6 Cranch 52. If a more specific answer had been desired, exceptions should have been taken. All exceptions to insufficient answers are expressly waived by agreement.

In regard to delivery, it is well settled, that if a deed be delivered to a stranger, for the use of the grantee, without any condition annexed, making it an escrow, it is a delivery to the grantee. Shep. Touch. 58. In this case, the deed was delivered to the clerk of the Fayette county court, for the use of the grantees, to be recorded in his office. It has also been decided, that if a deed of feoffment be made to four, but only delivered to three of them, and livery of seisin made to the three, for the use of all, without the assent of the fourth, and when it comes to his knowledge, he disagrees to it, still the freehold is in him, and so remains, until disclaimer in court; and so, if a deed *be made of goods and chattels, and be delivered to a stranger, for the use of donee, there the goods and chattels vest in [*111 donee, before notice or agreement; but in this case, donee may make refusal *in pais*, and by such refusal, the interest is divested. See *Butler* v. *Baker*, 3 Coke's Reports 26, 27. See also the case of *Doe on dem. Garnons* v. *Knight*, 5 Barn. & Cress. 471, for a full argument on the effect of delivery to a stranger, and for a collation of all the authorities. According to these principles, so far as the vesting of legal title is concerned, it matters not, whether the grantees were consulted or knew of the deed or not; the property embraced in it was vested in them, by force of the delivery to the clerk, for their use, until their disagreement. In cases of deeds of trust, where the property is conveyed to a stranger, for the benefit of creditors, and these creditors not parties to the deed, it has been decided by this court, in *Marbury* v. *Brooks*, 7 Wheat. 556; and *Brooks* v. *Marbury*, 11 Ibid. 78; *Brashear* v. *West*, 7 Pet. 608, also in the case of *Halsey* v. *Whitney*, 4 Mason 206; and *Wheeler* v. *Sumner*, Ibid. 183, that the assent of the creditors is not necessary to the validity of such a deed; and in the case of *Marbury* v. *Brooks*, *supra*, an assent, after a creditor had attached the

goods, was decided to be sufficient to make the deed valid from its execution.

The rule, that in absolute sales of chattels, the possession remaining with the grantor, is a fraud *per se*, has been fully recognised in Kentucky ; but it is equally well settled, that this rule has no application to mortgages and deeds of trust. See 5 Litt. 243 ; 1 J. J. Marsh. 282 ; 3 Ibid. 453. In *Snyder* v. *Hitt*, 2 Dana 204, the court say, that the possession of the mortgagor is not fraudulent, and in general, no evidence of fraud. This court, in *United States* v. *Hooe*, 3 Cranch 73, decide, that where the deed provides for the grantor retaining possession, it is not fraudulent, and in 1 Pet. 449, the rule is held only to apply where the possession of the grantor is inconsistent with the deed.

The reason of this distinction in Kentucky, is two-fold. 1. The possession of the mortgagor is not inconsistent with the deed : and, 2. All deeds of mortgage and of trust are required to be recorded.

*112] *The equity of redemption, or resulting trust of grantor, and his interest in freeing himself from debt, by making the property as available as possible for that purpose, are such actual and legal interests in the property, as all courts will regard and protect, and are such interests as render it not only consistent with the transaction, but highly beneficial to all parties, that the debtor, if honest and capable, should remain in the possession of the incumbered property. He is the person best acquainted with the property and its capabilities, and his interest perfectly coincides with that of the creditors, in making it as valuable as possible.

There can be no doubt, that the assignment in question is not an absolute sale, but a mortgage or deed of trust. The property is assigned for the purpose of paying the debts. Upon their payment, the property, by operation of law, results to the grantor. But by whatever name it may be called, it is, in substance and reality, a mortgage ; and Wheeler has, in the property, all the interests which are above enumerated as appertaining to the mortgagor : and there is, consequently, the same consistency of his possession with the deed, that there could be were it a mortgage, in the most nicely technical sense. In the deed, it is provided, substantially, that he shall remain in possession, managing the fund, until the grantees, by agent or otherwise, take possession.

In Kentucky, all mortgages and deeds of trust, whether of real or personal estate, on legal or equitable interests, are required to be recorded in the offices of the county courts. Brown and Morehead's Statute Law of Kentucky, 448–9 ; also, see Session Acts of 1836–37, p. 255 ; also, Session Acts of 1838–39, p. 96. These statutes would change the rule as to possession, even had it previously existed, by destroying the reason of it. In regard to chattels, the only ownership the world can know, is the continued possession. Being capable of transfer, by the most secret contracts, without the least solemnity or notoriety, purchasers and creditors could be deceived and defrauded without limit, did not the law provide for their security some visible test of ownership. The continued possession is the test as to chattels, but it is not, of real estate, the title-deeds being the evidence, and accordingly, we find the rule does not extend to real estate. In Kentucky,

*113] the notice of incumbrances is the record, and purchasers and creditors are completely guarded against being *defrauded by mortgages,

&c., by an easy reference to the office of the county court. The property is not, however, of the character to which the rule applies. Consisting of *choses in action*, they are incapable of visible possession, and pass by assignment. So this court held, in the case of *Spring* v. *South Carolina Insurance Company*, 8 Wheat. 268.

If a debtor gives up all he has, to *bonâ fide* creditors, and such, all he has provided for, are admitted to be, and he reserves no right, power or benefit to himself, it is impossible that this can be fraudulent. The law not only does not condemn, but approves and sanctions it. See the luminious opinion of Justice STORY in the case of *Halsey* v. *Fairbanks*, 4 Mason 207, and the numerous authorities collated and ably commented on.

THOMPSON, Justice, delivered the opinion of the court.—This is an appeal from the circuit court of the United States, for the district of Kentucky. The bill filed in the court below was for the purpose of setting aside a certain deed of assignment, made and executed by the defendant, Wheeler, for the purpose of securing to certain enumerated creditors the avails of his property, to the exclusion of the complainant; and that the complainant may be decreed to have satisfaction of his judgments set out in the bill, out of the property conveyed by the deed.

The bill sets out, that at the November term of the circuit court of the United States, in Kentucky, in the year 1837, the complainant recovered two judgments against Leonard Wheeler; one for the sum of $4000, with interest, from the 21st of February 1814; and the other for $891.53, with interest for the same time; upon which judgments executions were not to issue until the 1st of February 1838; at which time executions were duly issued, and put into the hands of the marshal of the district to be executed; upon which the marshal returned, that he found no property of which to make the money on the executions. The bill further states, that on the 27th of January 1838, the said Leonard Wheeler, by deed of trust or assignment, made a conveyance to certain of his preferred and specified creditors (of *which the complainant was not one) of certain property therein specified, to pay and discharge certain specified debts, which deed [*114 was duly acknowledged and recorded in the proper county; and the bill charges, generally, that this deed is fraudulent and void. It particularly charges, that the deed was made without the knowledge, privity or assent of the creditors named therein, and who are the parties to whom the deed is given; that the deed was never delivered to, nor accepted by, the grantees; that it was made with intent to deceive and defraud his just creditors, who were not included in its provisions; that the possession of the property conveyed by said deed, was retained by the said Wheeler, and never delivered to the parties of the second part, or any one of them; that the deed was lodged in the clerk's office for record, after the rendition of the complainant's judgments, and but a short time before he was authorized to issue execution upon his judgments. It further charges, that the sale of the goods to Joseph Putnam, one of the creditors named in the deed of trust, was fraudulent, and without any valuable consideration; and that the business was afterwards conducted in the name of the said Putnam, but for the use, in whole or in part, of the said Wheeler. It further charges, that Joseph Swift, another defendant, has for several years past been employed

in carrying on the grocery business, in which the said Wheeler was interested; and that the said Swift is now in possession of goods, or money, or other property, belonging to the said Wheeler, or is indebted to him for the same. It also charges, that Norman Porter, another of the preferred creditors, had money in his hands belonging to the said Wheeler, and to be used for his benefit; and that the note mentioned in the said deed of $3170, was purchased by said Porter for Wheeler's benefit, and with his money. The bill likewise prays, that Abel Wheeler, one of the preferred creditors, may answer and state particularly, whether he has at any time lent and advanced to Wheeler money or other property, and whether he now holds any note or memorandum, or other evidence of debt against him. The bill
*115] prays that the said Leonard Wheeler and the above-mentioned *preferred creditors, may answer specially and particularly to the several interrogatories put in the bill, in reference to the transactions between them severally and respectively.

The several answers of Leonard Wheeler, Porter, Putnam, Swift and Abel Wheeler, contain a full and explicit denial of all the chrges contained in the bill, tending in the least manner to sustain the allegations of fraud or collusion, or any secret or unfair transactions between them, or either of them, with Leonard Wheeler. And there is no proof offered to sustain these allegations; they may, therefore, be dismissed, as wholly unsupported.

The bill calls upon the said Leonard Wheeler to state how and to whom he delivered the deed of trust; in answer to which he states, that every creditor provided for by the deed, was a real and *bonâ fide* creditor. That he consulted with a number of his creditors, naming them, before making the deed; all of whom approved of it; and that he knows of none who disapproved of it, or rejected the benefit of its provisions; and some of them have accepted of it in writing, which appears by the exhibits annexed to the answer. That being satisfied with the propriety of the measure, he made and executed the deed, and left it in the proper office, to be recorded for the use of his creditors. He admits, that the funds mentioned in the deed of trust, remained in his possession; and that the creditors have never availed themselves of the privilege of appointing a trustee; having confidence, as he presumes, in the correctness of his management of the business. And he further states, that he has gone on in collecting the *choses in action*, and paying over the proceeds to the creditors, according to the provisions of the deed of trust. The answer of Wheeler, with respect to the delivery of the deed, and the possession and management of the funds, is corroborated by the answers of a number of the creditors, who are made parties, and called upon to answer on these points. They say, that they were consulted before the deed was executed, and approved of it then; and accepted it, when made. That no trustee has been appointed, because they had full confidence in Wheeler, and desired him to continue in the management of the business.

*116] There are several amended bills, with the answers thereto, *bringing up some new matters, but not of sufficient importance to require any special notice. The above statement of the bill and answers presents all the material questions which arise upon the merits of this case. It is deemed unnecessary to notice the objections made to the jurisdiction of the court below, either on the ground that Elisha I. Winter, the real party in

interest, should have been made the party complainant in this suit; or that there is a want of proper parties, defendants, to enable the court to make a decree upon the merits. The conclusion to which we have arrived supersedes the necessity of considering these questions.

Although the right and power of a debtor to give a preference to some of his *bonâ fide* creditors, to the exclusion of other, has not been denied on the part of the complainant; yet, it has been urged, in argument, that such preferred creditors are no favorites in a court of chancery, where, it is said, equality is equity; and that a court of chancery will look narrowly into all the circumstances, and if it be found, that the deed is tainted in the smallest degree with fraud, it will be declared void. And it has been insisted, that in the present case, there are strong circumstances to show, that in making this deed of trust, the defendant Wheeler did not act in good faith towards the complainant. That he obtained from him an agreement to postpone issuing executions upon his judgments, until after the first of February; and that a few days before that time, he made the assignment in question, so as to put all his property out of the reach of the executions; and that this was in bad faith, which ought not to receive the sanction of a court of equity. It may be observed, in the first place, that there is no evidence of any deception practised by Wheeler to lull him to sleep, or procure any delay in issuing executions on the judgments. It was done in the ordinary course in judicial proceedings. And if the principle be sound, that a debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer, he may certainly elect the time when it is to be done, so as to make it effectual. And such preference must necessarily operate to the prejudice of creditors not provided for; and cannot furnish any evidence of a fraudulent intention. But the circumstances of the present case are such as not only to remove all ground for any charge of fraud, *but even of injustice or unfairness in the conduct of Wheeler. [*117
Although it may be admitted, that John Tompkins is properly made complainant, yet it is manifest from the record, that he is a mere nominal party, and that Elisha I. Winter is the real party in interest. This is shown by the answer of Wheeler, and proved by the testimony of William Fellows; who swears that in the latter part of 1836, or the beginning of 1837, Winter, through his agent, applied to him, to purchase the claim of Tompkins, which had been sent to him for collection. That he offered $1000 for it, which was not at that time accepted. That in the summer of 1837, Winter himself made the same offer which his agent had made; and again, in the fall of 1837, he renewed the offer of $1000, and expressed his opinion of Wheeler's condition, when, with the opinion of some others, who he supposed knew Wheeler's circumstances, he in the month of October 1837, sold the claim to Winter for $1000; believing that he was purchasing it for the benefit of Wheeler. That, a few days after the sale, he received a written request from Winter not to let it be known that he had the control over the claim. Thus we see great anxiety in Winter to purchase a claim against a man embarrassed and in failing circumstances; and the consideration paid for it shows that the claim must have been considered almost desperate. Only $1000 given for a claim which, by the judgments stated in the complainant's bill, including interest, amounted to between $11,000 and $12,000. These circumstances, independent of the statements in Wheeler's answer, are

calculated to cast some suspicion upon the conduct of Winter, and to justify the inquiry, whether he comes into court with clean hands, and can justly reproach Wheeler with bad faith and unfairness towards him. Wheeler's circumstances were extremely embarrassed, if not desperate, and he found impending over him two judgments amounting to nearly $12,000, in the hands and under the control of Winter; who he had certainly no reason to believe was friendly to him; and which judgments, if they could have been enforced to their full amount, would have swallowed up a great proportion of his property. Was he not, under such circumstances, authorized, by every principle of justice and honesty, to secure, so far forth as he could, his *bonâ *fide* creditors? That the debts of all the creditors preferred
*118] in the deed of trust are *bonâ fide* debts, is fully established; not only by the proofs, but is admitted on the record, by an agreement which, among other things, states, "that the genuineness of the debts provided for in Wheeler's assignment will not be contested or called in question on the argument."

That a debtor has a legal right to prefer one or more of his creditors over others, when the transaction is *bonâ fide*, is not an open question in this court. That point was settled in the case of *Marbury* v. *Brooks*, which came twice before the court under circumstances somewhat different, and is reported in 7 Wheat. 556, and in 11 Ibid. 78. That this assignment was a *bonâ fide* transaction between Wheeler and his preferred creditors, is clearly established by the proofs. Every allegation in the bill, suggesting fraud or collusion, is fully met and denied by the several answers, and is wholly unsupported by any proofs.

But several objections have been taken to the legal effect and operation of this deed, on other grounds than that of fraud. That it was made by Wheeler, without the knowledge or consent of the creditors therein named; that it was never delivered to nor accepted by the creditors; that possession of the fund was retained by Wheeler, and no trustee appointed according to the provisions of the deed.

Some of these objections are not founded in fact. It is true, that it does not appear, that all the creditors had any knowledge of the deed, before it was executed. But it does appear, from the answer of a number of the creditors named in the deed, that they were advised of the necessity of Wheeler's securing them, and informed of his intention to secure them, before the deed was executed, and approved of it, and accepted the benefits of its provisions; and since that time, have been paid their debts in full. And there is no evidence that any one dissented. F. S. Fuller says, he was never consulted with, about making the deed, or informed of it, before its execution; and that he has never accepted of its provisions. But he does not say, that he has ever refused to accept of the provisions in his favor; and he may not, therefore, have precluded himself from still accepting. This deed is absolute upon its face, without any condition whatever attached to it; and being for the benefit of the grantees, the presumption
*119] *of law is, in the absence of all evidence to the contrary, that the grantees accepted the deed. In the case of *Marbury* v. *Brooks*, it is said by the court, that an assignment for the benefit of preferred creditors is valid, although their assent is not given at the time of its execution; if they subsequently accept in terms, or by actually receiving the benefit

of it. Deeds of trust, say the court, 11 Wheat. 96, are often made for the benefit of persons who are absent, and even for persons who are not in being; whether they are for the payment of money, or for any other purpose, and no expression of the assent of the persons for whose benefit they are made has been required, as preliminary to the vesting of the legal estate in the trustee; such trusts has always been executed, on the idea, that the deed was complete, when executed by the parties to it. The omission of creditors to assent to the deed, or to claim under it, may, under suspicious circumstances, afford some evidence of fraud. But real *bonâ fide* creditors are rarely unwilling to receive their debts from any hand that will pay them.

It is not true, that the deed remained in the possession of Wheeler; it was sent to the clerk's office to be recorded. It was, of course, placed in the hands of the clerk to be recorded, for the uses and purposes expressed in the deed, and, of course, for the benefit of the creditors named in it. It was put out of the possession and control of the grantor. The grantees in the deed are numerous, and all could not have the actual possession of it. It is laid down in Sheppard's Touchstone 58, that if a deed be delivered to a stranger, for the use of the grantee, without any condition annexed, making it an escrow, it is a delivery to the grantee. The delivery to the clerk to be recorded, may well be considered as falling within this rule. This principle is fully recognised in the case of *Garnons* v. *Knight*, 5 Barn. & Cres. 471, that a delivery of a deed to a third person, for the use of the party in whose favor it is made, where the grantor parts with all control over the deed, is effectual, and operates from the instant of such delivery.

If the fund had remained in the possession of Wheeler, for his own benefit, it might have cast a suspicion upon the fairness of the transaction; but there is no proof of any such object or design, nor of any fact from which an inference of *mala fides* can be drawn; but on the contrary, the object of his continuing in the possession of the property is satisfactorily accounted for by the *circumstances of the case. It consisted principally of unsettled accounts, and *choses in action*, which he was much more competent to settle than a stranger could have been. It was, therefore, for the benefit of the creditors, that he continued to settle up these accounts and pay over the money to his creditors, as the proofs show that he did. This was by the express consent of some of the creditors, and the presumed consent of all, as no dissent or complaint appears to have been made by any; and no one had any right to complain, but the parties who were to receive the benefit of the assignment. This possession was held at the will and pleasure of the creditors, which they could have withdrawn at any time, if dissatisfied with the management of Wheeler; and this was a substantial compliance with that part of the assignment which relates to the appointment of an agent or trustee, for the purpose of executing and fulfilling the trusts and purposes of the assignment. The creditors were, of course, to be the judges of the fitness and competency of such agent or trustee; and they were the only parties interested in the faithful discharge of his duties. No formal appointment was necessary; an express or implied assent of the creditors to Wheeler's acting as agent or trustee, was all that could be required, according to the fair interpretation of the assignment.

[*120

We are, accordingly, of opinion, that the decree of the circuit court, dismissing the bill without prejudice, be affirmed.

Decree affirmed.

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*121] *James S. Brander and Hugh L. McKenna, Plaintiffs in error, *v.* William E. Phillips and Henry Bell, trading under the firm of William Phillips & Company, and Rodah Horton and Nathaniel Terry, Defendants in error.

Lien of factor.—Discharge of accommodation drawer of bill.—Application of proceeds of consignment.

B. & McK., merchants, at New Orleans, were the factors of P. & Co. of Huntsville, Alabama, and made advances on cotton shipped to them; in August 1834, P. & Co. were indebted to B. & McK., $1350; and Williams, the agent of B. & McK., agreed with P. & Co., that B. & McK. would advance $8000 on bills to be drawn between the 20th of April, and the 31st of July 1835, by P. & Co., and any two of six persons named, among whom were Horton and and Terry, two of the defendants in this suit. Before July 31st, 1835, several shipments of cotton were made to B. & McK., by P. & Co., and several bills were drawn by them, jointly with Horton & Terry, and by others, without them; all of which were accepted by B. & McK.; these bills, with the advances before made, amounted to $29,795, and the proceeds of the shipments were $22,460. B. & McK. applied these proceeds to the liquidation of the bills drawn by P. & Co., to the exclusion of those drawn by them jointly with Horton and Terry; and as these bills exceeded the proceeds of the cotton, they brought an action on a bill drawn June 4th, 1835, by P. & Co., and Horton and Terry, amounting to $3000. The circuit court instructed the jury, that if they believed from the evidence, that at the maturity of the bill, B. & McK. had sufficient funds of P. & Co. to pay the bill, and Horton and Terry to be accommodation drawers, and sureties only, then, in the absence of any instructions from P. & Co. in regard to the application of the funds, B. & McK. were bound to apply them to pay the bill, and could not hold them to pay a bill drawn on them by P. & Co. only, which had been accepted by them, and was not then due: *Held*, that the instructions of the circuit court were correct.

When a factor makes advances, or incurs liability, on a consignment of goods, if there be no special agreement, he may sell the property, in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale, and the consignor has no right to interfere. The lien of the factor for advances and liabilities incurred, extends not only to the property consigned, but, when sold, to the proceeds in the hands of the vendee, and the securities therefor, in the hands of the factor.

The acceptors of the bill of exchange having, when the bill became due, funds of the drawers in their hands, sufficient to pay the same, the liability of the accommodation drawers was as completely discharged, on the payment of the bill, as that of the principals.

*122] *Error to the Circuit Court for the Southern District of Alabama. The case, as stated in the opinion of the court, was as follows:

Brander & McKenna, in 1833, 1834, 1835, were commission-merchants, at New Orleans, and acted as factors and agents for William E. Phillips & Company, of Huntsville, Alabama, in the sale of cotton, and made advances thereon. On all sales they were to receive two and a half per cent. for commission, and the same amount for advances. In August 1834, Phillips & Company were indebted to Brander & McKenna, in the sum of $1315.57 for advances. On the 15th of the same month, John Williams, agent for Brander & McKenna, agreed to advance Phillips & Company the sum of $8000, on bills to be drawn between the 20th of April, and the 31st July

1835, by them and any two of six persons named ; among whom were R. Horton and N. Terry, two of the defendants in error. Between the 15th of August 1834, and the 31st of July 1835, several shipments of cotton were made to the plaintiffs by the defendants ; and several bills were drawn by them, some jointly with Horton and Terry, and others, without them ; all of which were accepted by the plaintiffs. These bills, including the advances previously made, amounted to the sum of $29,795.65. The proceeds of the shipments of cotton to meet these advances, amounted to the sum of $22,460.43. The plaintiffs applied the proceeds of the cotton to the liquidation of the bills drawn by Phillips & Company, to the exclusion of those drawn by them jointly with Horton and Terry ; and as the acceptances exceeded the proceeds of the cotton, this action was commenced on a bill due 4th June 1835, for $3000 drawn, by the defendants.

On the trial, the court instructed the jury, that if they believed from the evidence, that at the maturity of this bill, Brander & McKenna had sufficient funds of Phillips & Company in their hands to pay it, and believed Horton and Terry to be accommodation *drawers and sureties only, and knew this at the maturity of this bill, then, in the absence of any [*123 instructions from Phillips & Company, in regard to the application of the funds, Brander & McKenna were bound to apply them to pay this bill, and could not hold them to meet the payment of a bill drawn on them by Phillips & Company, which had been accepted, but was not then due. And that, if, when this bill became due, the funds of Phillips & Company, in the hands of the acceptors, were sufficient to pay it, the bill was extinguished, and recovery could not be had on it. To this instruction, an exception was taken : and the jury having given a verdict for the defendants, the plaintiffs prosecuted this writ of error.

The case was argued by *Gilpin*, for the plaintiffs in error ; and by *Crittenden*, for the defendants.

Gilpin, for the plaintiffs in error.—The relation of Brander & McKenna with William E. Phillips & Company was strictly that of principals and agents or factors. The former had no interest of their own in the cotton forwarded. In performing this agency, the plaintiffs acted under two contracts, the nature and mutual obligations of which were well defined and understood. Their general contract as agents arose, by legal implication, from the course of trade which had existed between them and Phillips & Company for a series of years. They received their cotton, sold it, made payments and advances, and were allowed a certain commission. Their special contract, though relating to the same kind of business, was yet entered into for the particular benefit of Phillips & Company, and on particular terms. The object was, to induce advances from Brander & McKenna, to the amount of $8000, on a personal guarantee of certain individuals, independently of any security by shipments of cotton. To the extent of the probable security which such shipments would afford, they were already willing to make advances. This contract, therefore, could have no object but to secure them, if the whole proceeds of the cotton should not, in the end, cover the whole amount of the advances. *Brander & [*124 McKenna, thus being agents and factors, possessed, for their security, all the means which the law gives to persons in that relation ; to these

means they had a right to resort, to obtain payment of all that was due to them, either under the general or the special contract.

Now, what, under such circumstances, are an agent's rights? In the first place, he has a lien on the whole property, to cover his whole liability; as well debts that he has actually paid, as debts for which he is bound to provide. On the 1st June 1835, the cotton on hand was not more subject to be appropriated to the liquidation of a bill of William E. Phillips & Company, which Brander & McKenna had then actually paid, than of one not yet due, which they had accepted. No principle is better settled than this, that an agent cannot be required to apply property in his dands to a debt due, if he has also incurred a future liability. The property may be held by him for the latter, as well as for the former. If not, what agent would ever make advances? When a principal sends forward goods to his factor, even though sufficient to meet advances then actually made, they are not more applicable to those advances, than to liabilities then incurred, but not actually due. This has been established by a current of authorities. Huber. Prælect. lib. 20, t. *b*, § 1, 3; *Ex parte Deeze*, 1 Atk. 229; *Godin* v. *London Assurance Company*, 1 Burr. 494; *Kirkman* v. *Shawcross*, 6 T. R. 16; *Walker* v. *Birch*, Ibid. 262; *Stevens* v. *Robins*, 12 Mass. 180; *Jarvis* v. *Rogers*, 15 Ibid. 414; *Allen* v. *Megguire*, 15 Ibid. 490; *Jolly* v. *Blanchard*, 1 W. C. C. 255.

If the property in the hands of the factor was subject to be applied by him to the latest of his liabilities as well as to the earliest, is there a different rule in regard to the proceeds of that property? There is certainly no reason why there should be. If it be right for the factor to have security upon the one, it is equally proper that he should have it upon the other. It is even more proper, because the object of the consignment is not merely to obtain advances, but also to have sales made at any time when the state of the market should render it expedient. If the factor's security were lessened by a sale; if the proceeds derived from the sale were held by him with a lien less effective for his security than the unsold property, sales would never be made, till *the whole consignment was received. From the *125] evidence in this case, it is apparent, that Brander & McKenna were to sell the cotton "at their discretion;" their rights were not to be altered by the sale; the price they received for the cotton remained in their hands, exactly as if it had been the cotton itself. Their lien on the one did not differ from their lien on the other. *Ex parte Dumas*, 2 Ves. sen. 585; *Kruger* v. *Wilcox*, 1 Ambl. 252; *Foxcroft* v. *Devonshire*, 2 Burr. 936; *Drinkwater* v. *Goodwin*, Cowp. 251; *Kinloch* v. *Craig*, 3 T. R. 122, 788; *Atkinson* v. *Elliott*, 7 Ibid. 378; *Hammonds* v. *Barclay*, 2 East 227; *Mann* v. *Shiffner*, Ibid. 529; *Haille* v. *Smith*, 1 Bos. & Pul. 563; *Houghton* v. *Matthews*, 3 Ibid. 492; *Cowell* v. *Simpson*, 16 Ves. 280; *Hudson* v. *Granger*, 5 Barn. & Ald. 31; *Bolley* v. *Merrill*, 6 Greenl. 50; *Bradford* v. *Kimberly*, 3 Johns. Ch. 434; *Brown* v. *McGran*, 14 Pet. 495.

If, then, Phillips & Company could not themselves have directed the application of any portion of the cotton forwarded by them, or of its proceeds, to any particular liability which Brander & McKenna had incurred as their factors, the law will not certainly direct such an application. It will only do so in cases where a party might himself have done it. Brander & McKenna had the right, on the 4th of June, to appropriate the money,

which was then in their hands as the proceeds of the cotton, to any liability due or to become due, which they had then incurred ; Phillips & Company could not control the exercise of that right; the court therefore will not do so.

But suppose, that the receipt by Brander & McKenna of money derived from the sale of the cotton, in June, is to be considered as a payment to them ; still they never appropriated that payment to the account arising under the special contract, nor were they bound so to appropriate it. The evidence shows, that they kept their account of the advances to the amount of $8000 under the special contract, separate and distinct from their general contract ; in this separate account, they never gave a credit for the amount of these sales ; it was rendered to Phillips & Company, and such a credit never was claimed by them ; finally, one of the partners of that firm admitted, that the credit was properly applied to the general account, and although *this admission was made after the dissolution of the partnership, yet it is not the less competent evidence of the fact. *Wood* v. *Braddick*, 1 Taunt. 104 ; *Lacy* v. *McNeille*, 4 Dow. & Ry. 7. Nor were they bound by law to apply it to the special account ; Phillips & Company having directed no application, it remained with Brander & McKenna to make it to one or the other, at their own option ; and especially might they so make it, as to provide for the debt which was least secured. *Manning* v. *Westerne*, 2 Vern. 606 ; *Goddard* v. *Cox*, 2 Str. 1194 ; *Bodenham* v. *Purchas*, 2 Barn. & Ald. 45 ; *Peters* v. *Anderson*, 5 Taunt. 601 ; *Bosanquet* v. *Wray*, 6 Ibid. 598 ; *Kirby* v. *Marlborough*, 2 Maule & Selw. 22 ; *Simson* v. *Ingham*, 2 Barn. & Cres. 65 ; *Brewer* v. *Knapp*, 1 Pick. 337 ; *Dedham Bank* v. *Chickering*, 4 Ibid. 314 ; *Blackstone Bank* v. *Hill*, 10 Ibid. 133 ; *Hilton* v. *Burley*, 2 N. H. 196 ; *Cremer* v. *Higginson*, 1 Mason 324 ; *United States* v. *Wardwell*, 5 Ibid. 85 ; *Bainbridge* v. *Wilcocks*, Bald. 538 ; *Mayor of Alexandria* v. *Patten*, 4 Cranch 320 ; *Field* v. *Holland*, 6 Ibid. 27. [*126

Crittenden, for the defendant in error.—No agreement was made between the plaintiffs in error and William E. Phillips & Company, that they should make advances on cotton to be shipped to them from Alabama. In 1834, an agreement was made that bills should be drawn to the amount of $8000, to be also signed by certain persons, and which Brander & McKenna agreed to accept. No particular advance was made on any one of these bills ; but as a bill or bills were drawn, cotton was to be shipped by William E. Phillips & Company, to furnish funds for payment. The contract of the drawers was, to furnish funds for the payment out of the proceeds of cotton, to pay the bills, when due. The circuit court of Alabama said, that if funds were so provided, they should be applied to pay the bills, as they became due ; and they denied the right of the plaintiffs in error to hold funds in their hands, provided by the drawers of the bills for their payment, for the purpose of paying bills which might become due subsequently ; and by leaving the bills due unpaid, subject the indorsers to liability. The jury have found, that when the bill on which *this suit was brought became due, funds were in the hands of the acceptors, sufficient to pay them ; and this is conclusive. [*127

The bill on which this suit was instituted, was also signed by Horton and Terry, and was payable in nine months, according to the contract with

Williams, the agent of Brander & McKenna. The funds in their hands when the bill became due, should have been applied to pay the bill, without specific or express instructions. The obligation to make this application, was implied by the circumstances. On the deposit of the money in the hands of another, particular orders for its application are not required. Implied orders are equivalent. In this case, the application of the funds to pay the first bill becoming due, was ordered by the bill itself.

There is another consideration in this case which the court will notice. The question here is one in which sureties are interested. The indorsers of the bill are called upon to pay a bill, for the payment of which ample funds were in the hands of the acceptor, when it became due; and it is asked to apply those funds to debts becoming due afterwards, with which they had no connection. Can the drawees of the bill withhold the funds in their hands, until the final adjustment of accounts between them and the drawers? This would be most inequitable, and against the express terms of the acceptance. The acceptance on the part of the drawees, was a contract to pay the bill when it should become due; the contract on the part of the drawers, was to furnish funds te enable them to pay it, when due. The contract of the latter has been performed; and shall the contract of the former remain unexecuted, to the injury of the other drawers, who had no other connection with the parties but upon the bill? This court have said, in other cases, that whenever there is an account between parties and rests; the application of funds in the hands of the party to whom money is due, is to be made to the period of the rests in the account. Outstanding items in the account are not to operate to prevent such appropriations. Cited, *Bell* v. *Morrison*, 1 Pet. 351.

The question in this case is only on the instructions of the court; were they correct, if the facts were so found by the jury?

*128] McLean, Justice, delivered the opinion of the court.—This is a case on error from the circuit court for the district of South Alabama. Brander & McKenna, in 1833, 1834, 1835, were commission-merchants at New Orleans; and acted as factors and agents of William E. Phillips & Company, of Huntsville, Alabama, in the sale of cotton, and made advances thereon. On all sales they were to receive two and a half per cent. for commission, and the same amount for advances. In August 1834, Phillips & Company were indebted to Brander & McKenna, in the sum of $1315.57, for advances. On the 15th of the same month, John Williams, agent for Brander & McKenna, agreed to advance Phillips & Company the sum of $8000, on bills to be drawn between the 20th of April, and the 31st of July, 1835, by them, and any two of six persons named; among whom were R. Horton and N. Terry, two of the defendants in error. Between the 15th of August 1834, and the 31st of July 1835, several shipments of cotton were made to the plaintiffs by the defendants, and several bills were drawn by them, some jointly with Horton and Terry, and others without them; all of which were accepted by the plaintiffs. These bills, including the advances previously made, amounted to the sum of $29,795.65. The proceeds of the shipments of cotton to meet these advances, amounted to the sum of $22,460.43. The plaintiffs applied the proceeds of the cotton to the liquidation of the bills drawn by Phillips & Company, to the exclusion of those

drawn by them jointly with Horton and Terry ; and as the acceptances exceeded the proceeds of the cotton, this action was commenced on a bill, due 4th June 1835, for $3000 drawn by the defendants.

On the trial, the court instructed the jury, that if they believed from the evidence, that at the maturity of this bill, Brander & McKenna had sufficient funds of Phillips & Company in their hands to pay it, and believed Horton and Terry to be accommodation *drawers and sureties only, and knew this at the maturity of this bill ; then, in the absence of [*129 any instructions from Phillips & Company, in regard to the application of the funds, Brander & McKenna were bound to apply them to pay this bill, and could not hold them to meet the payment of the bill drawn on them by Phillips & Company, which had been accepted, but was not then due. And that, if, when this bill became due, the funds of Phillips & Company, in the hands of the acceptors, were sufficient to pay it, the bill was extinguished, and recovery could not be had on it. To this instruction, an exception was taken, and the plaintiffs in error contend, that they had a right to hold the cotton and its proceeds, to meet all outstanding liabilities which they had incurred on account of Phillips & Company ; and that they had a right so to marshal the securities, in the absence of any express agreement on the subject, as to save themselves from loss.

Where a factor makes advances, or incurs liabilities, on a consignment of goods, if there be no special agreement, he may sell the property, in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale ; and the consignor has no right to interfere. The lien of a factor for advances and liabilities incurred, extends not only to the property consigned, but, when sold, to the proceeds of the sale in the hands of the vendee, and the securities therefor in the hands of the factor. *Drinkwater* v. *Goodwin*, Cowp. 251 ; *Houghton* v. *Matthews*, 3 Bos. & Pul. 489 ; *Brown* v. *McGran*, 14 Pet. 495 ; Story on Agency 380.

But the case under consideration does not turn upon this principle. The liabilities of the plaintiffs exceeded the proceeds of the property consigned : and the question to be answered is, whether they can claim a reimbursement from Horton and Terry, who were bound jointly with Phillips & Company, in certain bills amounting to $8000. Other bills, to a much larger amount, drawn by Phillips & Company, without security, were accepted by the plaintiffs, several of which were not due, when the bill in controversy became payable ; and the instruction of the circuit court to the jury was, if, at that time, the plaintiffs had in their hands funds of Phillips & Company, of a sufficient amount to pay this bill, and they knew that Horton *and Terry were accommodation drawers, they were bound to pay it. When the plaintiffs accepted this and the other bills, were they [*130 not aware of their respective amounts and the times they became due? And were they not bound to take up the bills at maturity ? Of this, there can be no doubt. The bills drawn subsequently to the one under consideration, amounted to $15,000, all of which were accepted by the plaintiffs. Were these acceptances made, to any extent, on the credit of Horton and Terry? This has not been contended. On what ground, then, can this action be sustained ? The application of payments by the creditor, where no direction is given by the debtor, has no relation to the present case.

Had the bills become payable at the same time, on acceptances made on

the same day, the plaintiffs might have insisted on applying the funds in their hands to the payment of the notes without securities. But this would have been a very different case from the one now before us. After having accepted the bill under consideration, payable at a time stated, the plaintiffs accepled other bills, payable at a more remote period. Now, the contract by the acceptors was, that they would pay these bills, as they respectively became due. And this they were bound to do, so long as the funds of the consignors in their hands remained unexhausted. A bill became extinguished, as soon as it was paid by the plaintiffs, with the funds of Phillips & Company. And this principle applies as strongly to those bills signed by the accommodation drawers, as to others.

Could the plaintiffs lay a foundation for a recovery against Phillips & Company, by showing payment of a bill drawn by them, out of their own funds? This would not be pretended. And yet this is the principle contended for in the present case. The liability of the accommodation drawers was as completely discharged, on the payment of the bill in question, as that of the principals. The relation of factors which the plaintiffs bore to Phillips & Company, gave them no power to vary their acceptances. The cotton consigned was to meet the payment of the bills, as they became due. This was known to Horton and Terry; and it may well be supposed, that
*131] their liability was incurred in virtue of this *arrangement. But the plaintiffs, by appropriating the proceeds of the cotton to the payment of future liabilities, have violated their contract, endeavored to defeat the just reliance of the sureties, and charge them with the payment of the bills which they guarantied. This the plaintiffs cannot do. It would be a great hardship, if not a fraud, on the sureties. No lien can be regarded or enforced under such circumstances. The lien of a factor depends upon legal principles, founded on equitable considerations, and can be held valid on no other grounds. We think, that the instruction of the circuit court was correct; and the judgment is, therefore, 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 Alabama, 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, with costs.

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*132] *Tobias Nixdorff, Appellant, *v.* Lewis Smith, Appellee.

Injunction.

A decree of a perpetual injunction on suits instituted on the common-law side of the circuit court of the district of Columbia, reversed, and the bill dismissed; the accounts between the parties having been erroneously adjusted in the circuit court.

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

This case was argued by *Key*, for the appellant; and by *Coxe*, for the appellee.

Nixdorff v. Smith.

McKinley, Justice, delivered the opinion of the court.—This is an appeal to this court, from the circuit court of the district of Columbia, for the county of Washington, sitting in chancery. Smith, the appellee, filed a bill in chancery against Nixdorff, stating that he had purchased of Nixdorff all his right and interest in the stock in trade and commercial business, then carried on in the city of Baltimore, by Nixdorff & Hager; and agreed to pay to Nixdorff, in hand, the sum of $5000, and at the expiration of two years thereafter, such further sum as would be sufficient to reimburse to Nixdorff the balance of his interest, for investment of capital and interest thereon, after deducting the payment of the $5000. And in contemplation of the agreement, and after the terms had been fully settle, among the parties, but before it was written, Smith entered into partner, ship with Hager, and agreed with him to continue the same business, under the name and firm of Hager & Smith. And in anticipation of the new partnership, it was agreed, that the firm of Hager & Smith should assume the whole of the debts of Nixdorff & Hager, and provide for their payment; and that all the debts owing to Nixdorff & Hager should be collected by Hager & Smith; and it was further agreed, that Smith should sustain no loss by the collection of the debts due to Nixdorff & Hager.

It is further charged, that Nixdorff's half of the goods, in the store of Nixdorff & Hager, was sold to Smith, at twelve and a half per cent. discount on the cost price; that an inventory was *taken of the goods, and after making the stipulated deduction, Nixdorff's half amounted [*133 to $5975.32. The agreement, dated the 9th day of August 1833, and signed by the parties, was made part of the bill. It is there charged, that the amount of debts paid by Hager & Smith, for Nixdorff & Hager, including interest to the first of November 1837, was $45,092.52; and the amount collected for them, with interest, to the same period, amounted to $39,611.09; showing a balance against Nixdorff & Hager of $5381.43. It is further stated in the bill, that the firm of Hager & Smith afterwards purchased of Nixdorff, who was then doing business on his own account, goods and merchandise to the amount of $4500, for which they gave their promissory notes; that Hager & Smith afterwards failed in business, and Hager removed to the western country, leaving Smith to pay the debts of the firm; that Nixdorff has brought suit against him, on the common law side of the court, upon the promissory notes; and refuses to permit him to set off the above balance of accounts in that suit. He, therefore, prayed that Nixdorff might be enjoined from proceeding further at law; and that by decree of the court, this eqitable off-set should be allowed. The prayer for the injunction was granted.

Nixdorff, in his answer, denied that any balance was due from Nixdorff & Hager to Hager & Smith; and he also denied that he had ever refused to go into a settlement of the accounts between the two firms.

By order of the court below, the accounts between the parties, as set up in the bill and answer, were referred to an auditor, with many special instructions. By his report, it appears, that the amount of debts collected by Hager & Smith, for Nixdorff & Hager, under the contract between the parties, amounted to $42,026, including interest, to which he added the amount of goods contained in the inventory, after deducting twelve and a

half per cent. from Nixdorff's half, making in all $54,830.26, *to the credit of Nixdorff & Hager; and he charged them with debts paid under the contract, including interest, the sum of $45,992.52; to which he added the sum of $5000 paid by Smith to Nixdorff, making in all the amount of debts $50,992.52; showing a balance in favor of Nixdorff & Hager, of $3837.74. To this report, the complainant filed the following exception: "The auditor has erred in this, that he has charged the complainant with the amount of the whole inventory of the goods of Nixdorff & Hager; whereas, the complainant was purchaser of one-half of the goods only, and should have been charged with no more; the other half being the private property of Hager, and as such brought into the capital stock of Hager & Smith." The court sustained this exception, and directed the auditor to restate the accounts between the parties.

In the reformed report, the auditor charges Nixdorff with $45,992.52, for debts paid by Hager & Smith, for Nixdorff & Hager, and adds the $5000 paid by Smith to Nixdorff; making Nixdorff's debt to Hager & Smith $50,992.52; and he credits Nixdorff by $40,376.60, for debts collected for Nixdorff & Hager, to which he added $5975,32, for Nixdorff's half of the goods; making the whole amount of credits $46,351.92; leaving a balance due from Nixdorff & Hager, to Hager & Smith, of $4640.60. The amount of the debt due from Hager & Smith to Nixdorff, for which Smith was sued, being $4874.45, the auditor deducted the balance found due from Nixdorff & Hager, from that sum, and reports a balance finally due to Nixdorff of $233.85; and excludes Hager's half of the goods, included in the
*135] inventory, entirely *from the account, on the ground that they were not subject to the debts of Nixdorff & Hager. To this part of the report, the defendant excepted. But the court overruled the exception, confirmed the reformed report of the auditor, and decreed that the injunction should be made perpetual; except for the sum of $233.85, as reported by the auditor.

A very brief examination of the case will test the correctness of this decree. The equity set up in the complainant's bill, rests entirely on the assumption, that upon a full and fair settlement of accounts, under the contract referred to, a large balance would be found against Nixdorff; and upon the apparent establishment of this fact, is the decree founded. If, however, it be shown, that instead of Nixdorff being indebted to Hager & Smith, on such settlement, they are largely indebted to him, the bill will be without equity, and the decree, of course, erroneous. By bringing into the accounts all the effects of Nixdorff & Hager, the auditor's first report shows, very satisfactorily, a considerable balance in favor of Nixdorff.

But the complainant's counsel seems to have taken up the idea, that the $5000 paid by Smith to Nixdorff applied exclusively to the payment of Nixdorff's half of the goods; and that the legal effect of the payment was, to release Hager's half of the goods from liability to the debts of Nixdorff & Hager; and this principle was recognised by the auditor in his reformed report, and by the court in their decree; notwithstanding the allegations in the complainant's bill, and the stipulations of the contract, show clearly, that the $5000 were paid upon the purchase of the whole of Nixdorff's interest. Whether the payment was special or general, is not material to the merits of the case; but it is very material, in considering the effect

ascribed to it in the court below. For, if the payment had the power to release Hager's part of the goods from liability, because Nixdorff had sold to Smith his part of them, and received part of the purchase-money, it must necessarily have the same effect, if it applied to the sale and purchase of the whole of Nixdorff's interest. The fact being that Nixdorff did sell the whole of his interest to Smith, and received the $5000 in part payment of the whole, to carry out the principle assumed, the *whole of Hager's interest in the firm of Nixdorff & Hager was thereby discharged [*136 from liability to the payment of their debts; and the burden of paying them devolved upon Nixdorff. A course of reasoning leading to conclusions so much at variance with law and justice, is answered by merely stating it.

This singular error originated in charging Nixdorff with the $5000 paid by Smith, on account of the whole purchase; and then refusing to charge Hager & Smith with the whole amount of the partnership effects in their hands, originally belonging to Nixdorff & Hager. The very moment that Nixdorff was charged with this sum of $5000, the payment of it by Smith was neutralized, and the transaction between the parties stood as though no payment had been made. The only consideration left, therefore, to support the sale by Nixdorff to Smith, was the undertaking of Hager & Smith, in the written contract, to pay the debts of Nixdorff & Hager. In this aspect of the case, the liability of all their effects in the hands of the former, to the payment of the debts of the latter, cannot be doubted. By the first report of the auditor, it appears, that he settled the accounts between the parties upon the principles here suggested; that is, by charging Hager & Smith with the whole inventory of the goods, and the money collected for Nixdorff & Hager, and by charging Nixdorff with the money paid by Hager & Smith, in discharge of the debts of Nixdorff & Hager, and also with the $5000 paid to him by Smith. And upon this statement of the accounts, as already shown, a considerable balance appears in favor of Nixdorff & Hager. But the auditor afterwards, it appears, became a convert to the doctrine of the complainant's counsel; and in his reformed report, excluded Hager's part of the goods from the settlement altogether; and thereby created a seeming balance in favor of Hager & Smith, to nearly the amount of their debt to Nixdorff, on which the suit at law was brought. This statement of the accounts by the auditor, in his first report, as far as it has been here examined, is perfectly correct; and ought to have been confirmed by the court. The equity set up in the bill, depending entirely on the truth of the allegation, that the balance would be in favor of Hager & Smith, upon such settlement of the accounts; *the balance being clearly established against them, and in favor of Nixdorff, extinguishes, therefore, all [*137 pretence to any equitable set-off in favor of Smith. The decree of the circuit court is, therefore, reversed, the injunction dissolved, and the bill dismissed.

Decree reversed.

*John H. Randolph, Executor of Algernon S. Randolph, deceased, Plaintiff in error. *v.* Israel Barrett, Executor of Joel F. Randolph, deceased, Defendant in error.

Amendments.

The defendant, in the circuit court of Mississippi, was sued and declared against as the administrator of Algernon S. Randolph; he entered his appearance to the suit, and in person filed a plea in abatement, averring that he was not administrator of Algernon S. Randolph, and that he was the only executor of Algernon S. Randolph; the plaintiff moved to amend the writ and the declaration, by striking out administrator, &c., and inserting executor; leave was granted, and the amendment was made: *Held*, that there was no error in the circuit court in giving leave to amend.

The power of the circuit court to authorize amendments, when there is anything in the record to amend by, is undoubted. In this case, the defendant admitted by his plea, that he was the person liable to the suit of the plaintiff; but averred that he was executor and not administrator; whether he acted in one character or the other, he held the assets of the testator or intestate in trust for the creditors; and when his plea was filed, it became part of the record, and furnished matter by which the pleadings might be amended.

This amendment was not only authorized by the ordinary rules of amendment, but also by the statute of the United States of 1789, § 32.

Error to the Circuit Court for the Southern District of Mississippi. A summons was issued in the southern district of Mississippi, to John H. Randolph, stating him to be the administrator of Algernon S. Randolph, deceased, to answer the defendant in error, Israel Barrett, the administrator of Joel F. Randolph, of a plea of trespass on the case, returnable to May term 1839. To this writ the marshal returned, "Executed personally on J. H. Randolph, April 23d 1839."

The plaintiff below, on issuing the writ, filed a declaration against John H. Randolph, as administrator of Algernon S. Randolph, deceased, for acceptances of bills of exchange, for the use of the plaintiff's intestate; for money paid, laid out and expended; and on an account stated amounting to the sum of $5000 and upwards. On the 26th of April 1839, John H. Randolph, having appeared to the action, filed the following plea:

*139] *The said John H. Randolph comes and defends, &c., when, &c., and prays judgment of the plaintiff's writ and declaration, because he says, that he the said John H. Randolph is not administrator of the goods and chattels, rights and credits which were of Algernon S. Randolph, at the time of his death, nor hath he ever administered as such upon any of the goods or chattels, rights or credits of the said Algernon S. Randolph, but that he, the said John H. Randolph, is the only executor of the last will and testament of the said Algernon S. Randolph, who has qualified as such, and this he is ready to verify; wherefore, he prays judgment of the said writ and declaration, and that the same may be quashed, &c.

At May term 1839, the plaintiff and defendant being in the circuit court by their attorneys, on motion of the plaintiff's attorney, it was ordered by the court, that he have leave to amend his writ and declaration herein, which said amendment is made accordingly, by striking out the words, "administrator of all and singular the goods and chattels, rights and credits, which were of Algernon S. Randolph, at the time of his death, who died intestate," and inserting "executor of the last will and testament of Algernon S. Randolph, deceased;" and thereupon, it was further ordered, that

this cause be continued till the next November term of the court aforesaid.

Afterwards, at the November term of the court, on the 14th day of November 1839, the following judgment was entered by the circuit court. The plaintiff appearing by his attorney, and it appearing to the satisfaction of the court, that the writ aforesaid has been duly executed on the defendant, John H. Randolph, executor of the last will and testament of Algernon S. Randolph, deceased, and he failing to appear, though solemnly called, judgment was rendered for the plaintiff, Israel Barrett, administrator of Joel F. Randolph, for $5655, the damages having been assessed under a writ of inquiry. From this judgment, the defendant below prosecuted this appeal.

The case was argued by *Henderson*, for the plaintiff in error. No counsel appeared for the defendant.

*The following errors were assigned by the counsel for the plaintiff in error. [*140

1. That the judgment is rendered against the defendant below on default, whereas, a good and sufficient plea in abatement is interposed by the record, which is undisposed of, by judgment or otherwise.

2. It is error, that the court below extended to plaintiff leave to amend, equivalent to a new action, and proceeded to judgment, without award of new process, or rule to plead *de novo*.

3. It is error, that the judgment is rendered against the defendant as executor, &c., when, as it appears by the record, he is summoned and declared against as administrator.

Henderson said:—The latitudinous rule of amendment, given to the plaintiff in this case, may not, perhaps, be successfully contested; but it must be a manifest error, that there was, in fact, no amendment made, under the rule; and yet the judgment is rendered, as if the amendment had been made according to the rule. We suppose it certain, that leave to amend, specifying in what the amendment shall consist, cannot be regarded as the amendment itself. Had the defendant further pleaded, he must have pleaded to the declaration, and not to the rule of amendment. But the writ and declaration still remain, charging defendant as administrator; defendant could not, therefore, respond as executor, and must have again re-asserted his plea of *ne unques administrator*. So yet stands his plea; and hence we say, it is error, that it has not been decided on.

Or, in the other aspect, it is error, that the court has rendered judgment against the defendant, as executor, on a misrepresentation of the fact, as appears by record, that he was summoned as executor, when the writ shows differently, and upon a declaration also charging him as administrator. An amendment of a declaration, inserting a new name, is a new declaration; and it is the attorney's and not the clerk's business to make the amendment. 2 Brock. 14. So, of amending a bill. 3 W. C. C. 353. The judgment does not conform to the writ and pleadings, and cannot be made so to do in this court.

*McKinley, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the United States for the south- [*141

ern district of Mississippi. The defendant in the court below was served with a writ of summons, in an action on the case, and a declaration was filed against him, as administrator of all and singular the goods and chattels, &c., of Algernon S. Randolph, deceased, who died intestate, &c. To which the defendant entered an appearance, and filed in person a plea in abatement, averring that he was not administrator of the goods and chattels, &c., which were of the said Algernon S. Randolph, at the time of his death, &c. ; but that he, the said John H. Randolph, was the only executor of the last will and testament of the said Algernon S. Randolph, deceased, &c. Whereupon, the plaintiiff moved for leave to amend the summons and declaration, by striking out the words "administrator of all and singular the goods and chattels, rights and credits, which were of Algernon S. Randoph, at the time of his death, who died intestate," and inserting "executor of the last will and testament of Algernon S. Randolph, deceased." The leave was granted, the amendment ordered, and the cause continued. At the next term of the court, judgment by default was rendered against the defendant.

To reverse this judgment, the counsel for the plaintiff in error relied on these grounds : 1. The circuit court had no authority to order the amendment of the summons and declaration, there being nothing in the record to amend by. 2. No judgment could be rendered against the defendant, until the plea in abatement was disposed of. 3. Judgment by default could not be taken against the defendant, after appearance entered.

The power of the court to authorize amendments, where there is anything on the record to amend by, is undoubted. In this case, the defendant admitted by his plea, that he was the person liable to the suit of the plaintiff ; but averred that he was executor and not administrator. Whether he acted in one character or the other, he held the assets of the esta tor or intestate, in trust for the creditors ; and when his plea was filed, it became part of the record, and furnished matter by which the pleadings might be amended. *Master* v. *Hurtz*, 3 Maule & Selw. 450 ; *Barnes' Notes 5 ; 1 Mass. 433. And in addition to these authorities, express authority is given, by the 32d section of the judiciary act of 1789, to the courts of the United States, to permit either of the parties, at any time, to amend any defect in the process or pleadings, upon such conditions as the courts shall, in their discretion and by their rules, prescribe. This amendment is, therefore, not only authorized by the ordinary rules of amendment, but by the statute also.

*142]

The object of the defendant in filing the plea was, to prove that he was not administrator and that hewas executor ; and thereby to abate the plaintiff's writ. The motion of the plaintiff for leave to amend the writ and declaration, so as to charge the defendant as executor and not as administrator, amounted to a confession of the truth of the plea ; but instead of abating the writ, according to the prayer of that plea, the court granted the motion of the plaintiff, and ordered the amendment. This proceeding was a final disposition of that plea in abatement ; and as the defendant appeared for the purpose of pleading in abatement only, the decision of the court upon the plea put him out of court ; and for failing to appear again, and plead to the action, judgment by default was properly rendered against him. The judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

*United States, Appellants, *v.* John Breward, Appellee.

Florida land-claims.

Breward petitioned the governor of East Florida, intending to establish a saw-mill to saw lumber on St. John's river, for a grant of five miles square of land, or its equivalent: 10,000 acres to be in the neigborhood of the place designated, and the remaining 6000 acres in Cedar Swamp, on the west side of St. John's river, and in Cabbage Hammock, on the east side of the river; the governor granted the land asked for, on the condition that the mill should be built; and the condition was complied with. On the 27th of May 1817, the surveyor-general surveyed 7000 acres under the grant, including Little Cedar Creek, and bounded on three sides by Big Cedar Creek, including the mill; this grant and survey were confirmed.

Three thousand acres were laid off on the northern part of the river St. John's, and east of the Royal Road, leading from the river to St. Mary's, four or five miles from the first survey; this survey having been made at a place not within the grant, was void; but the court held, that grantee was to be allowed to survey, under the grant, 3000 acres adjoining the survey of 7000 acres, if so much vacant land could be found; and patents for the same should issue for the land, if laid out in conformity with the decree of the court.

In 1819, 2000 acres were surveyed in Cedar Swamp, west of the river St. John's, at a place known by the name of Sugar Town: this survey was confirmed.

Four thousand acres, by survey, dated April 1819, in Cabbage Hammock, were laid out by the surveyor-general: this survey was confirmed.

By the eighth article of the Florida treaty, all grants of lands made before the 24th of January 1824, by his Catholic Majesty, were confirmed; but all grants made since the time when the first proposal by his majesty for the cession of the country was made, were declared and agreed by the treaty to be void. The survey of 5000 acres having been made at a different place from the land granted, would, if confirmed, be a new appropriation of so much land, and void, if it had been ordered by the governor of Florida; and of course, it is void, having nothing to uphold it but the act of the surveyor-general. 10 Pet. 309, cited.

In the superior court of East Florida, the counsel for the claimant offered to introduce testimony in regard to the survey of 3000 acres; and the counsel of the United States withdrew his objections to the testimony; the admission of the evidence did not prove the survey to have been made. Proof of the signature of the surveyor-general to the return of survey, made the survey *primâ facie* evidence. Wiggins's Case, 14 Pet. 346, cited.

The proof of the signature of Aguilar to the certificate of a copy of the grant by the governor of East Florida, authorized its admission in evidence; but this did not establish the validity of the concession; to test the validity of the survey, it was necessary to give it in evidence; but the survey did not give a good title to the land.

The United States have a right to disprove a survey made by the surveyor-general, if the survey on the ground does not correspond to the land granted.

*Appeal from the Superior Court of East Florida. The claim was founded on a petition of Breward, dated 23d August 1816, and an [*144 alleged decree of Governor Coppinger thereon, dated the following day. The petition stated, that "he intends to establish a mill to saw lumber for the supply of commerce and the province, which he wishes to situate upon St. John's river, on the creek known by the name of Little Cedar creek; and whereas, said costly fabric requires, to secure in lands and timber, what may be sufficient to cover the great expenses which are necessary to build it, and it being all for the benefit of the province, he prays that there may be granted to him the usual five miles square of land, or its equivalent, destining to him ten thousand acres in the neighborhood of said place, and the remaining six thousand acres in Cedar Swamp, on the west side of St. John's river, and in Cabbage Hammock, on the east side of said river." Governor Coppinger's decree on this petition stated, that, "in consideration of the benefit and advantages which ought to result in favor of the province, if what the interested proposes is effected, the lands and permission which he

solicits are granted to him, but with the express condition, that he shall not have the absolute right to them, until he erects said machine."

The original of the petition and decree were not produced in evidence; neither were they to be found in the archives at St. Augustine; but a certified copy, under the hand of Tomas de Aguilar, secretary of the government, whose handwriting was proved, stating that they were true copies, faithfully taken from the original which existed in his office, was offered, and was objected to by the district-attorney, and admitted by the court.

There was also offered in evidence plats and certificates of survey, made for John Breward, by George J. F. Clarke, surveyor-general: 1. Dated 27th May 1817, for 7000 acres of land between the branches called Cedar creek, and Dunn's creek, on the northern part of the river St. John's. 2. Dated 28th August 1819, for 3000 acres on the northern part of the river St. John's, and east of the Royal Road leading from said river to St. Mary's. *3. Dated 10th October 1819, for 2000 acres in Cedar Swamp, on
*145] the west part of the river St. John's, at a place known by the name of Sugar-Town. 4. Dated 19th April 1820, for 4000 acres, in Cabbage Hammock, on the east part of the river St. John's, and south of the branch called Dunn's creek, which runs from Dunn's creek to the said river.

After hearing testimony in the cause, the superior court made a decree in favor of the claimants, for the four tracts of land; from which the present appeal was taken.

For the United States, it was contended, that the decree should be reversed, because: 1. That there was not sufficient evidence that the said alleged grant or commission was ever made by Governor Coppinger. 2. That the alleged concession, if made, was on a condition precedent, which was never fulfilled. 3. That the concession, if ever made, did not contemplate that the lands conceded should be surveyed in four different tracts or parcels. 4. That the description of the lands in the grant were too vague to be the foundation of a valid survey. 5. That the plats and certificates of survey did not conform to the description of the lands in the said pretended grant.

The case was argued by *Legaré*, Attorney-General, for the appellants; and by *Wilde*, for the appellee.

Catron, Justice, delivered the opinion of the court.—The petitioner asked five miles square of land, being 16,000 acres, on Little Cedar creek, of St. John's river; he intending to establish a mill to saw lumber; 10,000 acres were asked for in the neighborhood of the place; and the remaining 6000 acres, in Cedar Swamp, on the west side of St. John's river, and in Cabbage Hammock, on the east side of that river. On the 20th of August 1816, the governor of Florida decreed the same, on the condition the mill was built. The condition was complied with.

1. On the 27th of May 1817, George F. Clarke, the surveyor-general of
*146] the province, surveyed for Breward 7000 *acres, including Little Cedar creek; and bounded on three sides by Big Cedar creek and Dunn's creek; and which includes the mill. This survey is valid.

2. There were laid off 3000 acres on the northern part of the river St. John's, and east of the Royal road, leading from the river to St. Mary's.

This survey is proved to lie four or five miles from the first survey, and is on Trout creek. It was made the 28th of August 1819.

By the 8th article of the Florida treaty, all grants of land made before the 24th of January 1818, by his Catholic Majesty, were confirmed. But all grants made since the 24th of January 1818, when the first proposal by his majesty was made for the cession of the country, were declared and agreed by the treaty to be null and void. This survey having been made at a different place from the land granted, would, if confirmed, be a new appropriation of so much land; and void, if it had been ordered by the governor of Florida, and, of course, it is void, having nothing to uphold it but the act of surveyor-general. So this court held in *Seton's Case*, 10 Pet. 309. The party, however, is entitled to his entire 10,000 acres in the neighborhood of Little Cedar creek. The decree confirming the 3000 acre survey, is, therefore, reversed; and this quantity of land will be ordered by the superior court of East Florida, to be surveyed adjoining the 7000 acre survey, on vacant land; the addition to conform to the fourth article of the instructions to the surveyor-general, of the 10th of June 1811 (Land Laws United States 1004). The 7000 acres, and the 3000 acres, will be laid down in connection, as one 10,000 acre survey. Not more than one-third can be bounded in front on the river St. John's, should the claimant choose to add the 3000 acres next to either side of the 7000 acre tract adjoining the river. The 7000 acre survey being 360 chains deep, the 10,000 acres can only front 120 chains.

A motion was made to the court below, on the part of the petitioner, to be permitted to introduce testimony in regard to the survey of 3000 acres; when offered, the counsel for the United States withdrew the objections to the introduction of the paper. *It is now insisted, for complainant, that the validity and legality of the survey was admitted; and [*147 *Richard's Case*, 8 Pet. 470; *Sibbald's Case*, 10 Ibid. 323; and *Seton's Case*, Ibid. 309, are relied upon. These authorities, we think, do not sustain the argument. It being necessary to establish that such a survey had been made by the surveyor-general, proof of his signature was *primâ facie* sufficient to authorize the reading of the paper; and if the attorney of the United States was satisfied that the plat and certificate had been made by that officer (about which he could hardly be mistaken), to require proof of the fact would have been useless.

The contests of Aguilar's certificates have been numerous. Nothing was required but proof of the secretary's signature, to admit in evidence the copy of the concession; so this court held, in *Wiggins's Case*, 14 Pet. 346; but when the concession was admitted, its legality was not conceded by the defendant; no such ground has been, to our recollection, assumed, nor do we think it can be assumed, in regard to the survey. To test its legality by the laws and regulations of Spain, it was necessary the court should have the survey in evidence. It was the common case of the competency of a title paper, wanting legal effect; the court, therefore, properly admitted the paper, but improperly adjudged it gave title to the land.

3. The next survey (dated in 1819) is for 2000 acres in Cedar Swamp, west of the river St. John's, at a place known under the name of Sugar-Town. Had this last designation been left out, no difficulty could be raised in regard to the fact that the survey had been located at the place granted;

nor do we think this makes any difference, although a witness proves he knew nothing of such a town. The surveyor having described the land as laid off within the description of the grant, we take the fact to be *primâ facie* as he certifies it; nor do we think the certificate discredited by the further description, even should the object called for not be found. This survey is, therefore, confirmed.

4. The survey for 4000 acres (dated in April 1819) is in Cabbage Hammock, and within the grant, taking the certificate of the surveyor-general to be *primâ facie* true. And this, we think, is the credit that lawfully attaches to it. His duties *were prescribed by the instructions to him, in 1811 (Land Laws 1034); and if his plot and certificate are lawful on their face, they must be accredited, until the United States disprove them; which they have the right to do, if the survey on the ground does not, in fact, correspond to the land granted; although the certificate may declare it to be at the proper place. This survey is also confirmed.

*148]

The cause is, however, remanded to the court below, to be further proceeded in, as regards the rejected survey of 3000 acres.

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*149] *Zenas Fulton and others, Plaintiffs in error, *v.* Morgan McAffee, Defendant in error.

Error to state court.

The high court of errors and appeals of the state of Mississippi, on a writ of error to the circuit court of Washington county, Mississippi, confirmed a judgment of the circuit court, by which a title to land, set up under an act of congress of the United States, was held valid; thus construing the act of congress in favor of the party claiming a right to the land, under the act. The party against whom the decision of the court of appeals was given, prosecuted a writ of error to the supreme court of the United States: the writ of error was dismissed, the court having no jurisdiction.

In order to give the supreme court of the United States jurisdiction in such cases, it is not sufficient, that the construction of the act of congress on the validity of the act on which the claim was founded, was drawn in question; it must appear also, that the decision was against the right claimed. The power of the supreme court is carefully defined and restricted by the judiciary act of 1789; and it is the duty of this court not to transcend the limits of the jurisdiction conferred upon it.

Error to the High Court of Errors and Appeals of the state of Mississippi. The case is fully stated in the opinion of the court.

Coxe, for the defendant, moved to dismiss the writ of error, on the ground that the court had no jurisdiction of the case. The motion was opposed by *Crittenden*, for the plaintiffs in error.

Taney, Ch. J., delivered the opinion of the court.—This case is brought up by writ of error from the high court of appeals of the state of Mississippi. A motion was made, at the last term, to dismiss the case, upon the ground that this court has not jurisdiction under the 25th section of the act of 1789; but the argument upon the motion was not heard, until about the close of the session, when many other cases were pressing upon the attention of the court; and it was, therefore, held under advisement, until the present term.

It appears, that an action of ejectment was brought for certain lands in

the state of Mississippi, by Morgan McAffee, to which the present plaintiffs in error appeared as defendants; and upon *the trial, the verdict and judgment were in favor of McAffee. The defendant in that suit, [*150 thereupon, appealed to the high court of appeals, where the judgment of the inferior court was affirmed.

A brief statement will show the points that arose in the state court, so far as they are material upon the question of jurisdiction. By the act of congress of April 20th, 1832, entitled "an act for the relief of Jefferson College, in the state of Mississippi," the trustees of the college were authorized to relinquish certain lands which had been reserved for the use of the college, and to locate or enter other lands in lieu of them. The fourth section of this law authorized the college to transfer the right of location or entry conferred by the act; and declared, that the assignee should be entitled to receive a certificate from the register of the proper land-office, which should be "accounted and held as valid and complete as if a patent had issued therefor."

At the trial of the ejectment, McAffee, the lessor of the plaintiff, made title under a certificate dated August 18th, 1834, issued to him as assignee of Jefferson College, by virtue of this act of congress. The certificate was read in evidence, subject to all legal exceptions; the defendants in the case giving notice, at the time, that, in the progress of the trial, they would offer evidence that the said certificate was purchased fraudulently by the said McAffee. The defendants, then, for the purpose of showing that no patent had ever issued, by virtue of the said certificate, offered in evidence six patents, which had been issued on pre-emption certificates; and which, it was admitted, covered the land embraced by the certificate of McAffee. These patents were granted, in 1837 and 1838, to different persons, under whom the defendants claimed the possession. And in order to show that the said certificate of McAffee was fraudulently obtained, they offered to prove, that the parties to whom the patents above mentioned issued, were entitled to the benefit of pre-emption in the said land, under the acts of congress then in force, before the lessor of the plaintiff obtained his certificate; that they were present at the land-office, with money to enter and pay for the same; and offered to pay, in the presence of McAffee, on the day he obtained his certificate, and before he obtained it; and that the defendants had *acquired possession of the lands, afterwards, when these [*151 pre-emption claims had been allowed. This testimony was objected to on the part of the lessor of the plaintiff, and the court refused to permit it to go to the jury, upon the ground, that the certificate could not be impeached at law for fraud.

The defendants then offered to prove by the register of the land-office, that the pre-emption claims before mentioned were finally allowed and paid for, and that the patents produced by the defendants issued upon them; and that the commissioner of the general land-office had rejected McAffee's certificate, and refused to issue a patent upon it. This evidence was also rejected. The defendants then moved the court to exclude the said certificate, as evidence of legal title in the lessor of the plaintiff; but the motion was overruled. Exceptions were taken to these opinions, and the case was carried to the high court of errors and appeals; where the judgment of the inferior court was affirmed, as herein before mentioned.

From this statement of the case, it will appear, that the only right drawn in question was that claimed by McAffee under his certificate. If that certificate was a good legal title, it was elder, and therefore, superior to the legal title derived under the patents produced by the defendants.

The testimony offered to show that the certificate was fraudulently obtained, was intended to impeach the title McAffee claimed under it; and the objection to its legal effect was made for the same purpose. The patents given in evidence by the defendants were not offered, for the purpose of showing the legal title out of the lessor of the plaintiff; nor for the purpose of deriving a legal title under them, older than the plaintiff's certificate, by virtue of the act of June 19th, 1834, mentioned in the exception, or any other law of the United States; for it is stated in express terms, that they were offered in order to show that no patent had ever been issued on McAffee's certificate. They were intended, therefore, with the other evidence, to prove that this certificate was fraudulently and improperly obtained; that its authority had been denied by the commissioner of the general land-office; and consequently, that it did not confer on the lessor of the plaintiff a valid legal title, upon which he could recover in ejectment.

*152] *These being the only questions raised in the state court, and being there decided in favor of the right claimed by McAffee, under the act of 1832, we have no authority to revise the jndgment. In order to give this court jurisdiction, under the 25th section of the act of 1789, it is not sufficient, that the construction of the act of congress, or the validity of the right claimed by McAffee, was drawn in question, and decided by the state court. It must also appear, that the decision was against the right claimed.

We do not mean to express any opinion as to the rights in contest between the parties. The question before us concerns merely the jurisdiction of this court, upon the case as it is now presented; and it is, therefore, not material to the present inquiry, whether the parol evidence offered by the defendants was, or was not, properly rejected. For the decision on that point, as well as on the question as to the legal effect of the certificate having been in favor of the right claimed, this court is not authorized to examine into the correctness of the judgment given by the state court. The power of the supreme court, in this respect, is carefully defined and restricted by the act of 1789; and it is our duty not to transcend the limits of the jurisdiction conferred upon it. The writ of error must, therefore, be dismissed, for want of jurisdiction.

Writ of error dismissed

*United States, Appellants, *v.* Pedro Miranda and others, Appellees.

Florida land-claims.

On a petition from Pedro Miranda, stating services performed by him for Spain, Governor White the governor of East Florida, on the 26th November 1810, made a grant to him of eight leagues square, or 368,640 acres of land, on the waters of Hillsborough and Tampa bays, in the eastern district of Florida; no survey was made under this grant, while Florida remained a province of Spain; nor was any attempt made to occupy or survey the land, until after the cession of Florida to the United States; in 1821, it was alleged, that a survey was made by a surveyor of East Florida: *Held*, that the grant was void; no land having been severed from the public domain, previous to the 24 January 1818, and because the calls of the grant were too indefinite for locality to be given to them. Percheman's Case, 7 Pet. 51; Kingsley's Case, 12 Ibid. 476; Arredondo's Case, 6 Ibid. 741; Forbes's Case, 15 Ibid. 182; Buyck's Case, Ibid. 215, O'Hara's Case, Ibid. 275; and Delespine's Case, Ibid. 319.

The settled doctrine of the supreme court, in respect to Florida grants, is, that grants embracing a wide extent of country, or with a large area of natural or artificial boundaries, and which granted lands were not surveyed before the 24th of January 1818, and which are without such designation as will give a place of beginning for a survey, are not lands withdrawn from the mass of vacant lands ceded to the United States in Florida, and are void; as well on that account, as for being so uncertain that locality cannot be given to them.

Appeal from the Superior Court of East Florida. Pedro Miranda and others, on the 9th of May 1829, presented a petition to the superior court of East Florida, asking for the confirmation of a grant from the Spanish government of Florida, for eight leagues square, equal to 368,640 acres of land, situate on the waters of Hillsborough and Tampa bays, in the eastern district of the territory of Florida. The petition of Pedro Miranda and the grant, are as follows:

Translation.

His Excellency the Governor:—Don Pedro Miranda, second pilot of the launch of the bar of this port, with the most profound respect, represents to your excellency: That he has the honor to serve his Catholic Majesty (whom may God preserve!) from the year 1798, when he was employed as rower of the said launch, in which capacity he remained until he was [*154 promoted to his present post, on account of his known merits and experience. Moreover, your excellency well knows the veracity of his good conduct, fidelity and devotion to the service of his majesty; of which he has given proofs in various expeditions, which, by order of his government, your petitioner undertook along the water-courses of this province, when it was overrun by rebels; and as for so distinguished services, and others rendered to the satisfaction of your excellency, your petitioner has not received any compensation whatever; and as he finds himself in a penurious condition, and without any other expectations but from the protection of your excellency; therefore, he supplicates your excellency to be pleased, in remuneration of all which he has represented, and in consideration of his present destitute situation, to grant to him in absolute property, a square of eight leagues in the royal lands which are found on the waters of Hillsborough and Tampa bays, in this province, in virtue of royal orders on the subject of granting lands gratuitously to Spanish subjects; which favor your petitioner hopes to receive from the justice of your excellency.

St. Augustine of Florida, 19th November 1810.

DECREE.

St. Augustine of Florida, 26th November 1810. The merits and services alleged by this party being well known to this government, I grant to him, in the terms which he solicits, the said quantity of land, in the places which he indicates, without prejudice to a third party; and as a proof of this grant to be shown at all times, let a certified copy of this proceeding be issued to him from the secretary's office, for his security. WHITE.

The petition to the court stated, that said tract or parcel of land had been divided and laid off into townships of 23,040 acres each; that the said division of the said land into townships, as aforesaid, was made by one Charles Vignolles, in the year 1821; the said Charles Vignolles then being a surveyor of East Florida.

After hearing testimony and arguments of counsel, the superior court of East Florida gave a *pro formâ* decree in favor of *the petitioners, *155] for 46,080 acres; and the United States, and the claimants, prosecuted this appeal.

The case, on the appeal of the United States, was argued on the part of the United States, by *Duvall*, and *Legaré*, Attorney-General; and was submitted on printed arguments, by *Garr* and *Ogden*, for the appellees.

The arguments of the counsel on numerous points, submitted for the appellants and the appellees, are omitted; as the decree of the court was made exclusively, on the question of the validity of the grant, under the cession of Florida to the United States, by the treaty with Spain.

For the appellants, it was contended, that as no survey, possession or cultivation of the land had been proved, as was necessary according to the laws, usages and ordinances of the Spanish government, to vest a valid title to the land in the claimant, the decree of the superior court of East Florida should be reversed.

WAYNE, Justice, delivered the opinion of the court.—Appeal from the superior court of East Florida. The defendants in error claim title to a tract of land, under a grant made by Governor White, on the 26th November 1810, to Don Pedro Miranda, containing eight leagues square, or 368,640 acres, on the waters of Hillsborough and Tampa bays, in the eastern district of the territory of Florida.

Miranda's petition for the grant, and the grant, are in pages 153, 154. After a recital of services, he asks as a remuneration, and in consideration of his destitute condition, that there may be granted to him, in absolute property, a square of eight leagues, in the royal lands which are found on the waters of Hillsborough and Tampa bays, in virtue of royal orders on the subject of granting lands gratuitously to Spanish subjects. The governor, in reply, acknowledges his services, and grants to him "in the terms as he solicits, the quantity of land in the places which he indicates, without prejudice to a third party;" and directs, "a certified copy of the proceeding to be issued to him from the secretary's *office, for his security. It does not appear, *156] that such certified copy was given to him; but Aguilar, who was secretary when the grant was made, deposes, that he remembers that the grant was made to Miranda for his deserts and services on the shores of Hillsborough and Tampa bays; "that it was a grant of eight leagues square,

or thereabouts :" and he further says, the handwriting to the grant is the legitimate signature of Governor White. The district-attorney admits that he has seen in the office of the archives of Florida, a document, of which that introduced by the complainants is a copy.

No survey, however, of the land was made, whilst Florida was a province of Spain. Nor was any attempt made by the grantee, or by any agent or person claiming under him, to occupy any land under this grant, or to make a survey of it, until after the Floridas had been ceded to the United States. The complainants allege, that one was made in 1821, by Charles Vignolles, a surveyor of East Florida ; and this survey is the first assertion of right in the premises by the grantee. After this survey was made, the grantee conveyed portions of the land, between the years 1822 and 1828, to the claimants associated with him in this suit. They allege, that a claim for the whole of the lands was submitted to the examination of the commissioners appointed under the act of congress of 3d March 1823 (3 U. S. Stat. 754), entitled an act for ascertaining claims and titles to lands in the territory of Florida. The survey made by Vignolles, however, is not in the record ; nor does it seem to have been in evidence, on the trial of the cause in the court below. By agreement between the solicitors and counsel of the parties, a *pro formâ* decree was given for 64,080 acres of land, in favor of the complainants, situated on the waters of the bays of Hillsborough and Tampa ; and from this decree, the cause has been brought to this court by appeal, by the United States.

We do not think it necessary to discuss, in detail, the points urged in argument for and against the confirmation of this grant. Two considerations are decisive of its invalidity. The grant is void, no land having been severed from the public domain, previous to the 24th January 1818 ; and because the calls of the grant are too indefinite for locality to be given to them.

*The petitioner asks for "a square of eight leagues, in the royal lands which are found on the waters of Hillsborough and Tampa bays." The grant is, "I grant to him, in the terms which he solicits, the said quantity of land, in the places which he indicates." Tampa or Espiritu Santa, as it was known or called, before Florida was ceded to the United States, is the largest on the Gulf of Mexico. It is at least forty miles long, and in one or more places, from thirty to forty miles broad. Hillsborough river empties into it from the north. To the southeast of Hillsborough river are the Indian and Alafia rivers. Lower down the bay, on the same side, is Manali river, from sixteen to twenty miles wide at its mouth ; and Oyster river is twenty miles below the Manali. The eastern part of this bay was by the British called Hillsborough ; and the little bay attached to the north side, Tampa. The little Tampa is an elliptical basin, about ten miles in diameter. There are many islands in the bay, especially on the western part and at its mouth ; and Tampa extends to Sarragossa bay. Williams's Territory of Florida, page 24. Where, in this extensive area, shall this grant be located ? Shall it be on either of the rivers emptying into the bay ? On the eastern or western side of the bay ? At its head, or at its mouth ? Shall it be a contiguous body of land on Hillsborough bay, or on little Tampa ; or shall it be divided in equal parts on both ? If the grantee claims a right to survey on Hillsborough and little Tampa, as the places [*157

indicated in his petition, then it cannot be taken in a single body "of a square of eight leagues;" for the former being on the east part of the bay, and the latter on the north side, neither the dimension nor form of the grant could be surveyed touching on both. And this, whether it is to be taken in a square of four equal sides, or in a rectangular parallelogram with a part of one-third on the bay: which last is the mode prescribed by the Spanish authorities for surveys on navigable waters. Shall it be left to the grantee to choose, or shall the court arbitrarily fix upon a point for the beginning of a survey? If there was a starting point, the claimants might, putting aside the other questions in the case against the confirmation of the grant, be entitled to a survey. But there is none. No survey was made
*158] under the grant, whilst Florida belonged to Spain. Indeed, *it appears from the record, that neither the governor making the grant, nor any other governor of Florida after him, ever gave an order for a survey of this grant. The grantee, though all the time in Florida, from the time when the grant was given, until the treaty with Spain was made, a period of nine years, did not apply, or if he did, did not receive from the authorities of Spain an order for a survey. The case shows that in other grants of land made to him, subsequently to the date of that now under consideration (and there are nine or ten of them in the record; pages 81 to 93, inclusive), Miranda uniformly had them consummated by a royal title. And it is also worthy of remark, that in his petition to Governor Coppinger, on the 16th of September 1817, after reciting his services from 1794 to 1812, in the defence of the province, and that he had had in his charge divers extraordinary commissions, he states, "for which he had never had any compensation whatever." What, then, had become of his grant for a square of eight leagues in the royal lands which are found on the waters of Hillsborough and Tampa bays?

The locality, then, of the premises, was not acknowledged by the authorities of Spain. No effort was made to give identity to the grant, before the treaty was ratified. Is such a grant protected by the treaty? We think not! The eighth article of the treaty is: "All the grants of land made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities in the said territories, ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the times limited in the same, respectively, from the date of this treaty, in default of which the said grants shall be null and void. All grants made since the 24th of January 1818, when the first proposal, on the part of his Catholic Majesty, for the cession of the Floridas, was made, are hereby declared and agreed to be null and void." The words in the foregoing
*159] *extract "shall be ratified and confirmed to the persons in possession of the land," have been decided by this court, in *Percheman's Case*, 7 Pet. 51, to mean, "the grants shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c.;" or, as this court said in *Kingsley's Case*, 12 Ibid. 476, "stand ratified and confirmed, to the

same extent that the same grants would be valid, if Florida had remained under the dominion of Spain." And the words "in possession of them," have by this court, in *Arredondo's Case*, 6 Ibid. 741, and in all other cases upon Florida grants, after it, been determined not to imply occupation or residence only, but a legal seisin. The court said in that case, "by grants of land, we do not mean the mere grant itself, but the right, title, legal possession, and estate, property and ownership, legally resulting upon a grant of land to the owner." But in the case before us, from the want of survey, or some point for the beginning of one, there can neither be a seisin in fact nor in law; for identity of premises is as essential for a seisin in law, as it is necessarily implied in a seisin in fact. The grantee, then, can only claim validity for this grant to the same extent that it would have been valid, if the territories had remained under the dominion of his Catholic Majesty. And this brings up the questions, how far this grant was valid, when the Floridas were ceded to the United States; or whether, in the situation in which this grantee stood, when the treaty was made, he had more than a permission to ask for the means of having the lands identified, that he might have a right of possession.

The grant was made in 1810. No order of survey was made; nothing was done to withdraw the land from the general mass of property, or to show what it was, which was to be withdrawn. It, therefore, remained in the King of Spain, with the power to consummate that which had been done on Miranda's petition, into a complete title; according as it might be his pleasure to do or not to do so. And when he ceded the Floridas to the United States, the latter were placed in respect to this grantee, exactly in the situation in which his Catholic Majesty had stood. This being so, the eighth article of the treaty, on the most liberal interpretation of the intentions which actuated the high contracting parties, imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin, *nor a seisin in law. Identity is essential for the latter, and has uniformly been, in the contemplation of this court, when it has confirmed Florida grants, inchoate or complete. This court said, in *Forbes's Case*, 15 Pet. 182, "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." The grant now sought to be confirmed, was not so separated by survey, nor by any such distinctive call as will admit of a survey. In *Forbes's Case*, just mentioned, the grant was for land "in the district or bank of the river Nassau;" and the court say, after noticing the uncertainty of the description for the location of the land, "No survey of the land granted was ever made; the duty imposed upon the grantee to produce the plat and demarcations in proper time, was never performed. This was a condition 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." "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," &c. "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." And though, in the decree granting the land to Forbes, the governor says, "it will be the [*160

duty of the party to produce the plat and demarcations in the proper time;" it does not vary the principle, but rather serves to establish it; that "in grants of lands, with uncertain designations, to be made on a large district of country, they must have been severed from the public domain by survey, or be void for want of identity." Upon mature deliberation, the same doctrine was held in *Buyck's Case*, 15 Pet. 215, which was a grant for lands "at Musquito," "south and north of said place." Also, in *O'Hara's Case*, Ibid. 275; again, in *Delespine's Case*, Ibid. 319. Indeed, the settled doctrine of this court, in respect to these Florida grants, is, that grants for lands embracing a wide extent of country, or within a large area of natural or artificial boundaries, and which granted lands were not surveyed before the 24th of January 1818, and which are without such designations as will
*161] *give a place of beginning for a survey, are not lands withdrawn, from the mass of vacant lands, ceded to the United States in the Floridas; and are void, as well on that account, as for being so uncertain that locality cannot be given to them. The decree of the court below is reversed, and the grant declared to be invalid.

Decree reversed.

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*162] *United States, Appellants, *v.* John W. Low *et al.*, Appellees.

Florida land-claims.

On the 6th of April 1816, a grant was made by the governor of Florida, of five miles square or 16,000 acres of land, on condition that a mill should be built. The grant of 6000 acres was for land on Doctor's Branch, where the mill was intended to be erected; the 10,000 acres were granted on the north-west side of the lagoon of Indian river; the 6000 acres were surveyed in 1809, on Doctor's Branch and the mill was built. The survey under this grant, was confirmed.

The survey of 10,000 acres was made in February 1820, by the surveyor-general of Florida, "north-westwardly of the head of Indian river, and west of the prairies of the stream called North Creek, which empties itself at the head or pond of said river. The official return of the surveyor-general has acceded to it the force of a deposition. The land granted could only be surveyed at the place granted; if elsewhere, it would have been a new appropriation, and therefore, void, and contrary to the eighth article of the treaty with Spain.

According to the strict ideas of conforming a survey to a location, in the United States, the survey of 10,000 acres should be located adjoining the natural object called for, there being no other to aid or control the general call; and therefore, the head of the lagoon would necessarily have formed one boundary; but it is obvious, more latitude was allowed in the province of Florida, under the government of Spain.

The surveyor-general having returned that the survey was made according to the grant, and in the absence of other contradictory proof, the claim was confirmed.

Appeal from the Superior Court of East Florida. The heirs of John Low claimed 16,000 acres of land in East Florida, under a grant by Governor Coppinger, founded on a petition alleged to have been presented by their ancestor, dated 20th March 1816, and a decree of Governor Coppinger thereon, dated April 6th, 1816. The petition stated, that, "bounding with the petitioner's land, on Bell river, there was a creek known by the name of Doctor's Branch, which was suitable for the establishment of a water saw-mill, and as he could construct, and was desirous of constructing immediately, a saw-mill on said place, if he could obtain the permission of government, and a grant of the accustomed quantity of land for the supply of lumber, and the assurance, in his favor, that the great expenses that were indis-

pensable to its construction, and the risks to which he *would be liable, would be compensated; he, therefore, prayed that the governor would grant him five miles square of land, or its equivalent, permitting him to take 6000 acres in the vacant lands in the neighborhood of Doctor's Branch, and 10,000 acres on the north-west side of the head or lagoon of Indian river." The governor's decree on this petition stated, that, "in consideration of the benefit and utility that would result to the province, should it be executed as the petitioner proposed, he grants him the permission he asked, likewise the lands at the places he mentioned; with the express condition, that, until he erected the said machine, he should not have an absolute right in them," &c.

The originals of the petition and decree were not produced in evidence, neither are they to be found in the archives at St. Augustine. A certified copy, dated April 6th 1816, under the hand of Tomas de Aguilar, secretary of the government (whose handwriting was proved); stated to be faithfully drawn from the original in his office, was alone offered; and was objected to on the part of the appellants. There were also produced two plats and certificates of survey, made by George J. F. Clarke, the surveyor-general, for John Low. The first was dated December 23d, 1819, for "six thousand acres of land in the place called Doctor's Branch, on Bell river." The second was dated February 7th, 1820, for "ten thousand acres of land north-westwardly of the head of Indian river, and west of the prairies of the stream called North creek, which empties itself at the head or pond of said river.

Among the witnesses examined to prove the building of the mill, was George J. F. Clarke; who was objected to by the district-attorney. The objection to the testimony of George J. F. Clarke, taken in the superior court, was made on the ground that he was interested in the case. It appeared from the record, that after he had been examined on interrogatories to prove the surveys made by him, the following was attached, at his request, to the examination of the commissioner.

"I further state, that in February 1821, I purchased of the said John Low a tract of land embraced by this grant; this I mention in support of my confidence in the integrity thereof; *while I exercise the candor due to the honorable court in this case, and to myself as a witness. [*164
Perhaps, it may be necessary to add, that before February 1821, I was entirely uninterested in this grant. GEORGE J. F. CLARKE.
Before me—K. B. GIBBS, Commissioner."

After hearing the testimony, the court made a decree in favor of the claimants for both tracts of land, from which the present appeal was taken.

The case was argued by *Legaré*, Attorney-General, for the United States; and by *Berrien* and *Wilde*, for the appellees.

For the United States, it was contended: 1. That the testimony of Clarke was improperly admitted. 2 That there was not sufficient evidence that the said alleged grant or concession was ever made by Governor Coppinger. 3. That the alleged concession, if ever made, was on a condition precedent, which was never fulfilled. 4. That the description of the 6000

acres in the neighborhood of Doctor's Branch, was too vague to be the foundation of a valid survey. 5. That the plat and certificate of survey for the tract of ten thousand acres, did not answer to the description contained in the pretended grant, and so could not be the origin of title.

The *Attorney-General* said, that, as the representative of the United States, it was his duty, in all the cases of land-claims sent up from Florida, to examine them with a judicial eye. The act of congress requires that all the cases of this description brought before the courts of Florida, in which the decision shall be against the United States, should be brought by appeal to this court. If the law-officer of the government sees anything in the case, it is his duty to present it to the court for its decision ; and in doing this, he is not restrained by anything which may have been done or omitted by the district-attorney of the United States, before the courts of Florida. The whole subject is open ; and under this view, the whole of the matters before
*165] the court below *may be fully examined, and exceptions taken here, which had been omitted upon the first hearing of the case.

That this grant is null and void, has been already decided on the principles settled by this court in the case of the *United States* v. *Sibbald*, 10 Pet. 313 ; and in other cases. This was a grant on a precedent condition, the establishment of a mill. The condition was not performed. The evidence is insufficient to establish the improvement. The description of the land in the grant is too vague and indefinite.

The evidence of Clarke should have been rejected by the court ; and this court will exercise the power to strike it out, although it was allowed to be read by the district-attorney of the United States. The memorandum made by the commissioner, after taking the examination, shows his interest in the case. He had purchased a part of the very grant his testimony was to sustain.

As to the regulations of Spain relative to grants of lands by the governors of their territories, and which this court had declared to be in force, the attorney-general cited 2 White's New Recopilacion 278.

Berrien and *Wilde*, for the appellees.—No question can be presented to the court, on this record, which has not already been decided in the many Florida cases which have been frequently examined and decided by it. The grants are sufficiently descriptive. The lands were found by the surveyor-general under the Spanish government ; and surveys and plats were made of them. Whether the survey of the 10,000 acres was near to or distant from the 6000 acres tract, is of no consequence. The power of the Spanish governor to make the grant where he thought proper, was complete. The construction of Spanish grants is not determined by the principles of the common law, but by the laws and ordinances of Spain, by treaties, and by the orders of the king. This has often been so held by this court. *Delespine's Case*, 15 Pet. 319.

The evidence to establish the performance of the condition, is sufficient, without the testimony of Clarke. But still Clarke's evidence is insisted upon. A party is not to be taken by surprise, by a new exception in this
*166] court, and to be called upon to support *the legality of evidence which was allowed by the court below. Cases from Florida are not

exceptions to the principles which govern other appeals brought here. But the testimony of Clarke was legal. The statement made by the commissioner is no part of his evidence ; and if it is, it does not show that he was interested at the time of his examination. He had been interested, but that interest might have ceased. He does not assert a present interest.

CATRON, Justice, delivered the opinion of the court.—This was a mill-grant of five miles squares of land, or 16,000 acres : that is, at Doctor's Branch, where the mill was intended to be erected, 6000 acres ; and 10,000 acres "on the north-west side of the head or lagoon of Indian river." The concession was made (6th of April 1816) on the condition that the mill was built ; the mill was erected. The first survey was made at Doctor's Branch, in 1819, and is free from objection.

The second, for 10,000 acres, was made February 1820, by the surveyor-general of East Florida, "north-westwardly of the head of Indian river, and west of the prairies of the stream called North creek, which empties itself at the head or pond of said river." Such is the description in the certificate of the surveyor-general. The survey had been objected to, but the objection was withdrawn at the hearing below ; and it is insisted, that a waiver of its legality must be inferred. The objection extended to the competency of the paper as evidence, and not to its effect when heard ; so the court held in *Breward's Case*, at this term (*ante*, p. 142). The official return of the surveyor-general has accorded to it the force of a deposition. So we held in the cases of *Breward* and *Hanson*, to which we refer. The land could only be surveyed at the place granted ; if elsewhere, it would have been a new appropriation, when the survey bears date in 1819, contrary to the eighth article of the treaty with Spain ; and the question is, was it at the proper place?

It was granted "on the north-west side of the head of Indian river or lagoon." *According to the strict ideas of conforming a survey to a location, in the United States, the survey would be located adjoining the natural object called for, there being no other to aid and control the general call ; and therefore, the head of the lagoon would necessarily have formed one boundary. But it is obvious, more latitude was allowed in the province of Florida. The object of the grant was timbered land, fit for the supply of lumber ; and if the nearest vacant timbered land to the head of the lagoon was surveyed, the intentions of the government and of the grantee were complied with. This was the construction given by the surveyor-general to the words "north-west side." He permitted the general call to vary so far, and no farther, as to secure timbered land, excluding the prairies next the head of the lagoon. The legality of the survey depends on the fact. The description given in the certificate above recited, and that set forth by the decree, must be taken together ; the lines and boundaries on other lands are given in the decree. The complaint is, that the land was surveyed too far west. On the north, it is bounded by the lands of Charles Sibbald ; on the south, by those of John McIntosh ; on the west, by royal or vacant lands ; and on the east, by the prairies of North creek, which empties itself at the head of Indian lagoon. There is no evidence that North creek is navigable. If there was such evidence, as the survey includes the creek, we would reverse the decree, and order the sur- [*167

vey only to front one-third part on the creek. The surveyor-general certifies that this 10,000 acres is the tract of land granted to the petitioner, on the 6th of April 1816: and although no reliance would be placed on the assertion in the certificate, standing alone, still, taking the return that the survey was on the land granted, in connection with all the facts and circumstances appearing in the record, it tends to confirm the conclusion that the land was laid off on the next land to the head of the lagoon, covered with timber.

One other consideratiou has weight. If it be untrue, that the survey is at the proper place, the United States could have proved the fact to a certainty, with the slightest diligence; and ought to have proved it. This consideration is strengthened by the pleadings and evidence. The petition, filed in 1829, alleges that the surveys were made for lands granted; and sets out the descriptions, courses and distances, to which the *attor-
*168] ney of the United States made no answer; the fact was not admitted for this reason, and necessary to be proved by the complainant (6 Cranch 51); yet it shows that the claim was not resisted on this ground; and such was clearly the case throughout, as George F. Clarke, the surveyor-general, was twice examined as a witness, on many interrogatories, without having been requested to state the locality of the 10,000 acres survey. Upon all these facts and circumstances taken together, we order the decree to be affirmed.

Decree affirmed.

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*169] *Hyde & Gleises and H. Locket, Plaintiffs in error, *v.* Booraem & Company, Defendants in error.

Appellate jurisdiction.—Dependent contract.

The defendants in error, merchants in New York, agreed with the plaintiffs in error, H. & G., merchants in New Orleans, that indored notes should be given by H. & G., for a certain sum, being the amount due by H. & G., to B. & Co., and other notes or drafts of H. & G., payable in New York, which indorsed notes were to be deposited in the hands of L., to be delivered to B. & Co., on their performing their agreement with H. & G.; part of which was to take up certain drafts and notes given by H. & G., payable in New York. The notes, indorsed according to the agreement, were drawn and delivered to L.; B. & Co. performed all their contract, excepting the payment of a draft for $2000, and a note for $1568.74, which, from inability, they did not pay; and the same were returned to New Orleans, and were there paid, with damages and interest, by H. & G., at great loss and inconvenience. The notes deposited with L. amounted to upwards of $7000 beyond the draft for $2000 and the note for $1568.74. B. & Co. filed a petition, according to the Louisiana practice, praying for a decree by which the indorsed notes in the hands of L. should be delivered to them, equal to the balance due to them; the district judge gave a decree in favor of B. & Co., in conformity with the petition: *Held*, that the decree was erroneous; and the court reversed the same, and ordered the case to be remanded, and the petition to be dismissed with costs, by the circuit court of Louisiana.

The supreme court has no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it; that is the proper province of the jury; or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision; the court can only re-examine the law, so far as he has pronounced it, upon a state of facts; and not merely upon the evidence of facts found in the record, in the making of a special verdict, or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the supreme court, by an

appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with the supposed conclusions in matters of fact.

The contract between B. & Co. and H. & G. was, what the French law, the basis of that of Louisiana, calls a commutative contract, involving mutual and reciprocal obligations; where the acts to be done on one side form the consideration for those to be done on the other.

Upon principles of natural justice, if the acts are to be done at the same time, neither party to such a contract could claim a fulfilment thereof; unless he had first performed, or was ready to perform, all the acts required on his own part.

When the entire fulfilment of the contract is contemplated as the basis of the arrangement, the contract, under the laws of Louisiana, is treated as indivisible; and *neither party can compel the other to a specific performance, unless he complies with it *in toto*. [*170

ERROR to the District Court for the Eastern District of Louisiana. Booraem & Co., merchants of New York, agreed with Hyde & Gleises, merchants of New Orleans, who were indebted to them, to give them an extension of time for the payment of the amount due by them, if they would give their notes, payable at subsequent periods, for a certain sum, the notes to be indorsed, and deposited with H. Locket, and to be delivered to them, on their having paid certain engagements, due in New York; the amount of which was included in the amount of the notes deposited in the hands of H. Locket. The notes were given and deposited in pursuance of this agreement; and Booraem & Co. performed all the matters contained in the agreement, excepting that they did not pay a draft for $2000 and a note for $1568.74, due and payable in New York; being unable to pay the same. The draft and note were returned to New Orleans, and Hyde & Gleises, at great inconvenience and loss, paid the same.

Booraem & Co., proceeding according to the practice in Louisiana, filed a petition in the district court, then exercising the powers of a circuit court of the United States, asking that the notes of Hyde & Gleises, in the hands of H. Locket, taking from the same a sufficient amount to repay to them, Hyde & Gleises, the amount of the $2000 draft, and the note for $1568.74, should, by a decree of the court, be ordered to be delivered to them. After a full hearing of the case, on the petition, answer and testimony, the district court gave a decree in favor of the petitioners; and the defendants prosecuted this writ of error. The case is fully stated in the opinion of the court.

Key and *Henderson* argued the cause for the plaintiffs in error; and *Coxe* appeared and argued the cause for the defendants.

**Key* and *Henderson* contended, that the record showed, beyond cavil, that the special contract sued on was executory, and dependent, in its terms, of execution on both sides. Booraem & Co. agreed to cancel and extinguish certain liabilities and evidences of debt then due them by Hyde & Gleises, and to take up and extinguish others to become due, and part of which Booraem & Co. had passed from their hands. On this consideration, Hyde & Gleises undertook to furnish Booraem & Co. with new evidences of debt, payable at a more remote day than that to which any of the former liabilities extended, and to give approved indorsers on most of the new paper. Now, the obvious understanding of the parties to this agreement was, that so soon as the first set of securities was taken up and delivered to Hyde & Gleises, that the second set of securities, prepared and placed in the hands of a mutual depositary, should then be delivered over. [*171

So understood Mr. Locket, the depositary. So did Booraem & Co., as shown by their subsequent letter, of date 26th May 1837; and so it is averred by Hyde & Gleises. This is just; and courts favor the principle of dependent contracts, because most just. 1 Pet. 465.

It will be observed also, that this suit is not to recover money due by contract. Nor is it to recover damages for breach of contract. Nor is it an action of detinue and trover. But it is an attempt to have decreed a partial specific performance of a contract, for delivery of chattels or *choses in action*. Now, the rule is universal, that he who asks a specific performance, must himself have performed, or be be in a condition to perform, his part. 1 Wheat. 178; 2 Ibid. 290. But this record admits the agreement, and acknowledges the default of the plaintiff; and thereupon the court proceeds to reform and remodel the contract, to correspond with the d linquency of the plaintiff. This the defendant, insisting on the terms of his agreement, objects to. The court below has made, in its direction, a new contract, different from what the plaintiffs set forth; adverse to the proof in the case, and to the will of the defendants. This is equally unauthorized by legislative or judicial power. 2 Sumn. 278; 1 Pet 14; 4 Wheat. 316; 8 Ibid. 1.

*172] We submit, too, that, though T. R. Hyde & Brothers, and *W. T. Hepp, the indorsers, are not parties to the action, yet they must be noticed as parties to the contract, and parties whose interests are affected by this judgment. It is not sufficient, that they may defend themselves, when sued on the paper. The court should not expose them to the jeopardy of a suit, by decreeing a delivery of their paper to Booraem & Co.; unless it is found, in the terms of the contract, that the conditions and contingencies have happened on which it should be so delivered. If the decree is to affect their interests at all (as it manifestly does), will not the court look to see what these interests and their agreement are? It is perceived, then, that these persons are the sureties of Hyde & Gleises, on the terms of their contract. And if Hyde & Gleises had consented to change the contract, without consent of the sureties, they would not have been bound, even though beneficial to their interests. There is no equity against a surety; but such have a right to stand on the exact terms of their contract. 9 Wheat. 680; 12 Ibid. 511; 1 Paine 305; 3 W. C. C. 70.

Coxe, for the defendants in error, cited 4 La. 465; 3 Ibid. 1; Code of Practice in Louisiana, 517, 487–9; 7 Mart. 21; 1 Mart. (N. S.) 187; 4 Ibid. 21; 8 Ibid. 379; 1 Pet. 620; Louisiana Code, art. 602, 2040, 2042; 3 Mart. (N. S.) 606–7.

STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the circuit court of the eastern district of Louisiana. The original suit was brought, conformable to the Louisiana practice, by petition, in which Booraem & Co., the original petitioners, state, that two of the original defendants, Hyde & Gleises, merchants of New Orleans, being indebted to the petitioners in a considerable sum, did, in April 1837, deliver to the petitioners certain promissory notes, to wit, three notes drawn by Hyde & Gleises, to the order of, and indorsed by, T. R. Hyde & Brothers, dated the 6th of April 1837, at six, twelve and eighteen months, amounting to $5000; and three notes drawn by the same makers, to the order of, and

indorsed by, William T. Hepp, dated on the 6th of April 1837, at seven, eleven and fifteen months, amounting to $5000; *and three notes drawn by the same makers, to the order of Booraem & Co., dated the [*173 6th of April 1837, at nine, thirteen and seventeen months, amounting to $2750.64. The petitioners then state, that on receipt of the notes, they, the petitioners, agreed to extinguish any and all demands which they had against Hyde & Gleises, or for which the petitioners had become responsible, by account, note or acceptance, previous to the 6th of April 1837, and which, including interest and exchange, amounted to $11,798.64. The petitioners then aver, that they did pay and extinguish the said demands, with the exception of a draft for $2000, and a note for $1568.74, which they were unable to provide the means of taking up, and which have since been taken up by Hyde & Gleises. The petition then goes on to state, that these notes were left in the hands of H. Locket, Esq., the other defendant, at New Orleans, who had been notified not to dispose of them to the prejudice of the rights of the petitioners; that they had demanded the delivery of five of the notes, to wit, three indorsed by Hepp (the others drawn to the order of, and indorsed by, Hyde & Brothers, being omitted in this part of the petition, by mistake), and a balance in cash of $469.12, according to the account annexed; that they had also demanded a delivery of the same five notes, from Locket; but he had refused to deliver the same. The petitioners, therefore, prayed, that they might have a judgment of the court decreeing a delivery to them by Locket of the three notes drawn by Hyde & Gleises, to the order of T. R. Hyde & Brothers, and two of the three notes drawn to the order of William T. Hepp, one at eleven months for $1500, and the other for $2000 at fifteen months; and decreeing Hyde & Gleises to pay the said balance of $469.12; and they also prayed for further relief.

Such is the substance of the petition, which does not seem to be drawn with entire accuracy and precision. Annexed to the petition is a receipt, signed by Booraem & Co., acknowledging the receipt of the nine notes described in the petition, and *that they are given for the purpose of [*174 extinguishing the demands against Hyde & Gleises, before the 6th of April 1837, as stated in the petition; and then adding the following clause: "Should Joshua B. Hyde, of the firm of Hyde & Gleises, now in New York, have settled for the draft of $2000, paid by Booraem & Co., on the 15th of March 1837, or for the sum of $2128.36, by notes or otherwise, the said Booraem & Co. are bound to take them up at maturity, and are included in said arrangement herein first specified."

Hyde & Gleises, in their answer, admit the making and indorsing of the notes, and aver, that they were prepared for delivery to the petitioners, according to the receipt, which contains stipulations binding upon the petitioners, and forming conditions precedent to the delivery of the notes; that to secure a compliance with the agreement, it was mutually agreed, that the notes and receipts should be deposited in the hands of Locket, to be delivered to the petitioners, when the several conditions mentioned in the receipt were performed, and only in that event were to be delivered; that the petitioners totally neglected and refused to perform the conditions; and in consequence of such omission and neglect, the defendants, Hyde & Gleises, were forced to pay and did pay a note of $1564.74, and an acceptance of $2000, with costs and damages, both of which the petitioners had

assumed to pay ; that the friends of the defendants, Hyde & Gleises, were induced to indorse the notes, by the reasonable expectation that the defendants would be enabled to meet the notes from the profits of their business, and save their indorsers from loss, if the extensions stipulated in the receipt were granted upon all the demands of the petitioners; that by reason of the failure of the petitioners to comply with the agreement, and the payments they were forced to make, they exhausted their resources and credit, and their business was destroyed, and their ability to protect their indorsers was utterly at an end ; and they conclude, by denying their indebtment, in the manner stated in the petition, and pray that the petitioners may be cited to answer in reconvention, and be condemned to pay the amount of $5000 to the defendants as damages.

*175] *The defendant, Locket, by his answer, asserted, that the notes were deposited in his hands by the joint consent of the petitioners and Hyde & Gleises, to be delivered to the petitioners by him, when all the conditions in the receipt were fulfilled by the petitioners ; and he avers that the agreement never was fulfilled on the part of the petitioners, and that they are not entitled to the notes. The indorsers also filed a petition of intervention in the cause ; which, however, was afterwards withdrawn. The petitioners replied to the plea of reconvention, denying their indebtment.

Upon this state of the pleadings, the cause came before the circuit court for decision, without the intervention of a jury, by the consent of the parties, and the final decision was made by the district judge, upon an examination of the evidence offered by the parties. The decree was, in effect, that the defendants ought to pay to the petitioners, out of the notes, the balance of $11,789.64, after deducting the amount of the note of $1567.74, and of the acceptance of $2000 paid by the defendants, and the interest thereon ; and that for this purpose, four of the notes in the possession of Locket, to wit, two drawn by Hyde & Gleises to the order of T. R. Hyde & Brothers, of the 6th of April 1837, one for $2000,. payable in eighteen months, and the other for $1500, payable in twelve months, and two other notes drawn by Hyde & Gleises to the order of W. T. Hepp, dated 6th of April 1837, one for $2000, payable in eighteen months, and the other for $1500, payable in eleven months, amounting in all to $7000, to be delivered by Locket to the petitioners, or their attorney ; and that the remaining five notes be delivered to Hyde & Gleises ; and that judgment be for the petitioners against Hyde & Gleises for the remaining unsatisfied sum due to the petitioners, of $776.90, with interest from the decree. It is from this judgment that the present writ of error is brought ; the district judge having, at the request of the defendant's counsel, made a statement of the facts on

*176] which he relied ; *and the record containing, at large, the whole evidence at the hearing.

One of the embarrassments attendant upon the examination of this cause in this court, is from the manner in which the proceedings were had in the court below. We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. We

can only re-examine the law, so far as he has pronounced it upon the statement of facts, and not merely a statement of the evidence of facts, found in the record, in the nature of a special verdict, or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions on matters of fact. Unless this is done, it will be found extremely difficult for this court to maintain any appellate jurisdiction in mixed cases of the nature of the present. The same embarrassment occurred in the case of *Parsons* v. *Armor*, 3 Pet. 413; and was there rather avoided by the pressure of the circumstances, than overcome by the decision of the court. Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question, which we are to dispose of, is, whether, in point of law, upon these facts, the judgment can be maintained? We are of opinion, that it cannot be, and shall now proceed to assign our reasons.

In the first place, it is a material circumstance, that the petition is not to recover pecuniary compensation or damages for any supposed benefit conferred upon Hyde & Gleises under the agreement; but it is in the nature of a bill for a specific performance of that agreement, by a delivery up of a part of the notes deposited in the hands of Locket, not upon the ground of an entire performance of the agreement on the part of the petitioners; *but confessedly, upon the admission, that they have not performed it, except in part; and therefore, seeking a part performance only, [*177 *pro tanto*, from the other side. Now, the present being what in the French law, which constitutes the basis of that of Louisiana (Code of Louisiana, art. 1760–63), is called a commutative contract, involving mutual and reciprocal obligations, where the acts to be done on one side form the consideration for those to be done on the other, it would seem to follow, upon principles of natural justice, that if they are to be done at the same time, neither party could claim a fulfilment thereof, unless he had first performed, or was ready to perform, all the acts required on his own part. And this accordingly will be found to be the rule of the Civil Code of Louisiana (art. 1907), where it is declared, that in commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party, who wishes to put the other in default, must, at the time and place expressed in, or implied in, the agreement, offer or perform, as the contract requires, that which on his part was to be performed, or the opposite party will not be legally put in default. And again (art. 1920 and 2041), on the breach of any obligation to do or not to do, the other party in whose favor the obligation is contracted, is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option; or he may require the dissolution of the contract. But it is nowhere provided, that the party who has omitted to perform the acts which he has contracted to perform, can entitle himself, if the other party has been in no default, either to a specific performance, or to damages, or to a dissolution of the contract. That woul

be to enable the party committing the default to avail himself of his own wrong, to get rid of the contract.

But it is supposed, that where a party has performed his contract only in part, he may, nevertheless, be entitled to a performance, *pro tanto*, from the other side; although it has been by his own default, that there has not been an entire performance. And certain cases in the Louisiana reports have been relied on, to establish this doctrine. But these cases, when examined, will not be found to justify any such broad and general conclusion. They establish no more than this: that where, in a commutative contract, there has been a part performance on one side, from *which a benefit *178] has been derived from the other side, the other party is compellable to make compensation in pecuniary damages, to the extent of the benefit which he has received, deducting therefrom all the damages which he has sustained by the want of an entire performance thereof. There is nothing unreasonable in this doctrine; and although it may not be, in many cases, recognised and acted upon in the common law, it is often enforced in equity. But this doctrine is not applicable to all cases of commutative contracts, generally, but only to cases where the contract is susceptible, from its nature and objects, of divisibility; and where, not a specific performance, but a mere pecuniary claim, in the nature of a *quantum meruit*, is sought to be enforced. Thus, in the case of *Loxeau* v. *Declonat*, 3 La. 1, where A. agreed to build a sugar-house for B., for a certain price, and B. was to pay for it, when the work was completed, and to furnish materials; it was held, that if A. failed to complete the work in the manner stipulated, yet, if B. used the sugar-house, he was bound to pay for it in money, the value of the labor he had expended upon it; that is to say, the value of the benefit he had derived from the labor; for the Civil Code of Louisiana (art. 2740) contemplates that B., in such a case, is entitled to damages for the losses sustained by him from the want of a due fulfilment of the contract. The same decision was made under similar circumstances in the case of *Entre* v. *Sparks*, 4 La. 463.

But, where the entire fulfilment of the contract is contemplated by the parties, as the basis of the arrangement, the contract is treated as indivisible; and neither party can compel the other to a specific performance, unless he complies with *in toto*. Thus, if A. should agree to sell B. a ship for $10,000, or a horse for $500, and B. should pay a part only of the purchase-money, as for example, a fifth or tenth part thereof, it would hardly be pretended, that he would be entitled to a specific performance, *pro tanto*, by a conveyance of a fifth or tenth part of the ship or horse. And on the other hand, the vendor would have no pretence to require, that if he had a good title only to an undivided fifth or tenth of the ship or horse, the purchaser should be compellable to take that part and pay him, *pro tanto*, the purchase-money. In every such case, it would be manifest, the contract of sale would be indivisible; and that *each party would *179] have a right to insist upon an entirety of performance. Now, that is precisely the ground applicable to the present case. The contract between the parties, was, from its character and object, entire and indivisible. Hyde & Gleises, and their indorsers, entered into the new agreement, and gave the notes, upon the faith and confidence that the petitioners would punctiliously perform the whole of it on their side. The object was, to procure a

prolonged credit and delay of payment to Hyde & Gleises for all their debts contracted with the petitioners; and thus enable them to retrieve their affairs, rescue themselves from impending ruin, and to make their indorsers safe. This could be only by the petitioners taking up all the notes and acceptances already given by Hyde & Gleises, according to the stipulations of the petitioners, and thus enabling them to carry on their operations in business: and it seems to have been contemplated on all sides, that by the omission, Hyde & Gleises might be compelled to stop, and their indorsers be brought into peril; and, indeed, the record shows that the event actually occurred. If then Hyde & Gleises have failed to realize the benefits contemplated by the arrangement, by the default of the petitioners, what ground is there to assert, that they, or their indorsers, ought to be compelled to a specific performance of a contract *pro tanto*, when the consideration was a punctilious performance of the entirety? The most that could, under such circumstances, be contended for, would be, to say, not that Hyde & Gleises should be compelled to give up any part of the indorsed notes; but that they should be bound to repay to the petitioners, in money, the amount paid by them for Hyde & Gleises, deducting all damages sustained by the latter, by reason of the non-performance of the contract, as in the cases already cited. But that is not the object or the prayer of the allegations in the present petition.

In the next place, there is another view of the case, still more striking and conclusive. It is not true, as the petition supposes, that there was any actual delivery of the notes to the petitioners (which might have presented another question); but in point of fact, as the evidence fully establishes, the notes were deposited in the hands of Locket, to be delivered over to the petitioners, only upon their full performance of the stipulations on which they were *to have effect. It is admitted, that those stipulations [*180
have never been performed. Upon what ground, then, can the petitioners now demand a delivery of any of the notes, they not having fulfilled the conditions of the deposit? It has been said, that here, by the giving up of the new notes, tbe old debts due by Hyde & Gleises have been extinguished by novation; and therefore, their sole remedy lies upon the new contract, and notes given in pursuance thereof. But that doctrine is by no means true, as it is attempted to be applied to the circumstances of the present case. A novation will, indeed, if it be absolute and unconditional, amount to a direct extinguishment of the original debt, by substituting the new contract in its place. This is sufficiently apparent from the language of the Civil Code of Louisiana, art. 2181–94. But no extinguishment is wrought, if the arrangement is conditional, and the conditions are not fully complied with. Pothier (on Obligations 550–1) states this in the most clear and explicit terms. "It follows," says he, "that if the debt of which it is proposed to make a novation by another engagement, is conditional, the novation cannot take effect, until the condition is accomplished;" therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted; *vice versâ*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct."

Now, that the giving of these notes, by way of novation for the old debts, was conditional, is apparent, from the fact that they were not delivered to the petitioners, but were deposited in the hands of Locket, "subject to the provisions of the receipt," and to be delivered over by him, only when these conditions were complied with by the petitioners. So all parties must have understood the transaction; and the deposit, in any other view, would be as unaccountable as it would be unmeaning. The petitioners have never, as they admit by their petition, complied with these conditions. How, then, can they, consistently with all rules of law, insist upon the transaction being a complete and absolute novation, entitling them to the delivery of the substituted securities, in lieu of the old debts?

*181] *Nor is the consideration to be lost sight of, that the arrangement does not merely limit itself to the immediate interests of the debtors and the creditors. The indorsers have rights also, which must have been intended to be provided for and secured by the deposit; to which, in reason, they must be persumed to have been parties, and given their assent. We have no right to presume, that they would have indorsed these notes, without the entire confidence that the new arrangement would be carried out and fulfilled with the most scrupulous punctuality. Their own recourse over against Hyde & Gleises might otherwise be most materially and injuriously affected. Their object must have been, by securing to Hyde & Gleises the prolonged credit, to have enabled them to meet the new payments, and thereby exonerate themselves from ulterior responsibility. If, therefore, we were to give effect to the present suit, the conditions of the novation not having been fulfilled, we should either deprive the indorsers of all the benefits and securities contemplated in the arrangement; or, at all events, leave them exposed to a responsibility, as indorsers, from which, by the very deposit, they meant guard themselves.

There are other embarrassing difficulties in the frame of the decree, as to the manner in which it disposes of the notes, and divides the responsibilities of the respective indorsers without their consent, and proceeding to adjudge money to the petitioners for the balance. But it is unnecessary to dwell on them, for, upon the grounds already stated, we are of opinion, that the judgment ought to be reversed, and the cause remanded, with directions to the court below to dismiss the suit, with costs for the orginal defendants.

Judgment reversed.

*182] *Mathew Hobson, Appellant, *v.* The Heirs of Duncan McArthur, deceased, Appellee.

Arbitration.—Umpire.—Execution of power.—Relief in chancery.

It was agreed between McA. and H., that McA. should withdraw entries of 10,000 acres, part of 11,666 acres, which had been located for the use of H., and should relocate the same elsewhere; and that the 10,000 acres, the entries of which had been withdrawn, and the 10,000 acres relocated elsewhere by McA., should be valued by two disinterested persons, one to be chosen by each party, and if the two could not agree on the value of the land, or any part thereof, they should choose a third person, who should agree on the value of the land, and that H. should have so much of the land relocated, as should amount to the value of the land for which the locations had been renewed; and also to the value of $2000, in addition to the value of the 10,000 acres. The two persons appointed could not agree as to the value of part

of the land, and they nominated a third person; of the three persons thus appointed, two only agreed as to the value of part of the land. It is an unreasonable construction of this agreement, that it was so framed as that it not only might fail to accomplish the very object intended; but that, in all probability, it must fail, and become entirely nugatory, as the third man was not to be called in until the two had disagreed; it is a more reasonable construction, to consider the third man as an umpire, to decide between the two that should disagree; this would insure the accomplishment of the object the parties had in view. The valuation by the two appraisers was within the submission.

Where there is an original delegation of power to three persons, for a mere private purpose, all must agree; or the authority has not been pursued.

The court, under the prayer in a bill in chancery for general relief, will grant such relief only as the case stated in the bill, and sustained by the proof, will justify.

APPEAL from the Circuit Court of Ohio. In the circuit court of Ohio, a bill was filed by Duncan McArthur, asking for a specific performance of a contract, dated the 10th of November 1810. The complainant and the defendant, with John Hobson, entered into certain articles of agreement, relative to the withdrawal of the entries of land, in the state of Ohio, and the re-entry thereof on other lands, out of which, by the contract between the parties, compensation was to be made in the lands included in the relocation of the lands, of which the entries had been withdrawn. The value of the lands, the entries of which were, by the agreement, to be withdrawn, and of the *land on which the entries were to be relocated, were to be determined by persons mutually chosen and agreed upon; [*183 who, if they could not agree, were to nominate a third person.

Out of this agreement, and proceedings under it, the questions in this case arose, and were argned by *Stanbery*, for the appellant, and by *Mason*, for the appellees, the heirs of Duncan McArthur, who became parties to the proceedings, on the decease of Duncan McArthur. In the circuit court, a decree was given in favor of the complainant, Duncan McArthur; and the defendant, Matthew Hobson, prosecuted this appeal. The case is fully stated in the opinion of the court.

The question decided by the court was, as to the construction of the agreement of the parties, to submit the value of the land to the determination of persons mutually chosen and agreed upon, and if they could not agree that they should appoint a third person.

Stanbery, for the appellant, contended, that the decree of the circuit court was erroneous, in setting aside the appraisement of McArthur's surveys. The contract of November 10th, 1810, provides for an appraisal of the lands entered by Langham, and the lands entered by McArthur, "by two disinterested men, one to be chosen by each of the contracting parties; and if the said two men cannot agree on the price of the said lands, or any part thereof, the said two men are to choose a third man, who, together with the other two, shall agree on the price of said land." It appears, that the two appraisers first viewed the Langham entries, and disagreeing as to their value, called in Lyne Starling as a third man; and the three concurred in an appraisement of these lands; but differing in the value of the McArthur entries, an award as to their value was made by Starling and one of the appraisers, without the concurrence of the other appraiser.

Mr. Stanbery argued, that the intention of the parties to the contract was, that the third man was to act as an umpire, not as a third arbitrator.

He admitted, that the rule is well settled, that all the arbitrators must concur, unless the submission provides for an award by a majority. *But
*184] this was not a submission to three arbitrators. The submission is to two, and it is only in the event of their inability to agree, that the third man is to intervene. For what purpose? Not, certainly, to add to the difficulty by a new and discordant opinion, but to settle it by his decision. It was not necessary to the validity of the award, that the two arbitrators should concur with the umpire, or that either of them should concur with him; and the circumstance that the award is signed by one of the arbitrators as well as by the umpire, does not vitiate. Watson on Arb. 64.

2. But if the appraisement of the McArthur surveys cannot be sustained, the whole award is void; and the decree of the circuit court is erroneous, in sustaining the appraisement of the Langham entries. The express language of the contract is, that "the land from which the 10,000 acres is to be withdrawn, as located by Elias Langham, and also the land to be reentered by McArthur, is to be valued by two disinterested men." &c. Besides this specific enumeration of the matters submitted, it is obvious, that nothing short of an appraisement of both sets of entries would avail; for the object was to fix the relative values, and that could only be accomplished by a valuation of both. The arbitrators must respond to all matters specifically submitted; especially, where there is a dependency and necessary connection in the matters submitted.

Mason, for the appellees. The mode of ascertaining the value of the lands is provided for in the contract. Each party is to choose one man; and if the men thus chosen cannot agree, they "are to choose a third man, who, together with the other two, shall agree on the price of the land." It was, doubtless, competent for the parties to agree, that the concurrence of the whole number of appraisers should be requisite to constitute a valid appraisement of the land. There is no ambiguity in the terms of the contract. They do expressly require that the three men should "agree on the price." And they all did agree as to the price of the lands located by Lang-
*185] ham. *But only two agreed in appraising the lands entered by McArthur. The question is, whether the appraisement made by two is valid in law.

There is a difference in this respect between a private authority, and a public trust and duty; in the former case, all must join; in the latter, the power to several is well executed by the majority: "unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary." Kyd on Awards 106; Watson on Arb. 85 (edit. 1836); *Grindley* v. *Parker*, 1 Bos. & Pul. 229; *Cortes* v. *Kent Waterworks Company*, 7 Barn. & Cres. 314; *Rex* v. *Whitaker*, 9 Ibid. 648; *Dalling* v. *Matchett*, Barnes 57; s. c. Willes 215; *Green* v. *Miller*, 6 Johns. 40; *Perry* v. *Penring*, Cro. Jac. 399; *Sallows* v. *Girling*, Ibid. 277; 5 Dane's Abr. 562.

2. The appraisement was also invalid, because the agent transcended his authority in two particulars, viz: 1st, In having more land appraised than was required to pay the debt; and 2d, In having other lands appraised than those described in the power of attorney, under which he derived his

authority. The power of attorney was in conformity with the terms of the contract.

3. It was void for uncertainty in this, to wit: That the contract required the appraisement to be made in such a manner that Hobson could have released his title to the residue of the land not appraised; whereas, the appraisers proceeded to value more than $36,000 worth of land to pay a debt of $9250. The appraisement, therefore, was made in such a manner as to render it impossible for Hobson to comply with that essential part of the contract, which required him to convey to McArthur all the land that would remain, after deducting the quantity required to pay the debt due to himself. But Hobson was not content to have as much land, and no more, set off and appraised, as was necessary to pay the debt; nor did he have all the lands entered by McArthur appraised. Without having all appraised, he would have nearly four times as much appraised as was required to discharge his claim. *Certainly, the court cannot find in such acts of capriciousness, a compliance with the letter or spirit of the contract. [*186

A question naturally arises on this branch of the case—who had the right to select the land for appraisement? Was the right vested in the appraisers? or in the parties jointly? or in one of them, and which? It is answered, in the debtor. McArthur claimed this right, and asserted it in the letter of attorney to his son. The privilege of choice is not in the creditor, in such cases. The contract provided, in case of a deficiency of land to pay the debt, that McArthur should give other lands, &c. These other lands he, undoubtedly, had a right to select.

But supposing the appraisement of the McArthur entries to be void, what effect will that have on the appraisement of the Langham entries? "If a thing be awarded to be done which is bad for uncertainty, or as being beyond the submission, or for any other objection; and this part of the award does not form a consideration for the performance of the matter awarded on the other part, and is distinct and independent thereof; then the award is only void for so much." Though formerly otherwise, "nothing now is more clear, than that an award may be bad in one part, and yet good and binding in another part." Watson on Arb. 190–91.

Assuming, therefore, that the appraisement, so far as it respected the McArthur entries, was void, for any one or all the reasons assigned, and valid as to the residue; I proceed to inquire, what decree the complainants are entitled to ask for? McArthur had a right, by the contract, to pay in land or money, at his option; and on payment being made or tendered, in either mode, he had a right to require Hobson to release. Every stipulation to pay a debt in specific property is presumed to be made in favor of the debtor; and therefore, he may, in all cases, pay the debt in money, in lieu of the property which, for the ease of the debtor, the creditor had agreed to receive. Chipman on Cont. 31, 32, 34, 44; 2 Kent's Com. 400. The contract, in its legal effect, was the purchase of the warrants for a sum of money thereafter to be ascertained in the mode prescribed *by the contract, and to be paid in land or money, at the option of McArthur. [*187 It was the same, in substance, as a contract to pay so much money; for instance, $100 in wheat or cattle. This argument is not weakened by the fact, that the warrants were to be re-entered in the name of Hobson; because

the only object the parties could have had in the provision, requiring the entries to be made in the name of Hobson, was to afford him security for the performance of the contract on the part of McArthur.

But if McArthur had not the right of election, which is contended for, but on the contrary could have been compelled in a court of equity to pay in land; then it is maintained, that the conduct of Hobson has released him from that obligation; and deprived himself of the right, if he ever had a right, to demand payment in property. McArthur offered to pay in money, or to appoint another appraiser on his part, which Hobson refused. This appears in the record. The principle is, that an offer to do a thing is so far equivalent to performance, that it will entitle the person making it to demand whatever he was to have upon the performance. 2 Ld. Raym. 961; *Hotham* v. *East India Company*, 1 T. R. 645; *Parker* v. *Parkenhorn*, 2 W. C. C. 142; 15 Petersd. 24; Doug. 259, 659.

The interpretation of the contract which is contended for, was not fully sustained by the court below. That court set aside the appraisement of McArthur's entries, and directed the parties to re-appoint other appraisers. But if Hobson should neglect or refuse to appoint, he was ordered to release his interest in the lands, on receiving the sum of $9250, to be paid by McArthur. He did refuse to appoint another appraiser. And he had before received a larger sum in money than he was entitled to have, as was shown by the confidential contract. If the appraisement was properly set aside, and Hobson would not appoint another appraiser, and he had twice refused to do it, he was bound to release, on payment or tender of the money. What other decree could have been made?

*188] *Thompson, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the United States for the district of Ohio. The bill filed in the court below is founded upon, and seeks a specific execution of, the following agreement, bearing date the 10th of November 1810.

"It is hereby agreed upon, between Duncan McArthur, of Ross county, and state of Ohio, of the one part, and John Hobson, of Jackson county, and state of Georgia, and Matthew Hobson, of Oglethorpe county, and state of Georgia, aforesaid, on the other part, witnesseth, that whereas, 11,666⅔ acres were sent to Col. Richard C. Anderson's office, on or about the first instant, by Col. Elias Langham, in the name and for the use of said John and Matthew Hobson, with entries for the same. Now, be it known, that it is hereby understood and agreed upon by the contracting parties, that said McArthur is to withdraw 10,000 acres of the 11,666⅔ acres, and to relocate the said 10,000 acres elsewhere, in the name of the said John and Matthew; and it is further agreed upon by the contracting parties, that the land from which the said 10,000 acres is to be withdrawn, as located by Elias Langham, and also the land to be re-entered by said McArthur, is to be valued by two disinterested men, one to be chosen by each of the contracting parties, and if the said two men cannot agree on the price of said lands, or any part thereof, the said two men are to choose a third man, who, together with the other two, shall agree on the price of said land, and the said Hobsons are to have so much of said land, so to be relocated by said McArthur, as will amount to the value of the land from which said warrants shall have

been removed, and also land to the amount and value of $2000, in addition to the value of the 10,000, and where the same was entered by Elias Langham. And the said John and Matthew Hobson doth hereby obligate themselves, their heirs, executors and administrators, separately and jointly, to convey unto the said McArthur, his heirs, &c., all and singular the balance of said 10,000 acres, after deducting therefrom such quantity as, by valuation as aforesaid, will amount to the value of the said 10,000 acres, where the same was first located by said Langham, and also land to the value of $2000, as *aforesaid ; and it is further understood and agreed upon, that if the lands located by the said McArthur should not be valued to the [*189 amount of the lands so located by said Langham, and also $2000, then and in that case, said McArthur is to convey unto the said John and Matthew, their heirs, &c., other lands to the amount of said valuation, with the value of $2000 in land, as aforesaid, said Hobson to pay all office fees and surveying expenses. Said valuation to take place on or before the expiration of three and a half years from the date hereof ; said Hobson to pay the taxes on said lands, until divided ; and then the said McArthur to pay to the said Hobson his proportionable part of said taxes. In witness whereof, we, the contracting parties, do hereunto set our hands and seals, this 10th day of November, A. D. 1810.

Be it remembered, before signing, that the division of said lands shall take place forthwith, after the titles are considered secure, and that the lands located by Langham, are to be picked as he, upon his honor, intended.

(Signed) Duncan McArthur, [L. S.]
John & M. Hobson, [L. S.]

Witness :—E. Langham, Edward Baskerville.

The bill, after having set out substantially this contract, states, that John Hobson, on the 24th of November 1818, sold and assigned to the complainant, all his right and title to one-half (5000 acres) of the land-warrants located by him. That in pursuance of said agreement, he withdrew 10,000 acres of Langham's entries, and located them elsewhere. That on the 30th of July 1830, he appointed his son, Thomas J. McArthur, his attorney, to transact the business under the said contract ; who, in pursuance of said power, appointed, on his part, William Vance, to proceed in the valuation of the said lands. And that, for the same purpose, Matthew Hobson appointed Matthew Bonner, who proceeded to view the land ; and finding that they could not agree on the value, they selected Lyne Starling as a third man, to make the appraisement, pursuant to the terms of the agreement, who, together with Vance and Bonner, agreed upon the valuation of the lands located by Langham. The complainant *further states, that, afterwards, his agent proposed to the said Matthew Hobson, to [*190 select and point out to the appraisers for valuation, such parts of the entries made by McArthur as would amount to a sufficient quantity to satisfy the said Hobson, which proposition he declined, and insisted, that it was his right to have the whole of the lands entered by the complainant valued. That he was entitled to an interest in the whole of the entries made by the complainant, proportional to the valuation of the Langham entries. The bill states, that, afterwards, the three appraisers proceeded to examine the lands relocated by McArthur, and that two only of the appraisers, Bonner

and Starling, agreed on the valuation. And the bill then charges, that the said valuation has not been made in conformity to the said agreement, in this: that the said three appraisers have not all agreed as to the value of the lands relocated by the complainant, but that only two agreed thereto. Several other charges are made against the validity of this appraisement, which it is unnecessary to notice. The bill then sets out several proposals made by the complainant, for the settlement of the controversy, which he declined accepting, and refused making any conveyance or assignment of his interest in the land located by the complainant. The bill, then, for the purpose of obtaining an injunction, refers to an act of congress, of the 26th of May 1830, for the settlement of the conflicting claims of the complainant and the United States, to the land in question; and charges, that the defendant, Hobson, threatens to apply to the government for the appraised value and interest of $5000 acres of the land, entered in the name of the said Matthew Hobson; and prays that he may be enjoined from claiming and receiving from the treasury of the United States any part of the money appropriated by the act of congress, until the same is heard and adjudicated upon by the court. And further, praying that the said Hobson may be decreed to accept some one of the terms proposed by him, in fulfilment of the contract, according to its true intent and understanding. And that he may be compelled to perform the said agreement specifically, on his part, as the complainant has proposed and tendered to do on his part; and such other and further relief as may seem meet and just.

The answer of Hobson admits the contract of the 10th of November, 1810, set out in the bill; and that he is willing to abide *by the same, according to the just interpretation thereof. He admits the appointment of appraisers, and their proceeding to the valuation of the land, as stated in the bill; and that, thereupon, he informed the complainant of his willingness to settle all matters under the contract; and that after taking and retaining such proportion of the lands entered by the complainant, and valued as set out in the bill and answer, as would cover and include the claims of him, the defendant, under the contract, and agreeable to such valuation, he was willing, and then offered to assign and relinquish to the complainant, the rest and residue of the lands so valued, and also all the the other entries and surveys made by the complainant; which he wholly refused to do. The defendant admits, that he rejected all the demands and requisitions of the complainant, made at the time alluded to, and all the demands which had for their object and design a disregard in part or in whole of the doings of the appraisers. The defendant admits the passage of an act of congress mentioned in the bill, and that he means to avail himself of its provisions, if he can obtain a settlement of the matter with the complainant; but he is prevented by the complainant from relinquishing his interest in the lands to the United States. And he denies the right of the complainant to confine him to any particular part of either of the surveys, valued by the appraisers; but that when it is ascertained what number of acres he is entitled to, under the contract and valuation, then he will hold the same undivided and in common with the complainant, until by partition it shall be divided. And he denies the right of the complainant to pay off and settle with him in a given sum of money. That he is perfectly willing

*191]

to abide by the valuation made by the appraisers, and relinquish his claim as before offered.

An interlocutory decree was thereupon entered, declaring that the appraisement made by only two of the appraisers of the relocated entries and surveys made by McArthur was void, and ordered the same to be set aside and annulled; and then proceeds to give directions for another appraisement, which the defendant Hobson refused to comply with; and thereupon, a final decree was entered, declaring that the complainant, McArthur, had complied on his part with the interlocutory decree, and that the respondent Hobson had altogether neglected to comply with *the same on his part; and alleging that the sum of $9250 had been paid [*192 by McArthur to Hobson, as appeared by his receipt annexed to the agreement of the 25th of September 1830. It was, thereupon, ordered, adjudged and decreed, that the said Hobson should, within sixty days after the rising of the court, by a good and sufficient deed, transfer and assign to Duncan McArthur, his heirs and assigns, all his right, title and interest in the 10,000 acres of land relocated and surveyed by the said Duncan McArthur; and that in case he should fail to comply with this decree, within the time thereby limited, then that the decree should operate as such conveyance. And from this decree, the present appeal is taken.

The first and principal question in the case is, whether the appraisement or valuation of the land was made pursuant to the provisions of the contract of the 10th of November 1810. If it was, then the decree in this respect is erroneous. And it was the fault of the complainant that the contract was not carried into execution; and he cannot come now to ask for a specific execution of it.

The agreement was, that the land located by Langham, from which the 10,000 acres were to be withdrawn, and also the land to be re-entered by McArthur, should be valued by two disinterested men, one to be chosen by by each of the contracting parties; and in case the two men thus chosen could not agree on the price of said lands, then they were to choose a third man, who, together with the other two, should agree on the price of the said lands. The parties, in pursuance of the agreement, each chose a man to make the valuation, and upon their disagreement with respect to the same, they chose a third man, and the whole three thereupon agreed as to the valuation of the Langham location, but disagreed in the valuation of the McArthur location; and the valuation was made by Starling and Bonner, two of the appraisers; and it is contended, that this valuation was void, because made by two only.

It has been argued, that this being a delegation of power to the three for a mere private purpose, all must agree, or the authority has not been pursued. This may be admitted to be the rule, where the original delegation of the power is to the three, without any other provision on the subject. But in construing *this agreement, we must look at what [*193 was the obvious intention of the parties. The parties clearly intended, that the valuation should, at all events, be made. A third man was not to be called in, unless the two disagreed; and it is an unreasonable construction of this agreement, that it was so framed that it not only might fail to accomplish the very object intended, but that, in all probability, it must fail and become entirely nugatory, as the third man was not to be called, until

the two had disagreed. Upon the construction of the agreement, that the three must unite in the valuation, the office to be performed by the third man was to persuade the other two to agree with him. This could never have been the understanding of the parties. It is a more reasonable construction, to consider the third man in the character of an umpire, to decide between the two that should disagree. This would insure the accomplishment of the object the parties had in view; but a contrary construction would most likely defeat that object. Upon this view of the agreement, the valuation by two of the appraisers was within the submission.

It has also been made a question, whether the whole of the land re-entered by McArthur was to be valued, or only so much as was to be retained by Hobson. The terms of the submission would seem to settle this question. It expressly provides, that the land from which the 10,000 acres, located by Langham, was to be withdrawn, and also the land to be re-entered by McArthur, were to be valued, &c., and this must have been the understanding of the parties, in order to make a just partition between them. There is no provision made for the selection of any particular part to be appraised. By whom, then, was such part to be designated? But when the whole of each tract is valued, the proportion which Hobson is to have in the McArthur location is easily ascertained; and they would become tenants in common, subject to partition, according to their respective rights. Such is the clear construction of this agreement. It does not contemplate the sale of the land, or the division of any proceeds therefrom. A reference in the bill to the act of congress of the 26th of May 1830 (4 U. S. Stat. 403) appears to be for the purpose of obtaining an injunction to restrain Hobson from receiving any money from the treasury of the United Stattes, appro-
*194] priated by *that act. But the bill is not framed with a view to enforcing any rights growing out of that act, but prays that Hobson may be compelled to perform the agreement of the 10th of November 1810, twenty years before that act was passed. It is true, that there appears upon the record, an agreement entered into between these parties, bearing date the 25th of September 1830, relative to a division of the money to be paid by the government under this act. But this was an agreement made after the commencement of this suit, and which we cannot notice, for several reasons. If any relief is to be given on the basis of that agreement, it should have been brought before the court below, by a supplemental bill. But another insuperable objection is, that by an express stipulation in the agreement, it is not to be made use of in this case. This stipulation is as follows: "The said parties mutually agree and covenant, that this contract and agreement shall not be used by either of them, nor at any time held or interpreted in the suit aforesaid, or in any other suit, or in any other court, or in any proceedings, whether in court or out of court, under the aforesaid contract (the contract of the 10th of November 1810), as affecting, changing or in anywise disturbing the rights of either in the matters aforesaid; but the suit aforesaid shall be conducted, and other suits which either of them may think proper to bring, founded on the contract aforesaid, may and shall be conducted, in all respects, as though this contract had not been entered into."

In addition to this, the counsel on both sides declined, upon the argument, making any use whatever of this agreement. It must, therefore, be

dismissed, as having no bearing upon the case. And if so, there is no proof whatever, that Hobson had received any money on account of his land. The defendant, Hobson, was under no obligations to accept either of the propositions of the complainant, as stated in the bill. There is nothing in the contract of 1810 that called upon him to do this; and especially, after he had, on his part, complied with the provisions of that contract. And if the agreement of 1830 is laid out of view, there is no proof to show that Hobson had received $9250, as is assumed in the decree, and made the ground upon which he is ordered to transfer and assign to McArthur, all his right, title and interest in the whole 10,000 *acres of land, relocated and surveyed by McArthur. This could not have been done, under the [*195 prayer for general relief. The court, under this prayer, will grant such relief only as the case stated in the bill, and sustained by the proofs will justify. The frame and structure of the bill in this case is for a specific execution of the contract of the 10th of November 1810, which provides only for the valuation of the lands, and makes no provision for the sale of the land or the payment of any money. And if the facts would justify a prayer for any such relief, the bill should have been framed with a double aspect; so that if the court should decide against the complainant in one view of the case, it might afford him relief in another. But this bill is not so framed.

The decree of the circuit court, must, therefore, be reversed. But as the rights of the heirs of McArthur may depend, in some measure, upon the contract of the 10th of November 1810, connected with what has since taken place, under the act of congress, we think the bill ought to be dismissed, without prejudice.

It is accordingly adjudged and ordered, that the decree of the court below be reversed; and the cause remanded to the circuit court, with directions to dismiss the bill, without prejudice.

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*United States, Appellants, *v.* John M. Hanson and others, [*196 Appellees.

Florida land-claims.

A grant of five miles square, or 16,000 acres of land, was made by the Spanish governor of Eas Florida, at the mouth of the river Santa Lucia; the petition for the grant stated various merits and losses of the petitioner, and asked the grant of five miles square, for the construction of a water saw-mill; the grant was given for the purposes mentioned, and "also paying attention to the services and other matters set forth in the petition." No survey under the grant was made by the surveyor-general of Florida; but a survey was made by a private surveyor; the survey did not follow the calls of the grant, and no proof was given that it was made at the place mentioned in the grant; the survey and plat were not made according to the established rules relative to surveys to be made by the surveyor-general under such grants; nor was the plat made with the proportion of land on the river, required by the regulations. The superior court of Florida held, that the grant having been made in consideration of services rendered by the grantee, as well as for a water saw-mill, it was valid, without the erection of the mill; but the survey was altogether void, and of no effect; the decree of the superior court of Florida, by which the grant and survey were confirmed, was remanded to the superior court of Florida; that court to order the 16,000 acres granted, to be surveyed according to the principles stated in the opinion of the supreme court.

It has often been held, that the authorities of Spain had the power to grant the public domain, in

accordance with their own ideas of the merits and considerations presented by the grantee; and that the powers of the supreme court of the United States extend only to the inquiry, whether in fact, the grant had been made, and its legal effect when made, in cases where the law by implication introduced a condition, or it was peculiar in its provisions; no special ordinance of Spain introduces conditions into mill-grants. Wiggins's Case, 14 Pet. 346, and Sibbald's Case, 10 Ibid. 323, cited.

The certificate of a private surveyor, that he had permission from the governor of the territory to make a survey of the land granted, is no evidence of the fact. There is a marked and wide difference in the effect of the certificate of the surveyor-general and of a private individual who assumes to certify without authority.

Instructions of 1811, as to the duties of the surveyor-general, in making surveys under grants, by the governors of the public lands of Spain.

A grant by a Spanish governor of Florida meant not, as in the states of the United States, a perfect title; but an incipient right, which, when surveyed, required confirmation by the governor. The duty of confirmation by the acts of congress, is deputed to the courts of justice of the United States, in execution of the treaty with Spain.

The same credence that was accorded to the return of the surveyor-general, by the Spanish government, is due to it by the courts of the United States; plats and certificates, because of the official character of the surveyor-general, have accorded to them the force and character of a deposition.

*197] APPEAL from the Superior Court of East Florida. *Samuel Miles, a new settler, admitted under the protection of king of Spain, on the 18th of July 1813, presented a petition to Governor Kindelan, the Spanish governor of East Florida, setting forth great services performed by him for the supply of the troops of Spain, in the province, and severe sufferings and losses sustained by him in the service of the crown; and considering himself entitled to some favor, asked for a grant of five miles square of land, for the construction of a water saw-mill, at a place fit for the purpose, and which is vacant, situated at the mouth of the river Santa Lucia. The governor gave the following decree on the petition:

St. Augustine, Florida, 19th July 1813.

Taking into consideration the benefit and utility that will redound to the province, from a machine for sawing lumber, which the party proposes to construct in the place which he points out, and also paying attention to the services and other matters which he sets forth, let there be granted to him the five miles square of land which he solicits, without injury to a better right; and in order to prove this grant, let there be delivered to him from the secretary's office, the necessary certified copy. KINDELAN.

On the 7th of May 1815, a survey and plat of the land, was returned, with the following certificate:

I, Don Roberto McHardy, an inhabitant of this province, and private surveyor, do certify, that in consequence of a permission from this government I have surveyed and delineated a square of five miles, containing 16,000 acres of land, which this government has granted to Don Samuel Miles, on the 19th of July 1813, which plat is represented in the preceding plot. St. Augustine of Florida, on the 7th May 1815.

ROB. MCHARDY.

On the 23d day of May 1829, John M. Hanson and others, the grantees of Samuel Miles, brought their petition before the superior court of East Florida, setting forth the grant to Samuel Miles, and their title under the same; and praying that the land, as surveyed by Robert McHardy, might

be confirmed to them. After various proceedings in the court, at July term 1840, a *decree was made by the Honorable Isaac H. Bronson, judge of the superior court, in favor of the claim, in conformity with the survey of Robert McHardy. From this decree, the United States prosecuted an appeal. [*198

The case was argued by *Legaré*, Attorney-General for the United States. No counsel appeared for the appellees.

The Attorney-General contended:—1. That there never was any legal survey of the land, under the alleged grant: and that the survey of Robert McHardy, who was a private surveyor, was void for want of authority, even if proved to have been made; and could not sever the lands surveyed from the public domain. 2. That even if the said survey were made by legal authority, the land surveyed did not conform to the description in the said pretended grant, and the said survey was, therefore, void.

CATRON, Justice, delivered the opinion of the court.—This was a grant to Samuel Miles, dated 18th July 1813, for five miles square of land, or 16,000 acres, at the mouth of the river Santa Lucia. The first question is, was the grant made in property and dominion, or was it made on condition that a water saw-mill should be erected? The petitioner sets forth various merits and losses, and asks the governor to be pleased to grant to him, in virtue of these, the possession of five miles square for the construction of a water saw-mill, fit for the purpose, at a place that is vacant, at the mouth of the river Santa Lucia. The grant to be in lawful property and dominion. The grant was made to the petitioner for the purpose of constructing the mill, in the place pointed out: "and also (says the governor) paying attention to the services and other matters which he sets forth, that there be granted to him the five miles square of land which he solicits, without injury to a better right."

We have often held, that the authorities of Spain were authorized to grant the public domain, in accordance with their own ideas of the merits and considerations presented by the grantee; *and that our powers extended only to the inquiry, whether in fact the grant had been made; and its legal effect when made, in cases where the law by implication introduced a condition, or it was peculiar in its provisions. *Wiggins's Case*, 14 Pet. 346. As no special ordinance introduces conditions into mill-grants, we must construe the one before us by its own terms. The party desired the grant for the purpose of building a saw-mill; so he represents, and we must take his statement to be true, as the concession in effect adopts it; and to this end, 16,000 acres were granted, it being the usual quantity in such cases. The grant, however, is not founded on that consideration, although intended for that purpose. Meritorious services and losses are relied on; and the land was asked and granted, in lawful property and dominion, without any condition annexed to build the mill. [*199

2. The second objection is to the survey. Its validity is put in issue by the answer; and its introduction was objected to, when offered to be read on the hearing, because it had been made by a mere private surveyor; and because it did not follow the calls of the grant. The court received the survey, and decreed the land laid off. There was no proof that it was at

the place granted, further than appears by the face of the plat and certificate: and we must inquire, what credit ought to have been accorded to them by the court. Mr. McHardy certifies, that he was a private surveyor; and that he had permission from the government, whether general or special, does not appear. His own statement is no evidence of the fact. And so it is in regard to his description of the land surveyed, which he certifies as lying at the place granted. There is a marked and wide difference in the effect of the certificate of the surveyor-general and a private individual, who assumes to certify without authority. What the duties of the former are is well known from the proofs in many cases presented to this court. They, however, are set forth by the instructions of 1811. Land Laws 1003–4. First, the grant must be presented; then, the persons having adjoining lands to the place designated must be notified, that they may be present at the making of the survey, with their titles, so that there be no interference; the lands must be bounded by rectangular parallelograms; and fronts on rivers, navigable creeks and public roads, shall not exceed one-third of the *depth back: to each person, whose lands have been measured, a plat will be given, with the lines drawn in black ink; and when bounded by a river, creek or swamp (which is permitted), a quantity will be added, or be deducted, maintaining the rectangular form on the other lines; the number of acres will be on the centre of the plot; and the scale one inch to four chains. The plat will be delivered to the grantee with the following inscription: "Plat of the number of acres of land, of A. B., in such a place, measured and bounded by the public surveyor of this province, Don George Clarke, East Florida; the day of the year and month, on the same tracts. George Clarke." "The surveyor will keep a book of large paper, and copy therein the plats he gives out; these plats will be numbered; the book will be indexed. At the end of the book, he will have a sheet of sufficient size for a general plan, containing the surveys for individuals, with the number of each. The book will serve to show government what lands are vacant, or not measured; and he shall keep a journal to satisfy the persons having lands adjoining. The corners are to be marked with stakes, three inches diameter at the head; and the owners shall encircle them with oyster shells, two feet deep, and two feet diameter."

*200]

A grant delivered out for survey, meant not, as with us, a perfect title, but an incipient right; which, when surveyed, required confirmation by the governor. The duty of confirmation, by the acts of congress, is deputed to the courts of justice of the United States, in execution of the treaty with Spain. It follows the same evidence that was accorded to the return of the surveyor-general by the Spanish governor, before the cession, is due to it by the courts of this country. The acts of the officer and the governor were both on behalf of the government; each, by his duty, was bound to protect the public domain, and to guard the law from violation: if the surveyor, therefore, by his plat and certificate, returned that he had surveyed the land at the place granted, not by the assertion only that it was at the place, but by a description in legal form, that it was so; then the return was *primâ facie* competent evidence, without further proof, on which the governor could found the confirmation. Plats and certificates, because of the official character of the *surveyor-general, have accorded

*201]

to them the force and character of a deposition: the same as Aguilar's certificate to a copy of the grant; as we held in the case of *Wiggins*, 14 Pet. 346.

In contrast to the official survey and return, how does this private one of Mr. McHardy stand? No proof was made, that it was on the land granted; the certificate does not even so assert, and there is no plat in the record: did it, however, appear in the clearest manner, on the face of the paper, it would be of no value. The private surveyor acted not for, and with the interests of, the government, but at the instance of the grantee; and for his interest, and against the government. The survey was a private act; the plat and certificate private papers, delivered to the grantee, of which no record was made in the surveyor-general's office; and of which the governor could take no notice, unless it was presented to him, and extrinsic proof made that it was for the land granted; and that it had been lawfully made in regard to navigable waters, roads, adjoining granted lands, and line-marks. Then he could have ordered a perfect title to issue, founded on the survey; as he did do, in may instances, on surveys of Mr. McHardy, and as this court has done, and would do, on similar proof.

The decree of the superior court gives the line and description of the survey, to wit: "five miles square of land situated at the mouth of the river Santa Lucia; the lines of the said survey thereof are as follows, to wit, the first line commences at a cedar tree, marked M, on the bank of Indian river, and runs south 60° west, 400 chains to a pine, marked M; the second line commences at said pine, and runs north 30° west, 400 chains to another pine, marked M; the third line runs from said pine, north 60° east, 400 chains to a live-oak marked M, on the banks of Indian river; and the fourth line is formed and bounded by said river." It is laid down in a square, with one side of 400 chains on the Indian river. By the fourth instruction to the surveyor-general (declaratory of the standing law of the province), the front on the river could not exceed one-third of the longitudinal extention back. Land Laws 1004. Nor does the description in the concession, "of five miles square," alter the rule prescribed by the general law. It had reference more to *quantity than form of survey (*Sibbald's Case*, 10 Pet. 323); and was made on the assumption that no [*202 controlling objects, such as rivers, would be either included or bounded upon; and if they were, that the general law would govern the survey. The grant is for five miles square at the mouth of the river Santa Lucia; this is represented to be a fit place for a saw-mill, to supply timber for which the grant was made. We take it, the place is on the side of the Indian river, to which the Santa Lucia is a tributary; and that the Santa Lucia is not navigable, or a mill would not have been permitted to obstruct it; of this, however, the governor had the right to judge; but we cannot suppose, the survey was intended to include the Indian river, or to front on it one-third part. We, therefore, hold the concession carried with it the condition imposed by law, in regard to the form of the survey.

The decree is reversed, and the cause remanded to the court below to be further proceeded in. That court will order the 16,000 acres to be properly surveyed, according to the principles above stated; and found its decree of confirmation on the new survey.

Decree reversed.

*United States *v.* William Murphy and William Morgan.

Competency of witnesses.

The owner of property, alleged to have been stolen on board an American vessel, on the high seas, is a competent witness to prove the ownership of the property stolen, on an indictment against the person charged with the offence, under the "act for the punishment of certain crimes against the United States," passed 30th April 1790.

The fine imposed on the person who shall be convicted of the offence of stealing on the high seas, on board a vessel of the United States, is part of the punishment, in furtherance of public justice; rather than an indemnity or compensation to the owner. From the nature of an indictment and the sentence thereon, the government alone has the right to control the whole proceedings, and execution of the sentence; even after verdict, the government may not choose to bring the party up for sentence; and if sentence is pronounced, and the fine is imposed, the owner has no authority to interfere in the collection of it, any more than the informer or prosecutor; and the fine, therefore, must be deemed receivable by the government, and the government alone.

In cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be allowed to testify, for the statute must not be rendered ineffectual by the impossibility of proof.

In cases where, although the statute giving the party or the informer a part of the penalty or forfeiture, contains no direct affirmation that he shall, nevertheless, be a competent witness, yet the court will infer it, by implication, from the language of the statute, or its professed objects.

Certificate of Division from the Circuit Court for the Southern District of New York. On indictment for stealing sovereigns, while on board the ship Carroll of Carrolton, on the high seas.

The defendants, William Murphy and William Morgan, were indicted under the 16th section of the act entitled, "an act for the punishment of certain crimes against the United States," approved on the 30th of April 1790, for taking and carrying away, with an intent to steal and purloin, on board of an American vessel on the high seas, one hundred and two gold coins called sovereigns, each of the value of five dollars, of the personal goods of Francis McMahon.

The defendants having pleaded not guilty, and the case being brought to trial, Francis McMahon, the owner of the property described in the indictment, was called as a witness on the part *of the United States, *204] to prove the ownership of the said property, and that it had been stolen from him, in June 1840, in his passage on board the ship Carroll of Carrolton, from Liverpool to the city of New York; and also, to prove facts and circumstances tending to show that the defendants were guilty of the said offence; to the competency of which witness, as to either of the said matters, the counsel for the defendants objected, on the ground, that he was interested in the event of the suit; and so interested that he would not be rendered competent by any release to be executed by him. And, thereupon, the judges were divided in opinion upon the following questions which were presented for their decision. 1. Whether the said Francis McMahon, the owner of the property alleged to have been stolen, was a competent witness to be examined on the part of the United States, as to all the matters above mentioned? 2. If not competent to testify as to the guilt of the defendants, whether he was competent to prove the ownership of the property described in the indictment, and that it had been taken and

carried away, with intent to steal and purloin? 3. If not competent for both or either of the above purposes, without having released his interest in the fine to be imposed on the defendants in case of their conviction, whether, by releasing to the United States all his right to and interest in such fine, his competency would be restored? Which said points, upon which the disagreement has happened, were stated above, under the direction of the said court, at the request of the counsel for the parties in the cause; and were ordered to be certified unto the supreme court of the United States, at the next session, pursuant to the act in such case made and provided.

The case was submitted to the court, without argument, on the part of the United States, by *Legaré*, Attorney-General.

Nash, of counsel for the defendant, presented a printed argument.

1. The witness, Francis McMahon, the owner of the property charged to have been stolen, was not a competent witness *to be examined on the part of the United States, in this cause. The indictment is [*205 founded upon the 16th section of the act approved April 30th, 1790, being the act for the punishment of certain crimes against the United States. (1 U. S. Stat. 116.) The section upon which the indictment is founded, among other things, declares, that "if any person, upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, the person or persons so offending, their counsellors, aiders and abettors, knowing of, and privy to, the offence, shall, on conviction, be fined not exceeding fourfold the value of the property so stolen or purloined; the one moiety to be paid to the owner of the goods, and the other moiety to be informer and prosecutor." In this case, the witness is both the owner of the goods and the informer and prosecutor; upon the conviction of the defendants, the whole fine against them must be paid to the witness direct, without any suit or further proceedings; the court have no power to dispose of the fine, in any other manner, and nothing can be inflicted upon the defendants, on conviction, by way of sentence, but the fine; as whipping is abolished by the act of congress. The witness is directly interested in the sentence, the temptation to false swearing is great—immense; and increases just in proportion to the difficulties that surround the case to detect perjury.

Suppose, the witness should swear that fifty eagles were stolen from his trunk, then the sentence might award him two hundred; should he swear that one hundred were stolen, the sentence might award him four hundred; and so on in an arithmetical ratio; while his testimony could be confined within the bounds of probability or possibility, no one could detect the falsity in regard to the number of pieces stolen; the starting point is in the dark, concealed in his own bosom; perjury could not be detected; he might safely allege his trunk to be full of gold, and no one be able to testify to the contrary.

Informers are, generally, incompetent witnesses, where they are to receive any portion of the decree, sentence or judgment, without the necessity of a second suit. **The Thomas and Henry*, 1 Brock. 374; *Tilly's Case*, 1 Str. 316; *Rex* v. *Stone*, 2 Ld. Raym. 1545. By the [*206 common law, informers who are entitled under the statute to part of a penalty, are not competent witnesses. 1 Phil. Evid. 125; 2 Ibid. 166. In the present case, the act of congress does not intimate that the informer is

a competent witness ; without the aid of the statute, the informer is not a competent witness ; the statute can receive execution, without the party seeking to recover the penalty being admitted as a witness. *Salisbury* v. *State of Connecticut*, 6 Conn. 101.

2. The witness, Francis McMahon, was not competent to testify or prove the ownership of the property described in the indictment, and that it had been taken and carried away with intent to steal or purloin. The witness, if sworn in the cause for one purpose, in chief, becomes a general witness for all purposes ; he is not more interested in any one part of the controversy than in another ; he does not come within the rule in chancery, that a witness may be examined as to that part to which he has no interest. The witness once sworn in chief becomes a witness generally. *Varick* v. *Jackson*, and authorities there cited, 2 Wend. 166. A person who has had his name forged upon an instrument, is not a competent witness even to prove any fact besides the forgery which may contribute to the general conclusion of guilt ; and in case of a person whose goods have been stolen, he was a competent witness at the common law, only upon the ground, that the civil remedy was merged in the felony, and the party could not obtain restitution of stolen goods upon conviction ; this was only to be obtained upon an appeal of felony. The statute of 21 Hen. VIII., c. 2, gave full restitution of the property taken, after the conviction of an offender, of robbery. The writ of restitution was to be granted by the justices of the assize ; and at the present day, it seems, that if the prosecutor has been guilty of any gross neglect in his duty to the public, in bringing the offender to justice, he will not be entitled to the benefit of the writ of restitution. 1 Chit. Crim. Law, 7, 817. The reason that a person is a competent witness at the common *207] *law, to prove that his goods have been stolen by the defendant, and on such testimony to convict him, was, that the prosecutor could obtain nothing by the conviction of the defendant. The prosecutor whose goods have been stolen has been made a competent witness, in a prosecution against the offender, upon whose conviction he obtains restitution of the goods, by force of the statutes ; the statutes have made the prosecutor a competent witness ; he is not such witness, without the aid of the statutes, since he is to obtain restitution of his goods, upon conviction. The difficulty in the present case, in regard to McMahon, is, that no statute of the United States has made him a competent witness ; and without the aid of such a statute, he cannot be a witness by the common law, as he is directly interested in the sentence.

3. The witness, McMahon, cannot release to the United States his right to, and interest in, the fine to be imposed upon the defendants, in case of conviction ; and therefore, his competency cannot be restored or created. The United States are not authorized by law to take such a release ; the right to a share of a penalty, or the whole of such penalty, cannot be released or assigned. *Commonwealth* v. *Hergesheimer*, 1 Ash. 415. Nothing would exist to release or assign, at the time of making the same ; the right has not then accrued ; an estate cannot be granted by deed, to commence *in futuro ;* such deed is void. See Co. Litt. 265. The party may release a possibility coupled with an interest ; but a naked possibility is not subject to a release. See *Jackson* v. *Waldron*, 13 Wend. 178.

United States v. Murphy.

STORY, Justice, delivered the opinion of the court.—This case comes before us upon a certificate of division of opinion of the judges of the circuit court of the southern district of New York, under the following circumstances:

The defendants, William Murphy and William Morgan, were indicted, under the 16th section of the act entitled, "an act for the punishment of certain crimes against the United States," approved on the 30th of April 1790, for taking and carrying away, with an intent to steal and purloin, on board of an American vessel, on the high seas, one hundred and two gold coins, called *sovereigns, each of the value of five dollars, of the personal [*208 goods of Francis McMahon. The defendants having pleaded not guilty, and the case being brought to trial, Francis McMahon, the owner of the property described in the indictment, was called as a witness on the part of the United States, to prove the ownership of the said property, and that it had been stolen from him, in June 1840, in his passage on board the ship Carroll of Carrolton, from Liverpool to the city of New York; and also to prove facts and circumstances tending to show that the defendants were guilty of the said offence; to the competency of which witness, as to either of the said matters, the counsel for the defendants objected, on the ground, that he was interested in the event of the suit; and so interested that he would not be rendered competent by any release to be executed by him. And thereupon, the judges were divided in opinion upon the following questions, which were presented for their decision. 1. Whether the said Francis McMahon, the owner of the property alleged to have been stolen, was a competent witness to be examined on the part of the United States, as to all the matters above mentioned? 2. If not competent to testify as to the guilt of the defendants, whether he was competent to prove the ownership of the property described in the indictment; and that it had been taken and carried away, with intent to steal and purloin? 3. If not competent for both or either of the above purposes, without having released his interest in the fine to be imposed on the defendants, in case of their conviction; whether, by releasing to the United States, all his right to and interest in such fine, his competency would be restored?

We have considered these questions, and I am now directed to deliver the opinion of this court upon them. The first question presents, in its most general form, the consideration of the competency of McMahon, the owner of the goods alleged to have been stolen; and it must be admitted to involve no small difficulty, whether viewed in relation to principle or authority. The act of congress (act of 30th of April 1790, ch. 36, § 16), upon which this prosecution is founded, provides, "that if any person, within any of the places under the sole and exclusive jurisdiction *of the United States, [*209 or upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another; or if any person or persons having at any time hereafter the charge or custody of any arms, ordnance, munitions, &c., belonging to the United States, shall, for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin or convey away any of the said arms, ordnance, munitions, &c., the person or persons so offending, their counsellors, &c., shall, on conviction, be fined not exceeding the fourfold value of the property so stolen, embezzled or purloined; the one moiety to be paid to

the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor; and be publicly whipped, not exceeding thirty-nine stripes."

It is not unimportant to observe, in the construction of this section of the act, that the fine is, as to its amount, purely in the discretion of the court; that, whatever it may be, it rests on a mere contingency, even after conviction, whether it will ever be paid or not, depending upon the ability of the convict; and that if the fine is to be awarded as a part of the sentence of the court upon the indictment (as it seems properly to be), then it must be taken to be a part of the punishment, in furtherance of public justice, rather than an indemnity or compensation to the owner, since it may bear no proportion to his loss or injury. Besides, from the very nature of an indictment, and the sentence thereon, the government alone has the right to control the whole proceedings and execution of the sentence. Even after verdict, the government may not choose to bring the party up for sentence; and if sentence is pronounced, and the fine is imposed, the owner has no authority to interfere in the collection of it, any more than the informer or prosecutor; and the fine, therefore, must be deemed receivable solely by the government; and then it is distributable by the government, and by the government only. It would, indeed, require strong language, in any statute, where the proceedings were by indictment, to construe that indictment, or the sentence thereon, to be controllable by other parties who might have an interest in or under the sentence. In this respect, there is a great difference between an information or action *qui tam*, where a part of the penalty or forfeiture belongs to the informer *or prosecutor, and an indictment, the conviction upon which may entitle the informer or prosecutor to a part of the penalty or forfeiture. In the former case, the informer or prosecutor may not be a good witness; at least, not unless under special circumstances; in the latter case, he may be: for notwithstanding a conviction upon the indictment, he must still sue for the penalty or forfeiture, by action or information, and cannot receive it under the sentence upon the indictment. This distinction was adverted to by Mr. Justice Bayley, in delivering the opinion of the court, in the *King* v. *Williams*, 9 Barn. & Cres. 549, upon which we shall have occasion to comment more at large hereafter.

*210]

The rules as to the competency of witnesses in criminal cases are not, exactly and throughout, the same in America, as in England, although in most cases they concur. Thus, for example, in cases of forgery, the party whose name is supposed to have been forged, is not a competent witness in England. But a different course has generally, although, perhaps, not universally, prevailed in America. So, the owner of stolen goods has been universally admitted as a competent witness, in America, at least, to prove the identity of his property and the fact of the theft, if not to prove all other facts, although, independently of the statute of 21 Hen. VIII., c. 11, his competency seems to have been a matter of doubt in England. The general rule, undoubtedly, is, in criminal cases as well as in civil cases, that a person interested in the event of the suit or prosecution, is not a competent witness. But there are many exceptions, which are as old as the rule itself. Thus, it is stated by Lord Chief Baron Gilbert, as a clear exception, that where a statute can receive no execution, unless a party interested be a wit-

ness, there he must be allowed ; for the statute must not be rendered ineffectual by the impossibility of proof. Gilb. on Evid. 114 ; 1 Phil. Evid. ch. 8, § 7, p. 125 (edit. 1839 by Cowen). So, cases of necessity, where no other evidence can be reasonably expected, have been, from the earliest period, admitted as another exception. Thus, for example, upon indictments for robbery, the person robbed is constantly admitted as a competent witness, although he will be entitled to a restitution of his goods, upon conviction of the offender. 1 Phil. Evid. ch. 5, § 6, p. 120 (edit. 1839, by Cowen). So, in an action against *the hundred, by the party robbed, brought under the statute of Winton, he is admitted as a competent witness, [*211 to prove the robbery and the amount of the loss ; upon the ackowledged ground that it is, from necessity, in default of other proof. 2 Roll. Abr. 686 ; 1 Phil. Evid. ch. 5, § 2, p. 70 (edit. 1839, by Cowen). Another exception, quite as remarkable, and standing upon a ground applicable to the present case, is that of a person who is to receive a reward for or upon the conviction of the offender ; for he is universally recognised as a competent witness, whether the reward be offered by the public or by private persons. The ground of this exception is forcibly stated by Mr. Justice Bayley, in the *King* v. *Williams*, 9 Barn. & Cress. 549, 556, where he says : "The case of reward is clear, on the grounds of public policy, with a view to the public interest ; and because of the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals. It is with a view to stir up greater vigilance in apprehending, that rewards are given ; and it would defeat the object of the legislature, by means of those rewards, to narrow the means of conviction and to exclude testimony, which would otherwise be admissible." Another exception is, in cases where, although the statute giving the party or the informer a part of the penalty or forfeiture, contains no direct affirmation, that he shall nevertheless be a competent witness ; yet the court will infer it by implication, from the language of the statute or its professed objects. Several cases of this sort are collected and commented upon, by Mr. Justice Bayley, in the case of the *King* v. *Williams*, and they fully support the exception. Mr. Phillips also, in his work on Evidence, has given a summary of the leading decisions. 1 Phil. Evid. ch. 3, § 7, p. 125 (edit. 1839, by Cowen). Indeed, Mr. Justice Bayley puts the exception, founded upon statute provisions, upon a very broad and comprehensive ground, which is fully in point in the present case. He says, "where it is plain, that the detection and conviction of the offender, are the objects of the legislature, the case will be within the exception ; and the person benefited by the conviction, will, notwithstanding his interest, be competent." And in the very case then in judgment, which was a case for a forcible entry into a dwelling-house, on *the statute of 21 Jac. I., c. 15, where the prosecutor would, upon conviction, be entitled to judgment of restitution of the [*212 premises, he was held incompetent, solely because (to use the language of the learned judge) "the public interest will still have the protection of a common-law indictment ; and there is nothing from which an inference can be drawn, that it was with a view to the public interest, and not for the sake of the benefit of the party grieved, that the provision for restitution was introduced into the statute." Now, every word of this passage shows, that in the case now before us, the party ought to be held competent. No

common-law indictment will lie for the offence, but only the statute remedy, and the statute is obviously drawn with a view to the public interest, and the suppression of public crimes; and not for the interest of the party aggrieved, since the fine is in the discretion of the court, and may be purely nominal.

Looking to the objects of the present section, the promotion of public justice, and the suppression of public crimes, in which the government have a deep interest; and looking to the ordinary means by which the ends can be accomplished; it is difficult not to perceive, that if the owner of the stolen goods be incompetent, it will be found utterly impracticable, in most cases falling within the purview of the section, to procure any conviction, however frequent, or however flagrant, may be the offence. The places on land where the offence may be committed are such, as being within the exclusive jurisdiction of the United States, contain but few inhabitants, or few whose residence is not transitory and changing. Take the case of a lighthouse establishment, where scarcely any other inhabitants are found but the keeper and his family; if he and his wife are excluded as witnesses from incompetency, how will it be practicable to establish the identity of the property stolen, or of the person of the thief, however atrocious and premeditated may be the circumstances under which the offence is committed? It may be in the night-time; it may be in the broad day, even by a company of conspirators. But take the very case now in judgment, that of a theft committed on the high seas, where money is stolen from a passenger or an officer of the ship, or from one of the crew; who else besides himself can be expected to establish the identity of the property, or the circumstances of the theft? It is scarcely possible, that it could be *done, in one case in one hundred. Can congress reasonably be supposed, in cases of offences committed upon the high seas, thus to have intended to shut out all the ordinary means and ordinary proofs of the offence; and thus to have given new encouragement, and new motives to theft, and embezzlement and plunderage? We think not. Upon all the grounds of exception already stated; upon the ground of necessity, and of public policy, and of attaining the manifest objects of the statute, and the ends of justice; we think that the witness was admissible, for all the purposes stated in the first question.

*213]

This decision is not new in America. On the contrary, the doctrine has been recognised, at least to an equal extent, in Connecticut and Massachusetts. In the case of *Salisbury* v. *State of Connecticut*, 6 Conn. 101, the judges of the supreme court of that state held, that the owner of goods stolen was a competent witness for all the matters in issue, upon an indictment for the theft; although the statute declared that the thief, upon being convicted, should forfeit and pay treble the value of the property stolen to the owner thereof. It is true, that one main ground of this decision, by a majority of the judges, was, that there must be another action, *qui tam*, by the owner, to enforce the forfeiture. But the same judges held, that in such an action *qui tam*, brought by the owner, he would be a competent witness to prove the loss and identity of his property, for the like reasons as, under the statute of Winton, the party robbed is admitted. In the *Commonwealth* v. *Moulton*, 9 Mass. 30, upon an indictment for theft, it was held, that the owner of the goods was a competent witness as to all the facts in

the case ; notwithstanding the witness would, by the statute, upon the conviction of the offender, be entitled to restitution of his goods ; and, if they were not restored, to satisfaction out of the future earnings of the convict, and to recompense out of the county treasury for his labor and expense in the prosecution. Upon that occasion, the court said, that when (under a former statute) the party from whom goods were stolen was, by law, entitled to treble the value, he was always received as a competent witness as to all pertinent facts.

As to the second and third questions, they do not require any particular examination, after what has been already stated. We have only to say, that if we had not been of opinion, upon the *first question, that the witness was a general witness, we should have entertained no doubt, [*214 that he was a competent witness for the purposes stated in the second question, upon the ground of necessity, and the analogy to the case of the party robbed under the statute of Winton. And as to the third question, we should have no doubt, that if the witness had such an interest in the fine as would have rendered him incompetent, his competency might have been restored by a release. If, as the argument for the defendant seems to assume, the release is of a mere possibility, no release would be necesssary ; for a possibility of interest is no objection to the competency of a witness. If it is, on the other hand, a fixed interest in the event of the prosecution, then it is clearly releasable.

Upon the whole, we are of opinion, that all the questions ought to be answered in the affirmative. But at the same time, we desire to say, that although a competent witness, the credibility of his testimony is a matter for the consideration of the jury, under all the weight of circumstances connected with the case, and his interest in the result. We shall direct a certificate to be sent to the circuit court of the southern district of New York, accordingly.

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*Charles F. Hozey, Plaintiff in error, *v.* William Buchanan, [*215
Defendant in error.

Fraud.—Title to vessels.

An action was brought in the circuit court of Louisiana, against the sheriff of New Orleans, to recover the value of a steamboat sold by the sheriff, under an execution, as the property of Wilkinson, one of the defendants in the execution, Buchanan, the plaintiff, alleging that the steamboat was his property ; the defendant, in his answer, alleged that the sale of the steamboat by Wilkinson to Buchanan was fraudulent ; and that it was made to defraud the creditors of Wilkinson. Before the jury was sworn, the court, on the motion of the counsel for the plaintiff, struck out all that part of the defendant's answer which alleged fraud in the sale from Wilkinson to Buchanan : *Held*, that there was error in this order of the court.

By the act of congress, relating to the enrolment of ships and vessels, it is not required, to make a bill of sale of a vessel valid, that it shall be enrolled in the custom-house ; the enrolment seems not to be necessary, by the law, to make the title valid, but to entitle the vessel to the character and privileges of an American vessel.[1]

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[1] The enrolment is only *primâ facie* evidence of ownership. The F. W. Johnson, 18 Leg Int. 334.

Hozey v. Buchanan.

A bill of sale of a vessel, accompanied by possession, does not constitute a good title in law; such an instrument, so accompanied, is *primâ facie* evidence of right; but in order to constitute a full right, under the bill of sale, the transfer should be *bonâ fide*, and for a valuable consideration

Error to the District Court for the Eastern District of Louisiana. This was a writ of error brought by C. F. Hozey, to reverse a judgment obtained against him by William Buchanan, in the circuit court of the United States for the eastern district of Louisiana.

The original suit was brought by Buchanan, by petition, filed in court, in which he alleged, in substance, that he was the sole owner of the steamboat called the Nashville, of the value of $12,000, when she was illegally and wrongfully seized and sold as the property of William Wilkinson, by the defendant, Hozey, the sheriff of the parish and city of New Orleans. He alleged, that he had previously purchased all Wilkinson's interest in the boat, which was small, namely, one-fifth part; that he had thereby become the sole owner, and that Wilkinson had no interest in the boat, at the time of her seizure; and that he so notified said sheriff, who nevertheless proceeded to advertise and *sell her, at a great sacrifice, and to the damage of the petitioner $12,000, for which he prayed judgment.

*216]

In his answer and defence to this petition, Hozey denied that Buchanan ever had any interest in said boat. He alleged, that she belonged to William Wilkinson, and that he, in his official capacity as sheriff, having in his hands an execution of *fieri facias* from one of the courts of Louisiana, in favor of S. W. Oakey & Company *v.* C. McCantle & Company, or Cullen McCantle and William Wilkinson, did seize and sell said boat, in virtue of said execution, as he was bound to do, she being then at New Orleans, and belonging to said Wilkinson, one of the defendants in said execution. He alleged, that Buchanan was in New Orleans, when the boat was advertised and sold, and took none of those steps allowed by law to establish his alleged right to her, or to prevent the sale; and insisted, that he had, therefore, lost all claim on the respondent. He further alleged, that if any sale had been made by Wilkinson to Buchanan, it was not made with the formalities of law, but was fraudulent, and made with intent to hinder and defraud the creditors of Wilkinson.

Both the petitioner and respondent united in the prayer that the case may be tried by a jury. It was so tried; and a verdict was rendered in favor of the plaintiff for $8500; and the court thereupon gave judgment for the amount of the verdict, and costs of suit.

Before the cause came on for trial, the counsel for the plaintiff moved the court to strike out all that part of the defendant's answer which alleged fraud in the sale of the steamboat by Wilkinson to the plaintiff. This was opposed by the counsel for the defendant. It was ordered by the court, that the same should be stricken out, to which order the defendant excepted.

On the trial of the cause, the counsel for the defendant moved the court to instruct the jury that, by the act of congress, bills of sale of ships and vessels, to be valid, must be enrolled in the custom-house; and as the bill of sale on which the plaintiff relied, was admitted not to have been enrolled, the same could not be considered as legal title: but the court refused so to charge the jury, saying to the jury, that a bill of sale, accompanied by pos-

session, constituted a good title in law. The counsel for the defendant excepted to this opinion.

*Judgment having been rendered on the verdict, the defendant prosecuted this writ of error. [*217

The case was submitted to the court, on printed arguments, by *Coxe*, for the plaintiff in error; and by *Crittenden*, for the defendant.

Coxe, for the plaintiff, contended, that the ruling of the court, as stated in the exceptions, was erroneous; and the defendant was thereby precluded from making a valid defence to the action.

Crittenden urged, for the defendant in error, that neither of the exceptions presented any sufficient ground for the reversal of the judgment, which had been rendered in favor of the plaintiff, in the circuit court.

McLean, Justice, delivered the opinion of the court.—This is a writ of error from the circuit court for the eastern district of Louisiana. In the circuit court, Buchanan commenced an action against Hozey, for the recovery of the damages he had sustained by the seizure and sale of his steamboat Nashville, by Hozey, as sheriff of the parish of Orleans. The boat was alleged to be of the value of $12,000. Hozey, in his answer, denied that Buchanan ever had any interest in the steamboat. That having received, as sheriff, a writ of *fieri facias*, issued on a judgment in favor of Oakey & Company *v.* Cullen McCantle and Wilkinson, the last of whom owned the said steamboat; and it being within the parish of Orleans; he levied upon and sold it at public auction, in conformity to law, as he was bound to do. That Buchanan knew of the levy and sale, being then in New Orleans, but took no steps to arrest the proceedings, whereby he has lost his right, if he ever had any. And he alleges, that if any sale of the boat was made by Wilkinson to Buchanan, it was not done with the formalities required by law. And that the sale, if made, was fraudulent and void, as it was made to defraud the creditors of Wilkinson. The cause was submitted to a jury, and they found for the *plaintiff of the sum of $8500. On this verdict, a judgment was rendered. [*218

Before the jury were sworn, the counsel for Buchanan moved the court to strike out all that part of the defendant's answer which alleged fraud in the sale from Wilkinson to the plaintiff, which the court directed to be done. And the counsel for the defendant moved the court to instruct the jury, that by the act of congress, bills of sale of ships and vessels, to be valid, must be enrolled in the custom-house; but the court refused so to instruct the jury; and charged them, that a bill of sale, accompanied by possession, constituted a good title in law. Exceptions where taken to these rulings of the court.

Evidence was given before the jury, written and parol, conducing to show the prior ownership of the boat, for what she had been sold, her employment, the sale to Buchanan by Wilkinson, and the circumstances connected with it.

The plaintiff in error insists on a reversal of the judgment on two grounds. 1. The striking out of the answer the allegation of fraud. 2. The invalidity of the bill of sale, it not having been enrolled as required by the act of congress.

The allegation of fraud in the answer, in the sale from Wilkinson to the plaintiff below, was a most material allegation. If established, it constituted a good defence to the action. On what ground this was stricken from the answer, by the court, is not perceived, and cannot well be imagined. No authority has been shown in the Louisiana law, for such a proceeding; and it is believed, that none exists. It would be as novel as it would seem to be unjust, to strike out of the answer, on the motion of the plaintiff, that which constitutes a good defence, and on which the defendant may chiefly rely. And this was done, too, before the cause was submitted to the jury, and consequently, before the evidence was heard. If the answer were defective in setting up incompatible grounds of defence, and on this account was liable to objection as a plea that is multifarious; still it would not seem to be the right of the plaintiff to suggest how the answer shall be amended. The answer in this case, however, does not seem to have been liable to this exception. By art. 419 of the Code of Practice,
*219] it *is said, "After issue joined, the plaintiff may, with leave of the court, amend his petition; provided he does not alter the substance of his demand, by making it different from the one originally brought." And in art. 420, "The defendant may also amend his answer, subject to the same rules, and add to it new exceptions; provided that they be not of the dilatory kind. After answering on the merits, dilatory exceptions shall not be raised by way of amendment, unless with the consent of the plaintiff." By art. 421, "When one of the parties has amended, either his petiton or his answer, the other party has the right of answering the amendment; but it must be done immediately, unless the amendment be of such nature as to induce the court to grant further time for answering the same." The defendant may set up facts different from those alleged by the plaintiff; and these are considered as denied by the plaintiff, without replication or rejoinder. Art. 328–9. By art. 2597 of the Louisiana Code, it is declared that, "Whatever may be the vices of the thing sold on execution, they do not give rise to the redhibitory action; but the rule may be set aside in the case of fraud, and declared null in cases of nullity." And in the following article, that "the sale on execution transfers the property of the thing to the purchaser as completely as if the owner had sold it himself; but it transfers only the rights of the debtor, such as they are." To this effect is the case of *Thompson* v. *Rogers*, 4 La. 9; 3 Mart. 39; 10 Ibid. 222. Independently of the above authorities, which are full and explicit, no doubt could exist as to the right of the defendant to set out in his answer his grounds of defence, and impeach the sale of the steamboat from Wilkinson to the plaintiff below, for fraud, or on any other ground. But the allegation of fraud having been stricken from the answer, by the order of the court, the defendant, of course, could not introduce evidence to prove it. This was an error of the court, which we feel ourselves called upon to correct.

The circuit court did not err in refusing the first part of the second instruction, "that by the act of congress, bills of sale of ships and vessels, to be valid, must be enrolled in the custom-house; and as the bill of sale, on which the plaintiff relies, is admitted not to have been enrolled, the same
*220] cannot be considered *as a legal title." The enrolment seems not to be necessary by the acts of congress, to make the title valid, but

to entitle the vessel to the character and privileges of an American vessel. 7 Johns. 308. But the charge that "a bill of sale, accompanied by possession, constituted a good title in law," is liable to objection. That such an instrument, connected with the possession, is *primâ facie* evidence of right, may be admitted. But in view of the evidence in the case, there should have been the qualification, that the transfer was *bonâ fide*, and for a valuable consideration. Upon the whole, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings.

Judgment reversed.

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*Robert Milnor, John Thompson, David Petrekin and Levi Woodbury, Secretary of the Treasury, Complainants and Appellants, *v.* George W. Metz, Appellees. [*221

Insolvency.

M. was discharged by the insolvent laws of Pennsylvania, after having made, according to the requirements of the law, an assignment of "all his estate, property and effects, for the benefit of his creditors;" after his discharge, he presented a petition to congress for a compensation for extra services performed by him as United States gauger, before his petition for his discharge by the insolvent law. As gauger, he had received the salary allowed by law; but the services for which compensation was asked, were performed in addition to those of gauger, by regauging wines, which had become necessary by an act of congress, reducing the duties charged upon them; congress passed an act, giving him a sum of money for those extra services: *Held*, that the assignee, under the insolvent laws, was entitled to receive from the treasury of the United States, the amount so allowed. Comegys *v.* Vasse, 1 Pet. 196; United States *v.* Macdaniel, 7 Ibid. 1; United States *v.* Fillebrown, Ibid. 50; Emerson *v.* Hall, 13 Ibid. 409, cited.[1]

Appeal from the Circuit Court of the District of Columbia and county of Washington. The appellants, Milnor and Thompson, were, during the years 1836 and 1837, United States gaugers for the port of Philadelphia, and as such received the full compensation allowed by law for that period. The duties having been rendered unusually laborious during the year, by the operation of the act of July 4th, 1836, reducing the duties on wines, under which they were required to regauge them; they appealed to congress for extra compensation, to the amount of their full ordinary fees for these additional services. Their memorial to congress was presented in January 1838; and in May 1840, an act was passed for their relief, by which the sum of "$2757.23, being the amount of fees due to them for extra services as gaugers in the port of Philadelphia, after the passage of the act of 4th July 1836, reducing the duty on wines." George W. Metz made no claim before congress. as the assignee of Robert Milnor.

In December 1838, the appellant, Robert Milnor, applied, at *Philadelphia, for the benefit of the insolvent laws of Pennsylvania; [*222 and he was discharged in January 1839, having executed the usual assignment for the benefit of his creditors. The appellee, George W. Metz, was duly qualified, and became the sole assignee. After the act of 1840 had passed, he applied at the treasury department, claiming the amount of the sum allowed by the same to Robert Milnor, being one-half of the whole sum allowed; the other portion belonging to John Thompson. This application

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[1] S. P. Mayer *v.* White, 24 How. 317; Phelps *v.* McDonald, 99 U. S. 298.

was rejected ; and this suit was instituted against the appellants. The court made a decree in favor of the appellee ; and the appellant, Robert Milnor, prosecuted this appeal.

The case was argued by *Clement Coxe*, for the appellant ; and by *Bradley*, for the appellee.

Coxe contended :—1. That there was no purpose of Milnor to make the dedication claimed ; and that his purpose, either way, is immaterial, as the insolvent law determines, without reference to it, what shall, and what shall not, be included in the assignment. 2. That the insolvent, at the time of his assignment, had no such interest in the claim upon congress as could pass by that instrument. 3. That congress had the right to model their relief at pleasure, and having granted it to Milnor, and not to his assignee, the latter is without relief by the present suit.

Although, in the schedule of property annexed to the petition of Robert Milnor, for the benefit of the insolvent laws of Pennsylvania, a claim on congress is stated ; this does not preclude the denial of the right of the assignee. It is the assignment which gives the right, if any was given. 3 Petersd. 486. The act of congress limits the salaries of gaugers to $1500 ; and thus it is obvious, that Milnor and Thompson had not a *scintilla* of legal right to further compensation from the United States. A claim of this kind, being one for a gratuity, a benefaction, cannot be passed under the assignment. It must be an actual interest, not an expectancy.
*223] *If the assignee of Milnor had any right, it should have been presented to congress. The power of the legislature over the matter was complete. They have given the sum allowed to Robert Milnor ; and the circuit court had no power to alter the donation. The secretary of the treasury rejected the application of the assignee, and his decision was conclusive. Cited, *Decatur* v. *Paulding*, 14 Pet. 497.

Bradley, for the appellee, insisted, that the claim by the appellee, as assignee of Robert Milnor, to the portion of the sum allowed by congress to Robert Milnor, was valid ; and that the claim had passed to the assignee, under the assignment. The appellant claimed from congress a compensation for extra services performed by him for the United States, before he took the benefit of the insolvent laws of Pennsylvania, and the claim was allowed. There was a subsisting equity in favor of the petitioners. It was such a claim as, although a suit could not be instituted for its recovery, in an action by the United States, against the petitioners, it would have been matter of set-off. *United States* v. *Fillebrown*, 7 Pet. 28 ; *United States* v. *Ripley*, Ibid. 26. The principle of law which may be derived from these cases is, that if any one shall perform services at the instance or request of the government of the United States, he is entitled to compensation. The right to compensation is property belonging to the party who has done the services, and as such belongs to the creditors of the insolvent. The principles which are in question in this case, were settled by the court in the case of *Comegys* v. *Vasse*, 1 Pet. 193. It was held, in that case, that it was immaterial who presented the claim. The money recovered belonged to the assignee.

Coxe denied, that any legal claim existed on the United States for compensation. The salary of the gaugers was fixed by law, and whatever else

they obtained was a gratuity. He cited 13 Pet. 409, as in all respects sustaining the claims of the appellant. The decision of the court in the case *Comegys* v. * *Vasse*, was given on the terms of the Spanish treaty, which fully authorized the claim of the assignee. [*224

CATRON, Justice, delivered the opinion of the court.—The question in this cause is, whether a claim on the United States passed by an assignment, made by Milnor, an insolvent, by force of an act of Pennsylvania, where the insolvent resided, and where the assignment took place. The application was made to the court of common pleas of Philadelphia county, 24th December 1838. According to the requirements of the insolvent act, there was presented, "a statement of all the estate, effects and property of the petitioner, wheresoever situate, and of whatsoever kind." He says, "your petitioner has no property of any kind, except the following claim, viz: A claim on the government of the United States for about $3774.50." Assignees were appointed by the court, to whom the following assignment was made.

Know all men, by these presents, that I, Robert Milnor, the abovenamed petitioner, have assigned, transferred and set over, and by these presents do assign, transfer and set over, unto George W. Metz and Aaron Ross, their heirs and assigns, all my estate, property and effects whatsoever, to, for and upon the uses, trusts and purposes designated by the act entitled "an act relating to insolvent debtors," passed the 16th day of June A. D. 1836. Witness my hand and seal, this 11th day of January, A. D. 1839. ROBERT MILNOR. [L. S.]

Ross refused to serve, and was discharged by the court, leaving Metz the sole trustee. On the same day, Milnor was discharged.

On the 2d of May 1840, congress passed an act for the relief of Robert Milnor and John Thompson, ordering the secretary of the treasury to pay to them $2757.23, "being the amount *of fees equitably due to said Milnor and Thompson for extra services rendered by them as gaugers at the port of Philadelphia, after the passage of the act of the 4th of July 1836, reducing the duties on wines, then in custom-stores in said port, and commencing with the provisions of said act." Several petitions had been presented on the subject; the first in February 1838; the claim was pending before congress, when the assignment was made, and the insolvent discharged. He claimed the money as then due from the United States, and the act of congress admits the fact. Nevertheless, the answer insists, "that the remuneration was asked as a boon, and respondent has understood and believes, was advocated and granted as a gratuity." [*225

It is admitted, that Milnor was entitled, separately, to one-half of the money ordered to be paid by the act of congress, and Thompson to the other half. Milnor applied to the treasury for one-half of the money, as did Metz, the trustee. The department refused to examine the equities of the parties, or look beyond the act of congress. Metz filed his bill, enjoining Milnor from receiving the money; and had a decree for a perpetual injunction.

The case relied on to sustain the assumption that the money awarded by congress was a gratuity, is that of *Emerson* v. *Hall*, 13 Pet. 409. It was

this; Emerson, Chew and Lorrain libelled a slave ship, and caused her to be condemned, and claimed half the proceeds of the ship and cargo, which was awarded to them below; but the decree was reversed by this court, on the ground that Emerson, Chew and Lorrain, as surveyor, collector and naval officer of the port of New Orleans, had no right as captors; and that they stood on the footing of an officer who made a military seizure. Emerson died; and in 1831, congress passed an act bestowing on his legal representatives, and on Chew and Lorrain, the one-half of the condemnation money. Hall, as a creditor of Emerson, filed his petition in the probate court at New Orleans, against Byrne, the curator of the heirs of Emerson, for payment of his debt out of the moneys received under the act of congress. The probate court and the supreme court of Louisiana, on
*226] appeal, gave judgment for Hall; and on *a writ of error prosecuted to this court, the judgment was reversed, on the ground that the act of congress gave the money to Emerson's heirs, as a gratuity; because of the meritorious conduct of their father. Say the court, "He acted under no law, nor by virtue of any authority; his acts imposed no obligation, either in law or equity, on the government. Had he been sued for a debt due to it, he could not have set up these services, either as an equitable or legal set-off." They are declared to be like those, where an individual, by timely exertion, saves the public property from destruction by fire; or where a pension is given to heirs, for military services of the ancestor.

The services performed by Milnor were at the instance of the government, and necessary to execute the act of 1836. But being a second measurement, no express law or regulation of the treasury department fixed the fees; and the demand was rejected by the accounting officers, because they had no discretion to go beyond the law, or an express regulation founded on it. The equity of the claim was free from doubt. The gaugers only received fees for specific services, actually performed, and could not receive double compensation; and in this respect the equity was more prominent than in *Macdaniel's Case*, 7 Pet. 1. Macdaniel was a regular clerk in the navy department, and received a salary. He was ordered by his superiors to perform, and did perform, the extra duties of paying (1) the navy pensioners; (2) the privateer pensioners; and (3) to act as agent for navy disbursements. So that all his time may have been devoted to this extra service; and none to the regular office duties of clerk. Because of his regular salary, the accounting officer refused to allow additional compensation. To cover his claim for this, Macdaniel had retained $980, and was sued for it by the United States. The defendant's claim was allowed as an equitable set-off. The case of *Fillebrown*, 7 Pet. 50, is to the same effect. These cases have been constantly followed, where services had been performed, at the instance of the government, for which by the strict rules of accounting no credit could be given by the treasury.

The ground that the government was the debtor, and the claim rested
*227] on its discretion; or in other words, that it was as uncertain *as the pleasure of congress; and until the act of 1840 was passed, no claim existed against the United States, which could be judicially recognised as "property or effects," of the insolvent, we think is decided to the contrary, by this court, in *Comegys* v. *Vasse*, 1 Pet. 196. Vasse assigned under the bankrupt law of 1800. He had been an underwriter on polices of insurance

on vessels seized and condemned by the government of Spain. The owner had abandoned for a total loss, which the insurer had paid; and was the successor to the rights of the assured. The sentences of the Spanish prize courts were conclusive as to the right to the things condemned; and no claim existed on part of the insurer, that did not depend on the discretion and pleasure of the Spanish government. The equity was as remote, to say the least of it, in that case as in the one before us. By the treaty of 1819, Spain stipulated with this government to pay $5,000,000 in full discharge of the unlawful seizures; leaving the United States to distribute the indemnity. Vasse had awarded to him $8846. Comegys was the surviving assignee of the bankrupt. Vasse instituted suit against him, to try the right to the money. This court held, that although the illegal sentences of the Spanish prize courts were irreversible, the party had not lost all right to justice, or claim, upon principles of international law, to remuneration; that he had a right both to the justice of his own and the foreign sovereign; and that this right passed by the general assignment of the bankrupt. The treaty in that case (as the act of congress in this) operated on a pre-existing claim on a government. It follows, if the doctrine of donation did not apply in that case, neither can it in this.

Had a similar claim on the part of Milnor existed against an individual, instead of the government, then there can be no doubt, he could have recovered by suit; or it would have been the subject of set-off; or could have been assigned. So, it would have passed to his administrator, in case of death. As the government was equally bound to do its debtor justice, in a different mode, with an individual, we think no sound distinction exists in the two cases; and therefore, order the decree to be affirmed.

Decree affirmed.

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*United States, Appellants, *v.* Heirs of George *v.* F. Clarke and Heirs of George Atkinson, Appellees. [*228

Florida land-claims.

A grant of 15,000 acres, by the Spanish governor of East Florida, in consideration of important services performed on behalf of the government of Spain, to George Atkinson, confirmed by the supreme court.

By the eighth article of the Florida treaty, no grants of land, made after the 24th of January 1818, were valid; nor could a survey be valid on lands other than those authorized by the grant; still the power to survey, in conformity to the concessions, existed up to the change of flags.

Spain had the power to make grants founded on any consideration, and subject to any restrictions, within her dominions; if a grant was binding on that government, it is so on the United States, the successor of Spain. All the grants of land made by the lawful authorities of the king of Spain, before the 24th of January 1818, were, by the treaty, ratified and confirmed to the owners of the lands. Arredondo's Case, 6 Pet. 706; Percheman's Case, 7 Ibid. 51; and Sibbald's Case, 10 Ibid. 321, cited.

The grant to Atkinson was for the land he mentioned in his petition, or for any other lands that were vacant; three surveys were made of lands within the quantity granted, not at the place specially mentioned in the grant, but at other places: *Held*, that these surveys were valid, notwithstanding that they were made at different places.

Appeal from the Superior Court of East Florida. This was an appeal from the decree of the superior court of East Florida, confirming the

claims of the heirs of Clarke and Atkinson to 15,000 acres of land, under the acts for the adjustment of land-claims in Florida. The claim was founded on a petition of George Atkinson, merchant, of Fernandina, dated October 8th, 1816; and a decree of Governor Coppinger thereon, dated October 20th, 1816. The petition stated many services rendered to government, and benefits conferred on the province; and prayed that his excellency would be pleased "to grant him, in property, fifteen thousand acres of land in Cedar Swamp, and on the west of the lake named Upper Little Lake." The governor's decree stated, that, in consideration of the merits cited, he granted him, in property, the lands he solicited in the petition; and that
*229] the surveyor-general would run them for him, in *the places he mentioned, or in others that were vacant, and of equal convenience to the party.

The originals of the petition and decree were not produced in evidence, neither are they to be found in the archives at St. Augustine. A certified copy, under the hand of Tomas de Aguilar, secretary of the government (whose handwriting was proved), stated to be faithfully drawn from the original in his office, was alone offered; and was objected to on the part of the appellants. The objection was overruled.

There were also produced four several plats and certificates of survey, made by George J. F. Clarke, surveyor-general, for George Atkinson. 1. Dated 20th January 1818, for 4000 acres of land, northwardly of Dunn's creek, which runs from Dunn's lake to the river St. John's, and above the crossing-place of said creek. 2. Dated 12th March 1818, for 3000 acres of land, on the middle arm of Haw creek, which empties itself into Dunn's lake, toward the east. 3. Dated 21st March 1818, for 2000 acres of land, in the place called Dupon's hammock, south-easterly of Bowlegs' prairie, and south-westwardly of Paynestown. 4. Dated 24th January 1818, for 6000 acres, on Darcey's creek, and entending from the natural bridge of Santa Fe, on the road called Ray's trail.

The petition to the court in this case was filed on the 22d day of May 1829, in the name of George J. F. Clarke, for himself, and the heirs and legal representatives of George Atkinson, deceased, and set forth the grant; and that the claim of Atkinson had been filed before the land board of East Florida, who rejected the same, but did not report it forged or antedated; and that he had legal right, under the said George Atkinson, to —— acres, parcel of the said land.

On the 21st May 1830, the district-attorney filed his answer, which, *inter alia*, stated, that "the petitioner had not shown whether or not the said George Atkinson died intestate, or who were the legal heirs of the said George Atkinson, whether they are minors or otherwise, if any such there were; nor, indeed, had he expressly alleged that the said George Atkinson left any legal heirs or representatives, or that any such now existed; nor had
*230] he *shown any title in himself to the said tract of land, or any part thereof; nor had he stated or set forth in his petition any bargain, sale, deed or deeds of conveyance from the said George Atkinson, in his lifetime, or from any of the said legal representatives of the said George Atkinson, since his death, to the said petitioner, to all or any part of the said lands, or in what right he claimed, whether by gift, descent, devise, conveyance or otherwise; and respondent relied upon the aforesaid defects

in the petition or bill of complaint, as matter of defence on the hearing of this cause."

Clarke having died, his heirs, on the 13th day of July 1840, filed a petition to revive the suit, which was ordered accordingly, on the 16th of July 1840; and the cause came on to be heard on the 20th day of the same month. The counsel for the claimants then moved the court that the cause might also proceed in the name of Philip R. Younge and Mary Younge, his wife; Samuel Humphries and Letitia Humphries, his wife; Jane Gains, widow of Dr. Joseph Gains; and Letitia Atkinson; heirs and legal representatives of George Atkinson; and with the assent of the attorney of the United States, it was ordered accordingly.

No deed or conveyance, nor evidence of any kind, was offered, to show that either Clarke or his heirs had any interest whatever in the lands. After hearing testimony, the court made a decree in favor of the claimants, from which the present appeal was taken.

The case was argued by *Legaré*, Attorney-General, for the United States. For the United States, it was contended, that the decree ought to be reversed, on the following grounds: 1. That there is no evidence that Clarke, or his heirs, had any interest in the lands; and the petition, so far as regards them, ought to have been dismissed. 2. That the time limited by the acts of congress, for the commencement of the proceedings in court, having expired, before the heirs of Atkinson were made parties, the court had no jurisdiction as to the validity of the grant, so far as they were concerned. 3. That there was no sufficient evidence that the said alleged grant or concession was ever made by Governor Coppinger. *4. That Governor Coppinger had no authority to make such a grant. 5. That the description of [*231 the lands, in the said alleged grant, was too vague to be the foundation of a valid survey. 6. That there was no authority in the said alleged grant to survey four different tracts of land. No counsel appeared for the appellees.

Catron, Justice, delivered the opinion of the court.—In 1816, George Atkinson set forth to the governor of East Florida, various important services, through a series of years, performed in behalf of the government, and also many losses; in consideration of which, he solicited a grant in property of 15,000 acres of land, in Cedar swamp, and on the west of Upper Little Lake. The governor granted the lands in property; and added, "consequently, the surveyor general will run them for him in the places he mentions, or in others that are vacant and of equal convenience to the party."

Two places were designated where the lands were to lie, by the petition. They were surveyed in four places: the first survey for 4000 acres, near Dunn's creek; the second, for 3000 acres on Haw creek; the third, for 2000 acres in Dupon's hammock; and 6000 acres on Darcey's creek. One bears date the 20th of January 1818; and the other three in March of that year. None of them are on the lands solicited in the petition. The court below affirmed the surveys; and if this court concurs in the decree, the United States will be bound to issue patents for the four tracts. That the complainants are entitled to the lands in two surveys, at the places described

in the petition, is not questioned; the difficulty is, could the interested party elect to abandon his first locations, and then multiply the tracts?

By the 8th article of the Florida treaty, no grants made after the 24th of January 1818, were valid; nor could a survey be valid on lands other than those authorized by the grant; still, the power to survey in conformity to the concession existed up to the change of flags. That Spain had the power
*232] to make grants, founded on any *consideration, and subject to any restrictions, within her discretion, is a settled question. If the act was binding on that government, so it is on this, as the successor of Spain. All the grants of lands, made by the lawful authorities of the king of Spain, before the 24th of January 1818, were, by the treaty, ratified and confirmed to the owners of the lands. Such is the construction given to the eighth article, by this court, in *Arredondo's Case*, 6 Pet. 706, and in *Percheman's Case*, 7 Ibid. 51; that is, imperfect titles were equally binding on this government, after the cession, as they had been on the Spanish government before. The grant to Atkinson was for the lands he mentioned, or for any other lands that were vacant; and the surveyor-general was especially directed to lay them off in either way; the grant giving him an unrestricted discretion over the entire vacant lands of the province, to satisfy the highly meritorious claim of the petitioner; for however doubtful the merits of many claims may have been, as presented to us, of the justice of this there can be no question; it had in it peculiar equities, and therefore, the party had conceded to him peculiar privileges in selecting the lands. The official and well-defined duties of the surveyor-general are set forth in *Hanson's Case*, and need not be repeated. He was acting for the government, when making the survey, and bound to protect the public domain, within the restrictions imposed by the governor's decree; he did not exceed the decree, by going to other places than those pointed out in the petition; and therefore, did not exceed his authority, unless it was in making more surveys than two. This point was settled in *Sibbald's Case*, 10 Pet. 321. His was a mill-grant for five miles square, on Trout creek; and in the event that situation would not permit the quantity of 16,000 acres, he asked, and had granted to him, an equivalent of the deficiency, not at a particular place, but generally. In 1819, a tract of 10,000 acres was surveyed at Trout creek. In February 1820, another of 4000 acres was surveyed thirty miles off at Turnbull's swamp; and the remaining 2000 acres at Bowleg's hammock, some thirty miles in a different direction. It was proved, that no more than 10,000 acres could be had at Trout creek, because of interfering elder claims, and injury to third persons. The court adjudged, in effect, that the equiva-
*233] lent referred to quantity rather than form *of survey; and that the 6000 acres deficient, could be surveyed on any vacant lands in the province, and in several surveys; the only authority for doing so, was that an equivalent was decreed in case of deficiency. The last two surveys were confirmed, on the precise ground, that, as to the equivalent, the party was not restricted to any particular spot, nor to any form or number of surveys; and therefore, might elect any vacant lands, and at different places. Sibbald's was a weaker case than the present, the words of the grant being less explicit; the principles presented being precisely the same in both, we cannot reverse the decree below, without overruling the former decision, to

which the court below was bound to conform. We, therefore, order the decree to be affirmed.

Decree affirmed.

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*The Mayor and Aldermen of the City of Mobile, Plaintiffs in error, *v.* Miguel D. Eslava, Defendant in error. [*234

Land-titles in Alabama.

A lot of ground, part of the ground on which Fort Charlotte had been erected, in the city of Mobile, before the territory was acquired from Spain by the United States, had been sold under an act of congress of 1818; the lot had been laid out according to a plan, by which a street, called Water street, was run along the margin of Mobile river; and the street was extended over part of the site of Fort Charlotte; the lot was situated west of Water street but when sold by the United States, its eastern line was below high-water mark of the river. The purchaser of this lot improved the lot lying in front of it, east of Water street, having filled it up, at a heavy expense, thus reclaiming it from the river, which at high-water had covered it; when the lot east of Water street was purchased, the purchaser could not pass along the street, except with the aid of logs and other timber. Water street was, in 1823, filled up, at the cost of the city of Mobile; taxes and assessments for making side-walks along Water street, were paid to the city of Mobile, by the owner of the lot; the city had brought suit for taxes, and had advertised the lot for sale, as the property of a tenant under the purchaser of the lot. On the 26th of May 1824, congress passed an act, which declared, in the first section, that all the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of land, in the state of Alabama, and all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by that or any former act, and to which no equitable title existed, in favor of any individual, under that or any other act, between high-water mark and the channel of the river, and between Church street and North Boundary street, in front of the city of Mobile, should be vested in the corporation of the city of Mobile, for the use of the city for ever. The second section provided, "that all the right and claim of the United States to so many of the lots east of the Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots, known under the Spanish government as water lots, in the said city of Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile," &c. The city of Mobile claimed from the defendant in error the lot held by him, under the purchase from the United States, and the improvements before described; asserting that the same was vested in the city, by the first section of the act of 1824: *Held*, that under the provisions of the second section of the act, the defendant in error, claiming under the purchase made under the act of 1818, and under the act of 1824, was entitled to the lot.

The right relinquished by the United States was, to the water lots, "lying east of Water street and between Chuch street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots, known under the Spanish government as water lots, in the said city of Mobile, whereon improvements have been made." The improvements referred to the water and *not to the front lots; a reasonable construction of the act requires the improvements to have been made or owned by the proprietor of the front lot, at the time of the passage of the act; being proprietor of the front lot, and having improved the water lot opposite and east of Water street, constituted the condition on which the right under the statute vested.[1] [*236

Error to the Supreme Court of Alabama. The plaintiffs in error instituted an action, called, in the language of the laws of Alabama, "a plea of trespass to try titles," against Miguel D. Eslava, the purpose of which was the recovery of possession, and damages for the detention, of a certain lot

[1] See Mobile *v.* Hallett, *post*, p. 261; Mobile *v.* Emanuel, 1 How. 95; Pollard *v.* Files, 2 Id. 591

of ground, in the city of Mobile, bounded north by ground in the possession of Thomas Terry, east by Commerce street, south by Church street, west by Water street; and extending from the east side of Commerce street to the channel of the river.

The cause was tried in the circuit court, in November 1837, and a judgment on the verdict of a jury was rendered for the defendant. The plaintiffs took a bill of exceptions to the charge of the court, and afterwards, prosecuted a writ of error to the supreme court of Alabama; where the judgment of the circuit court was affirmed. The plaintiffs took out this writ of error to the supreme court of the United States.

The bill of exceptions stated, that the lot in controversy was held by the defendant, under the following circumstances: By an act of congress, passed in 1818, the lot of ground whereon Fort Charlotte, in the town of Mobile, had been situated, was directed to be surveyed and laid off into lots, with suitable streets and avenues, conforming as near as may be to the original plan of the town; and the lots thus laid off were directed to be sold, under the authority of the president of the United States. The lots were surveyed and laid off, and were afterwards sold. By an original plan of the town, a street known as Water street was run on the margin of Mobile river, continuous with and fronting the same. This street was run on part of the site of Fort Charlotte, where the lots are laid out; another street, known as Church street, was laid off on the site of the fort. The lots were sold by the United States, agreeable to the plan; no lots were laid off, and none were sold by the United States, east of Water street. Under the Spanish government, and while the United States held possession of Fort Charlotte, there was an open unobstructed *space from high-water mark on the river to the channel, except a wharf used for the commerce of the fort.

*236]

The lot in dispute was situated on the east side of Water street, directly opposite to the lot sold by the United States, part of the site of the fort, within the open space between high and low-water mark, and part of it within the boundary of the picket fence that formerly surrounded the fort. After the purchase of the lots laid out on the site of Fort Charlotte, by "the lot company," a survey was made by the company, and a larger quantity of ground was included in the survey. The defendant held under a purchase from the lot company. There is a regular oceanic tide in the river Mobile, the ebb and flow of which is about eighteen inches. In 1822, Water street and the lot in dispute were between high and low-water mark. The city of Mobile, at the cost of the city, filled up Water street to some extent, and confined the water at high-tide to the eastern edge of Water street. No evidence was offered to prove the lots in front of Fort Charlotte were known under the Spanish government as water lots, on which improvements had been made.

The plaintiffs, in the circuit court, claimed title under the act of congress of 20th May 1824, entitled "an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals in the said city." Considerable sums of money were expended by the purchasers of the lots on the site of Fort Charlotte, to fill up the lots between Water street and low-water mark; and the passage along Water street could only be made, until it was filled up by the corporation of Mobile, by logs laid along the street. The lot in dispute had been filled up at a heavy expense, and

the tenant of the defendant in error had, according to an entry on the books of the corporation, in 1823, filled up a stagnant pond at the end of Church street, which had been occasioned by the improvement on the lot. One witness testified, that the stakes in front of the lot, when sold by the United States, ran to the east of Water street, so that a portion of the property, when purchased from the United States, would have been within the staked lines of the lot. Evidence was offered by the defendant, to prove that in 1828, and for every year until 1836, taxes on the lot had been paid to the corporation of Mobile; that in 1833, the person in possession of the lot had been required *by the mayor of Mobile, to fill up two places upon it with earth or shells; and about the same time, the corporation had [*237 advertised the lot for sale, for unpaid taxes, which were afterwards paid.

The act of 20th May 1824, by its first section, declared, "that the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of land, in the state of Alabama; and also all the right and claim of the United States, to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, either by this or any former act, between high-water mark and the channel of the river, and between Church street, and North Boundary street, in front of the said city, be and the same are hereby vested in the mayor and aldermen of the said city," &c. The second section of the act declared, "that all the right and claim of the United States to so many of the lots east of Water street, and between Church street and North Boundary street, and now known as water lots, as are situated between the channel of the river, and the front of the lots known under the Spanish government as water lots, in the said city of Mobile, whereon improvements had been made, be and the same are hereby vested in the several proprietors or occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot," &c.

Upon which, the judge charged the jury, that if the lots specified in the patents 10, 11, 12, &c., were proved to have been bounded by high-water mark, at the time purchased, then they came within the terms of "lots known under the Spanish government as water lots, as used in the act of congress;" and if proved that the lot claimed was east of Water street, and in front of the lots covered by the patents, and that it had been improved before the passage of the act; it was vested in the proprietors and occupants of the lots held under the patents: and this, although Water street did intervene between the lots claimed and those held under the patents.

The case was arged by *Test*, for the plaintiffs in error; and by *Johnson* and *Sergeant*, for the defendant. *The decision of the court was [*238 given upon the construction of the act of congress of 1824, entirely. The arguments of the counsel on all the other questions which were discussed, are, therefore, necessarily omitted.

Test said, the act of congress of 1824 is the foundation of the title set up by the plaintiffs; and if they are not entitled to hold or recover under that act, they have no title whatever. The act was a pure commercial regulation, having in view the promotion of the commercial branch of the

national industry. It is a part of the history of the country, that Mobile was once one of the most sickly places on the globe. It was surrounded by islands and marshes, and the banks of the river were flat and swampy; and from this cause, it was frequently visited by the most fatal diseases. Thus it remained for years after the country was acquired by the United States.

One of the regulations of the Spanish government was, that the lands granted to individuals never extended into the river, or even to it; but the grantee was bound to leave a bank or ridgeway along the river margin. Wharfs or landing-places were always established by public authority; and the ground, part of which is now in dispute, had remained unimproved, until the act of 1824 was passed. The growing population of the city of Mobile, and the fact, that it was the outlet of the great and increasing productions of the state of Alabama, made it an object of particular interest with the government of the United States. As no grants of land had been made beyond high-water mark, and the improvement of the low grounds between high and low-water mark was essential to the health of the city, congress passed the act of 1824, giving to the owners of lots running to the river, the ground in front of the same, on which improvements had been made. The lots between Church street and North Boundary street, intended as the most northern street of the city, were those comprehended in the provisions of the act of congress. It was clearly intended by the act of congress, to give to the city, for the purpose of improving and erecting wharves and landing-places, all the land on the shores of the river, from Church street
*239] to the northern boundary of the city; and not to confine the city *to the width or location of Water street, nor to that part of the city where streets had been laid out; for that would not have provided a remedy commensurate with the evil. To the city was given, by the act, all the land below high-water mark, on which no improvements had been made, so that not a remnant should be left from one end of the city to the other. The lot in controversy in this case lies, without doubt, in the part of the city to which by any construction of the terms of the statutes describing the property granted, applies. In other cases, it may be necessary to ascertain what was meant by North Boundary street; but it is not in this.

Thus, the title of the plaintiffs in error is clearly made out, unless the defendant has a better title, under the second section of the act of 1824, or by the act of 1818, under which the lots laid out on the site of Fort Charlotte were sold. One of the counsel for the defendant has maintained, that the defendant was the riparian owner of this lot. This question need not now be discussed, as the title under the act of 1824 is alone under examination. The defendants counsel also say, that having purchased the lot under the act of 1818, which extended to the river; and having improved the lot to low-water mark, the provisions of the second section of the act apply to and give title to the property. This is denied. It was expressly proved, that the lots on which Fort Charlotte stood were not known as water lots, under the Spanish government, on which improvements had been made. Fort Charlotte, and the ground appurtenant to it, under the Spanish government, were bounded by the margin of the river. The object of congress was, to give to the owners of lots in the old town of Mobile, who had improved them, the ground to low water mark, for river purposes, and to promote the health of the city; but it was not intended to extend the grant

beyond those lots held under Spanish concessions, else why confine the grant to the owners of lots known under the Spanish government as water lots, whereon improvements had been made? If the lots laid out on the site of Fort Charlotte, and which had been sold, were intended to be included in the donation, why did not congress so declare in apt words to express that purpose?

Mr. Test also contended, that by a reference to a map exhibited, *some of the lots laid out on Fort Charlotte were clearly shown to be out of the lines of the ground included in the act of 1824; and [*240 he said, none of the Fort Charlotte lots could be considered within the letter or spirit of the act, as all had the same claims. To apply them to this lot, and not to all, was inconsistent.

Sergeant, for the defendant, upon the title claimed under the act of congress of 1824, contended, that the act 1824 granted the lot in controversy to those under whom defendant claimed, and not to the city of Mobile. The plaintiffs claimed, he remarked, entirely and exclusively, under the act of 1824, which operated as a gift, without any consideration whatever. They were not purchasers. Neither were they to take for the public, but for themselves, for their own use and benefit. It was incumbent upon them, therefore, to make out their case, clearly, and without reasonable doubt. The defendants, on the contrary, had an equity, before the act, from possession with claim of right, improvement, and, in fact, creation of the property by redeeming it from the water.

In construing this act, the whole of it must be taken together; and further, any construction should be very cautiously admitted, that would overturn a received construction long acted upon. The act has a twofold operation: it operates by way of grant, and it operates by way of confirmation or release. For the city of Mobile, it operates by way of grant only, and that grant is entirely gratuitous, being without consideration. First, it gives, specifically, the Bakehouse lot and the Hospital lot, both of them defined public property of Spain, and passed as such to the United States by treaty. They passed from the United States to the city of Mobile, by their appropriate boundaries, as the Fort Charlotte lot passed to the purchasers; with only this difference, that the latter paid for what they got. As to all the rest, the grant to the city of Mobile is of what is not otherwise granted, confirmed, released or excepted. The language of the first section is "not sold or confirmed to individuals, either by this or any other act;" and "to which no equitable title exists in favor of any individual," &c. And then there is the general proviso to the whole act, "that nothing in this act contained shall be construed to affect the claim or claims, *if any such there be, of any individual or individuals, or of any [*241 body politic or corporate." The city of Mobile, though first in the order of the act, is last in the order of grant. All the other grants, confirmations, releases, exceptions and provisoes are to be satisfied; and then the city is to take what "right and claim" there may be of the United States—not asserting that there will be any.

Now, in the first place, the defendant had a right, by the sale under the act of 1818, as has already been stated; which is confirmed, if necessary, by the act of 1824. In the next place, he had an "equitable title," by pos-

session, improvement, expenditure of money and labor in redeeming the land, contributions in taxes, and the like, repeatedly recognised by the United States as the ground of a pre-emption right. He has, especially, an equitable title against the city of Mobile, who not only looked on while he was expending money and labor as owner; but compelled him to pay taxes as owner, for the public use, and to contribute to the public gratification and convenience, by adorning the streets in the neighborhood of his property; and finally, by resolution, ordered him to be prosecuted as owner, for an alleged nuisance on his lot.

Again, he is within the very words of the second section of the act of 1824, and within the decision of this court, in *Pollard's Heirs* v. *Kibbé*, 14 Pet. 353. In the bill of exceptions, the facts were submitted to the jury by the judge, with instructions precisely conformable to the act. The facts have been found, and upon those facts, the judgment is right. With the state of facts, judicially settled, as the record shows, the defendant was clearly entitled under the act; and it would have been palpable error, to give judgment against him. There was no "right or claim" remaining in the United States; and therefore, there was none granted to the city of Mobile. It is of no importance, that other questions arose and were discussed in that court, or in the supreme court of Alabama; nor whether the opinion upon them was right or wrong. If the defendant was entitled to judgment, those questions are immaterial, and this court will affirm the judgment upon its proper grounds. The defendant has a perfect title under the act of 1824, whether he had a right before or not; and no one can gain-
*242] say it, who claims *by virtue of a residuary grant of the same act, as the city of Mobile does.

It is needless to add, finally, that the defendant clearly had a "claim," within the proviso of the act. He was in actual possession, notoriously claiming a right. The United States never meant to convey to the city of Mobile a capacity to disturb possessions, and carry on law-suits. Neither did they mean to destroy the power of congress to hear applications for relief, from persons whose claims, though imperfect, were entitled to equitable consideration and allowance. Where the land was vacant, and no claim was made to it, it was granted; such a grant was consistent with the ordinary method of proceeding; but to part, by grant (and especially without consideration or equivalent), with the power of doing liberal justice to claimants in actual possession, in the usual way, would seem to be against precedent, policy nnd reason, and in derogation of the accustomed privileges of the citizen. This court has not so interpreted the act of 1824. *Pollard's Heirs* v. *Kibbé*, 14 Pet. 365. The claim was, at least, such an one as might be presented to congress; and such an one, therefore, as to be within the proviso, according to the decision of this court.

McLean, Justice, delivered the opinion of the court.—This case comes before this court on a writ of error to the supreme court of Alabama. The plaintiffs brought an action to recover certain lots in the city of Mobile, bounded east by Commerce street, south by Church street, on the west by Water street, and extending on the east side of Commerce street to the channel of the river. They claim title under the act of congress of the 26th May 1824; and the circuit court of the state, in which the action was first

brought, decided against their title. That decision was removed to the supreme court of the state by writ of error, where the judgment of the circuit court was affirmed. Under the 25th section of the judiciary act of 1789, the case is brought before this court.

The first section of the above act declares, "that all the right and claim of the United States to the lots known as the Hospital and Bakehouse lots, containing about three-fourths of an acre of *land, in the state of Alabama; and also all the right and claim of the United States to all [*243 the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any other act, between high-water mark and the channel of the river, and between Church street and North Boundary street, in front of the said city, be and the same are hereby vested in the mayor and aldermen of the said city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the said city for ever."

The defendant's title was acquired by purchase from the United States, at a public sale in 1820. This sale was made under the act of congress of the 20th April 1818, which gave power to the president to sell the ground on which Fort Charlotte, at Mobile, stood. The ground was required to be laid off into lots, with suitable streets and avenues, conformiug, as near as practicable, to the plan of the city. Ten squares and parts of squares were surveyed and divided into lots, streets, &c. By the original plan of the city, a street, known as Water street, was run on the margin of the Mobile river, and this street, by the said survey, was extended over a part of the site of Fort Charlotte, along the margin of the river. No lots were sold east of this street. Lots 10, 11, 12 and 13, in square 1, lie immediately west of Water street and are bounded by it. The lots in dispute lie east of Water street, and directly opposite the lots above numbered.

In 1822, Water street and the property now in dispute, were between high and low-water mark. The corporation of the city, in 1823, expended $400 in filling up Water street; and by the improvement, confined the water, at high tide, to the eastern side of Water street. It was proved on the trial, that in order to reclaim one of the lots in square 2, east of Water street, the owner had to fill up seven feet; and that he could not pass along Water street, at that time, except with the aid of logs and other timbers. Another witness stated, that he purchased the lot west of the lots in dispute, and that he had to fill up his lot, before it could be occupied. And other evidence was given by defendant, conducing to prove that the eastern line of the lots, at the date of the sale, was *below [*244 high-water mark; and that the company who purchased the lots, at the sale of the government, expended about $3000 for the common benefit of their property, and to keep the water from it. It was also proved, that after the purchase of one of the lots in controversy, by Addin Lewis, under whom the defendant claims, he caused dirt to be hauled upon it, and timbers were laid, to fence out the water and fit the lot for a timber yard. Charles Matthews, who owned one of the lots, bounded by the water, expended $1009 in filling up his lot. And to show improvements on the lots in dispute, before 1824, the defendant read from the book of the corporation, the following entry, dated in 1823: "Charles S. Matthews having improved his lot by filling it up, and a stagnant pond being occasioned

thereby at the end of Church street, &c." In 1824, about one-half of the space between Water street and Commerce street, was subject to be covered by water, at the ordinary tides. Water street was not opened as low as Church street until 1824. It appeared, that the defendant and those under whom he claims, had paid taxes on the property to the corporation. That in 1824 or 1825, the defendant was required to pay for side-walks around his lots, upon the assessment of the corporation; and in 1833, he was required by the mayor of the city, to fill up two places upon one of the lots with earth or shells. About this time, the lot was advertised for sale, as the property of Matthews, the defendant's tenant, for taxes due the corporation; which were afterwards paid, with the costs of advertising, &c.

Upon these facts, the circuit judge charged the jury, "that, if the lots specified in the patents 10, 11, 12, &c., were proved to have been bounded by high-water mark, at the time purchased, then they came within the terms of 'lots known under the Spanish government as water lots,' as used in the act of congress; and if proved that the lots claimed were east of Water street, and in front of the lots covered by the patents, and that they had been improved, before the passage of the act of 1824, they were vested in the proprietors and occupants of the lots held under the patents; und this, although Water street did intervene between the lots claimed and those held under the patents." And the court further charged the jury, that "if
*245] the proof showed the property *to have been assessed in 1823, by the city authorities, at $4000, and recently at $88,000, and that the improved value resulted from the labor of Charles Matthews; that if, in August 1823, the mayor and aldermen, in reference to one of the lots in dispute, had on their minutes used this language, viz: Whereas, Charles Matthews has commenced to improve his lot by filling up, &c., and that a committee was organized to inquire into a nuisance connected with the lot; that in 1824 and 1825 of the years between that and the commencement of the suit, the city taxes had been assessed on the property and collected from Matthews; and that he had been required by an ordinance of the mayor and aldermen to make side-walks along this lot, and had so done; that Matthews had, by a written notice issued by the mayor, been required to fill up some low places on said lot, to abate a nuisance thereon, and that this property was advertised for sale as the propery of Matthews, in one of the city papers, for the non-payment of city taxes assessed thereon; and that, subsequently, Matthews had paid such taxes into the city treasury: that the facts estopped the plaintiff from asserting any pre-existing title under the act of congress."

The plaintiffs' counsel requested the judge to charge the jury, "that if they believed the facts were proved, as contended for by them, the plaintiffs were entitled to a verdict in their favor; which the judge refused to do."

In their opinion, the supreme court of Alabama do not give a construction of the act of 1824, under which the plaintiffs' right is asserted; but consider the respective rights and powers of the federal and state governments arising under the federal constitution, and the compact entered into on the admission of the state of Alabama into the Union. The power of the Spanish monarch over the soil and navigable waters, when the territory was under his dominion, is also considered and illustrated; and the doc-

trines of the common law, as applicable to the subject, are examined; and by this course of reasoning, the court, among other conclusions, decide that the act of 1824 is void, as congress had no power to grant the property in dispute. The result of this investigation was the affirmance of the judgment of the circuit court. And so far as regards the question before us, it is immaterial by what process of reasoning the *supreme court of Alabama came to this conclusion; their opinion constitutes no part [*246 of the record, and is not properly a part of the case; we must look to the points raised by the exceptions in the circuit court, as the only questions for our consideration and decision.

Both parties set up a right under the act of 1824. It is the foundation of the plaintiff's title; and the defendant relies upon it as sanctioning his claim. Now, no construction of this act can favor the hostile pretensions of both parties; and if the true construction of it shall give no title to the plaintiffs, this controversy is at an end. And in this view, it is unnecessary to inquire into the constitutionality of the act.

The defendant insists, that his right is sanctioned by the second section of the above act, which provides, "that all the right and claim of the United States to so many of the lots of ground, east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known, under the Spanish government, as water lots, in the said city of Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot, &c."

This court gave some consideration to the construction of this section in the case of *Pollard's Heirs* v. *Kibbé*, 14 Pet. 353; and there was a diversity of opinion among the judges on the subject. It must be admitted, that the section was loosely drawn, and its meaning may be somewhat involved in doubt. Some doubt has been expressed, whether the improvements required were to have been made on the front or water lot. But we think they must be made on the latter. The right relinquished by the United States was to the water lots lying "east of Water street," "and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water lots, in the said city of Mobile, whereon improvements have been made." Now, it will be observed, that all the words between the words "water lots," first used in the *above sentence, and the [*247 words "whereon improvements have been made," are only descriptive of the locality of the water lots to which the right was relinquished. And if this be the case, it follows, that the improvements refer to the water, and not the front lots. And we think a reasonable construction of the act requires the improvements to have been made or owned by the proprietor of the front lot, at the time of its passage. Being proprietor of the front lot, and having improved the water lot, opposite and east of Water street, constitute the conditions on which the right, if any, under the statute vests. In his charge to the jury, the judge laid down these conditions in clear terms; and instructed the jury, if the facts brought the defendant within

them, that they should find against the plaintiffs. The jury did so find, and this is conclusive as to the facts of the case; and the only inquiry remains, whether, by any possible construction of the act, in view of these facts, any right under it can be asserted by the plaintiffs?

A statute so badly drawn as to vest a right to the same property in hostile claimants, would, in itself, be a nullity. Exceptionable and involved as the language of this statute may be, it is not obnoxious to this objection. The first section, under which alone can the plaintiffs pretend to have any color of right, excepts from its provision "lots sold or confirmed to individuals, either by that or any former act, and to which an equitable title exists in favor of any individual, under that or any other act." This exception embraces the right of the defendant, as found by the jury; and shows that however obscure some points of the act may be, its provisions are consistent. As this is decisive of the case, it is unnecessary to notice the instruction prayed for by the plaintiffs in the circuit court; and which the court refused to give. It was asked in affirmance, generally, of the plaintiffs' right. The judgment of the supreme court of Alabama, which affirms the judgment of the circuit court of that state, is affirmed.

Catron, Justice.—This is a writ of error prosecuted to reverse the decision of the supreme court of Alabama, in an action corresponding to an ejectment. The first question is, has this court jurisdiction, *under the
*248] 25th section of the judiciary act? Both parties claim under a private act of congress of the 26th of May 1824. It granted to the corporation of Mobile, the lands between high-water mark and the channel of the river, in front of the city; the premises sued for are included within the limits. The decision of the state court was against the right claimed on the part of the plaintiffs. 1st. The defendant set up a claim under the second section of the same act, because he had improved the premises before 1824, and when he was an alienee from the proprietors of the front lots west of Water street 2d. He insisted that the city was estopped to set up a claim under the act of congress; because the defendant had improved the lot, and being recognised as owner by the corporation, in various ways.

The plaintiffs having read the act of congress as a grant, and proved the defendant in possession, asked the court to instruct the jury, that if they believed the facts were proved, as contended for by them, they were entitled to a verdict; which instruction the court refused: and a verdict was rendered for the defendant, and judgment given in the circuit court for him, to which a writ of error was prosecuted to the supreme court. One error assigned is, "that the charge of the circuit judge denies that the United States had power to grant the premises in question." On this assignment, there was a joinder—that there was no error.

The plaintiff's title is set out in the record; and upon this title and upon the last assignment of error, is the opinion of the supreme court of Alabama exclusively founded. The opinion is before us, and maintains that the act of 1824 is void; as did a most labored argument here, on the part of the defendant in error. To meet the opinion, this cause was avowedly brought into this court, by the corporation of the city of Mobile; it is conclusive in the state courts against the title of the city, and that of its alienees, to a vast amount of property held under the act of 1824: and I think it is our

duty to meet the question ; if we do not, the decision will remain the law of Alabama. The whole title of both sides is forth in the record ; and it was quite proper in the supreme court of Alabama to commence with the examination of the plaintiffs' first ; and if found void, to declare *that the plaintiffs could only recover on the strength of their own title, and refuse to examine the adversary title of defendant. The charge of the circuit court on any other point was not noticed ; nor do I see how, in another case, the corporation can more prominently present the question on the validity of the act of congress, so as to bring it before this court for final decision. First, or last, this is not to be avoided. [*249

That the whole case is before this court, will be seen by reference to *Ross* v. *Barland*, 1 Pet. 664. There, both sides derived title under an act of congress. The defendant's claim was rejected, on a construction given to the plaintiff's patent and entry. It recognised the case of *Matthews* v. *Zane*, 4 Cranch 382, as having settled the doctrine, that where both sides claim under acts of congress, and come to this court, under the 25th section of the judiciary act, for their construction, the court proceeds on the whole case, and for either side. The court say, "the third article of the constitution, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive. It is supposed, that the act (1789, § 25) intends to give this court power of rendering uniform the construction of the laws of the United States, and the decision of rights and titles claimed under those laws." This decision was made in 1808. The case of *Ross* v. *Barland* was this : Barland claimed by a patent, dated October 1820, founded on an entry of 1807. The defendant claimed under a patent dated in 1819. The state court adjudged the younger patent the better title ; it was coupled with the entry—giving the title date from 1807. This court says, "by the constitution, the judicial power shall extend to all cases arising under the constitution or laws of the United States, and treaties made, or to be made, under their authority ; and where the construction of a statute of the United States is drawn in question, and the decision is against the right or title set up under it, the decision may be re-examined, and reversed or affirmed, by this court." The court held, that as both parties claimed under the act of congress, the case of *Matthews* v. *Zane* governed.

*The point was more prominently presented in *Wilcox* v. *Jackson*, 13 Pet. 509. A pre-emption claimant took old Fort Dearborne, at Chicago. He got a certificate from the register of the land-office ; on this he sued in the state circuit court in Illinois. A special verdict set out all the facts. The defendant was a military officer in the fort. The United States resisted the claim, because it was insisted, the fort was appropriated land. On the special verdict, and on the broad facts referred to the court by the jury, the circuit court gave judgment for the defendant. A writ of error was prosecuted to the supreme court of Illinois. That court gave judgment for the plaintiff. Then, the United States, in the name of Wilcox, prosecuted a writ of error to this court, under the 25th section of the judiciary act. We examined the cause precisely as the supreme court of Illinois had done ; that is, on the entire record presented by the special verdict. On what ground the court below had founded its judgment, we only knew by its opinion produced to us. We reversed the judgment, and [*250

rendered one for the defendant. We declared the entry on which the plaintiff founded his action void, on a construction of the acts of congress, governing the case; following, to some extent, *Martin* v. *Hunter*, 1 Wheat. 305, 355.

In this case, the supreme court of Alabama declared the grant of the plaintiff void, because the land, as they supposed, had vested previously in the state. Had the bill of exceptions been turned into a special verdict, and there would not be a shade of difference in the cases. On this point, there was no doubt entertained in *Pollard's Heirs* v. *Kibbé*, 14 Pet. 53.

1. With this explanation, we will proceed to the merits; and first inquire, whether the claim of the defendant can be sustained, under his title from the purchasers of the Fort Charlotte property. By the act of April 1818 (3 U. S. Stat. 465), the president was authorized to cause Fort Charlotte to be abandoned, and the land on which it stood to be surveyed and laid off into lots, with suitable streets and avenues, conforming as near as might be to the original plan of the city of Mobile; and on the survey being completed, a plot thereof was to be returned to the secretary of the treasury, and another to be furnished *to the officer authorized to dispose of the lots, by the president; the lots were to be advertised and sold as other public lands of the United States, and a patent was to be issued for each lot.

*251]

The lots were laid off, as also the streets. Water street was located next the bay, and the lots nearest the water fronted that street on the west; the lots were neither surveyed nor sold, east of Water street. High tide flowed up to the street, and in part covered it; but east of it, there was a wide flat, covered, from a foot to eighteen inches deep, when the tide was in; but when out, free from water to the channel of the Mobile river. This flat was easily reclaimed by embankments and filling up; and was obviously the ground on which a great part of the city would soon be located. Reclaiming lands from the water through that section of country, is the common practice, and was deemed a matter of course in this instance. The purchasers of the Fort Charlotte lots, west of Water steeet, foreseeing the value of the property east of it, seized on the flooded lands, on the assumption that they were entitled to go to the channel of the river, as riparian owners of the front on the shore; and on this assumption, sold to Matthews the property in dispute, lying east of Water street. The flat has since been filled up, and there are several streets east of Water street. It is manifest, the United States only sold the lots laid off (for each of which a patent was issued), reserving the land next the channel of the river; in regard to which, the supreme court of Alabama say, "the defendant does not rely upon his riparian proprietorship, as entitling him to the land east of Water street; nor, indeed, could he insist on it, with success, as the Fort Charlotte lots were not bounded by the river, but had other fixed metes and bouds." Nor was it possible, that the lands seized upon and sold to Matthews, could follow as an incident to the patent, for two additional reasons: 1st. Had the purchase been to the river or bay of Mobile, in terms, the boundary would have been limited to high-water mark; such is the rule (as I think), beyond controversy, in regard to all our territory acquired from Spain. So the supreme court of Alabama held, in *Hagan* v. *Campbell*, 8 Porter 24; so it has held in other cases; it is the established law of

property in that state. 2d. Water street was reserved next the bay, and being public property, all the incidents *of acretion (had any accrued) would have belonged to the public, and not to the owners [*252 of lots west of the intervening street. On this point, the great Batture case, at New Orleans, turned. See Daubigny's Expose, 22, 58, 59. Gravier claimed to have purchased to the river Mississippi, and the claim was resisted, on the ground, that he had only purchased to the highway lying on the bank of the river. The question was, who should have the acretions? The case was decided on the fact that Gravier's purchase of the Jesuits' property was bounded by the bank; and that the road ran over his property, as an easement. 2 Hall's Law Journ. 295; 5 Ibid. 1, 113; Angel on Tide-waters, App'x, 197; Mr. Livingston's argument. The fact that Water street was reserved to the United States is undisputed in this case, and is conclusive of any claim, east of the intervening street, in the purchasers of the Fort Charlotte lots. The defendants's title can, therefore, derive no aid from this source.

2. Did he derive title by force of the act of 1824? The court below held, that the law was inoperative, for want of power in congress to pass title to the lands between Water street and the channel of the river; and the corporation of the city of Mobile, being the plaintiff, could not not recover (as actor) for want of title. That the United States acquired the title to lands flowed by tides, by the treaty with Spain, is, of course, admitted. That they had power to grant, up to the adoption of the constitution of Alabama, in 1819, is also admitted in the opinion under review. That the Spanish king could grant lands under tide-water, is free from doubt, and the United States acquired by cession all his powers over the vacant soil. But the lands flowed by the tides are claimed for the state of Alabama as a part of her sovereign rights.

To comprehend the nature of the claim, some laws and facts must be stated. When the Alabama territory, in 1819, proposed to form a state government, congress passed an act (ch. 171) to authorize the formation of a state constitution; and proposed several conditions for the adoption of the convention, which were adopted as part of the constitution; and amongst others, it was agreed with the United States, "that the people of Alabama for ever disclaim all right and title to the waste or unappropriated lands lying within the state; and that the same shall remain at the sole disposition of the United States." *"2. That all the navigable waters within the state shall for ever remain public highways, and free to [*253 the citizens of that state, and the United States, without any tax, duty or impost, or toll therefor, imposed by that state." The constitution of Alabama was presented to congress for recognition; and on the 14th of December 1819, it was resolved, "That the state of Alabama shall be one and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever." By the acceptance of the conditions on part of the United States, it is considered clear, says the supreme court of Alabama, "That the navigable waters of this state have been dedicated to the common use of the people of the United States; but perhaps it may be considered as questionable, what extent of soil is embraced by the dedication. We

think it must be so much ground as is covered with water, not only at low but at high tide." The court then proceeds further to declare:

"That the act of 1824 vested no title in the corporation of Mobile, for the reason, that the state of Alabama was admitted into the Union on the footing of the original states. That the original states, by their colonial charters, had the right of property in bays and arms of the sea; this they retained, and it can only be interfered with by the federal government, under the right to regulate commerce, so far as to preserve a free navigation. The United States then may be said to claim for the public an easement for the transportation of merchandize, &c., in the navigable waters of the original states; while the right of property remains in the states. The original states possessing this interest in the waters within their jurisdictional limits, the new states cannot stand upon an equal footing with them, as members of the Union, if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers. To recapitulate, we are of opinion: 1st, That the navigable waters within this state have been dedicated to the use of the citizens of the United States, so that it is not competent for congress to grant a right of property in the same. 2d, The navigable waters extend not only to low-water, but embrace all the soil that is within the limits of high-water mark. *254] 3d, By the acts of congress *regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters and the soil covered by them; consequently, the plaintiffs cannot recover, on the ground of a dedication to the uses of the city, under the act of 1824, which is an enactment of a later date. 4th, The original states, in virtue of their royal charters, are entitled to the right of property in the navigable waters within their territory, while the public are only entitled to an easement, to be provided for under that provision of the federal constitution which authorizes congress to regulate commerce, &c. Alabama is admitted into the Union on an equal footing with the original states; and, of consequence, is entitled to the right of property in the tide-waters within its limits. 5th, By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the right of the United States, except so far as it was reserved by the federal constitution, in some of its grants, or its retention was necessary to enable the federal government to exercise its delegated powers. Having attained these conclusions, it will follow, that the act of 1824 is inoperative, and confers no title upon the plaintiffs."

That the original states acquired by the revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true, that Alabama was admitted on an equal footing in regard to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable waters; and so can nine other states equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognised as belonging to the United States, as being a common fund of the Union. The clause inserted into the constitution of Alabama, reserving the rights of property to the United States, as a compact with them, embraces lands under water, as emphatically as those not covered with water; but if no stipulation saving the interest of the United States had been made, they

would have had just as much right to their private property as an individual had to his. They hold, as a corporation, an individual title.

The constitution of the United States provides, "that the congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging *to the United States; and nothing in this constitution shall be so construed as to [*255 prejudice any claims of the United States, or of any particular state." This is the paramount law of the land, by force of which the public domain in Alabama was held and governed, and which needed no aid.

Neither did congress cede it, by stipulating that the navigable waters should be highways. That such rivers are common for the purposes of navigation and commerce, in the widest sense, is free from doubt; that Alabama has jurisdiction and power over them, the same as the original states have over their navigable waters, is equally clear. Yet it does not follow, that the fee of the shores, banks and soils under water, is in the state of Alabama. The United States, as owner, can do no act to obstruct the free public use of the waters, more than a private owner of the soil under water could obstruct the navigation. The individual owner in fee of the bottom of a navigable river, can cultivate and take out the shell-fish or the minerals from the bed; nor can it be doubted, that the United States may pursue veins of silver, tin, lead or copper, under the bottom of a bay, the river Mississippi, or a great lake; although they could not impede in any degree their navigation. So may the assignees or lessees of the United States do the same.

Nor can it be otherwise in regard to the occupation of the lands between high and low-water mark. The delta of the Mississippi, the greater part of East Florida, much of Alabama, and also of the state of Mississippi, have lands covered slightly with the flow of high-water; these lands are subject to be redeemed by embankments; they amount to some millions of acres; many of them are of the best rice, indigo, and even sugar and cotton lands on this continent. Immense bodies of lands are flowed by the great lakes, and subject to be redeemed; and yet more, many parts of the shores of the great river Mississippi, from the mouth of the Missouri to the ocean, are annually flowed by a tide of its own; and the lands are redeemed by levees from the water, until the vessels on its surface float above redeemed plantations that have been submerged for months every year; and that were submerged in 1819, when it is supposed the United States, by implication, ceded all the flowed lands within her limits to Alabama. Embankments to exclude the water are almost as common on the banks *of the Mississippi river, [*256 and in the delta of country embraced by its mouths, as are fences, in other parts of the country, to protect the crops from animals; and it is not in the reach of probability, or of belief, that congress, by an oversight, surrendered all flowed lands to the states in which they lie; or that it was intended to cede to the new states the right to prohibit the construction of forts and defences by the United States, on the public lands below the high-water mark. I imagine, it has never occurred to any one, that a purchase of the soil from the state of Louisiana was necessary, before works within the flow of tide-water could be constructed for the defence of the mouths of the Mississippi river. The idea is new; and the assumption leading to such a consequence, startling. It is certainly not so in Alabama. To cut off

every pretence of the kind, congress asked Alabama when she entered the Union, to disclaim all right and title to the unappropriated and waste lands lying within the state, and that the same should remain at the sole disposition of the United States; and to this Alabama bound herself in the most solemn manner, by her constitution. The claim set up for her on this ground, has, therefore, no just foundation.

The supreme court of Alabama also holds, that by the several acts of congress, regulating the survey of the public lands, it is provided, those which border on navigable waters shall not include within their lines any part of the shore; and therefore, the federal government has renounced the title to the navigable waters, and the soil covered by them. The United States have surveyed the shore of the tide-waters, great lakes, and certainly the banks of the great rivers, to a wide extent. From the first, shores and banks of rivers have been the boundaries of fractional sections; large quantities of land have been sold, and are now in the market, within the high-water mark; many even on the Alabama river. On the Mississippi, most of the fractions are partially overflowed. Towns and villages on the banks of the rivers are partly within the high-water mark, resting on patents from the United States, or on confirmed French and Spanish claims. Scarcely any are exempt from this supposed infirmity of title, when situated on tide-water, or on the larger rivers, and this is especially so, in regard to the towns on the Mississippi, within the range of country sold out by the
*257] *United States. Indeed, one town, at the mouth of the Ohio, is entirely below high-water mark, and secured by embankment; so that it is idle to adduce the practice of the government as proof of abandonment. The United States reserved the lands under water, and between high and low-water mark, in many instances, for public use; and subject to grant by special acts of congress.

That this is so, we need go no further than the city of Mobile for evidence. The British government made a grant to William Richardson, in 1767, fronting on Mobile river, one hundred and forty poles, but bounded by the river. In 1807, the Spanish governor at Pensacola confirmed the same to John Forbes & Co., extending to the channel of the river. This grant was void, for want of authority in the governor to make it; the country having been ceded to the United States. *Garcia* v. *Lee*, 12 Pet. 511. The act of 1819 (Land Laws 748) granted it by confirmation to John Forbes & Co. It lies at the city, is two hundred and sixty-three acres on the high land, and was adjudged a good title in *Hagan* v. *Campbell*, by the supreme court of Alabama. 8 Porter 1–25. So, in *Pollard* v. *Kibbé*, 14 Pet. 355. The cause came to this court from the supreme court of Alabama. That court held, that the act of 1824, above referred to, conferred the better title on the defendant. This court reversed the decision, because the land in dispute was excepted from the act; and declared that the private act of the 2d July 1836, vested the title in fee in Pollard's heirs, the plaintiffs in the suit. They are now in as grantees, by force of the private act, under the sanction of our decision. The land lies east of Water street, and was covered with water at high tide; the same as the land in controversy.

If congress had no power to grant, the act of 1836 is void, and our decision wrong, as was that of the supreme court of Alabama. in the same case; for they held the previous act of 1824 was a valid grant. Many of

the flowed lands must have private owners. The old states are in the constant habit of granting them; in some, they are supposed to be of almost equal value with all the high lands; so it was confidently asserted in the argument of the cause of *Martin* v. *Waddell*, in regard to New Jersey. The great oyster banks are certainly worth many millions of dollars in that state, and are fast becoming private property. If the *United States cannot make titles, the new states must make them. The city of [*258 Mobile, on the river front, two squares deep, is without title, if it be true, that the act of 1824 is void for want of power in the United States to give title. I think it clear, that the assumption of abandonment, because of the mode of surveying the public lands, cannot be maintained.

Nor has Alabama a better founded or more plausible claim to the lands between high and low-water mark, on the ground that she was admitted into the Union on the equal footing with the original states. What was the condition of these states (the old thirteen) when they entered the Union? In Massachusetts (including what is now Maine) all the right of soil to lands, so far as the sea ebbed and flowed, by the colonial charter (to the extent of one hundred rods), was in the owners of the shores; and although the charter was annulled, the right was maintained as the common law of the stote, at the revolution. The law and decisions are found in Angel on Tide Waters 108; and in Dane's Abr. 694, 698. So, in New York, lands were held under tide-water, especially about the city, by individual titles *Mayor, &c.* v. *Scott*, 1 Caines 543. So it was in West New Jersey; and to a great extent, in Pennsylvania and Maryland. The authorities will be found in *Martin* v. *Waddell*, decided at this term (*post*, p. 367). It was only in those states where the royal charters had been surrendered or forfeited to the crown, and in which no grants to flowed lands had been made (if any such there were), that they devolved on the state as a consequence of the revolution. That mud-flats were then held in private property, in every state of the Union, can hardly be doubted. If one was in this condition, it is enough for our purpose. In Massachusetts, they were all thus held. If Alabama came in "on the same footing" with Massachusetts; then all the mud-flats may be held in private property also in Alabama.

The stipulation in the ordinance of 1787, and which is repeated in the resolution admitting Alabama, guarantying to the new state equal rights with the old, referred to the politicial rights and sovereign capacities left to the old states, unimpaired by the constitution of the United States; and which were confirmed to them by that instrument. Whilst territories, the people inhabiting the *countries now composing the new states, were [*259 subject to the will of congress; unrestrained further than restrictions were imposed by the federal constitution; and by compact, where the lands had been ceded by an original state, or by treaty, when acquired from a foreign nation. The power of congress was, and now is, in the territories, almost absolute. From this power, the territory is withdrawn, to the same extent, on entering the Union, that the original states were exempt, when they formed the constitution; having equal capacities of self-government with the old states, and equal benefits under the constitution of the United States. This is the extent of the guarantee. That each and all of the states have sovereign power over their navigable waters, above and below the tide, no one doubts. And it is just as free from doubt, that the shores and banks

of such waters, and the mud-flats flowed by them, are the subject of private ownership. The property cannot be appropriated, to the obstruction or injury of the public use in the water, further than the state government permits; and if it is attempted, the obstruction may be abated as a nuisance. Whether the Bay of Mobile has been obstructed, is not a matter of inquiry; no one pretends that it has been: the question is, could the flat between high-water mark and the channel of the river be granted by the individual owner, the United States? That it could, is, I think, free from doubt; and that the act of 1824 is valid, and passed the title to the corporation of Mobile, unless the defendant's premises were excepted from the grant by the act. The first section vests in the mayor and aldermen all the lands between high-water mark and the channel of the river, in front of the city, that lie below North Boundary street and above Church street. From which general grant are excepted, by the second section, lots on which improvements had been made, lying east of Water street and fronting the water lots, during the Spanish government, lying west of Water street. The improved property was, by the act, vested in the proprietor or occupant of the lot fronting and opposite on the west of the street; or in the purchaser of the new lot from the owner of the old one.

That the improvement must have been on the eastern and new water lot, is, to my mind, plain, from the reading of the act; so it has been held by the courts of Alabama, as appears by the case *of *Pollard's heirs;* that this has been the construction of the act by the parties interested, is manifest, from all the controversies in regard to this property; and those at whose instance the act was passed are the best judges of its meaning. 12 Wheat. 200. The old lots were only referred to, to give locality to the new, in case of existing improvements east of Water street. If the proprietor (which means owner) of the old lot had improved on the flat in front of it, then he was entitled, by the act, to an equal width, extending to the channel of the river, as compensation for his improvement. The Fort Charlotte lots were sold to a company, and they improved, before 1824, in front of six of them; and sold to Charles L. Matthews, who continued improving in 1823 and 1824; and has occupied the premises since; and he and his tenants defend the suit. The property was valued, for the purpose of taxation, at $88,000 at the time of the trial; it was worth only $4000 in 1823, and it was proved the increased value resulted from the labor of Charles Matthews.

*260]

The circuit court charges the jury (amongst other charges), "that if the lot specified in the patents 10, 11, 12, &c., were proved to have been bounded by high-water mark, at the time of the purchase; then they came within the terms of lots known under the Spanish government as water lots, as used in the act of congress;" and if it was proved, that the lot claimed was east of Water street, and in front of the lots covered by the patents, and that it had been improved, before the passage of the act, it was vested in the proprietors and occupants of the lots held under the patents; and this, although Water street did intervene between the lots claimed and those held under the patents. The charge is deemed correct. The objection that the lands in front of the Fort Charlotte lots did not pass by the act of 1824, has nothing in it. The first and second sections refer to the same premises; the first covers all the lands between high-water mark and the channel of

the river, and lying between Church street to North Boundary streets; of this there can be no doubt; and the exceptions in the second section apply to every part of the grant, made by the first. On these grounds, the judgment should be affirmed.

Judgment affirmed.

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*The Mayor and Aldermen of the City of Mobile, Plaintiffs in error, *v.* William E. Hallett, Executor of Joshua Kennedy, deceased, Defendant in error. [*261

Land-titles in Alabama.

A grant by the Spanish government, confirmed by the United States, was made of a lot of ground in the city of Mobile, running from a certain boundary, eastwardly to the river Mobile; the land adjacent to this lot, and extending from high-water mark to the channel of the river, in front of the lot, was held by the grantee, as appurtenant to the fast land above high-water mark. The city of Mobile instituted an action to recover the same, asserting a title to it under the act of congress of 26th May 1824, granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals in the said city: *Held*, that this lot was within the exceptions of the act of 1824; and no right to the same was vested in the city of Mobile by the act.

Error to the Supreme Court of the state of Alabama.

The case was argued by *Test*, for the plaintiffs in error; and by *Key* and *Sergeant*, for the defendant in error.

McLean, Justice, delivered the opinion of the court.—This case is brought here by a writ of error from the supreme court of Alabama. The plaintiffs claim title under an act of congress, and the decision of the state court was against the title; which, under the 25th section of the judiciary act, gives jurisdiction to this court.

The plaintiffs brought their action of trespass to try the title to a lot of ground in the city of Mobile, bounded as follows—commencing at a point on St. Louis street, in said city, sixty-six feet west of the corner of St. Louis and Water streets, thence north 25° west, to the line dividing the Price claim from the Orange Grove claim, thence parallel with St. Louis street, eastwardly, to the channel of the river, thence along the channel of the river, to a point meeting the line formed by the extension of the northern boundary of St. Louis street, thence along the north boundary of St. Louis street, to the place of beginning; with certain specified exceptions.

*On the trial, the following bill of exceptions was taken: "This cause was tried at the Mobile circuit court, of April term, &c., and it was among other things, proved, that the premises, which were claimed under an act of congress, entitled 'an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city,' passed 26th May 1824, were situated north of St. Louis street, and were bounded on the west by high-water mark, and east by the channel of the river; and that the defendant was claimant, in possession, of the land lying immediately west, and which extended from some certain boundary, eastwardly, to the river, and which he held by a Spanish grant, confirmed by the United States. It was proved further, that in the year 1824, and at the time of passing the act, Water street terminated below St. Louis street; [*262

and that in front of the lands which it was proved the defendant possessed in the direction, Water street was not extended or established, nor was its future course of direction known, or in any way determined on. Whereupon, the court charged the jury, that "by the true construction of the act of congress, the corporation of Mobile are not entitled to the premises in question, because the defendant possessed, by grant originating from the Spanish government, the adjacent land extending to the river Mobile, and the claim of the corporation was for land immediately west of it, extending from high-water mark to the channel of the river, to which charge the plaintiffs excepted."

The first section of the act of 1824, vests in the mayor and aldermen of the city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the city, for ever, all the right and claim of the United States to all the lots, not sold or confirmed to individuals, either by that or any former act, and to which no equitable title existed in favor of an individual, under that or any other act, between high-water mark and the channel of the river, and between Church street and North Boundary street in front of the city. And the second section of the act, which relinquishes the claim of the United States to the proprietors of front lots certain water lots which they had improved, excepts from the operation of the law, cases "where the Spanish government had made a new grant, or order of survey for the same, during the time at which *they had the power to grant the same; in which case, the right and claim of the United States shall be and is hereby vested in the person to whom such alienation, grant or order of survey was made, or in his legal representative: provided, that nothing in the act contained shall be construed to affect the claim or claims, if any such there be, of any individual," &c.

*263]

From both sections of the above act, it will be perceived, that congress carefully guarded against any interference with existing rights. In the first section, lots sold or confirmed to individuals, either by that or any former act, to which an equitable title existed in favor of any individual, were excepted from the operation of the act; and the proviso to the second section declares, that the act shall not be so constructed as to affect the claims of any individual. From the bill of exceptions, it appears, that the defendant was in possession of the land in controversy, under a Spanish grant, which was confirmed by the United States; and that the land extended to the Mobile river. It was, then, within the exception in the act of 1824, and no right vested in the plaintiffs. We think, therefore, that the instruction of the circuit court, to this effect, was right. The judgment of the circuit court was affirmed by the supreme court of Alabama, and we affirm the judgment of the latter court.

Catron, Justice. (*Dissenting.*)—I dissent from the principal opinion, on several grounds. It is impossible for me to ascertain frem the few facts stated in the record, whether the land in controversy lies in front of the city of Mobile, as it existed in 1824. It is quite probable, it lies north of any established street running west from the bay, at date of the act of congress under which the corporation claims; and it is clear, that such street is the limit of grant on the north, as it calls for North Boundary street;" and it is an admitted fact, that no street bearing this name existed in 1824. It

was incumbent on the corporation, as plaintiffs, to prove that their grant included the premises sued for, to authorize a recovery on the strength of their own title; as they could not rely upon the weakness of that of their adversary. Until this was done, the validity of the statute of the United States could not be drawn in question in *the state court. It must [*264 appear upon the face of the record: 1st, that such a question might have arisen; 2d, that it was actually made; and 3d, that it was decided. For the rule, I refer to the case of *Armstrong* v. *Treasurer of Athens County*, decided at this term (*post*, p. 281). Suppose, it appeared by the record, that the land lay miles above the city as it existed in 1824, and yet the state court had seen proper to declare that the act of congress was void; could this court take jurisdiction to examine and reverse the state decision? I think not! No question on the validity of the act could, in such case, have been properly raised or decided; because the act of congress had no application to the premises sued for. It rested on the plaintiffs in error to show, in the bill of exceptions, the facts that could give rise to the question; we cannot infer the facts, to give this court jurisdiction under the 25th section of the act of 1789. If it be true, that the making such a question at the bar, and its decision by the state court, gives jurisdiction to this court, then the validity of this act of congress may be drawn in question in any case when the state court sees proper to give an abstract opinion in regard to it.

It is supposed, the description of the premises in the declaration, can be referred to in this case, to aid the bill of exceptions; which in itself is not pretended to be sufficient to raise the question on the validity of the act of congress. The declaration is allegation, not proof. It is not referred to by the exceptions; no fact stated in it is recognised as proved by the court. The bill of exceptions states, that the plaintiffs claimed under the act of 1824; that the premises claimed by plaintiffs were north of St. Louis street, were bounded on the west by high-water mark, and east by the channel of the river; and that the defendant was claimant in possession of the land lying immediately west, and which extended eastwardly to the river: and which he held under a Spanish grant; and that Water street, in 1824, did not extend so far north as the front of the land claimed by defendant; and this is all it states. I deem it wholly inadmissible, in this court, to assume jurisdiction under the 25th section, by inference. But if it could, I should infer, rather, that the land in dispute lay north of the front of the city, when the grant *was made, than the reverse, because Water street did not extend [*265 so far north at that time.

2. If the premises are situate south of North Boundary street, as it existed in 1824, then, I have no doubt, the corporation took title, by virtue of the act of that year; notwithstanding that the land of the defendant's testator, Kennedy, fronted on the shore of the river, and was bounded by the high-water mark. The Mobile bay is an arm of the sea, where the tide flows and reflows, and is part of the ocean; and is navigable in the sense of the term as applicable to such waters. The shores between the high and low-water marks belonged to the king of Spain, and passed to the United States by our treaty with France, in 1803, as the king of Spain held them; unless they had been granted by the king, before the cession to France, or, at least, before they were ceded to the United States, in 1803. In regard

to title, no difference exists between the high lands, and those flowed by the tide. The act of 1824 granted the lands between ordinary high-water mark and the channel of the river, to the corporation of Mobile. The bill of exceptions, in effect, states, "that the defendant was claimant in possession of land lying immediately west of the land sued for; that his claim extended to the river, and lay west of it; and that the lands of the plaintiffs were bounded on the west by the high-water mark, and extended east to the channel of the river." So that the high-water mark is the common boundary between the grants.

I concur with my brethren of the majority, that if the defendant was in possession of the land in controversy, under a confirmed Spanish grant, that then such Spanish grant is excepted from the act of 1824; and that this is the true construction of the act, as this court held in *Pollard's Heirs* v. *Kibbé:* and it matters not when the Spanish grant was made, so that it was before Spain surrendered the country to the United States, for although such grant was void, still the act of 1824 intended to except it. This is the settled doctrine of the court on the construction of the act. But my brethren and myself differ as to the fact; we cannot go out of the record; and this explicitly states that the eastern boundary of the defendant's land was the western boundary of that sued for by the plaintiffs; and it is almost the only explicit *statement in the bill of exceptions. The case did not *266] turn in the courts below on a conflict of boundary; but, obviously, on the grounds assumed in the case of the same plaintiffs against Eslava, as will be seen hereafter.

As no right to the soil below high-water mark was claimed for the defendant, further discussion on this point might be dispensed with: yet, as the New Jersey case of *Martin* v. *Waddell* has just been argued for the third time in his court, and the doctrine of riparian rights was very fully presented, and as authorities are at hand, a slight reference to them will be made. A primary rule of construction (according to the English common law), as applicable to grants of lands made by the government to individuals, when they front on the shores of tide-waters, is, that they go no farther than ordinary high-water mark; and if the grant extends over the tide-water, taking the high land on both sides, the land under water does not pass by the ordinary terms of grant, applicable to high lands; because the soil under tide-waters is a public sovereign right, and an estate to itself, in the sovereign, held in trust for the public use, separate from the high land. This is the settled doctrine in England, as will be seen by the case of the *Royal Fishery of the Banne*, in 8 James I., reported by Sir John Davies 149; and by Angel, in his Treatise on Tide-waters, App'x, 35, ed. of 1826. The case was recognised as sound law by the court of king's bench, in *Carter* v. *Murcot,* 4 Burr. 2162, in which it is said, "That navigable rivers, or arms of the sea, belong to the crown, and not like private rivers, to the land-owners on each side: and therefore, the presumption lies the contrary way in the one case, faom what it does in the other. Here, indeed, it lies, *primâ facie*, on the side of the king and the public." "The case of the Royal Salmon Fishery in the river Banne, in Sir John Davies' Reports, is agreeable to this; and it is a very good case." The same doctrine has been maintained in Massachusetts, as will be seen by the case of *Storer* v. *Freeman*, 6 Mass. 435. In that state, a local peculiarity exists which is explained by the court.

So in New York. *Palmer* v. *Hicks*, 6 Johns. 133; *Mayor, &c. of New York* v. *Scott*, 1 Caines 543. And in many subsequent cases, this rule of construction is recognised.

*I understand the same rule to apply, by force of the laws of Spain, to the Spanish grant under which the defendant Hallett claims. So the supreme court of Alabama held, in *Hagan* v. *Campbell*, 8 Porter 1, 24. And see *Mayor, &c. of Mobile* v. *Eslava*, opinion of supreme court of Alabama. And I feel disinclined on this point to look beyond the decisions of the state court of Alabama; if power to look beyond it exists in this court, on this particular point, which I doubt. [*267

The defendant having no right of soil to the premises sued for, the next inquiry is, could congress grant the land below high-water mark? That the United States acquired the right of soil from France, by the treaty of 1803, is not open to question; and that a mud-flat flowed by tide-water is the subject of grant by the government to an individual, I think, cannot well be doubted by any one acquainted with the southern country; when such valuable portions of it are mud-flats, in the constant course of reclamation. That the king of England could so grant in the American colonies, and that the states of this Union, where the rights of soil are governed by the common law, can thus grant, is not an open question. The city of New York, by the king's charter of 1730, and by legislative acts of the state, holds a large body of land in and about the city that was formerly entirely below high-water mark, and that is but slightly reclaimed at this day; as will be seen by 1 Kent's Com. 7, 85.

And I understand it to be the settled doctrine in Alabama, that the United States has power to grant the lands from high-water mark to the channel of the river Mobile, previous to the formation of the state constitution. So the supreme court of that state held, in *Hagan* v. *Campbell*, above cited. But the ground assumed by that court, amongst others, is, that by the adoption of the state constitution, and its acceptance by congress, the right of soil to all lands flowed by tides passed to the state government by implication, as an incident to the state sovereignty. And on the same principle was the present cause decided by that court; for they certify in the record before us, "that the opinion delivered in the case of the *Mayor, &c. of Mobile* v. *Eslava*, at this term, is decisive of the present. The consequence is, that the *judgment of the circuit court is free from error, and must be affirmed." [*268

The case of the *Mayor, &c.* v. *Eslava*, has been before us this term, and I refer to my opinion in it, for the reasons why I supposed the supreme court of Alabama mistaken, when they declared the act of congress void. Assuming that the act of 1824 covered the land in controversy, then, I am of opinion, that the supreme court of Alabama erred, by declaring it invalid; and that the judgment ought to be reversed.

Judgment affirmed.

*Charles Kelsey and Charles McIntyre, Appellants, *v.* Alfred M. Hobby and Thomas P. Bond, Complainants.

Partnership accounts.—Jurisdiction of equity.—Proceedings to account. Release.

On the dissolution of a partnership, in 1822, it was agreed with the out-going partners, H. and B., that the debts due to the partnership should be collected by the remaining partners, K. and McI., and the debts due by the partnership should be paid by them, and a fixed sum should be paid to H. and B., when a sufficient sum was collected for that purpose, beyond the amount of the debts due by the firm. In 1829, K. and McI. having gone on, under this agreement, to collect the debts due to, and pay the debts due by, the partnership, H. and B. filed a bill in the circuit court of the South Carolina district, against K. and McI., charging that there was a surplus of the partnership effects, after paying all the debts, sufficient to pay them the sum which, by the agreement made on the dissolution of the partnership, was to be paid to them, and claiming certain Bridge bills, which were to be delivered to them; and praying for an account. The circuit court, after proceeding in the case, the accounts having been frequently before a master, and after evidence had been taken, made a decree in favor of H. and B., for a certain sum of money, &c., and the defendants appealed to the supreme court. It was contended by the appellants. that the circuit court, sitting in chancery, had no jurisdiction beyond that of compelling a discovery of the amount which K. and McI. had received under the agreement; and that if anything was found due to H. and B., they were bound to resort to their action at law, on the covenant, entered into at the dissolution of the partnership, to recover it. This is a clear case for relief, as well as for discovery, in chancery; H. and B. were entitled to an account; and if, upon that account, anything was found to be due to them, they were, upon well-settled chancery principles, entitled to relief also.

According to the ordinary proceedings of a court of chancery, the court should pass upon each item of an account reported by a master, when the amount actually received by a party is in controversy; this is necessary to enable the appellate court to pass its judgment on the items allowed, or disallowed, in the inferior court. But in a case where the remaining partners had received the sum claimed from them, beyond the debts they had agreed to pay, it mattered not how much more they had received; and such a case does not require a statement of the exact amount; the evidence, and accounts, and exceptions, being all in the record brought into the appellate court, the court can determine whether the sum mentioned is proved to have been collected or not.

During the pendency of the suit in the chancery in the circuit court of South Carolina, one of the complainants, H., being in New York where he had gone on other matters than those connected with the suit, was arrested by the defendant, in a suit at common law, for a claim which was in controversy in the suit in chancery; and which could have been adjusted in the chancery suit; and was required to give special bail for his appearance to the suit before a court in New York. Much difficulty arose in procuring special bail; and having called at the counting-house of K., one of the *plaintiffs in the suit, on the subject of the suit, *270] he there executed a release of all claims in the chancery suit, and acknowledged accounts presented to him to be correct, by which the claims in the chancery suit in South Carolina were admitted to be adjusted; the suit at common law was then discontinued. The defendants in the circuit court of South Carolina afterwards filed the release, and moved to dismiss the bill; which motion was opposed, on the ground that the release was obtained by duress; the parties went on to take testimony as to the circumstances under which the release was given: *Held*, that there could be no objection taken to the introduction of the release in this form, under the circumstances of the case. The release having been admitted without exception, no objection could afterwards be made to the manner in which it was introduced; it had the same effect that it would have had upon a cross-bill, or supplemental answer; and the complainant had the same opportunity af impeaching it.

There is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice; unless they are required by some fixed principles of equity law or practice, which the court would not be at liberty to disregard.

If the accounts between the parties are impeached, and a release has been obtained, executed by one of the parties, in a case depending before a court of chancery, the release will not prevent

the court from looking into the settlements; and the release in such a case is entitled to no greater force in a court of equity, than the settlement of the account on which it was given.

If a release is executed, and a settlement is made, of a particular item in an account for which suit has been brought, and in which the party has been arrested, the settlement having been confined to the claim for the damages for which the suit was brought, the mere circumstance of the defendant being detained by the process issued to recover the amount claimed, would be no objection to the validity of the agreement and release. But if, while under detention, for want of special bail, are lease was obtained of other matters than those embraced in the suit, and much more important in amount, and which had been insisted on for years, in the suit previously instituted, then in the course of proceeding; neither the circumstances under which the release was taken, and the account connected with it settled, nor the contents of the papers, entitle them to any consideration in a court of equity.

Appeal from the Circuit Court for the district of South Carolina.

This case was argued by *Coxe* and *Wood*, for the appellants; and by *Legaré*, for the appellees.

Taney, Ch. J., delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of South Carolina. It appears from the record, that Kelsey, McIntyre and Hobby, for some time previous to the 9th of February 1822, carried on *business in Georgia, as merchants, under the firm of C. Kelsey & Company; and it having been agreed among the partners that Hobby should withdraw from the firm, they, on the day above mentioned, entered into the following agreement: [*271

"Articles of agreement, entered into, at the dissolution of the firm of C. Kelsey & Company, between Alfred M. Hobby, of the first part, and Charles Kelsey and Charles McIntyre, of the second part, witnesseth, that the said Alfred M. Hobby doth agree to withdraw from the said firm, upon the following conditions, viz: that the said parties of the second part are to take upon themselves the entire settlement of the business of the said firm, and are to pay to the said A. M. Hobby, after the debts of the said firm are all paid and discharged, and a sufficient sum collected out of the debts now due to the said firm, $5500, and in Bridge bills, whenever he shall demand them, $1130. And the said A. M. Hobby, for said consideration of the above sums of money to be paid, and the further sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, hath relinquished, and by these presents doth transfer, to the said parties of the second part, all his interest or claims of whatever nature he has, or may have, as partner in the said firm. It is also stipulated and agreed, that the said A. M. Hobby, of the first part, in consideration as above specified, is to protect the said parties of the second part, from a certain judgment obtained against said firm by the branch of the United States Bank, in this city, and to hold them harmless from any balance, should there be any due, after the conclusio of the settlement between John McKinnie and Thomas Gardner, respecting the said judgment. And for the faithful discharge of this agreement, we bind ourselves, our heirs, executors, administrators or assigns."

At the time this agreement was executed, an inventory was taken of the assets and debts of the firm, by which it appeared, that the goods and property on hand, together with the debts due to the partnership, were estimated at $38,164.96; and that the debts due from it amounted to $26,057.91, and that this schedule formed the basis of the agreement.

*In November 1829, Hobby filed his bill against Kelsey and McIntyre, charging that there was a surplus of partnership effects, after paying all the debts, sufficient to satisfy the $5500 mentioned in the contract, as well as the Bridge bills, and praying an account. These Bridge bills were notes issued by a company who had built a bridge, in the state of Georgia; and these notes circulated as money, but at a heavy discount.

On the 7th of February 1830, McIntyre put in his separate answer, in which he denied that the assets of the partnership produced the surplus charged by the complainant; and exhibited an account according to which the funds of the partnership realized only $29,580.83, and the debts paid amounted to $28,874.66; and he insisted, that large sums were also paid by them for interest on the debts of the firm, and heavy expenses incurred, which were not introdnced into this account, but for which Kelsey and McIntyre ought to be allowed credit; and that when these sums were added, they would amount to considerably more than had been collected; and that in addition to this, they are entitled to an allowance of two and a half per cent. on all sums collected and paid by them. He also averred, that Hobby did not perform his part of the agreement, and that an execution was afterwards issued by the branch of the United States Bank, and the goods of Kelsey and McIntyre seized for the debt against which Hobby had convenanted to save them harmless; and that by reason of that execution and seizure, they were put to great expense, and were seriously injured in their credit, and embarrassed in their business as merchants; and insisted, that they were absolved from their agreement, by the failure of Hobby to perform his part. The answer further stated, that although Kelsey and McIntyre denied the right of the complainant to the Bridge bills he claimed, yet they were willing to give him an order for them, on the attorney in whose hands they had been placed for suit, and who had prosecuted the claim to judgment. That the respondent had always been ready to account with the complainant, Hobby, and to deliver him these bills, but that no demand was made until this suit was about to be instituted.

*273] *Kelsey, the other respondent, had removed to New York, a short time before the bill was filed, and his answer was not put in until January 10th, 1838. This answer is in substance the same with that of McIntyre, to which it refers.

There was a general replication to these answers, and the accounts referred to a master, by order of the court; when his report came in, many exceptions were filed to it on both sides; and upon hearing, the court set aside the report, and returned it again to the master, with directions as to the principles on which it was to be stated. A good deal of testimony was taken on both sides, and the master made a second report, at April term 1839, according to which the respondents had paid $2031.05, beyond the assets which came to their hands. Many exceptions were again filed on both sides to this report, and it was by order of the court again returned to the master with directions to take further proof as to one of the items in controversy.

In the latter end of August 1839, while the accounts were pending before the master, as herein before mentioned, Hobby went to New York, where Kelsey resided and was carrying on business; and a few days after he arrived there, he was arrested at the suit of Kelsey and McIntyre, upon a

claim for $4000 as damages for not having saved them harmless against the debt due the branch Bank of the United States, according to his covenant in the agreement herein before mentioned. It seems, that Kelsey was advised by his counsel, in New York, that this claim could not be allowed him in the chancery suit, because the damages were unliquidated. Being a stranger in the city, he found difficulty in procuring special bail; but an acquaintance, whom he had occasionally met in society, and to whom he applied, entered into a bail-bond to the sheriff, conditioned that he would appear to the suit and put in special bail within twenty days after the fourth of September then next ensuing; Hobby assuring him, that he expected some of his southern friends to be in New York, in a few days, and that he would then be able to relieve him. The party who thus became his surety informed Hobby, in the presence of the officer in whose custody he was, that he could not justify as special bail; and he was not, therefore, *accepted as surety in the bond, until the officer consulted Kelsey's counsel and received his consent. [*274

The southern friends, of whom Hobby spoke, when they arrived, offered to become his special bail, but not living in the state of New York, they could not be taken, without the consent of Kelsey. And Hobby remained in New York, unable to procure special bail, until the 6th of September, when he signed an admission of the correctness of an account concerning the whole controversy in the circuit court, which had been prepared some time before by one of Kelsey's clerks. According to this account, Kelsey and McIntyre had paid $15,859.73, under the agreement with Hobby, beyond the amount of the partnership funds that came to their hands. And at the same time that he signed the account, he executed the following release:

Account of C. Kelsey and Company with the old concern of C. Kelsey and Company. United States, South Corolina District. Being Sixth District, United States.

A. M. Hobby and Thomas C. Bond,
v.
Charles Kelsey and Charles McIntyre,
} Now pending before said Court in Chancery.

In this case, the parties, Alfred M. Hobby and Charles Kelsey have come together, and examined the subject-matters in dispute, and they find the within account correct, and it is hereby admitted to be correct, and every entry in it. And they do not deem it just or equitable that said suit should be further prosecuted. And in consideration of the premises, and one dollar paid, the parties in said suit hereby discharge each other from all demand in the same. And each party releases and discharges the other from all demand, of every name and nature, and agree that the said suit should be discontinued. As witness our hands and seals, this sixth day of September, 1839.

A. M. Hobby. [L. s.]
C. Kelsey. [L. s.]

Witness to the signatures and seals of A. M. Hobby and C. Kelsey—
Geo. H. Kelsey.
B. A. Hegemon.

*This release was attached to the account settled at the same time; and a letter written by Hobby to his counsel, and shown to Kelsey, [*275

stating that they had come to a settlement, and directing the suit in chancery to be discontinued ; and Hobby was, thereupon, discharged from the arrest, and shortly afterwards left New York.

On the 8th of January 1840, the release and settlement above mentioned were produced in court by the solicitors for the respondents, and a motion thereupon made to dismiss the bill. This motion was resisted on the part of the complainant, but the particular grounds upon which it was objected to are not set forth. The order of the court merely states that the release was impeached by the complainant's counsel, and authorizes both parties to take testimony in regard to the settlement and release. Under this order, sundry depositions were taken and returned on the part of the complainant, to show that the settlement and release were without consideration, and that they were extorted from him by the arrest under which he was detained in New York ; his southern friends and acquaintances being refused as bail, because they did not reside in the state, and he being unable to leave the city, until the temporary bail he had procured was discharged. And sundry depositions were also taken and returned on the part of Kelsey, to show that there was no hardness or oppression on his part, and no undue advantage taken of Hobby ; and that the settlement and release were freely and voluntarily made.

The case came on for final hearing, on the 30th of May 1840, upon the report of the master, and the exceptions filed to it on both sides. The report, which stated as before, a balance of $2031.95 in favor of Kelsey and McIntyre, for payments and allowances made to them, over and above the sums realized by them from the partnership effects, was set aside by the court ; and upon the testimony in the cause, the court proceeded to pass a decree in favor of the complainant, for $5500 with interest, and for the Bridge bills mentioned in the agreement, and allowing to the respondents a set-off of $300, for the damages sustained by reason of the execution issued against them by the branch Bank of the United States, as *herein before stated. From this decree, the respondents appealed to this court.

*276]

This statement of the facts in the case may appear to be tedious ; but from the nature of the proceedings, it is necessary, in order to show how the points arose which were made in the argument in this court.

The appellants contend, that the court of chancery had no jurisdiction beyond that of compelling a discovery of the amount which Kelsey and McIntyre had received under the agreement ; and that if anything was found due from them to Hobby, he was bound to resort to his action at law, on the covenant, in order to recover it. But the court think it was a very clear case for relief, as well as discovery in chancery. It is true, he had ceased to be a partner, but the appellants had received the assets of the partnership, upon a trust that they would collect them, and pay the debts, for which Hobby was liable as well as themselves ; and would pay over to him the sum before mentioned, as soon as they collected enough for that purpose, after the payment of debts. He was, therefore, entitled to an account ; and if, upon that account anything was found due to him, he was, upon well-settled chancery principles, entitled to relief also.

Neither can the objection be sustained, as to the mode in which the amount due was acertained. It is true, that according to the ordinary mode

of proceeding in courts of equity, instead of setting aside the report of the master, the court should have passed its judgment upon each of the exceptions, or have remanded the account to the auditor with additional directions as to the principles upon which it was to be stated. And if it had been necessary to ascertain precisely the amount which the appellants had collected over and above the debts they had paid, the proceeding adopted by the court would have been liable to the objections urged against it. For the decree could not in that case have been reviewed in the appellate court, and the exact balance ascertained ; unless the record showed what items were allowed and what disallowed in the inferior court. But this is not a case of that description. If the appellants had received the sum claimed by Hobby, beyond the amount of debts paid, it mattered not how much more they had received ; and the case did not require a statement of the exact amount. And as the evidence, *and accounts, and exceptions, are all in the record, this court can determine whether the sum mentioned is proved to have been collected or not. And if it appears to have been received, the decree must be affirmed ; even although it may happen that items allowed by the circuit court are disallowed here ; or items disallowed by that court are determined here to be correct and properly chargeable. And as all the testimony is before us, and the exceptions show all of the disputed items, neither party can be taken by surprise. [*277

It would extend this opinion to a most unreasonable length, if the court were to enter upon a particular and detailed examination of the various disputed items, and of the testimony and calculations relied on by the parties to support their respective claims. Fourteen exceptions were taken to the auditor's report by the complainants, and six by the defendants ; and the evidence upon which they depend is voluminous. Four of them require a particular examination and comparison of different accounts, in order to arrive at a just conclusion. We have looked into the whole testimony very carefully, and unless the release and settlement in New York is to be regarded as conclusive, we are satisfied, that Kelsey and McIntyre have received from the partnership assets, beyond the amount paid for debts, a larger sum than that decreed against them by the circuit court.

This brings us to examine the release, and the account stated at the time it was given. Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill ; and it is said, that being executed while the suit was pending, and after the answers were in, and the accounts before the master, it should have been brought before the court by a cross-bill or supplemental answer, and could not, in that stage of the proceedings, be noticed by the court in any other way. It is a sufficient answer to this objection, to say, that it was admitted in evidence without exception, and both parties treated it as properly in the cause ; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental *answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice ; unless they are required by some fixed [*278

principles of equity law or practice, which the court would not be at liberty to disregard.

The release and account being, therefore, regularly before the court, we proceed to inquire into their legal effect, and the degree of weight to which they are entitled. The effect of a release, executed in consideration of the settlements of accounts between the parties is clearly stated in Story's Equity Pleadings, p. 529, § 685. If the account is impeached, the release will not prevent the court from looking into the settlement; and the release in such a case is entitled to no greater force in a court of equity than the settlement of the account upon which it was given. In the case before us, the settlement of the account was the only consideration for the release. The complainant, who resides in Georgia, and who had gone to New York upon business, was unexpectedly arrested for a claim which was then pending between the same parties in the circuit court of the United States for the district of South Carolina. The suit was brought for damages alleged to have been sustained by the failure of Hobby to indemnify the appellants against the claims of the branch Bank of the United States herein before mentioned. It is true, that the plaintiffs in the suit were advised by counsel, that they could not be allowed for these damages in the proceeding in equity, because they were unliquidated; and they ought not, therefore, to be held accountable for that error. Yet it is very clear, that the suit should not have been brought; because these damages formed one of the items in controversy between the parties in the suit in chancery, which had been so long pending between them. And that court had not only jurisdiction over the subject, but it was bound to ascertain and allow them, before it could adjust the account, and grant the relief to which the complainant was entitled. The mode by which a court of chancery ascertains the amount, in cases of that description, is either by a reference to the master, or by sending an issue of *quantum damnificatus* to be tried by a jury. The cases upon this subject are collected and arranged in 2 Story's Com. on Equity, ch. 19, p. 104. *And the damages in question were in fact ascertained by the court, and deducted from the amount due to Hobby, in the decree now under examination. But, nevertheless, as Kelsey, in this respect, acted by the advise of his counsel, if the settlement which afterwards took place had been confined to the claim he was seeking to enforce, the agreement between the parties to fix the damages at any particular amount, would have bound Hobby, unless it was evidently unreasonable and exorbitant; or he could prove it was obtained by improper means. The mere circumstance of his being detained in New York, by reason of the process issued to recover the amount claimed, would be no objection to the validity of the agreement. But while Hobby was detained in the manner before stated, and unable to procure special bail, Kelsey obtained from him a release of matters not embraced in this suit, and much more important in amount; and which Hobby had been insisting on for years, and for which he was prosecuting a suit in the circuit court. Neither the circumstances under which the release was taken, and the account connected with it settled, nor the contents of these papers, can entitle them to weight in a court of equity. There is no evidence of any negotiations between the parties respecting this arrangement, previous to the interview at which these papers were signed. Upon that occasion, one of the clerks of Kelsey was present. He is one of

*279]

the witnesses to the release. He does not say, who proposed a settlement, but he states, that the account admitted by Hobby had been prepared, a long time before, by one of Mr. Kelsey's clerks; that the examination of the account did not take more than ten minutes. And the interview, at which it was acknowledged and signed, and the release executed, and a letter written by Hobby to his counsel in South Carolina to discontinue the suit against Kelsey and McIntyre, did not last more than an hour. This is the testimony of the witness. No books or papers appear to have been produced, or to have been in the city of New York, at the time, in the possession of either party, except the account produced by Kelsey, and signed by him and Hobby. And yet the release states that the parties had "come together and examined the subject-matters in dispute," and found that account correct; and thereby "admitted it to be correct, and every entry in it." And the account too which is thus admitted, contains *items [*280
for "exchange paid," "loss by discount on money received in collection of the partnership debts," "rent for counting room," travelling expenses, postage, clerk-hire, incidental expenses, and sundry others which would have required much time to examine, and the production of many vouchers, before Hobby could have known whether they were correct or not. The account in important particulars differs from the one on which Kelsey and McIntyre had themselves relied in the circuit court of South Carolina; and is more unfavorable to Hobby, by about $20,000, than the one which Hobby had been so long insisting on in his suit.

Such an account and release, executed under such circumstances, are not entitled to the consideration and weight which belongs to instruments freely executed, and with opportunities of knowledge and examination. So far from strengthening the claim of the appellants, they, in the judgment of the court, are calculated rather to bring suspicion upon them. They certainly cannot outweigh the testimony taken in the chancery proceedings; and the decree of the circuit court is, therefore, affirmed.

Decree affirmed.

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*Thomas Armstrong and others, Plaintiffs in error, *v.* The Treasurer of Athens County, Defendant in error. [*281

Error to state court.

An act was passed by the legislature, in 1840, by which certain lands held under conveyances from the president and trustees of the Ohio University, at Athens, were directed to be assessed and taxed for county and state purposes. A bill was filed by the purchasers of the land, against the tax-collector, praying that he should be perpetually enjoined from enforcing the payment of the taxes, because the lands had been exempted by a statute of Ohio, of 1804; which, the bill alleged, entered into the conditions of sale, under which the complainants held the land; it was insisted, that the act of 1840 violated the contract with the purchasers, and was void, being contrary to the clause of the constitution of the United States which prohibits the states from passing any law violating the obligation of contracts; the supreme court of Ohio dismissed the bill of the complainants. The ordinance of 1787, by which a large section of country in Ohio was sold to a company, gave two complete townships of land for the purposes of a university; in 1804, an act of the legislature of Ohio established the University, on the foundation of the fund granted by congress, and vested the land in the corporation of the university; the act directed the manner in which the land was to be leased, reserving rent to the corporation; and the 17th section directed, that the land appropriated and vested by the act, should be exempted from all state taxes. In 1826, the legislature authorized all the

University land, not incumbered with leases, or which had not been re-entered by the trustees of the University, or to which they had regained their title, to be sold in fee-simple, for the benefit of the University; the complainants purchased the land held by them, under this statute, and took deeds in fee; no exemption from taxes being contained in the statute, nor in their deeds: *Held*, that the lands having been purchased under the act of 1826, and not being held under the act of 1804, were subject to taxation; all the purchasers held under the act of 1826, and cannot go behind it; and their lands are subject, like other persons, to be taxed by the state.

The case of the state of New Jersey *v.* Wilson, 7 Cranch 164, cited and affirmed. In that case, the land had, for a sufficient consideration, been given by the state to a certain Indian tribe, and was declared to be for ever exempt from taxes. The Indians, with the consent of the state, sold the land, and the purchaser of the Indian title obtained the land, with the exemption from taxes granted by the state.

In order to give this court jurisdiction, under the 25th section of the judiciary act of 1789, which authorizes the removal of a case by writ of error or appeal from the highest court of a state to the supreme court of the United States, in certain cases, it must appear on the record itself, to be one of cases enumerated in that section, and nothing out of the record certified to this court can be taken into consideration.

This must be shown:—1st. Either by express averment, or by necessary intendment in the pleadings in the case; or, 2d. By the directions given by the court, and stated in the exceptions; or, 3d. When the proceedings are according to the law of Louisiana, by the statement of facts, and of the decision, as is usually made in such cases by the court; or, *4th. It
*282] must be entered on the record of the proceedings of the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by order of the court, or by the presiding judge, by order of the court, and certified by the clerk as part of the record in the state court; or, 5th. In proceedings in equity, it may be stated in the body of the final decree of the state court, from which the appeal is taken to this court; or, 6th. It must appear from the record, that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed, without deciding it.

Armstrong *v.* Athens County, 10 Ohio 235, affirmed.

Error to the Supreme Court of the state of Ohio. A bill was filed in the court of common pleas of the county of Athens, in the state of Ohio, by Thomas Armstrong and others, stating that they were seised in fee of certain lands purchased by them from the president and trustees of the Ohio University, in pursuance of the provisions of an act of the assembly of the state of Ohio, entitled "an act authorizing the trustees of the Ohio University, to dispose of certain lands," passed February 4th, 1826. The lands were situated within the two townships granted by congress, within the bounds of the Ohio Company's purchase, for the endowment of a university. By the 17th section of the act of the assembly of Ohio, passed February 1804, entitled, "an act establishing a University in the town of Athens," it is declared, "that the lands in the two townships aforesaid, with the buildings which are or may be erected thereon, shall be for ever exempt from all state taxes." The bill asserted, that the lands were purchased from the president and trustees of the University, in the full faith and confidence, that the same would remain for ever and exempt from all taxes for state purposes. The bill further represented, that notwithstanding the declaration contained in the act of February 18th, 1804, in pursuance of the provisions of an act of the assembly of Ohio, passed on the 21st of March 1840, entitled "an act to amend an act authorizing the trustees of the Ohio University to dispose of certain lands, passed February 4th, 1826," the several tracts of land belonging to the complainants had been appraised by the

assessor of Athens county, and placed on the duplicate for taxation, by the auditor of the county, and taxes for state and county purposes had been assessed on the said lands. The tax duplicates had been placed *in the hands of a collector, and they had been called upon to pay the [*283 same. The bill prayed for an answer, and for a perpetual injunction from further proceedings to collect the said taxes; and for further and other relief.

By the ordinance of congress of 1787, under which a large body of land was sold to a company, two townships of land were reserved for the purposes of a university; and in 1804, the legislature of Ohio established a university at Athens, appropriating to it these two townships of land. By this act, the land was to be leased out for ninety-nine years, the rents to be pain to the University; and the land was declared to be exempted from all state taxes. In 1826, the legislature of Ohio authorized all the land belonging to the University to be sold in fee-simple; and nothing was stated in this act, exempting the land to be sold from taxes. The appellants purchased the land from the University, sold under the authority of this law.

The treasurer of Athens county appeared and answered the bill, and admitted all the facts stated in it, and also that he intended to collect the taxes assessed on the land; asserting that he had a right to do so by virtue of an act of the general assembly of Ohio, passed 21st March 1840, in connection with other general laws of Ohio defining the duties of treasurer; which said act, and other further acts, he set up as a defence to the complainant's bill.

At the October term of the court of common pleas, the injunction which had been granted on the filing of this bill, was made perpetual. The defendant appealed to the supreme court, and the decree of the court of common pleas was, at the December term 1840, reversed; and the complainants were adjudged to pay costs.

In the record of the proceedings of the supreme court of Ohio, was the following certificate: "I do hereby certify, that in the above-named case, there was drawn in question the validity of the statute of the state of Ohio, passed on the 21st day of March 1840, entitled 'an act to amend the act, authorizing the trustees of the Ohio University to dispose of certain lands, passed July 4th, 1826, on the ground that it was repugnant to the constitution of the United States, and *that the decision of the court was in favor of the validity of said statute. [*284

EBEN LANE,
Chief Judge of the Supreme Court of Ohio."

From the decree of the supreme court of Ohio, the complainants appealed to the supreme court of the United States.

The case was submitted to the court, on a printed argument, by *Ewing*, for the appellants. No counsel appeared for the appellees.

Ewing, in the printed argument, stpted, that the act of the 18th of February 1804, expressly declares, that these lands "shall for ever be exempted from state taxes." This exemption is not limited to the duration of the particular tenure by which they were at first held, but the exemption was of the land and the improvements upon it for ever. The act of February 4th, 1826, authorizing the sale, does not, directly or indirectly, with

draw that exemption, or declare that it shall not attach to the land after sale. It was exempt for ever, when it was offered for sale ; and passed, with this exemption, into the hands of the purchaser. It was his, charged with the burdens, and favored with the privileges, which attached to it, under the several laws and parts of laws then in force respecting it ; and those laws formed part and parcel of his contract. The law of 1840, subsequently passed, changing those laws, to his injury, was a violation of his contract, contrary to the constitution of the United States, and therefore void. The case of the state of *New Jersey* v. *Wilson*, 7 Cranch 164, is in point ; there is nothing to distinguish the two cases from each other.

CATRON, Justice, delivered the opinion of the court.—This is a writ of error from a state court ; and it has become the duty of this court, before proceeding to examine the merits of the controversy, to determine whether jurisdiction over it is conferred by the 25th section of the judiciary act of 1789. It is true, no question upon that subject was raised in the argument presented for the appellant (the respondent having no counsel) ; but it has been the uniform practice of this court, in every case of this description, to ascertain, in the first instance, *whether the record presented a case
*285] in which we were authorized by law to revise the judgment or decree of a state court. And this question has so often arisen, and parties have been so frequently subjected to unnecessary expense in bringing causes here, in which a writ of error or appeal to this court would not lie, that we have thought this a fit occasion to state the principles upon which the court have constantly acted, and which may now be regarded as the law of the court.

In order to give this court jurisdiction, under the 25th section of the act of 1789, it must appear on the record itself, to be one of the cases enumerated in that section : and nothing out of the record certified to this court can be taken into consideration. This must be shown : 1st. Either by express averment, or by necessary intendment in the pleadings in the case : or 2d. By the direction given by the court, and stated in the exception : or 3d. When the proceeding is according to the law of Louisiana, by the statement of facts, and of the decision, as usually made in such cases by the court : or 4th. It must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided ; and this entry must appear to have been made by the order of the court, or by the presiding judge, by order of the court, and certified by the clerk, as a part of the record in the state court : or 5th. In proceedings in equity, it may be stated in the body of the final decree of the state court from which the appeal is taken to this court : or 6th. It must appear from the record, that the question was necessarily involved in the decision ; and that the state court could not have given the judgment or decree which they passed, without deciding it. We are not aware of any other mode in which the judgment or decree of a state court can lawfully be brought before us ; and we have stated them particularly, in order to prevent, in future, the difficulties and discrepancies which have so often arisen on this subject.

*In the case now before us, the presiding judge of the supreme
*286] court of Ohio has certified on the record, that the validity of a statute of the state was drawn in question, on the ground that it was

repugnant to the constitution of the United States, and that the decision was in favor of the validity of said statute ; and this certificate of the judge is certified by the cerk, as a part of the record. We presume, that the certificate of the presiding judge was made by the authority of the court ; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise, and was decided ; the case comes within the fourth clause above mentioned, and this court must take jurisdiction, and examine whether the point so certified was rightfully decided.

An act of the legislature of Ohio, passed in 1840, ordered certain lands held by the complainants to be assessed and taxed. The defendant was the tax-collector. The bill prays he be perpetually enjoined from enforcing the payment of the tax, because the lands had been exempted by a statute of Ohio, of 1804, which entered into the conditions of sale under which the complainants held. Therefore, it is insisted, the act of 1840 violates the contract of purchase, and is void ; being contrary to that clause of the constitution of the United States, which prohibits the states from passing any law violating the obligation of contracts. This is the only question presented by the record, that we can examine ; as the 25th section carefully restricts this court to specified cases of jurisdiction, beyond which we have no power to go into the cause.

There are six complainants, each setting up a distinct title ; they sue jointly, and for the six only, and not for themselves and others, equally assessed ; as in *Attorney-General* v. *Hetin*, 2 Sim. & Stu. 67 ; and similar cases, referred to in Story's Equity Plead. § 114, 123. The supreme court of Ohio having entertained jurisdiction, this court must do so likewise. The question of misjoinder is not open to us for revision.

The immediate deeds in fee, from the trustees of the Ohio University to complainants, are not set forth in the pleadings : we take it, however, that they contain no condition exempting the lands from taxation, as the bill is founded on the assumption that the 17th section of the act of 1804 entered into the *contract and imposed the exemption on the state. Whether such an inference arises in favor of the complainants, depends on the [*287 construction of an ordinance of congress and the several acts of the legislature of Ohio, passed in regard to these university lands. By the ordinance of 1787, 1 Laws U. S. 573, a sale of a large section of country was authorized to be made to a company of individuals, from which is reserved : " Not more than two complete townships to be given perpetually, for the purposes of a university, to be laid off by the purchasers, as near the centre as may be, so that the same shall be of good land, to be applied to the intended object by the legislature of the state." Ohio came into the Union as a state, in 1802. In 1804 (Ohio Land Laws 226), an act was passed, establishing a university on the foundation of the fund secured by congress, to be situated on the reserved lands ; being townships eight and nine. The lands were vested in the corporation, consisting of the president and trustees, " for the sole use, benefit and support of the university for ever." They were authorized to rent out the lands in separate tracts, of not less than eighty acres, or more than two hundred and forty acres, on a valuation of commissioners, at a yearly rent of six per centum per annum on the estimated value, for ninety years, renewable for ever ; and from time to time, a re-valuation was to

take place, to which the subsequent rents were to correspond ; with this addition—§ 12, "That the said corporation shall have power to demand a further yearly rent on said lands and tenements, not exceeding the amount of tax imposed on property of like description, by the state ; which rents shall be paid at such time and place, to such person, and collected in such manner, as the corporation shall direct." The 17th section declares, "that the lands in the two townships, appropriated and vested as aforesaid, with the buildings which are or may be erected thereon, shall for ever be exempted from all state taxes."

Thus the matter stood until 1826, when the legislature authorized the board of trustees of the university to sell and convey in fee-simple, (1) all the lands situate in the college townships, which were not incumbered with outstanding leases ; (2) such of said lands as had been re-entered by the
*288] board, for a breach *of the conditions of the leases, or where this incumbrance had been or might be otherwise removed ; (3) to convey in fee to the lessees, respectively, on the payment of such sum of money as would yield at an interest of six per centum per annum on the sum which was yearly reserved in the lease. Pursuant to this statute, the complainants purchased and took deeds in fee ; no exemption from state taxation being contained in the statute under which they took title, or in their deeds.

The object of the incorporating act of 1804, was to regulate a public fund, intrusted to the management of the state sovereignty, so as best to accomplish the intention of the donor, the United States. It was a matter of course, in the then state of the college fund, to exempt it from taxes, in the hands of the trustees. The lands brought no income, and could bear no tax, in their uncultivated condition, until they passed into the hands of private individuals. The tenants of the University, for twenty years, made their own contracts, and were bound to pay the ordinary taxes levied on the inhabitants of Ohio, not into the state treasury, but into that of the University. Every change in the general laws in regard to the revenue bound them ; as the value of real estate increased, and taxes were imposed in addition to previous burdens, to such an extent, the corporation of the University added to the rent of its tenants. The lands not leased continued exempt from taxation, on the fair supposition that they brought no income, and could bear no burdens. The policy of the act of 1804 is too plain to admit of comment ; and its wisdom so manifest, as to meet with instant sanction.

But what was the policy of the act of 1826 ? An entire change of the fund from real estate to a capital in money, vested by loan in the state treasury, was determined on by the corporation. Leave was asked and granted by the legislature, to sell the lands, and convey them in fee-simple to purchasers ; giving the tenants a preference, in cases where there were existing leases. As regarded the management and nature of the fund to sustain the University, the act of 1804 was to a great extent repealed ; by that act, the lessees of the corporation were governed ; their contracts were founded on it ; but with it the purchasers in fee had no concern, their contracts origi-
*289] nated in a different policy, *and are sanctioned by a different statute ; the complainants actually claim, and could only claim, by force of the act of 1826. This act secured the payments of no taxes to the University, as the substitute of the state. It simply authorized the corporation to sell,

as an individual might sell, and the respective purchasers took title as from an individual; they were strangers to the act of 1804, with the exception of those provided for by the third section of the act 1826, the value of whose lands was to be governed by the assessment of their rents under the former act, and who were entitled to have deeds in fee, on the payment of $100 for every six dollars of annual rent assessed upon them, disregarding the taxes they were bound by the act of 1804 to pay to the corporation. The mode of ascertaining the value makes no difference; all the purchasers hold under the act of 1826, and cannot go behind it; and are subject, like other persons holding lands in fee, to be taxed by the state.

The case relied on by the complainants as ruling this, is that of the *State of New Jersey* v. *Wilson*, 7 Cranch 164. In 1758, the Delaware tribe of Indians agreed with the colonial government of New Jersey, to release to the latter all their lands in that colony, south of the river Raritan; the government purchased a tract of land on which the Indians might reside, and stipulated, by a legislative act, that this tract should not thereafter be subject to any tax. The Delawares wished to emigrate, and join the Stockbridge tribe in New York. In 1801, the state of New Jersey, by a statute, authorized them to sell their lands. This act of assembly contained no exemption from the payment of taxes, after the sale. In 1803, the Indian tribe sold to Wilson and others; and the commissioners appointed by order of the legislature conveyed, for and on behalf of the Indians, to the purchasers. On the foregoing state of facts, it was held by this court, that the purchasers being in under the first grant of 1758, to the Indian tribe, were equally entitled to its benefits; and that no taxes could be levied on the land. The soundness of the decision we think undoubted. The compact with the Delaware tribe was for a cession to the government of a large body of land; the consideration for the cession, was a smaller tract vested, in trust for them, in fee; and a further and very material consideration was, that the latter tract should never *be taxed by the government. The parties were [*290
competent thus to contract, as no restriction was imposed on the colonial government, and the consideration was ample for the exemption. The condition attached to the land; so this court held: "The act authorizing the Indians to sell was a mere enabling statute; the purchasers took from and under the Indian tribe, held by virtue of the grant to them, and were, of course, entitled to all the benefits of the contract. New Jersey had, therefore, no more power to repeal that part of the grant which exempted the lands from taxation, than she had to repeal the entire contract; and therefore, her act of 1804, repealing the clause of exemption, was void."

We think the case in Cranch, compared with the one presented by the record, is too dissimilar, to require a particular comparison, or further comment. We concur with the supreme court of Ohio, that the bill must be dismissed; and so order.

Judgment affirmed.

*United States, Plaintiffs in error, *v.* Mary L. Eliason, Administratrix of William A. Eliason, Defendant in error.

Public officers.—Extra compensation.—Executive power.—Appellate jurisdiction.

An action was brought by the United States against Captain Eliason, for a balance due by him as disbursing officer at Fortress Calhoun; the defendant claimed an allowance as commissions on the disbursement of large sums of money, under the orders of the war department, in 1834, and the years included up to 1838, under the regulations of the war department contained in the army regulations printed in 1821, "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 a half per cent. on the sum expended."

By a subsequent regulation of the war department, of 14th March 1835, adopted in consequence of the provisions of an act of congress of 3d March 1835, all extra compensation of every kind, for which provision had not been made by law, was disallowed. The defendant's intestate claimed that the provisions of the act of March 3d, 1835, were applicable only to the disbursing of public money appropriated by law during the session of congress in which that act was passed: *Held*, that the order of the war department of 14th March 1835, took away all right to the extra allowances claimed under the prior army regulations.

In the district of Columbia, a writ of error lies to the decision of the circuit court, upon an agreed case; the same principle has been applied in cases brought before the supreme court from other parts of the United States. Faw *v.* Roberdeau's Executors, 3 Cranch 173; Tucker *v.* Oxley, 5 Ibid. 34; Kennedy *v.* Brent, 6 Ibid. 187; Brent *v.* Chapman, 5 Ibid. 358; Shankland *v.* Corporation of Washington, 5 Pet. 390; Inglee *v.* Coolidge, 2 Wheat. 363; Miller *v.* Nichols, 4 Ibid. 311, cited.

The power of the executive to establish rules and regulations for the government of the army is undoubted; the power to establish, necessarily, implies the power to modify or to repeal, or to create anew. The secretary of war is the regular constitutional organ of the president for the administration of the military establishment of the nation; and rules and orders, publicly promulgated through him, must be received as the acts of the executive, and as such are binding upon all within the sphere of his legal and constitutional authority.[1]

Error to the Circuit Court of the district of Columbia, and county of Washington. In February 1839 the United States instituted a suit against William A. Eliason, a captain in the United States corps of engineers, for the recovery of $2492.18, a balance in his hands, of *moneys paid to
*292] him for the purpose of disbursement at Fort Calhoun, and of $108.57, beyond the incidental expenses of fortification, making together $2600.75. On the decease of Captain Eliason, the suit was proceeded in against his administratrix.

In the circuit court, the counsel for the plaintiffs and the defendant agreed upon the following statement. "On the trial of the above cause, the plaintiffs, to maintain the issue on their parts joined, offered in evidence the transcript from the treasury department (showing the balance claimed) and the defendant then offered evidence to show that the said intestate was a captain in the United States corps of engineers, and as such was ordered to take charge and superintend the works on Fortress Calhoun, and took charge of, and continued the said work, from the 7th of November 1834, to the 10th of September 1838; and further offered in evidence the general regulations of the war department, as follows: and further, that the said intestate, while thus employed, disbursed $214,392.61; that he was also directed to take charge of, and superintended the removal of a light-house

[1] The Confiscation Cases, 20 Wall. 109.

into Fortress Calhoun, in which service he disbursed $1143.13 ; and further, that he was charged with the disbursement of, and did disburse the sum of $1891.43, for incidental expenses of fortifications, beginning in the year 1830 ; and that he purchased for the use of the engineer department, a set of instruments and case, and the department allowed him for the instruments, but refused to allow him for the case, amounting to $10 ; and further, that the pay and emoluments of the said intestate had been stopped by the government of the United States, from the 31st of December 1838, to the 15th day of June 1839, amounting to 1014.95 ; and the defendant then claimed credit." The account of Captain Eliason, which had been submitted to the accounting officers of the treasury, and the appropriations in the treasury, were made a part of the case.

*The regulations of the war department of the 13th March 1835, were : " The proviso in the act of congress, passed March 3d, 1835, entitled 'an act making additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouths of certain rivers, for the year 1835 ;' and which prohibits the allowance of extra compensation to officers of the army, has been submitted to the attorney-general for his opinion, and that officer has decided that it extends to, and prohibits, the allowance of all extra compensation, of every kind whatsoever, for which provision is not made by law : hereafter, therefore, no such extra compensation will be allowed." The prohibition under this order took effect from the passage of the law. [*293

The instructions, after enumerating particular offices held to be included in the proviso, by the secretary at war, proceed to say : " The construction of the act will apply, so as to prevent the granting of any extra compensation of any nature whatever, unless expressly authorized by law. The attorney-general has decided that the general clause in the above proviso will render illegal the allowance of any per-centage or compensation for disbursing appropriations, made previous to, as well as during, the last session of congress."

Article 67, § 14, from the army regulations, printed in 1821, was also in evidence : " 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 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*, 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."

In the circuit court, the following judgment was given : " The court is of opinion, that the proviso in the act of the 3d of March 1835, ch. 303, is only applicable to the disbursing of public money appropriated by law during the session of congress in which that *act was passed ; and it appearing therein, to the satisfaction of the court, that no part of the money so as aforesaid disbursed by the said defendant, was appropriated at the said session of congress, the court is also of opinion, that the said intestate was entitled to the allowance claimed by him for the disbursements as above stated, and do, thereupon, order the judgment to be entered for the said defendant." The United States prosecuted this writ of error. [*294

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

Legaré contended, that the regulations of the war department, of March 13th, 1835, were conclusive on the claims of all the officers of the army, who came within their provisions. We was fully aware of the decision of this court in *General Gratiot's Case*, and in *Minis's Case*, 15 Pet. 423, but the principle which was now claimed, was not affected by the rule laid down in those cases. The cases of the *United States* v. *Ripley*, 7 Pet. 18, and the other cases in the same volume, stand unaffected by the principle on which the United States now rely. These are special regulations of the war department, and the department had fully authority to establish such rules. If the true construction of the act of congress of March 3d, 1835, is, that it applied only to appropriations made at that session, the regulations of the war department, *proprio vigore*, had a full and valid application to all the cases subsequent to them, to which they applied. The question submitted to the court is, whether after the regulations of 13th March 1835, any allowance can be claimed for those extra services?

Bradley, for the defendant, argued, that as the cause was adjudged in the circuit court on a case stated, the writ of error should be dismissed. 1. No writ of error will lie on a special case stated. 3 Bl. Com. 378; Tidd's Pract. 1808–9; 1 Arch. Pract. pl. 92; Stephen's Plead. 93. 2. Where a writ of error will not lie, there can be no bill of exceptions. 1 Arch. Pract. 187; Hardr. 249; Bos. & Pul. 3, 16; Tidd's Pract. 791; 1 Salk. 254; 1 W. Bl. 679. *3. On a special case stated, unless the judge expressly reserves the power of turning the special case into a special verdict, it cannot be done. 2 Dow 78; and the cases cited on the other points.

*295]

As to the right of set-off, no doubt or controversy exists. The claim of Captain Eliason has, in fact, been allowed, up to the passage of the act of 3d March 1835. In the case of *Minis* v. *United States*, 15 Pet. 423, this court decided, that the act prohibited extra allowances only in the cases of the disbursement of public money, appropriated during the session of congress of 1834–35. The claim now before the court is for services in disbursing appropriations made before and since that act. The right of the defendant in error is not, therefore, affected by that act.

The claim is rested on the usage of the department, and upon the army regulations, and on numerous decisions of this court, down to the case of *Gratiot*, in 15 Pet. 371; in which such claims were most distinctly recognised, and the previous decisions affirmed. It seems to be conceded, that the claim should have been allowed, but for the order of the war department of 14th March 1835, by which such claims are supposed to be prohibited. In *Gratiot's Case*, 15 Pet. 371, the court, after having stated the right of the government thus to employ officers, and the right to compensation growing out of it, say, "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 of the disputed items, or any part of them." It is conceded, that there is no such law; but it is argued, that the implied contract cannot exist, in the face of the order or regulation of the war department of 14th of March 1835. Could this order or regulation revoke the regulations of 1821, 1825? They were made in

obedience to a law of congress. They ought to have the force of law. Did it intend to repeal those regulations? Is it, on its face, anything more than the exposition of the act of the 3d March 1835, as construed by the attorney-general of the United States, soon after it was passed? If that construction was erroneous, as has been decided by this court; is not the detailed exposition in the orders of the war department equally erroneous? Although it professes to be prohibitory, is it anything more than an opinion—an erroneous opinion, *of the secretary at war? He says, the prohibition took effect from the passage of the law. Could this do so? It is not designed, and ought not to be construed, as a repealing regulation. It is not so on its face, or upon a full examination of its language. [*296

Daniel, Justice, delivered the opinion of the court.—Upon a writ of error to the circuit court of Washington county, in the district of Columbia. On the 16th day of February 1839, the plaintiffs instituted an action of *assumpsit* in the circuit court of Washington county, against William A. Eliason, for the balance of $2600.75, charged against him on the books of the treasury, as disbursing officer at Fortress Calhoun, between the dates of the 7th of November 1834, and the 10th of September 1838. The defendant Eliason appeared to the suit, and filed the plea of *non assumpsit*, upon which issue was joined; but having died before the cause came to trial, the defendant in error, as administratrix of the decedent, was made a party defendant, and the cause regularly progressed to trial upon the issue made up between the original parties. Upon the trial before the circuit court, the following case was agreed between the parties by their attorneys, to be subject to the opinion of the court, as to the law upon the same, viz:

On the trial of the above cause, the plaintiffs to maintain the issue on their part joined, offered in evidence the transcripts from the treasury department (which are found in pages 12 to 16 of the record), and the said defendant then offered evidence to show that the said intestate was a captain of the United States corps of engineers, and as such was ordered to take charge and superintend the works on Fortress Calhoun, and took charge of, and continued, the said work, from the 7th November 1834, to the 10th September 1838; and further offered in evidence, the general regulations of the war department, as follows, art. 67, § 14: "Where there is no agent for fortifications, the superintending officer shall perform the duties of agent; while performing such duties, the rules and regulations for the government of such agents shall be applicable to him; and as compensation for the performance of that extra duty, he shall 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 centum* on the sum expended." And further, that the said intestate, while thus employed, disbursed $214,392.61; that he was also directed to take charge of, and superintend, the removal of a lighthouse into Fortress Calhoun, in which service he disbursed $1143.13: and further that he was charged with the disbursement of, and did disburse, the sum of $1891.43, for incidental expenses of fortifications, beginning in the year 1830; and that he purchased for the use of the engineer department, a set of instruments and case, and the department allowed him for the instru- [*297

ments, but refused to allow him for the case amounting to $10 ; and further that the pay and emoluments of the said intestate had been stopped by the government of the United States, from the 31st December 1838, to the 15th day of June 1838, amounting to $1014.95 ; and the defendant then claimed credit—

For compensation for disbursing money on account of Fortress Calhoun, from 7th November 1834, to 10 September 1838, up to which time he was in charge of said work, inclusive, at $2 per day	$2816 00
Of which, this amount only had been allowed	234 00
Balance	2582 00
For money disbursed on account for removing lighthouse, &c. .	21 64
" money disbursed for incidental expenses of fortifications .	46 95
" case of instruments	10 00
" pay and emoluments (marked B.), copied at page 29 . .	1014 95
	$3689 26
For balance of account rendered 29th March 1839 . . .	74 79
	$3764 05

*298] *And further offered evidence, that all the claims above stated, except that for pay and emoluments, had been submitted to, and rejected by, the accounting officer of the treasury department ; and further produced and offered in evidence, the following statement of the state of the appropriations under which the disbursements were made.

The plaintiffs offered in evidence the regulations of the war department of the 14th of March 1835 : "The proviso in the act of congress passed March 3d, 1835, entitled 'an act making 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 ;' and which prohibits the allowance of extra compensation to officers of the army, has been submitted to the attorney-general for his opinion, and that officer has decided, that it extends to, and prohibits, that allowance of all extra compensation, of any kind whatever, for which provision is not made by law: hereafter, therefore, no extra compensation will be allowed." And upon the aforegoing statements, it is submitted to the court to say, whether the defendant's intestate was entitled by law to the allowances claimed by him for disbursements as above stated. If the court is of opinion, that he is so entitled, then the judgment to be for the defendant ; if otherwise, for the plaintiffs, for the amount appearing due by the transcript.

F. S. Key, for the United States,
Jos. H. Bradley, for defendant.

Upon the statement of facts agreed, as above mentioned, the circuit court pronounced the following opinion and judgment :—"And thereupon, upon the full consideration of the case stated as aforesaid, the said court is of opinion, that the proviso in the act of the 3d March 1835, ch. 303, is only applicable to the disbursing of public money, appropriated by law during the session of congress in which that act was passed ; and it appearing

therein, to the satisfaction of the court, that no part of the money so as aforesaid disbursed by the said defendant, was appropriated at the said session of congress; the court is also of opinion, that *the said [*299 intestate was entitled to the allowances claimed by him for the disbursements as above stated, and do thereupon order the judgment to be entered for the said defendant." To this opinion an exception was taken by the plaintiffs, which was sealed by the court and made a part of the record.

Before considering the questions of law arising upon the agreed statement, and upon the exception taken to the opinion and judgment pronounced upon that statement, it is proper to advert to a point which has been made, *in limine*, by the counsel for the defendant in error, and which, if decided as he has contended it should be, would prove conclusive as to the fate of this cause. It is insisted by the defendant's counsel, that this court cannot take cognisance of the present cause, for the reason that having been tried upon an agreed case, a writ of error will not lie to the decision thereon. This position of the counsel is founded upon a remark of Mr. Justice Blackstone in his Commentaries, which has been transferred to the work of Mr. Tidd, and to some other compilations upon the practice in the English courts of common law. The passage in Blackstone, which will be found in his chapter on the Trial by Jury, vol. 3, p. 379 (Coleridge's edition), is as follows: "Another method of finding a species of special verdict, is, when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the court above, on a special case stated by the counsel on both sides, with regard to the matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision, the *postea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears on the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law; which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*."

It is manifest, from this quotation, that the reason why, according to the practice in the English courts, a writ of error will not be allowed, after a case agreed, is this, and this only; that in those *courts, the agreed [*300 case never appears upon or is made a part of the record, and therefore, there is no ground of error set forth, upon which an appellate or revising tribunal can act. In the language of Justice Blackstone, "nothing appears upon the record but the general verdict; whereby the parties are precluded from the benefit of a writ of error," &c., "which makes it," says the same learned judge, "a thing to be wished, that a method could be devised, either of lessening the expenses of special verdicts, or else of entering the cause at large upon the *postea*." The same rule in the English courts of law, and the same consequence, as resulting solely from their practice, may be seen in the Treatise on Pleading, by Stephen, p. 92, where the author, in speaking of the practice of taking special verdicts, and general verdicts, subject to a special case, remarks, that a special case is not like a special verdict entered on record, and consequently, a writ of error cannot be brought on this decision. There has been a recent statute enacted in

England, which, although it is not brought sufficiently to the view of this court, to justify any direct inferences as to its terms, or its bearing upon this particular question, may have been designed to remedy the very evil pointed out by Justice Blackstone. By a note to page 92, of Mr. Stephen's Treatise, it is said to have been enacted by 3 & 4 Wm. IV., c. 42, that where the parties, on issue joined, can agree on a statement of facts, they may, by order of a judge, draw up such statement in the form of a special case, for the judgment of the court, without proceeding to trial. By the established practice, anterior to this statutory provision, it was in the power of the parties to agree upon a statement of the case; it would seem reasonable and probable, therefore, that the power given to the judge (as an exercise of his judicial functions) to regulate the statement, was designed to impart a greater solemnity and permanency to the preparation of the proceeding, and to place it in an attitude for the action of some revising power. But even should a want of familiarity with the detail of English practice induce the hazard of misapprehension of its rules, or of the reasons in which they have their origin, the decisions of our own courts, and the long-established practice of our own country, are regarded as having put the point under consideration entirely at rest.

*301] *By the act of congress of 1801, assuming the government of the district of Columbia, in virtue of the cession from Maryland and Virginia, the laws of these states, and, of course, the proceedings in their courts as parts of these laws, were expressly recognised within such portions of the district, respectively, as originally were within the limits of the ceding states. (See 2 U. S. Stat. 103.) *United States* v. *Simms*, 1 Cranch 255. At the period of the cession, the practice is believed to have been well settled, both in Virginia and Maryland, that in trials at law, where special or agreed cases have been made, they have been signed by the counsel, as representing their clients, and spread at large upon the record, as a part thereof; and as constituting the only legitimate ground for the action of the court, and as furnishing the regular and proper test to be applied by an appellate or revising tribunal to this action. The practice is believed to be the same at this day; it has been repeatedly recognised by the decisions of this court; and, if ever heretofore seriously questioned, has never been overruled. See *Fuw* v. *Roberdeau's Executor*, 3 Cranch 173; *Tucker* v. *Oxley*, 5 Ibid. 34; *Kennedy* v. *Brent*, 6 Ibid. 187; *Brent* v. *Chapman*, 5 Ibid. 358; and *Shankland* v. *Corporation of Washington*, 5 Pet. 390. These are cases arising within the district of Columbia, but the same practice has been sanctioned in cases brought hither from without the district, as will be seen in the decisions of *Ingle* v. *Coolidge*, 2 Wheat. 363, and of *Miller* v. *Nicholls*, 4 Ibid. 311. This court, therefore, have no hesitancy in declaring, that the point of practice raised by the defendant's counsel presents no objection to the regularity in the mode of bringing this case before them.

In considering the exception taken to the opinion of the circuit court, in relation to the act of congress of March 3d, 1835, the order of the war department, of March 13th, of the same year, and the rights of the plaintiffs, and of the defendant, as connected therewith, this court have no difficulty in pronouncing the opinion and decision of the circuit court as although untenable. The power of the executive to establish rules and regulations for the government of the army, is undoubted. The very appeal made

by the defendant to the 14th section of the 67th article of the army regulations, is a recognition of this *right. The power to establish implies, necessarily, the power to modify or repeal, or to create anew. The [*302 secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval forces, could not be intrusted to officers of any grade inferior to the commander-in-chief; its consequences, if tolerated, would be a complete disorganization of both the army and navy. In the present instance, the order was adopted by the proper authority, and by the same authority, promulged to every officer, through the regular official organ; and the question propounded to the circuit court was neither more nor less than this, whether a subordinate officer of the army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the government, emoluments which a subsequent order from his superior had warned him that it was not in his power to require? This question can need no argument for its solution. This court are, therefore, of opinion, that the circuit court have erred in allowing to Captain Eliason, a *per diem*, as disbursing officer at Fortress Calhoun, subsequently to the 3d day of March 1835. Under the 14th section of the 67th article of the army regulations, they do, therefore, reverse the decision of the circuit court; and direct that a judgment be entered for the plaintiffs, for the sum of $2600.75, as claimed by them, together with their costs.

Judgment reversed.

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*John D. Amis, Plaintiff in error, *v.* Nathan Smith, [*303
Defendant in error.

Joint and several debtors.—Federal process.—Error.

Action on a promissory note, against sundry persons, surviving partners of the unincorporated Real Estate Bank of Columbus, Mississippi, founded on their certificate of deposit; all the defendants, except Wright, joined in the plea of *non assumpsit;* Wright afterwards pleaded *non assumpsit*, separately; at the trial, all the defendants, except Wright, withdrew their plea, and permitted judgment to go by default against them, and the plaintiff then discontinued the suit against Wright. Execution was issued, and was levied on the property of Amis, who gave to the marshal a forthcoming bond, with security, and the bond being forfeited, it was so returned by the marshal, which, by the statute of Mississippi, gives the bond the force and effect of a judgment against the obligor and his surety; at the succeeding term, Amis moved the court to quash the bond, which motion was overruled. The plaintiff in error claimed, 1. That the circuit court erred in permitting the plaintiff below to discontinue the suit against Wright, and in rendering judgment against the other defendants. 2. The *fieri facias* was illegal, because it included interest, not authorized by the judgment. 3. The overruling the motion to quash the forthcoming bond was a final judgment, which ought to be reversed.

If the contract be joint and several, and the defendants sever in their pleas, whatever may have been the doubts and conflicting opinions of former times, as to the effect of a *nolle prosequi* in such a case, it has never been held, that a simple discontinuance of a suit amounts to a *retraxit;* or that it in any manner worked a bar to the repetition of the plaintiff's action.

By a statute of Mississippi, all promises, contracts and liabilities of copartners, are to be deemed and adjudged joint and several; and in all suits on contracts in writing, made by two or more persons, it is lawful to declare against any one or more of them. This is such a severance of the contract, as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound by the contract; and there is no obligation on the part of the plaintiff to put the defendants in such condition, by his pleadings, as to compel each to contribute his portion for the benefit of the others. Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46, cited.

On a joint and several bond, suit must be brought against all the obligors jointly, or against each one severally, because each is liable for the whole; but a joint suit cannot be maintained against a part, omitting the rest. Whatever may be the defects, or illegality of the final process, no error can be assigned in the supreme court, on a writ of error, for that cause; the remedy, according to the modern practice, is by motion in the court below to quash the execution. If the question of the right to include the interest on the judgment, in the execution, were properly before the court, no reason could be seen, why interest on a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in it.

The provisions of the third section of the act of congress of 19th May 1828, adopted the forthcoming bond in Mississippi, as a part of the final process of that state, at the time of the passage of the act. "A final process" is understood by the court to be all *the writs of execution then in use in the state courts of Mississippi, which were properly applicable to the courts of the United States; and the phrase, "the proceedings thereupon," are understood to mean the exercise of all the duties of the ministerial officers of the state, prescribed by the laws of the state, for the purpose of obtaining the fruits of judgments; among those are the provisions of the laws relating to forthcoming bonds, which must be regarded as part of the final process.

*304]

The proceeding which produced the forthcoming bond, was purely ministerial; the judicial mind was in no way employed in its production. It does not, then, possess the attributes of a judgment; and ought, therefore, to be treated in this court as final process, or, at least, as part of the final process.

So far as the decisions of the state courts of Mississippi settle rules of property, they will be properly respected by the supreme court; but when the effect of a state decision is only to regulate the practice of courts, and to determine what shall be a judgment, the supreme court cannot consider themselves bound by such decisions, upon the ground, that the laws upon which they are made are local in their character.

It is the duty of the supreme court to preserve the supremacy of the laws of the United States, which they cannot do, without disregarding all state laws, and state decisions, which conflict with the laws of the United States.

No rule, under the third section of the act of 1828, which authorizes the courts of the United States to alter final process, so far as to conform it to any changes which may be adopted by state legislation and state adjudications, made by a district judge, will be recognised by the supreme court as binding, except those made by the district courts exercising circuit court powers.

The statute of Mississippi, taking away the right to a writ of error in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the circuit courts of the United States; a rule of court adopting the statute as a rule of practice would, therefore, be void.

Regarding the forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less a final judgment; and therefore, no writ of error lies in such a case.

Error to the District Court for the Northern District of Mississippi. In an action on a certificate of deposit, instituted, on the 7th of November 1839, by the defendant in error, Nathan Smith, in the district court of the United States for the northern district of Mississippi, against the plaintiff in error, with others, who were the surviving partners in the Real Estate Bank of Columbus, Mississippi, the plaintiff obtained a judgment by default against all the defendants, except Daniel W. Wright, who had been sued with them as one of the partners. All the defendants, except Wright, had

entered a plea of *non assumpsit*, which they afterwards, at the trial, withdrew; on which a judgment was entered *by *nil dicit* for $2584.74. [*305
Wright pleaded *non assumpsit* separately; and the plaintiff then discontinued the suit against Wright.

The plaintiff issued an execution, which was levied on personal property belonging to John D. Amis, who thereupon executed a forthcoming bond, with Samuel F. Butterworth as surety; which bond being duly forfeited, operated, under the laws of Mississippi, as a judgment against the obligors in the bond, on which execution might be issued forthwith. On the 14th December 1840, John D. Amis and Samuel Butterworth moved the court to quash the forthcoming bond: 1. Because it increases the costs, not warranted by law, the execution having included interest on the judgment. 2. That there is no authority for taking the said bond, or any such bond; and the bond creates a judgment against the obligors, and precludes them from a defence, and a trial by jury secured by the constitution of the United States. The court overruled the motion, and the defendant, John D. Amis, prosecuted this writ of error.

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

Key contended:—1. That there was error in the proceedings of the district court in allowing a discontinuance as to Daniel W. Wright, one of the defendants, and entering a judgment against the other defendants. 2. There was error in the court having refused to quash the forthcoming bond given by John D. Amis and Samuel Butterworth. The *fieri facias* which had been issued on the judgment, was not warranted by the judgment, because it included interest, which was not given by the judgment. The execution was illegal, and the bond given after it had issued, was void. 3. Refusing to quash the bond, and leaving it in force as forfeited, was a final judgment on which a writ of error will lie.

1. What does the record bring up for revision? The whole case; the original judgment; this is so from the nature of the proceeding. The forfeited bond is a proceeding by statute; it is made a statutory judgment. It must, therefore, conform to the *statute, and to do so, it must be [*306
founded on a lawful execution, and a valid judgment. Take away that judgment, the foundation, and all the rest falls. This is settled in 7 Cranch 288; 5 How. (Miss.) 191–2, 194–5. Hence it is, that the act of the legislature, of 1837, was necessary. Without that act, the original judgment could have been taken up to a court of error, and reversed; and that reversal would have put up an end to the proceedings under it. *United States Bank* v. *Patton*, 5 How. (Miss.) 223; 1 Ibid. 98.

2. And then the question arises, as to the effect of the act of 1837, in the courts of the United States. How can any legislation in Mississippi affect or limit the jurisdiction of the courts of the United States? Suppose, the legislature of Mississippi had said, there should be no appeal in any case, or (as in the Digest 538), without a certificate of the appellate court; that could not affect the jurisdiction of the courts of the United States, or take away from a suitor in these courts rights expressly conferred by the laws of the United States. It would defeat the object of the constitution in giving jurisdiction to the courts of the United States.

3. The original judgment is, then, here for revision, as in the case in 7 Cranch 202. How far is it examinable? For what errors is it responsible? Upon this point, Mr. Key cited 7 Cranch 202; 1 Pet. 46.

4. It is, then, upon authority, error for which judgment can be arrested, as is said by Judge WASHINGTON, in 7 Cranch 202; and if so, it is revisable. That case is decisive; for it adjudges that the plaintiff must proceed as far as the law allows against all the defendants, even when all were not taken; *à fortiori*, where they were taken, and when the other defendants had a right to expect the plaintiff would go on against all. This is the law, unless there is something in the laws of Mississippi which operates in a court of the United States, and allows a discontinuance.

The law of Mississippi allows contracts to be sued upon either as joint or several. This should not extend beyond the actual provisions of the statute to authorize suits to be so brought on such contracts. 3 How. (Miss.) 83. But when the suit is brought, and the parties are before the court, then it
*307] is altogether *another question, whether you can discontinue as to any of the defendants. Cited, Digest Laws of Miss. 595–6; 2 How. (Miss.) 870; 5 Ibid. 411–12; 3 Ibid. 78; 4 Ibid. 364, 369, 377.

Walker, for the defendant in error, made the following points:—That the severance in the pleading was discretionary with the court below, as every other interlocutory incidental order preceding the judgment, and furnished no ground to reverse the judgment for error. After a severance in the pleadings, by the defendants, a discontinuance as to any one of them is not irregular. In this case, the severance was by consent, and so was the discontinuance as to that party, and simultaneous with this, and in the same order, was the withdrawal of the plea by the other defendants, and the judgment by default final against them. By this withdrawal, after the severance, these defendants, by implication of law, and in fact, consented to the separate judgment against them. A judgment thus given, has, in law, the same effect as a judgment confessed, so as to release all errors; and especially, where no objection was made in the court below. 3 Stew. & Port. 269; 6 Port. 352, 358; 2 Stew. 13; 1 Pet. 165. The compulsory *non pros.* of the English practice, entered by the court, upon the motion of the defendant, against the plaintiff, does not prevail in this country. Such a *non pros.* which puts the whole case out of court, is entirely unlike the discontinuance under our practice; which in this case is a mere partial forbearance for the present to proceed further in the suit against one of the defendants, and leaves the case in court to proceed regularly against the other defendants. Note to *Powell* v *White*, 1 Doug. 169; 1 Pet. 46, 74, 469; 5 Ibid. 476; 6 Ibid. 598; 3 How. (Miss.) 598. This discontinuance as to one defendant may be taken, even where both plead separately to the merits. 1 Pet. 46; 5 Johns. 160; 20 Ibid. 126; 1 Pick. 500. Even at common law, a plaintiff might always discontinue as to one defendant, where the cause of action was joint and several in its nature, or where one or more might be sued separately. Note to *Parker* v. *Laurence*, Hob. (ed. of 1829) 177. By the statutes of Mississippi, this contract is made joint and
*308] several, *and a separate suit authorized against one or more of the defendants. How. & Hutch. Dig. Laws Miss. 578, 594. Under these statutes, the right to discontinue, in such cases, is expressly recognised

by the decisions of the courts of the state. 2 How. (Miss.) 870 ; 4 Ibid. 377. If this discontinuance had been erroneous, it is cured, after verdict, by our statute of jeofails ; and a judgment by *nil dicit* is placed on the same footing. How. & Hutch. 591 ; 2 How. (Miss.) 834, 902, 934.

As to the interest, it is allowable on judgments, even at common law. 3 Anstr. 804; 1 Har. & Johns. 755. In Mississippi, this interest is given by statute, on the judgment, and the execution is required to embrace the interest. Turn. Dig. 331 : How. & Hutch. 375, 616, 622–3, 626–8, 653 ; 3 How. (Miss.) 184 ; 4 Ibid. 377. Even if there had been error in the original judgment, that error is released by the new judgment on the forthcoming bond. How. & Hutch. 541 ; 4 How. (Miss.) 9. The new judgment is an extinguishment of the judgment on which the bond was given, and the bond operates as an estoppel at law, as to any error in the original judgment. The bond is a waiver of any error in the original judgment, and operates as a judgment by consent or confession. 2 Call 507 ; 6 Ibid. 1 ; 8 Pick. 386 ; 3 Cond. Rep. 244, 248–9. The court cannot go beyond the execution which is recited in the bond, and not the judgment preceding the execution ; and the bond admits the interest to be due, and is conclusive. If the execution had been erroneous, it should have been superseded ; but on the contrary, the validity of the execution is admitted by the bond, and by the judgment which is founded upon it. 5 How. (Miss.) 566, 573–4. If the interest was erroneously admitted to be added to the original judgment, it is a mere clerical error which is cured by the bond and new judgment upon it. Ibid. 200 ; 1 Ibid. 98. The error alleged here, as to the interest, is at most equivalent to a motion in the court below to open the judgment on the bond. And on what ground? Because it included interest alleged to be omitted to be calculated in the original judgment. But if this omission were made, it was a mere clerical error, the interest, it is conceded, is due by the law ; it is included in the bond, signed by the defendant, and admitted thereby to be *due the plaintiff, and on that bond the judgment is entered ; and why should the judgment be opened, when it is for no greater sum than in law and justice was due the plaintiff? [*309

The bond is constitutional. 4 How. (Miss.) 363 ; 5 Ibid. 434, 456 ; 4 Cond. Rep. 439, 442. The forthcoming bond law of the state applies to judgments in the courts of the United States. 1 Cranch. 299. If it be adopted in part, must not all its provisions be adopted, and also the construction given by the state courts to their local statutes? By these statutes, the original judgment is extinguished by the bond and forfeiture ; and it is further specially provided, that no writ of error can be prosecuted as regards the original judgment, after the forfeiture of the bond. It is said, this provision cannot apply here, because the writ is given by act of congress. There might be force in this argument, if a motion were now pending to dismiss the writ of error for want of jurisdiction. No such motion is made, but it is insisted, that after a judgment, the defendant has his choice, either to arrest the judgment for error, or to waive that right and release all errors, as in case of a judgment by confession, by giving the bond ; and that such bond is a voluntary waiver of all such errors, and that this waiver must be upheld by this court.

As to the last error assigned, it has been expressly decided by the courts

of Mississippi, that the bond may be given by one co-defendant. 5 How. (Miss.) 480, 483.

McKinley, Justice, delivered the opinion of the court.—This is a writ of error to the district court of the United States for the northern district of Mississippi, exercising circuit court powers. Smith brought an action of *assumpsit*, against Amis and others, surviving partners of the Real Estate Banking Company, of Columbus, Mississippi, founded upon their certificate of deposit. All the defendants joined in a plea of *non assumpsit;* and Wright, one of them, afterwards pleaded the same plea separately. At the trial, all the defendants, except Wright, withdrew their plea, and permitted judgment to go against them by *nil dicit*, for the sum of $2584.74 ; and
*310] the plaintiff then discontinued the suit *against Wright. Upon the judgment, execution issued, and was levied, by the marshal, on the property of Amis, who, in conformity with a statute of Mississippi, entered into bond, with security, conditioned for the forthcoming of the property on the day fixed for its sale. Amis failed to deliver the property, according to the condition of the bond, to the marshal, who thereupon made return that it was forfeited ; which, by the statute, gave it the force and effect of a judgment. How. & Hutch. Stat. Laws of Miss. 653. Amis, at the next term, moved the court to quash the bond, which motion was overruled, and thereupon he prosecuted this writ.

To reverse the judgment, he relies on these grounds: 1. The court erred in permitting the plaintiff to discontinue the suit against Wright, and in rendering judgment against the other defendants. 2. The *fieri facias* was illegal, because it included interest not authorized by the judgment. 3. Overruling the motion to quash the forthcoming bond was a final judgment by the court, which ought to be reversed.

Whether a discontinuance of the suit can be entered against one of several defendants, in a case arising on contract, depends upon the character of the contract, and the state of the pleadings between the parties. If the contract be joint and several, and the defendants sever in their pleas, whatever may have been the doubts and conflicting opinions of former times, as to the effect of a effect of a *nolle prosequi* in such a case, it has never been held, that a simple discontinuance of a suit amounted to a *retraxit*, or that it in any manner worked a bar to the repetition of the plaintiff's action. By a statute of Mississippi, all promises, contracts and liabilities of copartners, are to be deemed and adjudged joint and several. And in all suits founded on promises, agreements or contracts in writing, by two or more persons as copartners, signed by one or more of them, or by any person as agent in their behalf, it shall be lawful to declare against any one or more of them. How. & Huch. Stat. Laws of Miss. 595. This is such a severance of the contract as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound for the contract. And there is no obligation on his part to put them in such condition, by his pleadings, as to
*311] *compel each to contribute his portion for the benefit of the others. This reduces the inquiry to this simple question—Is the discontinuance in this case, authorized by law?

In the case of *Minor* v. *Mechanics' Bank of Alexandria*, a suit was brought on the office-bond of the cashier of the bank, against him and his

sureties. The bond was joint and several, and the defendants pleaded jointly to the action; and, as in this case, the cashier afterwards pleaded severally, whereupon, judgment was rendered against the sureties; and afterwards, the plaintiff entered a *nolle prosequi* against the other defendant. This court sustained this proceeding, and held that it did not affect the judgment against the sureties. 1 Pet. 46. That case, we think, is decisive of the first point made in this. On a joint and several bond, suit must be brought against all the obligors jointly, or against each one severally, because each is liable for the whole; but a joint suit cannot be maintained against a part, omitting the rest. There is, therefore, no analogy between the right of action and the right to enter a *nolle prosequi* against one, as was done in that case. In this case, the plaintiff had a legal right to sue any number of the joint and several promisors, and to omit the others; and therefore, there is a perfect analogy between the right of action and the right to discontinue the action against one, after judgment against the others. Thus far, the propriety of this judgment is undoubted.

The second point involves a question not cognisable in this court. Whatever may be the defects or illegality of the final process, no error can be assigned here for that cause. The remedy, according to modern practice, is by motion to the court below to quash the execution. If, however, the question were properly before the court, we can see no good reason why interest upon a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in it. The legislature say, "all judgments shall bear interest at the rate of eight per cent." Can the judgment be satisfied, without paying the interest? It is the practice in Mississippi, and several other states, to include no interest in the judgment, except what is then due; but to leave it to the collecting officer to calculate the amount of interest, according to law, when he settles with the defendant.

*The remaining objection will now be examined. If an execution had issued upon the bond, improperly, that might have been quashed [*312
on motion of the defendant. This leads us to the consideration of the grounds assumed by the counsel of the defendant. By a statute of Mississippi, it is enacted, that, "no writ of error shall be granted in any case, where a forthcoming bond shall have been given and forfeited" (How. & Hutch., Stat. Laws of Miss. 541); and the district judge has, it is said, adopted this provision of the statute, by rule of court. This being the local law of Mississippi, it is contended, that this court is bound by it; and by the expositions given to it by the supreme court of that state; and many decisions of that court have been referred to. In the case of the *United States Bank* v. *Patton*, 5 How. (Miss.) 200, it is held, that a forthcoming bond forfeited, is an extinguishment of the original judgment, and that a writ of error will not lie to it; and the same doctrine was held in *Sanders* v. *McDowell*, 4 Ibid. 9. If these doctrines are to prevail, the act of congress, authorizing a writ of error on final judgment, would become a dead letter; and the laws of Mississippi on this subject become the supreme law in that state. If the forthcoming bond is applicable at all to the proceedings of the courts of the United States, it must be in the character of final process.

By the third section of the act of congress of the 19th of May 1828, it is enacted, "that writs of execution, and other final process issued on judg-

ments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, saving to the courts of the United States in the states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity, by rules of court: provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change that may be adopted by the legislature of the several states, for the state courts." (4 U. S. Stat. 281.)

We think this section of the act of 1828 adopted the forthcoming bond in Mississippi, as part of the final process of that *state, at the pas-
*313] sage of the act. And we understand by the phrase, "final process," all the writs of execution then in use in the state courts of Mississippi, which were properly applicable to the courts of the United States; and we understand by the phrase "the proceedings thereupon" to mean, the exercise of all the duties of the ministerial officers of the states, prescribed by the laws of the state, for the purpose of obtaining the fruits of judgments. And among these duties is to be found one, prescribed to the sheriff, directing him to restore personal property levied on by him, to the defendant, upon his executing a forthcoming bond, according to law, and the further duty to return it to the court, forfeited, if the defendant fail to deliver the property, on the day of sale, according to the condition of the bond. These are certainly proceedings upon an execution; and therefore, the forthcoming bond must be regarded as part of the final process. It aids materially in securing the payment of the money to satisfy the judgment; and it is part of the process by which the plaintiff is enabled to obtain the payment of the money secured to him by the judgment.

But is this forthcoming bond a judgment, as well as process? The statute declares, that it shall have the force and effect of a judgment, simply, that an execution may issue upon it against the surety as well as the principal, and for all the costs incurred after the judgment. The same effect would have been produced, if the statute had directed execution to issue upon the forthcoming bond, without giving it the force and effect of a judgment. The proceeding which produced this bond was purely ministerial; the judicial mind was, in no way, employed in its production. It does not then possess the attributes of a judgment, and ought, therefore, to be treated in this court as final process, or, at least, as part of the final process. With all due respect for the judicial decisions of state courts, we cannot concede to those of Mississippi all that is claimed for them in this case. So far as they settle rules of property, they will be properly respected by this court. But when the effect of a state decision is only to regulate the practice of courts, and to determine what shall be a judgment, and the legal effect of that, or any other, judgment, this court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are
*314] made are local in their character. *It is the duty of this court, by their decisions, to preserve the supremacy of the laws of the United States, which they cannot do, without disregarding all state laws and state decisions which conflict with the laws of the United States.

In exercising the power conferred upon the circuit courts of the United

States, by the third section of the act of 1828, authorizing them to alter final process, so far as to conform it to any change which may be adopted by the legislatures of the respective states, for the state courts; there is the same danger to be apprehended as from state legislation, and state adjudications on the same sbbject. And therefore, no rule ought to be made, without the concurrence of the circuit judge. No rule made by a district judge will, therefore, be recognised by this court as binding, except those made by district courts exercising circuit court powers. The statute of Mississippi, taking away the right to a writ of error, in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the circuit courts of the United States; a rule af court adopting the statute as a rule of practice would, therefore, be void.

Regarding the forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less is it a final judgment; and therefore, no writ of error lies in such a case. 6 Pet. 648. But in this case, the writ of error is not to the supposed judgment, in refusing to quash the forthcoming bond, but to the principal judgment. It has been sued out and prosecuted by one of several joint defendants; and without asking that the other defendants should be summoned and served; the defendant in error has, however, appeared and defended the suit, and thereby waived the irregularity. But one error has been assigned to the judgment of the court, the other two apply to the final process. The judgment of the court below must, therefore, be affirmed for the reasons here stated.

Judgment affirmed.

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*John A. Gibson and Kinchen A. Martin, Plaintiffs in error, *v.* [*315
Beverly Chew, Defendant in error.

Jurisdiction.—Choses in action.

The circuit courts of the United States have not cognisance of any suit to recover the contents of a promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made; except in cases of foreign bills of exchange.

Error to the Circuit Court for the Southern District of Mississippi. An action was instituted in the circuit court of the United States for the southern district of Mississippi, by Beverly Chew, a citizen of the state of Louisiana, against John A. Gibson and Kinchen A. Martin, citizens of the state of Louisiana. The action was brought to recover the amount of a promissory note drawn by John A. Gibson, in favor of, and indorsed by, Kinchen A. Martin, for $3500, and indorsed over to the plaintiff.

The declaration set out the promissory note, the maker and indorser of the same being included in the same writ, under the provisions of an act of the legislature of Mississippi; which had been adopted as a rule of practice in the circuit court, by order of the district judge holding the circuit court. The defendants appeared to the action, and having demurred to the plaintiff's declaration, filed the following causes of demurrer. 1. This court has no jurisdiction, the plaintiff, in his declaration, being the assignee of Kinchen A. Martin, who is a citizen of the same state with the maker of the note

sued on, as declaration avers. 2. The declaration does not aver defendants to be residents of the southern district of Mississippi. The demurrer was overruled, and the defendants having refused to plead to the merits of the action, judgment was rendered in favor of the plaintiff. The defendants prosecuted this writ of error.

*316] *The case was argued by *Walker*, for the plaintiffs in error; and by *Key*, for the defendants.

Walker, for plaintiffs in error, stated, that this was a suit against the maker and indorser of a promissory note, both being alleged in the declaration to be citizens of the state of Mississippi. Then, by the 11th section of the judiciary act of the 24th September 1789, no suit could be prosecuted in the court below against the maker of the note. It is said, a state law authorizes this proceeding; but no state law can repeal, or be intended to repeal, an act of congress limiting the jurisdiction of the courts of the United States. By the act of congress, the courts of the Union are expressly deprived of all jurisdiction in this case; and such jurisdiction cannot be conferred by a state law, especially, in direct opposition to an act of congress in full force and unrepealed.

Key, for the defendant in error.

Wayne, Justice, delivered the opinion of the court.—This suit was brought in the circuit court of the United States for the southern district of Mississippi, by the defendant in error, as the indorsee of a promissory note, made in Mississippi, of which the plaintiff in error, Martin, was the payee, and the plaintiff, Gibson, the maker; both maker and payee being citizens of the state of Mississippi, when the note was made.

The jurisdiction of the court is denied, and the plea should have been sustained in the court below, as the circuit courts of the United States have not cognisance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. See the 11th section of the act to establish the judicial courts of the United States. (1 U. S. Stat. 78.) The judgment of the court below is reversed.

Judgment reversed.

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*317] * Martha Bradstreet, demandant, Plaintiff in error, *v.* William F. Potter, tenant, Defendant in error.

Practice on appeal.— Costs.

The questions presented to this court on the writ of error, being the same with those in Bradstreet *v.* Thomas, 12 Pet. 174, the judgment of the circuit court, in favor of the defendant in error, was reversed.

The counsel for the plaintiff and defendant in error having applied to the court to hear the case upon other points presented in the briefs of the plaintiff and the defendant, in order to obtain the judgment of the court upon these points, for the direction of the circuit court on the further trial of the cause; the court said: The court cannot give any opinion upon points not properly before it, those points not being in the bill of exceptions filed in the record to the

ruling of the circuit court; the proper functions of a court on a writ of error is to pass judgment upon the points excepted to in the opinion of the court below; and not to decide the law of the case, in anticipation of its trial in the circuit court.

The rule as to costs has been established by the 47th rule of this court. In all cases of reversal of any judgment or decree in the supreme court, except where the reversal shall be for want of jurisdiction, costs shall be allowed for the plaintiffs in error or appellants, as the case may be, unless otherwise ordered by the court.

ERROR to the Circuit Court for the Northern District of New York. The case had been tried in the circuit court for the northern district of New York, on a writ of right, sued out by the demandant, the plaintiff in error, for the recovery of certain lands in the county of Oneida, in the state of New York. After various proceedings in the case, the court gave judgment for the tenant, and this writ of errer was prosecuted by the demandant. The whole of the questions in this writ of error were the same with those presented to the supreme court in the case of Bradstreet *v.* Thomas, 12 Pet. 174.

Jones, for the demandant, and plaintiff in error: and *Beardsley*, for the defendant; it having been agreed by them, that the judgment of the circuit court must be reversed, on the authority of the case of *Bradstreet* v. *Thomas*, 12 Pet. 174; they united in an application to the court to take up the case on the merits, in order to obtain the decision of the court upon
*318] the *whole case; to be used in the circuit court on the trial of the cause, when it should be remanded under the order of this court.

Beardsley also presented to the court a question whether the defendant in error should be subjected to costs, if no judgment was given by this court on the merits of the cause.

WAYNE, Justice, delivered the opinion of the court.—It is admitted by the counsel for the defendant in error, that the case presents upon the record no other exceptions than such as were before this court, in the case of *Bradstreet* v. *Thomas*, 12 Pet. 174. That case then rules it, and the judgment in the court below must be reversed.

But it is now suggested, that both parties desire to obtain the opinion of the court upon ulterior points in the case, as stated in their respective briefs, so as to have those points settled for the new trial of the cause, when remanded, for the errors of procedure adjudicated in the former case of *Bradstreet* v. *Thomas*; because, from the terms of this court's opinion in that case, it seems doubtful, if the court could regularly consider and determine those questions, upon the bill of exceptions, as now framed; though it be the mutual desire of the parties to get the court's opinion upon those questions. It is only necessary to say, in reply to this suggestion, that the court cannot give any opinion upon points not properly before it, from those points not being in the bill of exceptions filed in the record to the court's ruling below. The proper function of a court, on a writ of errer, is to pass its judgment upon the points excepted to in the opinion of the court below; and not to decide the law of the case, in anticipation of its trial in the court below.

In respect to costs upon cases brought to this court, the rule is, as may be seen in the 47th rule of the court prefixed to 8 Peters's reports; that in all cases of reversals of any judgment or decree in this court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this court for the plaintiff in error, or appellant, as the case may be, unless other-

wise ordered by the court. The question as to costs in the circuit court is not before us. The judgment in the court below is reversed.

Judgment reversed.

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*319] *James Roach, Administrator of Philip Roach, Plaintiff in error, *v.* David W. Hulings, Defendant in error.

Error.—Process act.—Exceptions.

The jury, in rendering their verdict, failed to respond separately to the distinct issues they were sworn to try. The defendant had pleaded three pleas: 1. Covenants performed: 2. Payment: 3. Set-off, greater in amount than the claim of the plaintiff. On these three pleas, the jury gave a general verdict of damages in favor of the plaintiff, on which judgment was entered; in the circuit court, no exception waa taken to the verdict. The counsel for the plaintiff contended, that this was error in the circuit court, which was properly to be corrected in the supreme court. Objections of this character, that are neither taken at the usual stage of the proceedings, nor prominently presented on the face of the record, but which may be sprung upon a party, after an apparent waiver of them by his adversary, and still more, after a trial on the merits, can have no claim to the favor of the court; but should be entertained in obedience only to the strict requirements of the law. The three issues were joined on affirmative allegations by the defendant, and the verdict was for the plaintiff on these issues; admitting that this verdict is not affirmatively responsive to these issues, it virtually answers and negatives them all; for if all or either of them had been true, the verdict was untrue; should the judgment, then, be arrested, this would be done neither from a necessity to guard the merits of the controversy, nor from the principles of sound inductive reasoning; but solely in obedience to an artificial and technical rule, which, however it may be founded in wisdom and promotive of good in general, yet, like all other rules, is capable of producing evil when made to operate beyond the objects of its creation.

The third section of the act of congress of 1789, to establish the judicial courts of the United States, which provides that no summary writ, return of process, judgment or other proceedings in civil cases, in the courts of the United States, shall be abated, arrested or quashed, for any defect or want of form, &c., although it does not include verdicts, *eo nomine*, includes judgments; and the language of the provision, "writ, declaration, judgment or other proceedings in civil causes," and further, "such writ, declaration, pleading, process, judgment or other proceeding whatsoever," is sufficiently comprehensive to embrace every conceivable step to be taken in a cause, from the emanation of the writ down to the judgment. Both the verdict and the judgment in this case are within the terms and intent of the statute, and ought to be protected thereby.[1]

In trials at law, while it is invariable true, that decisions on the weight of the evidence belong exclusively to the jury, it is equally true, that whenever instructions upon evidence are asked from the court to the jury, it is the right and duty of the former to judge of the relevancy, and by necessary implication, to some extent, upon the certainty and definiteness of the evidence proposed. Irrelevant, impertinent or immaterial statements, a court cannot be called upon to admit, as the groundwork of instructions; it is bound to take care that the evidence on which it shall be called upon to act is legal, and that it conduces to the issue on behalf of either the plaintiff or the defendant.

*320] *Error to the Circuit Court of the district of Columbia, and county of Washington. The defendant in error instituted an action of covenant, in the circuit court of the county of Washington, against Philip Roach, upon certain articles of covenant. Before the trial of the cause, the defendant died, and his administrator became the defendant in the suit, a verdict and judgment were rendered for the plaintiff, and the defendant prosecuted this writ of error.

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[1] And see Parks *v.* Turner, 12 How. 39; Downey *v.* Hicks, 14 Id. 240; Railroad Co. *v.* Lindsay, 4 Wall. 650.

The case is fully stated in the opinion of the court. It was argued by *Brent, Jr.*, for the plaintiff in error; and by *Bradley*, for the defendant.

DANIEL, Justice, delivered the opinion of the court.—This case comes up on a writ of error to the circuit court of Washington county, in the district of Columbia. It appears from the record, that Philip Roach, the plaintiff's intestate, having contracted, by agreement in writing, on the 3d day of April 1829, with one Samuel Davidson, for the workmanship to be performed in the construction of a lock described as the outlet lock at a place called Lewistown, did, on the 27th of April, in the same year, enter into a covenant with Hulings, the defendant in error, in which it was agreed, that the defendant should supply all the timber, plank and boards, required in building this lock, at prices stipulated in the said covenant, to be paid by the plaintiff's intestate.

On the 13th of March 1837, an action of covenant was instituted by Hulings, in the circuit court of Washington county, against Philip Roach, to recover the value of the timber, plank, &c., alleged to have been furnished by the former, in performance of the contract. The covenant, is by *profert*, made a part of the record. An account, exhibit B, is filed, showing the amount and value of the materials for which compensation is claimed; also the deposition of a witness, Samuel Davidson, to prove the justice of this account. Philip Roach having died, after appearance to the suit, process was directed against his representative; and the defendant having subsequently appeared, as administrator of the deceased, filed, first, the pleas of covenants performed, and payment by his intestate; and next, the plea of set-off of an *alleged debt of $3000 due to the intestate in his life-time, and greater in amount than the damages claimed by the plaintiff. [*321
On these three pleas, issues were joined; and the jury rendered a general verdict in damages for the plaintiff. The questions of law decided by the court below, and now presented for review here, arise upon two bills of exception sealed by the judges of the circuit court, and made parts of the record.

But before going into an examination of these questions, it is proper to advert to a point which was neither suggested nor decided in the circuit court, but which has been urged, for the first time, by the counsel for the plaintiff in error, before this court. The point thus raised and pressed by counsel is the following: that the jury, in rendering their verdict, failed to respond separately to the distinct issues they were sworn to try; and that this failure by the jury constitutes an error for which the judgment of the circuit court should be arrested. Objections of this character, that are neither taken at the usual stage of the proceedings, nor prominently presented upon the face of the record, but which may be sprung upon a party, after an apparent waiver of them by his adversary, and still more, after a trial upon the merits, can have no claim to the favor of the court; but should be entertained in obedience only to the strictest requirements of the law. Let us see how far, in the present instance, the court is controlled by any such absolute and inflexible authority. The three issues were joined upon affirmative allegations by the defendant: 1st, That his intestate had performed his covenant: 2d, That he had paid whatever was due the plaintiff: and 3d, That the defendant possessed, in right of his intestate, a claim against the plaintiff, greater in amount than the plaintiff's demand against

him. Upon these affirmative averments, the jury find a verdict for the plaintiff. Admitting, that this verdict is not technically responsive to the several pleas, it virtually answers and negatives them all; for if all or either of the pleas had been true, the verdict was untrue. Should the judgment then be arrested, this would be done, neither from a necessity to guard the merits of the controversy, nor from the principles of sound inductive reasoning; but solely in obedience to an artificial and technical rule, which, however it may be founded in wisdom, and be promotive of good, in general, yet, like all other rules, is capable of producing evil, when *made to operate beyond the objects of its creation. It was to prevent the mischiefs ensuing from a misapplied rigor, that statutes of jeofails have been enacted, and their salutary influence is invoked, whenever the intrinsic merits of parties litigant would, without that influence, be sacrificed to mere modes and forms of practice. By the 32d section of the act to establish the judicial courts of the United states, it is provided, "that no summons, writ, return, process, judgment or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts, respectively, shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or wants of form in such writ, declaration or other pleading, return, process, judgment or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer, as the cause thereof." It is true, that a verdict, *eo nomine*, is not comprised within this provision of the statute, but judgments are; and the language of the provision, "writ, declaration, judgment or other proceedings in civil causes," and further, "such writ, declaration, pleading, process, judgment or other proceeding whatsoever," is sufficiently comprehensive to embrace every conceivable step to be taken in a cause, from the emanation of the writ down to the judgment. The court have shown that the proceedings in this cause were according to the right of the case, that they brought into view the real merits of the parties litigant before the jury; they, therefore, consider both the verdict and judgment are within the terms and intent of the statute, and ought to be protected thereby.

*322]

The first bill of exceptions states, that the plaintiff having introduced his proofs, the defendant then gave evidence, that in the spring of 1831, the plaintiff stated to the witness, that he had just settled with Philip Roach (the defendant's intestate) all his private accounts, as well as an account of one Davidson against said Roach, and had been paid the same, except $500 for which he had Roach's due-bill or note, payable on demand, but the witness was uncertain whether the plaintiff said it was a due-bill or note; and further stated, that he and Roach were going to *Washington, where Roach had provided to pay said due-bill or note. And the defendant further proved, that about the time of this statement by plaintiff, Roach drew out of a partnership, a considerable sum of money, for his own use; whereupon, the defendant moved the court to instruct the jury, "that if they believed the account in suit was settled by a due-bill or note given by defendant's intestate to the plaintiff, then the presumption is, that the said due-bill or note had been paid;" and afterwards further prayed the court

*323]

to instruct the jury, "that if the jury believe from the evidence, that the defendant's intestate, in the spring of 1831, closed the account in suit, by giving to the plaintiff his due-bill or note, payable on demand, and that immediately afterwards the plaintiff, with Philip Roach, came to Washington for the purpose of receiving the money for the said due-bill or note; that about the time of said visit to Washington, a considerable sum of money was withdrawn by said Roach, from a partnership in which said Roach was engaged with Patrick Donelly, in consequence of which Donelly abandoned the partnership; then the jury may presume from the above facts, and from the non-production of the due-bill or note by the plaintiff, no account being given by the plaintiff of said bill or note, that the same was paid and delivered to the said Philip Roach, and by him destroyed;" but the court refused, &c.

In trials at law, whilst it is invariably true, that the decision of questions upon the weight of the evidence belongs exclusively to the jury, it is equally true, that wherever instructions upon evidence are asked from the court to the jury, it is the right and duty of the former to judge of the relevancy, and, by necessary implication, to some extent, upon the certainty or definiteness, of the evidence proposed. Irrelevant, impertinent or immaterial statements, a court cannot be called upon to admit as the groundwork of instructions; it is bound to take care that the evidence on which it shall be called to act, is legal; and that it conduces to the issue on behalf either of the plaintiff or of the defendant. To apply these principles to the case under review: The purpose of the defendant below was, to show, that the demand of the plaintiff, if originally well founded, had been paid by the execution of a note by the testator of the defendant, which note had been subsequently satisfied, surrendered to the maker, and by him destroyed. *And what was the evidence introduced to establish these conclusions? The statement, by a witness, of a conversation [*324 between himself and the plaintiff, in 1831, wherein it was stated, amongst other things, by the former, that he had settled all his private accounts, as well as on account of one Davidson, against said Roach, and had been paid the same, except $500, for which he had Roach's due-bill or note, payable on demand, but the witness was uncertain, whether the plaintiff said it was a due-bill or note; and further said, that he and Roach were going to Washington, where Roach had promised to pay said due-bill or note; and further, that about this time Roach drew out of a partnership a considerable sum of money, for his own uses.

Now, the first thing which strikes the attention, with respect to the testimony of the witness, is, that he does not prove with certainty, if at all, the existence of any instrument whatsoever; he saw none, and cannot give a clear and certain description of it, as reported to him by the plaintiff; he does not know whether it was a due-bill or a note. In the next place, the witness does not disclose, whether this note or due-bill, or whatever it may have been, was given for the benefit of Davidson, or for that of the plaintiff; for we are told, that the plaintiff professed to have settled with Roach his own private accounts, as well as on account of one Davidson. Now, although there was a contract between Roach and one Davidson, for the building of the outlet lock, yet there is nothing in the plaintiff's contract with Roach, nor any proof in the record, which connects

the plaintiff, or his undertaking, or the obligations of Roach to him, with any transaction between Davidson and Roach. Then, when the plaintiff is represented as speaking of a settlement with Roach, on account of Davidson, distinguishing it, at the same time, from a settlement of his own private account, and as speaking of a note or due-bill taken upon these settlements, it would be as regular to presume, that such note or due-bill (if it were practicable to conjecture which it was) belonged as much to the one settlement as the other. Upon these loose statements, the court were asked to instruct the jury, that if they believed the account in suit was settled by a due-bill or note given by the defendant's intestate to the plaintiff, then the presumption is, that the said due-bill or note has been paid. And further, that if they believed from the *same evidence, that the defend-
*325] ant's intestate, in 1831, closed the account in suit, by giving to the plaintiff his due-bill or note, payable on demand, and that immediately afterwards, the plaintiff, with Philip Roach, came to Washington, for the purpose of receiving from Philip Roach the money for the said due-bill or note; and that money was drawn by said Roach from a partnership in which he was engaged; then the jury may presume from the above facts, and the non-production of the due-bill or note by the plaintiff (no account being given by the plaintiff of the said due-bill or note), that the same was paid, and delivered to the said Philip Roach, and by him destroyed, &c. The propositions which the court were here required to affirm, so far from following as regular or allowable inferences from the evidence, appear to be in nowise dependent upon it. No witness had proved so much as the existence of any particular writing whatsoever; much less, that of an obligation payable to the plaintiff, and in his own interest and behalf How, then, could the jury, with any propriety, be directed to presume, not only the existence of such an obligation, but also its discharge; and in addition to these facts, its actual surrender to, and destruction by, the defendant's intestate; thereby relieving him from all the presumptions naturally arising against a party from the non-production of a document, whenever the custody thereof is brought home to him, either by direct or circumstantial proofs. Almost any other propositions which can be imagined could, with as much regularity, have been required from the court as instructions to the jury, as those which the court was requested to affirm.

The cases of *Swift* v. *Stevens*, 8 Conn. 431, and of *Freeman* v. *Boynton*, 7 Mass. 483, have been relied on in argument for the plaintiff in error. Any influence of these cases in favor of the plaintiff, the court is unable to perceive. The former was an action upon a lost promissory note; the latter was also an action upon a note, in which the question of diligence was chiefly involved. In these cases, the only points ruled which seem to have any affinity with this case, were, that in the first, the existence, at one period, and the subsequent loss or destruction of the note, was required to be clearly shown; and in the second, it was decided, that as a general rule, the demand
*326] for payment of a note must be accompanied with the possession *of the note. Accordingly, in the case from 8 Pick., the existence and subsequent loss of the note were established by a disinterested depositary with whom it had been lodged. These cases were ruled, and most properly so, upon the principle, that a debtor, when he makes payment, shall receive the best allowable protection against a repetition of the same demand

upon him, viz., his bond or his note, when either has been given. The cases of *Clark* v. *Young*, 1 Cranch 181 ; of *Harris* v. *Johnston*, 3 Ibid. 311 ; and of *Morgan* v. *Reintzell*, 7 Ibid. 273, all turn upon the same principle. In the plaintiff's first bill of exceptions, the evidence tendered is vague and confused ; it establishes nothing pertinent to the point raised, and does not warrant, as a legitimate conclusion from it, the instruction asked for. The court, therefore, properly denied that instruction.

In the second bill of exceptions, the court is asked to instruct the jury, that should they be of opinion from the said evidence, that Philip Roach made and delivered his negotiable note, payable on demand, to the plaintiff, for the balance due him on a final settlement of all accounts, that the plaintiff cannot recover, unless he has produced the said note, or proved that the same was lost, or that the same was cancelled, &c. This bill of exceptions may be disposed of in very few words. The instruction it prays for purports to be founded upon the evidence contained in the former bill ; and it asks, that if the jury shall believe, upon the evidence, that Philip Roach did execute and deliver to the plaintiff his negotiable note, payable on demand, then, &c. Now, in the evidence referred to, there is not one word contained relative to a negotiable note made and delivered by Philip Roach to the plaintiff, or to any other person. It would have been improper for the jury to have embraced in their contemplation or belief anything concerning a negotiable note ; and improper for the court to have given them any instruction concerning a document which was not in the cause, and about which not a tittle of evidence was adduced from any quarter. In refusing the instructions asked for, as set forth in this second bill, the circuit court have also decided correctly ; and this court, approving its decision upon both the points adjudged by it, doth affirm the judgment of the circuit court.

Judgment affirmed.

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*William H. Fresh, Plaintiff in error, *v.* Riah Gilson, Christopher Midlar and James Fresh, Defendants in error. [*327

Agency.—Contract.—Assumpsit.

Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or in some instances, from acquiescence in those acts ; but presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and must still more give place, when in conflict with clear, distinct and convincing proof.

The circuit court of the district of Columbia admitted as evidence, a statement by one witness of what had been testified by another on the trial of a cause, to which the plaintiff in the cause and against whom the evidence was to operate, was not a party : *Held*, that this was error ; wherever the rights of a party, founded upon a deed, are dependent on the terms and conditions of that deed, the instrument thus creating and defining those rights must be resorted to ; and must regulate, moreover, the modes by which they are to be enforced at law. These identical rights cannot be claimed as being derived from a different and inferior source ; if the deed be in force, all who claim by its provisions must resort to it.

When the contract contained in a deed has beed varied or substituted by the subsequent acts or agreements of the parties, thereby giving rise to new relations between them, the remedies originally arising out of the deed, may be varied in conformity with them. An action upon the deed would not be insisted upon or permitted, because the rights and obligations of the parties to the suit would depend on a state of things by which the deed had been put aside.

Fresh *v.* Gilson, 5 Cr. C. C. 533, reversed.

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

This case was argued by *Brent, Jr.*, for the plaintiff in error; and by *Bradley*, for the defendants.

DANIEL, Justice, delivered the opinion of the court.—This case arises under the attachment law of the state of Maryland, passed in 1795; and comes before this court upon a writ of error to the circuit court of the district of Columbia, for Washington county; within which the law of Maryland above mentioned is in force. The proceedings instituted in this case, although commencing by an attachment, and upon what is termed a short note, in lieu of a formal declaration, assume, nevertheless, the essential character, and in some respects, the usual forms of the action of *assumpsit*,
*328] and must be governed by the *rules applicable to such an action. The defendants dissolved the attachment, by appearing and entering special bail, and pleading "*non assumpsit*;" and upon the issue made up on this plea, the cause was tried in the circuit court.

Upon the trial, exceptions were taken, in five separate instances, to the rulings of the circuit court, and in each of them, the exception sealed by the judges is made a part of the record. To test the accuracy both of the decisions thus pronounced, and of the objections alleged against them, it will be necessary to advert to the facts adduced in proof.

It appears, that on the 23d of August 1832, the defendants in error entered into a convenant wlth the Chesapeake and Ohio Canal Company, for certain rates and prices stipulated in a covenant sealed between the defendant and the company, by their president, and in a specification appended to the said covenant, to construct, in a substantial and workmanlike manner, culvert No. 116, on the 150th section of the Chesapeake and Ohio Canal; and to prosecute the work upon the said culvert, without intermission, with such force as should, in the opinion of the resident engineer, secure its completion by the first day of August 1833. On the 3d day of November 1832, a covenant was entered into between the plaintiff in error and the defendants, or rather with Riah Gilson, one of the defendants, styling himself superintendent for Gilson & Company, by which the construction of the culvert, No. 116, was let to the plaintiff, at the contract prices to be paid by the company for the work; with the exception that Fresh should pay to the defendants, from whom he took this contract, the sum of $100, which sum appears to have been a profit reserved to themselves by the first contractors, upon the transfer of their undertaking. In this second covenant, the plaintiff in error bound himself "to be urgent in the performance of the work, so that it might progress in accordance with the specification and directions of the engineers." And further, that in the event of neglect or failure on his part, the defendants should have authority to declare the work abandoned, to assume the direction, and to complete it at the plaintiff's expense. Having thus obtained a contract under the defendants, the plaintiff, on the 2d day of May 1833, made an agreement with Elijah Barret, for building of this culvert, by the latter;
*329] *stipulating to pay Barret the price of one dollar, twelve and a half cents for every perch of stone-work of twenty-five cubic feet, upon a certificate and approval of the engineer or superintendent of masonry as

to the fidelity of the work. The plaintiff, on the trial, offered these several contracts in evidence ; also an account against the defendant, stated on the 24th of December 1833, for masonry, excavation and paving performed, and for cement not supplied by the plaintiff in the construction of culvert 116 ; on which account, after allowing a credit of $1142.73, a balance of $1343.01 was claimed. This was the account on which the warrant of attachment issued. The plaintiff further proved the delivery of the letter, dated December 25th, 1833, adressed by him to Wells, the agent of the defendant, in which he required a statement of his account with them, and expressly forbade the payment to Elijah Barret of any amount whatever.

The defendants, to rebut the plaintiff's demand, offered the account, exhibit C, commencing December 5th, 1832, and terminating the 21st of December 1833, amounting to the sum of $1369.36 ; and proved by their clerk, that the work on the said culvert was completed on the 21st of December 1833, and that the account last mentioned was received by the plaintiff, without objection, except as to the quantity of cement charged therein. The defendants likewise offered in evidence, several orders, numbered from 1 to 7, drawn by Elijah Barret, by himself and his agents, in favor of William Harris, upon the defendants, at different periods during the autumn and winter of 1833, and claimed the benefit of them, as payments to the plaintiff. These orders purport to have been paid all on the same day, viz., April 29th, 1835, rather more than two years posterior to the date of the letter delivered to the defendant's agent, positively forbidding any payment to be made to Barret, or to his order, and nearly one month after the institution of this suit. And it is admitted, that the orders were never shown to the plaintiff, nor expressly recognised by him at any time. The defendant offered seven other papers, purporting to be orders and due-bills signed and certified by Elisha Barret, in November and December 1833 ; three of them *said to be for work done upon culvert No. 116, and amounting in the whole to $273.50 ; these last orders and certificates, it is also admitted, were never shown to the plaintiff, nor acknowledged by him, and it does not appear that they have ever been paid. Oral testimony was also introduced on the part of the defendants, in order to show that the work had been abandoned by the plaintiff, and its completion assumed and accomplished by the defendants ; and on the part of the plaintiff, like evidence was offered to prove that he continued on the work and labored on it until it was finished on the 21st of December 1833. [*330

Upon the foregoing state of facts, the counsel for the plaintiff moved the court to exclude from the jury the orders drawn by Barret in favor of Harris, as well as the evidence offered to prove the payment of those orders in April 1835, more than two years after their payment had been forbidden by the plaintiff : the court admitted this evidence to go to the jury, and this produces the question presented by the first bill of exceptions.

We are unable to perceive upon what correct legal principle this question was ruled as it has been by the circuit court. There is no express power apparent in the record, nor indeed, was any attempted to be shown in the proofs, existing in Barret, to bind Fresh for any amount, with any person. It is true, that under the contract between them, the former would have had a claim on his own behalf, whenever he should have fulfilled his undertaking ; but not even then, until he should have procured a certificate

from the engineer of the company. But the right or claim he would then have acquired, differs essentially from the pretension sanctioned by the decision of the court, which amounts to an evasion of the stipulated test of his own conduct and his own rights, and to a claim, by that very evasion, to bind his employer *ad libitum* to any amount and to any person. Nor is it perceived, that the admission of these orders was warranted by any presumption arising from the fact that orders previously drawn by the same person were comprised in the account proved to have been presented by Fresh ; and not objected to by him, except as to the quantity of cement charged therein. Liability for the acts of others may be created, either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from *acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them ; and still more must give place, when in conflict with clear, distinct and convincing proof. 3 Bac. Abr. 518, H, Presumptive Proof ; 4 Stark. Evid. 53. The letter of the plaintiff, Fresh, delivered to the agent of the defendants, more than two years anterior to the alleged payment of the orders drawn by Barret, fully accords with the character of the proof just described ; it justified no presumption of right or authority in Barret to make, nor of any obligation upon the defendants to pay, those drafts ; and the circuit court, therefore, erred, in permitting them to be given as evidence, instead of excluding them wholly from the jury.

*331]

The next question arises upon the admissibility of the second series of orders and certificates or due-bills signed by Barret, amounting together to $372.50, embraced in the second bill of exceptions. These orders are obnoxious to even stronger objections than those existing against the former orders drawn by Barret ; they not only, like the former, were never (as is admitted) shown to or acknowledged by the plaintiff, but they carry on their face no receipt or other semblance of payment, nor is proof attempted *aliunde*, that the defendants have given, or are bound to give, any consideration for them. The circuit court should have excluded these papers also.

It is next stated, that in addition to the evidence previously introduced by the defendants, they offered to prove by a competent witness, that at the trial of a cause brought by one Hammond against two of the defendants, and to which the plaintiff was not a party, certain facts were proved by a witness examined in that cause. The plaintiff asked the exclusion of this testimony by the court, but his motion was denied, and this denial presents the point upon the third bill of exceptions. The evidence let in by this decision of the circuit court was not the exhibition of a record, nor even of a judgment, nor of process ; but simply a statement by one witness, of what had been testified by another, on the trial of a cause to which the plaintiff was not a party, without an attempt to account for the absence of the person whose testimony was thus given at second hand. The principles, *that the best evidence the nature of the case admits of must always be produced, and that a person shall not be affected by that which is *res inter alios acta*, are too familiar to require authorities to support them. We will mention, however, as applicable to these points, 3 Bac. Abr. 322, I ; 3 East 192 ; 2 Wash. 287 ; 5 Cranch 14 ; 1 Stark. Evid. 58–9. But familiar

*332]

as these principles may be, as rudiments of the law, they are elements which enter essentially into the security of life, character and property. The circuit court, in conflicting with these principles, have further erred.

In the fourth bill of exceptions, it is stated, that defendants offered to prove, that Riah Gilson and Christopher Midlar, two of the defendants, superintended the performance of the work on the culvert No. 116, and that their superintendence was worth $150. That to the admissibility of this proof, the plaintiff objected, but the court permitted it to be received. The questions here raised, or rather the facts which make the basis of those questions, are somewhat vaguely and imperfectly stated. Enough, however, can be gathered from them, to justify the following conclusions. 1st. That by the written contract between the plaintiff and the defendant, or by any oral agreement attempted to be shown between these parties, there is no condition established authorizing or requiring the defendants to become the supervisors of the plaintiff in the performance of his work. 2d. That if the defendants have performed the work, either in fulfilment of their original contract with the canal company, or in consequence of an abandonment by the plaintiff, a charge for superintendence would appear inconsistent with the position they would have occupied in either view. Such a claim is, therefore, regarded as irregular and unauthorized, and should have been excluded.

Upon the fifth and final bill of exceptions, it is, in substance, set forth, that the plaintiff having given in evidence the contract between the canal company and the defendants, and the contract under the seals of the plaintiff and Riah Gilson, one of the defendants; the latter offered their account against the plaintiff, and proof that the culvert No. 116, was not completed until after the 1st of August 1833, the period designated in the original contract with the company. The plaintiff then offered evidence to *show, that the work was carried on until the 21st of December 1833, at which date it was completed, and afterwards accepted, formally [*333 and expressly, by the company. And the defendants offered oral evidence to prove, that the work had been abandoned by the plaintiffs, and was finished by the defendants. Then follow the instructions moved for and granted, in the following terms. The defendant then prayed the court to instruct the jury, that "if from the evidence, the jury shall find, that there was an agreement under seal between the said plaintiff and the defendant, for the execution of the work and labor for which this action was brought, the plaintiff is not entitled to recover in this action;" and further, that "if from the evidence, the jury shall find, that the said plaintiff performed the work and labor for which this action is brought, under a sealed agreement between the said plaintiff and Riah Gilson, then the plaintiff is not entitled to recover in this action;" to the granting of which two "instructions, unless qualified, the plaintiff objected; but the court overruled the objection, and gave the said instructions as prayed."

Had the ruling of the circuit court, in this instance, been limited to an affirmance of the second proposition insisted on by the defendants, this court could not hesitate in sustaining the decision; for we hold it as invariably true, that wherever the rights of a party founded upon a deed are dependent upon the terms and conditions of that deed, the instrument, thus creating and defining those rights must be resorted to, and must regulate,

moreover, the modes by which they are to be enforced at law. These identical rights cannot be claimed as being derived from a different and an inferior source. If the deed be in force, all who claim by its provisions must resort to it. This is regarded as a canon of the law, and numerous authorities might be adduced to sustain it, both from compilations and from the adjudged cases. 2 Bac. Abr. tit. Debt, G, citing 13 Hen. IV. 1, and Roll. Abr. 604 ; 1 Chit. Plead. 75 ; *Atty* v. *Parish*, 4 Bos. & Pul. 104 ; 12 East 585 ; *Clark* v. *Smith*, 14 Johns. 326 ; *Munroe* v. *Perkins*, 9 Pick. 298. These authorities, to which many more might added, are full and express to the point, that where a deed is the foundatiou of the claim, and can still be regarded as subsisting and in full force between the parties, the action
*334] to enforce its provisions must *be upon the instrument itself. In the case of *Tilson* v. *Warwick Gaslight Company*, 4 Barn. & Cres. 962, there are some expressions of BAYLEY, Justice, which indicate an opinion by that learned judge, in opposition to the doctrine above laid down, and as counsel in the case of *Atty* v. *Parish*, he had maintained an opposite doctrine ; but it should be borne in mind, that in *Tilson* v. *Gaslight Company*, the decision did not turn upon the principle ruled in the several authorities above cited, but entirely upon a state of the pleadings in which the judges declared they would be justified, if necessary, in presuming the existence of a deed. It should be remembered, too, that in deciding the case of *Atty* v. *Parish*, Chief Judge MANSFIELD, after advisement, and delivering the unanimous opinion of the court, declared the doctrine contended for by Justice (then Serjeant) BAYLEY, to be such as he did not understand, or did not feel the application of. With all the deference justly due to so learned and able a jurist as Justice BAYLEY, his argument as counsel, or his opinion, intimated, not upon the point adjudged, should not overrule a current of authorities extending from the Year Books to our own day.

There cannot be a doubt, that where the contract contained in a deed has been varied or substituted by the subsequent acts or agreements of the parties, thereby giving rise to new relations between them, the remedies originally arising out of the deed may be varied in conformity with them. An action upon the deed would not be insisted upon or permitted, because the rights and obligations of the parties to the suit would depend upon a state of things by which the deed had been put aside. Hence, it has been ruled, that where a person who had covenanted to perform certain work had failed or refused to fulfil his covenant, but had afterwards, upon the parol engagement of the covenantee, or by his acts, amounting in law to an engagement, gone on, in whole or in part, to do the work, he might recover the value of the work in *assumpsit* upon a *quantum meruit*. So, too, between partners, though articles of copartnership have been sealed between them, yet, upon an account stated, and a balance struck, *assumpsit* will lie. This principle is illustrated in several of the authorities already quoted, and in none of them more forcibly then in those of *White* v. *Parkin*, 12 East 585 ; *Monroe* v. *Perkins*, 9 Pick. 289 ; to which may be added the cases of the
*335] *Marine Insurance* *Company* v. *Young*, 1 Cranch 332 ; *Baird* v. *Blaigrove*, 1 Wash. 170 ; and *Latimore* v. *Harsen*, 14 Johns. 330 ; and in the case of *Fletcher* v. *Gillespie*, 3 Bing. 635, although a charter-party had been entered into, yet expenses incurred by the master in loading

the ship were recovered in *assumpsit;* for, say the court, in that case, "this claim does not rest upon the charter-party, it is for money paid *dehors* the contract, for the ease and benefit of the defendants, and from which they have derived advantage." Numerous cases applicable to the point here considered will be found collected by Saunders, in his Treatise on Pleading and Evidence, vol. i. p. 110. It is upon this well-settled distinction, that the court, whilst it recognises the principle affirmed by the second instruction contained in the fifth bill of exceptions, feel bound to disapprove and overrule the first instruction in that bill. It is manifest, that at the trial, testimony was introduced, tending to show that the contract between the defendants and the canal company, as well as that entered into between the same defendants and the plaintiff, had been modified or substituted by other and new contracts, tending too to show acts of performance by the parties to these new and modified engagements. It was certainly competent for the parties to use such evidence, and to rely upon its effect before the jury. The first instruction of the circuit court, contained in the last bill of exception, cuts off from the plaintiff, at least, all benefit of such evidence, however strong it might have been. In this we consider that instruction as having deprived the plaintiff of an undoubted legal right. We regard it, therefore, as erroneous; and for this cause, and for the reasons assigned for disapproving the rulings of the circuit court upon the other instructions given in this case, the judgment of that court is hereby reversed and the cause is remanded to be again tried by a jury in conformity with the principles of this decision.

Judgment reversed.

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*David Prouty and John Mears, Plaintiffs in error, *v.* Draper, Ruggles & Co., Defendants in error. [*336

Patent for improvement.

The plaintiffs, in the circuit court, claimed damages for the infringement of their patent for "a new and useful improvement in the construction of a plough;" the claim of the patentees was for the combination of certain parts of the plough, not for the parts separately. The circuit court charged the jury, that unless it was proved, that the whole combination was substantially used in the defendant's ploughs, it was not a violation of the plaintiff's patent; although one or more of the parts specified in the letters-patent might be used in combination by the defendant; the plaintiffs, by their specification and summing up, treated the parts described as essential parts of their combination, for the purpose of brace and draft; and the use of either alone by the defendant would not be an infringement of the combination patented: *Held*, that the instructions of the circuit court were correct.

The patent was for a combination, and the improvement consisted in arranging different portions of the plough, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect; none of the parts referred to were new, and none were claimed as new; nor was any portion of the combination, less than the whole, claimed as new, or stated to produce any given result. The end in view was proposed to be accomplished by the union of all, arranged and combined together in the manner described; and this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough, in the manner therein described, was stated to be the improvement, and was the thing patented. The use of any two of these parts only, or of two combined with a third, which was substantially different in the form, or in the manner

of its arrangement and connection with the others, was, therefore, not the thing patented; it was not the same combination, if it substantially differed from it in any of its parts.[1]

Prouty *v.* Draper, 1 Story 568, affirmed.

Error to the Circuit Court of Massachusetts. The plaintiffs in error instituted a suit in the circuit court of Ma sachusetts, for the recovery of damages for the violation of a patent granted to them by the United States, for a new and useful improvement in the construction of a plough.

The cause was tried before a jury, at October sessions of the circuit court, in 1841, and a verdict and judgment were rendered for the defendant. The plaintiffs took exceptions to the charge of the court, and prosecuted this writ of error.

*337] The case was submitted to the court, on printed arguments, by * *Choate*, for the plaintiffs in error; and by *Dexter*, for the defendants. The case is fully stated in the opinion of the court.

Taney, Ch. J., delivered the opinion of the court.—This case is brought here by a writ of error to the circuit court of the United States for the district of Massachusetts. The action was instituted for the purpose of recovering damages for an infringement of a patent, which the plaintiffs had obtained for an improvement in the construction of the plough. The invention is described in the specification, as follows:

"Be it known, that we, the said Prouty and Mears, have jointly invented, made and applied to use, a new and useful improvement in the construction of the plough, which invention and improvement we describe and specify as follows, viz: Heretofore, the standard and land-side of the plough has been placed perpendicular to, and at right angles with, the plane of the share; on this standard, the beam has been placed in such manner as to form an acute angle with the land-side, of such extent as to place that part of the beam to which the moving power is applied, at the distance of three or more inches from an extended line of the land-side, to the right; while the after-part of the beam extends one or more inches to the left of the perpendicular of the land-side, near the handle; the object has been to cause the plough 'to run to land,' or hold its width of furrow. The effect produced has been an uneasy, struggling motion, as it meets resistance at the point, wing or heel. We make our plough with the standard and land-side forming an acute angle with the plane of the share, the standard inclining to the right or furrow side, in such manner as to enable us to place the centre of the beam on a line parallel with the land-side, the forepart thereof at such distance

[1] Silsby *v.* Foote, 14 How. 219; s. c., 1 Bl. C. C. 445; McCormick *v.* Talcott, 20 How. 402; s. c. 6 McLean 539; Vance *v.* Campbell, 1 Black 427; Eames *v.* Godfrey, 1 Wall. 78; Reedy *v.* Scott, 23 Id. 366; Dunbar *v.* Myers, 94 U. S. 202; Fuller *v.* Yentzer, Id. 288; Gage *v.* Herring, 107 Id. 640. But the doctrine of equivalents applies to a patent for a combination; a combination, however, is not infringed, except by a machine containing all the material ingredients patented, or proper substitutes for one or more of them, well known to be such at the time the patent was granted. Seymour *v.* Osborne, 11 Wall. 516. The rule is otherwise, if the ingredient substituted was a new one, or performs a substantially different function, or was not known, at the date of the patent, as a proper substitute for the one omitted from his patented combination. Gould *v.* Rees, 15 Wall. 194. By an equivalent is meant, that the ingredient substituted for the one withdrawn, performs the same function as the other, and that it was well known, at the date of the patent securing the invention, as a proper substitute for the one omitted. Gill *v.* Wells, 22 Wall. 28.

from the extended line aforesaid, as to cause the plough to hold its width of furrow, and the after-part falling within the perpendicular of the land-side of the plough, the centre of it being nearly perpendicular to the centre of resistance, on the mould-board, which we conceive to be at about one-fourth part of the lateral distance from the land-side to the wing of the share, and at about one-third part of the perpendicular *height from the plane of the share to the upper edge of the mould-board. This [*338 location of the centre of resistance, we base on the fact, that many ploughs which have been used in sharp, sandy soils, have been worn quite through at that point. The result of this formation of the plough, is a steady, well-balanced motion, requiring less power of draft, and less effort in directing the plough in its course.

"The inclination of the standard and land-side, causes the plough to cut under, and take up the furrow, in the form of an oblique-angled parallelogram, or like a board, feather-edged, which being turned over, falls in level with the last furrow, more readily than right-angled or square-edged work. The coulter or knife, having a similar inclination, cuts the roots of the grass, &c., and leaves all vegetable matter on the surface, at a greater distance from the under edge of the furrow, which being turned over, more readily falls in, and is far better covered than with square-edged work. The top of the standard, through which the bolt passes to secure the beam, is transversely parallel to the plane of the share, and extends back from the bolt to such distance as to form a brace to the beam, when the after-part is passed down by lifting at the forepart; the share being fast under a rock, or other obstruction, the after-part of this extension is squared in such manner, that being jogged into the beam, it relieves the bolt in heavy draft. The bolts which we use to fasten the pieces of cast iron, of which our ploughs are made, together, and the wood-work, are round, with inverted convex heads, like the wood-screw, with a projection on the under side of the head, of semicircular form, which fits into a groove in the counter-sink part of the bolt-hole, as it is cast to receive it, which not only prevents its turning, but also diminishes the liability of breakage at the corners of square holes; all which will more fully appear by reference to the drawing annexed to, and forming part of this specification.

"We hereby declare, that what we claim as new, and of our invention, is the construction of such ploughs as aforesaid, and the several parts thereof, not separately, but in combination, for the purposes aforesaid, viz: *1. The inclining the standard and land-side so as to form an acute angle [*339 with the plane of the share. 2. The placing the beam on a line parallel to the land-side, within the body of the plough and its centre, nearly in the perpendicular of the centre of resistance. 3. The forming the top of the standard for brace and draft. We do not intend to confine our claim to any particular form or construction, excepting such form as may be necessary to place the beam in the perpendicular of the centre of resistance, and parallel to the land-side, and also to such form of the top of the standard, as shall serve for brace and draft, but have given such form as we deem to be most convenient, which may be varied, as is obvious."

The plaintiffs offered to prove the utility of the alleged improvement, which proof was dispensed with by the defendants. Certain ploughs, alleged by the plaintiffs to be made in conformity with their letters patent,

and certain ploughs made by the defendants, which were the alleged infringement of the plaintiff's patent, were produced in court; and no substantial difference between them was shown by the defendants to exist, unless the fact, that the top of the standard in the defendant's plough was not jogged into the beam, and did not extend so far back upon the beam, was to be so considered. And the plaintiffs offered evidence to show, that the top of the standard, formed as stated in the specification, would serve for both purposes of brace and draft, although not jogged into the beam.

The defendants introduced no evidence. The counsel for the plaintiffs requested the court to instruct the jury as follows, to wit: The counsel of plaintiffs respectfully move the court to instruct the jury, that if the defendants have used, in combination with the other two parts, a standard, of the description set forth in the specification, and it is proved to serve both for brace and draft, such use was an infringement of the plaintiffs' claim in that particular, although the defendants may not have inserted into a jog in the beam. Also, that if any two of the three parts described, as composing the construction claimed in the specification, had been used
*340] in *combination by the defendants, it was an infringement of the patent, although the third had not been used with them. The court refused to give the instructions so prayed, or either of them, in manner and form as prayed by the plaintiffs; but did instruct the jury as follows, to wit:

That upon the true construction of the patent, it is for a combination and for a combination only. That the combination, as stated in the summing up, consists of three things, viz: 1. The inclining the standard and land-side so as to form an acute angle with the plane of the share. 2. The placing the beam on a line parallel to the land-side, within the body of the plough and its centre, nearly in the perpendicular of the centre of resistance. 3. The forming the top of the standard for brace and draft. That unless it is proved, that the whole combination is substantially used in the defendant's ploughs, it is not a violation of the plaintiff's patent, although one or more of the parts specified, as aforesaid, may be used in combination by the defendants. And that the plaintiffs, by their specification and summing up, have treated the jogging of the standard behind, as well as the extention, to the essential parts of their combination for the purpose of brace and draft; and that the use of either alone by the defendants would not be an infringement of the combination patented. And thereupon, the jury rendered their verdict for the defendants.

The first question presented by the exception is, whether the extension of the standard, and the jogging of it into the beam, are claimed as material parts of the plaintiff's improvement. We think they are. In the paragraph in which it is described, he states that it "extends back from the bolt to such a distance as to form a brace to the beam;" and also, "that being jogged into the beam, it relieves the bolt in a heavy draft." And in their summing up, they declare, that they claim as new, and of their invention, the construction of such ploughs as aforesaid, and the several parts thereof, not separately but in combination; and proceeding then to specify the parts so claimed, they mention, "the forming of the top of the standard for brace
*341] and draft." They, indeed, say, that they do not mean to confine their claim to any particular form of construction, *except "to such form

of the top as shall serve for brace and draft:" that is to say, the top is to be so formed and so connected with the beam as to answer both purposes. And as those purposes, according to the preceding part of the specification, are to be accomplished by its extension back from the bolt, and by jogging it into the beam, these two things are essential to it, whatever variation may be made in its shape or size. They are, therefore, material parts of the improvement they claim.

The remaining question may be disposed of in a few words. The patent is for a combination, and the improvement consists in arranging different portions of the plough, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination, less than the whole, claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough, in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different, in form, or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts. The jogging of the standard into the beam, and its extension backward from the bolt, are both treated by the plaintiffs as essential parts of their combination for the purpose of brace and draft. Consequently, the use of either alone, by the defendants, would not be the same improvement, nor infringe the patent of the plaintiffs. The judgment of the circuit court must, therefore, be affirmed.

Judgment affirmed.[1]

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*Thomas Wood, Junior, Claimant of twenty-two Packages or Pieces of Cloth, Plaintiff in error, *v.* United States, Defendants in error. [*342

Fraudulent entries of imports.

The United States filed in the district court of the United States for the Maryland district, a libel of information *in rem*, upon a seizure upon land, in the district, of twenty-two pieces of cloth imported into New York, and claimed them as forfeited; the libel contained many counts, but that on which the decision of the supreme court was given, was founded on the 66th section of the revenue act of 1799, which declares, that any goods which shall not be invoiced, according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, all such goods, &c., shall be forfeited; the count stated, that the goods were not invoiced at the actual cost, at the place of exportation. The duties had been paid at New York, on the invoice produced on their entry; they were afterwards transmitted to Baltimore, and were there seized in the stores of certain persons having the custody thereof for the importer, who was the claimant, under a search-warrant, procured from a magistrate. To establish the fraud in the invoices, the United States offered in evidence sundry other invoices of cloth and cassimere, imported into New York by, and consigned to, the claimant, to show the fraudulent intention of the claimant in those importations as well as in the present; this evidence was objected to, and the objection was overruled. The district judge, after the

[1] For a further decision, on the question of costs, see 2 Story 190

whole evidence was gone through, gave the following instructions to the jury: 1. That the issues formed, and which the jury are sworn to try, involve no question except upon the causes of forfeiture alleged in the information and traversed; and therefore, no question relating to the mere seizure of the goods is in issue, or material under the pleadings. 2. If the jury shall find from the evidence in the cause, that the invoices of the goods proceeded against, were made up, with intent, by false valuations, to evade or defraud the revenue, the United States are entitled to recover, although the jury should also find from the evidence, that the goods had been passed through the custom-house at New York, by the collector, and the duties calculated by him on the invoices shall have been paid, or secured to be paid, and the goods delivered by the collector to the importer. 3. That under certain counts in the information probable cause for the prosecution had been shown by the United States; and that the burden of proof, under the 71st section of the act of 2d of March 1799, was upon the claimant; and that it is incumbent on him to prove to the jury, that the charges in the five counts, charging fraudulent importation, are untrue; that is, that he shall prove the truth of the invoices on which the goods were entered, and that the invoices and packages were not made up to evade or defraud the revenue. 4. That the burden of proof being on the claimant, under the 71st section of the act of 1799, and the 15th section of the act of 14th July 1832, it is incumbent on him to prove the actual cost of the goods in the invoices and entries stated to have been purchased by him; and that the value of the goods at the time of the seizure, or at any subsequent time, is not material, except so far as to assist or tend to enable the jury to ascertain the prices at the periods of purchase or shipment. 5. That the *burden of proof being upon the claimant, to prove that the invoices were not made up with intent to defraud the revenue, it is not sufficient for him to rely on the invoices themselves, merely, as proving their own truth and fairness. The case was removed by writ of error to the circuit court, and there, a judgment, affirming the judgment of the district court, having been entered, the claimant prosecuted a writ of error to the supreme court.

*343]

Held, 1. That the instructions of the district judge as to the original seizure, or the causes thereof were correct. It is of no consequence, whatsoever, what were the original grounds of the seizure, whether founded or not; if the goods were in point of law subject to forfeiture; the United States are not bound down by the acts of the seizers, to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if the seizure can be maintained as founded on an actual forfeiture at the time of the seizure. It was rightly held in the district court, that no question arose on the issues which the jury were to try, except upon the causes of forfeiture alleged in the information.[1]

2. There was no error in the admission of the evidence of fraud deducible from the other invoices offered in the case; the question was one of fraudulent intent, or not, and upon questions of that sort, where the intent of the party is the matter in issue, it has always been allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate his intent or motive in the particular act directly in judgment.[2]

3. If the invoices of the goods were fraudulently made, by a false valuation, to evade or defraud the revenue, the fact that they were entered, and the duties had been paid or secured at the custom house at New York upon these invoices, was no bar to the information for the forfeiture of the goods to the United States. It never can be permitted, that a party who perpetrates a fraud upon the custom-house, and thereby enters his goods upon false invoices and false valuations, and gets a regular delivery thereof upon the payment of such duties as such false invoices end false valuations require, can avail himself of that very fraud to defeat the purposes of justice.

The 66th section of the revenue collection act of 1799, ch. 128, remains in full force. There must be a positive repugnancy between the new and old laws for the collection of the revenue, before the old law can be considered as repealed; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy. The addition of other powers to custom-house officers to carry into effect the object of the former laws, and sedulously introduced to meet the case of a palpable fraud, should not be considered as repealing the former laws; there ought to be a manifest and total repugnancy in the provisions of the later laws, to lead to the conclusion that they abrogated, and were designed to abrogate the former laws.[3]

[1] Taylor *v.* United States, 3 How. 197; s. c., Crabbe 356; The Emulous, 1 Gallis. 563.

[2] Buckley *v.* United States, 4 How. 251; United States *v.* Rumsey, 5 Int. R. Rec. 93.

[3] McCool *v.* Smith, 1 Black 459; Ex parte Crow Dog, 109 U. S. 570. Repeals by implication of revenue and collection laws, are not favored. United States *v.* 67 Packages, 17

Wood v. United States.

The burden of proof, in the absence of fraud, in the entry of goods, was thrown upon the claimant. There was probable cause for seizure shown; probable cause must, under the 71st section of the act of 1799, in connection with the circumstances of this case, mean reasonable ground of presumption, that the charge is or may be well founded.[1]

Error to the Circuit Court of Maryland. *At the district court of [*344
the United States for the district of Maryland, on the 27th day of December 1839, the United States filed an information claiming a forfeiture of twenty-two pieces of cloth, of the value of $2500. The information contained nine counts. Afterwards, and before the trial of the cause before a jury, a discontinuance was entered by the district-attorney of the United States, of the first, second, third, fourth and fifth counts. The case was tried before a jury in July 1840, on the remaining counts in the information; and a verdict and judgment were rendered in favor of the United States. The claimant took a bill of exceptions to the charge of the court, and prosecuted a writ of error to the circuit court. In that court, a judgment was entered, *pro formâ*, in favor of the United States; and the case was brought by the claimant, Thomas Wood, by writ of error, to the supreme court.

The information filed by the United States, in the district court, in the third count, on the 66th section of the collection act of 1799, alleged, that the goods were not invoiced according to their actual cost, at the port of exportation, with design to evade the duties thereon. The sixth, seventh and eighth counts, on the 4th section of the supplementary act of 1830, and the ninth count, on the 14th section of the act of 1832, alleged, under different forms of statement, that the invoices on which the goods had been entered, and the packages containing them, had been made up with intent to evade or defraud the revenue.

The defendant's first plea was a denial that the goods had been seized for the same causes of forfeiture alleged in the information. The second plea set forth certain warrants issued under the 68th section of the act of 1799, authorizing the search for and seizure of goods entered without permits, and concealed in certain stores in Baltimore, and alleged, that the seizure was made under these warrants, and not under any other authority or for any other cause than that which was contained in them. The third plea alleged, that the goods in question were imported into New York, and duly entered and unladen under regular permits; that in order to the ascertainment of the duties, the collector caused them to be appraised, according to their actual value, at the time and place of exportation, and also caused one package out of every invoice, and one package out of every twenty packages *of each invoice, to be opened and examined; and that the [*345
packages so opened and examined were found and reported to the collector to be correctly and fairly invoiced and put up; that, after said examination and appraisement, the duties on the goods were duly ascertained and estimated by the collector, and paid by the claimant; that they were then delivered to the claimant, and were shipped by him to his agents in Baltimore; and that, whilst in possession of said agents, they were seized by the collector of the port of Baltimore, as alleged in the information.

To each of these first three pleas, the United States demurred generally, and the court below being of opinion, that they contained no matter of

How. 85; United States *v.* Walker, 22 Id. 299.

[1] And see Taylor *v.* United States, 3 How. 197.

defence to the information, gave judgment in favor of the United States on the demurrers.

The remaining pleas were, in succession, applicable respectively one to each of the counts of the information, and were simple traverses of the respective causes of forfeiture alleged in them. Issue was joined on each of these pleas. These, which were the only issues of fact tried, resulted in a general verdict for the United States; on which a judgment of condemnation was afterwards entered, as above stated.

It appeared by the bill of exceptions, that at the trial, the United States, to maintain the issues on their part, read in evidence to the jury, four entries and invoices which, it was admitted, were original entries and invoices, and had contained the twenty-two pieces of cloth against which the information was filed, and it was admitted, that the numbers then on said pieces were the same that they were when imported, and had not been changed or altered; that the said four invoices were severally passed through the custom-house of the port of New York, according to the forms prescribed by the acts of congress; and that, with one exception, the said twenty-two pieces were included in the packages designated by the collector of New York to be opened and examined. And it was further admitted and agreed, that the duties on the amount of each of said four invoices had been paid, according to the prices therein stated; and that the goods therein mentioned had been delivered, under regular permits, to the claimant, who afterwards shipped the twenty-two pieces taken from several of the original packages included in said four invoices, to the consignment of Beadell & Company, at Baltimore, for sale.

*346] *It also appeared by the evidence on the part of the United States, that the claimant had entered at the port of New York, in the years 1839 and 1840, twenty-nine importations, of which those in question were a part. Twenty-eight of these importations, including the four in question, were entered by him, and upon his oath, as goods of which he was the actual owner, by having purchased them for exportation, from the party by whom they were invoiced to him. Of these importations, the four which included the twenty-two pieces in question, were entered in 1839. Fifteen importations had been previously made, and ten were made after these four importations. All of the twenty-nine entries were accompanied by invoices. From the aggregate gross apparent cost of the goods in these invoices, some of which contained cloths alone, and others both cloths and cassimeres, there was a deduction in every invoice of five per cent., in some cases described to be a discount for cash, in others for measurement, and in two, without stating for what. It was in proof by persons conversant with the British market, that by the course of business in the places where the goods purported by the invoices to have been bought, no such discount or deduction was ever allowed on casimeres, whether invoiced separately, or included in the same invoice with cloths. It was also proved, by persons well acquainted with the same markets, at the time of the alleged purchases, that the goods could not, at that time, have been fairly bought for less than prices which exceeded, by a large per-centage, the prices mentioned in the invoices; and with a view to show further, that the invoices were fictitious as to the prices, and that the discount was fictitious, it was proved, that in every one of his importations made after the seizure of the goods in question, the claim-

ant acquiesced, without appeal or objection, in the acts of the assistant-appraisers of the customs and their assistants, in disallowing a similar discount or deduction of five per cent., and in raising the amount of their appraisements considerably beyond the prices mentioned in the invoices.

Before the evidence was given on the part of the United States, the counsel for the claimant objected to the admissibility in evidence of the invoices of the other goods imported by the claimants as above, before and after the importation of the goods in question, and of the oral testimony offered as above, in connection *with them. "But the court overruled the objection, being of opinion, that the question in the cause was a question of fraudulent intention; the inquiry being whether the invoices of the goods in controversy were made up with intent to evade the act of congress, and defraud the revenue; and that the acts of the claimant in passing other goods through the custom-house are evidence." This opinion formed the subject of the first exception of the claimant, on which he now insisted in this court. [*347

The second exception was to the refusal of the court below to give to the jury the instructions requested by the counsel of the claimant, and also to the instructions given by the court to the jury. To understand the character and extent of this exception, it is necessary to introduce the prayers of both parties for instructions to the jury, with the answers of the court. The United States, by their counsel, prayed the court for its opinion and direction to the jury:

1. That the issues which the jury are sworn to try, involve no questions except upon the causes of forfeiture alleged and traversed; therefore, no question relating to the seizure of the goods is in issue, or in any respect material, upon the pleadings in this case.

2. That if the jury find, from the evidence in this cause, that the invoices which contain the goods now in controversy, were made up with an intent to evade or defraud the revenue of the United States, the United States are entitled to condemnation of the said goods; although the jury should also find from the evidence, that the said goods have been passed through the custom-house, at New York, by the collector thereof, or by the appraisers, or other officers of the customs, and the duties calculated thereon been paid, or secured to be paid, and the said goods delivered by the said collector to the importer.

3. That there has been shown, on the part of the United States, probable cause for the prosecution, under the third, sixth, seventh, eighth and ninth counts of the information; and therefore, under the 71st section of the act of 2d March 1799, the burden of proof lies upon Thomas Wood, Jr., the claimant; and it is incumbent on him to prove to the jury, that the charges in the said five counts of the information are untrue, that is, to prove that *the goods in question were invoiced according to their actual cost at the place of exportation, and that the invoices and packages were not made up with intent to evade or defraud the revenue. [*348

4. The burden of proof being upon the claimant, to prove that the invoices were not made up with intent to defraud the revenue, that it is not sufficient for him to rely upon the invoices merely, as proving their truth and fairness.

5. The burden of proof being upon the claimant, it is incumbent on him

to prove to the jury the actual cost of the goods in question, and that he does not relieve himself of this burden of proof, by evidence of the mere value of said goods, except so far as such value may tend to show actual cost.

And the claimant, by his counsel, prayed the court to give the following instructions to the jury:—

1. That under a true construction of the 71st section of the act of congress of the 2d of March 1799, it is incumbent on the United States to show by evidence, a seizure, in pursuance of said act, or of other acts, if any, regulating seizures, and that in the absence of such evidence, the *onus probandi* cannot be thrown upon the claimant, by proof of probable cause; proof of probable cause of such seizure being made by said section a prerequisite which must be complied with.

2. That upon the evidence offered by the United States in this cause, the *onus probandi* does not lie upon the plaintiff, under the provisions of the 71st section of the act of 1799, because no probable cause has been shown to the court for the prosecution in this case.

3. If the jury find from the evidence, that the goods mentioned in the third count of the information were entered in the office of the collector of the collection district of New York, in the southern district of New York, and were unladen and delivered from the vessels in which they were imported, under permits granted by said collector, who caused the said goods, wares and merchandize to be examined, and that after such examination, the duties on the same were ascertained and estimated by said collector, and paid by the said claimant, and the said goods were, by the authority of the collector, delivered to the said claimant; and if the jury further believe, that the claimant caused the original packages in which said goods were im-
*349] ported to be broken up, and shipped *said goods, forming a part of said packages, to his agents in Baltimore, for sale, and that said goods were seized, after their actual arrival in Baltimore, and not before; that the United States are not entitled to recover under the third count of the information.

4. That the United States are not entitled to recover under the said third count of the information, because the 66th section of the act of congress, passed on the 2d of March 1799, entitled "an act to regulate the collection of duties on imports and tonnage," was not in force when the goods mentioned in said third count were imported.

5. That if the jury believe from the evidence, that the collector of the port or New York caused at least one package out of every invoice, and one package at least out of every twenty packages of each invoice containing the goods mentioned in the sixth and seventh counts of the information, to be opened and examined; and that said packages were, before such examination, designated on the several invoices in which they were respectively included; and that said collector did not deem it necessary that a greater number of packages than those so designated should be opened and examined. And if the jury further find, that upon such opening and examination, the goods were, in the judgment of the examining officer, found to correspond with said invoices, and not to be falsely charged in said invoices; and that after the said examination, the duties on said goods were ascertained and estimated by said collector, and paid by the claimant, and said goods were

delivered to the claimant, who afterwards sent them to his agents in Baltimore, for sale ; and that the seizure on which said information is founded, was made after said goods had arrived in Baltimore ; that then the United States are not entitled to recover under the said sixth count, so far as the same charges the invoices to have been found to be made up, with intent, by a false valuation or extension, to evade or defraud the revenue of the United States ; nor under the said seventh count.

6. That there is no evidence in the cause, from which the jury can find, that the packages in which the goods mentioned in the sixth and eighth counts of the information were imported into New York, were found, upon examination, at the district of Maryland, to be made up with intent to evade and defraud the revenue of the United States, and that, therefore, the United States are not *entitled to recover under said eighth count, nor under said seventh count, so far as the same charges the packages [*350 to be made up with such fraudulent intent.

7. That the United States are not entitled to recover upon either of the said sixth, seventh and eighth counts of said information, because the fourth section of the act of congress, passed on the 28th of May 1830, entitled "an act for the more effectual collection of the import duties," was not in force when the goods mentioned in said sixth, seventh and eighth counts were imported.

8. That there is no evidence in the cause, from which the jury can find, that the packages, or either of them, in which the goods mentioned in the ninth count of the information were imported, were opened and examined at the district of Maryland, on the day mentioned in said count, or at any other time, and were found to be made up, with intent to evade or defraud the revenue ; and that, therefore, the United States are not entitled to recover upon said ninth count.

But the court refused to give the instructions prayed for, both by the United States and the claimant, and rejected the same, and each and every of them ; but gave the following instructions and directions to the jury.

1. That the issues formed, and which the jury are sworn to try, involve no question except upon the causes of forfeiture alleged in the information, and traversed ; and therefore, no question relating to the mere seizure of the goods is in issue, or material, under the pleadings in this cause.

2. If the jury shall find from the evidence in the cause, that the invoices of the goods in question were made up, with intent, by a false valuation, to evade or defraud the revenue, the plaintiffs are entitled to recover ; although the jury should also find from the evidence, that the said goods have been passed through the custom-house at New York, by the collector thereof, and the duties calculated by him on said invoices, shall have been paid or secured to be paid, and the said goods delivered by said collector to the importer.

3. That there has been shown, on the part of the United States, probable cause for the present prosecution, under the third count, and the sixth, seventh, eighth and ninth counts in the information, *and that the [*351 burden of proof lies, under the 71st section of the act of the 2d of March 1799, upon Thomas Wood, Jr., the claimant ; and that it is incumbent upon him to prove to the jury, that the charges in the said five counts are untrue ; that is, to prove that the goods in question were invoiced accord-

ing to their actual cost at the port of exportation, and that the invoices and packages were not made up, with intent to evade or defraud the revenue.

4. That the burden of proof being upon the said Thomas Wood, Jr., under the 71st section of the act of 1799, and the 15th section of the act of the 14th of July 1832, it is incumbent upon him to prove to the jury, the actual cost of the twenty two pieces of cloth in the invoices and entries stated to have been purchased by him; and that the value of the goods at the times or dates of the seizure, or of any other subsequent times, are not material, except so far as they may assist or tend to enable the jury to ascertain the prices at the respective periods of purchase or shipment.

5. That the burden of proof being upon the claimant, to prove that the invoices were not made up with intent to defraud the revenue, it is not sufficient for him to rely upon the invoices themselves merely, as proving their own truth and fairness.

The case was submitted to the court, by *Meredith* and *Crittenden*, for the plaintiff in error; and *Legaré*, Attorney-General, and *Cadwalader*, for the United States; the counsel for the parties furnished printed arguments to the court.

The counsel of the *plaintiff* in error contended, upon the demurrers to the first three pleas:

1. That there is no right of seizure, after goods have been passed through the custom-house, according to all the requisitions of the revenue laws—they have been examined, inspected and appraised—the duties ascertained and paid, and the goods themselves delivered to the owner or importer, or his agent; and that they can never afterwards be pursued as forfeited, for any alleged or pretended fraud or imposition upon the custom-house; that the right in such cases, to claim and seize as a forfeiture, was limited to the transit of the goods through the custom-house, and *while they were
*352] under the hands of its officers, for their inspection, examination and appraisement. To pursue and seize them afterwards, when they have been introduced into the community and into the market, with all the authentic sanctions of the custom-house, is a very different thing. If congress had intended such a course, it would have declared itself explicitly, and prescribed, if not some restraint, at least, some form and mode for the exercise of a power so tremendous and fearful. And as there is no such legislation in any of the acts of congress, it cannot be held, that goods thus situated are liable to seizure or forfeiture.

2. That, even if there be a right of seizure, under such circumstances, the seizure actually made must be a good subsisting seizure, when the information is filed.

3. That the seizure made in this case was defective and irregular.

On the first exception, the plaintiff in error contended, that the evidence offered by the United States, of importations made by the claimant, subsequent to the importations charged by the information to have been fraudulent, was inadmissible.

On the second exception, the plaintiff in error contended:

1. That assuming upon the evidence, that the goods were entered at the New York custom-house, and were unladen and delivered, under permits

granted by the collector, who caused them to be examined, and upon such examination, ascertained and received the duties, and delivered the goods to the claimant, who afterwards broke up the original packages, of which said goods formed a part, and shipped them to Baltimore, for sale, where they were seized. The jury ought to have been instructed, if they believed such evidence, to find a verdict for the claimant on the third count of the information; and that the court erred in refusing to give such instruction.

2. That the third count of the information cannot be supported, because the 66th section of the duty act of March 1799, is repealed, and that the court ought so to have instructed the jury.

3. That assuming upon the evidence, that the collector of New York caused at least one package out of every invoice, and one package at least out of every twenty packages of each invoice of goods mentioned in the sixth and seventh counts of the information, *to be opened and examined, and that said packages were, before such examination, [*353 designated by the collector on the several invoices in which they were respectively included; that, upon such opening and examination, the goods were found to correspond with the invoices, and not to be falsely charged; that, after said examination, the duties were ascertained and paid, and the goods delivered to the claimant, who sent them to his agents at Baltimore, for sale, where the seizure was made; that the jury ought to have been instructed, provided they believed said evidence, that the United States were not entitled to recover under the sixth count, so far as the same charges the invoices to have been found to be made up, with intent, by a false valuation or extension, to evade or defraud the revenue; nor under the seventh count; and that the court erred in refusing so to instruct the jury.

4. That there was no evidence to support the eighth count in the information, nor the sixth count, so far as the same charges the packages to have been made up with a fraudulent intent.

5. That the fourth section of the act of congress of the 28th May 1830, is repealed, and consequently, the sixth, seventh and eighth counts in the information cannot be supported, and that the court ought to have so instructed the jury.

6. That there was no evidence in the cause, to support the ninth count of the information, and that the court erred in not so instructing the jury.

For the United States, the *Attorney-General* and *Cadwalader* contended, that the leading idea of all the arguments on the other side, that the United States are concluded by the passing of the goods through the custom-house, after an appraisement, and on payment of duties according to that appraisement, in all cases whatsoever, and even of admitted fraud; that the idea was that the United States had adopted a sort of Spartan system of permitting fraud, so it be cleverly enough executed, to escape detection at the custom-house, no matter how clearly it may be exposed afterwards. But there was, happily, no plausibility in the argument, that because there are collectors, appraisers and inspectors, perpetually on the watch to detect any violation of the revenue law, therefore, no other detection of it can be of any avail; that because *so many statutes have been passed, with a view, in the ordinary course of things, to insure the payment of the [*354

public dues, therefore, a fraud, which at common law, and in all law, taints and vitiates, and nullifies every civil proceeding, is permitted, because it has been perpetrated by some extraordinary contrivance, and in spite of those statutes.

As to the information, it was argued, that the five counts upon which the judgment of forfeiture was entered, were all good and sufficient. But if this were otherwise, the judgment would be affirmed, if any one count of the information were valid. The proceeding is *in rem*, for the enforcement of a forfeiture, and if one cause of forfeiture is effectual, many cannot be more effectual for the purpose. A condemnation upon one cause of forfeiture is an adjudication that the property is in the United States, and is the consummation and merger of the entire prosecution. Under cumulative forfeitures, however numerous, more cannot be done, than under a single forfeiture, to ascertain that the claimant's original property is divested and is become the property of the United States. In *Locke* v. *United States*, 7 Cranch 344, the condemnation was sustained upon one of many counts, without inquiry as to the sufficiency of the others, to which objections had been made.

The rest of the argument on behalf of the United States, embraced the following heads:

1. The 66th section of the act of 1799 is in force, and is the only act in force, under which individual pieces of goods, falsely invoiced, are made liable to forfeiture, without reference to the manner of making up the entire invoice or package containing them; and is, also, the only act under which the United States can proceed, in a personal action, to recover the value of the things forfeited, or such portion of them as cannot be found and seized.

2. The fourth section of the act of 1830 is in force for two purposes, notwithstanding the repealing clause of the 14th section of the act of 1832. 1. Where an invoice is made up, with intent to defraud the revenue, not merely the pieces falsely invoiced, but the whole invoice is forfeited.

*355] 2. Where a package, mentioned in the invoice, is made up *with an evasive or fraudulent intent, in respect to the invoice, the whole package is forfeited.

3. Under these acts, the enforcement of the forfeiture is not dependent upon the manner in which the goods may happen to have been seized, or the reasons for the seizure which may happen to have been known, or to have been assigned at the time of making it. The filing of an information by the United States is an adoption by them of the seizure, and refers the prosecution, not to the seizure, but to the antecedent causes of forfeiture alleged in the information. Matters that involve the regularity or method of the seizure cannot be put in issue, even under a plea in abatement, which would be the only appropriate method of raising the question; much less can they be pleaded in bar, or together with pleas in bar.

4. The power of the United States to enforce a forfeiture incurred under these acts, is not dependent upon the acts or omissions of the appraisers and other officers of the customs, who are required to ascertain or liquidate and receive the pecuniary amount of duties for which the importer and goods are liable. The two subjects of forfeiture and pecuniary liability for duties are, generally speaking, subjects of distinct independent statutory provisions; and different parts of the statutes are to be considered distribu-

tively, with reference to each respectively. When a forfeiture has been incurred by reason of a fraud, not even the secretary of the treasury and collector of the customs are authorized to remit or mitigate it, much less the appraisers and other subordinate officers of the collection of the revenue.

5. The 71st section of the act of 1799 having enacted, that in informations, where any seizure shall be made pursuant to that act, the burden of proof shall lie upon the claimant, where probable cause for the prosecution has been shown to the court, the probable cause for the prosecution required to be shown, is referrible to evidence pertinent to the issues upon causes of forfeiture set forth in the information, and not merely to the original grounds of seizure by officers of the revenue, before information filed, as contended for on behalf of the plaintiff in error.

*6. Probable cause for the prosecution was shown on the part of the United States—1. By proof of the gross disproportion of the [*356 cost stated in the invoices and the actual market price of the period of the pretended purchases. 2. By proof of the insertion as to both cloths and casimeres, of a pretended discount or allowance for measure, which, if not fictitious as to both cloths and casimeres, must have been so as to casimeres. 3. By the evidence of which the admissibility is involved in the next point, and under the bill of exceptions to testimony.

7. As a part of the necessary circumstantial evidence admitted in all cases of fraud, it was competent to prove that all the importations of this claimant, including those before, as well as those since, the importations in question, were attended with the same circumstances of a pretended discount or deduction for measure, and that on all of those which have been entered since the commencement of the present proceedings, he has acquiesced, without appeal or objection, in a liquidation of the duties, on the footing of disallowing this deduction, and of a still further addition, by the appraisements, to the cost of prices stated in the invoices. This evidence was competent for several reasons: 1. A comparison of the invoices with those in question, shows that the goods are all, or nearly all, from the same parties who made out the invoices of the goods in question, and the packages are marked so as to indicate that they are part of a connected series of importations. 2. To prove the fictitious character of the series of importations of which these were a part. 3. To disprove the possibility of their having been a casual or fortuitous discount or allowance, in the particular case in question, and to indicate the intent of the parties on both sides of the water, to make out the invoices fictitiously and evasively, in respect to the revenue. 4. To prove a systematic combination for this purpose, between the foreign exporter or party making out the invoices, and the importer who entered the goods upon them. *5. To disprove [*357 the reality of the discount by the acquiescence of the plaintiff in error in its rejection in subsequent cases.

Story, Justice, delivered the opinion of the court.—This is a writ of error from the judgment of the circuit court of the district of Maryland, affirming, *pro formâ*, a judgment of the district court of the same district. The original suit was a libel of information, *in rem*, upon a seizure upon land, in the said district, of twenty pieces of cloths imported into the United States, and alleged to be forfeited. The libel contained a number of counts;

but that alone which is necessary to be here stated, is the count founded upon the 66th section of the revenue collection act of 1799, ch. 128, which declares, "that if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited." The count stated, that the goods in controversy were not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties. Various pleas were put in, to some of which there were demurrers, and upon others issue was joined, upon which a trial was had by a jury; the jury found a verdict for the United States. The claimant (as well as the United States) prayed certain instructions to the jury, which were refused, and the court gave certain instructions to which the claimant excepted; and the cause came before the circuit court upon the bill of exceptions, filed by the claimant, as well to the refusal as to the instructions of the court.

At the trial, it appeared, that the goods in question had been originally imported into the port of New York, and were there duly entered and landed, and the duties paid upon the invoices produced by the claimant at the custom-house. They were afterwards transmitted to Baltimore, and there seized in the stores of certain persons having the custody thereof for the claimant, under a search-warrant of a magistrate, procured for that purpose. The validity of the original seizure is contested in some of the pleadings; and *this seems to have been insisted upon before the jury, as one of the grounds of defence.

*358]

At the trial, to establish the fraud in the invoices, besides other evidence, the counsel for the United States offered in evidence sundry other invoices of cloths and casimeres, twenty-nine in number, imported into the port of New York by the complainant, or consigned to him, for the purpose of showing the fraudulent intention of the claimant in those importations, as well as in the present. An objection was taken to the admissibility of this evidence, which was overruled by the court; and the evidence was admitted; and this constitutes one of the exceptions in the cause.

The district judge, after the whole evidence was gone through, gave the following instructions to the jury, which involve the whole merits of the controversy:

1. That the issues formed, and which the jury are sworn to try, involve no question except upon the causes of forfeiture alleged in the information and traversed, and therefore, no question relating to the mere seizure of the goods is in issue, or material, under the pleadings in this cause.

2. If the jury shall find from the evidence in the cause, that the invoices of the goods in question were made up, with intent, by a false valuation, to evade or defraud the revenue, the plaintiffs are entitled to recover, although the jury should also find from the evidence, that the said goods have been passed through the custom-house at New York, by the collector thereof, and the duties calculated by him on said invoices shall have been paid or secured to be paid, and the said goods delivered by said collector to the importer.

3. That there has been shown on the part of the United States, probable cause for the present prosecution, under the third count, and the sixth,

seventh, eighth and ninth counts in the information, and that the burden of proof lies, under the 71st section of the act of the 2d of March 1799, upon Thomas Wood, Jr., the claimant, and that it is incumbent upon him to prove to the jury, that the charges in the said five counts are untrue; that is, to prove that the goods in question were invoiced according to their actual cost at the port of exportation, and that the invoices and packages were not made up, with intent to evade or defraud the revenue.

*4. That the burden of proof being upon the said Thomas Wood, Jr., under the 71st section of the act of 1799, and the 15th section of the act of the 14th of July 1832, it is incumbent upon him, to prove to the jury, the actual cost of the twenty-two pieces of cloth in the invoices and entries stated to have been purchased by him, and that the value of the goods, at the times or dates of the seizure, or any other subsequent times, are not material, except so far as they may assist or tend to enable the jury to ascertain the prices at the respective periods of purchase or shipment. [*359

5. That the burden of proof being upon the claimant, to prove that the invoices were not made up, with intent to defraud the revenue, it is not sufficient for him to rely upon the invoices themselves merely, as proving their own truth and fairness.

In respect to the point made at the bar, as to the validity of the original seizure, or of the causes thereof, we are of opinion, that the first instruction of the district judge was entirely correct. It is of no consequence whatsoever, what were the original grounds of the seizure, whether they were well-founded or not, if, in point of fact, the goods are by law subjected to forfeiture; for the United States are not bound down, by the acts of the seizors, to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if, in point of fact, the seizure can now be maintained, as founded upon an actual forfeiture thereof, at the time of the seizure, and therefore, it was rightly held by the judge, that no question arose upon the issues which the jury were to try, except upon the causes of forfeiture alleged in the information. The remarks just made constitute an answer to the argument upon the demurrers to the two first pleas of the claimant; for, as has been already suggested, if a seizure has been actually made, and is a continuing seizure, it is no bar to proceedings thereon, that the cause of forfeiture relied on is not the same upon which the seizure was originally made. It is sufficient for the United States, that it adopts the seizure and now proceeds for a good cause of forfeiture, although utterly unknown to the original seizors.

Passing from this, the next point presented for consideration is, whether there was an error in the admission of the evidence of *fraud, deducible from the other invoices offered in the case. We are of opinion, that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken [*360

in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. The treatises on evidence by Mr. Philips and Mr. Starkie contain many illustrations to this effect. See Stark. Evid., vol. 1, p. 64 ; vol. 2, p. 220–1 (2d. Lond. edit. 1833) ; Phil. Evid., by Cowen, vol. 1, ch. 7, § 7, p. 179–80 ; vol. 2, p. 452, note 333 ; p. 465, note 352 (edit. 1839).

They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue ; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule ; for whatever does legally conduce to establish the points in issue, is necessarily embraced in it, and therefore, a proper subject of proof, whether it be direct or only presumptive. This doctrine was held in a most solemn manner in the case of the *King* v. *Wylie*, 4 Bos. & Pul. 92, where upon an indictment for disposing and putting away a forged banknote, knowing it to be forged, evidence was admitted of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. The same doctrine has been held in cases of the uttering of bad money and spurious notes; and also in cases of conspiracy. The same doctrine was affirmed and acted upon by this court, in the case of the the *United States* v. *Wood*, 14 Pet. 430, in the case of a prosecution for perjury.

Cases of fraud present a still more stringent necessity for the application of the same principle ; for fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely *decisive ; but all combined together *361] may become almost irresistible as to the true nature and character of the transaction in controversy. The case of *Irving* v. *Motly*, 7 Bing. 543, turned upon this very point. There, the action was trover, to recover back goods which had been purchased by an agent for his principal, by means of a fraud. In order to establish the plaintiff's case, it became necessary to show, that other purchases had been made by the same agent, for the same principal, under circumstances strongly presumptive of a like fraud. No doubt was entertained by the court, of the admissibility of the evidence ; and the main point urged at the bar was, that the agent should himself have been called to establish the purchases, but this objection was overruled, and the jury, having found a verdict for the plaintiff, the court gave judgment in his favor.

Indeed, it is admitted by the counsel for the plaintiff in error, in the case before us, that it is a general principle of law, that whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible proof. But the objections taken are, first, that when the proof was offered, no suitable foundation had been laid for its admission, and that the cause was launched with this proof ; and secondly, that the proof related to importations after, as well as before, the particular importation in question. We do not think either of these objections maintainable. The fraud being to be made out in evidence, the order in which the proof should be brought to establish it, was rather a matter in the discretion of the court, than of strict right in the parties. It is impossible to lay down any universal rule upon such a subject. Much must depend upon the posture and circumstances of the particular case ; and at all events, if

the proof be pertinent and competent, the admission of it cannot be matter of error. The other objection has as little foundation ; for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party, as fraud would be, in the last importation, from prior fraudulent importations. In each case, the *quo animo* is in question, and the presumption of fraudulent intention may equally arise and equally prevail.

The second instruction of the court is, in effect, that if the invoices of the goods now in question were fraudulently made, *by a false valuation, to evade or defraud the revenue, the fact that they had been [*362 entered, and the duties paid or secured, at the custom-house at New York, upon those invoices, was no bar to the present information. This instruction was certainly correct, if the 66th section of the revenue collection act of 1799, ch. 128, now remains in full force and unrepealed ; for it can never be permitted, that a party, who perpetrates a fraud upon the custom-house, and thereby enters his goods upon false invoices and false valuations, and gets a regular delivery thereof upon the mere payment of such duties as such false invoices and false valuations require, can avail himself of that very fraud, to defeat the purposes of justice. It is but an aggravation of his guilt, that he has practised imposition upon the public officers, as well as perpetrated such a deliberate fraud. The language of the 66th section completely covers such a case. It supposes an entry at the custom-house, upon false invoices, with intent to evade the payment of the proper duties, and the forfeiture attaches, immediately upon such an entry upon such invoices, with such intent. The success of the fraud in evading the vigilance of the public officers, so that it is not discovered, until after the goods have passed from their custody, does not purge away the forfeiture ; although it may render the detection of the offence more difficult and more uncertain. The whole argument turns upon this, that if the custom-house officers have not pursued the steps authorized by law to be pursued by them, by directing an appraisement of the goods, in cases where they have a suspicion of illegality or fraud, or no invoices are produced, but their suspicions are lulled to rest, the goods are untainted by the forfeiture, the moment they pass from the custom-house. We cannot admit that such an interpretation of the objects or language of the 66th section is either sound or satisfactory. The same reasoning governs the ruling of the court upon the demurrer to the third plea.

The question then arises, whether the 66th section of the act of 1799, ch. 128, has been repealed, or whether it remains in full force. That it has not been, expressly or by direct terms, repealed, is admitted ; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say, by necessary implication ; for it is not sufficient *to establish, that subsequent laws cover some or even all [*363 of the cases provided for by it ; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old ; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy. And it may be added, that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous, to guard against frauds by importers, it would be a strong

ground, to assert that the main provisions of any such laws, sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because, in subsequent laws, other powers and authorities are given to the custom-house officers, and other modes of proceeding are allowed to be had by them, before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is that the legislature intend the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each. There, certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.

Down to the act of the 28th of May 1830, ch. 147, it does not appear to us, that any act of congress whatsoever has been cited at the argument, which can, upon a reasonable construction, be deemed to repeal the 66th section of the act of 1799. The act of 1830, in the fourth section, provides, that the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number, should he deem it necessary, of goods imported, to be opened and examined; "and if the same be not found to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected; and if such goods be subject to an *ad valorem* duty, the same shall be appraised; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up, *with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited." The section then proceeds to repeal the 13th section of the act of the 1st of March 1823, ch. 149, without saying one word as to any repeal of any section of the act of 1799, ch. 128. Now, if here the rule be properly applicable, that "*expressio unius est exclusio alterius*," the presumption of any repeal by implication of the 66th section of the act of 1799, would seem to be completely repelled.

*364]

Besides, the fourth section of the act of 1830 is not pointed at the same class of cases as the 66th section of the act of 1799. It obviously and naturally, in its whole provisions, applies solely to cases where the packages have been opened and examined by order of the collector, and upon such examination, if any article is found, not contained in the invoice, or the package or invoice is found to be made up, with an intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, and then the same are declared to be forfeited. It would be a strong doctrine, to affirm, that where no such examination or detection had taken place at the custom-house, but the same had passed from the public custody, unopened, the forfeiture under this provision did apply, or was designed to apply. The 14th section of the act of the 14th of July 1832, ch. 224, has, in some measure, qualified and mitigated the effect of the 4th section of the act of 1830, by providing, that whenever, upon opening and examination of any package or packages of imported goods, composed wholly or in part of wool or cotton (under which predicament the present goods fall), the goods

shall be found not to correspond with the entry thereof at the custom-house, and if any package shall be found to contain any article not entered, such article shall be forfeited; or if the packages shall be made up, with intent to evade or defraud the revenue, the package shall be forfeited; and so much of the 4th section of the act of 1830, as prescribes a forfeiture of goods found not to correspond with the invoice thereof, is thereby expressly repealed.

In truth, however, there is not the slightest repugnancy between these sections of the act of 1830 and 1832, and the 66th section of the act of 1799. The former apply only to cases where there has been an opening and examination of the packages imported, before they have passed from the custody of the *custom-house; and in the course of such examination, the fraudulent intent in the making up of the package or invoice has [*365 been detected; and, thereupon, it declares the same to be forfeited. Now, the 66th section of the act of 1799, may cover the same cases, but the forfeiture is the same; and therefore, the provisions, in such a case, may well be deemed merely cumulative and auxiliary to each other. But the 66th section is not confined to such cases. On the contrary, it covers all cases where the goods have been entered, and have passed from the custom-house, without any examination or detection of the false invoices. It is, therefore, much more broad in its reach. To enforce a forfeiture, under the sections of the acts of 1830 and 1832, it would be necessary to allege, in the information or libel, all the special circumstances of the examination and detection of the fraud, under the authority of the collector; for they constitute a part of the *res gestæ*, to which the forfeiture is attached. But under the 66th section no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode, or the circumstances under or by which, it is ascertained.

Besides, the 66th section not only provides for a forfeiture of the goods, but in the alternative, for a forfeiture of the value thereof, to be recovered of the person making the false entry. No such provision exists in the acts of 1830 or 1832. It is impossible, therefore, successfully to contend, that the 66th section is repealed *in toto*, since no subsequent act covers all the cases provided for by it. It is, indeed, not a little singular, that the argument, that it is repealed by implication, must found itself upon the very ground that the present case is not covered by the other acts. It must, in effect, assert, that the repeal ought to be implied, in all cases where the goods have passed from the custom-house, without detection of the fraud, simply because, if they had been examined, and the fraud detected there, they might, in that case, and in that case only, have been subjected to forfeiture, which would at most only establish a repeal *pro tanto*. In our opinion, there is no just foundation for the argument, under any aspect. The provision in the 66th section is intended to suppress frauds upon the revenue; the other acts are designed *to be auxiliary to the same important purpose; there is no repugnancy between the provisions; and to con- [*366 strue the latter as repealing the former, would be to construe provisions to aid in the detection of fraud, in such a manner as to promote fraud, by cutting down provisions of a far more general and important character, and essential to the security of the revenue. It seems to us, that no court of

justice is at liberty to adopt such a mode of interpretation of the revenue laws, unless driven to it by a stern and irresistible necessity.

This reasoning might be expanded by a more minute comparison of the various acts of congress with each other, and of the particular language used in each with reference to this subject. But in our judgment, it is wholly unnecessary, because, after all, the whole question must rest upon the broad grounds already stated. We think the second instruction given by the district judge entirely correct.

The three remaining instructions turn upon the point, whether, under the circumstances, the *onus probandi* as to the facts stated in those instructions, was upon the claimant. Upon this we do not entertain the slightest doubt. The 71st section of the act of 1799 declares, that, "in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall lie upon such claimant;" and it is afterwards added, "but the *onus probandi* shall lie on the claimant, only where probable cause is shown for the prosecution, to be judged of by the court before whom the prosecution is had." Probable cause must, in this connection, mean reasonable ground of presumption, that the charge is, or may be, well founded; and we think, in this case, that there was abundance of proof, not only to justify such a reasonable presumption, but to give it solid weight; and in the absence of all countervailing evidence, which was completely within the reach of the claimant, if the invoices were *bonâ fide*, to give it a force difficult to be resisted. Upon the whole, our opinion is, that there is no error in the judgment of the circuit court, affirming the judgment of the district court, and therefore, it will be affirmed by this court.

Judgment affirmed.

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*367] *Merrit Martin and others, Plaintiffs in error, *v.* The Lessee of William C. Waddell, Defendant in error.

State rights in tide-waters.—Royal grants.—Rights of fishery. Oyster beds.

Ejectment for one hundred acres of land, covered with water, in Raritan bay, in the township of Perth Amboy, in the state of New Jersey; the land claimed lay beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows; and the principal right in dispute was the property in the oyster fisheries, in the public rivers and bays of East New Jersey. The claim was made under the charters of Charles II. to his brother the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America; the land in controversy was within the boundaries of the charters, and in the territory which now forms the state of New Jersey; the territory in the grant, by succeeding conveyances, became vested in the proprietors of East Jersey, who conveyed the premises in controversy to the defendant in error. The proprietors, by the terms of the grant to them, were originally invested with all the rights of government and property which were conferred on the Duke of York; afterwards, in 1702, the proprietors surrendered to the crown all the powers of government, retaining their rights of private property. The defendant in error claimed the exclusive right to take oysters in the place granted to him, by virtue of his title under the proprietors; the plaintiffs in error, as the grantees of the state of New Jersey, under a law of that state, passed in 1824, and a supplement thereto, claimed the exclusive right to take oysters in the same place. The point in dispute between the parties depended upon the construction and legal effect of the letters-patent to the Duke of York, and of the deed of surrender subsequently made by the proprietors.

Martin v. Waddell.

The right of the king of Great Britain to make this grant to the Duke of York, with all of its prerogatives and powers of government, cannot at this day be questioned.

The English possessions in America were not claimed by right of conqest, but by right of discovery; according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the European nations by which any portion of the country was first discovered.

The grant to the Duke of York was not of lands won by the sword, nor were the government and laws he was authorized to establish intended for a conquered people.

The country granted by King Charles II. to the Duke of York, was held by the king in his public and regal character, as the representative of the nation; and in trust for them. The discoveries made by persons acting under the authority of the government, were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domain. Johnson *v.* McIntosh, 8 Wheat. 595, cited

When the revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.[1] A grant, therefore, made *by their authority, must be tried and determined by different principles from those which apply to grants of the British crown, where the title is held by a single individual, in trust for the whole nation. [*368

The dominion and property in navigable waters, and the lands under them, being held by the king, as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, remains in the crown for the benefit and advantage of the whole community; grants of that description are, therefore, construed strictly; and it will not be presumed, that the king intended to part from any portion of the public domain, unless clear and special words are used to denote it.

The rivers, bays and arms of the sea, and all the prerogative rights within the limits of the charter of King Charles, undoubtedly, passed to the Duke of York, and were intended to pass, except those saved in the letters-patent.

The questions upon this charter are very different; it is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description; it was an instrument upon which was to be founded the institutions of a great political community; and in that light, it should be regarded and construed.

The object in view of the letters-patent appears on the face of them; they were made for the purpose of enabling the Duke of York to establish a colony upon the newly-discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution; and the people who were to plant this colony, and to form this political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

The land under the navigable waters, within the limits of the charter, passed to the grantee, as one of the royalties incident to the powers of government, and were to be held by him, in the same manner, and for the same purposes, that the navigable waters of England and the soil under them are held by the crown. The policy of England, since Magna Charta (for the

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[1] It was again decided in Russell *v.* The Jersey Co., 15 How. 426, that the soil under the navigable waters of East New Jersey belongs to the state and not to the proprietors. So also, in Smith *v.* Maryland, 18 Id. 71, it was determined, that the soil below low-water mark in the Chesapeake Bay, within the boundaries of the state of Maryland, belongs to the state, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence; and subject also to the enjoyment of certain public rights, among which is the common right of fishery; the state, however, has the right to regulate and protect the oyster fisheries. In Massachusetts, the rights of fishery in non-navigable rivers, are public rights, and subject to such reasonable regulations as the state may make for their protection. Holyoke Co. *v.* Lyman, 15 Wall. 500. And see Corfield *v.* Coryell, 4 W. C. C. 371; The Martha Anne, Olcott 18; Bennett *v.* Boggs, Bald. 60.

last six hundred years), has been carefully preserved—to secure the common right of piscary for the benefit of the public. It would require plain language in the letters-patent to the Duke of York, to persuade the court, that the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away; there is nothing in the charter that requires this conclusion.

The surrender by the proprietors to Queen Anne, in 1702, was of "all the powers, authorities and privileges of and concerning the government of the province;" and the right in dispute in this case was one of these privileges; no words are used for the purpose of withholding from the crown any of its ordinary and well-known prerogatives. The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the hands of the Duke of York; when the people of New Jersey took possession of the reins of government, and took into their own hands the power of sovereignty,

*369] the *prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.

Quære? Whether, on a question which depends not upon the meaning of instruments formed by the people of a state, or by their authority, but upon the letters-patent granted by the British crown, under which certain rights are claimed by the state, on one hand, and by private individuals, on the other, if the supreme court of the state of New Jersey had been of opinion, that upon the face of the charter, the question was clearly in favor of the state, and that the proprietors holding under the letters-patent had been deprived of their just rights by the erroneous judgment of the state court, it could be maintained, that the decision of the court of the state on the construction of the letters-patent bound the supreme court of the United States.

The decision of the state court upon the letters-patent by which the province was originally granted by the king of the Great Britain, is unquestionably entitled to great weight. If the words of the letters-patent had been more doubtful, *quære?* if the decision of a state court on their construction, made with great deliberation and research, ought to be regarded as conclusive?

ERROR to the Circuit Court of New Jersey. The defendant in error, the lessee of William C. H. Waddell, instituted, to April term 1835, in the circuit court of the United States for the district of New Jersey, an action of ejectment, against Merrit Martin and others, for the recovery of certain land covered with water, situated in the Raritan bay, below high-water mark, in the state of New Jersey. The defendants appeared to the suit; and at April term 1837, the cause was tried by a jury, who found a special verdict, on which judgment was afterwards entered for the plaintiff; from which judgment, the defendants prosecuted this writ of error.

The case was argued by *Wall* and *Wood*, for the plaintiffs in error; and by *Ogden* and *Wright*, for the defendant.

The special verdict found, that on the 12th day of March 1664, certain letters-patent, duly executed, were granted by Charles II., then King of England, to James, Duke of York; and set forth the letters-patent at large. The letters-patent stated, that the king—

"For divers good causes and considerations us thereunto moving, having, of our special grace, certain knowledge, and mere motion, given and granted, and by these presents, for us, our heirs and successors, do give and

*370] grant unto our dearest brother, *James, Duke of York, his heirs and assigns, all that part of the main land of New England, beginning at a certain place called or known by the name of St. Croix, next adjoining to New Scotland, in America; and thence extending along the sea-coast, unto a certain place called Petuaquine, or Pemaquid, and so up the river thereof, to the farthest head of the same, as it tendeth northward; and extending

from thence to the river of Kennebeque, and so upwards, by the shortest course, to the river of Canada northward ; and also, all that island or islands, commonly called by the several name or names of Matowacks or Long Island, situate, lying and being towards the west of Cape Cod, and the Narrow Higansetts, abutting upon the main land, between the two rivers there, called or known by the several names of Connecticut or Hudson rivers ; together also with the said river called Hudson river, and the lands from the west side of Connecticut to the east side of Delaware bay. And also, all those several islands called or known by the names of Martin's Vineyard and Nantucks, or otherwise Nantuckett (whereof the tenements aforesaid, with the appurtenances in the declaration aforesaid mentioned are parcel); together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments to said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand, of, in or to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, together with the yearly and other the rents, revenues and profits, of all and singular the said premises, and of every part and parcel thereof: to have and to hold, all and singular the said lands, islands, hereditaments and premises, with their, and every of their, appurtenances, hereby given and granted, or herein before mentioned, to be given and granted, unto our dearest brother, James, Duke of York, his heirs and assigns for ever ; to be holden of us, our heirs and successors, as of our manor of East Greenwich, in our county of Kent, in free and common socage, and not *in capite*, nor by knight-service, yielding and rendering. And the same James, Duke of York, doth, for himself, his heirs and assigns, covenant and promise *to yield and render unto our heirs and successors, of and for the same, yearly and every year, forty beaver-skins, [*371
when they shall be demanded, or within ninety days after. And we do further, of our special grace, certain knowledge, and mere motion, for us, our heirs and successors, give and grant unto our said dearest brother, James, Duke of York, his heirs, deputies, agents, commissioners and assigns, by these presents, full and absolute power and authority to correct, punish, pardon, govern and rule all such the subjects of us, our heirs and successors, as shall, from time to time, adventure themselves into any the parts or places aforesaid, or that shall or do, at any time hereafter, inhabit within the same, according to such laws, orders, ordinances, directions and instruments, as by our said dearest brother, or his assigns, shall be established, and in defect thereof, in case of necessity, according to the good discretion of his deputies, commissioners, officers or assigns, respectively ; as well in all causes and matters, capital and criminal, as civil, both marine and others, so always as the said statutes, ordinances and proceedings be not contrary to, but as near as conveniently may be, agreeable to the laws, statutes and government of this realm of England ; and saving and reserving to us our heirs and successors, the receiving, hearing and determining of the appeal and appeals of all or any person or persons of, in or belonging to the territories or islands aforesaid, in or touching any judgment or sentence to be there made or given. And further, that it shall and may be lawful, to and for

our said dearest brother, his heirs and assigns, by these presents, from time to time, to nominate, make, constitute, ordain and confirm, by such name or names, style or styles, as to him or them shall seem good, and likewise to revoke, discharge, change and alter, as well all and singular, the governors, officers and ministers, which hereafter shall be by him or them thought fit and needful to be made or used within the aforesaid parts and islands; and also to make, ordain and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government and magistracy, fit and necessary for and concerning the government of the territories and islands aforesaid, so always that the same be not contrary to the laws and statutes of this our realm of England, but as near as may be agreeable thereunto, and the same, at all times hereafter, to put in execution, or abrogate,
*372] *revoke or change, not only within the precincts of the said territories or islands, but also upon the seas, in going and coming to and from the same, as he or they, in their good discretion, shall think to be fittest for the good of the adventurers and inhabitants there; and we do further, of our own special grace, certain knowledge, and mere motion, grant, ordain and declare, that such governors, officers and ministers as, from time to time, shall be authorized and appointed, in manner and form aforesaid, shall and may have full power and authority to use and exercise martial law, in cases of rebellion, insurrection and mutiny, in as large and ample a manner as our lieutenants in our counties within our realm of England have or ought to have, by force of their commission of lieutenancy, or any law or statute of this our realm; and we do further, by these presents, for us, our heirs and successors, grant unto our said dearest brother, James, Duke of York, his heirs and assigns, that it shall and may be lawful to and for the said James, Duke of New York, his heirs and assigns, in his or their discretion, from time to time, to admit such and so many person or persons to trade and traffic unto and within the said territories and islands aforesaid, and into every or any part or parcel thereof, and to have, possess and enjoy any lands or hereditaments in the parts and places aforesaid, as they shall think fit, according to the laws, orders, constitutions and ordinances by our said brother, his heirs, deputies, commissioners and assigns, from time to time, to be made and established, by virtue of, and according to the true intent and meaning of, these presents; and under such conditions, reservations and agreements as our said brother, his heirs or assigns, shall set down, order, direct and appoint, and not otherwise, as aforesaid; and we do further, of our special grace, certain knowledge, and mere motion, for us, our heirs and successors, give and grant unto our said dearest brother, his heirs and assigns, by these presents, that it shall and may be lawful to and for him, them or any of them, at all and every time and times hereafter, out of any of our realms or dominions whatsoever, to take, lead, carry and transport in and into their voyages, and for and towards the plantations of our said territories and islands, all such and so many of our loving subjects, or any other strangers, being not prohibited or under restraint, that will become our loving subjects, and live under our allegiance, as shall willingly
*373] *accompany them in the said voyages; together with all such clothing, implements, furniture and other things usually transported, and not prohibited, as shall be necessary for the inhabitants of the said islands and territories, and for their use and defence thereof, and managing and

carrying on the trade with the people there, and in passing and returning to and fro; yielding and paying to us, our heirs and successors, the customs and duties, due and payable, according to the laws and customs of this realm. And we also, for us, our heirs and successors, grant to our said dearest brother, James, Duke of York, his heirs and assigns, and to all and every such governor or governors, or other officers or ministers as, by our said dear brother, his heirs or assigns, shall be appointed, to have power and authority of government and command in or over the inhabitants of the said territories or islands, that they, and every of them, shall and lawfully may, from time to time, and all times hereafter, for ever, for their several defence and safety, encounter, expulse, repel and resist, by force of arms, as well by sea as by land, and all ways and means whatsoever, all such person and persons, as without the special license of our said dearest brother, his heirs or assigns, shall attempt to inhabit within the several precincts and limits of our said territories and islands, and also all and every such person and persons whatsoever, as shall enterprise or attempt, at any time hereafter, the destruction, invasion, detriment or annoyance to the parts, places or islands aforesaid, or any part thereof. And lastly, our will and pleasure is, and we do hereby declare and grant, that these our letters-patent, or the enrolment thereof, shall be good and effectual in the law, to all intents and purposes whatsoever, notwithstanding the not reciting or mentioning of the premises, or any part thereof, or the metes or bounds thereof, or of any former or other letters-patent or grants heretofore made or granted of the premises, or of any part thereof, by us, or of any of our progenitors, unto any other person or persons whatsoever, bodies politic or corporate, or any act, law or other restraint, uncertainty or imperfection whatsoever, to the contrary in anywise notwithstanding; although express mention of the true yearly value or certainty of the premises, or any of them, or of any other gifts or grants by us, or by any of our progenitors or *predecessors, heretofore made, to the said James, Duke of York, in these presents, is not [*374
made, or any statute, act, ordinance, provision, proclamation or restriction heretofore had, made, enacted, ordained or provided, or any other matter, cause or thing whatsoever, to the contrary thereof in anywise notwithstanding."

The special verdict further found, that on the 23d day of June 1664, James, Duke of York, by indenture conveyed to Lord Berkley and Sir George Carteret, for a competent sum of money, all that tract of land adjacent to New England, lying and being to the westward of Long Island, and Manhitas Island, and bounded on the east, part by the main sea and part by Hudson's river, having upon the west, Delaware bay or river, and extending southward to the main ocean as far as Cape May, at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in forty-one degrees and forty minutes of latitude, and crossing over thence in a straight line to Hudson's river, in forty-one degrees of latitude; which said tract of land so as aforesaid demised, was, by the terms of the said indenture, thereafter to be called New Cæsaræa or New Jersey, and was a portion and part of the said tract of land, so as aforesaid granted by the said Charles II. to the said James, Duke of York and of which said tract, so as aforesaid demised, the tenements aforesaid, with the appurtenances, in the declaration aforesaid men

tioned, are parcel. To have and to hold, to the said John, Lord Berkley, and Sir George Carteret, from the day next before the day of the date of the said indenture, for one whole year thence next ensuing. By virtue whereof, the said John, Lord Berkley, and Sir George Carteret, into the tenements so as aforesaid demised, with the appurtenances, entered, and were possessed thereof, for the term aforesaid, and being so thereof possessed, afterwards, to wit, on the 24th day of the same month of June, in the year last aforesaid, by a certain indenture made between the said James, Duke of York, of the one part, and the said John, Lord Berkley, and Sir George Carteret of the other part, bearing date the same day and year last aforesaid, for and in consideration of a competent sum of good and lawful money of England, to the said James, Duke of York, paid, by the said John, Lord Berkley, and the said Sir George Carteret, he, the said James, Duke of
*375] *York, granted, bargained, sold, leased and confirmed to the said John, Lord Berkley, and Sir George Carteret, and to their heirs and assigns for ever, they then being in their actual possession, the tenements last aforesaid, with the appurtenance, so as aforesaid, to be called New Cæsaræa or New Jersey; and also, all rivers, mines, minerals, woods, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments whatsoever, to the said land and premises belonging, or in any wise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said James, Duke of York, by the before-recited letters-patent: to have and to hold the tenements last aforesaid, with the appurtenances and every of them, unto the said John, Lord Berkley, and Sir George Carteret, their heirs and assigns for ever.

The special verdict further found, that afterwards, on the 29th day of June 1674, King Charles II. granted to James, Duke of York, and on the 28th and 29th days of July 1674, James, Duke of York, for a competent sum of money, granted and conveyed to Sir George Carteret, all that tract of land, adjacent to New England, lying and being to the westward of Long Island and Manhitas Island, and bounded on the east, part by the main sea, and part by Hudson's river, extending southward as far as a certain creek, called Barnagat, being about the middle between Sandy Point and Cape May, and bounded on the west, in a straight line from said creek, called Barnagat, to a certain creek in Delaware river, called Renkokus Kill, and thence up the said Delaware river, to the northernmost branch thereof, in latitude forty-one degrees and forty minutes, and on the north, crossing over in a straight line to Hudson's river, in forty-one degrees of latitude (of which said tract of land and premises last mentioned and demised, the tenements aforesaid, with the appurtenances in the declaration aforesaid mentioned, are parcel); together with all mines, minerals, woods, rivers, fishings, hawkings, huntings and fowlings, and all the royalties, profits, commodities and hereditaments whatsoever, to the said last-mentioned tenements belonging, or in any wise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said James, Duke of York, by the before-recited letters-patent: to have
*376] and to hold the tenements last aforesaid, *with the appurtenances and every of them, unto the said Sir George Carteret, his heirs and assigns for ever. And further, that previous to the execution of the said

last-mentioned letters-patent, and of the several hereinbefore-mentioned indentures following the same, to wit, on the 13th day of June, in the year of our Lord 1674, by a certain proclamation, published and promulged on the same day and year last aforesaid, by the said Charles II., he, the said Charles II., did command and charge all persons whatsoever, inhabiting the said province of New Cæsaræa or New Jersey, whereof the tenements aforesaid, with the appurtenances, in the declaration aforesaid mentioned, are parcel, to yield obedience to the laws and government which were or should be thereafter established in the said province, by the said Sir George Carteret (who, in the words of the said proclamation, had the sole power under him, the said Charles II., to settle and dispose of the said province, upon such terms and conditions as to him, the said Sir George Carteret, should appear fit), upon pain of incurring the high displeasure of the said Charles II., and of being proceeded against according to law.

The jury further found, that afterwards, by conveyances from Sir George Carteret to divers persons, and by conveyances from Lord Berkley, and the will of Sir George Carteret, and sundry mesne conveyances and deeds of partition, set forth in the special verdict, and by a deed of confirmation from the Duke of York, the part of the province of New Jersey, called East New Jersey, of which the premises in this ejectment are part, became vested in twenty-four proprietors, and all rights, benefits and advantages, and all and every the isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings, fowlings, and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities and hereditaments whatsoever, unto the said easterly part of the said province of New Jersey belonging, or in anywise appertaining, with their, and every of their, appurtenances; and all the estate, right, title, and interest, claim and advantage whatsoever, as well in law as in equity, of the said grantors, and each and every of them, of, in, unto and out of said easterly part of the said province of New Jersey, and of every part and parcel thereof, and the reversion and reversions, *remainder and remainders of the same, and of every part and parcel thereof, and all the rents, duties, services reserved upon any estates or grants theretofore made by the said Lord Berkley and Sir George Carteret, or by any persons claiming any estate, interest or authority, from, by or under either of them, of any part of the said premises thereby conveyed unto the said Sir George Carteret; to have and to hold to the said Sir George Carteret, and to his heirs and assigns in severalty, to the sole and only use of the said Sir George Carteret, his heirs and assigns for ever; and that it was further agreed and covenanted in the said indenture, *quintipartite*, that the part of the said province of New Jersey, therein conveyed to the said Sir George Carteret should thereafter be known and distinguished by the name of East New Jersey. [*377

The jurors further found, that on the 14th day of March 1682, the Duke of York, in consideration of a competent sum of money, for the better extinguishing of all such claims and demands as the said Duke of York, and his heirs, might in anywise have, of or in the premises, with the appurtenances, called East New Jersey, as aforesaid, did grant, bargain, sell, release, convey and confirm unto the said twenty-four proprietors, their heirs and assigns, all the premises, with the appurtenances, so as aforesaid called East New Jersey, and every part and parcel thereof, together with all

islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises whatsoever, to the same belonging, or in anywise appertaining, and also the free use of all bays, rivers and waters leading unto, or lying between the last-mentioned premises, or any of them, for free trade, navigation, fishery or otherwise, to have and to hold to the said twenty-four proprietors, their heirs and assigns for ever, to the only proper use and behoof of the said twenty-four proprietors, their heirs and assigns for ever. And that the said Duke of York, by the said last-mentioned indenture, did also grant, transfer and assign to the said twenty-four proprietors, and to their heirs and assigns, proprietors of the said province of East New Jersey for the time being, all and every such, and the same powers, authorized jurisdictions, governments, and other matters and things whatsoever, which by the said several above-recited letters-patent, from the said Charles II., to the said Duke of York, or either of them, were granted or intended to be granted, to be exercised by the said Duke of York,
*378] his heirs or assigns, his or their agents or officers, in or upon the said premises, by the said last-mentioned indenture, confirmed or intended to be thereby confirmed, and every of them, to be held, enjoyed, exercised and executed by the said twenty-four proprietors, their heirs and assigns, proprietors of the said last-mentioned premises, for the time being, as fully, amply, to all intents, constructions and purposes, as the said Duke of York, or his heirs, could or ought to hold, enjoy, use, exercise or execute the same, by force and virtue of the said several above-recited letters-patent, or otherwise howsoever.

The jurors further found, that King Charles II., on the 23d day of November 1683, by an instrument in writing, duly executed, and reciting the said last-mentioned indenture, from the said Duke of York to the said twenty-four proprietors, did recognise their right to the soil and government of the said province of East New Jersey, and did strictly charge and command the planters and inhabitants, and all other persons concerned in the same, to submit and yield all due obedience to the laws and government of the said twenty-four proprietors, their heirs and assigns, as absolute proprietors and governors thereof, who, in the words of the said instrument in writing, had the sole power and right, derived under the said Duke of York, from him the said Charles II., to settle and dispose of the said province of East New Jersey, upon such terms and conditions as to the twenty-four proprietors, their heirs and assigns, should seem meet, as also, to their deputy or deputies, agents, lieutenants and officers lawfully commissioned by them, according to the powers and conditions granted to them.

The jurors further found, that afterwards, on the 15th day of April 1702, the said twenty-four proprietors, and the other persons, in whom the whole estate, right, title and interest in the said province of East New Jersey, were vested at the said last-mentioned date, as proprietors thereof, by an instrument in writing, under their hands and seals, bearing date the same day and year last aforesaid, did, for themselves and their heirs, surrender and yield up unto Anne, Queen of England, &c., and to her heirs and successors, all the powers and authorities in the said letters-patent granted, to
*379] correct, punish, pardon, govern and rule *all or any of her said majesty's subjects or others, who then were as inhabited, or thereafter might adventure into or inhabit, within the said provision of East New

Jersey; and also to nominate, make, constitute, ordain and confirm any laws, orders, ordinances, directions and instruments for those purposes, or any of them, and to nominate, constitute or appoint, revoke, discharge, change or alter any governor or governors, officers or ministers, which were or should be appointed within the said province, and to make, ordain and establish any orders, laws, directions, instruments, forms or ceremonies of government and magistracy, for or concerning the same, or on the sea, in going to or coming from the same, or to put in execution or abrogate, revoke or change such as were already made, for or concerning such government, or any of them; and also all the powers and authority by the said letters-patent granted, to use and exercise martial law in the said province of East New Jersey, and to admit any person or persons to trade or traffic there; and of encountering, repelling and resisting by force of arms, any person or persons attempting to inhabit there, without the license of them, the said proprietors, their heirs and assigns, and all other the powers, authorities and privileges of and concerning the government of the province last aforesaid, or the inhabitants thereof, which were granted or mentioned to be granted by the said several above-recited letters-patent, or either of them. And that the same Queen Anne, afterwards, to wit, on the 17th day of the same month of April, in the year last aforesaid, did accept of the said surrender of the said powers of government, so made by the said proprietors in and over the premises last aforesaid.

And the jurors further found, that afterwards, on the 25th of November 1824, the legislature of the state of New Jersey passed an act which declared that the shore and land covered by the waters of the Sound and Raritan river, in the township of Perth Amboy, should be set apart for the purpose of planting and growing oysters, subject to a rent to be paid to the state of New Jersey, and authorized the commissioners, acting under the law, to permit the owners of the adjacent land to stake off lots within the surveys of the commissioners; which surveys of the land covered with water, the commissioners were directed to make. The jury found, that the defendants in the ejectment, having complied *with the regulations of the act of assembly, were in possession of the lands covered with water, for the [*380
recovery of which the ejectment was brought. The jury found, the premises in dispute are situated beneath the waters of the Raritan river and bay, where the tide ebbs and flows. That the plaintiffs in the ejectment claimed title under regular conveyances from those to whom the proprietors of East Jersey had given deeds in fee-simple for the premises claimed by them.

The cause was argued at large, by the counsel for the plaintiffs, and the defendants, on many points; but the decision of the supreme court having been given exclusively on the questions presented on the construction and effect of the letters-patent, and the effect of the surrender by the proprietors of East New Jersey to Queen Anne, in 1702, the arguments of counsel on these questions only are given.

Wood, with whom was *Wall*, for the plaintiffs in error.—It is admitted, that the King of Great Britain, Charles II., had the power to grant the territory of New Jersey, as private property, and that he did so grant it, including private rivers, ordinary mines, &c. This territory was discovered and held, not for revenue, but for colonization and settlement. After

the grant, it was held by the proprietors, as private property, detached from government, and not as demesne lands of the government. This is conformable to usage. The proceeds of sales of the territory went into the private purse of the proprietors, snd was not applied to, the fiscal purposes of the government. Taxes were resorted to, under the proprietary government, to raise revenue. It is also admitted, that the king had power to create colonial and palatine governments and jurisdictions. This power was disputed and denied, after the revolution of 1688 ; but this did not operate retrospectively, and destroy such patents as were already granted. It is also admitted, that the surrender to Queen Anne embraced no private property ; but that the same was all reserved to the proprietors.

To enable the plaintiff below to recover, he must be able to maintain two positions : 1st, That he has a possessory title to the *premises in question, the soil of this navigable water : and 2d, That there was not a common right of fishery in the people at large, in the premises in question. In ejectment, the party must recover possession of the soil, and therefore, he must show a possessory title. If there was in the people of New Jersey a common right of fishery, the legislature, exercising plenary sovereignty, could, unquestionably, dispose of it, modify it, lease it, and exercise every act of ownership and control over it. Of course, the lease of it, under the statute, to the defendant, would be good. The use and occupancy of the premises by the defendant, is only commensurate with that right ; he does not pretend to take absolute possession of the soil ; he cannot be ejected from a possession commensurate with his right.

*381]

Has the plaintiff shown a possessory title to the soil ? All titles, in New Jersey, go back to the grant of Charles II. to the Duke of York ; and much depends upon the sound construction of this grant, in reference to the premises in question. There are, according to our view, two prominent errors in that opinion, of which we complain ; and it may contribute to a right understanding of the argument, to point them out at the threshold. 1st. In a grant by the king, of prerogative rights, to a subordinate governor, the *regalia* thus granted continue attached to the government, in the same way as when they were in the hands of the crown. In the grant of the right to an individual, they become mere private property—private franchises. The distinction, as will be shown, was in the mind of the circuit court ; but it did not make such a vivid impression as to induce the court to carry it out to its legitimate results.

2d. It is thought the court erred, in clothing the king with too despotic a power over the territory in question—treating him as an absolute despot, independent of parliament, and in considering the grant as transferring to the duke such absolute powers.

It is admitted, this royal grant has a double aspect—a public and a private aspect. The plaintiff below must succeed in bringing his claim under the second point, if he succeed at all. This country was held by right of discovery, and not conquest. It was only retaken from the Dutch, and claimed, on the ground *of this prior right of discovery. Smith's New Jersey Laws, 36–7 ; 1 Story Const. 136 ; Chitty's Prerog. 29–30 ; *Canal Commissioners* v. *People*, 5 Wend. 445 ; *Bogardus* v. *Trinity Church*, 4 Paige 178. The inhabitants emigrating to this country carried with them the laws of England, so far as they were applicable to their situa-

*382]

tion. 4 Paige 178 ; 2 P. Wms. 75 ; 2 Salk. 411 ; Clark's Colonial Law 7 ; 1 Chalmers's Opinions 198 ; 2 Ibid. 202. The use of fisheries and rivers, as common property, was peculiarly applicable to their situation. If claimed by conquest, the English when invited to settle there, would carry with them their own laws and constitutional rights. 1 Story Const. 111, and cases cited.

Again, if claimed by conquest, even as to the conquered, the moment English law is introduced, by proclamation or otherwise, it is irrevocable by the king. Cowp. 213. Here, it was introduced in the royal grant itself. The great principles of British liberty must be considered as accompanying this royal charter, and it must be construed accordingly. It is matter of history, that the Stuarts, to encourage emigration, introduced into these colonies the broadest principles of British liberty. The fundamental constitutions of New York show this. The people have always appealed to Magna Charta as the foundation of American as well as British liberty.

There is no language in this royal grant that will pass the sea and its arms, as private property. We must here treat it in the same way as if the king had granted a tract of land to a private individual. The plaintiff below can derive no aid from its being a public grant of territory and government. In that sense, we admit, the rivers passed ; and will presently show how they passed. We contend, first, that the sea and its arms were part of the regalia or prerogative rights of the crown. And secondly, that they could not, upon a sound construction of this charter, pass as private property, to the Duke, in his private capacity.

I. They are always called royal rivers. *Banne Case*, Davies 155 ; Shultze on Aquatic Rights ; 1 Bl. Com. 264. Prerogative *rights are such as are pre-eminently in the king, by way of preference over his subjects. Such as royal mines, wrecks, royal fish. Such rights as are held by the king on the same common ground as a subject holds, are not prerogative rights. Such, for instance, as private rivers and the ordinary demesne lands of the crown. Chitty's Prerog. 4. Royal rivers are pre-eminently in the king. Private rivers are presumed to be owned by the adjacent proprietors. Not so with public rivers ; they are, at common law, in the king. [*383

Again, the sea and its arms are peculiarly and pre-eminently in the king in respect to their uses ; all of which, at common law, are public, and they are held by the king for the public benefit, viz., navigation, fishery, the mooring of vessels, which is subject to the *jus preventionis*. Angel on Tide-Waters 158. The private rights arise only after the character is changed, as in the case of alluvion, wharfing out, draining, &c. Such rights, until consummated, are mere possibilities. The right in the sea and its arms centres in the king for conservation of the public use ; as a highway is called in the law, the king's highway. The counsel for the proprietors in *Arnold* v. *Mundy* contended, there was no distinction between the rights of the king, inasmuch as they were all held by the king, under his prerogative or political capacity. 1 Halst. 58. This argument confounded the distinction between the capacity in which the king holds, and the rights held by him. Though he holds all in his political capacity, he holds some pre-eminently, as *regalia* or royal rights. General words, "rivers, mines," &c., do not pass royal rivers, royal mines. *Case of Mines*, Plowd. 333–4, 336 ;

Alton Wood's Case, 1 Co. 46 *b*; 16 Vin. Abr. 597, Prerog. K. a. § 27; Chitty's Prerog. 392; *Canal Commissioners* v. *People*, 5 Wend. 451.

Nothing passes against the king by implication. *Banne Case*, Davies 157; Jure Coronæ 117; 7 Conn. 200. The term "rivers," will not pass the soil. Davies 154. The terms "*ex certa scientia*," &c., never have the effect to enlarge the construction, so as to embrace prerogative rights, in such general terms. *Alton Wood's Case*, 1 Co. 46 *b*, and the above case in 16 Viner. Such general terms as "all royalties," will not have the effect. 7 Conn. 200. But in the grant in question, it is all royalties appertaining to the premises granted. "Appurtenances" will pass nothing, except such things as are strictly appurtenant. Chitty's Prerog. 392. It will not be pretended, that royal rivers are appurtenant to the adjacent private land. These doctrines were fully maintained in this court, in the case of *Charles River Bridge*, in 11 Peters. It will also be borne in mind, that this ancient grant is to be construed in reference to the rights of the prerogative, as then understood.

*384]

II. We shall now view this royal charter in its other aspects, as a great state paper, containing a transfer of territory, with the powers of government, according to the principles of the British constitution. In this respect it is to be construed upon liberal principles of public law. We admit, that under this aspect of the case, the *regalia* passed. And we contend, that if the grants did contain language sufficient to pass them on technical grounds, they will be construed to pass to the duke as the *regalia* of the government; he standing in the place of the crown, to hold them as the king held them. All the *regalia*, such as the sea and its arms, or the royal rivers, mines, wrecks, &c., were held by the duke and the proprietary government under him, as attached to the government. The duke being in the place of the king in respect to them. 1 Halst. 77–8. This construction is supported by considering,—1st. The character and purpose in and for which the territory was held by the king. 2d. The design of the royal grant.

1. The territory was held and could only be held for settlement by colonization or otherwise. If held to lie idle, there would be the same objection to it as to the Indian title.

2. The design of the grant was to colonize and settle with British subjects, in order to consummate the title and extend the British dominions. The purpose was, as the grant purports on its face, to introduce British law, and the British constitution. To effect these great objects, it was indispenable that all the *regalia* or royal rights should be held here as they were in England, attached to the government, and for the benefit of the people.

*Prerogative rights are held for the benefit of the community; more especially those charged with the common use, as royal rivers. Chitty's Prerog. 4; 4 T. R. 410; The Elsebe, 5 Rob. 159. According to this view of the grant, the sea and its arms may correctly be said to be appurtenant to the government and territory as a colonial domain. This construction is illustrated by the cases of counties palatine. The count palatine derives his name, *a pelatio*, from his standing in the place of the king, and indictments are charged against his peace. 4 Inst. 204. Hence, lands in a county palatine, when granted by the court, pass without livery. 4 Inst.

*385]

206. Lands may be holden of him *in capite*, though they cannot be of a private subject. Davies 181. The *regalia*, in a county palatine, are incident to the government. *Boss* v. *Bishop of Durham*, 2 Bulst. 226–7. It is sufficient to prescribe for franchises not granted—by showing a county palatine. 4 Com. Dig. tit. Franchise, D, 7. A county palatine is an inferior subordinate jurisdiction, in the heart of the kingdom, with mere judicial and administrative powers. A colonial government extends over a large territory, and is clothed with high legislative and executive power as well as judicial—with complete, though subordinate sovereignty. If the *regalia* pass in a county palatine, as incident to the subordinate jurisdiction, the reasons for passing them as incident to the colonial government, to be held and applied to the benefit of the colonists, applies with tenfold force.

The surrender by the proprietors of the government to Queen Anne, included a surrender of all the *regalia*, such as wrecks, royal rivers, &c. 1st, Impliedly. 2d, In express terms.

1. Impliedly. If the above view taken of the grant be correct, this follows of course: If these *regalia* were, by the royal grant, converted into mere private franchises in the hands of individuals, as private property, detached altogether from the government, as we have admitted *to be in the case with the soil and private rivers, then they were not [*386 surrendered. If they continued concomitants of the government, then clearly they were surrendered. What is a surrender but a re-transfer? If the *regalia* pass incidentally, by the creation or transfer of the sovereign power, they will, of course, pass by the surrender or re-transfer thereof. A king *de facto* takes the *jure regalia*. Chit. Prerog. 205.

2. But there are in this surrender express terms, apt and sufficient to re-transfer the *regalia* to the crown. They surrender all powers, authorities and privileges of and concerning the government, and the inhabitants thereof. Leaming & Spicer 615. "Privileges" embraces the *regalia* in their hands. It was so understood by the proprietors. § 13. It is so used at common law. 7 Com. Dig. tit. Prerog. D, 32. If only the high political powers of government were designed to be surrendered, why was this language inserted in the surrender? The government itself embraces all these high political powers, and is senseless without them. All the minor *jure regalia* concerned the government and the inhabitants. The protocol is referred to, Leaming & Spicer 590, 596, wherein it is stated, that the rights in the seas cannot well be circumscribed. The rights of the seas, there referred to, were wrecks, royal fish, &c.

Now, any one familiar with the jurisprudence of New Jersey knows that the proprietors never claimed or pretended, after the surrender, to claim these rights. The error here arises from attending to the protocol or negotiation, instead of the surrender itself. The proprietors negotiated for a reservation of those rights, like the Duke of Athol. But though the commissioners were at first disposed to concede some of them, yet finally none of them were reserved in the surrender. But this attempt, on the part of the proprietors, to procure such a reservation, shows they were satisfied that the surrender would pass them to the crown, unless an express reservation could be obtained. In the construction of all ancient instruments, but more especially of public grants, long-continued usage should have great influence.

Next, as to the rights in the sea and its arms.

*387] *1. As to wrecks. This is one of the minor *regalia* respecting property, and is often vested in the subject as a franchise. Lords of manors bordering on the sea frequently claim it. Yet this was surrendered, and has been the subject of repeated regulation by statutes providing when and under what circumstances the proceeds shall be paid into the state exchequer. Patterson's Laws 385.

2. Ferries, when established, wharves, ferry-stairs, piers, &c., stretch into the rivers and bays. If, over a private river, the owner of the ferry would have to purchase the land of the owner of the river; no such claim to the public rivers has been set up by the proprietors.

3. Bridges, toll-bridges, and bridges connected with turnpikes, railroads, &c., when established over a public river, occupying the soil, would be an encroachment upon the rights of the proprietors, if they owned a bed of such river. Compensation in such cases is always made to the owners of private rivers and fast land; but none has been made to the proprietors as owners of the public rivers.

4. The right of the riparian proprietor to wharf out into the public river, is a local custom in New Jersey. How can the growth of such a custom be reconciled with the idea that the soil and fisheries in those public waters were the private property of the lords proprietors.

5. In all the public waters of the state, they have two kinds of fisheries —common fisheries, and private or shore fisheries, belonging to the riparian owner. The latter is confined to fisheries for those kinds of fish which were usually taken by hauling the net upon the shore, and are called shore fisheries. By long usage, these kinds of fisheries have grown into private rights, belonging to the riparian owner, and have been recognised by repeated legislative acts. *Bennett* v. *Boggs*, 1 Bald. 70. Those common fisheries and riparian several fisheries are all incompatible with the claims of the proprietors, who, under such claims, would have had several fisheries in all the rivers, and disposed of them to their grantees. The Delaware was, by an early law, declared to be a common fishery. But this grew out of the controversy with Pennsylvania, and was the assertion of a right as against them. The *same common rights of fishery have existed in all the other waters of the state. Leaming & Spicer 480. *388]

The oyster fisheries are common in all the rivers and bays of the state, and have always been protected as such. The acts recite the rights of the poor to take oysters, and protect them from encroachment by citizens of other states; all founded on the idea of common right. 1 Halst. 90–1; 1 Allison's N. J. Laws 57, Preamble; 1 Pat. 203; 1 Nevile 87.

It is not pretended, that the proprietors have ever possessed or enjoyed any of the *regalia*, since the surrender. They have occasionally made a few grants which have extended over these public waters, but they have been very few. Their grants have almost invariably been confined to the bank or margin of the public rivers. See 4 Griffith's Law Reg. 1292. But in the few grants they have made, it is not pretended, that the grantees have ever set up several fisheries for oysters, or floating fish; or claimed and exercised an exclusive right in any other way. One would suppose, if the proprietors had claimed the *regalia* after the surrender, they would at once have asserted and exercised the right of extinguishing the Indian title, a

prerogative right appertaining to private property. But this has never been claimed or exercised, independently of license from the royal government. General usage, in New Jersey, then, is decidedly hostile to this extraordinary claim of the proprietors.

A question has arisen, whether the King of England can grant the soil of the sea and its arms, so as to destroy or prejudice public rights. Not considering this question at all material to the main argument, I have purposely kept it out. If he had not such a power, however, it serves to strengthen the construction of the royal grant that he did not intend thus to convey the sea and its arms by this charter. It has been shown, that all the uses to which these public waters can be applied are public and common. It is only when the waters are excluded from the soil by alluvion, wharfing out, &c., that it becomes private; and then the whole character is changed. *Udall* v. *Trustees of Brooklyn*, 19 Johns. 175. To grant the soil, so as to give an individual the right to take it after such a change, has been made a nice question; and it has *been stated, that a grant, to have this [*389
effect, must be specially formed. Harg. 18; 2 Anst. 604, 609. But why need it be so specially formed; if the king can at once grant, so as to vest in an individual the soil, and divested of all common use before the change takes places?

Common of fishery is a right which may be specially pleaded, and cannot be traversed. *Richardson* v. *Mayor of Orford*, 2 H. Bl. 182; s. c. 4 T. R. 437; *Ward* v. *Creswell*, Willes 268. A grant of soil cannot destroy the common right of fishery. Chit. Prerog. 142; 2 Bl. Com. 39. The distinction drawn by Blackstone between free and several fisheries is not that the latter requires an ownership of the soil, but an exclusive fishery in a private river, granted by a private person. See Chitty on Fisheries 243–69. Harg., p. 11, admits a common right of fishery cannot be destroyed.

The grants and pre-emptive rights spoken of in the books are claims by prescription, and grants of prescriptive rights, arising or presumed to have arisen prior to Magna Charta. See also 5 Mod. 73; Sid. 148–9; 16 Vin. Abr. Piscary, B, 1; Year Book, 8 Edw. IV. 18; 7 East 195; 1 Inst.; Magna Charta, ch. 16, 23. The grant of the river Thames opposite London, is founded on an ancient prescriptive grant. Shultze 56. No case can be shown of a grant, since Magna Charta and its confirmation, not founded on an ancient prescriptive right. The royal fisheries in the river Banne were special royalties, the ancient inheritance of the crown, resting upon old charters, collected from the Pipe Rolls; the evidence of which, as there adduced, would have been superfluous, if the king has the right and power over the navigable waters here contended for.

The only remaining question to be considered is the effect of the decisions of *Arnold* v. *Mundy*, 1 Halst. 1; and 1 Penning. 391. The first of these cases occupied the whole ground. The suit was brought on a location made under the proprietors, with a view to try the right. In the other case, the question came up incidentally. The object of this suit unquestionably was, to review and overturn the decision of *Arnold* v. *Mundy*. There is no pretence for alleging that any question under the *constitution of the [*390
United States arose in *Arnold* v. *Mundy*. The question was of unwritten local laws, resting on the construction of an ancient charter, applicable to real property, and affected by the usages of the state. The jurisdic-

tion of this court over cases where citizens of another state than the one in which the suit arises are concerned, rests upon the ground that the federal courts, in applying the law, will be more free from any undue influence. But it is state law they are to apply, not to review, alter or remodel state law. The jurisdiction of this court is not controlling or reviewing. It is not, so far as respects the settling of state law, equal ; it is subordinate. The federal courts follow, and do not lead ; their jurisdiction is occasional. Perhaps, not one part in ten thousand of the public waters in question, are under the jurisdiction of this court at all. The members of this court cannot be expected to be acquainted with all those local usages and opinions which enter into and modify the laws of a state, especially, its unwritten law. Hence, this court has decided, that the state judiciary is presumed best to know its own law, and is the appropriate organ to expound and settle it. *Elmendorf* v. *Taylor*, 10 Wheat. 152 ; *Bell* v. *Morrison*, 1 Pet. 359–60. Hence, this court follows, and changes with, the state law. *Green* v. *Neal*, 6 Ibid. 301.

It is said, the decision in *Arnold* v. *Mundy* was not carried up and decided in the court of appeals. The true point to be ascertained is, whether that decision is state law ; whether it has been so far adopted and acted upon, as to form a part of its unwritten law. There are two branches of unwritten law in relation to this subject. 1. Those old and well-established doctrines about which there can be no dispute, and which can never be modified or changed, without legislative interference, such as the law of descents. 2. Adjudications upon cases constantly arising, attended with new combinations of circumstances. It is in reference to this second branch, that the rule applies. Under the maxim *stare decisis*, these adjudications form part of the unwritten common law. But they may, occasionally, when found not to work well, be *modified. This flexibility is made to
*391] harmonize with the stability resulting from the application of the above maxim. The power of reconsidering and new-modelling adjudications will be exercised with great delicacy and caution. Adjudications once deliberately made, are held as forming part of the settled law, notwithstanding this occasional interference with the rule. An occasional deviation does not impair the character of a fixed rule. When an adjudication is once deliberately made by a court competent to settle the law, the power of disturbing or remodelling it does not belong to the tribunal of a foreign government. If such a point came up in the supreme court of any other state, upon the local law of New Jersey, and it might come up incidentally, such a decision as in *Arnold* v. *Mundy* would be implicitly followed. The courts at Westminster Hall would implicitly follow it. This court, under the decision of *Green* v. *Neal*, would implicitly follow it.

Is the supreme court of New Jersey competent to settle law ; or must it be carried up to the court of appeals? The appeals to that court are only occasional ; there are no reports of their decisions. The decisions of the supreme court are all reported by law ; and they have, by force of law and usage, the authority of binding precedents, in the state, when not appealed from. When cited in other cases, even in the court of appeals, they are respected as precedents and as state law ; more especially, when they have stood for years, and have become the basis of business transactions and of legislative action, as in the present case.

It is also objected, that there has been but one decision upon this point. One decision, fully and thoroughly investigated, may be more effective, than half a dozen decisions slightly considered. This ought not to be made a question of arithmetic. There are seldom, in any case, fully discussed, more than one decision, because a court will not, unless in a very special case, hear a second argument in the same or in another cause on the same point. It may, in other cases, be incidentally alluded to, but this can add little weight to the force of the decision. If that is wanted, we have it in this case. The doctrine was incidentally passed upon in 1 Penning. 391. Tide-waters were there held by the court, and admitted by all the counsel, to be public navigable rivers. *The oyster fishery, there, was only deemed to be public and common on that account. It has nowhere been [*392 decided by this court, that there must be more than one decision, or a decision of the court of appeals, in those states where they have such courts, in order to introduce a case into the settled law of the state; such a doctrine, if carried out, would unsettle a vast body of law, and would be productive of infinite mischief in those states where a branch of the legislative body forms an occasional court of appeal. Remarks made by the court in the case before them, must be taken in reference to the circumstances. In a case where the decision was by the state court of appeals, it may be said to form a part of the settled law; so, where there have been several decisions, as sometimes happens in will cases, they may be said to have the same effect; but it does not follow, that one decision may not have the same effect. In 5 Pet. 151, and 6 Ibid. 299, this court followed a single decision of the state courts. A contrary doctrine would lead to unfortunate conflicts between the state and federal judiciary. If this court should attempt to overturn *Arnold* v. *Mundy*, it could not be binding upon the state courts. There would then be only one decision here. And upon the principles already settled in this court, they would be bound to respect and follow the decision of their own state court in preference. If this court should believe that the soil was in the plaintiff below, but there was a common right of fishery, for the reason above stated, the judgment should be in favor of the defendants below.

Ogden, for the defendants in error.—There are two questions in this case: 1. The extent of the grant of King Charles II. 2. The operation and effect of the surrender in 1702, to Queen Anne. The question whether the country, now the United States, was acquired by discovery or conquest, is of no moment in this case.

The question, what passed to the Duke of York, by the letters-patent, properly divides itself into two portions. 1. What was the thing granted? 2. Had the king the power to make the grant, as it is construed by the defendants in error?

The grant is of all the lands, soils, rivers, &c., and of all other regalities. "Soil is the appropriate word to pass land under *water. It [*393 is not a general term, but an apt and proper one to pass soil under a river; and therefore, when used, passes, by the king's grant, all that is the prerogative right of the king. It is to be holden by the Duke of York and his heirs, in fee-simple, in free and common socage. Now, suppose the deed stopped here, would there be any doubt of its contstruction? It then

grants the powers of government, civil and military. By the grant of the Duke of York, King Charles II. parted with all the premises included within the grant, and also with all his rights of sovereignty or power of government, on condition, and so long as the laws made by the new government were not contrary to the laws of England ; reserving only a right of receiving and hearing appeals from provincial judgments and decrees or sentences. He parted with all his prerogative rights in the territory contained in the grant ; because having parted with the sovereign power, he must necessarily have parted with all the rights of sovereignty. He parted with his crown and with all the rights attached to it ; and he had no prerogative rights remaining in him, except those expressly reserved. The Duke of York, and the proprietors of New Jersey under him, were seised and possessed of all the rights of the King of England, both of property and government.

This presents the point, had the king power to make such a grant? It seems to the counsel for the defendants in error, to be placing this question on too narrow a ground, to put the validity of this grant, upon the king's prerogative rights. Those rights were, from their nature, and must be, confined to England. This grant, parting not only with the soil, but with the government of the country granted by him, transcends all his prerogative rights under the common law of England. He, as king, cannot grant a right of sovereignty over any part of England. This right to part with and convey the property and sovereignty of government of this territory, must be traced to the great principles of national law, applicable to every nation, to every sovereign in whom is the power of disposing of any property which the nation has acquired either by conquest or discovery. The correctness of this view of sovereign power, must be judged of, not by the common law, but according to the law of nations.

*394] *It is considered a cession by a sovereign to one of his subjects, but it is intended to vest in that subject a territory with all the rights of government ; and it must be construed as if it were a cession to another sovereign. By the treaty of 1783, the king of Great Britain ceded all his right and sovereignty over the United States. Did not the rivers and the soil under them pass, without apt and special words to include all his regalities? This was a newly-acquired territory, then a wilderness ; the settlement and improvement of it were great objects with the crown. In order to effect this, it was intended to hold out great inducements to Englishmen and others, to come over and inhabit it. Self-government was always a favorite object with the people of England, who were strongly imbued with a love of liberty ; and in furtherance of that object, this grant, and the power and property included in it, were made and granted by the king. The people were to be subject to their allegiance to the crown ; but not to be subject to all the prerogatives vested in the king by the common law.

To a certain extent, this was a part of one and the same nation. The enemies of England, in time of war, were their enemies ; and in time of peace, they were at peace with every nation with whom England was at peace. But to a great extent, they were an independent government ; making their own laws, holding treaties with the Indians, naturalizing citizens, and exercising full legislative authority ; restrained only by the condition contained in the patent, with an exclusive power of taxing their inhabitants, &c. To

assert that they held all their rights, and exercised all their power, subject to the common law prerogative of the king of England, would be contrary to common sense. To one prerogative, from their peculiar and anomalous situation, they were subject, the power of the king to declare war and to make peace; but to nothing else. The exercise of the royal prerogative had, in many cases, been considered as leading to acts of tyranny, in England; and to avoid being no longer within it, was, no doubt, one great inducement to many to leave that kingdom; and they never could believe, that those prerogative rights were to follow them in their new homes.

*In connection with this point in the argument, it is important to refer to dates. The patent of Charles II. to the Duke of York [*395 was dated on the 12th of March 1664. The duke conveyed to Berkley and Carteret on the 24th June 1664. The concession and agreement made by Berkley and Carteret with all and every the adventurers, and all such as shall settle or plant there, bears date the 10th of February 1664. If this was before the grant to the Duke of York, it is probable, the concessions were known and approved by the king, before he made the grant to the duke. Whether, therefore, these grants, concessions and agreements of Berkley and Carteret were made after or before the letters-patent, is of no consequence.

By the 25th article of the concessions, we find the proprietors acting and erecting a government of their own, with the knowledge and consent of the king, with three distinct departments, legislative, executive and judicial; and free, it is apprehended, from all the common-law prerogatives of the crown of England, and subject only to one great prerogative, that of making war and peace In confirmation of this doctrine, the court are referred to Salk. 666, where Lord Holt says, "the law of England does not extend to Virginia; her law is what the king pleases." In the opinion or Lord Holt, the power of the king was unlimited; restrained or governed by no principle of the common law. He had a right, then, to grant New Jersey, without any reference to the laws of England, or to his prerogatives under those laws. He could give no stronger evidence of his pleasure, than by the words of the grant made by him to the Duke of York.

But if this case is to be determined according to the strictest and most technical rules of the common law, let us now examine that law, and see what will be the result upon the questions in this case. It is contended by the counsel for the plaintiffs in error, that the prerogative rights of the king to rivers, in which the tide ebbs and flows, to the bays and inlets from the sea, to the soil under the rivers, and to the fisheries, are held by him in trust for the use of all his subjects; and cannot be transferred by him to an individual. *If these were the trusts upon which the king held these [*396 rights, it is presumed, that the state of New Jersey must now hold them upon the same trusts. By the revolution, the state acquired all the rights which belonged to the crown, but none others. If the king held all the rights upon the trusts mentioned, the state must hold them upon the same trusts. But by the legislation of New Jersey, all such trusts are denied. Acts of the legislature of New Jersey of November 24th, and December 27th, 1818. These acts authorize the leasing of those flats, or land, or soil under the water, to any individual, and not to the riparian owners of the soil only, but to any one who shall pay the state a certain annual rent; and

have actually leased to the plaintiffs in error the premises in dispute, for a term of years, none of whom are stated to be the owners of the adjacent shores. If the legislature of New Jersey have the power to lease for years, they may do so for life or in fee. So long as they have the power to convey any interest or estate in the premises to individuals, the nature and continuance of the estate to be conveyed or granted must depend entirely and exclusively on the legislative discretion.

By what course of reasoning do the counsel for the plaintiffs in error arrive at the conclusion, that the state have now the power to make a disposition of this property for private purposes, and that the crown, anterior to the revolution, had no such power or right. It is not intended to consume the time of the court, by reading the cases referred to in the argument already addressed to the court by the counsel for the defendants in error. The principles contained in these authorities will be stated. All rivers, bays which are what are called arms of the sea, in which the tide ebbs and flows. and the soil under them, below high-water mark, and the rights of fisheries in these rivers, *primâ facie* belong to the king. They may, however, belong to a subject; but he must show his title to them. He may show, either an actual grant, or he may show a title by prescription, which always supposes a grant. A grant from the king of a river, and the soil under it, passes a
*397] right of fishery to the grantee. It was, for some time, made a *question, whether there could be a several right of fishery, without the ownership of the soil; all the cases on that subject necessarily admit that the right of soil under the river may be vested in an individual. There are but two cases from which a contrary doctrine can be deduced; they are the cases in 6 Mod. 73, and 5 Rob. 159. But this court, it is confidently believed, will not suffer these two cases to overrule the mass of authorities cited for the defendants in error, nor the authority of Sir Matthew Hale, one of the most learned and accurate lawyers that ever lived.

To proceed to the second point: what rights were surrendered by the proprietors to the crown, by the deed of surrender of 1702? It will be recollected, that the original grant from Charles II., was not only of the property, but of the government of the territories granted; all civil and military power was granted. In 1702, the proprietors surrendered their right of government, and nothing else; whatever was a right of property was retained by them; whatever was necessary for the government, was surrendered by them. Certainly, the surrender never intended to abandon any of the property, and to enable the queen to grant it. It has been shown, that the property in the soil was granted to those who held under the letters-patent of Charles II., as property. It is, then, evident, that it never was surrendered to the crown. If it never was granted as property, but was a part of the powers of government, necessarily appertaining to it, then it was not surrendered. As has been shown by the cases cited, the soil under a river may be granted by the crown to a subject, and the government still goes on. This fully establishes the position, that the retaining such property in the crown is not necessary to the existence and administration of the government. The proprietors exercised privileges which are essential to every government. They established forts; a fort was erected at Amboy. They continued, after the surrender, to use and exercise all rights of property in the territory for its protection and for their advantage.

This is not a case of local law, and the decisions of the courts of New Jersey are not entitled to authority *in the courts of the United States, as they would be on the construction of the statutes of New Jersey. This court will look at these decisions with respect, but will not yield to them the decision of the question before the court. The court are now called upon to give a construction to a patent from the king of England, which related to territory as well within the limits of what is now New York, as New Jersey. This is not a local question. For the construction the court are now called upon to gave to these letters-patent, they will look at the interpretation given to them in West Jersey. The people of that part of the territory granted by the letters-patent, have always used the right of fishery in the river Delaware. This right has been derived from grants of the proprietors of West Jersey. [*398

Wright, for the defendants in error.—The following is a concise statement of the facts of the case. An action of ejectment was instituted in the circuit court of the United States for the district of New Jersey, by the defendant in error, to try the title to land covered with water, situated in the bay of Amboy, near the mouth of the Raritan river. The defendant in error, being plaintiff below, obtained a judgment in the circuit court, on a special verdict; and this writ of error was prosecuted by the defendants.

In the circuit court, the plaintiffs in the ejectment claimed title under a patent from King Charles II. of England, to his brother James, then Duke of York, executed 12th March 1664, by which the whole of the territory, now the state of New Jersey, including the premises in question, with other large bodies of land, were granted to the Duke of York. By conveyances from the Duke of York and others, the property was claimed to be vested in the defendant in error. The patent describes the land in the usual form of such conveyances from the crown of England, without any exceptions or reservations, with certain islands upon the sea-coast, "and the lands from the west side of Connecticut river to the east side of the Delaware bay." This was the grant of property from the king to the duke, and it is not questioned, that the mesne conveyances from the duke down to the plaintiff in the ejectment, have been equally broad and comprehensive to carry the title to the premises in question. In a *subsequent part of the patent, full powers of government, civil and military, in and over the territory, are granted to the duke, "his heirs, deputies, agents and assigns," reserving only an appeal to the king in favor of any person "touching any judgment or sentence to be by them made or given." [*399

On the 15th of April 1702, the twenty-four proprietors of East New Jersey, "assignees of the Duke of York," surrendered to Anne, then Queen of England, the powers of government granted in the patent from the king; which surrender was made in the very terms of the grant in the patent; and that surrender, so made, was accepted by the queen two days after it was made. Under this state of facts, not controverted, the questions in this case are made:

I. Could the king of England, in conformity with the law of nations and the laws of England, convey, in the year 1664, to a subject of his realm,

a valid title to land covered by the water of bays, rivers or arms of the sea, where the tide ebbs and flows, in the province of New Jersey?

The laws of nature and nations establish the following propositions, pertinent to this question: 1. Every nation is the proprietor as well of the rivers and seas as of the lands within its territorial limits. Vattel 120, § 266. 2. The sea itself, to a certain extent, and for certain purposes, may be appropriated and become exclusive property as well as the land. Vattel 127, § 287; Ruth. book 1, ch. 5, p. 76, § 3. 3. The nation may dispose of the property in its possession, as it pleases; may lawfully alienate or mortgage it. Vattel 117, §§ 261–2. 4. The nation may invest the sovereign with the title to its property, and thus confer upon him the rights to alienate or mortgage it. Vattel 117, §§ 261–2.

The laws of England establish the following propositions material to this point: 1. The common law of England vests in the king the title to all public property. 1 Bl. Com. ch. 8, 298–9; 2 Ibid. 15, 261–2; Harg. Law Tracts, *de Jure Maris*, ch. 4, 10, 11, 12; 6 Com. Dig. tit. Prerogative, 60, B. 63; *Tenure 337; 5 Com. Dig. tit. Navigation, 107; 3 Co. 5, 109. 2. A subject may acquire the property of navigable rivers and the soil, and of specific localities in the sea itself, by grant or prescription, as he may many other prerogative rights of the king of a like character; and the king may make all these grants to a subject. Harg. Law Tracts, *de Jure Maris*, ch. 4, 11, 13, ch. 5, 17, 18; *Palmer* v. *Mulligan*, 3 Caines 315, 319; *People* v. *Platt*, 17 Johns. 195. The Massachusetts cases equally recognise the authority of the law tracts in that state. So, too, are the decisions in other states. 1 Pick. 180; 2 Conn. 481; 2 Binn. 475.

*400]

As it has been said, that no grants to navigable rivers, and the soils and fisheries thereof, have been made since Magna Charta, the following references are made. Davies 155; *Hamilton* v. *Donegall*, 3 Ridg. Parl. Cas. 276–328. Other authorities of English elementary authors, and English adjudged cases, sustain Lord Hale in the positions, that the subject can acquire these rights, and that the king has a right to make the grants, and has been accustomed to make them. 1 Bl. Com. 286; 5 Cruise's Dig. 45, § 10, tit. King's Grant, 54; 3 Ibid. 262; *Carter* v. *Murcot*, 4 Burr. 2163; s. c. 2164–5; 1 Mod. 105; 5 Com. Dig. 108, tit. Navigation; 6 Ibid. 55, tit. Prerogative; 4 Co. part 7, p. 19; *Bulbrook* v. *Goodere*, 2 Burr. 1768. All the following authorities of a date later than the publication of Hargrave's Tracts give to them the highest authority. *The Banker's Case*, Skin. 601; *Mayor of Orford* v. *Richardson*, 4 T. R. 439; 5 Burr. 285; 5 Mod. 556; 3 Barn. & Cres. 875; 2 Bos. & Pul. 472; 5 Barn. & Cres. 268. American cases sustain the right of the king to make such grants. 2 Bing. 476; 4 Mass. 144, 522; 1 Pick. 180; 3 Johns. 357; 6 Ibid. 131; 17 Ibid. 195; 20 Ibid. 90; 1 Conn. 284; 7 Ibid. 486; 2 Ibid. 481; 1 Har. & McHen. 564; 8 Wheat. 577–97.

Mr. Wright proceeded to examine the cases cited for the plaintiffs in error, in support of the principles contended for by them. He argued, that none of those cases impugned the doctrine he had claimed. Some of the cases were taken from the civil, and not *from the common law, to which only the parties must look for the principles to govern the controversy. The difference between the civil and common law rights, and

*401]

the civil law, are laid down by Bracton. 5 Barn. & Cres. 290, 292–3, 309, 311.

Blackstone (2 Bl. Com. 39) supposes, that Magna Charta, ch. 16, had restrained the king from granting free fishery, by which he evidently intends "exclusive fishery, in navigable waters, when the soil is in the king;" but he says it is different as to several fishery, because that must either be in, or be derived from, the owner of the soil.

The kings of England, then, had the right, by the laws of nations and the laws of England, at least, until the statute of 1 Ann. in the year 1701, to grant in fee, to a subject, the crown lands and various royal franchises, portions of the property and inheritance of the crown, within the realm; and the subject could take, hold, possess and enjoy, in full propriety, according to the grant, the lands and franchises so conveyed to him by the sovereign. It cannot surely be necessary to resort to argument or authority, to prove that the power of the king to make grants to his subjects, either of lands or franchises, in the waste and wilderness province of New Jersey, in 1654 or 1674, was at least as extensive as the power he then possessed to make similar grants within the realm of England.

Still, it has been objected, that the title of the defendant in error is not sustained by these authorities, and the principles they establish; because it is said, the power of the king to grant is confined to the alienation of his private property, "his ordinary revenue," "lands vested in him upon feudal principles," and does not extend to the public property, to property held "by virtue of his prerogative," in which way only, it is alleged, he holds "the *allodium* of the soil of navigable rivers and the sea." The authorities already cited answer this objection. All the cases establish the power of the king to make the grant, or the right of the subject to hold by prescription, which pre-supposes a grant from the crown as the only lawful commencement of the title. Cited, 3 Cruise's Dig. 244, tit. Franchise, § 1; 5 Ibid. 46, tit. King's Grant, § 7; 2 Bl. Com. 265; 4 Burr. 2165. *This objection, however, has no foundation in the English common law, but is [*402 entirely subversive of one of its oldest and best-settled principles. The king holds nothing as "private property," but everything in *jure coronæ*. Even that which was his private property, before he was king, the moment the crown descends upon him, is held *jure coronæ*, and not as his private property. 6 Com. Dig. 60, tit. Prerogative, D. 64; Skin. 603.

A second objection is, that by chapters 16 and 23 of the statute of Magna Charta, adopted by the king and parliament of England, in the ninth year of the reign of Henry III., A. D. 1224–5, the power of the king to grant the soil of navigable rivers, ports, havens and arms of the sea was restrained, and the exercise of it as to new grants entirely prohibited, so that any such grants, made subsequent to that statute, are contrary to its provisions, and therefore void. This objection admits of several very conclusive answers; but the one which seems to present itself as first in order, as, if sound, it must be in importance, is—

1. That neither of these chapters of Magna Charta relate at all to the title of the soil upon which they act, or contain any prohibition whatever against grants of soil anywhere, either by the sovereign or a subject. They merely, in the broadest construction which any one has sought to give to them, prescribe and restrain the use of the soil of the banks and beds of

rivers, as it relates to obstructions to navigation and fishing; and that equally whether the propriety of that soil be in a subject, or in the king. This position will not be obviated, if the court shall be of the opinion that, by virtue of these statutes, a common right of fishery in the waters which cover the premises in question was secured to all the subjects of the king, and has passed to the people of the state of New Jersey; because the plaintiffs in error do not defend under any such claim of common right, but under a title in the state of New Jersey, adverse to the title of the defendant in error, and by virtue of which they claim a several fishery, the right to put the waters and banks in defence, to put down wears thereon, not
*403] obstructing the navigation, and to exclude, for *a term of years, all the other inhabitants of New Jersey from taking fish there.

2. Another answer to this objection is, that Magna Charta is a mere statute, and it application was local and confined to the realm of England, for which the parliament which passed it was the local legislature, unless subsequently expressly extended to the colonies by competent authority. This is shown upon the face of the statute itself. The preamble contains this language. Cited, Coke's Institutes, part 1, vol. 1, p. 1 (Eng. edit. 1817). In order further to show the proper construction of the 16th chapter of Magna Charta, Mr. Wright also cited 2 Bl. Com. 39; Cruise's Dig. 261, tit. Franchise; *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 875; 1 Statutes of Great Britain and Ireland, 579, 718, vol. 2, 213, 242, 644, 688; 7 Co. part. 13, p. 35–36.

It is believed, that both the objections above enumerated are effectually disposed of by the considerations and authorities presented, and that the proposition before arrived at is fully established, viz: "That the king of England had the right, by the laws of nations, and the laws of England, at least, until the statute of 1 Anne, in the year 1701, to grant in fee, to a subject, the crown lands, and various royal franchises, portions of the property and inheritance of the crown, within the realm; and the subject could take, hold, possess and enjoy, in full propriety, according to the grant, the lands and franchises so conveyed to him by the sovereign." This court has adopted these principles, as to the power of the king over his distant and conquered dominions; and has applied them to the American colonies, especially so far as they relate to grants of the soil of this country, in a great variety of decisions. One of the leading cases, if not the most so, is that of *Johnson* v. *McIntosh*, in which the opinion of the court was pronounced by the late Chief Justice Marshall. *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–4, 595, 597.

Whatever then may have been, or may be, the power of the king of England to grant lands within the realm, it is believed, the main question with which this argument commenced, may now be safely answered. That
*404] the king of England, in conformity *with the laws of nations and the laws of England, could convey, in the year 1664, to a subject of his realm, a valid title to lands covered by the water of bays, rivers and arms of the sea, where the tide ebbs and flows, in the then province of New Jersey; and that the courts of the United States cannot, according to the well-established principles of the laws of nations, of the laws of England, and of the laws of the United States, as applicable to grants of land within

the United States, pronounce such a conveyance void, for the want of constitutional and legal power in the king to make the grant.

II. The next question is, do the letters-patent from the king to the Duke of York, found in the special verdict, in fact, convey the premises claimed by the defendant in error; and to recover which this action is brought? This inquiry must be answered principally from the letters-patent themselves, and in them are found the following grants: Mr. Wright read the charter from King Charles II. to the Duke of York, as set forth in the special verdict; and cited on the construction of the charter, 2 Bl. Com. 347, 348, 346; 7 Conn. 186; *Palmer* v. *Hicks*, 6 Johns. 133; 7 Conn. 199–200.

These letters-patent, then, do convey to the Duke of York the premises in question in this suit, so far as the propriety thereof was vested in the king at the time of the grant. Under these letters-patent, the Duke of York took and held the territory described and conveyed unto him in the same year, when he assigned and transferred the same to Lord Berkley and Cartaret. They thus became the owners of the property and government, and exercised all their rights in the same. Mr. Wright then referred to the grants to the purchasers from Lord Berkley and Cartaret, as stated by the jury, and to the proceedings of the twenty-four proprietors of East Jersey, after they become the owners of the territory and government. He cited Leaming & Spicer, 153, 77, 138, 227, 362.

III. Did this surrender to the queen of England include, and carry with it, a surrender by the proprietors who made it, of the propriety of the soil covered by the waters of the navigable rivers, bays, ports, haven and arms of the sea, within the territory *granted to them under the letters-patent from King Charles II. [*405

1. Does the deed of surrender, upon its face, reconvey the title to, and property in, that part of the territory of New Jersey in which the premises are situated? By a reference to the charter, it will be seen, that the powers of government were granted by a different instrument from that of the grants of the soil and the appurtenances to it. The two classes of grants are in nowise connected. Leaming & Spicer, 609–15. No construction of the language employed in these patents can be adopted, which, by fair legal interpretation, can be made to amount to a conveyance of a single item of the property granted in the first letters-patent. It is denied, that the grantors in the deed of surrender intended to surrender and reconvey to the crown, any of the rights of soil or of property conveyed to them by the letters-patent of King Charles II. This is shown by the terms of the surrender. Leaming & Spicer, 613, 588–90, 593–4, 596, 619.

The residue of the argument of Mr. Wright was, upon questions arising on the charter and surrender, on which no opinion was given by the court; and this part of the argument is, therefore, omitted. The opinion of the court was upon the power of the king to grant the soil as claimed under the charter, by the defendant in error, holding under the twenty-four proprietors of East Jersey, as the grantees under the Duke of York.

The last question for consideration is on the effect of the decision of the supreme court of New Jersey, in the case of *Arnold* v. *Mundy*, 1 Halst. 1. Does that decision bind this court in the present case? The principal cases in which this question has been raised and considered or decided in this

court, are the following: *McKean* v. *Delancy*, 5 Cranch 22, *Polk* v. *Wendall*, 9 Ibid. 87; *Thatcher* v. *Powell*, 6 Wheat. 119; *Blight* v. *Rochester*, 7 Ibid. 535; *Daly* v. *James*, 8 Ibid. 495; *Elmendorf* v. *Taylor*, 10 Ibid. 152; 11 Ibid. 361; 12 Ibid. 153; 1 Pet. 571.

The principles deducible from these decisions, and which are to govern
*406] the application of the rule, would seem to be the following: *1. That the point presented to this court, and upon which its decision is invoked, shall be identical in substance and in law with the point presented to, and decided by the state courts, whose decisions are relied upon as being the guide to this court. 2. The point must arise upon the construction of a legislative act of the state, whose courts have given the construction relied upon; or as to what is the local law of that state, relating to the title to real property in the given case. 3. The decision of the state court upon the point presented, must have remained so long, and have been so uniform, as to authorize the presumption of acquiescence on the part of the people and authorities of the state, and to have made the decisions of these courts upon that point a settled and established rule of law, as to titles to lands within the state.

Mr. Wright then went into a particular examination of the case of *Arnold* v. *Mundy*, and contended, that the decision did not come, in any manner, within the principles he had stated, and which are sustained in the cases referred to. In this examination he cited Harg. Law Tracts, *de jure Maris*, ch. 1, p. 5; 1 Mod. 105. Upon this point, after the examination of the case, he said: For each and all of these reasons, the decision of the supreme court of New Jersey in the case of *Arnold* v. *Mundy*, cannot be considered as establishing a rule of law as to real property in that state, binding upon this court in the decision of this cause. *Wilkinson* v. *Leland*, 2 Pet. 656; *Hinde* v. *Vattier*, 5 Ibid. 401. After the analysis of the report of that case, which has been before made, it is believed, that this court will follow the rule laid down in these two cases, and say, that the circuit court of New Jersey, in the case in question, was bound to decide, as the state courts ought to have decided the same great questions, when presented to them for decision. In that case the rules of the English common law, and not those of the civil law, will be the guide to a decision here.

Taney, Ch. J., delivered the opinion of the court.—This case is brought here by writ of error from the circuit court of the United States for the district of New Jersey. It was fully argued at the last term. But it was
*407] not then decided; *because the important principles involved in it, made it proper that the case should be heard and determined by a full court, and as some of the justices were not present at the former hearing, a re-argument was ordered. In pursuance of this order, it has been again elaborately discussed by counsel; and having been carefully considered by the court, I am instructed to deliver their opinion.

The questions before us arise upon an action of ejectment, instituted by the defendant in error, who was the plaintiff in the court below, to recover one hundred acres of land, covered with water, situated in the township of Perth Amboy, in the state of New Jersey. At the trial in the circuit court, the jury found a special verdict, setting forth, among other things, that the land claimed lies beneath the navigable waters of the Raritan river and bay,

where the tide ebbs and flows. And it appears, that the principal matter in dispute, is the right to the oyster fishery in the public rivers and bays of East New Jersey.

The plaintiff makes title under the charters granted by Charles II. to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on this continent. The last-mentioned grant is precisely similar to the former in every respect, and was made for the purpose of removing doubts which had then arisen as to the validity of the first. The boundaries in the two charters are the same, and they embrace the territory which now forms the state of New Jersey. The part of this territory known as East New Jersey, afterwards, by sundry deeds and conveyances, which it is not necessary to enumerate, was transferred to twenty-four persons, who were called the proprietors of East New Jersey; who, by the terms of the grants, were invested, within the portion of the territory conveyed to them, with all the rights of property and government which had been originally conferred on the Duke of York by the letters-patent of the king. Some serious difficulties, however, took place, in a short time, between these proprietors and the British authorities; and after some negotiations upon the subject, they, in 1702, surrendered to the crown all the powers of government, retaining their rights of private property.

The defendant in error claims the land covered with water, mentioned in the declaration, by virtue of a survey made in 1834, *under the authority of the proprietors, and duly recorded in the proper office. [*408 And if they were authorized to make this grant, he is entitled to the premises, as owner of the soil, and has an exclusive right to the fishery in question. The plaintiff in error also claims an exclusive right to take oysters in the same place; and derives his title under a law of the state of New Jersey, passed in 1824, and a supplement thereto, passed in the same year. The point in dispute between the parties, therefore, depends upon the construction and legal effect of the letters patent to the Duke of York, and of the deed of surrender subsequently made by the proprietors.

The letters-patent to the duke included a very large territory, extending along the Atlantic coast from the river St. Croix to the Delaware bay, and containing within it many navigable rivers, bays and arms of the sea; and after granting the tract of country and islands therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments to the said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all the estate, right, title, interest, benefit and advantage, claim and demand of the king, in the said land and premises;" the letters-patent proceed to confer upon him, his heirs, deputies, agents, commissioners and assigns, the powers of government; with a proviso, that the statutes, ordinances, and proceedings established by his authority, should "not be contrary to, but as nearly as might be agreeable to, the laws, statutes and government of the realm of England; saving also an appeal to the king, in all cases, from any judgment or sentence which might be given in the colony, and authorizing the duke, his heirs and assigns, to lead and transport out of any of the realms of the king to the country granted, all such and so many of his subjects, or strangers not prohibited,

or under restraint, who would become the 'loving subjects' of the king, and live under his allegiance, and who should willingly accompany the duke, his heirs and assigns."

The right of the king to make this grant, with all of its prerogatives and powers of government, cannot, at this day, be questioned. *But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown, in the country discovered by its subjects, on this continent; and the principles upon which it was parcelled out and granted.

*409]

The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants. The grant to the Duke of York, therefore, was not of lands won by the sword; nor were the government or laws he was authorized to establish intended for a conquered people.

The country mentioned in the letters-patent was held by the king in his public and regal character, as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent. The doctrine upon this subject is clearly stated in the case of *Johnson* v. *McIntosh*, 8 Wheat. 595. In that case, the court, after stating it to be a principle of universal law, that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say, that, "if the discovery be made and possession taken under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the *national domains; by that organ, in which all territory is vested by law. According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognised in America as in the island of Great Britain."

*410]

This being the principle upon which the charter in question was founded, by what rules ought it to be construed? We do not propose to meddle with the point which was very much discussed at the bar, as to the power of the king, since Magna Charta, to grant to a subject a portion of the soil

covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But from the opinions expressed by the justices of the court of king's bench, in the case of *Blundell* v. *Catterall*, 5 Barn. & Ald. 287, 294, 304, 309; and in the case of the *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 883–4, the question must be regarded as settled in England, against the right of the king, since Magna Charta, to make such a grant. The point does not, however, arise in this case, unless it shall first be decided, that in the grant to the Duke of York, the king intended to sever the bottoms of the navigable waters from the prerogative powers of government conferred by the same charter; and to convert them into mere franchises in the hands of a subject, to be held and used as his private property. And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British crown, *when the title is held by a single individual, in trust for the whole nation. [*411

Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual, to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown, for the benefit and advantage of the whole community. Grants of that description are, therefore, construed strictly; and it will not be presumed, that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays and arms of the sea, and all prerogative rights, within the limits of the charter, undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters-patent. The words used evidently show this intention; and there is no room, therefore, for the application of the rule above mentioned.

The questions upon this charter are very different ones; they are—Whether the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether, in his hands, they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit? And in deciding a question like this, we must not

look merely to the strict technical meaning of the words of the letters-patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description. *412] *It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters-patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly-discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

It is said by HALE, in his treatise *de Jure Maris*, Harg. Law Tracts 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, "that although the king is the owner of this great coast, and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty."

The principle here stated by HALE, as to "the public common of piscary" belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed, is whether, since Magna Charta, "either the king or any particular subject can gain a propriety exclusive of the common liberty." For, undoubtedly, rights of fishery, exclusive of the common liberty, are, at this day, held and enjoyed by private individuals under ancient grants But the existence of a doubt as to the right of the king to make such a grant, after Magna Charta, would, of itself, show how fixed has been the policy of that government on this subject, for the last six hundred *413] years; and how carefully it *has preserved this common right for the benefit of the public. And there is nothing in the charter before us, indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the crown, but not all of them, general words are used, conveying "all the estate, right, title, interest, benefit, advantage, claim and demand" of the king, in the lands and premises before granted. The estate and rights of the king passed to the duke, in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king, as

a prerogative right, passed to the duke in the same character. And if the word "soils" be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters-patent with "other royalties," and conveyed as such. No words are used for the purpose of separating them from the *jura regalia*, and converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it, as near as might be, agreeable, in their new circumstances, to the laws and statutes of England; and how could this be done, if in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers and bays and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke, for his own individual emolument? There is nothing, we think, in the terms of the letters-patent, nor in the purposes for which it was granted, that would justify this construction. And in the judgment of the court, the lands under the navigable waters passed to the grantee, as one of the royalties incident to the powers of government; and were to be held by him, in the same manner, and for the same purposes, that the navigable *waters of England, and the soils under them, are held by the crown. [*414

This opinion is confirmed, by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic cost, were granted, by different monarchs of the Stuart dynasty, to different persons, for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charters very nearly resembled in every respect the one now in controversy; and none of them, it is believed, differed materially from it, in the terms in which the bays, rivers and arms of the sea, and the soils under them, were conveyed to the grantees. Yet, in no one of these colonies, has the soil under its navigable waters, and the rights of fishery for shell-fish or floating fish, been severed by the letters-patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters, for the same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even

bathe in its waters, without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement, conformed to the practice of the other chartered colonies. And it would require very plain language in these letters-patent, to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away. But we see nothing in the charter to require this conclusion.

*415] *The same principles upon which the court have decided upon the construction of the letters-patent to the Duke of York, apply with equal force to the surrender afterwards made by the twenty-four proprietors. It appears by the special verdict, that all the interest of the duke in East New Jersey, including the royalties and powers of government, were conveyed to these proprietors, as fully and amply, and in the same condition, as they had been granted to him ; and they had the same dominion and propriety in the bays, and rivers and arms of the sea, and the soil under them, and in the rights of fishery, that had belonged to him under the original charter. In their hands, therefore, as well as in those of the duke, this dominion and propriety was an incident to the regal authority, and was held by them as a prerogative right, associated with the powers of government. And being thus entitled, they, in 1702, surrendered and yielded up to Anne, Queen of England, and to her heirs and successors, "all the powers and authorities in the said letters-patent granted, to correct, punish, pardon, govern and rule all or any of her majesty's subjects or others, who then were inhabitants, or thereafter might adventure into or inhabit within the said province of East New Jersey ; and also to nominate, make, constitute, ordain and confirm any laws, orders, ordinances, directions and instruments for those purposes, or any of them ; and to nominate, constitute or appoint, revoke, discharge, change or alter any government or governors, officers or ministers, which were or should be appointed within the said province ; and to make, ordain and establish any orders, laws, directions, instruments, forms or ceremonies of government and magistracy, for or concerning the same, or on the sea, in going to or coming from the same ; or to put in execution, or abrogate, revoke or change such as were already made, for or concerning such government, or any of them ; and also all the powers and authorities by the said letters-patent to use and exercise martial law in the said province of East New Jersey ; and to admit any person or persons to trade or traffic there ; and of encountering, repelling and resisting by force of arms, any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns: and all other the powers, authorities and privileges of and concerning the

*416] province last aforesaid, or the inhabitants *thereof, which were granted, or mentioned to be granted, by the said several above-recited letters-patent, or either of them ;" which said surrender was afterwards accepted by the queen.

We give the words of the surrender, as found by the special verdict, and they are broad enough to cover the *jura regalia* which belonged to the proprietors. They yield up "all the powers, authorities and privileges of and concerning the government of the province ;" and the right in dispute was

one of these authorities and privileges. No words are used, for the purpose of withholding from the crown any of its ordinary and well-known prerogatives. The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the hands of the Duke of York. Whatever he held as a royal or prerogative right, was restored, with the political power to which it was incident. And if the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty, and withheld from the crown ; if the right of common fishery for the common people, stated by HALE in the passage before quoted, was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms ; and would not have been left for inference from ambiguous language.

The negotiations previous to the surrender have been referred to, in order to influence the construction of the deed. But whatever propositions may have been made, or opinions expressed, before the execution of that instrument, the deed itself must be regarded as the final agreement between the parties ; and that deed, by its plain words, re-established the authority of the crown, with all of its customary powers and privileges. And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.

This construction of the surrender is evidently the same with that which it received from all the parties interested, at the time it was executed. For it appears, by the history of New Jersey, *as gathered from the acts, documents and proceedings of the public authorities, that the crown, [*417 and the provincial government established by its authority, always afterwards, in this territory, exercised the same prerogative powers that the king was accustomed to exercise in his English dominions. And as concerns the particular dominion and propriety now in question, the colonial government, from time to time, authorized the construction of bridges with abutments on the soil covered by navigable waters ; established forts ; authorized the erection of wharves ; and as early as 1719, passed a law for the preservation of the oyster fishery in its waters. The public usages, also, in relation to the fisheries, continued to be the same. And from 1702, when the surrender was made, until a very recent date, the people of New Jersey have exercised and enjoyed the rights of fishery for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors. The few unimportant grants made by them, at different times, running into the navigable waters, which were produced in the argument, do not appear to have been recognised as valid, by the provincial or state authorities, nor to have been sanctioned by the courts. And the right now claimed was not seriously asserted on their part, before the case of *Arnold* v. *Mundy*, reported in 1 Halst. 1 ; which suit was not instituted until the year 1818 ; and upon that occasion, the supreme court of the state held, that the claim made by the proprietors was without foundation.

The effect of this decision by the state court, has been a good deal discussed at the bar. It is insisted by the plaintiffs in error, that as the matter

in dispute is local in its character, and the controversy concerns only fixed property, within the limits of New Jersey, the decision of her tribunals ought to settle the construction of the charter; and that the courts of the United States are bound to follow it. It may, however, be doubted, whether this case falls within the rule, in relation to the judgments of state courts when expounding their own constitution and laws.

The question here depends, not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British crown; under which certain rights are claimed by
*418] the state, on the one hand, and by *private individuals on the other. And if this court had been of opinion, that upon the face of these letters-patent, the question was clearly against the state, and that the proprietors had been derived at their just rights, by the erroneous judgment of the state court; it would, perhaps, be difficult to maintain, that this decision, of itself, bound the conscience of this court. It is, however, unquestionably, entitled to great weight. It confirms the construction uniformly placed on these charters and instruments, by the other public authorities; and in which the proprietors had so long acquiesced. Public acts and laws, both of the colonial and state governments, have been founded upon this interpretation; and extensive and valuable improvements made under it. In the case referred to, the sanction of the judicial authority of the state is given to it. And if the words of the letters-patent had been far more doubtful than they are, this decision, made upon such a question, with great deliberation and research, ought, in our judgment, to be regarded as conclusive.

Independently, however, of this decision of the supreme court of New Jersey, we are of opinion, that the proprietors are not entitled to the rights in question; and the judgment of the circuit court must, therefore, be reversed.

Thompson, Justice. (*Dissenting.*)—The premises in question in this case are a mud-flat covered by the waters of the bay of Amboy, in the state of New Jersey. The cause comes up on facts found by a special verdict in the court below; by which it appears, that the lessors of the plaintiff produced upon the trial, a regular deduction of title from Charles II. down to themselves, and the premises in question are admitted to be within the grant. And the general question in the case is, whether this mud-flat passed under the grant, and in virtue of the several conveyances set out in the special verdict, became vested in the proprietors of New Jersey, as private property. The opinion of a majority of the court is against this right, in which opinion, however, I cannot concur, and shall briefly assign the reasons upon which my opinion rests.

*419] Some objections have been made to the right of maintaining *an action of ejectment, growing out of the nature of the subject-matter in controversy. There can be no grounds for such an objection. The subject in question is the right to land, and not to water. It is the ordinary case of an ejectment for land covered with water, and the premises are so set out and described in the declaration; and the special verdict finds, that the lessors of the plaintiff, under the title by them shown, entered into the tenements, with the appurtenances, in the declaration mentioned, and were thereof possessed, until the defendant afterwards entered upon, and ejected,

expelled and removed the plaintiff from such possession. So that the subject-matter in controversy is found not only to be subsceptible of actual possession, but to have been so possessed and enjoyed.

A majority of the court seem to have adopted the doctrine of *Arnold* v. *Mundy*, decided in the supreme court of New Jersey, 1 Halst. 1, in which it is held, that navigable rivers, where the tide ebbs and flows, and the ports, bays and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey; and that, under the grant of Charles II. to the Duke of York, all the rights, which they call royalties, passed to the duke, as governor of the province, exercising the royal authority, and not as the proprietor of the soil; but that he held them as trustee for the benefit of all settlers in the province, and that the proprietors did not acquire any such right to the soil, that they would grant a several fishery; and that no person who plants a bed of oysters in a navigable river, has such property in the oysters as to enable him to maintain an action of trespass against any one who encroaches upon it. And this rests on the broad proposition, that the title to the land under the water did not, and could not, pass to the Duke of York, as private property. To maintain this proposition, it must rest on the ground, that the land under the water of a navigable river, is not the subject of a private right; for if it can be conveyed by words, the grant in the present case is broad enough to pass the title to the land in question.

It is worthy of observation, that the course of New Jersey in relation to this claim is hardly consistent with her pretensions. In the case of *Arnold* v. *Mundy*, the chief justice says, upon the revolution, all these rights became vested in the people of New *Jersey, as the sovereign of the country, and are now in their hands; and the legislature may regulate them, [*420 &c. But the power which may be exercised by the sovereignty of the state is nothing more than what is called the *jus regium*; the right of regulating, improving and securing the same, for the benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature, and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people.

If this be the received doctrine in New Jersey, in relation to the navigable waters of that state, and the oyster fisheries, they remain common to all the citizens of New Jersey, and never can be appropriated to any private or individual use, and all laws having such object in view must be utterly null and void; and it is difficult to perceive, how the law of New Jersey, found by the special verdict, can be sustained. This act declares, that the shore and land covered with water may be set apart and laid out by commissioners, for the purpose of growing and planting oysters thereon, reserving such parts as might be judged necessary for public accommodation; provided, that nothing in the said act contained should authorize the commissioners to present any obstruction, or cause any injury to the navigation of the said sound and river, or to any fishery or fisheries therein. Here, the legislature treat these flats in all respects as land, to be used for planting and growing oysters; and for the use of which a revenue is derived to the state, by the payment of a rent reserved. It is not the use of the water for

any public purpose, that this law contemplates ; but an exclusive right to the use of the land under the water, in contradistinction to the use of the water for purposes of navigation ; and that this law is so to be considered, is manifest, from the proviso, that no obstruction should be made to the fishery or fisheries therein ; and here is a manifest distinction made between a fishery and an oyster-bed. For if it had been understood, that the fisheries included oysteries, the enacting clause and the proviso would present a glaring inconsistency. The enacting clause authorizes the setting apart the oystery to exclusive private use, when, by the proviso, no obstruction is to *421] *be made to the fisheries. So that, if an oystery is a fishery, the owner is deprived of the exclusive use of it. The act seems to be founded upon a distinction clearly held up, in many cases to be found in the books, between an oystery and a fishery, in the common use of the term. The one applying to the use of land under the water, which is peculiarly adapted to the growing of oysters, and to be used for that purpose, in the cultivation of oysters, as other lands are used for the purpose to which they are particularly adapted ; whereas, a fishery, in common acceptation, has reference to the use of the water for floating fish ; and this is a very obvious and natural distinction.

That the title to land under a navigable stream of water must be held subject to certain public rights, cannot be denied. But the question still remains, what are such public rights ? Navigation, passing and repassing, are certainly among those public rights. And should it be admitted, that the right to fish for floating fish was included in this public right, it would not decide the present question. The premises in dispute are a mud-flat; and the use to which it has been and is claimed to be applied, is the growing and planting of oysters. It is the use of land, and not of water, that is in question. For the purpose of navigation, the water is considered as a public highway, common to all ; like a public highway on land. If land over which a public highway passes, is conveyed, the soil passes, subject to that use ; and the purchaser may maintain an action for an injury to this soil, not connected with the use ; and whenever it ceases to be used as a public highway, the exclusive right of the owner attaches ; so with respect to the land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public ; the owner, nevertheless, retaining all the rights and benefits of the soil, that may not impede or interfere with the use as a public highway. Should a coal-mine, for instance, be discovered under such highway, it would belong to the owner of the soil, and might be used for his benefit ; preserving, unimpaired, the public highway. So, with respect to an oyster-bed, which is local, and is attached to the soil. It is not the water that is over the beds that is claimed ; that is common, and may be used by the public ; but the use of the soil by the owner which is consistent with the use of the water by the public, *is reserved to the owner. Suppose, this mud-flat *422] should, by the wash from the shore, or the receding of the water, or in any other manner, be filled up and become solid ground (which is by no means an extravagant supposition); would not the proprietors be considered the owners of this land, and have the exclusive right to the use and enjoyment of it, if they had in no way parted with such right? This cannot be denied, if the soil passed to and became vested in the proprietors, under the

grant to th m. It surely would not be claimed by the state, it being no longer susceptible of public use.

The case of *Brown* v. *Kennedy*, 5 Har. & Johns. 195, is fully to this point. The question there related to the right to the soil in the bed of a navigable river, which had been diverted to a canal; and it was held, that the property in the soil covered by the water was vested in the lord proprietary, by the charter of Maryland; that by the common law, the right was in the king, and he might dispose of it *sub modo;* that the property in the soil may be granted, subject to the *jus publicum;* that by the terms of the charter to Lord Baltimore, they clearly passed the property in the soil covered by any waters, within the limits of the charter; and if the bed of the river had not been conveyed away, it would have remained in the proprietary; and if an island had sprung up, it would have been his; or if the bed of the river had been left bare, it would be his, as the *jus publicum* would be destroyed.

The rules and principles laid down by Lord HALE, as we find them in Hargrave's Law Tracts, are admitted as containing the correct common-law doctrine as to the rights and power of the king over the arms of the sea and navigable streams of water. We there find it laid down, that the king of England hath a double right in the sea, viz., a right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership. Harg. 10. The king's right of propriety or ownership in the sea and soil thereof, is evinced principally in these things that follow. The right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown; as the right of depasturing is originally lodged in the owner of the coast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this *great coast, and as a consequence of his propriety, hath the primary right of fishing in the sea, and the creeks [*423 and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty (p. 11). In many ports and arms of the sea, there is an exclusion of public fishing by prescription or custom (p. 12), although the king hath *primâ facie* this right in the arms and creeks of the sea, *communi jure,* and in common presumption; yet a subject may have such a right in two ways. 1. By the king's charter or grant; and this is without question. The king may grant fishing within some known bounds, though within the main sea, and may grant the water and soil of a navigable river (p. 17); and such a grant (when apt words are used) will pass the soil itself; and if there shall be a recess of the sea, leaving a quantity of land, it will belong to the grantee. 2. The second mode is by custom or prescription. There may be the right of fishing, without having the soil, or by reason of owning the soil, or a local fishery that arises from ownership of the soil (p. 18). That, *de communi jure,* the right of the arms of the sea belongs to the king; yet a subject may have a separate right of fishing, exclusive of the king and of the common right of the subject (p. 20). But this interest or right of the subject must be so used as not to occasion a common annnoy-

ance to the passage of the ships or boats; for that is prohibited by the common law, as well as by several statutes. For the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use (p. 22)—as the soil of a highway, in which, though in point of property, may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified (p. 36).

These rules, as laid down by Lord HALE, have always been considered as settling the law upon the subjects so which they apply, and have been understood by all elementary writers, as governing rules, and have been recognized by the courts of justice *as controlling doctrines. They establish, that by the common law, the king is the owner of all navigable rivers, bays and shores. That he owns them in full dominion and propriety, and has full power and authority to convey the same; that he may grant a several fishery in a navigable stream, and the common law has annexed only two limitations upon this power: that these waters shall remain highways for passage and navigation, and that whilst they remain ungranted, there is a common right of fishery in them; but subject to these limitations, the king has as full power to convey as an individual has to convey the land of which he is the owner.

*424]

I see nothing to countenance the distinctions set up, that the king holds these subjects as trustee, any more than does the dry land; or that he cannot convey them, discharged of the right of common fishery. There is no reason for such distinction with respect to land under water. The true rule on the subject is, that *primâ facie* a fishery in a navigable river is common, and he who sets up an exclusive right, must show title, either by grant or prescription. This is the doctrine of the king's bench, in England, in the case in 4 Burr. 2163. It was an action of trespass for breaking and entering the plaintiff's close, called the river Severn; and the defence set up was, that it was a navigable river, and an arm of the sea, wherein every subject has a right to fish; and that an exclusive right cannot be maintained by a subject, in a river that is an arm of the sea, but that the general right of fishing is common to all. But this doctrine was not recognised by the court. Lord MANSFIELD said, the rule of law is uniform. In rivers not navigable, the proprietors of the land have the right of fishing on their respective sides, and it generally extends *ad filum medium aquæ*. But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common; it is *primâ facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right; though the presumption is against him, unless he can prove such a prescriptive right. Here, it is claimed and found. It is, therefore, consistent with all the cases, that he may have an exclusive privilege of fishing, although it is an arm of the sea; such a right shall not be presumed, but the contrary, *primâ facie;* but it is capable of being proved, and must *have been so in the present case. And YATES, Justice, says, he was concerned in such a case, but the right was not proved, and so found common; but such a right may be proved. It may be appropriated by prescription; and he refers to the royal salmon fishery in the river Banne, in Sir John Davies's reports, and says, it is agreeable to this, and that it is a very good case. That it appears

*425]

by it, that the crown may grant a several fishery in a navigable river, where the sea flows and reflows, or in the arm of the sea. And he refers to the case in 1 Mod. 105, where, he observes, Lord HALE says truly, if any one will appropriate a privilege to himself, the proof lieth on his side. Now, if it may be granted, it may be prescribed for; for a prescription implies a grant.

In the argument of this case, the counsel on the part of the defendant referred to the case of *Warren* v. *Matthews*, as reported in 6 Mod. 73, where it is said, every subject, of common right, may fish with lawful nets, &c., in a navigable river, as well as in the sea, and the king's grant cannot bar them thereof; and this case has been much relied on, in the argument of the case now before the court. But this report of the case in 6 Mod. 73, is clearly a mistake. It is the only case to be found, in which the broad proposition here stated is recognised, that the king's grant cannot bar the subject of the common right of fishing. And in the report of the same case, 1 Salk. 357, the case as stated is, that one claimed *solam piscariam*, in the river Ex, by a grant from the crown. And NOTT, Chief Justice, said, the subject has a right to fish in all navigable rivers, as he has to fish in the sea; and a *quo warranto* ought to be granted to try the title of this grantee, and the validity of his grant. Lord NOTT, here, no doubt, meant to speak of the *primâ facie* right of the subject. For if he intended to say, that no such exclusive right could be given by grant from the king, it would be absurd to issue a *quo warranto* to try the title and validity of the grant, if, by no possibility, a valid grant could be made. At all events, it is very certain, that the king's bench, in the case of *Carter* v. *Murcot*, did not recognise the doctrine of *Warren* v. *Matthews*, as reported in 6 Mod. 73. And under these circumstances, it is entitled to no weight in the decision of the case now before the court.

It is unnecessary to refer to the numerous cases in the English books on this subject; the doctrine as laid down in the case of **Carter* v. *Murcot* is universally recognised as the settled law on the subject, [*426 and is fully adopted and sanctioned by the courts of this country. Numerous cases of this description have come before the courts in the state of New York, and the principles and rules as laid down in the case of *Carter* v. *Murcot* fully recognised and adopted. In the case of *James* v. *Gould*, 6 Cow. 376, the court in referring to that case, place the decision upon it, and say, "this is the acknowledged law of Great Britain and of this state;" and cases are referred to showing such to be the settled law.

In the case of *Johnson* v. *McIntosh*, 8 Wheat. 595, this court say, that according to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown as a branch of the royal prerogative. And this principle is as fully recognised in America as in Great Britain; all the lands we hold were originally granted by the crown; our whole country has been granted; and the grants purport to convey the soil as well as the right of dominion to the grantee. Here, the absolute ownership is recognised as being in the crown, and to be granted by the crown, as the source of all title; and this extends as well to land covered by water as to the dry land; otherwise, no title could be acquired to land under water. There is, in this case, no intimation that any of the lands are vested in the crown, as trustee, but as absolute owner. If lands under

water can be granted, and are actually granted, the grantees must, of course, acquire all the right to the use and enjoyment of such lands of which they are susceptible, as private property, as much so as the dry land; and there can be no grounds for any implied reservation of ungranted rights, in the one case, more than in the other; and the grant of the soil carries with it, of course, all the uses to which it may be applied, among which is an exclusive or several fishery. All grants of land, whether dry land or covered with water, are for great public purposes, subject to the control of the sovereign power of the country. So, the grant of the soil under water, which carries with it a several fishery, is subject to the use of the water for the public purposes of navigation, and passing and repassing; but it is nowhere laid down as the law of the land, that a several fishery is a part of the *jus publicum*, and open to the use of the public. So long as the *427] *fishery remains ungranted, it is common, and may be used by the public; but when granted to individuals, it becomes private property as much as any other subject whatever; and I think the law is too well settled, that a fishery may be the subject of a private grant, to be at this day drawn in question.

If, then, according to the principles of the common law, the king had the power to grant the soil under the waters of a navigable stream, where the tide ebbs and flows; and if such grant of soil carries with it the right of a several fishery, to the exclusion of a public use, the remaining inquiries are, whether the grant of Charles II. to the Duke of York, in the year 1664, did convey the premises in question? and if so, then, whether this right was surrendered by the proprietors of New Jersey to Queen Anne, in the year 1702?

This charter to the Duke of York is one containing not only a grant of the soil, but of the powers of government. This court, in the case of *Johnson* v. *McIntosh*, in noticing the various charters from the crown, observe, that they purport to convey the soil and right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting the lands. Some of these charters purport to convey the soil alone, and in those cases in which the powers of government as well as the soil are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant; and in some instances, even after the powers of government were revested in the crown, the title of the proprietors of the soil was respected. The Carolinas were originally proprietary governments; but in 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown, and the king purchased the title of those proprietors who were disposed to sell. Lord Carteret, however, who was one of the proprietors, surrendered his interest in the government, but retained his title to the soil; and that title was respected till the revolution, when it was forfeited by the laws of war.

This shows the light in which these charters, granting the soil, were considered by this court. That they conveyed an absolute *interest *428] in the soil, and passed everything susceptible of private and individual ownership, of which a fishery is certainly one, according to the settled law, by the authorities I have referred to. Subject always, as before mentioned,

to the *jus publicum*, or rights of navigation and trade; but of which the right of a common fishery forms no part, after the soil has been conveyed as private property.

It is unnecessary to notice particularly the various charters and mesne conveyances set out in the special verdict. It was admitted, on the argument, that the premises in question fall within these conveyances; and vested in the proprietors of New Jersey all the right and title, both of soil and the powers of government, which passed to the Duke of York under the charter of Charles II. The terms employed in the description of the rights conveyed, are of the most comprehensive character, embracing the land, soil and waters. After a general description and designation of the territory embraced within the charter, and comprehending the premises in question, it adds, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments, to the said several islands, lands and premises belonging and appertaining, with all and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand of, in or to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof; to have and to hold, all and singular the premises hereby granted, or herein mentioned, unto our brother James, Duke of York, his heirs and assigns for ever; to be holden of us, our heirs and successors, in free and common socage." If these terms are not broad enough to include everything susceptible of being conveyed, it is difficult to conceive, what others could be employed for that purpose. The special verdict, after setting out the mesne conveyances by which the title is deduced down to the proprietors of New Jersey, sets out a confirmation of the title in the proprietors by Charles II., as follows: "And the jurors, on their oath aforesaid, further say, that the said Charles II., afterwards, to wit, on the 23d day of November, in the year of our Lord 1683, *by a certain instrument in writing, duly executed, bearing date on the [*429 same day and year last aforesaid, and reciting the said last-mentioned indenture from the said Duke of York to the said twenty-four proprietors, did recognise their right to the soil and government of the said province of East New Jersey, whereof the tenements aforesaid, with the appurtenances, in the declaration aforesaid, are parcel, and did strictly charge and command the planters and inhabitants, and all other persons concerned in the same, to submit and yield all due obedience to the laws and government of the said twenty-four proprietors, their heirs and assigns, as absolute proprietors and governors thereof, who, in the words of the said instrument in writing, had the sole power and right, derived under the said Duke of York, from him, the said Charles II., to settle and dispose of the said province of East New Jersey, upon such terms and conditions, as to the twenty-four proprietors, their heirs and assigns, should deem meet." Here is the most full recognition and confirmation of the right and title of the proprietors to the soil, with the absolute power to dispose of the same, in such manner as they should think proper. The absolute ownership could not be expressed in a more full and unqualified a manner. In the case of *Fairfax* v. *Hunter's Lessee*, 7 Cranch 618, the question was as to the legal effect and operation of certain descriptive words in a charter of

Charles II.; and Mr. Justice STORY, in giving the opinion of the court, said, "The first question is, whether Lord Fairfax was proprietor of, and seised of, the soil of the waste and unappropriated lands in the Northern Neck, by virtue of the royal grants of Charles II., and James II.; or whether he had mere seignoral rights therein, as lord paramount, disconnected with all interest in the land, except of sale and alienation. The royal charter expressly conveys all that entire tract, territory and parcel of land, situate, &c., together with all the rivers, islands, woods, timber, &c., mines, quarries of stone, and coal, &c., to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent and purpose whatsoever." "It is difficult," say the court, "to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof; and if the union of the title, and the exclusive use, do not constitute the complete and absolute *dominion in the property, it will not be easy to fix any which shall constitute such dominion." *430] The terms here used are certainly not more broad and comprehensive than those used in the charter under consideration; and if they will pass the right to the soil, in the one case, they certainly must, in the other. The land in the one case, being covered with water, and in the other not, can make no difference as to the passing of the title, if land under water can be conveyed at all; and whatever the public right to the use of the water may be, it can give no right to the use of the land under the water, which has, by the grant, become private property. And if, as I think, the authorities clearly show, a grant of the soil carries with it the right to every private use to which it can be applied, including the cultivation of oysters, there can be no ground upon which this can be claimed as a common right. A several fishery and a common fishery are utterly incompatible with each other. The former is founded upon and annexed to the right of soil; and when that right of soil is acquired by an individual, the several fishery begins, and the common fishery ends.

Did the proprietors, then, by the surrender of Queen Anne, in the year 1702, relinquish any rights of private property in the soil, derived under the charter of Charles II.? I think it very clear, that they surrendered nothing but the mere powers of government granted by the charter, retaining, unaffected in any manner whatever, the right of private property.

The special verdict states the surrender as follows: "That on the 15th day of April, in the year 1702, the said twenty-four proprietors, and the other persons in whom, by sundry means conveyances and assurances in the law, the whole estate, right, title and interest in the said province of East New Jersey, were vested, at the said last-mentioned date, as proprietors thereof, by an instrument in writing, under their hands and seals, bearing date the same day and year last aforesaid, did, for themselves and their heirs, surrender and yield up unto Anne, Queen of England, &c., and to her heirs and successors, all the powers and authorities in the said letters-patent granted, to correct, punish, pardon, govern and rule all or any of her said majesty's subjects, or others who then were, as inhabitants, or thereafter might adventure into, or inhabit, within the *said province of East New Jersey. And also to nominate, make, constitute, ordain and confirm any laws, orders, ordinances, directions and instruments, for those purposes, or any of them; and to nominate, constitute or appoint, *431]

revoke, discharge, change or alter any governor or governors, officers or ministers, which were or should be appointed within the said province; and to make, ordain and establish any orders, laws, directions, instruments, forms or ceremonies of government and magistracy, for or concerning the same, or on the sea, in going to or coming from the same, or to put in execution or abrogate, revoke or change such as were already made, for or concerning such government, or any of them. And also the powers and authorities by the said letters-patent granted, to use and exercise martial law in the said province of East New Jersey. And to admit any persons to trade or traffic there. And of encountering, repelling and resisting by force of arms, any person or persons attempting to inhabit there, without the license of them, the said proprietors, their heirs and assigns. And all other the powers, authorities and privileges of and concerning the government of the province last aforesaid, or the inhabitants thereof, which were granted, or mentioned to be granted, by the said several above-recited letters-patent, or either of them. And that the said Queen Anne, afterwards, to wit, on the 17th day of the same month of April, in the year last aforesaid, did accept of the said surrender of the said powers of government, so made by the said proprietors, in and over the premises last aforesaid."

I do not perceive, in this surrender, a single term or expression that can, in the remotest degree, have any reference to the private property conveyed by the grant, or to any matter except that which related to the powers of government; all the enumerated subjects manifestly have relation only to such powers. And after this specification of particulars, comes the special clause, "and all other the powers, authorities and privileges of and concerning the government;" necessarily implying that the specified subjects related to the powers of government; and the acceptance by the queen manifestly limits the surrender to such powers; she accepts the said surrender of the said powers of government so made by the proprietors in and over the premises.

If there was anything in the language here used, which could *in the least degree render doubtful the object and purpose of this surrender, the memorials of the proprietors, and the correspondence which took place on the subject, referred to on the argument, as contained in the collection of Leaming & Spicer, must remove all doubt, and show that the surrender was confined exclusively to the powers of government, and intended to operate, not only as a surrender of such powers, but as a confirmation of all right and title to the soil and private property of the proprietors. And if so, the proprietors' right must depend upon the power of the king to grant the right claimed in the premises, and the construction of the charter, as to what it does embrace. And I have endeavored to show, that by the settled and uncontradicted principles of the common law, the king had the power to grant the land under the water of a navigable river; and that such grant carries with it to the grantee, all rights of private property of which the susceptible, subject to the *jus publicum;* that the grant of the soil necessarily carries with it a several and exclusive fishery, which is utterly incompatible with the rights of a common fishery, and which, of course, can form no part of the *jus publicum;* and that the grant in question of Charles II. to the Duke of York, conveyed all private right in the soil which could be conveyed by the king; all which rights, by sundry mesne conveyances, became vested in the proprietors of East New Jersey, and [*432

from them to the lessor of the plaintiff. And I can discover nothing in the authorities, giving countenance to the idea, that the king held the land covered by the waters of a navigable river, as trustee, or by a tenure different from that by which he held the dry land. And I must again repeat, if the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals. If it was a trust estate in the king, for the benefit of his subjects, and upon the revolution, the government of New Jersey became the trustee, in the place of the king, and the trust devolved upon such government, and the land became as inalienable in the government of New Jersey as in the hands of the king, and the state must be bound to hold all
*433] such lands subject to the trust, which, as contended, embraces *a common right of fishery in the waters, and the dredging for oysters in the land covered by the waters ; and if this be so, there certainly can be no power in the state, without a breach of trust, to deprive the citizens of New Jersey of such common right, and convert these oyster grounds to the private and exclusive use of individuals.

There is nothing in the case, in my judgment, showing a usage in the state, by which the proprietors have, either directly or by implication, relinquished or abandoned any right of property which they derived under the charter of Charles II. All the authority exercised by the state in granting ferries, bridges, turnpikes and railroads, &c., are the exercise of powers vested in the government over private property, for public uses, and formed a part of the powers of government surrendered by the proprietors to Queen Anne ; and it is only since the decision in *Arnold* v. *Mundy*, that the private right of the proprietors to the lands under the waters in New Jersey has been denied, and assumed by the state to grant the same to individuals ; and even in such cases, it has been done cautiously, and apparently with hesitation as to the right of the state. In the two cases referred to on the argument, of a grant to N. Burden, on the 8th of November 1836, and to Aaron Ogden, on the 25th of January 1837, of land under the water, the grant is a mere release or quit-claim of the state ; but the proprietors have been in the habit of making grants for land under the water, from the time of the surrender to Queen Anne down to the year 1820, and numerous instances of such grants were referred to on the argument.

With respect, however, to the right of fishery, there is, in my judgment, a marked distinction, both in reason and authority, between the right in relation to floating fish, and the right of dredging for oysters. The latter is entirely local and connected with the soil. There are natural beds of oysters, but in other places, there is a peculiar soil, adapted to the growing of oysters. They are planted and cultivated by the hand of man, like other productions of the earth ; and the books in many cases clearly hold up such a distinction, and speak of the oyster fishery as distinct from that of floating fish (5 Burr. 2814); and in the case of *Rogers* v. *Allen*, 1 Camp. 309, this distinction is expressly taken. It was an action of trespass for breaking and
*434] entering *the several oyster fishery of the plaintiffs, in Burnham river, and fishing and dredging for oysters. The defence set up was, that the *locus in quo* was a navigable river, in which all the king's subjects

had a right to fish and dredge for oysters; and evidence was introduced, showing that all who chose, had been accustomed to fish in Burnham river, for all sorts of floating fish, without interruption; and it was contended, that a fishery was entire, and that as it had been proved, that it was lawful for all the king's subjects to catch floating fish, so they might lawfully dredge for oysters. But HEATH, Justice, ruled otherwise, and said, a fishery was divisible; a part may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish, in the river Burnham, but it by no means follows, that they are justified in dredging for oysters, which may still remain private property; and although a new trial was granted upon another point in the case, the doctrine as above stated was not at all impugned by the court of king's bench.

Upon the whole, I am of opinion, that the judgment of the circuit court ought to be affirmed.

BALDWIN, Justice, also dissented.

Judgment reversed.

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*DANIEL DOBBINS, Plaintiff in error, *v.* The Commissioners of ERIE COUNTY, Defendants in error. [*435

Taxation.

A captain of the United States revenue-cutter, on the Erie station, in Pennsylvania, was rated and assessed for county taxes, as an officer of the United States, for his office: *Held*, that he was not liable to be rated and assessed for his office under the United States, for county rates and levies.[1]

The question presented in the case before the courts of Pennsylvania, was, whether the office of captain of the revenue-cutter of the United States, was liable to be assessed for taxes, under the laws of Pennsylvania; the validity of the laws of Pennsylvania imposing such taxes, was in question in the case, on the ground, that the laws were repugnant to the constitution and laws of the United States; and the court decided in favor of the validity of the law. The supreme court of the United States has jurisdiction on a writ of error, in such a case.

Taxation is a sacred right, essential to the existence of government; an incident of sovereignty; the right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a state. But in our system, there are limitations upon that right; there is a concurrent right of legislation in the states, and the United States, except as both are restrained by the constitution of the United States; both are restrained by express prohibitions in the constitution; and the states, by such as are reciprocally implied, when the exercise of the right by a state conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs, when taxation by a state acts upon the instruments, and emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign power; the government of the United States is supreme within its sphere of action; the means necessary and proper to carry into effect the powers in the constitution are in congress.

The compensation of an officer of the United States is fixed by a law made by congress; it is in its exclusive discretion, to declare what shall be given; it exercises the discretion, and fixes the amount; and confers upon the officer the right to receive it when it has been earned. Any law of a state imposing a tax upon the office, diminishing the recompense, is in conflict with the law of the United States which secures the allowance to the officer.

Commissioners *v.* Dobbins, 7 Watts 533, reversed.

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[1] Nor can congress impose a tax upon the salary of a state judicial officer. Collector *v.* Day, 11 Wall. 113.

Error to the Supreme Court of Pennsylvania. In the court of common pleas of Erie county, the plaintiff in error instituted an action against the commissioners of Erie county, the purpose of which was to have a decision on the right asserted by the commissioners of the county to assess and collect taxes on the office of the plaintiff, a citizen, and residing in *Erie
*436] county, Pennsylvania, a captain of the United States revenue-cutter. The following case was stated and submitted to the court; either party to have the right to prosecute a writ of error.

"The plaintiff is, and has been, for the last eight years, an officer of the United States, to wit, captain of the United States revenue-cutter service; and ever since his appointment, has been in service in command of the United States revenue-cutter Erie, on the Erie station. He has been rated and assessed with county taxes for the last three years, to wit, 1835, 1836 and 1837, as such officer of the United States, for his office, as such, valued at $500; which taxes so rated and assessed and paid by the plaintiff, amount to the sum of $10.75. The question submitted to the court is, whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies; if he is, then judgment to be entered for the defendants; if not, then judgment to be entered for the plaintiff for the sum of $10.75.

The court of common pleas gave judgment for the plaintiff, and the case was removed to the supreme court of Pennsylvania; in which court the judgment was reversed, and a judgment was entered for the commissioner of Erie county. The plaintiff, Daniel Dobbins, prosecuted this writ of error.

The case was submitted to the court, by *Galbraith*, for the plaintiff; and by *Penrose*, for the defendants, on printed arguments.

Galbraith, for the plaintiff in error.—The plaintiff was rated and assessed, under the construction given to the state law by the county officers, with a tax upon his office, created under a law of the United States. The act of congress entitled "an act to regulate the collection of duties on imports and tonnage," passed March 2d, 1799, § 97 (1 U. S. Stat. 699), empowers the president of the United States to cause revenue-cutters to be built. The 98th section provides, "that there shall be to each of the said revenue-cutters, one captain or master, and not more than three lieutenants
*437] or mates," &c. *Its 99th section provides, "that the officers of the said revenue-cutters shall be appointed by the president of the United States, and shall respectively be deemed officers of the customs," &c., and prescribes their duties. Another act of congress, passed the 2d March 1799 (Ibid. 708–9), prescribes the compensation of the commissioned officers of the revenue-cutters, including the captains. The plaintiff, as stated and admitted in the case, was a captain of the revenue-cutter Erie, commissioned as prescribed by the act of congress; and for that office, was rated and assessed under the state laws of the state of Pennsylvania, which may be found in Purd. Dig. 189 (Ed. 1836); and which authorizes the assessment of a state or county tax upon "all offices and posts of profit." Does this mean "offices and posts of profit" with which the state or state laws have nothing to do in their creation? The supreme court of the state has decided in this case, that it does, in 7 Watts 513; and the question here

presented is, whether or not that decision be correct. The supreme court of the state has decided in favor of the validity of the state law, in the construction given to it by the financial officers acting under the authority of the state, and therefore, its decision is the subject of examination and revision here, as decided by this court in *Weston* v. *City Council of Charleston*, 2 Pet. 449.

The supreme court of Pennsylvania did not touch the point in question, or that presented in the case. No distinction is drawn between an office created by and under the state laws, and one which is the creature of the laws of the national government. It is simply decided, that an office is the subject of the taxing powers of the state officers, under the laws of the state; which is not disputed, so far as relates to offices created by or controlled under state legislation. It is asked, if this office of captain of a revenue-cutter, appointed and commissioned under the authority of the acts of congress, it not one of "the means employed by the government of the Union for the execution of its powers?" and if so, if it is not brought within the principle of the case of *Mc Culloch* v. *State of Maryland*, 4 Wheat. 316; and again reviewed in 9 Ibid. 738? These cases clearly establish the principle, that the state sovereignty, the *state laws, and the acts of the state officers, under its laws, can only extend to such things as exist [*438 by its own authority, or are introduced by its permission; and cannot extend to, or operate upon, an office created by the exclusive authority of the United States, and under the control of the laws of the Union alone; and which cannot be trammelled or interfered with by the state authorities.

Penrose, for the defendants.—Captain Dobbins was a "taxable person," a citizen of Erie county, who enjoyed the privilege of a citizen, and the protection of the state government. He was clearly, as such, liable to taxation. In determining the amount of the tax, the sovereign state had a right to say, arbitrarily, that he should pay so much, or, which is more just, to ascertain his income, and by rating that, fix a tax proportioned to it. There is no doubt, that the office or post which he held, fell within the descriptive terms of the statute, terms to ascertain this "rate" of the tax to be paid by the "taxable person,"—"all offices and posts of profit," without qualification. The office of president judge of a judicial district is within the act, notwithstanding the constitutional provision in regard to the salary of such officers. *Commissioners, &c.* v. *Chapman*, 2 Rawle 73.

Having inquired into the nature of the tax, and ascertained that the office or post held by the plaintiff in error falls within the descriptive terms of the statute, we come to the question. Is this statute invalid, on the ground of its being repugnant to the constitution or laws of the United States? On this point, we stop to inquire, what is this power of taxation in a state, its nature and extent. "It is an incident of sovereignty, and is co-extensive with that of which it is an incident." "It is called a sacred right;" "it is admitted to be essential to the very existence of government." "It is so ample, that it may be exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." "There is no limit on the exercise of the *right, no guard [*439 against the abuse of the power; but in the structure of the govern-

ment, and the discretion of the representative of the people." "It is not confined to the people and property of the state; it may be exercised upon every object brought within its jurisdiction." "The power of legislation, and consequently, of taxation, operates on all persons and property belonging to the body politic." "It is an original principle, which has its foundation in society itself; it is granted by all, for the benefit of all." "However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature." *McCulloch* v. *State of Maryland*, 4 Wheat. 428; *Providence Bank* v. *Billings*, 4 Pet. 563; *Biddle* v. *Commonwealth*, 13 Serg. & Rawle 409; *Brown* v. *State of Maryland*, 12 Wheat. 419.

What are the limitations on this great prerogative power, which it is admitted resides in the states, and does this case fall within any such limitation? These limitations are either express or implied.

1. The express limitation is found in the constitution of the United States, § 10, art. 1, of that instrument. "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And there is a like prohibition to laying a duty on tonnage. It was wisely judged, that no other limitation than this was necessary, to secure the objects of government, and guard the citizen from oppression. He is the common constituent of the representative in the state, as well as the national government. Besides, by reserving to the general government the exclusive right of laying imposts or duties, congress had an ample source of revenue, obviously, the least oppressive to the people. For these imposts, though they be called in strictness an indirect tax, are rather a voluntary retribution by such as chose to purchase the imported article on which it is levied. And although the power of direct taxation is not taken from, or rather is given to, the general government, to be used in these cases of national emergency, when a patriotic people will bear *almost any burden *440] without a murmur, yet it is obvious, from the fact that the states are excluded from laying imposts, that this is the great source from which it was intended, except under extraordinary circumstances, the general government should derive its revenue; and that the power of direct taxation, without any other limitation, should be left to the states. It is their natural, their only resort. The limited purposes and objects of the state governments, immediately affecting the interests of the people, will, of course, make them submit with cheerfulness to a direct tax for the support of such government; which they would not so readily endure, except in emergencies referred to, for the more onerous support of the national government.

The law of the state of Maryland, requiring an importer of foreign goods by bale or package, to take out, and pay $50 for, a license to sell his goods, fell within this prohibition, and was decided to be repugnant and unconstitutional. *Brown* v. *State of Maryland*, 12 Wheat. 419. But even there it was held, that the words of this prohibition "ought not to be pressed to their utmost extent." And when the importer has so acted on the thing imported, that it has become mixed up with the mass of property in the country, it has lost its distinctive character as an import, and is subject to

taxation. And it is upon this principle, that the law of the state of Pennsylvania, imposing a duty on retail-dealers was ruled to be in accordance with the constitution. *Biddle* v. *Commonwealth*, 13 Serg. & Rawle 409. Analogous to it, is the principle on which the case of the *Commissioners* v. *Chapman*, 2 Rawle 73, was ruled. In that case, the office of president judge of a judicial district was decided to be within the act, notwithstanding the constitutional provision in regard to the salary of such officers. The opinion of the court in that case is respectfully referred to.

2. The implied limitations on the power of taxation. It is admitted, that it was urged, that as the convention which formed the constitution had imposed an express limitation, no other limitation could be established by inference. And this view was strongly fortified by the contemporaneous exposition of *the Federalist, the eminent authors of which asserted, [*441
"that the right of taxation in the states is sacred and inviolable," "with the sole exception of duties on imports and exports;" that "they retain the authority in the most absolute sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of the constitution." It may be conceded, that it was pressing too far the argument from this source, to contend for "that construction of the constitution that would place within the reach of the states those measures which the government might adopt for the execution of its powers." But it is a strong argument to show the high character, and wide extent of this power of taxation, and excludes the inference of any limitation upon it, which does not clearly fall within the essential principle of preventing a control by the states of such measures.

It was very apparent, that a like power of taxation in the general government, created no such inference. The authority is co-equal. Federalist. A power conferred upon congress does not *per se* exclude the states from the same power, unless it be in its nature exclusive. 5 Wheat. 48. So, the power of congress to levy taxes does not exclude the states from a similar power. *Gibbons* v. *Ogden*, 9 Wheat, 201. The great principle of these implied limitations is, that the states, in the exercise of the high prerogative power of taxation, should not be permitted to reach and control those measures necessary and proper for the execution of the powers vested by the constitution in the government of the United States. This is the ruling principle of all the cases.

It being judicially ascertained, that congress possessed the power to incorporate a bank of the United States; it was constitutional, because it was an instrument, and the means employed by the government of the Union for the execution of its powers. The power to tax such instrument, and these means, is the power to destroy; and therefore, the one is repugnant to the other. *McCulloch* v. *State of Maryland*, 4 Wheat. 428; *Osborn* v. *United States Bank*, 9 Ibid. 867. It was on this principle, that it was ruled, that "a tax imposed by a law of any state *of the United States, or [*442
under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional." The creation of the stock was a measure necessary and proper for the execution of the power "to borrow money on the credit of the United States." It was an instrument for the execution of that power. *Weston* v. *City Council of Charleston*,

2 Pet. 449, 465. So, neither can a state tax any other instrument employed by the government for the execution of its powers. It cannot tax the mail; it cannot tax the mint; it cannot tax patent-rights; it cannot tax the judicial process. But this implied limitation on the high prerogative power of taxation, is not pressed to extreme consequences, which would in fact destroy it; but stops with resistence of a direct repugnant enactment of the state; it is not carried one inch beyond this. Hence, a state may not tax a bank of the United States; but it may impose a tax on the citizens of such state holding stock in such bank, and fix the amount of the tax by express reference to the value of such stock. So it may tax the real estate held by the bank within the state. It cannot tax the mint which is the instrument, but it may tax the income of the superintendent, although that income may be made up, in whole or in part, by the salary of his office. Indeed, unless this be permitted, he might escape taxation; as any tax, if the argument be carried to an extreme, may affect that income. It may not tax the mail, but it may the postmaster. It may not tax the patent-rights, but it may the income of the patentee, derived from the sale of patented articles. Such is the peddler's tax or license. It may not tax judicial process, but it may the clerk who issues it. The former is an instrument for the public good; the income of the officer is his private emolument, with which the public has nothing to do.

A contractor, says Ch. J. MARSHALL, for supplying a military post with provisions, cannot be restrained from making purchases within any state, or from transporting them to any place at which the troops are stationed, nor could he be fined or taxed for doing so. But the property of the contractor may be taxed as the property of other citizens. *Osborn* v. *United States Bank*, 9 Wheat. 867. That property may be the profits of his con-
*443] tracts. *It might be contended, that the tax diminished his ability to execute such contract. The limitation is not carried to such consequences. A tax on government stock was decided, as we have seen, to be unconstitutional. *Weston* v. *City of Charleston*, 2 Pet. 449. But it seems to have been admitted, in that case, that if the tax had been an income tax, although the income was in part or in the whole made up of interest on this stock, such tax would have been constitutional. Such appears from the opinion of Justice JOHNSON, who dissented from the majority of the court.

So here, a tax upon the hull and apparel of the revenue-cutter, commanded by Captain Dobbins, would have been unconstitutional. She was "the means" or "instrument" of the government. But this tax by the state is not of such instrument, but of one of her citizens, whose income is rated to fix the amount of his contribution to the public burden. The distinction is obvious: the reason for the difference is well taken by Chief Justice MARSHALL, in *McCulloch* v. *State of Maryland*, 4 Wheat. 428. "The people of a state, therefore, give to their government a right of taxing themselves and their property. And as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory." The safeguard of the influence of the constituent over the representative, is as

perfect a protection to the citizen who holds office under the government of the Union as to any other citizen. The court will remark, that all offices or posts of profit are required to be rated. There is no discrimination as to the nature of the office or post.

WAYNE, Justice, delivered the opinion of the court.—This cause has been brought to this court by a writ of error to the supreme court of Pennsylvania. That court reversed the judgment of the court of common *pleas of Erie county, which it had given in favor of the plaintiff [*444 (now in error), upon an agreed statement of facts, in the nature of a special verdict.

"It was agreed and admitted, that the plaintiff has his residence and domicil at Erie, Erie county, Pennsylvania, and votes in said place; that he has been, for the last eight years, an officer of the United States, a captain in the United States revenue-cutter service, and ever since his appointment, has been in service, in command of the revenue-cutter Erie, on the Erie station. That he has been rated and assessed with county taxes for the last three years, 1835, 1836, 1837, as such officer of the United States, for his office, as such, valued at $500; which taxes paid by the plaintiff, amount to the sum of $10.75. The question submitted to the court is, whether the plaintiff is liable to be rated and assessed for his office under the United States, for county races and levies? If he is, then judgment shall be entered for the defendants; if not, then judgment shall be entered for the plaintiff, for the sum of $10.75."

This is the only question submitted upon the record. We think it sufficiently appears, to give the court jurisdiction, that the supreme court, in reversing the judgment of the court of common pleas, and in giving judgment against the plaintiffs, decided in favor of the validity of a law of Pennsylvania subjecting the plaintiff to be rated and assessed for his office under the United States, for county rates and levies; the validity of which law was in question, on the ground of its being repugnant to the constitution and laws of the United States.

It was urged in argument, by the counsel for the defendants in error, if the court has jurisdiction of the cause, that the judgment of the supreme court should be affirmed, because the plaintiff, when assessed did not apply to the commissioners for relief, as the statute provides. And, that having paid the tax, to an officer who had a color of right to receive it, it cannot be recovered back by the plaintiff. Neither of these questions can be considered by this court. They are not in the special verdict upon which the judgment was rendered. By referring to the case, as reported in 7 Watts 513, it will be seen, that the supreme court put the case exclusively *upon the power and right of the commissioners to enforce the tax [*445 upon the plaintiff, for his office under the United States.

The assessment was made by the commissioners of Erie county, under the act of Pennsylvania of the 15th April 1834. It is believed to be the only instance of a tax being rated in that state upon the office of an officer of the United States. It has, however, received the sanction of the supreme court. If it can be lawfully done, it cannot be doubted, that similar assessments will be made under that law, upon all other officers of the United States, in Pennsylvania. The language of the court is, "the case is put on

the power and right to impose the tax. In other words, is this a legitimate subject of taxation? Perhaps, this may, in some measure, depend on, whether, within the true meaning of the acts, it is the office itself, or the emoluments of the office which are made the subjects of taxation." In the preceding extract, we gave the language of the court. The law is, that an account shall be taken of "all offices and posts of profit." The next section makes it the duty of the assessors, "to rate all offices and posts of profit, professions, trades and occupations, at their discretion, having a due regard to the profits arising therefrom." The emoluments of the office, then, are taxable, and not the office. But whether it be one or the other, we cannot perceive how a tax upon either conduces to comprehend within the terms of the act, the office or the compensation of an officer of the United States. It will not do to say, as it was said in argument, that though the language of the act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear, in return for the privileges enjoyed, and the protection received from government: and then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

The first answer to be given to these suggestions, is, that the tax is to be levied upon a valuation of the income of the office. But besides, the obligation upon persons to pay taxes, is mistaken, and the sense in which a tax is a personal charge, is misunderstood. The foundation of the obligation to pay taxes is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed, *as well by those members of a state who do not, because they are not able to pay taxes, as by those who are able, and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. The necessity of money for the support of states, in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which are enforced without any regard to the persons who are the owners. Taxes are never assessed, unless it be a capitation tax, upon persons, as persons, but upon them on account of their goods, and the profits made upon professions, trades and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals—"comprehending under the word 'goods,' all the estate and effects which every one hath, of whatsoever sort they be; taxes regard the persons of men, only because of their goods." The goods, then, are taxed, and not the person. But those who are to pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities of the state. The obligation, however, only becomes a charge upon the person, in consequence of the power in the state to enforce the payment of taxes by coercion. The power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object upon which it is laid, may be a personal charge; but that is a

*446]

very different thing from its becoming a charge upon the person, in consequence of the coercion which may be provided by law to enforce the payment.

We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear upon right principles. Besides, as it was drawn from the statutes of Pennsylvania, it implied the supposition, that her legislature, in these enactments upon taxation, had disregarded those principles. But this is not so. If the occasion was a proper one for this court to do it, we might easily show, that the act throughout, *was framed upon an enlightened recognition by the legislators of that state, of all the principles upon which taxes are [*447 imposed. The only difficulty in the act has arisen from the terms directing assessments to be made upon all offices and posts of profit, without restricting the assessments to offices and posts of profit held under the sovereignty of that state; and not excluding them from being made upon offices and posts of profit of another sovereignty—the United States.

The case being now cleared of other objections, except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it; that is, "whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies?" It is not necessary for the decision of this question, that the power of taxation in the states, and in the United States, under the constitution of the latter, should be minutely discussed. Taxation is a sacred right, essential to the existence of government—an incident of sovereignty. The right of legislation is co-extensive with the incident to attach it upon all persons and property within the jurisdiction of a state. But in our system, there are limitations upon that right. There is a concurrent right of legislation in the states and the United States, except as both are restrained by the constitution of the United States. Both are restrained upon this subject, by express prohibitions in the constitution; and the states, by such as are necessarily implied, when the exercise of the right by a state conflicts with the perfect execution of another sovereign power, delegated to the United States; that occurs when taxation by a state acts upon the instruments, emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the constitution, are in congress. Taxation is a sovereign power in a state; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are also sovereign powers in the United States. Let us apply then the principles just stated, and the powers mentioned to the case in judgment, and see what will be the result.

*Congress has power to lay and collect taxes, duties, imposts, &c., [*448 and to regulate commerce with foreign nations and among the several states, and with the Indian tribes. Neither can be done, without legislation. A complicate machinery of forms, instruments and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers and gaugers must be employed; "the better to secure the collection of duties on goods and on the tonnage of vessels," revenue-cutters, and officers to com-

mand them, are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by congress to execute sovereign powers. They are the means necessary to an allowed end: the end, the great objects which the constitution was intended to secure to the states, in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or the guns put on board to enforce obedience to the law. These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true, it becomes his, when he has earned it. If it can be taxed by a state, as compensation, will not congress have to graduate its amount with reference to its reduction by the tax? Could congress use an uncontrolled discretion in fixing the amount of compensation, as it would do, without the interference of such a tax? The execution of a national power, by way of compensation to officers, can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the states would be different. To allow such a right of taxation to be in the states, would also, in effect, be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly: neither by their own action, nor by that of congress. The revenue of the United States is intended by the constitution, to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particular, in carrying *into effect the laws made to execute all the express powers, "and all other powers vested by the constitution in the government of the United States." But the unconstitutionality of such taxation by a state as that now before us may be safely put (though it is not the only ground) upon its interference with the constitutional means which have been legislated by the government of the United States, to carry into effect its powers to lay and collect taxes, duties, imposts, &c., and to regulate commerce. In our view, it presents a case of as strong interference as was presented by the tax imposed by Maryland, in the case of *McCulloch*, 4 Wheat. 316; and the tax by the city council of Charleston, in *Weston's Case*, 2 Pet. 449; in both of which it was decided by this court, that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.

*449]

But we have said, that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground; and we do so, because it is applicable to exempt the salaries of all officers of the United States from taxation by the states. The powers of the national government can only be executed by officers whose services must be compensated by congress. The allowance is in its discretion. The presumption is, that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. "The officers execute their offices for the public good. This implies their right of reaping from thence the

recompense the services they may render may deserve;" without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it; and which is intended to bear equally upon all according to their estate. The compensation of an officer of the United States is fixed by *a law made by congress. It is in its exclusive discretion to determine [*450 what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional, because it conflicts with a law of congress made in pursuance of the constitution, and which makes it the supreme law of the land.

We are, therefore, of opinion, that the judgment of the supreme court of Pennsylvania, reversing the judgment of the court of common pleas of Erie county, declaring the plaintiff was not liable to be rated and assessed for county rates and levies, for his office under the United States, is erroneous, in this, that the said supreme court adjudged that the act of Pennsylvania, embracing all offices and posts of profit, comprehending offices of the United States, was not repugnant to the constitution and laws of the United States; whereas, this court is of opinion, that such repugnancy does exist. We are, therefore, of opinion, that the said judgment ought to be reversed and annulled; and the cause remanded to the said supreme court of Pennsylvania in and for the western district, with directions to affirm the judgment of the court of common pleas of Erie county.

Judgment reversed.

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*Charlotte A. Parish, Appellant, *v.* Harvey W. Ellis and wife, [*451
Appellees.

Appellate jurisdiction.

The acts of congress, relating to judicial proceedings in the territory of Florida, gives the right of appeal to the supreme court of the United States, in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize; but cases at law are to be brought up by writ of error, as provided for by the judiciary act of 1789; it has always been held, that a case at law cannot, under the act of 1803, be brought to the supreme court by appeal.

In many of the states and territories, the ancient common-law remedy for the purpose of obtaining an allotment of dower, as well as the remedies for other legal rights, have been changed for others more convenient and suitable to our situation and habits; yet they are regarded as cases at law, although they are not carried on according to the forms of the common law. Parsons *v.* Bedford, 3 Pet. 447, cited.[1]

[1] The constitution has recognised the distinction between law and equity, and it must be observed in the federal courts, though there is no such distinction between them in the state in which the suit is brought. Bennett *v.* Butterworth, 11 How. 669. And therefore, an ejectment cannot be maintained in a federal court upon an equitable title, in accordance with a state practice. Fenn *v.* Holme, 21 Id. 481.

APPEAL from the Court of Appeals in Florida. The case is fully stated in the opinion of the court.

The only question in the case on which the court gave an opinion, was, upon the right of the appellant to bring the case to this court by appeal, instead of by writ of error.

Gilpin, for the appellees, contended, that an appeal does not lie in this court; this case could be brought here only by writ of error. It is not a case either of equity, admiralty, or prize or no prize. From 1789 to 1803, all cases were brought here by writ of error. Act of 24th September 1789, § 22 (1 U. S. Stat. 84). In 1803, appeals were allowed; but they were expressly confined to cases of equity, admiralty and prize or no prize. Act of 3d March 1803, § 2; 2 Ibid. 244. The courts have always strictly maintained this distinction between the two modes of proceeding. *United States* v. *Hanson*, 1 Gall. 21; *The San Pedro*, 2 Wheat. 141. In the case of *Ward* v. *Gregory*, 7 Pet. 633, this court dismissed an appeal from a judgment rendered in the proceedings upon a *mandamus*, which were not proceedings in a case of equity, admiralty, or prize or no prize. The proceedings for the assignment of dower certainly falls as little within either of these classes of cases as *those upon a *mandamus*. They are common-law proceedings; and the writ for the allotment of dower in this case resembles, generally, that which is used in such proceedings. *Williams* v. *Gwyn*, 2 Saund. 44 *d*, note 4. This appeal, therefore, ought to be dismissed.

*452]

TANEY, Ch. J., delivered the opinion of the court.—This case is brought here by appeal from the judgment of the court of appeals for the territory of Florida. A motion has been made, to dismiss the case, upon the ground, that it was a proceeding at law, and not in equity, and that under the acts of congress regulating the appellate jurisdiction of this court, the case cannot be brought here by appeal; and that we have no jurisdiction to revise the judgment of the territorial court, unless it is brought up by writ of error. The question may, perhaps, seem to be rather one of form than of substance. But, nevertheless, it is our duty to conform to the acts of congress; and we cannot exercise the appellate jurisdiction conferred upon this court, except in the form prescribed by law.

The case in the territorial court was this: James L. Parish died in Jefferson county, in the territory of Florida, in 1838, leaving his widow, Charlotte A. Parish, the present appellant, and no children. His sister, Catharine Ellis, one of the appellees, was his heir-at-law; and he left real estate, negroes and personal property, of considerable value. After his death, his widow petitioned the superior court of Middle Florida, for an allotment of her dower in the real estate, and her share of the personal property; claiming to be entitled to one-half of each, under a law of the territory, passed in 1838. And thereupon, a writ was issued by the court to the sheriff, directing him to deliver over to the petitioner her portion of the estate, as prayed for. On the 18th of December 1838, the sheriff returned the writ with an inquisition or report of certain freeholders summoned by him, allotting to the widow as her dower certain portions of the real estate, negroes and property, being the one-half of the gross amount of said estate in quantity and value. On the 15th of April 1839, the present appellees interposed *and objected to the return and allotment, because it

*453]

was made before the estate was settled by the administrator, and, as they also alleged, collusively; and because the allotment was too large, and the mode of proceeding informal. It was, however, confirmed by the superior court; and an appeal thereupon taken to the court of appeals for the territory, where the judgment of the superior court was reversed. And from this judgment of reversal, the case has been brought here by appeal.

If the proceedings in the territorial courts were proceedings at law and not in equity, we have no jurisdiction to hear the case, because it is not brought here by writ of error. The act of congress of July 14th, 1832, § 3 (4 U. S. Stat. 601), declares, that the regulations prescribed by the second section of the act entitled "an act in addition to an act entitled an act to amend the judicial system of the United States," approved the 3d of March 1803, as far as said regulations shall be practicable, shall be observed in respect to all writs of error and appeals from the said court of appeals in the said territory to the supreme court of the United States. And the act of 1803, thus referred to in the law of 1832, gives the right of appeal in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize; but leaves the cases of law to be brought up by writ of error as provided for by the act of 1789. And it has always been held, that a case at law cannot, under the act of 1803, be brought here by appeal. 2 Wheat. 141–2.

The question, then, is whether the proceedings in the Florida courts were in a case at law. They certainly differ from the ancient common-law proceeding by writ of dower; and, indeed, they necessarily differed from it, because the widow's share of the negroes and personal property were united in the same proceeding that was instituted to recover her dower in the real estate; and it certainly does not strictly conform to any of the modes of proceeding known to the common law. But in many of the states and territories, the ancient common-law remedy for the purpose of obtaining an allotment of dower, as well as the remedies for other mere legal rights, have been changed for others more convenient and suitable to our situation and habits. Yet they are regarded as cases at law, although they are not carried on according to the forms of the common law. In the case of **Parsons* v. *Bedford*, 3 Pet. 447, the court, when speaking of remedies of [*454 this description, said, that all suits brought to settle legal rights which were not of equity or admiralty jurisdiction, whatever might be their peculiar forms, were cases at law, within the meaning of those terms, as used in the constitution and acts of congress. In a case like the present, it is true, that although the right is strictly a legal one, yet the court of chancery possesses concurrent jurisdiction with the courts of law. But the proceeding in question is obviously not according to the principles or established practice of courts of equity, and was not intended to be such. It could not be sustained in any court acting upon the rules of a court of chancery; and must, therefore, be regarded as a proceeding at law. And being a case at law, it cannot, under the acts of congress before mentioned, be brought here except by writ of error. The appeal must, therefore, be dismissed.

Appeal dismissed.

*Smith Harpending and others, Appellants, *v.* The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York and others, Appellees.

Limitation in equity.—Adverse possession.—State decisions.

A bill was filed in the circuit court of the southern district of New York, by the heirs of John Haberdinck, claiming certain real estate in the city of New York, and an account of the rents and profits thereof; the estate having been devised, in 1696, to the ministers, elders and deacons of the Reformed Protestant Dutch Church of the city of New York; to this bill, the respondents, among other matters, pleaded that they had been in actual adverse possession of the premises, for forty years next before the filing of the bill.

If the complainant, by his bill, or the respondent, by his plea, sets forth facts from which it appears, that the complainant, by the statutes of the state, has no standing in court, and for the sake of repose and the common good of society, is not permitted to sue his adversary; it is the rule of the court not to proceed further, and dismiss the bill.

In pleading the statute of limitations to a bill in chancery, it is not necessary that there shall be an express reference to the statute of the state in which the proceeding is instituted; the court is judicially bound to take notice of the statutes of limitations, when the facts are stated and relied on as a bar to further proceedings, if they are found sufficient.

One tenant in common may hold adversely to and bar his co-tenant.

After the elapse of twenty years from the commencement of adverse possession of the property claimed, the defendants had a title as undoubted as if they had produced a deed in fee-simple from the true owners of that date; and all inquiry into their title or its incidents, was effectually cut off.

The supreme court of the United States are bound to conform to the decisions of the state courts, in relation to the construction of the statute of limitations of the state in which the controversy has arisen; such is the settled doctrine of the supreme court. Green *v.* Neal, 6 Pet. 291, cited.[1]

No distinction is made by the courts of the state of New York, between a religious corporation, claiming to hold under the statute of limitations of the state, in regard to capacity to hold by force of the statute; therefore, none can be taken by the supreme court of the United States.

The statute of New York is in substance the same as that of 21 Jac. I.; that such a possession as is set forth in the plea in this case is protected by the statute, has been the settled doctrine of the courts of that state for more than thirty years, if it ever were doubted.

The second part of the plea of the defendants averred, that all the parts of the lands sold had been conveyed and the moneys received by the defendants, more than forty years before the plea was filed. This is deemed a conclusive bar; the bill seeks the money, and six years barred the relief; this being a concurrent remedy with the action at law.

*456] *The defendants had disclaimed the ownership of certain lots which were described in the bill, and of which they were charged with being owners; the circuit court dismissed the bill as to these lots: *Held*, that this was proper; there was no probable cause for retaining this part of the bill, to obtain an account from the respondents; obviously, no claim exists that can be made available for the complainants, in regard to this portion of the property.

Appeal from the Circuit Court for the Southern District of New York. On the 25th of March 1839, the appellants filed a bill in the circuit court of the United States for the southern district of New York (they being citizens of other states than the state of New York), stating that prior to September 1696, John H. Haberdinck, of the city of New York, with four others, was seised in fee of the "Shoemaker's fields or lands," a tract of about sixteen acres, in the city of New York; and that in the same year, partition of the same was made, and Haberdinck became seised in severalty of divers parcels of the land described in the bill. Haberdinck died seised of the land,

[1] **Davie *v.* Briggs, 97 U. S. 637; Andreæ *v.* Redfield, 98 Id. 225; Amy *v.* Dubuque, Id. 471.**

in January 1722, leaving a widow, who died in 1723; and John Haberdinck, Junior, of New York, was his only heir, and inherited his lands. The bill stated, that the complainants were the heirs of John Haberdinck, Junior, their names having been varied to Haberding. It stated, that they are seised, with Peter Haberding, a citizen of New York, of these lands, as heirs as aforesaid; and that no sale or devise of the lands has been made by them, or by any of their ancestors.

The bill stated, that John H. Haberdinck made leases of part of the lands for ninety-nine or more years, and some of the leases so granted did not expire until after 1829. The Dutch Church had, for some time past, had possession of the lands allotted to John H. Haberdinck by the partition; and claimed that they took such possession in virtue of some will or devise of John H. Haberdinck to them. They also obtained possession of the undivided parcel, and alleged title to some shares of it, by deeds from the other tenants in common; and had demised parts of the same, &c.

The bill alleged that the church was a religious corporation in the city of New York, incorporated under the laws of New York. The complainants had applied to the church for a statement of *the title under which [*457
they claimed the property, and for a list of papers, and the inspection of their rent-roll, and an account of the rents and profits. In March 1822, the bill alleged, that the defendants returned to the chancellor of New York an inventory, in which they set forth that these lands were held by them as "sundry lots devised to the church by John Haberdinck, called the Shoemaker's land, as mentioned in a former inventory, situated in the second and third wards of the city of New York;" and the defendants alleged the said will was valid.

The parts of the will set out in the bill of the complainants relating to the property claimed by the complainants were as follows: "Item. I, the said John Haberdinck, do hereby give, devise and bequeath unto the minister, elders and deacons of the Reformed Protestant Dutch Church of the city of New York, and their successors for ever, all my (the testator's) right, title and interest, and property, in and to an equal fifth part, share and proportion of all that tract or parcel of land, situate, lying and being upon Manhattan Island, within the city of New York, called or known by the name of Shoemaker's field or land, on the north side of Maiden Lane or path, &c.; the which tract or parcel of land contains, by estimation, sixteen acres." The will then described the different lots, according to the partition, and proceeded, "all of which several and respective lots, pieces and parcels of land, I, the said testator, do hereby give, devise and bequeath unto the said minister, elders and deacons of the Reformed Protestant Dutch Church of the city of New York, and to their lawful successors for ever, with all and singular the buildings, messuages, edifices, improvements, emoluments, profits, benefits, reversions, advantages, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, or reputed or esteemed as part and belonging to the same; to have and to hold all the aforesaid several and respective lots, pieces and parcels and land, with the several and respective premises and appurtenances, unto the said minister, elders and deacons of the Reformed Protestant Dutch Church of the city of New York, and their lawful successors, to the sole and only proper use, benfiet and behoof of the said minister, elders and deacons of the Reformed

Protestant Dutch Church of the city of New York, and their lawful suc-
*458] cessors for *ever, to be received and employed by the said minister, elders and deacons of the Reformed Protestant Dutch Church of the city of New York, immediately after my decease and the decease of my wife Mayken Haberdinck, and only to the proper use, benefit and behoof, and for the payment and satisfaction of the yearly stipend, salary or maintenance of the respective minister or ministers, which, from time to time, and at all times hereafter, shall be duly and legally called to the ministry of the said church, and to no other use or uses whatsoever. And I, the said testator, do hereby further order and direct, that the sole management, direction, administration and government of the same, after my decease and the decease of my wife, Mayken Haberdinck, shall only be and remain in the hands, care, management, direction and administration and government of the elders of the said church, for the time being, or whom they shall nominate, constitute and appoint to act in their stead or place, and without being subject or bound to render any account of the same, but only to the minister or ministers, elders and deacons of the said Reformed Protestant Dutch Church of the city of New York, for the time being. Provided, always, that it shall not be lawful, nor in the power of the said minister, elders and deacons of the Reformed Protestant Dutch Church of the city of New York, nor their successors, nor the said elders or managers for the time being, nor in the power of any other person or persons whatsoever, for ever hereafter, to make sale, dispose, or alienate any part of the said lands and premises, nor any of the profits, benefits, revenues or advantages accruing or arising out of the same, to any use or uses whatsoever; but that the same shall be for ever and remain to the only proper use, benefit and behoof as is above recited, declared and expressed."

The complainants charged, that the will and the devise to the church was, at the date of the will, at the testator's death, and is at this time, wholly and absolutely void, illegal and inoperative at law. "The church could not and did not acquire any right or estate under the will; and the possession of the premises was in subordination to the title of the complainants and their ancestors. The church took possession of five of the lots that were on Broadway, although only a part of two were devised to them."

The bill further stated, that the church was incorporated on the
*459] *11th of May 1696, then having a church in Garden street, and certain tracts of ground, and were authorized "to have, take, acquire and purchase" lands, &c., and not exceeding the yearly value of two hundred pounds, New York currency, equal to $500. That the property held by them was considerable, and had ever since been actually, and for twenty years past has been worth, at least $10,000. The yearly value of the lands devised by Haberdinck had ever since greatly exceeded the amount which the church was, from time to time, by law authorized to hold; from 1780 to 1800, the yearly value thereof was $10,000; from 1800 to 1820, at least $20,000; and to this time, at least $30,000. In order to keep down the "annual income," the church had given leases for long terms at a low rent, and then sold such terms, for large sums, and used the money to buy other lands for other purposes.

The church had always held those lots under claim of title subordinate to the title of the complainants, and their ancestor; it was always incapable,

in law, of acquiring or holding a valid title thereto by adverse possession; and was, at the time of Haberdinck's death, incapable in law, of acquiring and holding the lands by devise. If it should appear, that the lands were actually devised to the church by the will, yet such devise would appear to have been made on the "express condition" that the lands were to be held by the church for the payment and satisfying the yearly stipend, salary or maintenance of the respective minister or ministers which should be, from time to time, duly and lawfully called to the ministry of tha said church, and to no other use whatever; and on the express condition, that it should not be lawful for the ministers, elders and deacons, to sell or dispose of any part of the property, or to apply any of the profits, revenues, &c., to any use whatever, other than those mentioned. At the time of the making of his will by Haberdinck, the only church was in Garden street; they had since built two others, and abandoned that as a place of worship. The income of the church from these lands had annually, for fifty years, greatly exceeded the yearly salaries paid, or which could be paid, to their ministers, and they had used the large surplus annually for other purposes, &c. *The bill prays for a discovery, whether the church held under the will of [*460 Haberdinck, and if so, a full account of the same, and of all matters relating to the property; and for an account, &c.

The defendants, after various exceptions to the bill of the complainants, and to the relief sought in the same, and the denial of many of the allegations in the bill, and disclaiming the ownership of certain lots described in the bill, and in the answer filed, said: These defendants do plead in bar, and by way of plea say, that for all the time commencing forty years prior to the filing of the bill of complaint, namely, commencing on the 25th day of March, in the year of our Lord 1799, until and at the time of the filing of this plea, these defendants were and have been, and are, by themselves and tenants holding under them, in the sole and exclusive possession of all and singular the lands in the bill of complaint mentioned (excepting the lands above described as hereinafter disclaimed), during all which time of possession, all and singular the said lands have been improved by buildings, and inclosed with a substantial inclosure, excepting that the land twenty-five feet in width from John street, to Fair street, now Fulton street, between the side of lots 84 and 86, and a continuation thereof, having been during all that time enjoyed as a public street for access to the lands upon the same, and as a public street then, ever since, and now used by all good citizens of this state as a public street and highway, without rents, issues or profits thence accruing, and excepting a piece of land twenty-five feet in width, extending from the rear of lot 62, in the said bill mentioned, seventy-five feet along the rear of lots 41, 42 and 44, and excepting the two pieces of land, the one extending along the south-westerly side of lot No. 68, and the rears of lots 77, 78, 79 and 80; the other extending along the north-easterly side of lot 66, and the rears of lots 32, 33, 34 and 35, from Nassau street, to the rear of the said lots; and during all that time, these defendants have, by themselves and their tenants holding under them, actually occupied and possessed all and singular the said lands, claiming and enjoying the same, during all the time aforesaid, as being seised thereof in their demesne as of fee, in severalty, and in their own sole and exclusive right, as the sole and exclusive owners thereof, in their own right, in fee-simple, and to their own

sole and *exclusive use, and not otherwise ; and during all that time, these defendants have been in the sole and exclusive receipt and enjoyment of the rents, issues, profits, avails and proceeds thereof, to the sole and exclusive use of the said corporation, claiming the right to receive and enjoy the same to their own use, and not otherwise.

The following points, relating to the matters decided by the court, were submitted by the counsel for the appellants.

I. The plea is defective, in regard to the allegations in the bill, as to the defendants entering and holding under leases from Haberdinck.

II. The plea does not make out a complete and absolute title in the defendants to the premises in question ; and it is, therefore, no defence, either to the discovery, or the relief sought by the bill.

1. The defendants were incapable of taking lands by devise ; and they are chargeable in law with a knowledge of this incapacity.

2. The devise to the defendants, by the will of John Haberdinck, was absolutely void ; and the defendants knew of its nullity.

3. The entry of the defendants was made, and their possession commenced under the void devise to them in the will of John Haberdinck, and was continued and held under that devise, to the time of filing the bill in this cause.

4. The possession and claim of the defendants were not, in their inception, hostile to the title of the heir-at-law ; but were consistent therewith, and in subordination thereto.

5. The plea does not show when, or by what means, the possession then commenced and held, was changed into an adverse holding. And although it sets up a claim of title in severalty, from 1799 down, it does not show on what title, or color of title, that claim was founded. On the contrary, by not negativing the charges in the bill in respect to their claiming under the will, it is admitted, that since 1799, as well as before, their claim has been founded on the void devise in the will of Haberdinck.

6. The defendants' possession and claim of title, from the time of their first entry to the filing of the bill, having been at all times exclusively under and by virtue of a void devise, known to them to be such, are unavailing for any purpose. They do not, therefore, show an adverse possession.

*462] 7. The views taken of the defendants' possession, are more *especially applicable to this case, as otherwise the policy of the prohibition contained in the statute of wills will be defeated, and the defendants allowed to do indirectly what they are expressly prohibited by law from doing directly. The decree of the circuit court should be reversed, and the plea overruled.

The case was argued by *Eaton* and *Coxe*, for the appellants ; and by *D. Lord, Jr.*, and *Wood*, for the defendants.

Eaton explained in detail the various statements and facts presented on the record, and the grounds upon which the matter was to be considered by the court ; contrasting the numerous circumstances set forth in the bill, answer and plea, in the review. That the complainants' ancestor, as tenant in common, was seised of a tract of land, called the Shoemakers' field, at present situated in the most populous part of the city of New York ; of

which partition having been made, he had seisin in severalty and continued in undisturbed possession until his death, in 1723. That he devised this portion of his estate in trust, &c., to this church, the defendant. That it was a religious corporation, That complainants are the heirs-at-law, and have never parted with any portion of this estate. That in pursuance of the trust created in favor of the church, the minister, elders, deacons, &c., entered into the possession, and have ever since retained that possession. None of these special averments contained in the bill were denied ; and hence, by the acknowledged rules of law, they are to be taken as confessed. He argued, that by the rules of equity proceedings, every material allegation contained in a bill which failed to be controverted by the plea and answer, in support of it, was to be taken as true. Mitf. Plead. 299–300 ; Story's Eq. Plead. §§ 38, 694 ; 4 Paige 195.

By the laws which, from time to time, had been enacted, usually termed the statutes of mortmain, of wills, &c., and which being in force in England, were alike in force within the colonies, no devise of real property to a religious corporation could be available to pass an estate ; such devise was void. Various stratagems, at different times, had been resorted to by the clergy, to defeat *these enactments, by a resort to the creating of uses, trusts and long leases, which were as often met by their corresponding legislation on the part of the British parliament. Uses and trusts had been placed upon the same footing as devises, and made subject to the laws of mortmain by statute of 15 Ric. II., c. 15. Leases for a longer period than twenty years were forbidden also by the British parliament. Stat. 22 Hen. VIII., c. 10 ; 1 Ves., jr. 218 ; 6 Ves. 404 ; 9 Ibid. 535. The statutes referred to were in force in the colony of New York to the year 1788. 4 Paige 198. Being in force, as the authority shows, a colonial act of legislation was incapable to repeal, alter or change them. Not even the British parliament could change them, so as to affect a right which had become vested before. It is not a prerogative right of the king to make dispensation of an express statute. He cannot do it ; the king cannot do any act forbidden by law. The charter of incorporation under which the defendants allege a right to take the estate in question, can be of no avail whatever ; because it was not in the power of the sovereign to permit that to be done which the laws of the kingdom prohibited. As the laws prohibited a devise of real estate to religious houses, no sanction on the part of the king could legalize any such bequest, to the prejudice of the rights of third persons ; such was not a *regalia* privilege. [*463

Against the right of the complainants to recover, a plea in bar is interposed, setting forth that this church, for a period of forty years before the filing of the present bill, had enjoyed quiet and undisturbed possession ; that it had received to its own use the rents and profits. An answer in support of the plea is also offered, with a disclaimer as to a part of the property claimed. A plea may be good in part and bad in part. That which is good is only to be regarded, the rest is to be set aside ; but an established rule of equity practice is, that a plea, to be good, must be clear, definite, precise and full as to all the matter which is offered as a bar to the relief sought. 4 Paige 195. The plea under consideration was not of that description and character. The admissions made upon the record are, that the defendants' first entry was under, and in pursuance of, a devise of claimants' ancestor,

which, at the time was, void, as being adverse *to existing laws ; and they fail to show, either by the plea or answer, that their possession ever assumed anything of adverse character ; then it was nothing more than a permissive, silent, acquiesced in, possession, subordinate to, and not adverse to, the title of complainants.

He who enters upon lands, by permission of another, is estopped to urge an outstanding title in another person, for the reason that the possession of the tenant is the possession of the lessor ; and that cannot be called in question, until some act of ouster or of open disclaimer be made. 4 Wheat. 213 ; 5 Ibid. 124 ; 7 Ibid. 59 ; 9 Ibid. 288. In these decisions, made by the supreme court, the principle is asserted and maintained, that to make the statute of limitations available, the possession must be adversary ; not permissive, or subordinate to the title of complainants. The pleadings admit, that from 1723, the time of the first entry under this void devise, to the year 1799, a period of more than seventy years, the possession by the church was under, and in pursuance of, this very devise about which we are inquiring, and hence, was in subordination to it ; and as such, not being adverse, the statute of limitations is wholly insufficient to cure the deficiencies of the title. The authorities referred to refuse such a privilege.

Under the devise made to the deacons and elders of this church, possession was taken. It was a void devise, being contrary to the statutes of mortmain. Their possession was that of the complainants ; the church merely holding in trust, not in fee. From lapse of time, a perfect title may be created by presumption. The law will, after a possession of twenty years, presume the existence of a deed ; but if the facts adduced are found to be insufficient to warrant a belief of title, then the presumption fails of its effect. A tenant who has lived on his farm for twenty years, may defend himself on the presumption of a deed ; but if he produce an insufficient and void deed or title, then the force of the presumption is taken from him ; and for this most obvious reason, that the weight and force of presumption ever fails, where facts interpose to put aside the presumption. The rule of law is, that the title relied on must be of such a description and character that, in view of legal consideration, it must appear to be *primâ facie* a good title ; and hence arises the *difference between a void and voidable title. In the one, not the other, the statute of limitations may be relied on. Authorities are wanting to show that upon an admitted void title, or upon a trust, any benefit can be derived from a resort to lapse of time. *Ten Eyck* v. *Frost*, 5 Cow. 346; 6 Wheat. 497; Pet. C. C. 361.

*465]

No authority could be found to give sanction to so pretended a defence as the present. The title relied upon was void at its incipiency ; and no circumstance has since arisen to change its original defective character. Even the stale idea of innocent purchaser did not come to its aid. An old man, led away by superstitious apprehensions, gave his all away from his relations, to propitiate his hopes through the church. The wardens and elders, well knowing that his indulged feelings were at war with what the laws of the country authorized, encouraged him to the act, and received this bequest. They entered into the possession under that devise, and in that way still hold it. Nothing, then, of innocent purchaser, could interpose in their favor ; the wrong originally practised is the wrong which still remains, and for which the successors of this church should be answerable, precisely

as if they were now brought back to the year 1723, when this will was introduced for probate and registration. Then it was a void devise; and remaining so to this time, under unchanged circumstances, it is void still, as regards the heirs-at-law. With this religious corporation the wrong commenced, and with it the wrong has continued. No change of the original parties having taken place, after the lapse of more than a century, the matter ought to be weighed as though it were to be considered apart from the long intervening time. The statute of limitations, under such circumstances, should not afford protection. The possession of this church was merely a trust for the benefit of the *cestuis que trust*—the heirs-at-law; and by legal interpretation, should in no otherwise be understood.

Judicially, it has been pronounced, that the statute of limitations is a plea that ought favorably to be received. It would not be proper to controvert the correctness of that opinion; but the present case does not fall under the reason of that decision—*cessante ratione cessat et ipsa lex.* With innocent buyers without notice, the rule might apply; but here the original wrongdoers *and violators of the law were still the holders of the property in controversy; the use and benefit of which they have [*466 enjoyed for a century, without having any legal title whatever. It was not for them to talk of hardships, after that they had held, for so long a period, possession of a large estate, for which not a cent of consideration was ever paid. It was a wrong originally practised, and that wrong was insisted to be carried out, upon no better pretext than a reliance on the statute of limitations; which was wholly inapplicable, under all the circumstances that belonged to the case under consideration. Statutes of limitation were intended for the guiltless, the weak and the helpless, for imperfect colorable titles, and not for the protection of a corporation; which, as this record shows, has thrown itself into open rebellion against all the mortmain laws which were then in force in the country. The church can sustain no injury, having never paid anything for this vast property, and hence cannot justly complain. It was received into their possession, under a devise which the laws, as the defendants well knew, did not authorize; and hence is void; and being thus void—a mere trust—the statute of limitations is incapable to perfect it into a title. The elders of the church entered into the possession of this estate in their own wrong, which the law holds shall never constitute a right; and in violation of the existing statutes of the country; and when, at last, the heir comes to demand his right, he is told, as the plea sets forth, we have had the property of your ancestor so long that we cannot surrender it. The policy of the English statutes of mortmain, of uses and trusts, was to prevent religious corporations from holding real estate. To argue, that the statute of limitations may give title to that which positively the law forbade to be holden, is to effect an object indirectly which could not be done directly; it would be a solecism in terms. The devise being repugnant to law, was a nullity—was void. Theirs is to be considered exclusively as the possession of the heirs.

The statute of New York, now in force in that state, after a lapse of twenty-five years, gives title to a mere *possessio pedis* right; it was passed in 1830. This statute could only have a prospective bearing, it could not act retrospectively. It changed the law as it had before been, and consequently, should have no *binding effect, until 1855, when the [*467

full period of twenty-five years would be completed. Adverse possession was a term well defined and understood, in England; it was a possession such as was known, open and avowed, having in it nothing of concealment and secrecy; but showing that a title was relied on, strictly adverse to all and every opposing claim, because colorable legal. By the statute of New York for quieting titles, an adverse possession is required; and a mere *possessio pedis*, with improvements of the property, is defined to be adverse. Here was a new principle introduced, variant from the former acknowledged rule of law, and hence it must fail to be operative, until the prescribed period of twenty-five years shall be fully ended and completed, which will not be until the year 1855.

The plea of forty years adverse quiet possession is unavailing, for a further reason, which is presented on the record. It is shown, that so recently as 1822, the elders and deacons of this church, in rendering a list of their taxable property to the chancellor, as the laws of New York required, represented this property given in by them, as having been devised to their church by John Haberdinck, denominating it, "The Shoemakers' Field." This confession, voluntarily made, shows, that they were then holding by the same tenure under which they originally entered. Nothing of adverse right, or insubordinate to complainant's title, was then asserted; so far from it, they admit that their possession, at that time, was under and in pursuance of the devise made to them by our testator in 1723. This admission, presented on the record, excluded the idea set forth in the plea, that an adverse possession for forty years has been held; it was a subordinate, and not an adverse possession. Neither by the plea, nor answer, was it shown, that forty years before the filing of the bill, anything took place of the nature of ouster; or that any open, public and notorious disclaimer had been made, and a new and different title asserted. The defendants rest merely on the limitation—the mere naked possession, claiming, as they say, "to have enjoyed the property, in their demesne as of fee, in severalty, holding adversely, &c." Claiming in fee is an inconclusive, insufficient plea. It should be more definite. It might be a claim openly or secretly made,

*468] *in a way that he in reversion might know nothing of the disclaimer and ouster; and if so made, which the plea fails to explain, clearly it is wanting in those essentials which the decision of this court make necessary. 5 Wheat. 124; 9 Ibid. 288.

A case in all respects similar to the present, is at hand. 5 Sim. 640. There, the defendants had been in possession for seventy years; and to a bill filed by the remainder-man to recover the estate, a plea was put in, stating, that adverse possession of the property had been held during the whole time; and that the receipts and profits had been received. The vice-chancellor overruled the plea, and on an appeal taken, his decision was affirmed by Chancellor Brougham. Mylne & Keen 738. By the concurrent opinion of both, it was adjudged, that to make a plea of adverse possession good, it must show how, where, and after what manner, it became adverse, that the complaining party might be enabled, through the notice afforded, to defend against it. This plea before the court was precisely similar; it asserted an adverse possession, without stating in what it consisted; the tendered issue was too broad to be met; it was not, as it should be, clear, full and definite, and hence was rightfully overruled. The plea under

consideration is in all respects alike, and should be subject to the decision there given. In both cases, a mere reliance of adverse possession is insisted upon, omitting to show how or whence it was derived.

The specific devise made was to the minister, elders and deacons of the church, for the express purpose of paying the salary of the minister; and "to no other use and purpose whatever." The minister then was the holder, both of the use and the trust; and hence, was it equivalent to or an actual bequest to the church in fee-simple.

He proceeded to show, that the disclaimer was insufficiently and badly pleaded; and that a plea of this description should be so presented that the complainants might know the persons against whom they should proceed: cited, 1 Montague's Pleas in Equity 216; Equity Draftsman 71.

Lord, with whom was *Wood*, for the respondents.—The only equitable relief sought by the bill, is discovery in *aid of an action at law, partition of land held in common, and a declaration of an implied trust. [*469
To all these, the statute of limitations, and lapse of time, are a bar at law and in equity: no express trust for the complainants can be pretended; and a trust for others does not prevent the possession of the trustees from being adverse. *Piatt* v. *Vattier*, 9 Pet. 415; *Elmendorf* v. *Taylor*, 10 Wheat. 168; *Bogardus* v. *Trinity Church*, 4 Paige 178; s. c., 15 Wend. 111; *Hunt* v. *Wickliff*, 2 Pet. 208.

To obviate the bar of the lapse of time, the bill sets out that the respondents entered under leases, but this is denied by the plea: and the plea is supported by the answer, and admitted to be true, by not being put in issue. It is also objected, that the plea is insufficient, because it does not set out how the possession was adverse. This is not true, in fact. It sets out an actual occupation, claiming title in fee, in severalty, and without any trust for the complainants.

The plea may be considered in two aspects: 1. As setting up a possession without reference to the will alleged in the bill, as the source of the respondents' title: or, 2. As connected with that will.

1. Without reference, then, to the alleged paper title, the possession is alleged in the plea to be an actual occupancy, by inclosure and improvement, accompanied with claim of title, in severalty, in fee. This is sufficient to constitute adverse possession. In the case in 5 Sim. 645, the plea averred that the possession was adverse, without showing the facts rendering it adverse. Here, we show the facts, and upon them the court see the possession to be adverse; the plea does not withdraw from the court the legal question as to the character of the possession. Mere possession, without any other circumstance shown, is evidence of seisin in fee. Stark. Evid. 1191, note 9; Bull. N. P. 103. When evidence of title is given, it is then presumed, in the absence of contrary proof, to be in subordination to the title: but this presumption is not made, in the face of express proof of claim of title; but the possession is qualified by the claim of title, whether claimed as arising tortiously or otherwise. Bull. N. P. 404. Possession must be shown by the plaintiff in ejectment, as part of his case (Bull. N. P. 102; Run. Eject. 340); and a possession *with a claim adverse to the plaintiff, certainly, [*470
is not sufficient to supply this want of the plaintiff. Possession, actual *pedis possessio*, does not require a paper title as the only criterion

to show its character. See 2 Rev. Stat. (N. Y.) 221, § 5–13; *Ricard* v. *Williams*, 7 Wheat. 105, where the claim of title followed the possession, although no paper title was shown; *Jackson* v. *Porter*, 1 Paine 457; *Jackson* v. *Olitz*, 8 Wend. 440; *Jackson* v. *Woodruff*, 1 Cow. 276; *La Frombois* v. *Jackson*, 8 Cow. 603. In all these cases, the doctrine is distinctly announced in the language of the judges. See 2 Roscoe on Real Actions 502. To require that the plea should show how the possession was hostile in commencement, is allowing the very evil which the statute is aimed at; the older the possession the more difficult the proof. If then, possession is allowed to stand alone, it is clearly adverse, and the plea a perfect bar.

2. But it is said, that by not denying our entry under the devise, we admit it, and the plea must be taken with that fact. This requires us to consider the possession in connection with the paper title. By the will, all the lands are devised to the respondents, no charge merely is granted; nor is any express trust created for the heir-at-law. By the plea, all holding as trustee for the complainant is denied. Our possession under this will, then, is a possession under color and claim of a title in fee, contrary to the title of the heir-at-law.

It is said, however, that the will is void by the English mortmain acts, and so, not capable of being the basis of an adverse possession. For the purpose of this argument, we allow the will to be void; by virtue, not of the mortmain acts, but of the exception in the statute of wills, 34 Hen. VIII., c. 5, which statute was, in terms, re-enacted in New York to the time of the revision of 1830. 3 R. S. (N. Y.) app'x 51. But possession may be adverse, if taken under a void deed. Cases above cited; also, *Jackson* v. *White*, 13 Johns. 118; *Jackson* v. *Brinck*, 5 Cow. 483; *Jackson* v. *Woodruff*, *1 Ibid. 276; *Jackson* v. *Wheat*, 18 Johns. 40; *Jackson* v. *Newton*, 18 Ibid. 355; *Jackson* v. *Whitbeck*, 6 Cow. 632.

*471]

But it is said, this doctrine only applies to voidable and not to void paper titles. Wills not conformable to the statute are always void. If made by a joint tenant, an infant, a *feme covert*, or without three witnesses, they are void: but will not a possession under such wills, for more than twenty years, bar an ejectment? Can the question of voidness be agitated, after an indefinite lapse of time? If so, such titles could never become confirmed by age; and wills, of all papers most liable to question from accident as well as want of skill in the writers, would be thrown out of the protection of the statute.

Again, it is urged, that being a religious corporation, it is against the policy of the law that their possession, commencing under a forbidden title, should ever become confirmed. But all that the law does, is simply to make the will void; it does not declare, nor can it be construed as limiting the operation of such a statute as that of limitations. This is doubling the statutory penalty, and that by implication. Besides, this argument would apply to all corporations, equally with religious; and to all conveyances, equally with wills. All the mass of property held by individuals, invested with corporate franchises, would be incapable of becoming sure by lapse of time. It is not an open question as to this cause, that corporations, even religious, may acquire title by possession, although commencing by fraud and wrong. *Humbert* v. *Trinity Church*, 24 Wend. 587; also, 15 Ibid. 111;

decisions of a court of last resort, binding this court on a question of local law. *Livingston's Lessee* v. *Moore*, 7 Pet. 542. See also 16 East 5.

It is also urged, that our holding these lands increased our annual income beyond our charter license. By our answer, we show it not to be so, at the time of our entry, and at the date when we allege our adverse possession. Any subsequent or intermediate increase is not within the prohibition. 2 Inst. 722, on the statute 39 Eliz., ch. 5 ; recognised also, in *Van Kleeck* v. *Dutch Church*, 6 Paige 621, affirmed in error, 20 Wend. As to our fraudulently keeping down the income, by making long leases at low rents, and selling at a premium, and investing it; it is denied in the plea and supporting answer.

*3. But it is urged, that supposing the will valid, a trust is created, which is not within the statute of limitations, nor barred from [*472 lapse of time. No express trust in favor of the complainants appears on the face of the bill. If a trust exist at all, it is for the ministers of the Dutch Church ; it is not a trust for the complainants ; and an implied trust is subject to the bar of lapse of time. *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 624 ; *Cholmondeley* v. *Clinton*, 4 Bligh 1 ; 2 Jac. & Walk. 138 ; 2 Meriv. 173, 357 ; *Provost* v. *Gratz*, 6 Wheat. 494 ; 7 Ibid. 116. In truth, however, it is not a trust, but a charity ; and if so, all surplus will go in augmentation of the charity ; it being clear, that the land is wholly given away from the heir-at-law. *Attorney-General* v. *Wilson*, 3 Mylne & Keen 362 ; *Thetford School Case*, 8 Co. 130 ; *Attorney-General* v. *Brazen Nose College*, 8 Bligh (N. S.) 377 ; *Attorney-General* v. *Haberdashers' Company*, 4 Bro. C. C. 106 ; *Attorney-General* v. *Sparks*, Ambl. 201. And lands given to a charity may be aliened through the aid of chancery, if for the benefit of the charity. 8 Bligh 458 ; *Dutch Church* v. *Mott*, 7 Paige 79. The counsel also referred to the statutes of limitation, 21 Jac. I., c. 16 ; Bull. N. P. 102 ; 1 Rev. Laws (N. Y.) 185, § 2, 3, 5 (1813) ; 2 R. S. 292 (1830) ; also § 49–52 ; *Bradstreet* v. *Huntington*, 5 Pet. 402.

No formal defects of the plea are pointed out : the answer supports the plea, by meeting every matter in the bill stated as tending to countervail the plea, by qualifying the possession ; if such answer is too general, that is subject of exception ; the plea will not be defective on account of the answer, unless material allegation are left unanswered, not where thy are answered, but not with sufficient minuteness. Story Eq. Pl. 516, 536, 674, 675, 692.

Coxe, in reply.—The large amount of property involved in this case, and zeal and ability with which the defendants have resisted the complainants' demand, have conferred upon it an importance to which it never could have attained, had the subject of the controversy been less valuable, or the principles of law at issue between the parties alone been considered. The complainants *are humble citizens, obscure and unknown ; the de- [*473 fendants a wealthy and powerful corporation. They are, moreover, a religious body, professing, and it does not become me to intimate that these professions are not sincere, to appropriate their revenues as well as their services, in the most praiseworthy objects of human attention. These circumstances are calculated to enlist the sympathies of all our best affections.

Independently of these circumstances, the complainants have been unexpectedly deprived of the services of the distinguished counsel under whose advice this suit was originally instituted, and by whom it has, until this its last stage, been conducted, and by whom it was hoped it would be brought to a satisfactory and successful close. At this late and critical point in the case, they have been prevented, by circumstances unforeseen and uuavoidable, to be present; and the entire weight of this responsibility has thus been devolved upon counsel comparatively strangers to the case. All that we can ask or hope, therefore, is, that due allowances shall be made for our situation, that the points of law which the case presents shall be thoroughly considered, the authorities on either side maturely weighed; and in full confidence that this will be done, we find compensation for our own weakness in the learning and wisdom of the court.

It becomes important in such a case to bring our minds to a distinct understanding of what constitute the real and substantial points at issue between the parties. The bill was filed by complainants, in March 1839. It avers, in substance, that John Haberdinck, together with four other persons named in the bill, were, prior to the 14th September 1696, seised in fee-simple, as tenants in common, of a certain tract of land in the city of New York, then known by the name of the "Shoemakers' field or lands." Being so seised, these parties made a division of part of said land into one hundred and sixty-four lots, leaving a residue which still remained undivided; made partition among themselves of the one hundred and sixty-four lots, assigning to each tenant in common his particular portion in severalty, and continuing their joint interest in the undivided part. That a deed was made and a map of the property, effectuating and showing this proceeding. John Haberdinck thus became seised in severalty in fee of certain of these
*474] lots, and co-tenant in common of the undivided portion. *Prior to the 7th February 1723, John Haberdinck and his wife both died without issue. The complainants and one Peter Harpending are averred to be his heirs-at-law, and that no legal conveyance of any description has been made of said property, but that the same descended to and vested in the said complainants and Peter Harpending, as his heirs, who as such are absolutely seised of, and entitled to, said lands. That John Haberdinck, in his lifetime, made a lease of the said premises, or a part thereof, for ninety-nine years or some other long term, the details of which as well as the date are unknown to complainants. That defendants have, for some time past, been in possession of all the lots so held by Haberdinck in severalty, and have stated and claimed that they held under some devise or will of Haberdinck. That defendants are a religious corporation, incorporated under the laws of New York. That they have also obtained possession of the undivided lot, and allege that they have acquired it under some of the tenants in common.

Complainants have applied to defendants, 1st, For an admission or statement of the will of Haberdinck, under which they claim to hold, and for permission to inspect and read the same; to enable them to proceed at law for the recovery of the property. 2d, For a list or schedule of the several lots held by them or their tenants, under color and pretence of title, derived from Haberdinck, and for any lease or assignment to them, and for the rent roll and an account. That defendants pretend, that John Haberdinck was

not so seised in fee, the contrary is charged by complainants to be the truth. That they held and now hold under a will of said John Haberdinck, and in pursuance of this allegation, they did, on or about the 7th March 1822, in conformity with a statute of New York, make an account or inventory of their property, and return the same to the chancellor, in which they represent that they hold said lands under the will of said John Haberdinck (*prout* the same). They aver said last will and testament of John Haberdinck to be a valid and lawful instrument, sufficient to vest said property in them; whereas, complainants, producing the will of John Haberdinck, duly proved, 7th February, 1723, aver it to be null and void; that it is in contravention of the law of the land, *but that nevertheless defendants entered and held, and continued to hold, said land under it. That defendants at [*475 times pretend that they entered under a claim of title adverse and hostile to that of John Haberdinck, Jr., and have always held under such claim, and thus have acquired a valid title, whereas, complainants charged the contrary to be true, and aver, that defendants entered under certain leases of said John Haberdinck, now expired, or under some other title derived from him and subordinate to his title and that of complainants, his heirs, and particularly, under some long lease which expired between 1810 and 1822; that as late as 1810, in making a return and inventory of their property in conformity with the statute, they represent the same to be held by them under a devise of John Haberdinck.

The bill then sets forth the charter granted to defendants, in May 1696, setting forth the object of the incorporation; the power granted of holding lands within the amount of two hundred pounds or $500 per annum. That the annual value of the lands held by defendants, at the date of the charter, and for twenty years past, has been at least $10,000. That the lots claimed by defendants under John Haberdinck are of great value, greatly exceeding what by law they were authorized to hold; from 1780 to 1800, of the yearly value of $10,000; from 1800 to 1820, of the yearly value of $20,000, and from 1820, they have been of the yearly value of $30,000. It avers the entire invalidity of the devise, and the incapacity of defendants to take and hold the land; but if this be not so, that the devise is for a specific object, the maintenance of the minister of the church then held by defendants in Garden street, which was the only church held at the time of the devise under the charter; that this church has long since been extinct; the same having been sold by defendants, and that there being no minister such as alone was contemplated by testator, the object of testator's bounty has ceased to exist, and a trust results to the heir. That at all events, the object of the bounty was a precise one; no benefit was conferred or designed to be bestowed directly upon defendants; but a simple trust for the maintenance of the minister; and that should this trust be a valid one, the revenues *arising from these lands, have, for a series of years, largely [*476 exceeded what was required for this purpose, and that complainants are entitled, if the immediate devise to defendants be prohibited, and therefore void, to have the estate either subject in their hands to this trust, or discharged even of that.

The bill avers then a *primâ facie* case in the complainants. By not demurring to the bill, it is admitted, that the case thus exhibited is *primâ facie* a case of right in them. It is met by a plea, which, so far as it is

material to examine it, on the present occasion, and exclusive of the disclaimer of a portion of the premises, is a mere naked assertion of an adverse possession for forty years. It avers, that for all the time commencing forty years prior to the filing of the bill, viz., 25th March 1799, until the time of filing the plea—1. That defendants have been, by themselves and their tenants, in the sole and exclusive possession. 2. During all which time of possession, the lands have been improved by buildings, and inclosed with a substantial inclosure. 3. During all this time, defendants have actually occupied and possessed said lands, claiming and enjoying the same as being seised theroof in fee-simple, and in their own sole and exclusive right. 4. During all this time, they have been in the sole and exclusive possession, receipt and enjoyment of the rents, issues and profits, &c., claiming the right to receive and enjoy the same. 5. As to a portion of the land, they aver that more than forty years since they sold it, and have received the money for their own use. 6. In general terms, they traverse the particular right set up by complainants. So far, then, as there are affirmative averments made in the plea and answer, the defence set up is, in its whole length and breadth, an assertion of a possession for forty years, under a claim of title. So far as it negatives or traverses the averments in the bill, it denies any joint estate with complainants, or as trustee for complainants, or under any lease from complainants' ancestor, or under any title subordinate to that of complainants.

Independently of the averments in the bill which are thus met by the plea and answer, there are others which are not covered *by either. *477] Among these, it is only necessary to advert to some of the more important. It is not denied, that the original entry of the defendants was avowedly under and by virtue of the will of John Haberdinck; that as regards a part of the premises, they originally entered under the title of parties claiming to hold as tenants in common with complainants' ancestor; that they aver they hold under the will of John Haberdinck, set out in the bill; that in March 1822, they recognise the will of John Haberdinck as the foundation of their then title; that the will set out in the bill is the last will and testament of John Haberdinck, under which defendants claim to hold; that they did not originally enter under a title adverse to that of complainants; that they have always held and now hold under a title subordinate to that of complainants' ancestor; that defendants were not competent to take and hold under a devise from John Haberdinck, that if competent to take at all, it was merely as trustees for a specific purpose; that the income of the estate is far larger than is required for the specific purpose designated in the will, viz., the maintenance of a minister or ministers; that the church in Garden street is no longer in existence, nor is there any minister of such church. The averments in the bill are full and precise upon all these points, and not being traversed in the plea or answer, they are impliedly admitted to be true. This is a well-established principle of equity practice. Mitf. 295; 2 Dan. Ch. Pr. 98; Story Eq. Plead. 538, § 694; *Bogardus* v. *Trinity Church*, 4 Paige 178; 2 Sch. & Lef. 727.

With all these averments unanswered, defendants set up as their sole ground of defence, the possession of forty years, without any assertion of a patent, deed, agreement to convey, or other document to give validity or even color to their original entry and subsequent holding; without any

allegation of an ouster of the co-tenants in common, and without any specification of the time when, or the circumstances under which, the original character of the possession became changed, and assumed a hostile type. This we conceive to be both defective in form, and insufficient in substance.

1. The defectiveness in form is not so material, but as our learned opponents have asserted the formal sufficiency and propriety of the pleadings, it may be as well briefly to examine this *position. The plea presents a single point of defence to the entire bill, to the prayer for discovery [*478 and the prayer for an account, to the claim of a tenant in severalty and that of a co-tenant in common with defendants ; to the title of complainants, as founded upon the original invalidity of the will which lies at the root of defendants' possession, and that which asserts a right as *cestui que trust*, either to the whole property, or to so much of it as may remain after fulfilling the specific trust created by the will. If this plea is bad as to one of these foundations of claim, it must be overruled. Now, it is unnecessary to advert particularly to the New York statutes of limitation ; they have been read to the court. It may be as well, however, to remark, that the statutes of limitation in their terms apply only to suits at law, and that equity, by analogy, extends their provisions to suits in chancery. That these statutes prescribe different terms of limitation to suits of different characters, one period is fixed as a bar to an account, another to an ejectment, &c. There is no one applicable to each and every of the claims of complainant. Nor is there any statute of limitations of New York which prescribes the term of forty years as a bar to any species of action, or to any kind of recovery. Twenty years, the bar to ejectment, is the longest period applicable to either of the demands now set up, to some of them, especially a case of resulting trust in favor of the heir, upon the termination of the object of the bounty provided for by the testator, or for the surplus, after fully meeting that trust ; it is believed, that no statute of limitations exists in New York, nor has this court of equity established such a bar. Even in reference to those parts of the case to which those statutes create a specific bar, there being no such period as forty years fixed, but a shorter period ; the plea of forty years is vicious, inasmuch as it tenders an immaterial issue. The forms of pleading in courts of equity are not so precisely fixed as at common law, but there are certain precise rules, founded in reason, which must and ought to govern both. There is no better criterion by which to judge of the sufficiency of a plea, than that which is furnished by the inquiry, will its decision finally and necessarily decide the case? If a party pleads a bar of forty years, when the statute makes twenty or six years a bar, it results necessarily *that the decision upon the fact [*479 against the party pleading it, is immaterial. Com. Dig. tit Pleader.

2. The more important question, however, is, is this plea insufficient, and consequently, bad in substance? We apprehend it is, both from the defects of the plea in general, and especially under the circumstances averred in the bill. There have been certain general principles laid down by the counsel for the appellee, which it is unnecessary for us to controvert in the abstract. It is stated as a principle of law, that an adverse possession may be pleaded as a bar against the recovery by a tenant in common. In this abstract form, the proposition is not denied. It may, under circumstances, be a good defence, in others, it may not. There must be something superadded, such

as ouster of the co-tenant, to render it available. While we admit, that it may be made an effectual bar, we deny, that in all cases, it necessarily is so. If, then, the addition of such circumstances be essential to the validity of this plea, in the absence of those circumstances, or without the proper averment of them, the plea is defective. 5 Wheat. 116, 124 ; 7 Ibid. 120 ; 24 Wend. 587, 602. So, in certain cases, even a trust interest may be barred by the statute of limitations, but so far from this being the general rule, the reverse is the case, and it is only under special circumstances that such a bar is available by a trustee against his *cestui que trust*. Wherever the relation of trustee and *cestui que trust* is distinctly created, is real and substantial, and not merely the creature of implication, where equity will recognise its existence and enforce its obligations, the possession by the trustee cannot be converted into one of an adverse character ; and lapse of time will interpose no bar. The trust is here averred in the bill, it is denied by counsel in argument, but neither the plea nor answer controvert the allegation. The bill also contains the precise averments which show the legal existence of a trust. These averments are unnoticed in the plea or answer, and must, consequently, on this argument, be assumed to be true. Nor is there any weight in the objection raised by counsel, in the argument, that the claim of a trust is incompatible with the general scope of the bill. That bill is framed with a double aspect ; one of the views which it presents is, that if it was the design of the testator to provide a *fund for the specific purpose mentioned in his will, which is clearly the case, from the strong affirmative as well as negative words employed by him ; if no bounty was designed, beyond this specific purpose of maintaining a minister or ministers, if the defendants could take the property devised as trustee, then after performing this duty, and executing the design, the surplus belongs to the heirs, and the relationship of trustee and *cestui que trust* is established between complainants and the church. So, if the object of the bounty ceases to exist, as is also charged in this case, courts of equity do not regard the forms of instruments, they look to the substance and the intent, and give the construction which is consistent with such intent. *Flagg* v. *Mann*, 2 Sumn. 487 ; Lewin on Trusts 168, &c. Where lands are devised for a specific purpose, as for the payment of legacies, after the trust is fulfilled, there is a resulting trust in favor of the heir-at-law. 2 Powell on Dev. 32 ; *Culpepper* v. *Aston*, 2 Chan. Cas. 115, 223 ; 9 Mod. 171 ; *Roper* v. *Radcliffe*, 2 Eq. Cas. Abr. 508. So, when a devise is made to trustees, for a specific or particular object, and that object does not require the application of the entire fund, or exhaust the whole appropriation, the surplus will be decreed to the heir, even though a legatee. 2 Powell on Dev. 34–5 ; *Starkey* v. *Brooks*, 1 P. Wms. 390 ; Ambl. 165 ; 3 Dow 148. Nor is the trust alleged in the bill one which by writers on equity law is designated as a constructive trust, where a party, for the furtherance of justice, will be decreed to hold a particular estate as trustee for the rightful owner. *Boone* v. *Chiles*, 10 Pet. 177. The very instrument which creates the estate, by its own force and legal interpretation, clothes it with the trust, first, for the minister intended to be provided for ; after this, for the heir. When such a trust is once fixed upon the party, the trustee cannot defend himself against his *cestui que trust*, on the plea that he holds adversely, for he shall never be permitted to create in himself an interest opposed to that of his *cestui que trust*. *Prevost* v.

*480]

Gratz, Pet. C. C. 364. This part of the case, then, resolves itself into a simple question of construction. What is the true interpretation of the will? We think it clear, that whatever estate, if any, passed to the church, was purely a trust. No beneficial interest was designed for it, unless a merely incidental one. It was to create a fund for the *single and exclusive purpose of paying the salary of the church in Garden street. This [*481 purpose, it is averred, upon one construction of the will, has ceased to exist, and the specific trust is at an end; on the other, that it does not exhaust the fund, but leaves a large surplus, and this surplus is claimed by the heir. These averments are not controverted by the pleadings.

Another of these general propositions asserted by the respondent's counsel is, that a corporation, even one of a religious character, may hold an adverse possession, and thus acquire title. In the abstract, this is not denied—such may be the case. It, however, by no means follows, that every possession by a religious corporation will be regarded as such an adverse possession as will furnish it with a shield against the rightful owner. The complainants contend, that this capacity in the respondents is limited and restricted. 1. Under no circumstances will it be available, when, in the case of a natural person, it would not be. Wherever, from the character of the possession, a private individual would be precluded from interposing such a defence; as, for example, where he held as tenant in common, or as trustee, it will not be allowed to the artificial person. 2. Where the acquisition of property is prohibited by the charter itself, and the corporation could not legally take and hold by actual conveyance, adverse possession cannot confer title. That cannot be indirectly acquired, the direct acquisition of which is inhibited. If, then, this religious corporation is incompetent to take by express devise, if the will would be null and void, an entry under it cannot ripen by lapse of time into a title. 3. It is wholly unimportant and inconsequential, whether this prohibition be found in the charter itself, or in a different and general statute. If the statutes of wills, or the statutes of mortmain, prohibit the corporation from taking by will, the prohibition is as effective as if it were done by the charter itself. *New York* v. *Utica Ins. Co.*, 15 Johns. 355.

In some respects, the restrictions upon a corporate body in thus acquiring title, are greater than exist in relation to private persons. By way of illustration, it may be suggested, that when a natural person has disseised a rightful owner, and dies seised, by this casting of the descent, the heir succeeds to a higher species of title than his ancestor had. So, if a corporation should, by purchase, acquire the title of the original disseisor, or after descent cast, of *his heir, this might furnish a good title by adverse possession. But the possession originally acquired by a cor- [*482 porate body, can never, in its own hands, thus ripen and strengthen. The vice of the original trespass adheres to it, so long as that possession lasts.

We are further told in argument, that the respondents have been in possession of this property, claiming and holding it as the rightful owners, from the year 1723, now nearly a century and a quarter; and that equity will raise any presumption to support such a possession; that to uphold it, a colonial license may be presumed, to take the case out of the prohibition of the statute of wills. This suggestion admits of many answers. In the first place, it involves a total departure from the defence set up. That defence

is a possession of forty years, and this furnishes no ground for such a presumption. But no presumption can arise of the existence of an act which could not legally have been performed, and would have been purely void, if it existed. The colonial government had no authority to grant such a license, dispensing with the prohibitions of the statute. The doctrine of these dispensing licenses has been misapprehended. In England, this dispensation was a peculiar act of royalty. The general prohibition was founded on the principle, that these grants of land to corporations and in mortmain, were detrimental to the lords, by depriving them of their escheats. The king, the ultimate lord, was peculiarly injured by these alienations, and he was permitted, by his license, to ratify the grant, so far as to remit the penalty to himself. He could, however, by this license, only waive his own rights; he could not affect those of other or intermediate lords. Nor, even in England, were such licenses given in cases of wills.

It is contended, that the possession of defendants, as alleged in the plea, being under a claim of title in fee-simple, is an adverse possession, and creates a complete bar to complainants' recovery. In other words, the proposition is, that the character of adverse is recognised by the law as attached to the possession averred in the plea, throughout the whole continuance of that possession, and that this is a sufficient answer to the bill. Let us analyze this plea. The specific averments are these: 1. For all the time commencing forty years prior to the filing of the bill, viz., 25th *March 1799, until the filing of the plea, defendants have been and are in the exclusive possession, &c. 2. That during all this time, the lands have been improved by buildings, and inclosed with a substantial inclosure. 3. That this possession and occupation have been accompanied by a claim and enjoyment of the premises, as owners in fee, in severalty, in their own right, and not otherwise. 4. The receipt and enjoyment of the rents, issues and profits, to their sole and exclusive use. 5. As to other of the lands, they aver, without specification of date, circumstances or party, a sale for a valuable consideration, and the receipt of the purchase-money by them. The great question in the case is, that these facts thus pleaded constitute a sufficient answer to the *primâ facie* case set up in the bill. Respondents aver that these facts operate *per se* to bar complainants' recovery. To test this, let it be put into a logical and tangible shape. The proposition is, that a possession for forty years, of lands improved by buildings, substantially inclosed, under a claim of title in fee-simple, the sale of a part, and the receipt of the rents of the residue, to the sole use of defendants, constitute, *per se*, a valid adverse possession, which confers title, at all events, and under all circumstances. This is the proposition we are to encounter. This bar is alleged, notwithstanding the particular averments in the bill, which are, by implication, admitted to be true. 1. That defendants are under a legal disability to take or to hold the land. 2. That the original entry and the holding for a series of years was in subordination to the bill asserted by complainants. 3. That defendants have, solemnly and deliberately, within these forty years, recognised their title as taken under complainants' ancestor. 4. Without any averment as to the original character of this possession, or when or how it became adverse. 5. Without the averment of any deed, will or other document of title; without any allegation of ouster of the co-tenants in common; without any derivation of

*483]

title from a prior adverse possessor. It is not averred, that the improvements by building, or the inclosure, were the acts of defendants. It is not alleged, that the claim of right was public or notorious, or within the knowledge of complainants, or of any other persons. It is, therefore, a mere naked possession. That this is not sufficient, is well established. *Jackson* v. *Sharp*, 9 Johns. 163; *Jackson* v. *Waters*, 12 Ibid. 365; *La Frombois* v. *Jackson*, 8 Cow. 598; *Livingston* v. *Peru Iron Company*, 9 Wend. 511; *Thomas* v. *Marchfield*, 13 Pick. 240; *Sumner* v. *Child*, 2 Conn. 607; *Cottrell* v. *Watkins*, 1 Beav. 361. [*484

The next proposition is somewhat more specific. It is alleged, that a claim of the fee-simple, under a void documentary title, if accompanied with possession, constitutes an adverse possession, and creates a bar. No distinction is here taken between the defects to which the original documentary title may be subject. We concede, that where the deed, &c., is merely defective, and therefore, in itself, incompetent to pass an estate, it may yet be so far operative as to give a color to the party holding under it, and serve as the bases of a title by adverse possession. On the other hand, we assert, that where this deed is essentially void, as prohibited by law, it never can support or give adverse character to the possession acquired and held under it. The doctrine of respondents asserts a principle wholly at war with the fundamental principles of all codes of law and private morals. It assumes the power of time to convert that which is essentially wrong into right. It allows the laws to be violated, not only with impunity, but with recompense. It is at variance with the principle upon which all statutes of limitation rest. These statutes are emphatically statutes of repose; they proceed upon the doctrine that length of possession and lapse of time warrant the presumption, that such possession originated in right; that the evidence has been lost. They thus assume to supply what is imperfect, not to cure what was essentially illegal: "never," to use the language of this court, "to enable one man to steal the title of another, by professing to hold under it." *Kirk* v. *Smith*, 9 Wheat. 288; *Ricard* v. *Williams*, 7 Ibid. 107.

In the case at bar, the void character of the title under which respondents entered and held is established by the admissions on the record. It has been adjudged to be with the express prohibition of the law. This illegal title is admitted by the return to the chancellor set out in the bill, to be that under which defendants hold. That the declarations of a party as to the character of his title and possession are competent evidence, is conceded by *the adverse counsel, in one branch of their argument, but if denied, is established by high authority. 7 Wheat. 111; 1 Paine 467. No grant or conveyance can be presumed, which is not in accordance and harmony with these declarations. 7 Wheat. 112. Presumption can never fairly arise, of the existence of a deed, when all the circumstances upon which it must rest are perfectly consistent with its non-existence. 7 Wheat. 109; *Jackson* v. *Porter*, 1 Paine 457, 464. The whole current of authorities sustains our proposition, that no possession can, by lapse of time, acquire the immunities attached to an adverse possession, when it had its inception in that which the law prohibits. *Kirk* v. *Smith*, 9 Wheat. 283, 541; 9 Wend. 511, 516; 7 Ibid. 152; 4 Dana 479; 9 Cow. 361, 543; 5 Ibid. [*485

346 ; 6 Ibid. 751 ; 13 Johns. 537 ; 10 Ibid. 462 ; 12 East 141 ; 8 Cow. 590, 606, 610, 617, 621 ; Ballant. on Lim. (Tillingh. edit.) 374.

The distinction which has been attempted will not bear examination. It is said, that the cases, in which this proposition has been asserted, are only those in which the entry has been made under a foreign title, and therefore, in hostility to the sovereignty of the state ; or where the title was fraudulent in its inception. The authorities do not justify or sustain this restriction. The cases of the Canadian grants were adjudged illegal, because derived from a foreign power, and being invalid, they were insufficient to support the possession. The illegality was the basis of the judgment. In this case, the will was in the face of a peremptory statute prohibition ; in that class of cases, the illegality was only implied.

We are now told, that the statutes of mortmain which have been invoked by complainants, are not in force in New York ; and 2 Meriv. 143, is cited to sustain the assertion. The same case was cited in 20 Wend. 480, to sustain the same proposition, and it then received a conclusive answer. This question is not, however, now open for discussion ; the devise is conceded to be illegal and invalid ; that this will is the foundation of respondents' title, is admitted. The question is, can a title, originating in an act distinctly prohibited, become effective and valid by lapse of time.

*486] It has not been thought important, to dwell particularly upon *the allegations in the bill which relate to the inventory and return made by respondents to the chancellor of New York. One of these represents their title as derived under a demise of John Haberdinck ; and this alone is noticed in the answer, in which it is averred to be a clerical error. What was the nature and extent of that error, or how it occurred, is not stated. Obviously, it was the mere mistake of using the word *demiso* for *deviso ;* for in relation to the second return, in which they represent themselves as holding under the will of John Haberdinck, the answer does not even notice it. Under these circumstances, it is submitted, that the defence set up is essentially defective, both in form and substance.

Catron, Justice, delivered the opinion of the court.—The respondents rested their defence below on a plea in bar ; that they had been in actual adverse possession of the premises, in regard to which they are asked to account and make discovery, for forty years next before filing of the bill. The plea was sustained ; and from this decree there was an appeal prosecuted to this court by the complainants. 1. They insist the plea is bad in form : and 2. Insufficient in substance.

1. The first objection to the form of the plea is, that it does not rely on twenty years' adverse possession, but on forty years ; twenty years being the time of holding adversely to constitute a bar by the statute of New York. In this respect, there is no technical rule observed by the courts of chancery. If the complainant, by his bill, or the respondent, by his plea, sets forth the facts from which it appears that the complainant, by the statutes of the state, has no standing in court, and for the sake of repose, and the common good of society, is not permitted to sue his adversary, it is the rule of the court not to proceed further, and dismiss the bill. Had the complainants set out the fact of forty years' adverse possession, then a demurrer interposing the bar would have been the proper defence, counter-

vailing circumstances aside. Such was the course taken in *Humbert* v. *Trinity Church*, 24 Wend. 587, and which was in accordance with the established practice of courts of chancery.

2. It is insisted, that the act of limitations is not relied on, by express *reference to the statute of New York. We think it was unnecessary [*487
to rely, in terms, on the statute. It was more convenient not to do so. The bill seeks discoveries, the right to have which, twenty years' adverse possession could only bar. It also seeks an account of the proceeds of sales of parts of the estate, and an account of the rents and profits of other parts, assuming the respondents to be trustees for the complainants. To this aspect of the bill, six years forms the bar to a decree. The court is judicially bound to take notice of the statutes, when the facts are stated and relied on as a bar to further proceeding, if they are found sufficient. So the chancellor of New York held, in *Bogardus* v. *Trinity Church*, 4 Paige 197 ; and we think correctly.

3. In regard to the substance of the plea, it is insisted for respondents, 1. That the answer does not cover and support the plea, by the denial of facts alleged by the bill, which, if true, obviate the bar. That, taking the facts alleged as established by admission, then the respondents were express trustees for the complainants, held possession for them, and are compellable to account, regardless of the lapse of time. To test the sufficiency of the answer, we must take every allegation of the bill as true, which is not denied by the answer ; and then inquire, whether, those facts being admitted, the plea is sufficient to bar the claim to relief set up by the bill. 4 Paige 197 ; Mitf. 300 ; *Plunket* v. *Penson*, 2 Atk. 51 ; 15 Ves. 377.

The complainants charge certain circumstances, which, if true, preclude a bar, without admitting the existence of the bar ; yet, alleging facts which obviously stand in the way of relief, unless the circumstances be true. They have the undoubted right to call on the defendants to furnish by their answer, the evidence that they did hold the church estate as express trustees ; and under and for the respondents. These facts would invalidate the plea, if admitted, and the defendants must answer to all the matters which are specially alleged as evidence of these facts. Nor would the denial in the plea serve the purposes of the complainants, for on setting it down for argument, its truth must be admitted. Story's Eq. Plead. 515, § 672–3 ; Beames's Pleas in Equity 33–4.

Have the respondents furnished the evidence claimed from *them, [*488
or, have they repelled the circumstances by a sufficient denial of their existence? If unanswered, the circumstances must be taken as true, for the purposes of resisting the plea (as already stated), to the extent that they stand unanswered. The bill alleges, that John Haberdinck, in 1696, jointly with four others, was seised in fee-simple of a tract of land called the Shoemaker's field, lying on the north-east side of Maiden Lane, in the city of New York. In 1696, the parties divided the premises, in part, into lots ; and the other tenants in common conveyed to John Haberdinck, in severalty, his one-fifth part of the lands divided, which are severally described by lots. That, previous to 1723, Haberdinck died, leaving no children. John Haberdinck, Junior, was the lawful heir of John, the elder ; and the complainants are descendants and heirs of John the younger. That no sale or devise of the premises has ever been made by any of the ancestors

of complainants through whom they claim ; and that they are entitled and seised as heirs-at-law and by right of succession. That the Reformed Dutch Church of the city of New York, by its ministers, &c., had had possession of the premises held in severalty by John Haberdinck, and claimed to have taken possession under some will or devise of John Haberdinck, whereby the premises were devised to them.

The first circumstance stated in evidence of the bar is, that John Haberdinck, in his lifetime, had let the premises, or some part therof, to lease, for ninety-nine years ; and that the lease expired in 1819. When the bill was filed, does not appear by the record. We take it, within less than twenty years after 1819. To whom the term of ninety-nine years had been granted, the bill does not in this part of it allege. The defendants deny all knowledge of the existence of any such lease ; except for three lots to William Huddleston, dated in 1723, for the term of seventy years, from the first of May of that year ; and this lease is not thought to be genuine. This answer we deem sufficient.

It is next alleged, that the ministers, &c., of the church are a religious corporation, duly incorporated and located in the city of New York ; and
*489] as such, obtained by purchase from some of the *tenants in common with John Haberdinck, the elder, or from some one claiming under them, parts of the Shoemakers' field not partitioned in 1723. This allegation needed no answer in support of the plea. One tenant in common may well hold adversely to, and bar his co-tenant.

The complainants also allege, they applied to the corporation for an inspection of title-deeds ; an account of sales ; of rents and profits ; for possession of the lands, and a partition of the undivided part ; which had been refused. If barred of the right to the land, so were the complainants of the relief sought by their request to the corporation. Nor has the contrary been assumed. As to title-deeds, none but the lease for ninety-nine years could have aided the complainants ; and the distinct answer that none such existed covers this allegation.

As a supervening circumstance, complainants allege, that respondents, in 1822, acknowledged they entered and held under the will of Haberdinck, the elder, by an account and inventory of their property rendered to the chancellor of New York, pursuant to a statute of that state. The will is then set out, dated 1722, by which the property was devised to the ministers, elders, &c., of the church, and their successors for ever, with its probate ; and the devises therein, to the religious corporation, are alleged to be illegal and void ; that no title was taken under the will ; and that the possession was held in subordination to the right and title of the heirs-at-law. It is reiterated, that the corporation entered as assignees, under leases for long terms of years, made by John Haberdinck, in his lifetime, and which have lately expired ; or, under some other title derived from John Haberdinck, and subordinate to the title of the heirs-at-law ; but particularly, under a demise by Haberdinck to the ministers, deacons, &c., or to some other person, which was assigned to them, and which expired between the years 1810 and 1822. And under some title, subordinate to that of the heirs-at-law, the respondents have ever claimed, held and enjoyed the premises. That so late as the year 1810, they admitted, by an inventory returned to the chancellor, that they held under a demise to

the corporation by John Haberdinck. The charter *granted by the king in 1696, is substantially set forth, and it is averred, the annual profits of the premises devised, exceed two hundred pounds, or $500, the extent to which the church was permitted by law to receive profits; that from 1780 to 1800, the yearly value of the premises was $10,000; from 1800 to 1820, $20,000; and from that time to the date of the filing of the bill, of the yearly value of $30,000. That to keep down the rents, long leases have been given at low rates; and then the leases have been sold out, and other lands purchased with the proceeds of the sales, and other investments made. That a religious corporation, which is by law incapable of receiving or taking lands by devise, cannot hold adverse possession of such lands upon which they have entered and always claimed under such devise. This being the case of the respondents, the complainants were entitled, as heirs-at-law, to rents and profits and the proceeds of sales; at least, after deducting therefrom a support for the ministers of said church, which the income greatly exceeded, and to which extent and no other, by the terms of the will, could the revenues and income of the devised premises be applied. And a discovery and account is asked of the surplus, if no more.

As to parts of the premises, the defendants disclaim title; and as to other parts, they plead they had sold and conveyed in fee-simple, more than forty years before the filing of the bill; and the alienated lands had ever since been held and enjoyed under the conveyances adversely to the claim of the complainants. To such parts of the foregoing allegations as charge in any form a holding in subordination to the title of complainants as tenants in common, or, by demises or otherwise, the respondents answer in various forms, that they claim to hold for themselves in severalty and in fee-simple, and in hostility to the claim set up in the bill, for forty years next before it was filed; that they never acknowledged any title in the complainants, and that the expression in the return to the chancellor, that they held by demise under John Haberdinck, was a clerical error. Respondents neither admit nor deny that they held under the will of John Haberdinck; or that they have received revenues and profits, as charged. These facts are treated as immaterial. *Not being answered as repelling circumstances, they must be considered as true. [*491

The plea avers, that for forty years previous to the time of filing the bill, that is, from 1799, and up to the date of the plea, the defendants had been, by themselves and their tenants, in the sole and exclusive possession of all and singular the lands in the bill mentioned (except those disclaimed); during all of which time, all and singular the said lands have been improved by buildings, and inclosed with substantial inclosures, and actually occupied by themselves and their tenants, claiming and enjoying the same as being seised thereof in their demesne as of fee, in severalty, and in their own sole and exclusive right, and as the exclusive and sole owners thereof, and to their own sole and exclusive use, and not otherwise; and that respondents have, in like manner, been in the receipt of the rents and profits. As to that part of the premises alleged to have been sold, respondents plead, that more than forty years before the filing of the bill, thus being in possession in their own right and severalty, and claiming the right to sell and convey in fee-simple absolute, did grant and convey the same in fee-simple, absolute, for a valuable consideration to them paid, and which the

corporation applied to its own use, claiming the right to do so, without any accountability to any person whatever; and the said premises have ever since been held, occupied and enjoyed under said conveyances, adversely to the claim of the complainants, in their bill set forth.

Stripped of the circumstances met by the answer, and the case presented to us for decision is simple. The complainants claim under Haberdinck, the elder, as heirs-at-law. The respondents entered under the will of Haberdinck, and have for more than a century claimed under it. The complainants allege the will is void; the respondents disregard the allegation as immaterial, and raise no question on its validity. They rely on forty years' adverse possession, claiming to hold for themselves in fee-simple, and in severalty. To cover the possession, no paper title is invoked, substantial inclosures and actual occupancy for forty years, are relied on in substitution of a valid paper title. The plea having been set down for argument,
*492] the facts it *assumes must be taken as true; and we are called on to pronounce the law on the facts.

The defence set up is independent of the complainants' case, and purely legal in its character, in so far as the bar is sought to protect the possession of the lands, supposing this to be the relief prayed. This is not the case, however; the bill seeks—1. An account of the rents and profits; 2. An account of the proceeds of such parts of the lands as the corporation has sold; 3. The production of the title papers and rent-rolls, appertaining to the estate; and 4. A discovery of the amount of the proceeds by rents and sales, through a series of years; treating respondents as trustees for the complainants. As these are incidents to the title, if it is confirmed in fee-simple to the respondents, by force of the statute of limitations of the state of New York, and the complainants are barred of their recovery at law of the estate, the incidents of rents, proceeds of sales, and discovery of title papers follow the title, aside from the shorter bar of six years in regard to the money demands. At the end of twenty years from 1799, when the adverse possession commenced, if the statute of limitations applied to the case made by the plea, the defendants had a title as undoubted as if they had produced a deed in fee-simple from the true owner, of that date; and all inquiry into their title, or its incidents, was as effectually cut off.

Complainants contend, that in 1722, a devise to a corporation, for the purpose of maintaining religion, was void, where the income from the property bequeathed exceeded two hundred pounds, being contrary to the statute of wills of Henry VIII.; therefore, the will of John Haberdinck was inoperative, and the premises descended to the heir-at-law. Nor could the corporation take by deed more than by will. Having no capacity to take by will or deed, and the operation of the act of limitations being a confirmation of a supposed paper title from some one, of the whole premises, the corporation, in like manner, wanted capacity to take by force of the act of limitations; which would be in equal violation of the statute of Henry VIII. On this presumption, the bill is obviously founded; and it is, in fact, the only question in the cause.

*493] *Respondents insist, on the other hand: 1. That the devise was to a charity, and therefore not embraced by the statute of Henry VIII. 2. That bodies corporate are excluded from the statute of Henry VIII., by the statutes of the state of New York; 3. That there is no allegation in the

bill, that the income of the devised premises was worth more than two hundred pounds, in 1722, when the will took effect; and if the will was valid then, it continued to be valid afterwards, according to 2 Inst. 722; 4. That we are bound to presume, after the lapse of more then a century, the existence of a colonial statute authorizing the bequest; and which has been destroyed by time and the accidents of the revolution in the government. These considerations are mere incidents in the controversy as it is presented to us; none of them seem to have been conclusively settled by the decisions of the state courts of New York, and therefore, we express no opinion upon them. It may be true, that in 1722, the corporation of the Protestant Dutch Church could not take, and yet in 1799, it was enabled by the statutes of New York to take and hold the premises. If so, time could confirm the title, because of the newly-created capacity.

Be this as it may, we are bound to conform to the decisions of the state courts of New York, in the construction of their acts of limitation. Such is the settled doctrine of this court. *Green* v. *Neal*, 6 Pet. 291. The chancellor of New York held, in *Bogardus* v. *Trinity Church*, 4 Paige 178, that the corporation could make defence, and that it did take title by force of the act of limitations. The court of errors held the same, in *Humbert* v. *Trinity Church*, 24 Wend. 587. As no distinction is made by the state courts of New York between a religious corporation and an individual, in regard to capacity to hold by force of the statute, none can be taken by this court.

It is only left, then, to consider whether a naked possession is protected by the statute, to the extent of the substantial and actual inclosures, for all the time necessary to form the bar. The statute of New York is in substance the same as that of the 21 Jac. I.; that such a possession as is set forth by the plea is protected by the statute, has been the settled doctrine of the courts of that state for more than thirty years, if it ever was doubted. *We need only refer to *Jackson* v. *Shoemaker*, 2 Johns. 234; *Jackson* v. *Wheat*, 18 Ibid. 44; *Jackson* v. *Woodruff*, 1 Cow. 285; and *Jackson* v. *Olitz*, 8 Wend. 440. These cases were at law, and the statute is equally binding on the courts of chancery, where the complainants seek to have an account of rents and profits accruing out of a legal estate. This is also settled by the state courts of New York, in 4 Paige 179, by the chancellor; and in 24 Wend. 587, above cited, by the court of errors. We, therefore, concur with the circuit court, that the first part of the plea must be sustained, for so much as it covers. [*494

The second part of the plea, averring that all the parts of the lands sold had been conveyed, and the moneys received by the corporation more than forty years before the plea was filed, we deem a conclusive bar. The bill seeks the money, and six years barred relief; this being a concurrent remedy with an action at law.

For all the lots disclaimed by the answer and plea, the bill was properly dismissed; there was no probable cause for retaining is to obtain an account from the respondents; obviously, no claim exists that can be made available for complainants in regard to this portion of the property. Mitf. Plead. 319. We order the decree below to be affirmed.

Decree affirmed.

*Jeremiah Carpenter, Plaintiff in error, *v.* The Providence Washington Insurance Co., Defendant in error.

Fire-insurance.—Mortgagor and mortgagee.—Assignment of policy.—Questions of general commercial law.—Notice of other insurance.

Action on a policy of insurance on the "Glenco Cotton Factory," against loss or damage by fire; the policy was dated the 27th day of September 1838, and was to endure for one year; the policy contained a clause, by which it was stipulated by the assured, that if any other insurance on the property had been made, and had not been notified to the insurers, and mentioned in or indorsed on the policy, the insurance should be void; and if afterwards any insurance should be made on the property, and the assured should not give notice of the same to the insurers, and have the same indorsed on the policy, or otherwise acknowledged by the insurers in writing, the policy should cease; and in case any other insurance on the property, prior or subsequent to this policy, should be made, the assured should not, in case of loss, be entitled to recover more than the portion of the loss should bear to the whole amount insured on the property; the interest of the assured in the property not to be assignable, unless by consent of the insurers, manifested in writing; and if any sale or transfer of the property without such consent was made, the policy to be void and of no effect; on all the policies of insurance made by the insurance company, there was a printed notice of the conditions on which the insurance was made. The declaration alleged, that Carpenter was the owner of the property insured, and was interested in the same to the whole amount insured by the policy, and that the property had been destroyed by fire; the facts of the case showed, that the property had been mortgaged for a part of the purchase-money, and the policy of insurance was held for the benefit of the mortgagor; another insurance was made by another insurance company, but this was not communicated in writing to the Providence Washington Insurance Company; nor was the same assented to by them, nor was a memorandum thereof made on the policy.

No doubt can exist, that the mortgagor and the mortgagee may each separately insure his own distinct interest in property against loss by fire; but there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein; on the other hand, if the premises are destroyed by fire, before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. Upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor; the payment of the insurance is not a discharge of the debt, but only changes the creditor.

When the insurance is made by the mortgagor, he will, notwithstanding the mortgage or other incumbrance, be entitled to recover the full amount of his loss, not exceeding the insurance, since the whole loss is his own. The mortgagee can only insure to *the amount of his
*496] debt; whereas, the mortgagor can insure to the full value of the property, notwithstanding any incumbrances thereon.

An assignment of a policy by the assured only covers such interest in the premises as he may have had at the time of the insurance, and at the time of the loss; if a loss takes place after the policy has been assigned, the assignee alone is entitled to recover; the rights of the assignee under the policy cannot be more extensive than the rights of the assignor. Columbian Insurance Company *v.* Lawrence, 10 Pet. 507, 512; 2 Ibid. 25, 49, cited.

Policies of insurance against fire are not deemed in their nature incidents to the property insured, but they are mere special agreements with the persons insuring against such loss or damage as they may sustain; and not the loss or damage that any other person having an interest as grantee, or mortgagee, or creditor, or otherwise, may sustain, by reason of the subsequent destruction by fire.

The public have an interest in maintaining the validity of the clauses in a policy of insurance against fire; they have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential to the present state of the country for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses.

Questions on a policy of insurance are of general commercial law, and depend upon the con-

struction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs.

The circuit court charged the jury, that at law, whatever might be the case in equity, mere parol notice of another insurance on the same property was not a compliance with the terms of the policy; and that it was necessary, in the case of such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed on the policy; otherwise the insurance was to be void and of no effect: *Held*, that this instruction of the circuit court was correct; it never can be properly said, that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires; without which it declares that the policy shall be void and of no effect.[1]

ERROR to the Circuit Court of Rhode Island.

The case was argued by *Whipple*, for the plaintiff in error; and by *Green* and *Sergeant*, for the defendants in error.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of Rhode Island. The original action was brought by Carpenter, the plaintiff in error, against the Providence Washington Insurance Company, the defendants in error, upon a policy of insurance, underwritten by the insurance company, of $15,000, "on the Glenco Cotton Factory, in the state of New York," *owned by Carpenter, against loss or damage by fire. The policy was dated on [*497 the 27th of September 1838, and was to endure for one year. Among other clauses in the policy are the following: "And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." "And if the said insured, or his assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property." "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall henceforth be void and of no effect." Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: "Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect.

[1] Where the conditions require the assured to give notice of any subsequent insurance, the policy is avoided by a failure to give such notice, though the second policy be voidable by reason of a failure to indorse the prior insurance upon it. Bigler *v.* New York Central Ins. Co., 22 N. Y. 402. S. P. Landers *v.* Watertown Fire Ins. Co., 86 Id. 414. And see Gill *v.* International Ins. Co., 1 Dill. 443.

The declaration averred, that during the continuance of the policy, he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came on for trial upon the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exceptions to certain instructions refused, and
*498] other instructions given by the *court in certain matters of law arising out of the facts in proof at the trial; and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions.

The facts which were in proof at the trial were very complicated; but those which are material to the present inquiry will be, as briefly as they may be, here stated. The premises were originally owned in equal moieties by Egbert and Epenetus Reed. In June 1835, Epenetus Reed conveyed his moiety to H. M. Wheeler, who gave a bond and mortgage on the premises to secure $8000 of the purchase-money to Epenetus Reed. On the 17th of October 1836, Egbert Reed sold his moiety of the premises to Samuel G. Wheeler, and the latter thereupon gave a bond and mortgage for the sum of $10,000 (the purchase-money) to Epenetus Reed; and on the same day, he, Wheeler, made an additional agreement, under seal, with Epenetus Reed, by which he covenanted that he would effect a policy of insurance upon the property, in the name of himself, or of himself and Henry M. Wheeler, for the sum of at least $10,000, and assign the same to him, Reed, as collateral security to the said last bond and mortgage, and would annually renew the policy, or effect a new one, and keep each assigned to Reed as security, in such way and manner as that the said property shall be insured for at least the sum of $10,000, and the policy held by him as collateral security as aforesaid; and if he neglected so to insure and assign for the space of ten days, then, that Reed might do the same, at the expense of Wheeler, and add the premium which he might be compelled to pay, with interest thereon, to his said bond and mortgage, and to collect the same therewith, or that Wheeler would pay the same to him in such other way as he might desire.

From the 17th of October 1836, to the 6th of December 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory, in equal moieties, and transacted business under the firm of Henry M. Wheeler & Company. On that day, Samuel G. Wheeler sold his moiety to Jeremiah Carpenter. On the 18th of April 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a
*499] *mortgage on the premises from Henry M. Wheeler and wife, dated in June 1835, to Epenetus Reed, on which there was then due $6000, which Carpenter assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss, the amount to be paid to him. That policy expired on the 27th of September 1838, the day on which the policy, upon which the present suit is brought, was effected.

It is proper further to state, that other policies on the same factory had

been effected, and renewed from time to time, from December 12th, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence, called the American Insurance Company; and among these was a policy effected by way of renewal, on the 14th of December 1837, in the name of Henry M. Wheeler & Company, for $6000, for the benefit of Henry M. Wheeler and Carpenter (who were then the joint owners thereof), payable, in case of loss, to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April 1838, of his moiety, having been notified to the American Insurance Company, the latter agreed to the assignment; and the policy thenceforth became a policy for Carpenter, payable, in case of loss, to Epenetus Reed. And on the 23d of May 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy, thus effected on the 14th of December 1837, was (as the Washington Insurance Company assert) not notified to them at the time of effecting the policy made on the 27th of September following, and declared upon in the present suit; nor was the same ever mentioned in, or indorsed upon, the same policy; and upon this account, the company insist, that the present policy is, pursuant to the stipulations contained therein, utterly void.

Subsequently, viz., on the 11th of December 1838, the American Insurance Company renewed the policy of 14th of December 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also, the Washington Insurance Company insist, that their *policy of the previous 27th of September 1838, is, according to the stipulations [*500 therein contained, utterly void.

It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the $6000 insured thereby; and that at the November term 1839, of the circuit court, the company set up as a defence, that there was a material misrepresentation of the cost and value of the property in the factory insured, made to them at the time of the original insurance; and it being intimated by the court, that if such was the fact, it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action, before verdict.

The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion which we are to pronounce, to recite them at large, *in totidem verbis;* since the points on which they turn admit of a simple and exact exposition.

The first instruction asked the court, in effect, to say, that the original policy of the American Insurance Company, made in December 1836, and the several renewals thereof, although made in the name of the Wheelers (the mortgagors), being in fact for the use and benefit of Epenetus Reed, the mortgagee, were, for all substantial purposes, the policy of Reed, and could never inure to the benefit of the Wheelers, or of Carpenter; and that neither the Wheelers nor Carpenter had any such interest therein as rendered it incumbent on them to give any notice of its existence to the

Washington Insurance Company; and that it was, to all intents and purposes, as if Reed had effected the said policy in his own name, upon his specific interest as mortgagee. This instruction the court refused to give; and on the contrary, instructed the jury, that as by the memorandum made on that policy, on the 14th of December 1837, the policy was, by the consent of all the parties interested therein, and of Carpenter, to be for the benefit of Carpenter, he, Carpenter, became interested therein, legally or equitably; and that notwithstanding the assignment thereof by the Wheelers to Carpenter, and of Carpenter to Reed, the policy, and the renewals
*501] thereof, ought to have been notified to the *Washington Insurance Company, at the time when the policy declared on was underwritten, if the policy was then a subsisting policy, and was so treated by Carpenter and the American Insurance Company, and Carpenter had a legal or equitable interest therein, and was entitled to the benefit thereof.

The question, then, is here broadly presented, whether the policy of the American Insurance Company is, under all the circumstances, to be treated as a policy exclusively for Reed, the mortgagee, or whether it is to be treated as a policy on the property of, and for the benefit of, the mortgagors. No doubt can exist, that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases, from that time, to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire, before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But, then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor. Far different is the case where an insurance is made by the mortgagor on the premises, on his own account; for, notwithstanding any mortgage or other incumbrance upon the premises, he will be entitled to recover the full amount of his loss, not exceeding the insurance; since the whole loss is his own, and he remains personally liable to the mortgagee or other incumbrancer, for the full amount of the debt or incumbrance.

These principles we take to be unquestionable, and the necessary result of the doctrines of law applicable to insurances by the mortgagor and the
*502] mortgagee. If, then, a mortgagor procures *a policy on the property against fire, and he afterwards assigns the policy to the mortgagee, with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due, in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the

insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy. Annother essential difference between the case of a mortgagor and that of a mortgagee (which has been already hinted at) is, that the latter can insure for himself, at most, only to the extent of his debt, whereas the mortgagor can insure to the full value of the property, notwithstanding any incumbrances thereon, for the reasons already stated.

Some of these principles are completely illustrated by the terms of this very policy of the American Insurance Company; and the like clauses are to be found in the policies of the Washington Insurance Company, now under consideration. Thus, although it is expressly provided, "that the assured may assign this policy to Epenetus Reed;" yet it is, at the same time, provided, that "the interest of the assured in this policy is not assignable, unless by the consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." Now, the interest here last spoken of, manifestly, is the interest of the owner in the premises insured, and not merely his interest in the policy.

But independently of any special clauses of this sort, it is clear, both upon principle and authority, that an assignment of a policy by the assured only covers such interest in the premises as he may have at the time of the insurance, and at the time of the loss. It is the property of the assured, and his alone, that is designed to be covered; and when he parts with his title to the *property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the [*503 assignee cannot be more extensive under the policy than the rights of the assignor; and as to the grantee of the property, he can take nothing by the grant in the policy, since it is not, in any just or legal sense, attached to the property, or an incident thereto. This doctrine was laid down in very expressive terms by Lord Chancellor KING, so long ago as in the case of *Lynch* v. *Dalzell*, 4 Bro. P. C. 432 (Tomlin's edit.); 2 Marsh. Ins. b. 4, ch. 4, p. 803, which was an insurance against fire. "These policies," said he, "are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment, but they are only special agreements with the persons insuring, against such loss or damage as they may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently, can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferrible from one to another, without the express consent of the office." Now, this case is the stronger, because it was a case where not only the policy but the premises had been assigned to the very parties who sought the benefit of the insurance. The same doctrine was asserted by Lord HARDWICKE, in the case of *The Sadlers' Company* v. *Badcock*, 2 Atk. 554, where there had been an assignment of the policy,

after the insured ceased to have any interest in the premises. Upon that occasion, Lord HARDWICKE said, "I am of opinion (that) the insured should have an interest or property at the time of the insuring and at the time the fire happens." "The society are to make satisfaction in case of any loss by fire. To whom, or for what loss, are they to make satisfaction? Why! to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore, must mean insuring the person from damage;" and he cited with approbation the very language of Lord KING, already stated, in *Lynch* v. *Dalzell.* The authority of these cases was fully recognised and acted upon by this court in the case of the *Columbian Insurance Company of Alexandria* v. *Lawrence*, 10 Pet. 507, 512, where the *court said, *504]
"We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor, on the mortgaged premises, in case of a loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract, for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

For these reasons, it is apparent, that Epenetus Reed, as mortgagee, and merely in that character, can have no interest in or right to the policy in the American office, now under consideration. The insurance is not made by him, or in his name, or upon his account. The policy was originally made in December 1836, for Henry M. Wheeler & Company, who were then the owners of the factory; and by its very terms, it is an insurance for them against loss or damage by fire. When the policy was renewed in December 1837, it was so renewed for the benefit of Henry M. Wheeler and Jeremiah Carpenter, who had then become the joint owners thereof. When, subsequently, in April 1838, Carpenter became the sole owner of the premises, the company agreed to the transfer and assignment of the entirety to Carpenter, so that henceforth it became a policy upon his sole property, for his account and benefit, in the same manner and with the same legal effect, as if the policy had been renewed in his own name.

But it is said, that there is a clause in the original policy, and it is equally applicable to the renewals, "that the assured may assign this policy to Epenetus Reed." And the argument is, that this liberty to assign, when the assignment to Reed was actually executed, transferred the whole interest in the property insured, as well as in the policy, to Reed, and made the policy, to all intents and purposes, a policy for the sole benefit of Reed, as mortgagee, as much as if the insurance had been made in his own name. To this suggestion, several answers may be made, each of which is equally fatal to the construction contended for. In the first place, although an assignment to Reed was authorized by the policy, it was never disclosed to the American Insurance Company, for what purposes or objects the assignment was to be made, whether to Reed as trustee or agent of the assured, or for *fugitive and temporary purposes, or as a security for debts, or *505]
whether it was designed to be absolute and unconditional. Neither was it disclosed to the company, that Reed was, in point of fact, a mortgagee; nor were the company requested to insure his interest, as mortgagee, or to make the insurance exclusively upon his interest and for his account. Now, as has been already seen, an insurance for a mortgagor, and one for

a mortgagee, involve very different considerations, responsibilities, rights and duties; and the company might well be willing to make an insurance upon the property on account of the mortgagors, when they might be unwilling to make any on account of the mortgagee. And it is clear, upon principle, that no policy can or ought to be deemed a policy exclusively upon the interest of the mortgagee, unless the company have notice that it is so designed, and they assent to it. A mortgage-interest is, without doubt, an insurable interest; but then it is a special interest, and should be made known to the underwriters. Mr. Marshall, in his Treatise on Insurance against Fire, says, "It is not necessary, however, in all cases, in order to constitute an insurance interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, an agent, with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified. 2 Marsh. Ins. b. 4, ch. 2, p. 789. This language was quoted with approbation by this court, in the case of the *Columbian Insurance Company* v. *Lawrence*, 2 Pet. 25, 49, and the reason for it is there given by the court. "Generally speaking," said the court, "insurances against fire are made, in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest of the assured; and it would seem, therefore, to be always material, that they should know how far this interest is engaged in guarding the property from loss." Now, since there is no pretence to say, that the interest of Reed, as mortgagee, was disclosed *to the company, or that the company agreed to insure his interest as mortgagee, and that only; it would seem to follow, that the policy [*506 cannot be construed to operate in the manner propounded by the instruction prayed by the plaintiff.

In the next place, the policy itself, upon its very terms, admits of no such interpretation; and indeed, requires a different interpretation, to give due effect to those terms. The policy, as has been already stated, is in the name of the owners, and for their account, and on their property. If it was designed solely for Reed, why was he not named, and he alone named as the assured? How can any court be at liberty, without other explanatory words, to construe a policy made by A. in his own name, on his property, to be, not a policy on his own interest, but on the interest of B. who is a stranger to the policy? The language of Lord KING and Lord HARDWICKE, and of this court, in the cases already cited, show conclusively, that policies of this sort are not deemed in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring, against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest, as grantee, or mortgagee, or creditor, or otherwise, may sustain, by reason of a subsequent destruction thereof by fire. It would seem, then, repugnant to the terms of this policy, to construe it to be, not what it purports to be, an insurance for the owner of the property, but an insurance for an undisclosed creditor or mortgagee. It would

materially change the language, the objects and the obligation of the parties thereto.

In the next place, it would, in our judgment, be inconsistent with the manifest intention, as well of the assured, as of Reed, to give it such an interpretation. The agreement between Samuel G. Wheeler and Reed, of the 17th of October 1836, demonstrates, in the clearest manner, that the policy was to be effected by the Wheelers, as owners, and to be assigned, after it was effected by them, to Reed, as collateral security for his bond and mortgage; and it was only upon their neglect to procure such insurance and assign the policy, that Reed was to be at liberty to do the same at their expense. The language of the instrument is, "I do hereby agree with Epenetus Reed, &c., that I will effect a policy of insurance upon the said property, in the name of myself, or of myself *and Henry M. Wheeler, *507] for the sum of at least ten thousand dollars, and assign the same to him as collateral security to said bond and mortgage; and that I will annually renew the said policy, or effect a new one, and keep each assigned to him as security, &c., and the policy held by him as collateral security; and if I neglect so to insure and assign for the space of ten days, then, that said Reed may do the same at my expense," &c. Now, language more direct than this can scarcely be imagined, to express the intention of the parties, that the insurance was to be made in the name of the owners, upon their interest in the property, and for their account, and the policy to be assigned as collateral security to Reed. Not one word is said, that the insurance was to be solely and exclusively for Reed, as mortgagee; for in such a case, he would hold the policy as a principal, and not as a collateral security. It is obvious, from the language, also, that Reed was not to be the absolute owner of the policy, as he would be, if made for him exclusively as morgagee, but he was to hold it as collateral security. If, then, the debt of Reed should be paid or extinguished, in the whole or in part, would not the right of the owners correspondently attach to the policy? If the whole debt was paid, would they not be entitled to a re-assignment thereof? Yet, unless, in such a case, the policy attached to the property for their own account and benefit, the re-assignment would be a mere nullity. To us, it seems beyond all reasonable doubt, that the policy, under this agreement, was designed by the parties to be on account of the owners and for their benefit, and that it was to be only collateral security to Reed, to the extent of any interest he might have therein, in case of loss by fire. In this view, it operated as a security to the owners, against the entire loss; in any other view, they would only change their creditors, upon any loss, from Reed to the underwriters.

Besides, in point of fact, the policy must have its effect and operation, from the time of its execution, and not otherwise. The language of the policy is, "that the assured may assign this policy to Epenetus Reed;" not that this policy shall now be for Epenetus Reed, or on his interest. The owners, then, had an option, whether to assign or not. If they never had assigned the policy to Reed at all, and a loss had occurred, would not the loss have been payable to the owners? In point of fact, the policy, although *made on the 12th of December 1836, was not assigned to Reed *508] until the 21st of January 1837. In whom did the interest, then, originally, and in the intermediate time, vest, under the policy? Clearly,

in the owners; for they, and they only, had any interest in the property or the policy, until the assignment was made. The authorities all hold, that the party insured must have an interest, at the time of the making of the policy, as well as at the time of the loss; and if Reed had no interest, upon which the policy would attach, by its terms, when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity. The subsequent renewals were to the same effect, and for the same purposes and parties, as the original policy. Carpenter, after he became sole owner, did not assign the policy to Reed until the 23d of May 1838, more than five months after the renewal, and more than one month after the conveyance of the whole property to himself. Now, the question may be here again asked, whether if the loss had occurred before these assignments, a recovery upon the policy might not have been had by Carpenter, in his own name, and for his own account? We think, that the question must be answered in the affirmative; and if so, then it demonstrates, that the policy made in the name of the owners, was for their account and benefit; and payment only was, in case of loss, to be made to Reed. For these reasons, we are of opinion, that the first instruction asked of the court was rightly refused; and that the instruction given was entirely correct.

The second instruction asked, proceeds upon the ground, that although the policy of the American Insurance Company, of the 6th of December 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company, at the time of underwriting the policy declared on. The court refused to give the instruction; and on the contrary, instructed the jury, that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting *and valid policy, and had never, in fact, been avoided, but was still held by the [*509 assured as valid; then, that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void.

We are of opinion, that the instruction, as asked, was properly refused; and that given was correct. It is not true, that because a policy is procured by misrepresentation of material facts, it is therefore to be treated, in the sense of the law, as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters, upon due proof of the facts; but until so avoided, it must be treated, for all practical purposes, as a subsisting policy. In this very case, the policy has never, to this very day, been avoided or surrendered to the company. It is still held by the assured; and he may, if he pleases, bring an action thereon to-morrow; and unless the underwriters should, at the trial, prove the misrepresentation, he will be entitled to recover. But the question is not, how the policy may now be treated by the parties, but how was it treated by them, at the time when the policy declared on was made. It was then a subsisting policy, treated by all parties as valid, and supposed by the underwriters to be so. The misrepresentation does not then seem to have been known to the American

Insurance Company. It was an extrinsic fact; and if known to the American Insurance Company, it certainly was not known to the Washington Insurance Company. How were the latter to arrive at any knowledge of the fact of misrepresentation; and how were they to avail themselves of the fact, if the American Insurance Company should not choose to insist upon it? Nor is it immaterial, in the present case, as was suggested at the bar, that the present plaintiff now seeks to avail himself of his own misrepresentation, or that of those under whom he claims, to protect himself against his own *laches* in not giving notice of the policy to the underwriters. And it may well be doubted, whether a party to a policy can be allowed to set up his own misrepresentations, to avoid the obligations deducible from his own contract. Be this as it may, it is, in our judgment, free from all reasonable doubt, that notice of a voidable policy must be given to the underwriters; for such a case falls within the words and the meaning of the stipulations in the policy. It is a prior policy, and it has a legal existence until avoided.

*510] *Indeed, we are not prepared to say, that the court might not have gone further, and have held, that a policy, existing and in the hands of the assured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts, should have been notified to the underwriters; even although, by proofs, afforded by such extrinsic facts, it might be held, in its very origin and concoction, a nullity. And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain, whether there still remains any such substantial interest of the assured in the premises insured, as will guaranty on his part, vigilance, care and strenuous exertions to preserve the property. To quote the language of this court, in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assured. Besides, in these policies, there is an express provision, that in cases of any prior or subsequent insurances, the underwriters are to be liable only for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, is a fact perfectly known to the assured, and not easily or ordinarily within the means of knowledge of the underwriters. The public, too, have an interest in maintaining the validity of these clauses, and giving them full effect and operation. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential, in the present state of our country, for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases, by ordinary good faith and ordinary diligence on the part of the assured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises

*511] are *within the personal observation and knowledge of the under-

writers. Such a course would necessarily have a tendency to enhance premiums; and to make it difficult to obtain insurances, where the parties live, or the property is situate, at a distance from the place where the insurance is sought.

But, be these considerations as they may, we see no reason, why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation, according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for those stipulations, would not have been entered into. We are then of opinion, that there is no error in the second instruction. On the contrary, there is strong ground to contend, that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable.

We have not thought it necessary upon this occasion to go into an examination of the cases cited from the New York and Massachusetts reports, either upon this last point, or upon the former point. The decisions in those cases are certainly open to some of the grave doubts and difficulties suggested at the bar, as to their true bearing and results. The circumstances, however, attending them, are distinguishable from those of the case now before us, and they certainly cannot be admitted to govern it. The questions under our consideration, are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external *sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment. [*512

The third instruction prayed the court to instruct the jury, that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that "was, in law, a compliance with the terms of the policy." The court refused to give the instruction as prayed; but instructed the jury, that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said, that the stipulation in the policy is complied with, when there has been no

such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.

The fourth and last instruction given by the court, stands upon the same considerations as those already mentioned; and it would be a useless task to repeat them. If the other instructions given by the court were correct, it is admitted, that this cannot be deemed erroneous. Upon the whole, our opinion is, that the judgment of the circuit court ought to be affirmed, with costs.

Judgment affirmed.[1]

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*513] *Eleaser Carver, Plaintiff in error, *v.* Joseph A. Hyde and others, Defendants in error.

Patent law.

Action for damages for a violation of a patent for an improvement on the cotton-gin. The charge of the circuit court of Massachusetts, upon the facts in the case, was in favor of the defendants; and the judgment in favor of the defendants on the verdict of the jury was held to be correct.

Error to the Circuit Court of Massachusetts. The plaintiff in error instituted a suit for the recovery of damages for the infringement of his patent for an improvement in the use of cotton-gins. The circuit court, on the verdict of the jury, gave a judgment for the defendants. A bill of exceptions having been tendered by the plaintiff to the charge of the court, on the facts, in favor of the defendant, given by the court; the plaintiff prosecuted this writ of error.

The case was submitted to the court, on printed arguments, by *Dexter*, for the plaintiff in error; and by *Fletcher* and *Philips*, for the defendants.

Taney, Ch. J., delivered the opinion of the court.—This case is brought here by writ of error, directed to the circuit court of the United States for the district of Massachusetts. It is an action by the plaintiff in error against the defendants, to recover damages for the infringement of a patent-right, obtained by the plaintiff on the 16th of November 1839. The patent is in the usual form, and the question before us depend upon the construction of the specification, which is in the following words:

"Be it known, that I, Eleazer Carver, of Bridgewater, in the county of Plymouth, and state of Massachusetts, have invented a certain improvement in the manner of forming the ribs of saw-gins, for the ginning of cotton; and I do hereby declare that the following is a full and exact description thereof. In the cotton-gin, as heretofore known and used, the fibres of the
*514] cotton are drawn by the teeth of circular saws, through *a grating formed of a number of parallel bars or ribs, having spaces between them sufficient to allow the saws to pass, carrying the fibres of the cotton with them (which are then brushed off by a revolving brush), but not wide enough to let the seeds and other foreign substances pass through. Above the saws, the ribs come in close contact, thus forming a shoulder at the top of the space between them. Various forms have been given to the bars or

[1] See a further decision between the parties, on a bill in equity subsequently filed against the insurance company, in 4 How. 185.

ribs, with a view to procure a free passage of the cotton ; but the cotton-gin, as heretofore made, has been always subject to the inconvenience of the grate becoming choked by hard masses of cotton and motes, or false seeds, collecting in the upper part of the spaces between the ribs, and impeding the action of the saws, and also preventing the mass of cotton which is drawn by the saws up to the top of the spaces, but not drawn through them, from rolling back freely, so as to pass again over the saws, as it should do. My improvement, which I am about to describe, is intended to obviate these difficulties ; and it consists in giving a new form to the ribs composing the grate. Instead of making the ribs of a bar of iron of equal thickness throughout, so that the upper and under surfaces shall be parallel, I so form the rib, that at the part where the saws pass through, carrying the cotton with them, the space or depth between the upper and outer surface, and the lower or inner surface, shall be greater than the thickness of the rib in other parts has heretofore been, or needs to be, and so great as to be equal to the length of the fibre of the cotton to be ginned, so that the fibre shall be kept extended between the ribs for about its full length, while it is drawn through them by the saws. This mill, of course, requires, either that the rib should be as thick at that part as the length of the fibre, or that the rib should be forked or divided, about that part, so that the upper or outer surface, and the under or inner surface shall diverge to that distance of each other, instead of being parallel, as formerly, when the rib was made of one bar of uniform thickness. This under or inner surface then takes a new direction upwards, and slopes towards the upper or outer surface, until the two surfaces meet above the periphery of the saw. This last-described part of the under surface is fastened against the framework of the gin. The operation of this improvement is, that those fibres of *the cotton which are so firmly caught by the teeth of the saws as to be disengaged from the mass [*515
of the cotton to be ginned, are drawn out to their full length, and pass clear through the grate, and are then brushed off by the revolving brush, while the fibres that are drawn into the grate, but not caught by the teeth of the saws firmly enough to be carried quite through, are disengaged, and pass up to where the under surface meets the upper surface, above the saws, and finding no obstruction there, pass back out of the grate, without choking it, and roll down again with the mass of unginned cotton, and are caught below by the saws, and carried up again, and so on, until all the fibres are drawn through."

The specification then proceeds to describe the invention more particularly, by referring to and explaining the drawings annexed to it, showing the advantages of his improvement, the manner of arranging the ribs in the gin, and the mode of inserting and fastening them in the framework. This description could not be comprehended without an extra drawing ; nor is it necessary, in order to understand the questions of law in dispute between the parties ; it is therefore omitted. After giving this description, the specification states the improvement, of which the patentee claims to be the inventor, as follows :

" Having thus described my improved rib and its advantages, I now claim, as my invention, and desire to secure, by letters-patent, the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at the part where the cotton is drawn through the

grate, so that it shall be equal to the length of the fibre of the cotton to be ginned (whether this be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form) ; and I also claim, as part of the said improvement, the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface, above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs, as above described."

At the trial in the circuit court, the plaintiff in error, after having produced his patent, with the schedule annexed to it, offered in evidence, by the testimony of witness skilled in the *art, that the rib described in *516] the plaintiff's specification was a new and useful improvement ; that the fastening of the rib to the framework in the manner therein stated, had nothing to do with the ginning, but was only necessary to keep the rib firm ; that the rib of the defendants was, substantially in principle, like that of the plaintiff, and operated in the same manner, and produced the same effect ; and that, in their opinion, it differed from the plaintiff's rib only by taking away a part which was wholly immaterial in the operation of ginning.

The defendants then produced witnesses skilled in the art, who testified that the ribs of the defendants did not substantially operate in the same manner with the plaintiff's, but were different in form and principle, and proceeded to state the particulars in which they differed ; and testified, that the defendants' ribs were entirely detached from the breast band, and stood out in front of it, like the bar of the "Edenton grate," which was known and in use long before the plaintiff's ; and that the front and back surfaces of the defendants' ribs did not slope and meet at the upper end above the saws, as the plaintiff described his to do, and was not shaped as the plaintiff's was exhibited and described in his drawings, specification and claim.

"Whereupon, the defendants' counsel insisted, that the ribs of the defendants were, according to the whole evidence, substantially different from those described and claimed by the plaintiff, not only because, as the counsel alleged, it appeared by the whole of said evidence, that in the defendants' said ribs, no part of the under surface sloped upwards, and met the upper surface above the periphery of the saw, and was there fastened against the framework of the gin ; but also, in the other particulars above described. But the plaintiff's counsel insisted, that said ribs were substantially alike, in all respects ; and that in the rib of the defendants, the under surface did, according to said evidence, in fact, slope upwards, and meet the upper surface above the periphery of the saw, but that it was not necessary to the plaintiff's invention, as described and claimed in his said specification ; nor was it essential to the said invention, in fact, that the under surface of the rib should be fastened against the framework of the gin, where the two surfaces meet, above the periphery of the saw. *And the presiding *517] judge who sat at the trial aforesaid, did then and there declare and deliver his opinion to the jury aforesaid, as follows, viz : That to entitle the plaintiff to maintain the action and issue aforesaid, on his part, it was necessary for the jury to be satisfied, that the defendants had substantially violated and infringed the patent-right of the plaintiff, as set forth and described in his patent. That if the defendants used only such

part of the said patented improvement as was known and used before his supposed invention, it was no violation or infringement thereof; that the improvement of the plaintiff, as specified and summed by him, was in the following terms, viz: 'I now claim as my invention, and desire to secure by letters-patent, the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the lenght of the fibre of the cotton to be ginned (whether this be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form); and I also claim as part of the same improvement, the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface, above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs, as above described.' That the true construction and interpretation of the specification and summing is, that it claims and states as a substantial part of the improvement, not only the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface thereof, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned, in the manner above stated, but it also claims and states as a substantial part of the same improvement, the sloping up of the lower and inner surface of the rib, so as to meet the upper or outer surface, above the saws, leaving, when the rib is inserted in the framework, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs, as described in the same specification; and that thereby the fixing or fastening of *the ribs against the framework, in the manner stated in the specification, is made by the patentee a substantial part of the said improvement; so that if the defendants do not fix or fasten the ribs of their machine against the framework, in the manner stated in the specification, either at all, or substantially in the same manner as the patentee, or fix or fasten it only in a manner known and used before the plaintiff's supposed invention, the defendants are not guilty of any violation or infringement of the plaintiff's patent, as stated in the declaration; and with this declaration, the said presiding judge left the said cause to the jury, who thereupon, then and there, returned a verdict for the defendants." [*518

It will be seen by this statement, that the question of law presented by the exception is a very narrow one, and depends altogether on the construction of the specification. And it is difficult to make it understood, without the aid of the drawing or model. The plaintiff considers the invention secured by the patent to consist of the rib only—and of that part of the rib which, by its form, increases the depth between its upper or outer surface and the lower or inner one, at the place where the cotton is drawn through the grate. He insists, that the sloping up of the rib, so as to meet the upper or outer surface of the saw, as well as the manner of fastening it against the framework of the gin, as mentioned in his specification, are not substantial or essential parts of his invention. The question is, whether they are claimed as such by his patent. The circuit court held, that they were so claimed; and we think the opinion was clearly right. They are expressly stated by the patentee to be a part of the improvement for which he asks a

patent, and he describes particularly the smooth and uninterrupted passage upward between the ribs, leaving no break or shoulder between the two surfaces, when the ribs were inserted in the frame, as one of the advantages resulting from his improvement. And this smooth and uninterrupted surface must necessarily depend not merely on the form of the rib, but also in the manner in which it is connected with the framework.

*519] *The rib in question is not an invention to be used by itself, but an improvement upon that portion of the cotton-gin; and is to be used in connection with other parts of a machine which has been publicly known and used a long time. There must, therefore, be some mode of fastening and connecting it with the other machinery; and the effect produced by the rib necessarily depends, in a great degree, upon the mode in which it is arranged and connected with the saw, and the other parts of the machine. He specifies the mode and claims it as part of his invention. According to his statement, his improvement consisted in the form of the rib which increased the depth between the upper and lower surface, at the part where the cotton is drawn through the grate, in the sloping up so as to meet the upper or outer surface, above the saws, and in the smooth and uninterrupted passage produced by the manner in which it was connected with the frame. These three things he represents as constituting his improvement, and they are all combined together in his specification and claim, making together one invention to be used in connection with the other and old machinery of the cotton-gin. And the drawing which accompanies his patent shows the manner in which the rib is sloped and arranged with the saw, and annexed to the frame-work, in order to attain the object of the invention.

Now, the end to be accomplished is not the subject of a patent. The invention consits in the new and useful means of obtaining it. And if the defendant had, by a rib of a substantially different form, or differently arranged with the saw, or not fastened at all to the frame, made an improvement which more effectually secured the object intended to be accomplished by the plaintiff's patent, it would be difficult to maintain, that it could not be lawfully used, because it produced the same result with the plaintiff's invention.

The usefulness of the rib depends altogether, as described in the specification, upon the manner of its connection with the periphery of the saw, and with the frame work. And if, therefore, as was said by the circuit court, the rib made by the defendant was not fastened at all to the frame-work, or in a manner substantially different from the plaintiff's, or in a

*520] manner known and used before the plaintiff's invention, it was no *infringement of his patent. And whether the manner was the same in substance or not, was a question of fact for the jury, and as they found for the defendant, we must assume that it was substantially different. The judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

*James Todd, Thomas Warren, Tristram G. Mitchell, William C. Mitchell and Woodbury Storer, Administrator of Israel Waterhouse, deceased, *v.* Charles Daniel, Complainant and Appellee.

Practice.

Motion to dismiss an appeal: the appellants were the original defendants; after the decree of the circuit court, an appeal was claimed by all the defendants, and allowed by the court; a part of the defendants, who had originally claimed the appeal, before any further proceedings, abandoned it; and the residue of them, excepting Todd, had, since the appeal was filed, abandoned it, and Todd only entered his appearance in the supreme court; the record stood in the names of all the appellants. A motion was made to dismiss the appeal, for irregularity and want of jurisdiction; on the ground, that it could not be maintained in behalf of Todd alone: the court refused to dismiss the appeal.

The proper rule, in cases of this sort, where there are various defendants, seems to be, that all the defendants affected by a joint decree (although it may be otherwise, where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all) should be joined in the appeal; and if any of them refuse or decline, upon notice and process (in the nature of a summons and severance in a writ of error) to be issued in the court below, to become parties to the appeal, then that the other defendants should be at liberty to prosecute the appeal for themselves and upon their own account; and the appeal, as to the others, be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed.

Appeal from the Circuit Court of Maine.

Davies, for the appellee, moved to dismiss the appeal. He stated, that the appeal had been actually entered in the circuit court, in the names of the appellants mentioned on the record; but that there were other defendants in the circuit court, against whom the decree had been rendered, who had not joined in the appeal, not having had any regular notice of such appeal. They were Hayes, Gouch and Westcott. Of the above-named appellants, James Todd alone enters his appearance here, by his counsel, Francis O. J. Smith, Esq., who now brings up the record, and proposes to prosecute the appeal on behalf of Todd, in this court, singly, without any of the rest; *whose names, however (appearing in the record as appellants), are extended on the docket by the clerk. [*522

The counsel for Todd, by writing filed in the case here, February 16th, disclaims and disavows any and all appearance for either of the other defendants named as appellants. The other defendants who joined in the appeal have subsequently abandoned any further prosecution of it; and have given notice to the complainant's counsel to that effect, submitting to the decree, and some of them offering to pay their respective amounts, according to the decree of the circuit court; the last notice by the Mitchells being dated January 28th, 1842, at which time, the appeal here had not been entered, nor the record filed.

Smith, for the appellant, James Todd, opposed the motion.—The only party here actually interested in the appeal is Mr. Todd. Although he had been only an agent in the transaction out of which the controversy involved in this suit arose, the decree of the circuit court affected him as principal, and subjected him to the payment of a considerable sum of money. It was to controvert this claim, that the appeal had been prosecuted. If others, who had been appellants, had withdrawn their appeal, or if some of them

did not enter an appeal, the party who now asks to maintain it, should not be injured by this condition of the case.

STORY, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Maine, in a suit in equity, in which the appellants were the original defendants. After the decree was made, an appeal was claimed by all the defendants, and allowed by the court. A part of the defendants, who originally claimed the appeal, before any further proceedings, abandoned their appeal; and the residue of them, excepting Todd, have, since the session of this court, abandoned their appeal, and Todd only has entered his appearance. But the record stands in the names of all the defendants, as parties appellant. Under these circumstances, the counsel for the appellee has moved the court to dismiss the appeal, for irregularity and want of jurisdiction, upon the ground, that it cannot be maintained on behalf of Todd alone.

*523] There is no doubt, that the appeal having been deserted by all *the original defendants, except Todd, it must be dismissed with costs as to them; but as to Todd, very different considerations must arise. He seeks to reverse the decree in the court below, as erroneous in regard to himself; and the question is, whether he is not entitled to maintain the appeal separately, for his own interest, although it is deserted by all the other defendants. We think that he is; otherwise, an irreparable injury might be inflicted upon him, by an erroneous decree, for which the law would not afford him any redress. The decree in this case is, in fact, against him as principal, and against the other defendants, in aid of him, for distinct portions of the purchase-money received by them under the contract of sale made by Todd, and stated in the bill and answer. The decree may be entirely right in regard to the other defendants, and yet it may be erroneous as to Todd. He has, or at least may have, a distinct and independent interest in the controversy, in respect to which he is entitled to be heard in this court.

The proper rule, in cases of this sort, where there are various defendants, seems to be, that all the defendants affected by a joint decree (although it may be otherwise, where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all) should be joined in the appeal; and if any of them refuse or decline, upon notice and process (in the nature of a summons and severance in a writ of error), to be issued in the court below, to become parties to the appeal, then that the other defendants should be at liberty to prosecute the appeal, for themselves and upon their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed. In the present case, what has occurred is equivalent to such proceedings. All the defendants originally claimed an appeal; some of them have declined to pursue it at all; others have deserted it, since it was pending in this court; and therefore, there is no pretence to say, that any practical inconvenience can occur from Todd's now prosecuting it alone, and since the other defendants have all had notice and declined to interfere, and are content to abide by the original decree.

*524] In the case of *Cox* v. *United States*, 6 Pet. 172, no doubt was entertained by this court, that a writ of error might *be maintained

by the defendants, severally, where the judgment operated, under the laws of Louisiana, as a several as well as joint judgment, although they might have united in the writ of error; and if any one choose not to prosecute it, they others might, upon a summons and severance, proceed alone.

The case of *Owings* v. *Kincannon*, 7 Pet. 399, seems to have been misunderstood at the bar. The objection in that case was not, that one or more of the defendants might not pursue an appeal, for their own interest, if the others refused to join in it, upon due notice, and process for that purpose from the circuit court; but that it did not appear that all the defendants were not ready and willing to join in the appeal, and that the appeal was brought by some of the appellants, without giving the others an opportunity of joining in it, for the protection of their own interest, not only against the appellee, but against the appellants, as their own interests might be distinct from, or even adverse to, that of the appellants; and it was right and proper, that all the parties should have an opportunity of appearing before the court, so that one final decree, binding upon all the parties having a common interest, might be pronounced.

Upon the whole, therefore, our opinion is, that the appeal must be dismissed, with costs, against all the defendants except Todd, and as to him, it is to be retained, for a hearing upon the merits.

Ordered accordingly.

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*Adam S. Mills and others, Plaintiffs in error, *v.* William G. Brown and others, and the County of St. Clair, Defendants in error. [*525

Error to state court.

The supreme court has not jurisdiction on a writ of error to the supreme court of a state, in which the judgment of the court was not, necessarily, given on a point, which was presented in the case, involving the constitutionality of an act of the legislature of the state of Illinois asserted to violate a contract.

The supreme court will not, when requested by the counsel for plaintiffs and defendants in error in a case in which it has not jurisdiction to affirm or reverse the judgment of the court from which the same has been brought by a writ of error to a state court, examine into the questions in the case and decide upon them. Consent will not give jurisdiction; when the act of congress has so carefully and cautiously restricted the jurisdiction conferred upon this court, over the judgments and decrees of the state tribunals, the court will not exercise jurisdiction in a different spirit.

Error to the Supreme Court of the state of Illinois. The plaintiffs in error instituted a suit in the circuit court of the state of Illinois, claiming, by a bill filed in that court, to hold, under an act of the legislature of Illinois, an exclusive right to erect a ferry on the Mississippi river, from land owned by them, to the city of St. Louis, Missouri. The defendants in the suit denied the right thus set up, and claimed the right to set up another ferry, from Illinois to St. Louis, under other acts of the legislature of Illinois. The case was, after a decree of the circuit court in favor of the defendants, carried by the plaintiff by appeal to the supreme court of the state, where judgment in favor of the defendants was affirmed. The plaintiffs prosecuted this writ of error, on the ground, that the act of the legislature of Illinois, passed subsequent to the act which had authorized the

plaintiffs to erect their ferry, was a violation of the contract made with the plaintiffs by the act of assembly.

The decision of the supreme court of Illinois, which was in favor of the defendants, was given upon other questions presented in the case, besides those on the contract made by the first act of the assembly of Illinois. The *526] counsel for the plaintiffs in error proposed to the court *that a decision upon the whole merits of the case should be made, although it might be considered that the court had not jurisdiction of the case on the writ of error; the questions in the case being of great importance, and the parties being willing and desirous to have them decided by this court.

The case was argued by *Bogy* and *Jones*, for the plaintiffs in error; and by *Key* and *Reynolds*, for the defendants.

Taney, Ch. J., delivered the opinion of the court.—This case is brought here by writ of error to the supreme court of Illinois, under the 25th section of the act of 1789. It appears, that the legislature of Illinois, by a law passed March 2d, 1819, granted to a certain S. Wiggins, his heirs and assigns, the right to establish a ferry, upon his own lands, across the Mississippi, near the town of Illinois. By a subsequent act of March 2d, 1839, the legislature of Illinois granted to the county of St. Clair, in that state, and to certain commissioners in behalf of the county, the right to locate a road and landing between Cahokie creek and the Mississippi river, opposite to St. Louis. And the commissioners appointed by this law proceeded to lay out the road and establish the landing to certain lands which belonged to the plaintiffs in error; and to which, by sundry conveyances, they derived title from the said Wiggins. The plaintiffs in error thereupon filed their bill in the circuit court of the state, praying that the county of St. Clair and the said commissioners should be enjoined from further proceedings under the act of assembly last above mentioned. The respondents, the present defendants in error, appeared and demurred generally to the bill; and upon final hearing of the cause, the demurrer was sustained by the court, and the bill dismissed. From this decision, the complainants appealed to the supreme court of the state, where the decree of the circuit court was affirmed. The points proposed to be raised here, are: 1st, Whether the act of assembly of 1819, was not a contract with the said Wiggins, his heir and assigns; and 2d, Whether the act of 1839 does not impair the contract.

*These points are not directly stated in the pleadings, nor are *527] they noticed in the decree of the circuit or supreme court of the state. Yet, if it appeared from the bill, that the court could not have sustained the demurrer, without considering and deciding these points; if they were necessarily involved in the decision of the case, as presented by the bill and demurrer, this court would have jurisdiction, upon the writ of error, although they are not expressly stated in the decrees to have been raised and decided.

It is unnecessary, for the purposes of this opinion, to state the contents of the bill. Indeed, as concerns the question before us, it could not well be understood, without giving the whole bill in its own words. It is sufficient to say, that we have carefully examined it, and are satisfied, that the points proposed to be raised here were not necessarily involved in the judgment

given by the state court. On the contrary, we think it may have come to the conclusion, that the demurrer ought to be sustained on other grounds, and that the bill was not so framed as to require a decision upon these questions.

It is true, that the plaintiffs and defendants in error have both waived all objections to jurisdiction, and have pressed the court for a decision on the principal points. But consent will not give jurisdiction. And we have heretofore, on several occasions, said, that when the act of congress has so carefully and cautiously restricted the jurisdiction conferred upon this court, over the judgments and decrees of the state tribunals, it would ill become the court to exercise it in a different spirit. And it certainly could not be justified in expressing an opinion favorable or unfavorable as to the correctness of this decree, when it has not the power to affirm or reverse it. The writ of error must, therefore, be dismissed.

Writ of error dismissed.

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*Joshua Mauran, Plaintiff in error, *v.* Edward Bullus, Defendant in error. [*528

Construction of guarantee.

In the construction of all written instruments, to ascertain the intention of the parties is the great object of the court, and this is especially the case, in acting upon guarantees.

Generally, all instruments of suretyship are construed strictly, as mere matters of legal right; the rule is otherwise, where they are founded on a valuable consideration.

Error to the Circuit Court of Rhode Island. The case, as stated in the opinion of the court, was as follows:

The defendant in error and Joshua Mauran, Jr., of the city of New York, on the 8th of September 1836, entered into articles of copartnership, in the trade and business of general shipping merchants, and of buying and selling merchandize on their own account, and also on commission for the account of others; which was to continue three years. Mauran agreed to pay into the firm, as capital stock, such sums as he should be able to realize on closing the business of merchandizing, in which he had been engaged. Bullus agreed to pay a sum of from $28,000 to $30,000 in cash. And it was stipulated, that Mauran should not withdraw from the concern more than $2000 per annum, nor Bullus more than $3000, unless by consent of the copartners in writing. Mauran covenanted, that within a reasonable time, he would pay the debts owing by him, out of his private funds; and that on or before the 8th of September instant, he would give to Bullus satisfactory security for the performance of this covenant.

On the 9th of September 1836, the defendant below wrote to Bullus the following letter:

"Mr. Edward Bullus:

Dear Sir,—As you are about to form a connection in the mercantile business in the city of New York, with my son, Joshua Mauran, Jr., under the firm of Mauran & Bullus. And as the said J. Mauran, Jr., *having been, and is at this time prosecuting mercantile business in that [*529 city, on his own account: Now, therefore, in consideration of the same and

at the request of Joshua Mauran, Jr., I hereby agree to bear you harmless in regard to the closing up and settlement of the said Joshua Mauran, Jr.'s former business, and I hereby guaranty you against any loss or liability you may sustain from the former business of said Joshua Mauran, Jr., &c.

JOSHUA MAURAN."

The action was brought by Bullus on this guarantee. On the trial, an account against the old concern of Joshua Mauran, Jr., with the firm of Mauran & Bullus, was given in evidence, from which it appeared, that the old concern was indebted to the new, the sum of $5403.75.

And it was proved by Joshua Mauran, Jr., that the partnership continued until August 1839, when the firm failed. That Bullus paid into the partnership stock $29,695.86, and that the witness was unable to pay anything. That at the time of forming the copartnership, his father, the defendant, was in New York, with whom he conversed relative to the terms of the partnership. That he showed his father the articles, or the minutes from which they were drawn, and was satisfied that the conditions were fully known to him. But the witness stated, that he did not know of his father's having any knowledge that the firm were to settle and pay the debts owing by the witness. The witness stated, that certain loans were made by the firm to him, in anticipation of the receipts from the old concern, which were charged. After the completion of the articles of copartnership, the witness delivered to his father a paper, drawn by the attorney who drew the articles, for his father's signature; his father did not sign the paper, but after his return to Providence, sent the letter of guarantee. Many of the debts of his old concern, the witness stated, became due before sufficient funds could be collected from the same to meet them, and these debts were paid by the firm. That this was a mode of settlement of the accounts of the old concern, not originally contemplated. His father often inquired what the deficiency of the old concern would amount to, but he did not know, to the knowledge of the witness, that the old concern was indebted to the firm. *That the firm, on their failure, assigned all their property and estate to William D. Robinson, including the debts of the old concern, which amounted to the sum of $12,418.95. These debts were credited to the stock of Joshua Mauran, Jr., and at the time, they were all, except one of George Bucklin, of about $1800, considered bad; and that one had been released, though the witness considered him bound in honor to pay it. Various accounts between the firm and Joshua Mauran, junior and senior, and other persons, were given in evidence.

*530]

The defendant introduced his son, Suchet Mauran, as a witness, who stated, that his father brought with him, on his return from New York, about the 8th of September 1836, a bond, binding him to pay the debts of Joshua Mauran, Jr. It was under seal, and the witness read it; and it was, as he believes, in the handwriting of Mr. Bonney, of the city of New York, who wrote the articles of copartnership; that his father would not sign the bond, but sent the letter of guarantee. The bond remained among the loose papers of his father, for some time, but after a diligent search could not be found. That the bond, by its terms, required his father to pay all the outstanding debts of Joshua Mauran, Jr., to his creditors, or to whoever might pay them.

The evidence being closed, the defendant below moved the court to give the following instructions:

1. That said letter of guaranty of the defendant, dated the 9th of September, contained no authority to the said Mauran & Bullus to pay any part of the debts of the said Joshua Mauran, Jr.'s old concern; that if it authorized any payment of said debts, by any person, it was by the said Edward Bullus alone; and that the said Edward Bullus could not recover said sum of $5403.75, or any part thereof; inasmuch as he had paid no part thereof, the whole having been paid by the said Mauran & Bullus. Which instruction the court refused to give, as prayed for; on the contrary, they instructed the jury, that if, from the evidence submitted to them, they were of opinion, that at the time of signing said letter of guaranty, it was understood both by the plaintiff and the defendant, that the plaintiff was to be at liberty to *pay the said debts of the said Joshua Mauran, Jr., either out of his own private funds, or out of the partnership funds of the [*531 firm of Mauran & Bullus; and in either case, the plaintiff was to be entitled to indemnity therefor, under and in virtue of the said letter of guaranty; and if they were of opinion, from the facts in said case, that no funds whatsoever had been paid into the partnership by the said Mauran, Jr., as a part of the capital stock thereof, and that all the capital stock had been paid by the said Bullus; and that he was and still remained a creditor of the firm to the full amount of such capital stock; then the plaintiff was entitled to recover in the present suit, such sums of money as he had paid in discharge of the said debts of Mauran, Jr., either out of his own private funds or out of the funds of the said firm of Mauran & Bullus, for which he had not otherwise received any indemnity.

2. And the defendant's counsel prayed the court further to instruct the jury, that even if said letter had imposed upon said defendant any obligation to pay said debts to the said Edward Bullus, or to the said Mauran & Bullus; that the said Mauran & Bullus, by assigning the uncollected debts due to the said Joshua Mauran, Jr, to the said Robinson, their assignee, and placing them entirely beyond the control, or agency and management of the defendant, had discharged the defendant from any liability which might originally have arisen from said letter of guaranty. Which instruction the court refused to give; but instructed the jury, that if they should find a verdict for the plaintiff, they ought to deduct from the amount of the plaintiff's claim in the writ, the full value of the debts of the said Mauran, Jr., so assigned, and charge it against the claim of the plaintiff, and render a verdict in his favor for the balance only, after such deduction.

To the instructions refused and those given, the defendant excepted. The jury, under the instructions of the court, found a verdict in favor of the plaintiff for $3764.25, on which a judgment was entered. The defendant prosecuted this writ of error.

The case was argued by *Whipple*, for the plaintiff in *error; and [*532 by *Z. Collins Lee* and *Southard*, for the defendant.

Whipple contended, that the obligation of Joshua Mauran, as contained in his letter of guaranty of 9th September 1836, to Edward Bullus, was confined to an agreement to bear him harmless in regard to the closing up and settlement of the former business of Joshua Mauran, Jr., and against

any loss or liability he might sustain from the former business of Joshua Mauran, Jr. It did not contemplate the interference of Joshua Mauran, Jr., in the closing up of that business, nor that any money of the firm of Mauran & Bullus should be taken to pay the former debts of Joshua Mauran, Jr. If, contrary to this understanding of his responsibility, Mr. Bullus had acted otherwise, he had no claim under the letter of guaranty. That the said letter of guaranty, of the 9th of September, contained no authority to Mauran & Bullus, or to Edward Bullus, to pay any part of the debts of Joshua Mauran, Jr.; but that it was a simple indemnity against any damage which the said Edward Bullus might unavoidably sustain from the closing up of the former business of Joshua Mauran, Jr.

The construction given to the letter by the court below, imposed upon the defendant a present liability for the whole amount of the debts of Joshua Mauran, Jr., whatever the amount might be. Whereas, the case shows that such a liability was proposed to the defendant, by Edward Bullus, and rejected by the defendant; this simple indemnity against unavoidable injury being substituted in its stead. The letter being addressed to Edward Bullus, before the copartnership of Mauran & Bullus, and in contemplation thereof, cannot be considered as a contract with any other person than Edward Bullus. That the plaintiff so considers it, by bringing the action in the name of Bullus; and that in order to support the action, it is necessary to prove a payment and advance of money by said Bullus, individually. Consequently, that a payment from the funds of Mauran & Bullus, by the authority of Mauran & Bullus, will not support said action in the name of Edward Bullus. Story on Partnership, p. 350–55, and authorities there cited.

*533] *Under the second exception, Mr. Whipple contended, that Mauran & Bullus, by taking the whole property of Joshua Mauran, Jr., into their possession, and upon their failure, assigning the uncollected debts and other property to their assignees, instead of placing it under the management of the defendant, had assumed the ownership of the debts and other property, and discharged the defendant from any liability, if any liability ever existed.

Z. Collins Lee and *Southard*, for the defendants in error, contended—

1. That the letter of guaranty in question was an absolute and unequivocal indemnity to Edward Bullus, against all loss and damage in settling up the old concern of Joshua Mauran, Jr.; and could be construed in no other way, and must be liberally interpreted according to the fair intentions of the parties to it.

2. That being a guarantee to Edward Bullus, individually, and he alone being the party to the contract, he was alone injured, and therefore, the suit was properly brought in his own name, and not that of the firm; and it made no difference in principle, whether he paid the advances out of the partnership fund or not, as, in point of fact, he had furnished all the capital to the new firm, and it was, therefore, his own fund.

The following cases as to the first point (construction of letters of guaranty) were cited: *Mason* v. *Pritchard*, 12 East 227; *Flagg* v. *Upham*, 10 Pick. 147; *Drummond* v. *Prestman*, 12 Wheat. 519; *Douglass* v. *Reynolds*, 7 Pet. 117; and *Lee* v. *Dick*, 10 Ibid. 490.

On the 2d point, cited Collyer on Part. 446–7 ; Gow on Part. 123 ; Story on Part. 354. Also the cases of *Alexander* v. *Barker*, 2 Cromp. & Jerv. 133, 138 ; *Robson* v. *Drummond*, 2 Barn. & Adol. 303, and the counsel referred generally to the cases named in the note to Story on Partnership 354.

McLean, Justice, delivered the opinion of the court.—After stating the facts, he said : The questions in this case arise on the instructions of the court ; and they, very properly, as we think, refer the jury to the facts and circumstances under which the guarantee was given. It is *only by such reference, that that instrument can be correctly understood and [*534 construed. In the construction of all instruments, to ascertain the intention of the parties is the great object of the court ; and this is especially the case in acting upon guarantees.

The guarantee under consideration, in the first place, refers to the fact that Bullus, to whom it was addressed, was about to form a connection in the mercantile business, in the city of New York, with the son of guarantor. And from the evidence, it appears, that he was well acquainted with the nature and extent of that partnership, for he had read the articles of copartnership, or the *memoranda* from which they were drawn. As it appears from the statement of Bonney, that the articles were drawn in August, and placed in the hands of Bullus, who returned them with the blanks filled and some alterations, there can be little doubt, that the defendant below read them while at New York. That he was well acquainted with the conditions of the partnership, his son testifies.

With this knowledge, we come to the next sentence in the guarantee, which is, "And as the said Joshua Mauran, Jr., having been, and is at this time prosecuting mercantile business in that city on his own account." It will be recollected, that in the articles of copartnership, Joshua Mauran, Jr., covenanted, that he would give to his partner satisfactory security that he would pay all the debts which he then owed, and all the responsibilities incurred by him in carrying on his former business, without drawing upon the partnership fund. Of this covenant, the defendant below not only had full notice, but it was proved, that on his return from New York to Providence, he took with him a bond drawn by the person who drew the articles of copartnership, binding him to pay the debts of his son. This bond he did not execute, but wrote to Bullus the letter of guaranty. With these facts in view, after stating the fact that his son had been in business in New York as above, and that Bullus was about commencing a partnership with him, the defendant says, "Now, therefore, in consideration of the same, and at the request of Joshua Mauran, Jr., I hereby agree to bear you harmless, in regard to the closing up and settlement of the said Joshua Mauran, Jr.'s former business. And I hereby guaranty you against *any loss you may sustain from the former business of said Joshua [*535 Mauran, Jr.

Now, looking at the facts connected with the guarantee, and the circumstances under which it was given, there would seem to be no doubt of the understanding and intention of the parties. Bullus, having a capital of nearly $30,000, was unwilling to advance it as the stock of the new firm, unless he should be indemnified against the debts which had grown out of

the former business of his partner. And Joshua Mauran, Sen., with the view of securing so considerable a capital, and so advantageous a connection in business for his son, was willing to indemnify Bullus against these debts. And he preferred the guarantee to the bond which was prepared. The latter would have imposed an unconditional obligation to pay these debts, whilst the former only required him to pay Bullus the sum advanced by him in discharge of them.

But it is earnestly contended, that as these debts were paid by the firm, and not by Bullus only, he cannot maintain an action in his own name on the guarantee. It is very clear, that the firm could not maintain an action on this instrument. The indemnity was personal and limited to Bullus.

But the best answer to this argument is the finding of the jury, under the instruction of the court. They were instructed, "that if, from the evidence, they should find, that at the time of signing the letter of guaranty, it was understood both by the plaintiff and the defendant, that the plaintiff was to be at liberty to pay the debts of Joshua Mauran, Jr., either out of his own private funds, or out of the partnership funds ; and in either case, the plaintiff was to be entitled to indemnify therefor, under the letter of guaranty," &c., they should find for the plaintiff. They did so find, and consequently, the facts hypothetically stated in the instruction are established. And the only question that can arise on this part of the instruction is, whether the facts found were properly submitted to the jury.

Now, out of what fund these debts were to be paid, could not be a matter of any importance, it would seem, to the guarantor. The objection that Bullus cannot recover, because the debts were paid with the partnership funds, under the circumstances, is purely technical. Every dollar of the
*536] money thus paid, though used in *the partnership name, was in fact the money of Bullus. To meet this technical objection, and carry out the indention of the parties, we think the instruction was proper. The facts on which it was founded did not contradict the written agreement, nor, in any degree, affect the liability of the party beyond the clear import of the guarantee. By the articles of copartnership, either partner, with the consent in writing of the other, might withdraw from the firm any amount of money. This was known to the guarantor. And also the fact that the whole capital of Bullus was paid into the firm. If this be admitted, it followed, that any payments made by Bullus, in discharge of the debts, could only be paid out of the firm. The jury also found, in pursuance of the latter part of the same instruction, that Bullus was a creditor of the firm to the full amount of its capital stock. These facts, found by the jury, disembarrass the case from the technicalities thrown around it by the counsel of the guarantor. They show that it was the understanding of the guarantor, that Bullus should be indemnified against the previous debts of his pertner, whether he paid them out of the partnership fund, or otherwise.

The construction that the guarantor is only bound to indemnify, in case payment of these debts had been enforced against Bullus by legal measures, is not sustained by the words of the instrument. In the first place, he was not, and could not be made, legally responsible for these debts. The guarantor then must have contemplated a voluntary payment, or at least, not a payment by legal compulsion. The guarantor agrees to bear Bullus "harmless, in regard to the closing up and settlement of the said Joshua Mauran,

Jr.'s former business." Here is a strong recognition of an agency by Bullus in the settlement of these debts. To sustain the credit of the firm, it was necessary to pay the debts in question; and we find that, in a very short time after the firm commenced business, the payment of these debts was commenced, and such payments were made, from time to time, by the firm, until near the time of its failure. The moneys received from the debts due to the previous concern were credited on the books of the firm, and the payments made by it on the *same account were charged. But the mode [*537
of keeping the account by the firm can have no bearing in the case, as the facts found by the jury obviate all objections on this ground.

Suppose, Bullus had been charged on the books of the firm, with the moneys paid in discharge of the debts; the objection as to the partnership interest could not in that case be made. But the money thus applied would have been no more the money of Bullus than that which was paid by the firm. The facts found by the jury present the case in its true character, and give a strong equity to the plaintiff below. Generally, all instruments of suretyship are construed strictly, as mere matters of legal right; the rule is otherwise, where they are founded on a valuable consideration. But in the present case, the relationship of Mauran, the partner, and the guarantor, connected with the other circumstances, constitute as clear a case for indemnity as could well be imagined. That the debts of Mauran, Jr., were paid by Bullus, or, with his assent, in virtue of the guarantee, there is no reason to doubt. Indeed, this fact is substantially found by the jury.

The assignment by the firm of the uncollected debts of Joshua Mauran, Jr., to Robinson, does not release the guarantor. In this respect, the instruction of the court was correct. The jury were directed, if they should find for the plaintiff, to deduct from the amount thus found the full value of the debts of Joshua Mauran, Jr., which had been assigned by the firm, and render a verdict for the balance. The debts of Mauran, Jr., assigned by the firm, were proved to be bad with but one exception; and that appears to have been deducted by the jury from the sum paid by the firm, in discharge of those debts.

Upon the whole, we are satisfied, that substantial justice has been done between the parties, by the judgment of the circuit court; and we think there is no principle of law, arising out of the instructions, which require a reversal of the judgment. It is, therefore, affirmed.

Judgment affirmed.

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*Edward Prigg, Plaintiff in error, *v.* The Commonwealth of [*539
Pennsylvania, Defendant in error.

Constitutional law.—Fugitives from labor.—Powers of the states.

Edward Prigg, a citizen of the state of Maryland, was indicted for kidnapping, in the court of oyer and terminer of York county, Pennsylvania, for having forcibly taken and carried away, from that county, to the state of Maryland, a negro woman, named Margaret Morgan, with the design and intention of her being held, sold and disposed of, as a slave for life, contrary to a statute of Pennsylvania, passed on the 26th day of March 1826; Edward Prigg pleaded not guilty, and the jury found a special verdict, on which judgment was rendered for the commonwealth of Pennsylvania; the case was removed to the supreme court of the state, and the judgment of the court of oyer and terminer was, *pro formâ*, affirmed; and the case was carried

to the supreme court of the United States; the constitutionality of the law, under which the indictment was found, being denied by the counsel of the state of Maryland; which state had undertaken the defence for Edward Prigg, and prosecuted the writ of error; the cause was brought to the supreme court, with the sanction of both the states of Maryland and Pennsylvania, with a view to have the question in the case settled. Margaret Morgan was the slave for life, under the laws of Maryland, of Margaret Ashmore, a citizen of that state; in 1832, she escaped and fled from the state, into Pennsylvania; Edward Prigg, having been duly appointed the agent and attorney of Margaret Ashmore, and having obtained a warrant from a justice of the peace of York county, caused Margaret Morgan to be taken, as a fugitive from labor, by a constable of the state of Pennsylvania, before the magistrate, who refused to take cognisance of the case; and thereupon, Edward Prigg carried her and her children into Maryland, and delivered them to Margaret Ashmore. The children were born in Pennsylvania; one of them, more than a year after Margaret Morgan had fled and escaped from Maryland.

By the first section of the act of assembly of Pennsylvania, of 25th March 1826, it is provided, that if any person shall, by force and violence, take and carry away, or shall, by fraud or false pretence, attempt to take, carry away or seduce, any negro or mulatto, from any part of the commonwealth, with a design or intention of selling and disposing of, or keeping or detaining, such negro or mulatto, as a slave or servant for life, or for any other term whatsoever such person, and all persons aiding and abetting him, shall, on conviction thereof, be deemed guilty of a felony, and shall forfeit and pay a sum not less than $500 nor more than $3000, and shall be sentenced to undergo a servitude for any term or terms of years, not less than seven years, nor exceeding twenty-one years, and shall be confined and kept at hard labor, &c. Other provisions are contained in the act; it was passed in 1826, as declared in its title, to aid in carrying into effect the constitution and laws of the United States, relating to fugitives from labor; and on the application to the legislature, by commissioners from the state of Maryland, *with a view to meet the supposed wishes of the state of Maryland,
*540] on the subject of fugitive slaves; but it had failed to produce the good effects intended.

It will, probably, be found, when we look to the character of the constitution of the United States itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures; as well as to the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. Perhaps, the safest rule of interpretation, after all, will be found to be, to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

It is historically well known, that the object of the clause in the constitution of the United States, relating to persons owing service and labor in one state, escaping into other states, was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union, into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property, in all the slave-holding states; and indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which, the Union could not have been formed. Its true design was, to guard against the doctrines and principles prevailing in the non-slaveholding states, by preventing them from intermeddling with, or obstructing or abolishing, the rights of the owners of slaves.

By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves within its territorial dominions, when it is opposed to its own policy and institutions, in favor of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right; the state of slavery is deemed to be a mere municipal regulation, founded upon, and limited to, the range of the territorial laws.

The clause in the constitution of the United States, relating to fugitives from labor, manifestly contemplates the existence of a positive, unqualified right, on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain. Any state law or regulation, which interrupts, limits, delays or postpones the rights of the owner to the immediate command of his service or labor, operates, *pro tanto*, a discharge of the slave therefrom; the question can never be, how much he is discharged from, but whether he is discharged from any, by the natural or necessary operation of the state laws, or state

regulations; the question is not one of quantity or degree, but of withholding or controlling the incidents of a positive right.

The owner of a fugitive slave has the same right to seize and take him in a state to which he has escaped or fled, that he had in the state from which he escaped; and it is well known that this right to seizure or recapture is universally acknowledged in all the slave-holding states. The court have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of the slave is clothed with *the authority in every state of the Union, to seize and recapture his slave, wherever he can do it, without any breach of [*541 the peace or illegal violence. In this sense, and to this extent, this clause in the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

The constitution does not stop at a mere annunciation of the rights of the owner to seize his absconding or fugitive slave, in the state to which he may have fled; if it had done so, it would have left the owner of the slave, in many cases, utterly without any adequate redress.

The constitution declares, that the fugitive slave shall be delivered up, on claim of the party to whom service or labor may be due. It is exceedingly difficult, if not impracticable, to read this language, and not to feel that it contemplated some further remedial redress than that which might be administered at the hand of the owner himself—"a claim" is to be made.

"A claim," in a just juridical sense, is a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing, as a matter of duty.

It cannot well be doubted, that the constitution requires the delivery of the fugitive, on the claim of the master; and the natural inference certainly is, that the national goverment is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it, is contemplated to exsist on the part of the functionaries to whom it is intrusted.

The clause relating to fugitive slaves is found in the national constitution, and not in that of any state. It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution; on the contrary, the natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.

A claim to a fugitive slave is a controversy in a case "arising under the constitution of the United States," under the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity, for the very purpose of giving effect to the right; and if so, then it may prescribe the mode and extent to which it shall be applied; and how, and under what circumstances, the proceedings shall afford a complete protection and guarantee of the right.

The provisions of the sections of the act of congress of 12th February 1793, on the subject of fugitive slaves, as well as relative to fugitives from justice, cover both the subjects; not because they exhaust the remedies, which may be applied by congress to enforce the rights if the provisions shall be found, in practice, not to attain the objects of the constitution; but because they point out all the modes of attaining those objects which congress have as yet deemed expedient and proper. If this is so, it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication, prohibit it; for if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, *and in a certain form, it cannot be, that the state legislatures have a right [*542 to interfere. This doctrine was fully recognised in the case of Houston *v.* Moore, 5 Wheat. 1, 21, 22. Where congress have exclusive power over a subject, it is not competent for state legislation to add to the provisions of congress on that subject.

Congress have, on various occasions, exercised powers which were necessary and proper, as means to carry into effect rights expressly given, and duties expressly enjoined, by the constitution. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the ends.[1]

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[1] This case in effect decides, that where congress has exclusive power over a subject, it is not competent for state legislation to add to its provisions. It was one of those political

The constitutionality of the act of congress relating to fugitives from labor, has been affirmed by the adjudications of the state tribunals, and by those of the courts of the United States. If the question of the constitutionality of the law were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it; and such extensive and uniform recognitions, would, in the judgment of the court, entitle the question to be considered at rest. Congress, the executive, and the judiciary have, upon various occasions, acted upon this as a sound and reasonable doctrine. Stuart *v.* Laird, 1 Cranch 299; Martin *v.* Hunter, 1 Wheat. 304; Cohens *v.* Commonwealth of Virginia, 6 Ibid. 264, cited.

The provisions of the act of 12th February 1793, relative to fugitive slaves, is clearly constitutional in all its leading provisions; and indeed, with the exception of that part which confers authority on state magistrates, is free from reasonable doubt or difficulty. As to the authority so conferred on state magistrates, while a difference of opinion exists, and may exist, on this point, in different states, whether state magistrates are bound to act under it, none is entertained by the court, that state magistrates may, if they choose, exercise the authority, unless prohibited by state legislation.

The power of legislation in relation to fugitives from labor, is exclusive in the national legislature Sturges *v.* Crowninshield, 4 Wheat. 122, 193, cited.

The right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever state of the Union they may be found, is, under the constitution, recognised as an absolute positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation.

The right and duty are co-extensive and uniform in remedy and operation, throughout the whole Union. The owner has the same security, and the same remedial justice, and the same exemption from state regulations and control, through however many states he may pass with the fugitive slave in his possession, *in transitû*, to his domicil.

The court are by no means to be understood, in any manner whatever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never

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blunders which, as Talleyrand said, are worse than crimes. And the more so, because such decision was totally unnecessary; the sole question before the court being that of the conflict of the state law with the federal constitution. This case resulted in the passage of the fugitive slave law of 1850, the repeal of the Missouri compromise, and ultimately, the civil war and the entire abolition of slavery, without even compensation to the owners of slave property in those states which remained loyal to the Union. It was subsequently decided, that whilst the states had no power to embarrass the owner of a fugitive slave in the assertion of his rights, they might legislate in aid of such claimant. It is generally supposed, that the act of 1850, in relation to fugitives from labor, is virtually repealed by the constitutional amendment abolishing slavery; but this is not so; it is still in force as to runaway apprentices, who are fugitives from labor, within the meaning of its provisions, as was decided in the district court for the eastern district of Pennsylvania in July 1853, in the case of James M. Boaler *v.* William Cummines, Jr.

KANE, J.—I have had my attention called to the clause of the constitution, and the acts of congress of 1793 and 1850, providing for the rendition of persons held to labor, and the mode of so doing, very often; and the result of the attention heretofore bestowed, and the simple nature of the question to be decided induce me to give my decision now. Taking the words of the clause of the constitution, and those of the act of 1850 alone, there can be no difficulty—the words are, "persons held to service or labor in one state, under the laws thereof." Now, I know of no words that could more clearly include apprentices than those I have quoted, for the plain effect of the very words of every indenture of apprenticeship is to hold the party to service; and if I could go beyond the words of the act of congress, and those of the article of the constitution, I should say, that every consideration of policy would dictate such a construction; because, to decide the contrary, would be to discharge every apprentice in Pennsylvania that chose to cross the Delaware, and every one elsewhere that repaired to this state and refused to return to his duty. The relation created by an indenture of apprenticeship is of such character, that minors and orphans, instead of remaining ignorant and unprotected, become acquainted with the arts and sciences, and are fitted for the duties of life; and to preserve such a state of usefulness the principles of extradition should be applied. It is true, that no case has been cited in which a United States court or judge has decided this very question; but

been conceded to the United States; it is wholly distinguishable from the right and duty secured by the provision of the constitution relating to fugitive slaves, which is exclusively derived from the constitution, and obtains its whole efficiency therefrom.

The court entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and to remove them from their borders, and otherwise to secure themselves against their depredations, *and evil example, as they certainly may do, in cases of idlers, vagabonds and paupers. The [*543 rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases, they may be promoted by the exercise of the police power. Such regulations can never be permitted to interfere with or obstruct the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same.

The act of the legislature of Pennsylvania upon which the indictment against Edward Prigg is founded, is unconstitutional and void; it purports to punish as a public offence against the state, the very act of seizing and removing a slave by his master, which the constitution of the United States was designed to justify and uphold.

ERROR to the Supreme Court of Pennsylvania. The defendant in error, Edward Prigg, with Nathan S. Bemis, Jacob Forward and Stephen Lewis, Jr., were indicted by the grand jury of York county, Pennsylvania, for that, on the first day of April 1837, upon a certain negro woman, named Margaret Morgan, with force and violence, they made an assault, and with force and violence, feloniously did take and carry her away from the county of York, within the commonwealth of Pennsylvania, to the state of Maryland, with a design and intention there to sell and dispose of the said Margaret Morgan, as and for a slave and servant for life. Edward Prigg, one of the defendants, having been arraigned, pleaded not guilty. The cause

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perhaps, it is because the master has enforced his rights by seizing his apprentice and conveying him home, that this law and that of 1793 has not been resorted to, and the want of use, or *non-user*, has no influence upon the construction of a plainly expressed statute.

It is equally clear, that though a judge, in considering the case of a fugitive slave, in connection with the statute, might speak only of a slave as within its purview, and another, in a case like the present, might speak only of apprentices; yet each might with propriety use the words, "a person held to labor." It is equally to be observed, that no decision has been had, in which it has been held, that the words of the constitution apply only to slaves. Most certainly, this lad is held by a binding under a local proceeding, within the authority of any state to provide, and thereby to affect persons within her limits and subject to her jurisdiction. The marriage of a minor in Delaware, good by the law of that state, would be good everywhere else. Now, one of the objects of apprenticeship is to prevent pauperism; and a child whose parents are in another and a distant state, and who have deserted him, is a pauper, notwithstanding the fact of his having lawful protectors who do not discharge their duty to him, and the disposition of him under the municipal regulations of the state in which he is deserted, is binding on him, and his parents too. It cannot, however, be said, that in this case the binding was against the father's will, for it is in proof before me, that it was with the consent of the father, who sent his son to Delaware on trial, to be bound if he was liked, and sent him back to that state, after he was bound, when, on one occasion, he had absconded. The question, therefore, is between the father and master on this proof; and it cannot be, that the father shall stand by, and see his son bound in another state, to receive education and nurture, and just when he becomes valuable to a master, to take him away; such a course would amount to positive fraud. The consent is so material, that it is not going too far to say, that if a slave should come here, with his master's consent, and bind himself apprentice, or, being here, should so bind himself, with the master's consent, in the first case, he would not be a fugitive slave, within the meaning of the act of congress, and in the second, the master would not be allowed to question the validity of the indenture. This case, therefore, returns to the commissioner for adjudication, he being now in possession of my views on the subject. Relator remanded to the custody of the marshal.

was tried before the court of quarter sessions of York county, on the 22d day of May 1839; and the jury found the following special verdict:

"That at a session of the general assembly of the commonwealth of Pennsylvania, holden at the city of Philadelphia, on the first day of March 1780, the following law was passed and enacted, to wit, "An act for the gradual abolition of slavery:

§ 3. All persons, as well negroes and mulattoes, as others, who shall be born within this state, shall not be deemed and considered as servants for life or slaves; and all servitude for life, or slavery of children, in consequence of slavery of their mothers, in the case of all children born within this state, from and after the passing of this act as aforesaid, shall be and hereby is utterly taken away, extinguished and for ever abolished.

*544] § 4. Provided always, that every negro and mulatto *child, born within this state, after the passing of this act as aforesaid (who would, in case this act had not been made, have been born a servant for years, or life, or a slave), shall be deemed to be, and shall be, by virtue of this act, the servant of such persons, or her or his assigns, who would, in such case, have been entitled to like relief, in case he or she shall be evilly treated by his or her master or mistress, and to like freedom dues and other privileges, as servants bound by indenture for four years are or may be entitled; unless the person to whom the service of any such child shall belong, shall abandon his or her claim to the same; in which case the overseers of the poor of the city, or township or district, respectively, where such child shall be so abandoned, shall, by indenture, bind out every child so abandoned, as an apprentice, for a time not exceeding the age hereinbefore limited for the service of such children.

§ 5. Every person who is, or shall be, the owner of any negro or mulatto slave or servants for life, or till the age of thirty-one years, now within this state, or his lawful attorney, shall, on or before the first day of November next, deliver or cause to be delivered in writing to the clerk of the peace of the county, or to the clerk of the court of sessions of the city of Philadelphia, in which he or she shall respectively inhabit, the name and sirname, and occupation or profession, of such owner, and the name of the county and township, district or ward wherein he or she resideth; and also the name and names of any such slave and slaves, and servant and servants for life, and till the age of thirty-one years, within this state, who shall be such on the said first day of November next, from all other persons; which particulars shall, by said clerk of the sessions and clerk of the said city court, be entered in books to be provided for that purpose by the said clerks; and no negro or mulatto now within this state shall, from and after the said first day of November, be deemed a slave or servant for life, or till the age of thirty-one years, unless his or her name shall be entered as aforesaid on such records, except such negro or mulatto slaves and servants as are hereinafter excepted; the said clerk to be entitled to a fee of two dollars for each slave or servant so entered as aforesaid, from the treasury of the county, to be allowed to him in his accounts.

*545] § 6. Provided always, that any person in whom the *ownership or right to the service of any negro or mulatto shall be vested at the passing of this act, other than such as are hereinbefore excepted, his or her heirs, executors, administrators and assigns, and all and every of them, sev-

erally, shall be liable to the overseers of the poor of the city, township or district to which any such negro or mulatto shall become chargeable, for such necessary expense, with costs of suit thereon, as such overseers may be put to, through the neglect of the owner, master or mistress of such negro or mulatto, notwithstanding the name and other descriptions of such negro or mulatto shall not be entered and recorded as aforesaid, unless his or her master or owner shall, before such slave or servant obtain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant his or her freedom.

§ 8. In all cases wherein sentence of death shall be pronounced against a slave, the jury before whom he or she shall be tried, shall appraise and declare the value of such slave; and in case such sentence be executed, the court shall make an order on the state treasurer, payable to the owner for the same, and for the costs of prosecution; but in case of remission or mitigation, for the costs only.

§ 9. The reward for taking up runaway and absconding negro and mulatto slaves and servants, and the penalties for enticing away, dealing with, or harboring, concealing or employing negro and mulatto slaves and servants, shall be the same, and shall be recovered in like manner, as in case of servants bound for four years.

§ 10. No man or woman, of any nation or color, except the negroes or mulattoes who shall be registered as aforesaid, shall, at any time hereafter, be deemed adjudged or holden, within the territories of this commonwealth as slaves or servants for life, but as free-men and free-women; except the domestic slaves attending upon delegates in congress from the other American states, foreign ministers and consuls, and persons passing through or sojourning in this state, and not becoming resident therein, and seamen employed in ships not belonging to any inhabitant of this state, nor employed in any ship owned by any such inhabitant; provided, such domestic slaves shall not be alienated or sold to any inhabitant, nor (except in the case of members of congress, *foreign ministers and consuls) retained in this state longer than six months. [*546

§ 12. And whereas, attempts may be made to evade this act, by introducing into this state negroes and mulattoes bound by covenant to serve for long and unreasonable terms of years, if the same be not prevented: Therefore—

§ 13. No covenant ot personal servitude or apprenticeship whatsoever, shall be valid or binding on a negro or mulatto, for a longer time than seven years, unless such servant apprentice were, at the commencement of such servitude or apprenticeship, under the age of twenty-one years; in which case, such negro or mulatto may be holden as a servant or apprentice, respectively, according to the covenant, as the case shall be, until he or she shall attain the age of twenty-eight years, but no longer.

§ 14. That this act, or anything herein contained, shall not give any relief or shelter to any absconding or runaway negro or mulatto slave or servant, who has absconded himself, or shall abscond himself, from his or her owner, master or mistress, residing in any other state or country; but such owner, master or mistress, shall have like right and aid to demand, claim and take away his slave or servant, as he might have had, in case this act had not been made: and that all negro and mulatto slaves, now owned

and heretofore resident in other states, who have absconded themselves, or been clandestinely carried away, or who may be employed abroad as seamen, and have not absconded or been brought back to their owners, masters or mistresses before the passing of this act, may, within five years, be registered as effectually as is ordered by this act concerning those who are not within this state, on producing such slave before any two justices of the peace, and satisfying the said justices, by due proof, of his former residence, absconding, running away or absence of such slaves as aforesaid, who thereupon shall direct and order the said slaves to be entered on the record as aforesaid.

And the jurors further found, that at a session of the general assembly of the commonwealth of Pennsylvania, holden at the city of Philadelphia, *547] on the 29th day of March 1788, the *following law was passed and enacted, "An act to explain and amend 'an act for the gradual abolition of slavery,'"

§ 1. For preventing many evils and abuses arising from ill-disposed persons availing themselves of certain defects in the act for the gradual abolition of slavery, passed on the first day of March, in the year of our Lord 1780, be it enacted :—

§ 2. The exception contained in the tenth section of the act of the first of March 1780, relative to domestic slaves, attending upon persons passing through or sojourning in this state, and not becoming resident therein, shall not be deemed or taken to extend to the slaves of such persons as are inhabitants of, or resident in, this state, or who shall come here, with an intention to settle and reside ; but all and every slave or slaves who shall be brought into this state, by persons inhabiting or residing therein, or intending to inhabit or reside therein, shall be immediately considered, deemed and taken to be free, to all intents and purposes.

§ 3. No negro or mulatto slave, or servant for term of years (except as in the last exception of the tenth section of the said act, is excepted), shall be removed out of this state, with the design and intention that the place of abode or residence of such slave or servant shall be thereby altered or changed, or with the design and intention that such slave or servant, if a female and pregnant, shall be detained and kept out of this state till her delivery of the child of which she is or shall be pregnant, or with the design and intention that such slave or servant shall be brought again into this state, after the expiration of six months from the time of such slave or servant having been first brought into this state, without his or her consent, if of full age, testified upon a private examination, before two justices of the peace of the city or county in which he or she shall reside, or being under the age of twenty-one years, without his or her consent, testified in manner aforesaid, and also without the consent of his or her parents, if any such there be, to be testified in like manner aforesaid, whereof the said justices, or one of them, shall make a record, and deliver to the said slave or servant a copy thereof, containing the name, age, condition and the place of abode of such slave or servant, the reason of such removal, and the place to *548] which he *or she is about to go ; and if any person or persons whatsoever shall sell or dispose of any such slave or servant, to any person out of this state, or shall send or carry, or cause to be sent or carried, any such slave or servant, out of this state, for any of the purposes aforesaid, whereby such slave or servant would lose those benefits and privileges

which by the laws of this state are secured to him or her, and shall not have obtained all such consent as by this act is required, testified in the manner before mentioned, every such person and persons, his and their aiders and abettors, shall severally forfeit and pay, for every such offence, the sum of seventy-five pounds, to be recovered in any court of record, by an action of debt, bill, plaint or information, at the suit of any person who will sue for the same; one moiety thereof, when recovered, for the use of the plaintiff, the other moiety for the use of the poor of the city, township or place from which such slave or servant shall be taken and removed.

§ 4. All persons who now are, or hereafter shall be, possessed of any child or children, born after the first day of March 1780, who would, by the said act, be liable to serve till the age of twenty-eight years, shall on or before the first day of April 1789, or within six months next after the birth of any such child, deliver or cause to be delivered, in writing, to the clerk of the peace of the county, or the clerk of the court of record of the city of Philadelphia, in which they shall respectively inhabit, the name, sirname, and occupation or profession of such possessor, and of the county, township, district or ward in which they reside, and also the age (to the best of his or her knowledge), name and sex of every such child or children, under the pain and penalty of forfeiting and losing all right and title to every such child and children, and of him, her or them immediately becoming free; which said return or account in writing shall be verified by the oath or affirmation of the party, which the said clerks are hereby respectively authorized and required to administer, and the said clerks shall make and preserve records thereof, copies and extracts of which shall be good evidence in all courts of justice, when certified under their hands and seals of office; for which oath or affirmation, and entry or extract, the said clerks shall be respectivly entitled to one shilling and six-pence, and no more, *to be paid by him or her, who shall so as aforesaid make such entry, or demand the extract aforesaid. [*549

And whereas, it has been represented to this house, that vessels have been fitted out and equipped in this port, for the iniquitous purpose of receiving and transporting the natives of Africa to places where they are held in bondage, and it is just and proper to discourage, as far as possible, such proceedings in future:

§ 5. If any person or persons shall build, fit, equip, man or otherwise prepare any such ship or vessel, within any port of this state, or shall cause any ship or other vessel to sail from any port of this state, for the purpose of carrying on a trade or traffic in slaves, to, from or between Europe, Asia, Africa or America, or any place or countries whatsoever, or of transporting slaves to or from one port or place to another, in any part or parts of the world, such ship or vessel, her tackle, furniture, apparel and other appurtenances, shall be forfeited to the commonwealth, and shall be liable to be seized and prosecuted by any officer of the customs, or other person, by information *in rem*, in the supreme court, or in the county court of common pleas for the county wherein such seizure shall be made: whereupon, such proceedings shall be had, both unto and after judgment, as in and by the impost laws of this commonwealth in case of seizure is directed. And moreover, all and every person and persons so building, fitting out, manning, equipping or otherwise preparing or send-

ing away any ship or vessel, knowing or intending that the same shall be employed in such trade or business, contrary to the true intent and meaning of this act, or in any wise aiding or abetting therein, shall severally forfeit and pay the sum of one thousand pounds, one moiety thereof to the use of the commonwealth, and the other moiety thereof to the use of him or her who will sue for the same, by action, debt, bill, plaint or information.

And whereas, the practice of separating, which is too often exercised by the masters and mistresses of negro and mulatto slaves, or servants for term of years, in separating husbands and wives, and parents and children, requires to be checked, so far as the same may be done without prejudice to such masters or mistresses:

§ 6. If any ower or possessor of any negro, mulatto slave or slaves, or servant or servants for term of years, shall, from and *after the first day of July next, separate or remove, or cause to be separated or removed, a husband from his wife, or wife from her husband, a child from his or her parents, or a parent from a child, or any or either of the descriptions aforesaid, to a greater distance than ten miles, with the design and intention of changing the habitation or place of abode of such husband or wife, parent or child, unless such child shall be above the age of four years, without the consent of such slave or servant for life or years shall have been obtained and testified in the manner hereinbefore described, such person or persons shall severally forfeit and pay the sum of fifty pounds, with costs of suit, for every such offence, to be recovered by action of debt, bill, plaint or information, in the supreme court or in any court of common pleas, at the suit of any person who will sue for the same; one moiety thereof, when recovered, for the use of the plaintiffs, the other moiety for the use of the poor of the city, township, or place from which said husband or wife, parent or child, shall have been taken and removed. *550]

And the jurors further found, that at a session of the general assembly of the commonwealth of Pennsylvania, holden at Harrisburg, on the 25th day of March 1826, the following law was passed, "An act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and prevent kidnapping."

§ 1. If any person or persons shall, from and after the passing of this act, by force and violence, take and carry away, or cause to be taken or carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt so to take, carry away or seduce, any negro or mulatto, from any part or parts of this commonwealth, to any other place or places whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever, every such person or persons, his or their aiders or abettors, shall on conviction thereof, in any court of this commonwealth having competent jurisdiction, be deemed guilty of a felony, and shall forfeit and pay, at the discretion of the court *passing the sentence, a sum not less than five hundred, nor more than one thousand dollars, one-half whereof shall be paid to the person or persons who shall prosecute for the same, and the other half to this commonwealth; and moreover, shall be sentenced to undergo a servitude *551]

for any term or terms not less than seven years, nor exceeding twenty-one years, and shall be confined and kept to hard labor, fed and clothed in the manner as is directed by the penal laws of this commonwealth for persons convicted of robbery.

§ 2. If any person or persons shall, hereafter, knowingly sell, transfer or assign, or shall, knowingly, purchase, take or transfer an assignment of any negro or mulatto, for the purpose of fraudulently removing, exporting or carrying said negro or mulatto out of this state, with the design or intent, by fraud or false pretences, of making him or her a slave or servant for life, or for any term whatsoever, every person so offending shall be deemed guilty of a felony, and on conviction thereof, shall forfeit and pay a fine of not less than five hundred dollars, nor more than two thousand dollars, one-half whereof shall be paid to the person or persons who shall prosecute for the same, and the other half to the commonwealth; and moreover, shall be sentenced, at the discretion of the court, to undergo a servitude for any term or time not less than seven years, nor exceeding twenty-one years, and shall be confined, kept to hard labor, fed and clothed in the same manner as is directed by the penal laws of this commonwealth for persons convicted of robbery.

§ 3. When a person held to labor or servitude in any of the United States, or in either of the territories thereof, under the laws thereof, shall escape into this commonwealth, the person to whom such labor or service is due, his or her duly authorized agent or attorney, constituted in writing, is hereby authorized to apply to any judge, justice of the peace or alderman, who, on such application, supported by the oath or affirmation of such claimant, or authorized agent or attorney as aforesaid, that the said fugitive hath escaped from his or her service, or from the service of the person for whom he is duly constituted agent or attorney, shall issue his warrant, under his hand and seal, and directed to the sheriff, or any constable of the proper city or county, authorizing and empowering said sheriff or constable, to *arrest and seize the said fugitive, who shall be named in said warrant, and to bring said fugitive before a judge of the proper [*552 county, which said warrant shall be in the form or to the following effect:

"State of Pennsylvania, ——— county, ss.

The Commonwealth of Pennsylvania, to the sheriff or any constable of ——— county, greeting: Whereas, it appears by the oath, or solemn affirmation, of ——— ———, that ——— ———, was held to labor or service to ——— ———, of ——— county, in the state of ———, and the said ——— ——— hath escaped from the labor and service of the said ——— ———: You are therefore commanded, to arrest and seize the body of the said ——— ———, if he be found in your county, and bring him forthwith before the person issuing the warrant, if a judge (or if a justice of the peace or alderman) before a judge of the court of common pleas, or of the district court, as the case may be, of your proper county, or recorder of a city, so that the truth of the matter may be inquired into, and the said ——— ——— be dealt with as the constitution of the United States, and the laws of this commonwealth direct. Witness our said judge (or alderman, or justice, as the case may be), at this ——— day of ———, in the year of our Lord one thousand eight hundred and ——.

By virtue of such warrant the person named therein may be arrested by the proper sheriff or constable to whom the same shall be delivered, within the proper city or county.

§ 4. No judge, justice of the peace or alderman shall issue a warrant on the application of any agent or attorney, as provided in the said third section, unless the said agent or attorney shall, in addition to his own oath or affirmation, produce the affidavit of the claimant of the fugitive, taken before and certified by a justice of the peace or other magistrate authorized to administer oaths, in the state or territory in which such claimant shall reside, and accompanied by the certificate of the authority of such justice or other magistrate, to administer oaths, signed by the clerk or prothonotary, and authenticated by the seal of a court of record, in such state or territory; which affidavit shall state the *said claimant's title to the service of
*553] such fugitive, and also the name, age and description of the person of such fugitive.

§ 5. It shall be the duty of any judge, justice of the peace or alderman, when he grants or issues any warrant under the provisions of the third section of this act, to make a fair record on his docket of the same, in which he shall enter the name and place of residence of the person on whose oath or affirmation the said warrant may be granted; and also, if an affidavit shall have been produced under the provisions of the fourth section of this act, the name and place of residence of the person making such affidavit, and the age and description of the person of the alleged fugitive contained in such affidavit, and shall, within ten days thereafter, file a certified copy thereof in the office of the clerk of the court of general quarter sessions of the peace, or mayor's court of the proper city or county; and any judge, justice of the peace or alderman who shall refuse or neglect to comply with the provisions of this section, shall be deemed guilty of a misdemeanor in office, and shall, on conviction thereof, be sentenced to pay, at the discretion of the court, any sum not exceeding one thousand dollars, one-half to the party prosecuting for the same, and the other half to the commonwealth. And any sheriff or constable, receiving and executing the said warrant, shall, without unnecessary delay, carry the person arrested before the judge, according to the exigency of the warrant. And any sheriff or constable, who shall refuse or wilfully neglect so to do, shall, on conviction thereof, be sentenced to pay, at the discretion of the court, any sum not exceeding five hundred dollars, one-half to the party prosecuting for the same, and the other half to the commonwealth, or shall also be sentenced to imprisonment, at hard labor, for a time not exceeding six months, or both.

§ 6. The said fugitive from labor or service, when so arrested, shall be brought before a judge as aforesaid, and upon proof, to the satisfaction of such judge, that the person so seized or arrested doth, under the laws of the state or authority from which she or he fled from service or labor, to the person claiming him or her, it shall be the duty of such judge to give a certificate thereof to such claimant, his or her duly authorized agent or attorney, which shall be sufficient warrant for removing the said fugitive to the state or territory from which she or he fled: *Provided, that the oath of
*554] the owner or owners, or other person interested, shall in no case be received in evidence before the judge, on the hearing of the case.

§ 7. When the fugitive shall be brought before the judge, agreeably to

the provisions of this act, and either party allege and prove to the satisfaction of the said judge, that he or she is not prepared for trial, and have testimony material to the matter in controversy, that can be obtained in a reasonable time, it shall and may be lawful, unless security, satisfactory to the said judge, be given for the appearance of the said fugitive, on a day certain, to commit the said fugitive to the common jail for safe-keeping there to be detained at the expense of the owner, agent or attorney, for such time as the judge shall think reasonable and just, and to a day certain, when the said fugitive shall be brought before him by *habeas corpus* in the court-house of the proper county, or in term-time, at the chamber of the said judge, for final hearing and adjudication: Provided, that if the adjournment of the hearing be requested by the claimant, his agent or attorney, such adjournment shall not be granted, unless the said claimant, his agent or attorney, shall give security, satisfactory to the judge, to appear and prosecute his claim, on the day to which the hearing shall be adjourned: Provided, that on the hearing last mentioned, if the judge committing the said fugitive, or taking the security as aforesaid, should be absent, sick, or otherwise unable to attend, it shall be the duty of either of the other judges, on notice given, to attend to the said hearing, and to decide thereon.

§ 8. The officer which may or shall be employed in the execution of the duties of this act shall be allowed the same fees for service of process that sheriffs within this commonwealth are now allowed for serving process in criminal cases, and two dollars and fifty cents per day for each and every day necessarily spent in performing the duties enjoined on them by this acts to be paid by the owner, agent or attorney, immediately on the performance of the duties aforesaid.

§ 9. No alderman or justice of the peace of this commonwealth shall have jurisdiction or take cognisance of the case of any fugitive from labor from any of the United States or territories, under a certain act of congress, passed on the tenth day of February 1793, *entitled "an act respecting fugitives from justice, and persons escaping from the service of their masters;" nor shall any alderman or justice of the peace of this commonwealth issue or grant any certificate or warrant of removal of any such fugitive from labor as aforesaid, except in the manner and to the effect provided in the third section of this act, upon the application, affidavit or testimony of any person or persons whatsoever, under the said act of congress, or under any other law, authority or act of the congress of the United States; and if any alderman or justice of the peace of this commonwealth shall, contrary to the provision of this act, take cognisance or jurisdiction of the case of any such fugitive as aforesaid, except in the manner hereinbefore provided, or shall grant or issue any certificate or warrant of removal as aforesaid, then and in either case, he shall be deemed guilty of a misdemeanor in office, and shall, on conviction thereof, be sentenced to pay, at the discretion of the court, any sum not less than five hundred dollars, nor exceeding one thousand dollars, one-half thereof, to the party prosecuting for the same, and the other half to the use of the commonwealth. [*555

§ 10. It shall be the duty of the judge or recorder of any court of record in this commonwealth, when he grants or issues any certificate or warrant of removal of any negro or mulatto claimed to be a fugitive from labor to the state or territory from which he or she fled, in pursuance of an act of

congress passed the 12th day of February 1793, entitled "an act respecting fugitives from justice and persons escaping from the service of their masters," and of this act, to make a fair record of the same, in which he shall enter the age, name, sex and general description of the person of the negro or mulatto for whom he shall grant such certificate or warrant of removal, together with the evidence and the name of the places of residence of the witnesses, and the party claiming such negro or mulatto, and shall, within ten days thereafter, file a certified copy thereof in the office of the clerk of the court of general quarter sessions of the peace, or mayor's court of the city or county in which he may reside.

§ 11. Nothing in this act contained shall be construed as a repeal or alteration of any part of an act of assembly passed the first day of March, 1780, *entitled "an act for the gradual abolition of slavery," except the eleventh section of said act, which is hereby repealed and supplied nor of any part of an act of assembly passed on the 28th day of March 1788, entitled "an act to explain and amend an act for the gradual abolition of slavery," except the 7th section of this last-mentioned act, which is hereby supplied and repealed.

*556]

And the jurors further found, that the negro woman, Margaret Morgan, in the within indictment mentioned, came into the state of Pennsylvania from the state of Maryland, some time in the year 1832; that at that time, and for a long period before that time, she was a slave for life, held to labor, and owing service or labor, under and according to the laws of the said state of Maryland, one of the United States, to a certain Margaret Ashmore, a citizen of the state of Maryland, residing in Harford county; and that the said negro woman, Margaret Morgan, escaped and fled from the state of Maryland, without the knowledge and consent of the said Margaret Ashmore; that in the month of February 1837, the within-named defendant, Edward Prigg, was duly and legally constituted and appointed by the said Margaret Ashmore, her agent or attorney, to seize and arrest the said negro woman, Margaret Morgan, as a fugitive from labor, and to remove, take and carry her from this state into the state of Maryland, and there deliver her to the said Margaret Ashmore; that as such agent or attorney, the said Edward Prigg, afterwards, and in the same month of February 1837, before a certain Thomas Henderson, Esquire, then being a justice of the peace in and for the county of York, in this state, made oath that the said negro woman, Margaret Morgan, had fled and escaped from the state of Maryland, owing service or labor for life, under the laws thereof, to the said Margaret Ashmore; that the said Thomas Henderson, so being such justice of the peace as aforesaid, thereupon issued his warrant, directed to one William McCleary, then and there being a regularly appointed constable in and for York county, commanding him to take the said negro woman, Margaret Morgan, and her children, and bring them before the said Thomas Henderson, or some other justice of the peace for said county; that the said McCleary, in obedience *to said warrant, did accordingly take and apprehend the said negro woman, Margaret Morgan, and her children, in York county aforesaid, and did bring her and them before the said Thomas Henderson; that the said Henderson thereupon refused to take further cognisance of said case, and that the said Prigg afterwards, and without complying with the provisions of the said act of the general

*557]

assembly of the commonwealth of Pennsylvania, passed the 25th of March 1826, entitled "an act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping," did take, remove and carry away the said negro woman, Margaret Morgan, and her children, mentioned in said warrant, out of this state, into the state of Maryland, and did there deliver the said woman and children into the custody and possession of the said Margaret Ashmore. And further say, that one of the said children so taken, removed and carried away, was born in this state, more than one year after the said negro woman, Margaret Morgan, had fled and escaped from the state of Maryland as aforesaid.

But whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said Edward Prigg be guilty in manner and form as he stands indicted, the jurors aforesaid are altogether ignorant, and therefore, pray the advice of the court; and if, upon the whole matter aforesaid, it shall seem to the said court, that the said Edward Prigg is guilty, then the jurors aforesaid, upon their oaths aforesaid, say that the said Edward Prigg is guilty in manner and form as he stands indicted. But if, upon the whole matter aforesaid, it shall seem to the said court, that the said Edward Prigg is not guilty, then the jurors aforesaid, upon their oaths aforesaid, say that the said Edward Prigg is not guilty in manner and form as he stands indicted.

This special verdict was, under an agreement between Messrs. Meredith and Nelson, counsel for Edward Prigg, and Mr. Johnson, Attorney-General of Pennsylvania, taken under the provision of an act of the assembly of Pennsylvania, passed 22d of May 1839; and by agreement, the court gave judgment *against Edward Prigg, on the finding of the jury and the indictment. The defendant prosecuted a writ of error to the [*558 supreme court of Pennsylvania, to May term 1840. On the 23d May 1840, the following errors were assigned before the court, by Mr. Meredith and Mr. Nelson, who represented the state of Maryland, as well as the defendant. The plaintiff in error suggests to the supreme court here, that the judgment rendered in the court of oyer and terminer or York county in this case, should be reversed for the reason following, viz: That the act of assembly of the commonwealth of Pennsylvania, set out in the record in the said cause, is repugnant to the provisions of the constitution of the United States, and is therefore void. The supreme court affirmed, *pro formâ*, the judgment of the court of oyer and terminer; and the defendant, Edward Prigg, prosecuted this writ of error.

The case was argued, for the plaintiff in error, by *Meredith* and *Nelson*, under authority to appear in the case for the state of Maryland; and by *Johnson*, Attorney-General of Pennsylvania, and *Hambly*, for the commonwealth of Pennsylvania.

The arguments of all the counsel, with the exception of that of Mr. Nelson (which has not been received), have been by them, respectively, furnished to the reporter.

The counsel for the plaintiff in error contended:—That the law of Pennsylvania, on which the indictment of the defendant founded, was unconstitutional:—1. Because congress has the exclusive power of legisla-

tion upon the subject-matter of the said constitutional provision, which power has been exercised by the act of the 12th February 1793. 2. That if this power is not exclusive, still the concurrent power of the state legislatures is suspended, by the actual exercise of the federal power. 3. That if not suspended, still the statute of Pennsylvania, in all its provisions applicable to this case, is in direct collision with the act of congress; it is, therefore, unconstitutional and void.

*559] **Meredith*, for the state of Maryland, interposing in behalf of the plaintiff in error, adverted to the special act of the legislature of Pennsylvania, of the 22d of May 1839, as the result of a negotiation between that state and Maryland, the object of which was, to settle, by the authoritative decision of the supreme court of the Union, the power of state legislation, over that provision of the constitution of the United States which relates to fugitive slaves. He then briefly stated the facts of the particular case, as found by the special verdict; and referring to the provisions of the act of congress of the 12th of February 1793, respecting fugitives from justice, and persons escaping from the service of their masters, and to the several sections of the Pennsylvania law of the 25th of March 1826, which have given rise to the controversy between the two states, he remarked, that the validity of this law depended entirely upon the constitutionality of the act of congress. If that act was constitutionally passed, he argued, that it was wholly immaterial to inquire, whether it was passed in the exercise of an exclusive or of a concurrent power of legislation; because, in either case, the conclusion would be the same. The Pennsylvania law must be declared inoperative and void, and the judgment of her courts, which he was about to examine, must necessarily be reversed.

If this should appear to be a proper view of the question presented by the record; if it depended solely upon the constitutionality of the act of congress; the whole matter, as he believed, would be found to lie within very narrow limits. But, undoubtedly, the cause itself, looking to the consequences of its decision by the tribunal he addressed, was one of deep and prevading interest. It involved matters of high concernment, not only to the two sovereign states, which stood before the court as the immediate parties to the controversy; but to those other states of the Union, which, with reference to the questions at issue, occupied the same relative position. Indeed, it would, perhaps, be not too much to say, that the case was one of vital interest to the peace and perpetuity of the Union itself. For he believed, that to the interference of state legislation, might justly be ascribed much of that exasperation of public sentiment, which unhappily prevailed upon a subject that seemed every day to assume a more malignant and *560] threatening aspect. It was fit, therefore, that such *a cause should receive not only a careful, but a thorough examination, before it was finally passed upon by the conclusive judgment of the court.

That he might render what assistance was in his power to this end, he proposed to consider the case, with a view of maintaining the three following propositions: 1. That congress has the exclusive power of legislation upon the subject-matter of the constitutional provision in question. 2. That if the power is not exclusive, still, from its very nature, the concurrent power of the state legislatures is suspended by the actual exercise of the

federal power. 3. That if the power is not suspended over the whole subject-matter of the provision, still it cannot be constitutionally exercised, so as to conflict with federal legislation ; and consequently, that the law of Pennsylvania, so far as it was applied upon the indictment to the case of the plaintiff in error, is void and inoperative ; because its provisions are in direct collision with those of the act of congress.

Before proceeding to discuss these propositions, he observed, that there was a preliminary inquiry on which it would be proper to bestow a brief attention. And that was, whether this constitutional provision required legislation ; whether *proprio vigore*, it was not sufficient of itself, and by itself, to effectuate the object it contemplated. He did not, it was true, anticipate such a construction from the learned counsel for the state of Pennsylvania ; for, if successfully maintained, it would be fatal to their case. Because it was clear, beyond all doubt, that if the legislation of congress is inhibited, on the ground that the constitution neither intends nor requires legislative regulation, the same reason must necessarily exclude the legislation of the states ; and therefore, in reference to the present case, if the constitution effects its own purposes, by its own unassisted strength, the law of Pennsylvania which professes by its title "to give effect to the provisions of the constitution of the United States, relative to fugitives from labor," is at best a mere work of legislative supererogation, wholly futile and inoperative. It was not, therefore, he said, in its direct bearing upon the case, that he deemed the inquiry important ; but because, elsewhere, in legislative assemblies, as well as in judicial forums, this construction had *been so gravely insisted on as to deserve, at least, a passing notice. [*561

A very brief examination of the provision in the constitution would, he thought, make it manifest, that it looks to subsequent legislative enactments. The first clause prohibits the states from passing any law, or adopting any regulation, by which fugitives from labor may be discharged from service. If the provision had stopped there, he admitted, that legislation would have been unnecessary ; because a state law, in violation of so express a prohibition, would be *ipso facto* void ; and the judicial power, extending to all cases arising under the constitution, would be unquestionably competent so to declare it. But the next clause of the provision is of a different character. It guaranties a right ; and enjoins a duty ; it declares, that the fugitive shall be delivered up, on claim, to the party to whom his service or labor may be due. Here, then, are two acts to be done. A claim is to be made ; but the mode in which it is to be made, and the forms to be observed in making it, are not provided for. Again, a delivery is required ; but from whom, and in what manner, and on what condition, the constitution does not prescribe. Regulations upon these points were indispensable to effectuate the object, and they were left to legislative enactments. And very properly so, because it is the office of a written constitution to establish general principles only, leaving them to be carried out by future legislation.

Mr. Meredith then adverted to the history and origin of the act of congress, of the 12th of February 1793, as the strongest illustration of the necessity of such legislation ; and for this purpose referred to the first volume of State Papers, title Miscellaneous, page 38, *et seq.* It appeared from

these documents, that in the year 1791, but two years after the organization of the government, the governor of Pennsylvania, under the analogous provision in the constitution relative to fugitives from justice, made a demand upon the governor of Virginia for the surrender and delivery of three persons, who had been indicted in Pennsylvania for kidnapping a negro, and carrying him into Virginia. The governor of Virginia hesitated upon the course to be pursued, and referred the matter to the attorney-general of that state, who advised that the demand ought not to be complied with.
*562] In an elaborate opinion, to which *the court was referred, he took several objections; and among them, the one most strenuously insisted on was, that the constitution had provided no means, and prescribed no method, for carrying the provision into effect. And that congress had not supplied such means by any law upon the subject. "If," he said, "the delivery and removal in question can be effected, it must be under the authority only of the constitution of the United States. By that, the delivery is required, and the removal authorized; but the manner in which either shall be effected is not prescribed." And again, "the demand cannot be complied with by the governor of Virginia, without some additional provision by law, to enable him to do so." The governor adopted this view of the subject, and expressed a hope, in communicating his refusal, that the case would furnish an inducement to congress to legislate at once upon the constitutional provision. Upon this refusal, the governor of Pennsylvania addressed a communication to the president of the United States, in which he says, "As the attorney-general of Virginia has suggested another difficulty with respect to the mode of arresting persons as fugitives from justice, I have thought the present a proper occasion to bring the subject into your view; that by the interposition of the federal legislature, to whose consideration you may be pleased to submit it, such regulations may be established, as will in future obviate all doubt and embarrassment upon a constitutional question so delicate and important." The president, it appears, laid these proceedings, with the opinion of the attorney-general of the United States, before congress; and the result was, that at the same session, the act, as it now stands upon the statute book, was reported by a committee; and was finally passed without opposition, on the 12th of February 1793.

The origin, then, of this act of congress, so strongly illustrative of the difficulties and embarrassments which would continually have arisen, if the article of the constitution referred to had been left to execute itself, dispenses with the necessity of all further argument upon this part of the subject. For it is scarcely necessary to remark, that the same difficulties and embarrassments would have arisen in reference to the provision regarding fugitives from labor, but for the enactments of the law of 1793. Indeed,
*563] in looking to both provisions, it would be found, that the *necessity of legislation is obviously much less, in that which concerns fugitives from justice, than in the one now more immediately under consideration. The act of congress had never been questioned upon this ground, till the case of *Jack* v. *Martin* came before the court of errors of the state of New York. And even in that case, it was a mere intimation thrown out by the chancellor, but neither reasoned out, nor relied on. In every other case, it has been taken for granted, that legislation was necessary to effect-

uate the object of the framers of the constitution. In *Wright* v. *Deacon*, 5 Serg. & Rawle 63, Chief Justice TILGHMAN, after quoting the provision, says, "Here is the principle; the fugitive is to be delivered on claim of his master. But it required a law to regulate the manner in which this principle should be reduced to practice. It was necessary to establish some mode in which the claim should be made, and the fugitive be delivered up." So also, in the case of the *Commonwealth* v. *Griffith*, 2 Pick. 11, PARKER, Chief Justice, says, "The constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by congress. It is very clear, that it was not intended that application should be made to the executive authority of the state."

It being then indisputable, as the counsel thought, that the constitution looks to, and requires the aid of legislation to accomplish its purpose; he proceeded to argue, that this legislation was intended to be federal, and exclusive of state legislation. Why, he asked, was the provision introduced into the constitution? The colonial history of the country would show, that at one period, slavery was recognised as a legal institution in all the provinces; and that in all of them, a customary or conventional law prevailed, which conferred upon the owner of a fugitive slave the right to reclaim him, wherever he might be found. Before the close of the revolution, however, public opinion in the northern section of the country had materially changed, with regard to the policy and humanity of a system, that had, unfortunately, been fastened upon the colonies by the power of the mother country, without regard to their interests, and in defiance of repeated protests. In 1780, Pennsylvania passed an act for the gradual abolition of slavery. In the same year, Massachusetts, by her Declaration of Rights, emancipated her slaves. And in a short time *afterwards, these examples were followed by all, or nearly all of the New England States. [*564

The institution, however, still continued to exist in the south. The clamate of that region, and the products of its soil, peculiarly adapted to this species of labor, had increased the slave population to so great a number, that, at the close of the revolution, the system had so intertwined itself with the vital interests of private property, and with the maintenance of the public safety, as to render every project, even of gradual abolition, unsafe and impracticable. During the confederation, the southern states had sustained great inconveniences and loss, by the change that had been effected by the abolition laws of the northern states. The conventional or customary law was no longer observed. There was no provision upon the subject in the articles of confederation. In many of the northern states, no aid whatsoever would be allowed to the owners of fugitives slaves; and sometimes, indeed, they met with open resistance. 3 Story's Com. Const. 677. "At present," said Mr. Madison, in the Virginia convention, 2 Elliot's Deb. 335, "if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect." And in the North Carolina convention, Mr. Iredell observed, that, "in some of the northern states they have emancipated their slaves; if any of our slaves go there, they would, by the present laws, be entitled to their freedom, so that their masters could not get them again."

It was during this conflict of law, of opinions and of interests between

the northern and southern states, that the constitution embracing the provision in question was adopted. That provision, it is well known, was the result of mutual concessions in reference to the whole subject of slavery. On the one hand, the south agreed to confer upon congress the power to prohibit the importation of slaves after the year 1808; on the other, the north agreed to recognise and protect the existing institutions of the south; and for that very purpose, the clause in question was engrafted upon the constitution. The history of the times proves, that the south regarded and relied upon it, as an ample security to the owners of slave property. In the Virginia convention, in order no satisfy the minds of the people, that property of this *description was abundantly protected, Governor Randolph held this language: "Were it right to mention what passed in convention on the occasion, I might tell you, that the southern states—even South Carolina herself—conceived this property to be secured by these words." Such, undoubtedly. was the confidence of the whole south, in the intention of the framers of the constitution. Such was their intention; and if so, it would seem to follow as a necessary consequence, that they meant to commit all legislative power over the subject exclusively to congress. The provision was manifestly intended to restore to the south the rights which the customary law had formerly extended to them, in common with the other colonies. Those rights had been disregarded by many of the states. And the apprehension must have forced itself upon every southern mind in the convention, that if the provision were left to be carried out by state legislation, it must prove but a precarious and inadequate protection. The provision, it is true, yielded the right of the owner to reclaim the fugitive, in whatever state he might have sought refuge; but if the power to regulate the mode in which this provision was to be carried into practical effect —if the power of enforcing its execution were left to the states, it could not but have been foreseen, that its whole purpose might be defeated. That the states might either legislate or not; in the one case, leaving the owner without legal means to vindicate his rights; in the other, embarrassing the prosecution of them, so as to delay or defeat them. In a word, to borrow the language of Chief Justice Nelson, whose whole argument upon this subject, in the case of *Jack* v. *Martin*, 12 Wend. 311, is entitled to the most attentive consideration of the court, "the idea that the framers of the constitution intended to leave the legislation of this subject to the states, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the states, in respect to it, cannot be admitted." The confidence of the south, could only have reposed itself in congress, "where the rights and interests of the different sections of the country, liable to be influenced by local and peculiar causes, would be regulated with an independent and impartial regard to all."

*565]

If such was the intention of the framers of the constitution, the next inquiry is, whether it can be effectuated by the express *or implied powers granted in that instrument. Congress has legislated upon the subject. But had it a constitutional authority to do so? Is the power thus exercised directly or impliedly given? In conducting this inquiry, it is proper, in the first place, to look to the collateral supports on which this act of congress rests for its validity. It was passed only four years after the adoption of the constitution. In that congress, were many of the lead-

*566]

ing and most distinguished men of the convention. The act was not passed hastily; for it was reported in 1791, and finally acted on in 1793. It was not passed without full consideration; for the Virginia case, and the different opinions, looking to federal or state legislation upon a kindred subject, were communicated to congress in 1791. Here, then, is a contemporaneous exposition of the constitutional provision, in the act itself, which has been always regarded by this court as of very high authority. A practical exposition, which, in the language of a distinguished commentator, approaches nearest to a judicial exposition. 1 Story's Com. Const. 392. It is, indeed, the very case he puts, having all the incidents of such an exposition. For the authority of congress to pass this law was determined after solemn consideration, *pro re nata*, upon a doubt raised—upon a *lis mota*, in the face of the nation—with a view to present action, and in the midst of jealous interests. To this source of collateral interpretation, it has been already said, this court is in the habit of looking with great respect. Among other cases, those of *Martin* v. *Hunter's Lessee*, 1 Wheat. 351, and *Cohens* v. *State of Virginia*, 6 Ibid. 418, may be referred to; for the purpose of showing that the court has resorted to contemporary construction—to practical expositions of constitutional powers—in cases of much more doubt and difficulty than the present.

But further, from the period of its enactment, till very recently, this act of congress has been acquiesced in—practically applied in all the states, and regarded as containing judicious and salutary regulations in reference to both the subjects to which it relates. Ought a construction, time-honored as this is, to be lightly disturbed? This court has already answered the question. It has held a practice and acquiescence for a much shorter period, as fixing the construction of the constitution on a question of at least quite as much doubt. In the case of *Stuart* v. *Laird*, *1 Cranch 309, which involved the constitutionality of the provision [*567 in the judiciary act of 1789, giving to the judges of the supreme court circuit court powers, the court held this language: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

But in addition to contemporaneous exposition, and long acquiescence, we have the judicial decisions of the three great non-slave-holding states—Massachusetts, New York and Pennsylvania; in which the constitutionality of this act of congress was challenged and sustained. *Commonwealth* v. *Griffith*, 2 Pick. 11; *Wright* v. *Deacon*, 5 Serg. & Rawle 63; *Jack* v. *Martin*, 12 Wend. 312. So, too, in every case before the circuit court of the United States, the provisions of this act of congress have been judicially dealt with, without a question as to its constitutionality. It is submitted, therefore, that a very clear case of construction ought to be made out, to shake even the collateral supports on which this law rests.

But if the question can still be considered an open one, there is no difficulty in showing that the power of legislation in reference to this subject is

granted by the constitution to congress. It would be strange, if it were not so; strange, if upon a subject of such intense and general interest, to which the mind of the convention had been so directly called, they had left their work unfinished—their purpose unaccomplished. It has been said, however, and may again be said, that the legislative power of the federal government is a limited one; that the constitution enumerates the cases in which it may be exercised, but that this is not among the number. That besides these enumerated cases, a general power is given to congress to pass all laws necessary and proper to carry into execution all powers granted by the constitution to the government, or any of its departments or officers; but that
*568] there is no power so granted in reference to *this provision. Is this so? The constitution declares, that slaves escaping from service shall be delivered up, on claim, to the person to whom such service shall be due. What is the meaning of these words "on claim?" They look to a proceeding of a judicial character; to an assertion of the right of property, to be made before a tribunal competent to judge and decide; and to execute that decision, by a delivery of the property, if the claim be established. Is not this, then, a part of the judicial power, which extends to all cases at law and in equity, arising under the constitution, laws and treaties of the United States? Is not every such claim a legal claim? and when asserted, is it not a case at law arising under the constitution? If, then, the judicial power extends to cases falling within this provision of the constitution, congress had an unquestionable right to vest it. It was a duty to vest it; because this court has decided that the language of the constitution in regard to the impartment of the judicial power is imperative upon congress. *Martin* v. *Hunter*, 1 Wheat. 304, 316.

The judiciary act of 1789 does not cover the whole judicial power under the constitution. Subsequent legislation has supplied many omissions in that act, of which the act of 1793 is an instance, vesting in the circuit and district courts that portion of the judicial power which is embraced by the second and third sections of the fourth article of the constitution.

It is true, that the act does not prescribe a judicial proceeding according to the forms of the common law. But in the same case of *Martin* v. *Hunter*, this court has said, that in vesting the judicial power, congress may parcel it out in any mode and form in which it is capable of being exercised. The act contemplates a summary proceeding, but still of a judicial character. It provides for the preliminary examination of a fact, for the purpose of authorizing a delivery and removal to the jurisdiction most proper for the final adjudication of that fact; to the state on the laws of which the claim to service depends. But this examination is judicial in its character. The parties (claimant and alleged fugitive), are brought within the jurisdiction; the case is to be heard and decided upon proof; the certificate is not to be granted, unless the judge shall be satisfied, upon evidence, that the party is a fugitive owing service to the claimant. He acts, therefore, in a judicial character, and exercises judicial functions.

If, then, congress possesses this legislative power, which has been
*569] thus exercised, the nature of that power requires that it should be exclusive. It can only be efficacious and adequate to its object, by being exclusive. And if exclusive, either expressly, or by undeniable implication, the settled principle is, that the states are as absolutely prohibited from

legislation as if they were expressly forbidden to legislate. *Sturges* v. *Crowninshield*, 4 Wheat. 122. What is the nature of the power in this case? What is the object of this constitutional provision? It is, to restore to the slave-holding states, substantially, the right which the conventional law of the colonies gave them. It is to confer upon them an authority to reclaim and remove their fugitive slaves, with the least possible inconvenience, expense and delay. To be effectual to this end, it is obvious, that the mode of proceeding ought to be uniform. And in order to its being uniform, the power to prescribe that mode should be exclusively vested in one legislative body. If there be a concurrent power of legislation in the states, with a right to exercise that power, then it follows, that the fugitive could only be reclaimed according to the forms of state laws, irrespective of the regulations prescribed by congress. The constitutional guarantee would thus become a sounding phrase, signifying nothing. State legislation, upon such a subject, would become the sport of prejudice. Different tribunals, forms of proceeding, and modes of proof, would be established in the different states. And the pursuing owner would find it utterly impracticable, ignorant of the particular state into which the fugitive had escaped, to meet the requirements of the local law. A still further difficulty would be inseparable from the existence of a concurrent power. State laws have no obligatory force beyond state limits. A certificate of removal would carry no authority beyond those limits; and consequently, it would be necessary for the owner to make a new claim, offer new proofs, and obtain a new certificate in every state through which he might be compelled to pass to the state of his own residence. The nature of the power, therefore, and the effect of its actual exercise by the states, raise an implication sufficiently strong to render it exclusive.

But admit it to be concurrent; the principle is too firmly established, *to admit of argument, that in a case of this kind, where there is but one subject-matter of legislation, the concurrent power of the states [*570 is wholly suspended by the action of the federal power. The doctrine in *Houston* v. *Moore*, 5 Wheat. 1, is this, that where once congress has exercised its power on a given subject, the state power over the same subject, which has before been concurrent, is, by that exercise, absolutely prohibited. In other words, wherever congress exercises a concurrent power, it is made in effect an exclusive power, over the particular subject-matter of the power. There are, it is true, cases of concurrent powers on which both federal and state legislation may act at the same time; and where the latter is not suspended by the action of the former. Thus, the exercise of the taxing power by congress does not suspend the concurrent power of the states. Because, although the same power, it is exercised on different objects, or for different purposes. But where the power acts on the same subject-matter, to accomplish the same end, as in this case, the state power is necessarily suspended.

But if the principle thus adverted to were not applicable to this case, there is another which would be conclusive, and that is, that in the exercise of concurrent powers, if there be a conflict between federal and state legislation, the latter must yield to the constitutional supremacy of the former. It remains, then, only to show, that such a conflict exists in the present case; and a very cursory examination and comparison of the two laws will

be abundantly sufficient for the purpose. Thus, the act of congress authorizes the claimant to arrest the fugitive, without a warrant. The Pennsylvania law peremptorily requires one. The act of congress admits the oath of the owner or his agent, as proof of the claim. The Pennsylvania law excludes both, and requires the testimony of indifferent witnesses. The act of congress protects the claimant from all unnecessary delay and expense. The Pennsylvania law authorizes delay upon the suggestion of the fugitive; and burdens the claimant with the incidental costs. The act of congress imposes a penalty for obstructing or hindering the claimant in the prosecution and enforcement of his rights. The Pennsylvania law gives him no redress. In a word, the regulations which the two laws prescribe, are in all essential respects variant from each other. The *object of both may *571] be the same, but the means of attaining it are entirely different.

In conclusion, then, of the whole matter. The indictment charges the offence of kidnapping, under this state law. The special verdict expressly finds, that the fugitive was a slave for life, owing service and labor according to the laws of Maryland. The judgment of the court was against the party thus indicted. It follows, that in the judgment of the court, the offence of kidnapping, in Pennsylvania, may consist in seizing and carrying out of that state, an acknowledged slave, if the provisions of the state law for his arrest and removal are not complied with. The special verdict finds that fact, and the judgment of the court is founded on it. The offence charged is not that the fugitive was removed from the state of Pennsylvania, without complying with the provisions of the act of congress. Supposing that to be an offence punishable by state authority; which it clearly is not; it is not an offence provided for by this law; nor, according to the tenth section, would an exact compliance with the act of congress have been any protection to the party accused. The special verdict expressly finds, that the slave was carried out of the state, without complying with the requirements of this law of Pennsylvania. That is the gravamen of the charge. And consequently, if the state of Pennsylvania has no constitutional power to legislate at all upon the subject, the power being exclusively in congress; or, if having originally a concurrent power, it has been suspended by its actual exercise by congress; or if this state legislation is found to be in conflict with the federal legislation upon the same subject-matter; if either of these propositions has been successfully maintained, this judgment of conviction ought to be reversed.

Hambly, for the defendant in error.—The final decision of a great constitutional question should at all times be regarded as a subject for grave consideration and reflection; inasmuch as it may affect the happiness and prosperity, the lives and liberties of a whole nation. Among the people of this free country, there is nothing which should be guarded with more watchful jealousy, than the charter *of their liberties; which being *572] the fundamental law of the land, in its judicial construction, every one is immediately interested, from the highest dignitary to the meanest subject of the commonwealth. Any irreverential touch given to this ark of public safety should be rebuked, and every violence chastised; its sanctity should be no less than that of the domestic altar; its guardians should be Argus-eyed; and as the price of its purchase was blood, its privileges

and immunities should be maintained, even if this price must be paid again.

In all the solemn constitutional questions which have been adjudicated before this, the highest tribunal in the land, no one has arisen of more commanding import, of wider scope in its influence, or on which hung mightier results for good or ill to this nation, than that which is now presented to the court for consideration. An all-absorbing subject is incidentally involved in it—a subject which is, even now, heaving the political tides of the country, which has caused enthusiasm to throw her lighted torch into the temples of religion, and the halls of science and learning, whilst the *forum* of justice, and the village bar-room have equally resounded with the discussion. Its influences have been calculated by political economists; its consequences and determinations by political prophets; until all, from the statesman in the hall of legislation to the farmer at his fireside, are found arrayed on one side or the other of this great question, so that, whilst it has become "sore as a gangrene" in one region, it is the football of the enthusiast in another.

Prigg having been convicted in the state courts of a crime which the statutes of Pennsylvania designate as "kidnapping," the state of Maryland, of which he is a citizen, now raises the objection that the laws of our state are unconstitutional; and to test this question, we are this day here. On the 25th of March 1826, the general assembly of Pennsylvania passed an act, the first section of which renders it a felony to seduce or carry away any negro or mulatto from the state of Pennsylvania, to make them slaves. Mr. Hambly cited §§ 2–10 of the act of 1826. All the provisions of this act of the general assembly are alleged to be unconstitutional; and the plaintiff in error says, are *in contravention of the act of congress and the constitution of the United States. The third paragraph of the second [*573 section of article 4th of the constitution, declares, "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." Under this section, some contend, that the owner of a slave has a right, without reference to the municipal laws of the state or territory where he happens to be, to seize and carry away any alleged slave. That no legislation is necessary, either by congress or the states; that the clause is perfect in itself, and totally independent; and that the word "claim" means demand and surrender, without inquiry or investigation! That if legislation be necessary, congress has exclusively that power, has already acted, exercising its power over the whole matter, and therefore, all state legislation is valid.

The act of congress was passed 12th of February 1793; and authorizes the arrest of a fugitive from labor, and taking him before a judge of the circuit or district courts of the United States, or before any magistrate of a city or town corporate, and upon satisfactory proof, the judge or magistrate shall give a certificate which shall be sufficient warrant for the removal of the fugitive. The second section fixes a forfeiture of $500 on any person who shall obstruct, hinder, rescue or harbor such fugitive, &c. In the argument of this matter, it is asserted, that no legislation is needed; that the constitutional provision is ample; and that under the phrase "shall

be surrendered, on claim," everything which legislation can give, is already secured; and that under this clause, a power is contained, in virtue of which, any one may step into a crowd and seize and carry off an alleged slave, "just as he would a stray horse," or any other article of personal property. If this conclusion be correct, it is surely a strange deduction from the language used in that clause, and in direct opposition to what would seem to be impliedly its meaning. If such be the true meaning of "claim," why does that clause *say, that no state, by "any law or regulation therein," *574] shall discharge from service? Why speak of "law or regulation," if none be allowed? Why allude to that which is forbidden and unlawful? Why speak of state laws or regulations, if the states dare not pass any? And why not at once use the language which obviously presented itself, and say, that "escaping into another state," shall not discharge from service or labor, without adding a word about "laws or regulations?" The conclusion is unsound, and altogether unwarranted. The language of the constitution not only pre-supposes legislation, but that this legislation not only is to be, or may be, but will be, by the states. It was just as much as saying to the states: You may pass laws upon the subject—you may make regulations—you may prescribe the time and manner of seizure, the authorities before whom the parties shall come for adjudication—but you shall not discharge a *bonâ fide* fugitive from labor from that service which he owes under the laws of the state from whence he fled. Your authorities shall say, whether, under the laws of that state, he owes service, and if he do, you shall hand him over.

This construction is likewise contradicted by the fact, that, not only the states, but congress, legislated upon the subject, not long after the formation of the constitution—congress as early as 1793. It is, therefore, manifestly an argument which raises a strong presumption against the position contended for; that, at the early day, when the framers of that instrument were almost all in full public life; when the debates at its formation and upon its adoption were still fresh in the memory of the whole country; congress should have legislated upon this very point. Had the public men of the day forgotten the meaning of this phrase? Could they forget that "claim" meant peremptory surrender—that this was the meaning intended in the use of that word by the framers of the constitution, and should go to work to legislate, where not only no legislation was necessary, but not at all allowable? Such supposition will not be indulged a moment.

But again, if they had intended that neither the states nor congress should legislate upon this subject, is it not altogether certain, that they would not have used the term "claim," but would have selected other language better fitted to carry definitely the meaning which they intended to attach? What is the *meaning of "claim?" "A challenge of ownership," *575] says Plowden. A challenge of interest in a thing which another hath in possession, or at least out of the possession of the claimant. "Claim" implies that the right is in dispute or in doubt. "Claim" may be made by two or more at the same time. "Claim" has a technical legal meaning; and those who drew this instrument, being eminent lawyers and well versed in the use of language, may possibly have designed to point the meaning of the phrase, and for that reason used that word. This impression, too, is greatly strengthened by the recollection, that in the preceding clause respect-

ing fugitives from justice, a much stronger word is used. "Shall be delivered up on demand," is the language used in reference to criminals; but fugitives from labor are to be delivered up "on claim." What now is the difference between these two terms? Why, evidently, "demand" is peremptory. It will not admit of delay; it insists upon immediate obedience. "Claim" supposes debate, litigation the decision of a right. How is it, when one seeks satisfaction for an offence? I "demand" satisfaction! I require it immediately! You shall give it me, or I will force it from you! His antagonist sees by his language he is in earnest, and he must reply. But if he should say, I "claim" satisfaction, debate springs up, negotiation ensues, and the offence most likely takes another shape. This word "demand," in fact, thrust itself upon the attention of the framers of the constitution. It was used in the preceding paragraph, in reference to criminals from justice, and is eminently better fitted to express unconditional surrender than "claim" is.

But beside this, if the framers of this paper had designed such a purpose as that imputed to them, would they not have omitted from this clause the words "in consequence of any law or regulation therein;" and the clause would then have stood in an obvious shape; and every one would have understood, that any fugitive from labor, escaping into another state, should not thereby be discharged from service, &c. This puts the matter, it is considered, in a very clear and strong light; and exceedingly adverse to the construction that neither the Union nor the states can legislate upon this subject. Another reason which might here be noticed is, that no one, either in the debates upon the formation of the constitution, or *at its adoption by the states, ever asserted that to be the meaning of [*576 this clause. Mr. Hambly here referred to the debates in the Virginia convention.

Another most valid and substantial reason against this construction is, that it would be a violation of the very spirit of the instrument. If, under this term "claim," the stretch of power is so very great, that a man from a neighboring state can venture into Pennsylvania or Maryland, and upon his simple allegation, seize, and without reference to state authorities, carry off any one whom he may choose to single out as his fugitive from labor, it is a most unheard of violation of the true spirit and meaning of the whole of that instrument. The same power that can, upon simple allegation, seize and carry off a slave, can, on the allegation of service due, seize and carry off a freeman. There is no power, if neither congress nor the states can legislate, to dispute the question with the seizing party. In non-slave-holding states the presumption is, that every man is a freeman, until the contrary be proved. It is like every other legal presumption, in favor of the right. Every man is presumed to be innocent, until proved guilty. Every defendant against whom an action of debt is brought, is presumed not to owe, until the debt be proved. Now, in a slave-holding state, color always raises a presumption of slavery, which is directly contrary to the presumption in a free or non-slave-holding state; for in the latter, *primâ facie*, every man is a freeman. If, then, under this most monstrous assumption of power, a freeman may be seized, where is our boasted freedom? What says the fourth article of the amendments to the constitution of the United States? "The right of the people to be secure in their persons, houses, papers and

effects, against unreasonable searches and seizures, shall not be violated." Art. 5 "No person shall be deprived of life, liberty, or property, without due process of law."

But here we are met with the remark, that "slaves are no parties to the constitution;" that "we, the people," does not embrace them. This is admitted, but we are not arguing the want of *power to "claim" *577] and take a slave, but to claim and take a freeman! Admit the fact, that he is a slave, and you admit away the whole question. Pennsylvania says: Instead of preventing you from taking your slaves, we are anxious that you should have them; they are a population we do not covet, and all our legislation tends toward giving you every facility to get them; but we do claim the right of legislating upon this subject so as to bring you under legal restraint, which will prevent you from taking a freeman. If one can arrest and carry away a freeman, "without due process of law;" if their persons are not inviolate; your constitution is a waxen tablet, a writing in the sands; and instead of being, as is supposed, the freest country on earth, this is the vilest despotism which can be imagined! Is it possible, this clause can have such a meaning? Can it be, that a power so potent of mischief as this, could find no one of all those who had laid it in the indictment against the king of Great Britain, as one of the very chiefest of his crimes, "that he had transported our citizens beyond seas for trial," whose jealousy would not be aroused—whose fears would not be excited, at a grasp of power so mighty as is claimed for this clause? Think you not, that some one of those ardent, untiring, vigilant guardians of liberty, would have raised a warning voice against this danger? And that, too, when only eighteen months after the formation of this charter, although they had already in the body of the instrument carefully guarded the writ of *habeas corpus*, and provided for the trial of all crimes by jury, and in the state where committed, yet, as if their jealousy had been excited to fourfold vigilance, in their amendments provided for the personal security of the subject from "unreasonable seizure," and that no one should be "deprived of liberty, without due process of law."

Suppose (by no means an impossible case), a man to be seized in the streets of Philadelphia, simultaneously by a citizen of South Carolina and a citizen of Virginia, each claiming him as their slave; under the construction contended for, each would be entitled to carry him off, upon mere allegation! He offers satisfactory evidence to show that he is entirely free; but the state authorities cannot interfere, because the states cannot legislate and give them power; and congress cannot legislate, and *if it did, could *578] not give state officers judicial power. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304. What is to be done? allow these parties to wrangle it out in the streets, to settle the question with dirk and bowie knife, or execute the judgment of Solomon? No! the answer will be, hand them over to the district court, and there let them settle the right to property. Yes! but there you meet an unexpected difficulty. The district court can try the right of property as between the claimants, but not the right of liberty as between them and the arrested freeman; therefore, it follows, that because the party out of possession of the alleged slave cannot prove his right to take him, the party in possession retains him, and carries a freeman into slavery. Possession of a slave, in the absence of proof, is sufficient evidence

of title. 2 Marsh. 609. But in exercising the power of claim, and of excluding the arrested party from testing the question of slave or free, do you not violate the first clause of § 2, art. 4? "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In some states, they sell out, for jail fees, the personal services of certain prisoners. Now, suppose such an one, not a negro, to be seized in Pennsylvania, as an alleged fugitive from labor (and undoubtedly under this clause he may be seized), but the truth comes out, that the party seized is not and never was a prisoner, or sold out to service. Under this construction, you cannot try the question; and a free citizen goes promptly and without redress into slavery! Aye! but let that be tried, say the advocates of this doctrine, in the state to which he goes. There are two answers to this remark: first, it is in direct violation of the spirit of that provision in the constitution which requires trials to take place in the state where the infraction of law occurred; and secondly, what chance of fair trial would any man, under such circumstances, have in the state to which he is taken, where all the presumptions are against him, where the whole public opinion is against him, where he is entirely separated from his witnesses, whilst the whole *onus probandi* is thown upon him. Better a thousand slaves escape, than that one freeman should be thus carried into remediless slavery!

It is true, that Chancellor WALWORTH, in the case of *Jack* v. **Martin*, in 14 Wend. 507, says, that the right of recaption existed at common law, and "is guarantied by the constitution." Now, [*579 with the greatest deference for the opinion of the learned judge, we are not convinced that the right of recaption of persons ever existed here, or if it did exist, it is taken away by the amendment to the constitution. The open avowed ground is taken, that in a free state every man is *primâ facie* a freeman who is at large. If so, he comes under that class called "people;" and the right of "the people" to be secure in their persons against unreasonable seizures is guarantied by the constitution. Aye! but he is a slave, say the opponents of this doctrine. But that is not admitted. The very question at issue is, slave or free. Now, so long as he is not proved a slave, he is presumed free; and therefore, if you seize him, it is a violation of this constitutional privilege.

But, it is said, if this be not the true construction of this clause, and legislation be necessary, that the right appertains alone to congress; and that the act of 1793 covers the ground, and leaves no room for the action of state legislation. That no power to legislate upon this subject is expressly granted "in terms" to congress, must be at once conceded. It must likewise be as readily conceded, that it is not "prohibited" to the states. Then, if congress possesses this power, it must be, in virtue of a concurrent authority of acting upon the subject matter; or because this is a faculty which is necessary to the exercise of some power already granted. That it is not the latter, is manifest; for the most laborious investigation, and the most careful search, aided by the most critical powers of mind, can show no single provision of the instrument to the exercise of which this legislative power would be necessary.

There are two kinds of concurrent powers embraced by the constitution: 1. Those which both bodies may lawfully legislate upon; and 2. Those which the states may legislate upon until congress acts; when the latter,

being the supreme power, excludes the former. As an instance of the former, the regulation of the militia may be cited. Congress can "organize, arm, discipline and govern," whilst to the states is reserved the right of
*580] appointing officers and *the authority of training. Art. 1, § 8, cl. 16; *Houston* v. *Moore*, 5 Wheat. 24. An illustration of the latter class may be found in the power to establish bankrupt laws; on which, it has been decided by this court, that the states might legislate until congress did, when the acts of the former would cease and expire. *Sturges* v. *Crowninshield*, 4 Wheat. 193.

In order, therefore, to ascertain whether this power of legislation be concurrent or not, we must inquire: 1st. Whether it were possessed by the states, previous to the formation of the constitution, and appertained to sovereignty. 2d. Whether granted in express terms to the Union, or prohibited to the states. 3d. Whether it be an exertion of sovereign power by operating beyond the state territory; or, 4th. As necessarily originating in the Union, so that no exercise of it by the states can take place, without clear, open and undisguised conflict with the constitution.

Now, let us test this question by these rules. It is manifest, that slaves and slavery were the subjects of legislative power by the states, before the Union. After the declaration of independence, in 1776, each state, at least before the confederation, was a sovereign independent body. Each had the right to enact laws which no other power could revise; each could make war or conclude peace, without reference to the other; each could raise armies or maintain a navy, without consulting the others; and, in fine, possessed every faculty of sovereign power, as effectually and entirely as either France or England or any of the kingdoms of the old world, and equally as untrammelled. Then, this being the case, the union was formed, by taking away from the individual states portions of power, and vesting them in one central body, known as "the Union," in the formation of which were admitted maxims: 1st. That it possessed nothing by implication, except what was absolutely necessary to its existence: and 2d. That powers not delegated to the Union, nor prohibited to the states in express terms, were reserved. Art. 9 and 10 of Amendments. South Carolina, as early as 1695, passed laws upon the subject of slaves and slavery, and so down to the present time. So also, Connecticut in 1711, and Maryland in 1715.
*581] These, then, *are sufficient, as instances of the exercise of this power by the states, long before the constitution was formed; and this proves the first position,—that it was possessed by the states, previous to the formation of the constitution. And it will not be controverted, that the power is not "expressly" granted to the Union, nor prohibited to the states. Thirdly, the exercise of this power by the states is merely a matter of police and internal regulation; and therefore, does not operate beyond the state territory: and lastly, the power does not originate in the Union —that is, the right of legislation does not grow out of the Union; the power itself, the subject-matter, is not the birth of the Union; nor is its exercise a "clear, open undisguised conflict with the constitution," as the exercise of extra-territorial power would be.

It is inferred, then, from all this, that this power is not a concurrent one; that for want of express reservation of such right, it has not the features which enable it to be exercised at the same time by both parties,

as is the case with the militia laws. Nor can the action of congress absorb it and drive the states from it, as is the case with the bankrupt laws. It is a power which exists, and can only exist, in the states. Nor is it any answer to all this, to say, that a variety of laws and regulations will be passed by different states; that the legislation will be incongruous and dissimilar. We must take the constitution as we find it! Our duty is to construe, not to legislate! And we are told by good authority, that in the construction of constitutions, the *argumentum ab inconvenienti* will not answer; we dare not use it. The *ita scripta* rule is enough for us. If the constitutional provision be defective, there is a constitutional mode to amend it: let us then rather apply to that, than violently wrest the instrument by construction.

It is urged, however, that the passage of the act of congress of 1793 affords a very strong argument in favor of congressional action upon this subject; that the fact of its passage at so early a day evinces the understanding of that clause of the constitution to have been, amongst the framers of it, that congress alone had the right to legislate; and hence, by implication, as it were, they would convince us, that it was one of those concurrent *powers which the action of the highest legislative body absorbs and takes away from the states. This argument, if it prove anything, will prove too much. [*582

The act of congress authorizes the arrest of the fugitive, and requires him to be taken before any judge of the district or circuit court, or before any magistrate of a county, city or town corporate. Now, it is a principle perfectly settled by judicial decision, that congress cannot communicate the exercise of judicial power to any person who does not hold the commission of the general government. *Martin* v. *Hunter's Lessee*, 1 Wheat. 330. "Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself." Const. § 3, art. 2: "The president shall commission all officers." Now, if no man can be an officer of this government, without bearing the commission of the president, certainly, no "magistrate of a county, city or town corporate" can be a judicial officer of the general government, and so cannot take authority under the act. This principle is necessarily derived from art. 3, § 1, which provides, "that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish;" and of course, the persons holding this power must be commissioned by the power which establishes the courts. This doctrine has long been held by both the supreme and state courts. *United States* v. *Lathrop*, 17 Johns. 4; *Ely* v. *Peck*, 7 Conn. 239. The former was a case in which an action of debt was brought for a penalty, under the act of 1813, for selling spirituous liquors, and gave the state courts jurisdiction. The last case was an action against a deserting mariner, in which the state court had jurisdiction given it by an act of congress; but the judges in both cases declined exercising it. 1 Kent's Com. 402–3. This, then, being the case, that the act of congress of 1793 gave to "magistrates of a county" an authority which it could not give, the conclusion is irresistible, that they did not at that day understand, in the legislative hall, the construction of the constitution, as well as we do now, after an interval of half a century; and therefore, the argument above cited is of no avail,

inasmuch as it explodes itself. Besides which, we might add, that the
*583] states *have claimed the power just as openly and avowedly as congress has done.

It is supposed, however, that the weight of judicial authority from the state courts, is in favor, very decidedly, of the exercise of this power by the national legislature. Let us, therefore, examine. In 5 Serg. & Rawle 62, is contained the case of *Wright* v. *Deacon*. This was a writ *de homine replegiando*. The case had already been tried on *habeas corpus*, and adjudicated against the party, and upon that point decided; whilst it was taken for granted, that the constitution and act of congress gave warrant for his removal. The question was not agitated as to the constitutionality of the law of congress, or that of Pennsylvania; and the case, therefore, gives no authority for this construction. *Commonwealth* v. *Griffith*, 2 Pick. 11, was an indictment for an assult and battery upon a negro, and the defence made was, that he was a slave, and had fled from servitude. The court say, "This brings the case to a single point, viz., whether the statute of the United States is constitutional or not. The constitution, say they, does not prescribe the mode of reclaiming a slave, but leaves it to be determined by congress." Here is taken for granted, that which is far from appearing. One leap reaches the conclusion; without showing how congress attains this power, whether expressly, by implication, or how. In fact, one of the judges dissents, saying that he thought the fugitive should be seized in conformity to state laws. Further, the unconstitutionality of the law was not attacked on the ground that congress had no right to legislate at all; but merely because in conflict with other parts of the instrument. This case, therefore, it is respectfully conceived, proves nothing for the plaintiff in error.

In 12 Wend. 314, is found the case of *Jack* v. *Martin*. This was a writ *de homine replegiando;* and Judge Nelson, in the court below, decided, that the legislative power was concurrent, and therefore, the action of congress excluded the states from legislating, and that the object being palpable—*i. e.*, to secure the slaves of the south—it should have a construction that would operate most effectually to attain the end. We contend, that we are giving that construction to this clause most likely to produce the desired
*584] end. If excited argument and *an interested withdrawal of the whole subject-matter from the hands of the states could be effected by the south, will it not produce constriction and collision with the free states? Which is most likely to keep the peace? A tone of confidence and conciliation, or of defiance and the attempted exercise of illegal power? We must negotiate and legislate upon this and every other subject with the calumet of peace, rather than the tomahawk; with the conciliatory spirit of a band of brothers, instead of the animosity of deadly foes. The case of *Jack* was taken up before the court of errors and appeals, and the decision below sustained—not the question of constitutionality, but the question of fugitive or not, because Jack had admitted he was a slave by his pleas. But the question of constitutionality was debated, and in my judgment not a single solid reason was given for that construction, but on the contrary, Chancellor Walworth says, "I have looked in vain among the delegated powers of congress for authority to legislate upon the subject," and concludes that state legislation is ample for the purpose.

Now, then, upon recapitulating these cases, what have we? 1. We have one case where the constitutionality of the law is taken for granted, by Chief Justice TILGHMAN. 2. We have argument of Judge NELSON and Senator BISHOP, in favor of it, and the case in Pickering: and—3. We have the decisive opinion of Chancellor WALWORTH, and the dissenting judge in the case in Pickering. For, neither in *Ex parte Simmons*, tried by Judge WASHINGTON, and reported in 4 W. C. C. 396, nor in the case of *Johnson* v. *Tompkins*, Bald. 571, was the question of constitutionality at all mooted or spoken of, but both judges speak in the same breath of state laws and laws of congress; without once impugning the right of either party to legislate, or for one moment intimating a doubt as to the constitutional right of either party to pass them.

It may, however, be contended, that this authority to legislate is given to congress by the 18th clause of § 8, art. 1, of the constitution: "And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government *of the United States, or in any department or officer thereof," Judge STORY says, in his Commentary, § 1238: [*585 "The plain import of this clause is, that congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to congress." This case, then, is not embraced by the first part of the section, because it is not one of the "foregoing" enumerated powers. Nor is it included under the other term, "all other powers vested," because there is no power vested, for the learned commentator just alluded to, says it means express powers.

Speaking of the constitution, we are told in *Martin* v. *Hunter's Lessee*, 1 Wheat. 326, the government of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given or given by necessary implication. On the other hand, this instrument is to have a reasonable construction, according to the import of its terms. The words are to be taken in their natural and obvious sense; not in a sense unreasonably restricted or enlarged. Certainly, then, this phrase, "powers vested," means express powers; any other mode of construction would do violence to the whole instrument, and overturn a whole series of decisions. If, then, it means express power, there is none such in this case; and therefore, under this clause, congress cannot exercise the authority claimed. 1 Kent's Com. 388–90. "The correct principle is, that whenever the terms in which the power was granted to congress, or the nature of the power required that it should be exclusively exercised by congress, the subject was as completely taken away from the state legislature as if they had been expressly forbidden to act on it." But is that the case here?—the power is not granted in terms at all, and the nature of the power is such, that the states can as easily and usefully exercise it as congress. The truth is, the power is one of police and internal regulation, as much as ferries, turnpikes and health-laws; and in *Gibbons* v. *Ogden*, 9 Wheat. 203, we are told, that "no direct power is granted over these objects to congress, and consequently, they remain subject *to state legislation. If the legislative power of [*586 the Union can reach them, it must be for national purposes." How

can legislation respecting slaves become national when only a part of the states hold them? Such legislation cannot assume a national aspect, or attain a "national purpose."

If, then, this power be not expressly in congress, nor concurrently, nor necessarily appurtenant to any other power, what is the meaning of this clause? "No person held to service or labor in any state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service, but shall be delivered up, on claim of the party to whom such service or labor is due." It simply means this—nothing more nor less: You may legislate; you may regulate; but this one point alone you shall not touch: You shall not discharge the fugitive from service, if he were a slave by the law of the state from whence he fled.

The result is, that no power being given to congress to legislate, it is reserved to the states, under the 10th article of the amendments. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved." Federalist, No. 32. The state governments clearly retain all the rights of sovereignty which they had before the adoption of the constitution, and which were not by that constitution exclusively delegated to the Union. 1 Wheat. 325. Suppose, art. 4, § 1, is read thus: "Full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state;" and then stopped. Is it not apparent, that the states could by law regulate the kind and *quantum* of proof, the manner in which their courts should receive it; and if it was thought they could not, why in express terms reserve to congress "the right to prescribe the manner in which they shall be proved, and the effect thereof." Under art. 1, § 4, cl. 1, the times, places and manner of holding elections for senators and representatives shall be prescribed by the state legislatures; but the framers of the constitution cautiously add, that congress may make or alter such regulation, except as to place.

*587] *Art. 1, § 8, cl. 5, the power to coin money, one of the highest attributes of sovereign power, is expressly given to congress; and yet, in § 10, cl. 1. of art. 1, the states are cautiously and expressly prohibited from coining money. This has always been the highest mark of sovereign power.

It is, however, supposed by some, that because congress has legislated on the surrender of criminals, that therefore, there is stronger ground for claiming the right of legislating here. Mr. Hambly cited the Madison Papers, and Debates in Convention, that this matter was expected to be left to state legislation; and that the south was not united itself upon the subject. Madison Papers, p. 1447. As if, however, to remove all doubt upon this subject, we have, in the constitution itself, an open admission that the whole subject of slaves and slavery was left in the hands of the states. Art. 1, § 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 congress prior to 1808." Now, what is the meaning of this? Why, that congress shall leave the slave-trade, and all its operations, to state legislation entirely, with the exception, that after 1808, they may stop it, if they choose; but if they do not choose, it will always remain in the hands of the states, until they do see fit to close it. This, to my mind, with any other

consideration, is sufficiently convincing that every body at that day rightly understood this whole matter to be the subject of state legislation.

The use of the terms "legally" and "justly," in the formation of the constitution, shows that the right was to be ascertained by competent authority, not taken for granted; and that legislative power somewhere was to exercise itself upon the matter, and by none, more probably, than the same power which then had it in control,—the state legislatures.

It now only remains to examine two arguments urged on behalf of the plaintiff in error. It is alleged, that the judiciary act of 1789 vests in the courts of the United States the whole judicial power of the government; and that this being judicial power, which is sought to be attached to the general government, it is impliedly embraced by that act. *One word will be a sufficient answer to that argument. The power asked, [*588 or rather claimed, is not judicial, but legislative; and therefore, can by no possibility be claimed by, through or under the judiciary act. Another argument is, that legislative construction has, with this court, almost the authority of judicial decision. And because congress has, in its reports upon slavery, admitted or asserted this right, their claim, therefore, should be regarded almost as a judicial construction. It is answered, that if there be any one thing in this country entirely loose, uncertain and vascillating, it is legislation; and whenever the judicial exposition of our highest courts becomes so wavering and uncertain as to bear comparison with our legislation, we shall truly be the pity and contempt of all civilized nations.

It has been shown: 1. That "claim" does not mean peremptory demand and unconditional surrender. 2. That legislation is contemplated by the language of the clause; and that both congress and the states have legislated. 3. That this construction was never asserted by the framers of the constitution. 4. That it would violate its spirit. 5. That the power of recaption of persons never existed, or if it did, is restrained by the amendments. 6. That this power is neither expressly granted to congress nor prohibited to the states; nor is it necessary to the exercise of any granted power, nor impliedly reserved. 7. That the states possessed this power before the constitution was formed. 8. That it is a mere regulation of police, and does not suppose the exercise of national power; and, 9. That the constitution, in art. 1, § 9, gives, or rather leaves the whole subject in the hands of the states, where it originally found it.

Johnson, Attorney-General of Pennsylvania, stated, that he appeared before the court in obedience to the directions of the act of assembly, passed in 1839, to which reference had been made, to maintain the constitutional authority of Pennsylvania to enact the several laws set out in the paper-book in the hands of the court; and constituting the ground-work of the indictment and proceedings in the present case. He said, he occupied a position of great *delicacy and embarrassment; he stood before the [*589 court not only as the counsel, but as the official representative of the Commonwealth of Pennsylvania; and was, as such, bound by an oath as solemn as that taken by their honors, to support the constitution of the United States. It was made his duty to vindicate the right of Pennsylvania to adopt the laws in question against the allegation of the learned gentleman, who so ably represented the interests of Maryland, that they

conflicted with the constitution and laws of the general government. In performing this duty, he felt the responsibility to be almost as binding as if he were pronouncing a judicial decision, to advance no doctrines that were, in his judgment, incompatible with the true construction of the federal constitution.

It was gratifying to him, to be able to assure the court, that this official duty and his own conscientious convictions of right, as a citizen of the Union, were in perfect harmony on this subject; he should not hesitate to speak in earnest, for he spoke with sincerity. He desired to place Pennsylvania *rectus in curiæ*, on her proper footing, before the court. She came there voluntarily. She was not dragged sullenly to that high bar, denying the jurisdiction of the court and disclaiming its authority. This proceeding was one of amity, of concord, on the part of Pennsylvania and of Maryland, which were, as the learned counsel had told the court, the real and substantial parties. They came into that court to try a great question of constitutional law, to terminate disputes and contentions which were arising, and had for years arisen, along the border line between them, on this subject of the escape and delivery up of fugitive slaves. Neither party sought the defeat or humiliation of the other. It was for the triumph of law, they presented themselves before the court. They were engaged, under an imperative sense of duty, in the work of peace; and he hoped he would be pardoned, if he added, of patriotism also.

The difficulties which resulted in the present case had been previously felt, and made the subject of negotiation between these states. And it was a curious fact, that this very act of 25th March 1826, the unconstitutionality of which is alleged in this case, was the joint fruit of such negotiation. It was passed, as he believed, at the instance and with the entire approval of
*590] commissioners appointed by the constituted authorities of the state *of Maryland, to wait upon the legislature of Pennsylvania to obtain the passage of some law of the kind. At the time of its passage, it was loudly condemned by that portion of the citizens of Pennsylvania who favored the abolition of slavery. And now, a singular change of places is exhibited —the state of Maryland repudiates what she then sanctioned; and the adversaries of slavery sustain, though not very cordially, what they then condemned. One of these parties thinks this act of 1826 is too indulgent to slave-holders; the other, that it deprives them of their just rights. The considerate and enlightened citizens of Pennsylvania, with few, if any, exceptions, were, he believed, of the opinion that this law was precisely what it should be—alike warranted by the federal constitution, and careful to protect the rights of all. As such, it would be his duty, as it was his pleasure, to maintain it against every assault upon its constitutionality, let it proceed from whatever source it may.

By the act of 1780, Pennsylvania began the great work of philanthropy in regard to her slaves. She has pursued the policy there indicated, until slavery, with only here and there a time-stricken relic of former policy, has vanished from the soil. She did not trench on the rights of other states. She did not impugn the principles, or the conduct of their citizens—deeply as she abhorred slavery herself. She performed her own duty, and left to others the glory or the shame of performing or of neglecting theirs. In this act of 1780, there is a saving of the rights of slave-holders in other

states. So, in the act of 1826. Its very title speaks its object. It is "an act to give effect to the provisions of the constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping." Thus is this very unconstitutional act found to be an act to give effect to the constitution. The history of the legislation of Pennsylvania on this subject will prove, that though she has been ever found in the vanguard of the friends of liberty and humanity, she never has forgotten what is due to her sister states; she never has wavered in her loyalty to the constitution of the Union; and come what may, she never will depart from this course.

That Pennsylvania had the right, then, to enact the law in question, she solemnly avers to have been accorded to her by *the state of Maryland herself. She will not consent to surrender it, until this court, [*591 by its decision, strips her of that valued attribute of sovereignty. None will deny, that the main questions involved in this case are delicate, in some respects intricate, and in any point of view, important to all sections of the Union. Substantially they are these: 1. Is the power of prescribing the mode of delivering up fugitives from service or labor, under the 2d section of the 4th article of the constitution, exclusively vested in the general government? 2. If it is not, is it concurrently vested in the state and general governments, to be exercised on particular terms? or is it solely vested in the state governments? 3. Have the states the right to inflict penalties, as in cases of crimes, upon those who seize and remove fugitive slaves out of their territories, without pursuing the mode prescribed, either by the act of congress of 1793, or by the acts passed on the same subject, by the states themselves? The last of these three questions is the most material in the present case: perhaps, it is the only real question in this case, upon which the court is imperatively called upon to pronounce its judgment.

It is to be extremely regretted, that we have no judicial guides to aid us in the argument of this cause, which are of higher authority than the mere opinions of individual judges, who have, incidentally, often hastily, expressed them. The cases, such as they are, unfortunately, are few, conflicting and contradictory. They have, it is true, all occurred in states where slavery has been abolished, for such questions must rarely, indeed, happen, in states where slavery exists. It is obviously the interest of all parties in such states, to determine the question in one way. Without pretending to trouble the court with a detailed and critical examination of the following cases, he would refer to them as exhibiting a most striking illustration of the "uncertainty of the law." *Deacon's Case*, 5 Serg. & Rawle 62; *Johnson* v. *Tompkins*, Bald. 571; *Commonwealth* v. *Holloway*, 2 Serg. & Rawle 306; s. c. 3 Ibid. 4; *Commonwealth* v. *Griffiths*, 2 Pick. 18; *Jack* v. *Martin*, 12 Wend. 322; s. c. 14 Ibid. 510. In the cases in the New York and Massachusetts reports, the courts were divided in opinion. In *the cases in the Pennsylvania reports, the question did not properly arise, [*592 and the court, without examination, declared its opinion on the constitutionality of the act of congress of 1793. This subject has been incidentally noticed in a few other instances, but not in such a manner as to be deemed essential.

The questions are thus perfectly open and free from all embarrassment on the score of authority. Decisions of this court on other provisions of the

constitution will supply us with useful analogies; but we are thrown back on the elementary principles of the constitution itself, for the foundation of the present argument. Let us then recur to these principles, as the source of the power we are in quest of, and trace it up to its fountain-head.

The times call for a full and frank exposition of this subject; and he rejoiced that it had been presented, at this juncture, before this tribunal, and in the friendly spirit that actuated the parties now at the bar. He begged leave to make one further preliminary suggestion, before he opened the constitution. It was this: that the state and national governments were too often viewed as hostile and repugnant to each other in their relations. Powers granted to one, were regarded as if withdrawn from the other; and it seemed to be the effort of some who were called upon to judge between them, to treat them as if they mutually approached each other as belligerents, with swords drawn. This was not his opinion, nor would it be his course. He thought, with the fathers of the republic, that both were essential to each other; both formed one consistent, harmonious, beautiful system of government—complete when united—imperfect when divided: combined, stronger than links of iron—dissevered, weaker than a rope of sand. It would be his purpose, therefore, to contend for such a construction of the federal constitution as would place the state and national governments on this solid and impregnable basis.

I. In regard to the first question he had suggested, he would proceed to read and comment on the second section of the fourth article of the constitution, which was in these words, "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
*593] or labor may be due." This provision certainly gives no authority *to the general government, in terms; none, even by implication. It simply enjoins a duty on the states, and prohibits them from passing laws or regulations liberating fugitive slaves. It recognises the general right to legislate on this subject, for it restricts its exercise in a particular manner. If they could not legislate at all, it was futile and absurd, to say they should not pass laws of a particular description. But it enjoins that the fugitives shall be "delivered up," "on claim." This duty is made incumbent on the states, without prescribing the exact mode of its performance. The agency of the general government is in nowise concerned or invoked; the obligation is on the states, and for the states; their power is left perfectly free and untrammeled, with this single restriction—that they cannot discharge the fugitives from the claim of their masters or owners. The authority vested in the states, is in the nature of a negative pregnant; it denies and admits—denies the particular power of liberating fugitives, and admits the general power to prescribe how they shall be delivered up. Should the states transcend their authority, by enacting laws impairing the right of the slaveholder, the remedy is by judicial instrumentality. It is here: this court will pronounce the acts unconstitutional and void. But this power of the general government is preventive—not active; it is solely the right to restrain, not the right to compel. There are various restrictive clauses in the federal constitution; but no one ever supposed, that a prohibition of legislation upon the states gave the positive right to congress to legislate;

much less can it be pretended, that a prohibition of a particular species of legislation divested the states of all general authority on the subject, and transferred the right to the national government. This construction of the powers of the general government would annihilate the state sovereignties at a blow. See on this subject of the general powers of the general government, the letters of the Federalist, Nos. 41, 42 and 43; but especially 42. In this letter, the subject of the 4th article of the constitution is distinctly and elaborately considered. Every line, and every word, is noticed; but this very identical provision, in regard to fugitive slaves, is entirely omitted. Had it, at that day, been supposed to have conferred any power on the general government, could it thus have been passed silently by? Does the tremendous power arrogated for the national government, in *this case, lurk in this provision, without having been discovered by the [*594 keen eyes of Hamilton, Madison or Jay? These letters of the Federalist, were written before the adoption of the constitution. They were read by almost every one. The comments were identified with the letter of the constitution itself. They have been always treated as a contemporary exposition, by the first judicial intellects of the age, sanctioned by popular adoption; and he felt persuaded the court would pause, before it construed into the constitution, powers which these great men never dreamed of ascribing to the general government.

The reason for introducing this provision into the constitution, is itself the best exponent of its meaning. Prior to the adoption of the constitution, slavery, absolutely, or in a modified form, existed in all the states, except perhaps in Massachusetts. The right of the master to pursue and recapture fugitive slaves then existed by mutual comity. Few, if any, free negroes could be found. The presumption was, that all negroes were slaves. No general regulation was necessary; for it was the interest of all the states, to countenance and aid the master in the recapture of his runaway slave. But symptoms of repugnancy to slavery began to be manifested in Pennsylvania and other states; and the southern states were apprehensive that it might, at some future day, interfere with the recovery of their property. They desired a guarantee from the general government; not that that government should provide for the redelivery of their fugitive slaves, but that the constitution of the Union should prohibit the states from passing laws declaring them to be free. The provision of the constitution under consideration furnishes this guarantee; it never was intended for more. See 2 Elliot's Debates, 335, 336; Mr. Madison's and Governor Randolph's speeches in the Virginia convention. Had the southern states demanded more than this simple guarantee; had they required that the right of the states to prescribe the mode of surrendering up fugitive slaves should be yielded to congress exclusively; we know not but it might have jeoparded the formation of the Union itself. It is well known, the word "slave" is not found in the constitution. That it was excluded on account of the scruples of certain of the northern members of the convention; and had these members been told, that they were depriving the states they represented *of the power of directing the mode in which fugitive slaves were to [*595 be redelivered to their masters, who can doubt, that they would have rejected with indignation, any instrument of government, containing such a surrender of state sovereignty as this?

The constitution does not aim at any abridgment of the state sovereignties on this subject, except in the single point of prohibiting them from setting fugitive slaves at liberty. In all other essential particulars, it wisely leaves them to the exercise of their own judgment. Different rules on this subject would naturally be established in different states. Less strictness of proof of the right of the master would be satisfactory in a slave state, than would be so in a free state. Some respect is due to the common feelings, or even prejudices of a community, in the enforcement of claims deemed odious in principle to any considerable number of the people. If even compatible with justice, they should not be pressed in a manner to outrage or wound the sympathies of those on whom the demand is made. To abhor slavery, in principle, is no great offence, in a country where liberty is the boast and the birthright of every creature wearing the image of his Maker. The states are the best judges of that mode of delivering up fugitive slaves, which will be most acceptable to their citizens. It is evident, that no general law can suit the spirit of the people in all; and the only rational mode of providing for the evil, is that provided by the framers of the constitution—by committing it to the wisdom and patriotism of the states themselves. The tendency of this course of reasoning is, not only to prove that the general government has not exclusive, but that it has no jurisdiction over this subject whatever. To remove all possibility of difficulty, however, he would proceed to consider the nature of its exclusive powers, with some minuteness, but great brevity.

On every principle of rational construction, recognised by common sense and by judicial decisions, exclusive authority on any given subject was vested in the national government in only three cases. 1. When the power is expressly granted. 2. When the power is vested in the general government, and prohibited to the states. 3. When the exercise of a power by the states would be contradictory *and repugnant to the exercise of a rightful power by the general government. See the Federalist, No. 32; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Gibbons* v. *Ogden*, 9 Wheat. 1.

*596]

Under which of these classes of exclusive powers, can such power be inferred in this case? Not under the first, for, as has been already shown, no such power is given. Not under the second, for no power is vested in the general government, nor prohibited to the states, in the section now before the court, which has been violated. Not under the third, for the general government neither possesses, nor has exercised any power, to which the exercise of the power of enacting the law in question by Pennsylvania, is either contradictory or repugnant. The supposed incompatibility, arising from the nature of the power to be exerted, cannot render it exclusive in the national government; for the very foundation of the argument is wanting, the existence of the power at all.

II. Taking it, then, as established by the argument, that exclusive authority to legislate on this subject is not vested in the general government, is it vested in the respective states concurrently, and co-operatively with it, or solely and independently of all control on the part of congress? Anterior to the adoption of the constitution, the power of prescribing the mode of surrendering up fugitive slaves, clearly belonged to the states alone. It is not taken away by that instrument; it is not inconsistent with

any of the powers vested in congress or the general government; it is one of the most necessary attributes of sovereignty recognised and sanctioned by every principle of national law. It belongs to them still. No rightful power exists to divest it. The constitution forbids it; and the constitution only can strip them of this power. See 4 Wheat. 122; 5 Ibid. 1; 2 Dall. 294; 3 Ibid. 386; 2 Wheat. 259; 3 W. C. C. 316, 322. The tenth article of the amendments of the constitution settles this part of the case beyond all cavil or controversy. There let it rest. Whatever may be the power exercised by congress, the states at least cannot be deprived of the power that belongs to them under the constitution.

The act of congress of the 12th February 1793, on this subject, is supposed to be a constitutional exercise of power. Passed so recently after the adoption of the constitution, and *by men intimately associated with that event, it has hardly ever been subjected to the test of examination; it has been taken for granted, and acted upon without question. But even great names cannot sanctify wrong; time cannot supply the want of constitutional authority. We must examine that act of congress now, as it would have been examined if it had come before this court the day after it was enacted. He would not speak irreverently of the congress of 1793; but he would take occasion to say, the history of this famous law exhibited some curious reminiscences. Its origin, in a few words, was this. In the year 1791, the governor of Pennsylvania made a demand on the governor of Virginia, for the surrender of three persons charged with kidnapping a free negro. After taking the advice of the attorney-general of that state, the governor refused to comply, on the ground, that although the constitution made it obligatory on him to surrender up fugitives from justice, yet as there was no act of congress directing the mode in which it should be done, he could not and would not yield to the demand. The governor of Pennsylvania submitted the question to President Washington, who, after consulting the attorney-general of the United States, brought the whole matter to the notice of congress. See 1 American State Papers, Miscellaneous, 38–9. That body referred the subject to a committee; a bill was reported, substantially the act of 1793. It lay upon the table for a considerable period, and finally passed and became a law on the 12th February 1793. It is to be observed, that the only question submitted, was the one touching fugitives from justice—not fugitive slaves. The two subjects were comprehended by congress in one bill, and the northern states were constrained to agree to the provision relative to fugitive slaves, for the purpose of procuring the passage of a law providing for the case of fugitives from justice. [*597

The science of legislative log-rolling, which has been deemed of quite modern origin, appears not to have been unknown to the congress of 1793. There is no question about the power of congress to legislate on the question of fugitives from justice. The demand is to be made by the executive authority, on a "charge made" against a person, of treason, felony, &c., who shall flee, &c. The first section of the fourth article of the constitution expressly confers on congress the power of prescribing *the manner in which "records and judicial proceedings shall be proved, and the effect thereof." The right, therefore, to legislate on this subject is clear. But there is not the remotest connection between this matter and that of fugitive slaves. The one has sole reference to crimes perpetrated against [*598

the public peace and public safety; the other to the recapture or reclamation of private property: yet congress classed them together, and made the provision for one depend on a similar provision for the other.

What are the features of this act of congress, which, as is contended, was passed in pursuance of the constitutional authority of the general government; and which terminated for ever, if such right ever existed, the concurrent power of the states to legislate on the same subject? It empowers state judges, magistrates, &c., to take cognisance of the cases of fugitive slaves, together with judges holding their appointments under the national government. So far as it attempts to vest this or any jurisdiction in state officers, it is unconstitutional and void. The solemn decision of this court has branded such attempt with condemnation. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; 3 Story's Com. Const. 114, 115, 386, 603; Serg. Const. Law 386, 398.

That act, then, is void, so far as relates to all instrumentality for its execution, but by the judges of the courts of the United States. The authority of its framers, as constitutional lawyers, is thus exploded; and their boasted work, like all things human, is characterized by frailty and error. If it even be regarded as conformable to the constitution, its execution is rendered almost impracticable by the want of adequate agents. In a large state like Pennsylvania, with but two district judges residing three hundred miles apart, how is the difficulty of obtaining certificates of removal for fugitive slaves to be obviated? If the state authorities cannot be called upon to furnish aid, what are the limits to the obstacles that environ the masters? A very brief season of trial will make them known. He would suggest to the court, whether this act of congress was not operative only in the district of Columbia, the territories, and wherever congress had exclusive right of legislation. To this extent, he did not intend to question its validity.

*599] It was a fair and reasonable presumption from the provision of the act of congress itself, authorizing the interposition of state officers, that congress, aware of its inherent defect of jurisdiction, contemplated the co-operative or concurrent aid of state legislation, to carry the provisions of this law into effect. If not, why impose on the state magistrates duties which they could not perform? Would a certificate of removal, given under this void authority, authorize the master to remove his slave? Clearly not! Nor would it afford him any protection against the rescue or escape of his slave. To seek the aid of such official authority would be alike dangerous and idle. It would lead to incessant broils and disturbances of the public peace; and to the inevitable escape of the fugitive from his master. In this state of the case, the legislature of Pennsylvania deeming the act of congress, pursuant to the federal constitution, steps forth to aid the pursuers of fugitive slaves. The act of assembly of that state of the 25th of March 1826, was passed in the manner he had already stated, to confer authority on her own magistrates and judges, which the constitution had denied under the act of congress.

It, in the first place, describes the offence charged against the defendant in this case, and then proceeds to find the mode in which the state magistrates and judges shall take cognisance of the cases of fugitive slaves. It does not change the mode of making proof on the part of the claimants, nor the mode of granting certificates of removal; it simply deprives subordinate

magistrates of the power of granting such certificates, but it directs their interference to procure the arrest of the fugitive, and enjoins on the several judges the duty of hearing the proof and granting the proper certificates for the removal of the fugitive, on certain terms therein prescribed. It does not touch the act of congress. It recognises its authority, and leaves it as it stood before. Proceedings under this act of assembly are purely voluntary. Claimants may resort to it for aid, or pursue the directions of the act of congress. If its provisions are onerous, discard them: take shelter under the national law. But it is an additional remedy provided for the benefit of the slave-holders. It gives them a short cut to justice, and what cause have they to complain, if it leaves the other course equally free for their adoption? *In determining which remedy to invoke, the slave-owner will be governed by circumstances, distance, place, character [*600 of neighborhood, clearness of his own proof, &c., and will act according to the preponderance of advantages. Not one particle of inconvenience can he suffer under this act of Pennsylvania, while he has the chance of manifold benefits.

The acts of congress and of Pennsylvania form together an harmonious system, neither jarring nor conflicting in any part of its operation. It is careful of the rights of the slave-holder, and is adapted to the feelings, sympathies and sovereign power of the states. If the power to pass laws on the subject of delivering up fugitive slaves be concurrent, the states cannot control the acts of congress, and cannot, therefore, impair the rights of the owners. If the power be solely vested in the states, they cannot impair this right under the federal constitution. In either case, the slave-holders may bid defiance to hostile state legislation. The mode of recapturing or seizing their property by the southern slave-holders, under the laws, both of congress and of the legislature of Pennsylvania, is a summary one, in derogation of the common law; and might be confined to a strict and rigid adherence to the boundaries laid down on the subject, in either of them, to the exclusion of the other under the constitution; but when the free states themselves, who might require this construction, choose voluntarily to surrender it, and treat it as a remedial power, to be enlarged, by both state and national legislation, for the benefit of the slave-holders, it is an extraordinary spectacle to see those most deeply interested arrayed among the adversaries of this liberal policy. It appeared to him one of the most unaccountable delusions that ever seized the human mind. He would leave to future times, as a matter of wonder, the task of discovering why his learned and zealous friends on the other side, and himself, had not changed places in this argument. Experience will demonstrate who advocates the true interest, not of the north only, but of the south, and of all sections of the Union. He did not for an instant question motives, he spoke of results alone. To these he would appeal, for a judgment that might abide the test of time, with all its attendant train of circumstances, fraught with good or ill to our country.

Supposing the power to pass laws on the subject of fugitive *slaves to be concurrent, the learned counsel on the other side contended, [*601 that it had been exercised by congress; that the whole ground of legislation was provided for; that the right of the states was thereby superseded, and that the act of assembly of Pennsylvania was absolutely void. To all these

positions, he would answer, in addition to what had already been advanced, that congress had not covered the whole ground; that it had expressly intended to employ the agency of state magistrates, which could not be done without state legislation; and that the states, if they had a right to authorize the action of their officers, could do so on such terms as they pleased, if they did not contradict the act of congress. There was no such contradiction or repugnancy in this case, and of course, the argument raised on that presumption totally failed.

He could not, on this branch of the case, fortify his argument with stronger reason or authority than by quoting the words of Mr. Justice STORY, in the case of *Houston* v. *Moore*. On this basis, he did not fear to let it rest. "The constitution, containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of such powers in affirmative terms to congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states." And also, "in all other cases not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with congress, not only on the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning."

III. The vital question in this cause seemed to him to be this: whether the state of Pennsylvania could not punish the forcible removal of a negro, in the manner and for the purposes set forth in this special verdict, as a criminal offence, when such removal *was made in total disregard of *602] the act of congress, and of her own act of 1826. He need hardly remind the court, that the provisions of the federal constitution under consideration, prescribed that fugitive slaves were to be "delivered up," "on claim." Both the acts of congress and the legislature of Pennsylvania directed the mode to be pursued in making claim and delivery. It is obvious, that the constitution contemplated two acts—the claim by the master, and the delivery in pursuance of it, by the state where the fugitive was found. One preceded the other; and neither could be available to restore the slave to his master, alone. Under the act of congress, he might "seize" the slave, but could not remove him, without the certificate of the judge or magistrate. Under the act of 1826, the magistrate may issue his warrant to apprehend the fugitive; but the judge alone can grant the certificate. Under neither can the master remove the slave, without this certificate. It is his only legal warrant of removal, and it is a sufficient warrant throughout the whole Union. A forcible removal is nowhere authorized or countenanced; on the contrary, it can only be a removal under the law, and according to the law. The master, under the act of congress, may "seize" his slave, but only for the purpose of taking him before a judge. He is protected in making such seizure; but the moment he abuses

this right, and in defiance of law, undertakes to remove his slave, without a certificate, he forfeits the protection of the law, and becomes amenable to such punishment as the states may prescribe.

The act of congress punishes those who interfere with the rights of the slave-holder; but is silent as to the rights of negroes wrongfully seized, and of the states whose territory is entered by persons, under pretext of right, to violate the laws and carry forcibly away those who are living under their protection. These cases are clearly left to the guardianship of the states themselves. The tenth article of the amendments to the constitution secures this right; and self-respect, if not self-protection, demands its exercise. It has already been decided, by this court, that persons who violate or disregard the provisions of an act of congress may be made amenable to state law. *Houston* v. *Moore*, 5 Wheat. 1; 2 Hamilton's Works 347. This is, not on the principle, that to violate an act of congress is a *crime against the state; but that the offence denounced by the laws of the state is not protected by the national authority, and hence may be punished as a crime. [*603

Prigg, the defendant in this case, first sought the aid of the state law, to seize his slave, and then, in contempt of both its mandates and those of the act of congress, removed the fugitive, without making claim, obtaining certificate, or doing anything to procure the warrant of the law. This was a wanton insult to the dignity of the state of Pennsylvania; and tended directly to produce riots, disturbances and ill-blood between her citizens and those of the state of Maryland. Would it not be monstrous, to hold, that an act which leads to such results, which offends so deeply the honest prejudices of large portions of the citizens of a state, is not, or may not be punished as, a crime against her sovereignty and her laws? If such power do not belong to the states, it is difficult to conceive, how any portion of their police arrangements may not at any time be annulled and abrogated by the general government. A more absolute annihilation of the state sovereignties than this would be, is not within the stretch of human power.

It is a familiar principle to the court, that on the ground of repugnancy to the constitution, state laws may be void in part, and valid for the residue. These questions are extremely delicate; and this court will declare laws void for this reason, only in a clear case. *Fletcher* v. *Peck*, 6 Cranch 87. If possible, the court will reconcile them with the constitution; and so far as depends on their policy or justice, leave that to the judgment of the people who enact and must obey them. Dismissing from consideration, for the purposes of this argument, the right of the states to pass laws on the subject of the delivery up of fugitive slaves, in what respect does the act of 1826, so far as relates to the punishment of those who are guilty of kidnapping, conflict with the constitution of the United States, or with any act of congress? He thought, he might challenge the utmost ingenuity to point out such conflict. It was clearly the exercise of a reserved power. It only punished those who set all laws on this subject at naught, and by their examples, did more to endanger the rights of the slave-holders in the recovery of their fugitives, than all the state laws ever adopted had done, or could do. Such rash and indiscreet efforts to regain fugitive slaves, as this defendant made, have done *much to foment the spirit of opposition to slavery in the north; and if persisted in, will awaken a [*604

feeling not easily subdued or controlled. Did the chivalrous and considerate slave-owners of the south come themselves in pursuit of their fugitive slaves, these instances of outrage would seldom, if ever, happen; but the agents often employed by them, are of the most debased character, and being alike ignorant and regardless of law and courtesy, excite, by their conduct, the deepest emotions of indignation and abhorrence. It is against such offenders, that the penal enactment in question is chiefly aimed. Can it be possible, that this court will strike down the arm of state authority, thus uplifted to maintain peace, order and the respectful observance of the law?

The fact that the negro thus forcibly and illegally removed is a slave, is wholly immaterial. It is admitted by the other side, that legislation under the constitution is necessary to carry the provision on this subject of fugitive slaves into effect. If so, the right of removal cannot exist independent of such legislation. Although the slave may be so, in fact, yet he must be identified and certified by the law to be such, to authorize his removal. Until this is done, no presumption of slavery arises. True, it will arise, if "seized" on "claim," and taken before a judge, but not, if removed without this judicial sanction. Here is the true point of the case. The law protects the owner or agent, until he proceeds to remove the slave in defiance of its prohibition. The instant he does this, the crime is committed; the penalty is incurred; the violated law demands its victim. The constitution evidently contemplates the act of the law, and not the act of the party, in the recovery of fugitive slaves; and he who, with a strong hand, usurps the prerogative of the law, and tramples on its mandates, has no right to complain of the punishment it inflicts.

The special verdict in this case distinctly admits, that the act of the defendant is neither sanctioned nor protected by either the act of congress or the legislature of Pennsylvania. It was, therefore, clear, as he believed, whatever might be the opinion of the court upon the broad question of the power of the states to pass laws directing the mode of delivering up fugitive slaves, that the act of Pennsylvania, so far as it affected this case, or was involved in its determination, was not repugnant to the constitution,

*605] *and that accordingly the judgment of the supreme court of that state must be affirmed.

In conclusion, said Mr. Johnson, the court will allow me to say, that I have argued this case on the presumption that many great rules of constitutional interpretation have been settled by its decisions; and that I have adopted and applied them so far as they appeared applicable, without consuming the time or abusing the patience of the court, by elaborate inquiries into their justice or their authority. I have not deemed it respectful, to address this court as if I were delivering a course of elementary lectures in a law academy. I know my own duty, and the character of this court, too well, to engage in such an undertaking. I feel persuaded that my deficiencies will be far more than supplied by the learning and experience of your honors. I have sought to confine my argument strictly to the case before you, and I hope, within this scope, no points of essential interest have escaped my attention.

I trust, I shall be pardoned, if I again reiterate my conviction, that the construction of the constitution for which I have contended, is the true,

rational and just one. Whatever may be the opinion of others, it cannot and will not be plausibly alleged, that this construction violates any of its provisions, or endangers any power vested in either the national or state governments. It offends no prejudices; it trenches on no right; it sets no example to be hereafter pleaded in justification of measures which tend to augment the power of the general government, and to strip the states of their proudest attributes of sovereignty. It binds each in its proper sphere; it invests both with all requisite and proper authority to perform the functions for which they were designed, and it divests this obligation to deliver up fugitive slaves, which, to the sensitive, is harsh and odious, of almost every feature of painful repugnance to the feelings.

But let the picture be reversed: Deny the right of the states to legislate on this subject, for the preservation of their own peace and the protection of their own soil from insult and aggression; aggregate exclusive power for the general government to order and direct how, and by whom, alleged fugitive slaves are to be restored to their masters or hired pursurers, and you arouse a spirit of discord and resistance, that will neither shrink nor slumber, till the obligation itself be cancelled, or the Union which creates it be *dissolved. I do not say this in menace: God forbid I should! but in expostulating warning, to those who, by demanding too much, [*606 may sacrifice even that to which they are justly entitled.

The various, diversified and almost antagonist interests of different sections of our Union, render government here a task of no small caution, forbearance and responsibility. Time and experience have emphatically taught us, that there is but one mode in which these interests can be effectually guarded and promoted; and that is, by a strict, steady and undeviating adherence to the spirit and letter of the national constitution. The events of every day, and every year, invest the constitution with additional claims to our veneration. Its advantages seem to multiply with our necessities, and to spring out of them. It would not be difficult, in the course of our history, to point out particular instances, in which different quarters of the Union, influenced by adverse interests, have sought to apply opposing constructions to the same provisions, on assumed general, strict or latitudinarian principles; and yet, in a very brief period of time, constructions of other provisions have compelled these sectional parties to change their respective ground, and to repudiate what they had before adopted. These considerations rebuke the spirit of self-confidence and of self-interest, and admonish us, that in the end, that construction is the only sound, rational and safe one, which encroaches on no peculiar interest, and which sustains all alike, with even-handed justice. Let the south and the north remember, that he who lives by the sword to-day, may die by the sword to-morrow. Then, indeed, may we read the constitution in the benign spirit of the golden rule, to do "unto others, as we would that they should do unto us."

The framers of our glorious constitution, appear to have been little less than inspired. They not only guarded the liberties of their own age, but they looked into futurity, and provided for the liberties of ages to follow them—constitutional indemnities which must then have been established, or never established at all. The day to intrench political freedom within a written constitution, was the day when the fresh recollection of the revolu-

tionary contest not only taught its value, but the duty of placing it beyond the reach of invasion ; and our fathers, conscious of this truth, performed
*607] the duty devolved on them, in a manner worthy of *its inestimable importance. The most skeptical must trace the finger of God in this work ; and acknowledge that he has sanctified it in the councils of his Providence. It is adapted to our condition in every stage of our national advancement. From the Atlantic to the Pacific oceans, and from the lakes to the borders of Mexico, it has stretched forth its cherishing arm over our people, and diffused its blessings on all alike. It has "grown with our growth, and strengthened with our strength ;" it was the swaddling clothes of our national infancy ; it is the coat of mail that envelopes the giant-limbs of our national manhood. Changed as is our condition, modified as may seem our government in various matters of policy ; the constitution of our fathers is still, solid and entire, the constitution of their descendants. If we would preserve it, if we would perpetuate its benefits, we must, in its interpretation, adhere with inflexible tenacity to that spirit of generous and enlightened concession in which it had its origin, which now and for ever must be its breath of life. It is equally endangered by straining its just powers too far, as by crippling their operation, and shrivelling up the vigorous energies which alone make it a form of government capable or worthy of popular confidence and support. To claim for it, what is withheld—exclusive authority to legislate on the delicate subject of directing the delivery up of fugitive slaves, to the entire exclusion of state interposition, seems to me the rankest usurpation. In resisting this doctrine, I verily believe, I stand here more as the true friend of the south, than those who honestly, but erroneously, urge it upon the court. In the name, then, of Pennsylvania, in the name of all the states—in the name of the Union itself—I protest against this dangerous encroachment on state sovereignty and state independence. The long and impatient struggle on this question, I trust is nearly over. The decision of this court will put it at rest.

Pennsylvania will be the first to acquiesce in whatever decision may be pronounced ; and deeply and anxiously as she desires to see all the rights guarantied to her by the national constitution steadfastly maintained, she submits, with a confidence that knows no fear, these rights, which are
*608] equally dear to every *sister state as they are to her, to the judgment of this high and enlightened tribunal.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of Pennsylvania, brought under the 25th section of the judiciary act of 1789, ch. 20, for the purpose of revising the judgment of that court, in a case involving the construction of the constitution and laws of the United States. The facts are briefly these :

The plaintiff in error was indicted in the court of oyer and terminer for York county, for having, with force and violence, taken and carried away from that county, to the state of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her, as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March 1826. That statute, in the first section, in substance, provides, that if any person or persons shall, from and after the passing of the act, by force and violence, take and carry away, or

cause to be taken and carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt to take, carry away or seduce, any negro or mulatto, from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars; and moreover, shall be sentenced to undergo servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years; and shall be confined and kept to hard labor, &c. There are many other provisions in the statute, which is recited at large in the record, but to which it is in our view unnecessary to advert upon the present occasion.

The plaintiff in error pleaded not guilty to the indictment; and at the trial, the jury found a special verdict, which, in substance, states, that the negro woman, Margaret Morgan, was a slave for life, and held to labor and service under and according to the *laws of Maryland, to a certain Margaret Ashmore, a citizen of Maryland; that the slave escaped and [*609 fled from Maryland, into Pennsylvania, in 1832; that the plaintiff in error, being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837, caused the said negro woman to be taken and apprehended as a fugitive from labor, by a state constable, under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognisance of the case; and thereupon, the plaintiff in error did remove, take and carry away the said negro woman and her children, out of Pennsylvania, into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore. The special verdict further finds, that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland. Upon this special verdict, the court of oyer and terminer of York county adjudged that the plaintiff in error was guilty of the offence charged in the indictment. A writ of error was brought from that judgment to the supreme court of Pennsylvania, where the judgment was, *pro formâ*, affirmed. From this latter judgment, the present writ of error has been brought to this court.

Before proceeding to discuss the very important and interesting questions involved in this record, it is fit to say, that the cause has been conducted in the court below, and has been brought here by the co-operation and sanction, both of the state of Maryland, and the state of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this court; so that the agitations on this subject, in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest. It should also be added, that the statute of Pennsylvania of 1826, was (as has been suggested at the bar) passed with a view of meeting the supposed wishes of Maryland on the subject of fugitive slaves; and that, although it has failed to produce the good effects intended in its practical construction, the result was unforeseen and undesigned.

The question arising in the case, as to the constitutionality of the statute
*610] of Pennsylvania, has been most elaborately argued at the *bar. The counsel for the plaintiff in error have contended, that the statute of Pennsylvania is unconstitutional; first, because congress has the exclusive power of legislation upon the subject-matter, under the constitution of the United States, and under the act of the 12th of February 1793, ch. 51, which was passed in pursuance thereof; secondly, that if this power is not exclusive in congress, still the concurrent power of the state legislatures is suspended by the actual exercise of the power of congress; and thirdly, that if not suspended, still the statute of Pennsylvania, in all its provisions applicable to this case, is in direct collision with the act of congress, and therefore, is unconstitutional and void. The counsel for Pennsylvania maintain the negative of all these points.

Few questions which have ever come before this court involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest. We have accordingly given them our most deliberate examination; and it has become my duty to state the result to which we have arrived, and the reasoning by which it is supported.

Before, however, we proceed to the points more immediately before us, it may be well, in order to clear the case of difficulty, to say, that in the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications, in its actual application to particular clauses. And, perhaps, the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the
*611] words of each just such operation *and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

There are two clauses in the constitution upon the subject of fugitives, which stands in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth article, and are in the following words: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." "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."

The last clause is that, the true interpretation whereof is directly in

judgment before us. Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was, to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somerset's Case*, *Lofft 1; s. c. 11 State Trials, by Harg. 340; s. c. 20 How. State Trials 79; which was decided before the American revolution. It [*612 is manifest, from this consideration, that if the constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states. The clause was, therefore, of the last importance to the safety and security of the southern states, and could not have been surrendered by them, without endangering their whole property in slaves. The clause was accordingly adopted into the constitution, by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.

How, then, are we to interpret the language of the clause? The true answer is, in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it. If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain. The slave is not to be discharged from service or labor, in consequence of any state law or regulation. Now, certainly, without indulging in any nicety

of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is *discharged from any, by the
*613] natural or necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive and absolute right.

We have said, that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any, which is not expressed, and cannot be fairly implied. Especially, are we estopped from so doing, when the clause puts the right to the service or labor upon the same ground, and to the same extent, in every other state as in the state from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him, as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slave-holding states. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject. Mr. Justice Blackstone (3 Bl. Com. 4) lays it down as unquestionable doctrine. "Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant; in which case, the owner of the goods, and the husband, parent or master, may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace." Upon this ground, we have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent, this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

But the clause of the constitution does not stop here; nor, indeed, con-
*614] sistently with its professed objects, could it do so. Many *cases must arise, in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any adequate redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons, who either secrete or conceal, or withhold the slave. He may be restricted by local legislation, as to the mode of proofs of his ownership; as to the courts in which he shall sue, and as to the actions which he may bring; or the process he may use to compel the delivery of the slave. Nay! the local legislation may be utterly inadequate to furnish the appropriate redress, by authorizing no process *in rem*, or no specific mode of repossessing the slave, leaving the owner, at best, not that right which the constitution designed to secure, a

specific delivery and repossession of the slave, but a mere remedy in damages; and that, perhaps, against persons utterly insolvent or worthless. The state legislation may be entirely silent on the whole subject, and its ordinary remedial process framed with different views and objects; and this may be innocently as well as designedly done, since every state is perfectly competent, and has the exclusive right, to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance. If, therefore, the clause of the constitution had stopped at the mere recognition of the right, without providing or contemplating any means by which it might be established and enforced, in cases where it did not execute itself, it is plain, that it would have been, in a great variety of cases, a delusive and empty annunciation. If it did not contemplate any action, either through state or national legislation, as auxiliaries to its more perfect enforcement in the form of remedy, or of protection, then, as there would be no duty on either to aid the right, it would be left to the mere comity of the states, to act as they should please, and would depend for its security upon the changing course of public opinion, the mutations of public policy, and the general adaptations of remedies for purposes strictly according to the *lex fori*.

And this leads us to the consideration of the other part of the clause, which implies at once a guarantee and duty. It says, "but he (the slave) shall be delivered up, on claim of the party to *whom such service or labor may be due." Now, we think it exceedingly difficult, if not impracticable, to read this language, and not to feel, that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made! What is a claim? It is, in a just juridical sense, a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time, an equally expressive, definition was given by Lord DYER, as cited in *Stowel* v. *Zouch*, 1 Plowd. 359; and it is equally applicable to the present case: that "a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him." The slave is to be delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful recaption or delivery? When and under what circumstances shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or otherwise, while the slave, in possession of the owner, is *in transitu* to the state from which he fled? These and many other questions will readily occur upon the slightest attention to the clause; and it is obvious, that they can receive but one satisfactory answer. They require the aid of legislation, to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort,

[*615

would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted. The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce
*616] them; and *it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution. On the contrary, the natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution. The remark of Mr. Madison, in the Federalist (No. 43), would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is deposited by the constitution?" meaning, as the context shows, in the government of the United States.

It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognised and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case "arising under the constitution" of the United States, within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity, for the very purpose of giving effect to that right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances, the proceedings shall afford a complete protection and guarantee to the right.

Congress has taken this very view of the power and duty of the national government. As early as the year 1791, the attention of congress was drawn to it (as we shall hereafter more fully see), in consequence of some practical difficulties arising under the other clause, respecting fugitives from justice escaping into other states. The result of their deliberations was the passage of the act of the 12th of February 1793, ch. 51, which, after having, in the first and second sections, provided by the case of fugitives from justice, by a demand to be made of the delivery, through the executive
*617] authority of the state where they are found, *proceeds, in the third section, to provide, that when a person held to labor or service in any of the United States, shall escape into any other of the states or territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made; and upon proof, to the satisfaction of such judge or magistrate, either by oral evidence or affidavit, &c, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe

service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor, to the state or territory from which he or she fled. The fourth section provides a penalty against any person, who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or rescue such fugitive from the claimant, or his agent or attorney, when so arrested, or who shall harbor or conceal such fugitive, after notice that he is such; and it also saves to the person claiming such labor or service, his right of action for or on account of such injuries.

In a general sense, this act may be truly said to cover the whole ground of the constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects, in its enactments; not because it exhausts the remedies which may be applied by congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the constitution; but because it points out fully all the modes of attaining those objects, which congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot *be, that the state legislatures have a right to interfere, and as it were, by way of compliment to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it. This doctrine was fully recognised by this court, in the case of *Houston* v. *Moore*, 5 Wheat. 1, 21–2; where it was expressly held, that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed. [*618

But it has been argued, that the act of congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore, it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties, can be found among the express powers of legislation enumerated in the constitution, they remain without any means of giving them effect by any act of congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay! even although, in a practical sense, they may become a nullity, from the want of a proper remedy to enforce them, or to provide against their violation. If

this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties. Such a limited construction of the constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed, that congress could, constitutionally, by its legislation, exercise powers, or enact laws, beyond the powers delegated to it by the constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly *given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.

*619]

Thus, for example, although the constitution has declared, that representatives shall be apportioned among the states according to their respective federal numbers; and for this purpose, it has expressly authorized congress, by law, to provide for an enumeration of the population every ten years; yet the power to apportion representatives, after this enumeration is made, is nowhere found among the express powers given to congress, but it has always been acted upon, as irresistibly flowing from the duty positively enjoined by the constitution. Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of congress to carry them into effect, and congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon congress to make laws to carry the stipulations of treaties into effect; it has been supposed to result from the duty of the national government to fulfil all the obligations of treaties. The senators and representatives in congress are, in all cases, except treason, felony and breach of the peace, exempted from arrest, during their attendance at the sessions thereof, and in going to and returning from the same. May not congress enforce this right, by authorizing a writ of *habeas corpus*, to free them from an illegal arrest, in violation of this clause of the constitution? If it may not, then the specific remedy to enforce it must exclusively depend upon the local legislation of the states; and may be granted or refused, according to their own varying policy or pleasure. The constitution also declares, that the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it. No express power is given to congress to secure this invaluable right in the non-enumerated cases, or to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, and can be effectually *provided for only in this way, that it ought not to be deemed, by necessary implication, within the scope of the legislative power of congress. These cases are put merely by way of illustration, to show, that the rule of interpretation, insisted upon at the argument, is quite too narrow to provide for the ordinary exigencies of the national government, in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the constitution.

*620]

The very act of 1793, now under consideration, affords the most con

clusive proof, that congress has acted upon a very different rule of interpretation, and has supposed, that the right as well as the duty of legislation on the subject of fugitives from justice, and fugitive slaves, was within the scope of the constitutional authority conferred on the national legislature. In respect to fugitives from justice, the constitution, although it expressly provides, that the demand shall be made by the executive authority of the state from which the fugitive has fled, is silent as to the party upon whom the demand is to be made, and as to the mode in which it shall be made. This very silence occasioned embarrassments in enforcing the right and duty, at an early period after the adoption of the constitution; and produced a hesitation on the part of the executive authority of Virginia to deliver up a fugitive from justice, upon the demand of the executive of Pennsylvania, in the year 1791; and as we historically know from the message of President Washington, and the public documents of that period, it was the immediate cause of the passing of the act of 1793, which designated the person (the state executive) upon whom the demand should be made, and the mode and proofs upon and in which it should be made. From that time down to the present hour, not a doubt has been breathed upon the constitutionality of this part of the act; and every executive in the Union has constantly acted upon and admitted its validity. Yet the right and the duty are dependent, as to their mode of execution, solely on the act of congress; and but for that, they would remain a nominal right and passive duty, the execution of which being intrusted to and required of no one in particular, all persons might be at liberty to disregard it. This very acquiescence, under such circumstances, of the highest state functionaries, is a most decisive proof of the universality of the opinion, that the *act is founded in [*621
a just construction of the constitution, independent of the vast influence, which it ought to have as a contemporaneous exposition of the provisions, by those who were its immediate framers, or intimately connected with its adoption.

The same uniformity of acquiescence in the validity of the act of 1793, upon the other part of the subject-matter, that of fugitive slaves, has prevailed throughout the whole Union, until a comparatively recent period. Nay! being from its nature and character more readily susceptible of being brought into controversy in courts of justice, than the former, and of enlisting in opposition to it, the feelings, and it may be, the prejudices, of some portions of the non-slaveholding states, it has naturally been brought under adjudication in several states in the Union, and particularly in Massachusetts, New York and Pennsylvania; and on all these occasions its validity has been affirmed. The cases cited at the bar, of *Wright* v. *Deacon*, 5 Serg. & Rawle 62; *Glen* v. *Hodges*, 9 Johns. 67; *Jack* v. *Martin*, 12 Wend. 311; s. c. 12 Ibid. 507; and *Commonwealth* v. *Griffin*, 2 Pick. 11, are directly in point. So far as the judges of the courts of the United States have been called upon to enforce it, and to grant the certificate required by it, it is believed, that it has been uniformly recognised as a binding and valid law, and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our judgment, entitle the question to be considered at rest; unless, indeed, the interpretation of the constitution

is to be delivered over to interminable doubt throughout the whole progress of legislation and of national operations. Congress, the executive, and the judiciary, have, upon various occasions, acted upon this as a sound and reasonable doctrine. Especially did this court, in the cases of *Stuart* v. *Laird*, 1 Cranch 299, and *Martin* v. *Hunter*, 1 Wheat. 304, and in *Cohens* v. *Commonwealth of Virginia*, 6 Ibid. 264, rely upon contemporaneous expositions of the constitution, and long acquiescence in it, with great confidence, in the discussion of questions of a highly interesting and important nature.

But we do not wish to rest our present opinion upon the ground *either of contemporaneous exposition, or long acquiescence, or even practical action; neither do we mean to admit the question to be of a doubtful nature, and therefore, as properly calling for the aid of such considerations. On the contrary, our judgment would be the same, if the question were entirely new, and the act of congress were of recent enactment. We hold the act to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation. *622]

The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states, until it is exercised by congress. In our opinion, it is exclusive; and we shall now proceed briefly to state our reasons for that opinion. The doctrine stated by this court, in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193, contains the true, although not the sole, rule or consideration, which is applicable to this particular subject. "Wherever," said Mr. Chief Justice MARSHALL, in delivering the opinion of the court, "the terms in which a power is granted to congress, or the nature of the power, require, that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been forbidden to act." The nature of the power, and the true objects to be attained by it, are then as important to be weighed, in considering the question of its exclusiveness, as the words in which it is granted.

In the first place, it is material to state (what has been already incidentally hinted at), that the right to seize and retake fugitive slaves and the duty to deliver them up, in whatever state of the Union they may be found, and, of course, the corresponding power in congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the constitution of the United States, and are there, for the first time, recognised and established in that peculiar character. *Before the adoption of the constitution, no state had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other states. Whenever the right was acknowledged, or the duty enforced, in any state, it was as a matter of comity, and not as a matter of strict moral, political or international obligation or duty. Under the constitution, it is recognised as an absolute, positive right and duty, pervading the whole Union with an equal and su- *623]

preme force, uncontrolled and uncontrollable by state sovereignty or state legislation. It it, therefore, in a just sense, a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy. The natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the state legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment. It would be a strange anomaly, and forced construction, to suppose, that the national government meant to rely for the due fulfilment of its own proper duties, and the rights it intended to secure, upon state legislation, and not upon that of the Union. *A fortiori*, it would be more objectionable, to suppose, that a power, which was to be the same throughout the Union, should be confided to state sovereignty, which could not rightfully act beyond its own territorial limits.

In the next place, the nature of the provision and the objects to be attained by it, require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union. If, then, the states have a right, in the absence of legislation by congress, to act upon the subject, each state is at liberty to prescribe just such regulations as suit its own policy, local convenience and local feelings. The legislation of one state may not only be different from, but utterly repugnant to and incompatible with, that of another. The time and mode, and limitation of the remedy, the proofs of the title, and all other incidents applicable thereto, may be prescribed in one state, which are rejected or disclaimed in another. One state may require the owner to sue in one mode, another, in a different mode. One state may make a statute of limitations as to the remedy, in its own tribunals, short and summary; another *may prolong the period, and yet restrict the proofs. Nay, some states may utterly refuse to act upon the subject of all; and others [*624 may refuse to open its courts to any remedies *in rem*, because they would interfere with their own domestic policy, institutions or habits. The right, therefore, would never, in a practical sense, be the same in all the states. It would have no unity of purpose, or uniformity of operation. The duty might be enforced in some states; retarded or limited in others; and denied, as compulsory, in many, if not in all. Consequences like these must have been foreseen as very likely to occur in the non-slave-holding states, where legislation, if not silent on the subject, and purely voluntary, could scarcely be presumed to be favorable to the exercise of the rights of the owner.

It is scarcely conceivable, that the slave-holding states would have been satisfied with leaving to the legislation of the non-slave-holding states, a power of regulation, in the absence of that of congress, which would or might practically amount to a power to destroy the rights of the owner. If the argument, therefore, of a concurrent power in the states to act upon the subect-matter, in the absence of legislation by congress, be well founded; then, if congress had never acted at all, or if the act of congress should be repealed, without providing a substitute, there would be a resulting authority in each of the states to regulate the whole subject, at its pleasure, and to dole out its own remedial justice, or withhold it, at its pleasure, and according to its own views of policy and expediency. Surely, such a state of things never could have been intended, under such a solemn guarantee

of right and duty. On the other hand, construe the right of legislation as exclusive in congress, and every evil and every danger vanishes. The right and the duty are then co-extensive and uniform in remedy and operation throughout the whole Union. The owner has the same security, and the same remedial justice, and the same exemption from state regulation and control, through however many states he may pass with his fugitive slave in his possession, *in transitû* to his own domicile. But upon the other supposition, the moment he passes the state line, he becomes amenable to the laws of another sovereignty, whose regulations may greatly embarrass or delay the exercise of his rights, and even be repugnant to those of the state where he first arrested the fugitive. Consequences like these show,
*625] that *the nature and objects of the provisions imperiously require, that to make it effectual, it should be construed to be exclusive of state authority. We adopt the language of this court in *Sturges* v. *Crowninshield*, 4 Wheat. 193, and say, that "it has never been supposed, that the concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited; the confusion of such a practice would be endless." And we know no case in which the confusion and public inconvenience and mischiefs thereof could be more completely exemplified than the present.

These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusive in congress. To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states, and has never been conceded to the United States. It is wholly distinguishable fom the right and duty secured by the provision now under consideration; which is exclusively derived from and secured by the constitution of the United States, and ows its whole efficacy thereto. We entertain no doubt whatsoever, that the states, in virtue of their general police power, possesses full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated, by such a course; and in many cases, the operations of this police power, although designed generally for other purposes, for protection, safety and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with, or to obstruct, the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same.

Upon these grounds, we are of opinion, that the act of Pennsylvania
*626] upon which this indictment is founded, is unconstitutional *and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the constitution of the United States was designed to justify and uphold. The special verdict finds this fact, and the state courts have rendered judgment against

the plaintiff in error upon that verdict. That judgment must, therefore, be reversed, and the cause remanded to the supreme court of Pennsylvania, with directions to carry into effect the judgment of this court rendered upon the special verdict, in favor of the plaintiff in error.

TANEY, Ch. J.—I concur in the opinion pronounced by the court, that the law of Pennsylvania, under which the plaintiff in error was indicted, is unconstitutional and void; and that the judgment against him must be reversed. But as the questions before us arise upon the construction of the constitution of the United States, and as I do not assent to all the principles contained in the opinion just delivered, it is proper to state the points on which I differ.

I agree entirely in all that is said in relation to the right of the master, by virtue of the third clause of the second section of the fourth article of the constitution of the United States, to arrest his fugitive slave in any state wherein he may find him. He has a right, peaceably, to take possession of him, and carry him away, without any certificate or warrant from a judge of the district or circuit court of the United States, or from any magistrate of the state; and whoever resists or obstructs him, is a wrongdoer: and every state law which proposes, directly or indirectly, to authorize such resistance or obstruction, is null and void, and affords no justification to the individual or the officer of the state who acts under it. This right of the master being given by the constitution of the United States, neither congress nor a state legislature can, by any law or regulation, impair it or restrict it.

I concur also in all that is contained in the opinion concerning the power of congress to protect the citizens of the slave-holding states, in the enjoyment of this right; and to provide by law an effectual remedy to enforce it, and to inflict penalties upon those who shall violate its provisions; and no state is authorized to pass any law, that comes in conflict in any respect with the remedy provided by congress. *The act of February 12th, 1793, is a constitutional exercise of this power; and every state law [*627 which requires the master, against his consent, to go before any state tribunal or officer, before he can take possession of his property; or which authorizes a state officer to interfere with him, when he is peaceably removing it from the state, is unconstitutional and void.

But, as I understand the opinion of the court, it goes further, and decides, that the power to provide a remedy for this right is vested exclusively in congress; and that all laws upon the subject, passed by a state, since the adoption of the constitution of the United States, are null and void; even although they were intended, in good faith, to protect the owner in the exercise of his rights of property, and do not conflict in any degree with the act of congress. I do not consider this question as necessarily involved in the case before us; for the law of Pennsyivania, under which the plaintiff in error was prosecuted, is clearly in conflict with the constitution of the United States, as well as with the law of 1793. But as the question is discussed in the opinion of the court, and as I do not assent either to the doctrine or the reasoning by which it is maintained, I proceed to state very briefly my objections.

The opinion of the court maintains, that the power over this subject is

so exclusively vested in congress, that no state, since the adoption of the constitution, can pass any law in relation to it. In other words, according to the opinion just delivered, the state authorities are prohibited from interfering, for the purpose of protecting the right of the master, and aiding him in the recovery of his property. I think, the states are not prohibited; and that, on the contrary, it is enjoined upon them as a duty, to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories. The language used in the constitution does not, in my judgment, justify ths construction given to it by the court. It contains no words prohibiting the several states from passing laws to enforce this right. They are, in express terms, forbidden to make any regulation that shall impair it; but there the prohibition stops. And according to the settled rules of construction for all written instruments, the prohibition being confined to laws injurious *to the right, *628] the power to pass laws to support and enforce it, is necessarily implied. And the words of the article which direct that the fugitive "shall be delivered up," seem evidently designed to impose it as a duty upon the people of the several states, to pass laws to carry into execution, in good faith, the compact into which they thus solemnly entered with each other. The constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union; and is the paramount law. The right of the master, therefore, to seize his fugitive slave, is the law of each state; and no state has the power to abrogate or alter it. And why may not a state protect a right of property, acknowledged by its own paramount law? Besides, the laws of the different states, in all other cases, constantly protect the citizens of other states in their rights of property, when it is found within their respective territories; and no one doubts their power to do so. And in the absence of any express prohibition, I perceive no reason for establishing, by implication, a different rule in this instance; where, by the national compact, this right of property is recognised as an existing right in every state of the Union.

I do not speak of slaves whom their masters voluntarily take into a non-slave-holding state. That case is not before us. I speak of the case provided for in the constitution; that is to say, the case of a fugitive who has escaped from the service of his owner, and who has taken refuge and is found in another state.

Moreover, the clause of the constitution of which we are speaking, does not purport to be a distribution of the rights of sovereignty by which certain enumerated powers of government and legislation are exclusively confided to the United States. It does not deal with that subject. It provides merely for the rights of individual citizens of different states, and places them under the protection of the general government; in order more effectually to guard them from invasion by the states. There are other clauses in the constitution in which other individual rights are provided for and secured in like manner; and it never has been suggested, that the states could not uphold and maintain them, because they were guarantied by the constitution of the United States. On the contrary, it has always been held to be the duty *of the states to enforce them; and the action of the *629] general government has never been deemed necessary, except to resist and prevent their violation.

Thus, for example, the constitution provides that no state shall pass any law impairing the obligation of contracts. This, like the right in question, is an individual right, placed under the protection of the general government. And in order to secure it, congress have passed a law authorizing a writ of error to the supreme court, whenever the right thus secured to the individual is drawn in question, and denied to him, in a state court; and all state laws impairing this right are admitted to be void. Yet no one has ever doubted, that a state may pass laws to enforce the obligation of a contract, and may give to the individual the full benefit of the right so guarantied to him by the constitution, without waiting for legislation on the part of congress. Why may not the same thing be done in relation to the individual right now under consideration?

Again, the constitution of the United States declares, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. And although the privileges and immunities, for greater safety, are placed under the guardianship of the general government; still the states may, by their laws, and in their tribunals, protect and enforce them. They have not only the power, but it is a duty enjoined upon them by this provision in the constitution. The individual right now in question, stands on the same grounds, and is given by similar words, and ought to be governed by the same principles. The obligation to protect rights of this description is imposed upon the several states as a duty, which they are bound to perform; and the prohibition extends to those laws only which violate the right intended to be secured. I cannot understand the rule of construction by which a positive and express stipulation for the security of certain individual rights of property in the several states, is held to imply a prohibition to the states to pass any laws to guard and protect them.

The course pursued by the general government, after the adoption of the constitution, confirms my opinion as to its true construction. No law was passed by congress to give a remedy for this right, *until nearly four years after the constitution went into operation. Yet, during that [*630 period of time, the master was undoubtedly entitled to take possession of his property, wherever he might find it; and the protection of this right was left altogether to the state authorities. In attempting to exercise it, he was continually liable to be resisted by superior force; or the fugitive might be harbored in the house of some one who would refuse to deliver him. And if a state could not authorize its officers, upon the master's application, to come to his aid, the guarantee contained in the constitution was of very little practical value. It is true, he might have sued for damages. But as he would, most commonly, be a stranger in the place where the fugitive was found, he might not be able to learn even the names of the wrongdoers; and if he succeeded in discovering them, they might prove to be unable to pay damages. At all events, he would be compelled to encounter the costs and expenses of a suit, prosecuted at a distance from his own home; and to sacrifice, perhaps, the value of his property, in endeavoring to obtain compensation.

This is not the mode in which the constitution intended to guard this important right; nor is this the kind of remedy it intended to give. The delivery of the property itself—its prompt and immediate delivery—is

plainly required, and was intended to be secured. Indeed, if the state authorities are absolved from all obligation to protect this right, and may stand by and see it violated, without an effort to defend it, the act of congress of 1793 scarcely deserves the name of a remedy. The state officers mentioned in the law are not bound to execute the duties imposed upon them by congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it. And the master must take the fugitive, after he has seized him, before a judge of the district or circuit court, residing in the state, and exhibit his proofs, and procure from the judge his certificate of ownership, in order to obtain the protection in removing his property which this act of congress profess to give. Now, in many of the states, there is but one district judge, and *there are only nine states which have judges of the supreme court residing within them. The fugitive will frequently be found by his owner, in a place very distant from the residence of either of these judges; and would certainly be removed beyond his reach, before a warrant could be procured from the judge to arrest him, even if the act of congress authorized such a warrant. But it does not authorize the judge to issue a warrant to arrest the fugitive; but evidently relied on the state authorities to protect the owner in making the seizure. And it is only when the fugitive is arrested and brought before the judge, that he is directed to take the proof, and give the certificate of ownership. It is only necessary to state the provisions of this law, in order to show how ineffectual and delusive is the remedy provided by congress, if state authority is forbidden to come to its aid.

*631]

But it is manifest, from the face of the law, that an effectual remedy was intended to be given, by the act of 1793. It never designed to compel the master to encounter the hazard and expense of taking the fugitive, in all cases, to the distant residence of one of the judges of the courts of the United States; for it authorized him also, to go before any magistrate of the county, city or town corporate wherein the seizure should be made. And congress evidently supposed, that it had provided a tribunal at the place of the arrest, capable of furnishing the master with the evidence of ownership, to protect him more effectually from unlawful interruption. So far from regarding the state authorities as prohibited from interfering in cases of this description, the congress of that day must have counted upon their cordial co-operation; they legislated with express reference to state support. And it will be remembered, that when this law was passed, the government of the United States was administered by the men who had but recently taken a leading part in the formation of the constitution. And the reliance obviously placed upon state authority, for the purpose of executing this law, proves that the construction now given to the constitution by the court, had not entered into their minds. Certainly, it is not the construction which it received in the states most interested in its faithful execution. Maryland, for example, which is substantially one of the parties to this case, has continually passed laws, ever since the adoption of the constitution of the United States, for the arrest *of fugitive slaves from other states as well as her own. Her officers are by law

*632]

required to arrest them, when found within her territory; and her magistrates are required to commit them to the public prison, in order to keep them safely, until the master has an opportunity to reclaiming them. And if the owner is not known, measures are directed to be taken, by advertisement, to apprise him of the arrest; and if known, personal notice to be given. And as fugitives from the more southern states, when endeavoring to escape into Canada, very frequently pass through her territory, these laws have been almost daily in the course of execution, in some part of the state. But if the states are forbidden to legislate on this subject, and the power is exclusively in congress, then these state laws are unconstitutional and void; and the fugitive can only be arrested, according to the provisions of the act of congress. But that law, the power to seize is given to no one but the owner, his agent or attorney. And if the officers of the state are not justified in acting under the state laws, and cannot arrest the fugitive, and detain him in prison, without having first received an authority from the owner; the territory of the state must soon become an open pathway for the fugitives escaping from other states. For they are often in the act of passing through it, by the time that the owner first discovers that they have absconded; and in almost every instance, they would be beyond its borders (if they were allowed to pass through without interruption), before the master would be able to learn the road they had taken.

I am aware, that my brethren of the majority do not contemplate these consequences; and do not suppose, that the opinion they have given will lead to them. And it seems to be supposed, that laws nearly similar to those I have mentioned, might be passed by the state, in the exercise of her powers over her internal police, and by virtue of her right to remove from her territory disorderly and evil-disposed persons, or those who, from the nature of her institutions, are dangerous to her peace and tranquillity. But it would be difficult, perhaps, to bring all the laws I have mentioned within the legitimate scope of the internal powers of police. The fugitive is not always arrested, in order to prevent a dangerous or evil-disposed person from remaining in her territory. He is himself most commonly anxious to escape *from it; and it often happens, that he is seized near the borders of the state, when he is endeavoring to leave it, and is brought back and detained, until he can be delivered to his owner. He may sometimes be found travelling peaceably along the public highway, on his road to another state, in company with and under the protection of a white man who is abetting his escape. And it could hardly be maintained, that the arrest and confinement of the fugitive in the public prison, under such circumstances, until he could be delivered to his owner, was necessary for the internal peace of the state; and therefore, a justifiable exercise of its powers of police. It has not heretofore been supposed necessary, in order to justify these laws, to refer them to such questionable powers of internal and local police. They were believed to stand upon surer and firmer grounds. They were passed, not with reference merely to the safety and protection of the state itself; but in order to secure the delivery of the fugitive slave to his lawful owner. They were passed by the state, in the performance of a duty believed to be enjoined upon it by the constitution of the United States. [*633

It is true, that Maryland as well as every other slave-holding state, has a

deep interest in the faithful execution of the clause in question. But the obligation of the compact is not confined to them; it is equally binding upon the faith of every state in the Union; and has heretofore, in my judgment, been justly regarded as obligatory upon all.

I dissent, therefore, upon these grounds, from that part of the opinion of the court which denies the obligation and the right of the state authorities to protect the master, when he is endeavoring to seize a fugitive from his service, in pursuance of the right given to him by the constitution of the United States; provided the state law is not in conflict with the remedy provided by congress.

THOMPSON, Justice.—I concur in the judgment given by the court in this case. But not being able to yield my assent to all the doctrines embraced in the opinion, I will very briefly state the grounds on which my judgment is placed.

*634] *The provision in the constitution upon which the present question arises is as follows: "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." Art. 4, § 2. We know, historically, that this provision was the result of a compromise between the slave-holding and non-slave-holding states; and it is the indispensable duty of all to carry it faithfully into execution, according to its real object and intention.

This provision naturally divides itself into two distinct considerations. First, the right affirmed; and secondly, the mode and manner in which that right is to be asserted and carried into execution. The right is secured by the constitution, and requires no law to fortify or strengthen it. It affirms, in the most unequivocal manner, the right of the master to the service of his slave, according to the laws of the state under which he is so held. And it prohibits the states from discharging the slave from such service, by any law or regulation therein. The second branch of the provision, in my judgment, requires legislative regulations, pointing out the mode and manner in which the right is to be asserted. It contemplates the delivery of the person of the slave to the owner; and does not leave the owner to his ordinary remedy at law, to recover damages on a refusal to deliver up the property of the owner. Legislative provision, in this respect, is essential for the purpose of preserving peace and good order in the community. Such cases, in some parts of our country, are calculated to excite feelings which, if not restrained by law, might lead to riots and breaches of the peace. This legislation, I think, belongs more appropriately to congress than to the states, for the purpose of having the regulation uniform throughout the United States, as the transportation of the slave may be through several states; but there is nothing in the subject-matter that renders state legislation unfit. It is no objection to the right of the states to pass laws on the subject, that there is no power anywhere given to compel them to do it; neither is there to compel congress to pass any law *on the subject; the legislation must be voluntary in both; and governed by a sense of duty. But I cannot concur in that part of the opinion of the court, which asserts that the power of legislation by congress is exclusive; and that no

*635]

state can pass any law to carry into effect the constitutional provision on this subject, although congress had passed no law in relation to it. Congress, by the act of 1793, has legislated on the subject; and any state law in conflict with that, would be void, according to the provisions of the constitution, which declares, that the laws of the United States, which shall be made in pursuance of the constitution, shall be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. This provision meets the case of a conflict between congressional and state legislation; and implies, that such cases may exist, growing out of the concurrent powers of the two governments. The provision in the constitution, under consideration, is one under which such conflicting legislation may arise; and harmony is produced by making the state law yield to that of the United States. But to assert that the states cannot legislate on the subject at all, in the absence of all legislation by congress, is, in my judgment, not warranted by any fair and reasonable construction of the provision. There is certainly nothing in the terms used in this article, nor in the nature of the power to surrender the slave, that makes legislation by congress exclusive. And if, as seems to be admitted, legislation is necessary to carry into effect the object of the constitution, what becomes of the right, where there is no law on the subject? Should congress repeal the law of 1793, and pass no other law on the subject, I can entertain no doubt, that state legislation, for the purpose of restoring the slave to his master, and faithfully to carry into execution the provision of the constitution, would be valid. I can see nothing in the provision itself, nor discover any principle of sound public policy, upon which such a law would be declared unconstitutional and void. The constitution protects the master in the right to the possession and service of his slave, and of course, makes void all state legistion impairing that right; but does not make void state legislation in affirmance of the right. I forbear enlarging upon this question, but have barely stated the general grounds upon which my opinion rests; and principally to guard against the conclusion, that, *by my silence, I assent [*636
to the doctrine that all legislation on this subject is vested exclusively in congress; and that all state legislation, in the absence of any law of congress, is unconstitutional and void.

Baldwin, Justice, concurred with the court in reversing the judgment of the supreme court of Pennsylvania, on the ground, that the act of the legislature was unconstitutional; inasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping. But he dissented from the principles laid down by the court as the grounds of their opinion.

Wayne, Justice.—I concur altogether in the opinion of the court, as it has been given by my brother Story. In that opinion it is decided:—

1. That the provision in the second section of the fourth article of the constitution, relative to fugitives from service or labor, confers upon the owner of a fugitive slave the right, by himself or his agent, to seize and arrest, without committing a breach of the peace, his fugitive slave, as property, in any state of the Union; and that no state law is constitutional which interferes with such right.

2. That the provision authorizes and requires legislation by congress to guard that right of seizure and arrest against all state and other interfer-

ence, to make the delivery of fugitive slaves more effectual when the claims of owners are contested; and to insure to owners the unmolested transportation of fugitive slaves, through any of the states, to the state from which they may have fled.

3. That the legislation by congress upon the provision, as the supreme law of the land, excludes all state legislation upon the same subject; and that no state can pass any law or regulation, or interpose such as may have been a law or regulation when the constitution of the United States was ratified, to superadd to, control, qualify or impede a remedy, enacted by congress, for the delivery of fugitive slaves to the parties to whom their service or labor is due.

*637] *4. That the power of legislation by congress upon the provision is exclusive; and that no state can pass any law as a remedy upon the subject, whether congress had or had not legislated upon it.

5. That the act of congress of the 12th February 1793, entitled "an act respecting fugitives from justice, and persons escaping from the service of their masters," gives a remedy; but does not exhaust the remedies which congress may legislate upon the subject.

6. That the points so decided are not intended to interfere in any way, nor do they interfere in any manner, with the police power in the states, to arrest and imprison fugitive slaves, to guard against their misconduct and depredations; or to punish them for offences and crimes committed in the states to which they may have fled.

7. These points being so decided and applied to the case before the court it follows, that the law of Pennsylvania, upon which the plaintiff is indicted, is unconstitutional; and that the judgment given by the supreme court of Pennsylvania against the plaintiff must be reversed.

All of the judges of the court concur in the opinion, that the law under which the plaintiff in error was indicted, is unconstitutional. All of them concur also in the declaration, that the provision in the constitution was a compromise between the slave-holding, and the non-slave-holding states, to secure to the former fugitive slaves as property. All of the members of the court, too, except my brother BALDWIN, concur in the opinion, that legislation by congress, to carry the provision into execution, is constitutional; and he contends, that the provision gives to the owners of fugitive slaves all the rights of seizure and removal which legislation could give; but he concurs in the opinion, if legislation by congress be necessary, that the right to legislate is exclusively in congress. There is no difference, then, among the judges, as to the reversal of the judgment; none in respect to the origin and object of the provision, or the obligation to exercise it. But differences do exist as to the mode of execution. Three of the judges have expressed the opinion, that the states may legislate upon the provision, in

*638] aid of the object it was intended to secure; and that *such legislation is constitutional, when it does not conflict with the remedy which congress may enact.

I believe, that the power to legislate upon the provision is exclusively in congress. The provision is, 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 ser-

vice or labor is due." The clause contains four substantive declarations; or two conditions, a prohibition, and a direction. First, the fugitive must owe service or labor under the law of the state from which he has escaped; second, he must have fled from it. The prohibition is, that he cannot be discharged from service, in consequence of any law or regulation of the state in which he may be; and the direction is affirmative, of an obligation upon the states, and declarative of a right in the party to whom the service or labor of a fugitive is due.

My object, and the only object which I have in view, in what I am about to say, is, to establish the position, that congress has the exclusive right to legislate upon this provision of the constitution. I shall endeavor to prove it, by the condition of the states when the constitution was formed; by references to the provision itself; and to the constitution generally.

Let it be remembered, that the conventioners who formed the constitution, were the representatives of equal sovereignties; that they were assembled to form a more perfect union than then existed between the states under the confederacy; that they co-operated to the same end; but that they were divided into two parties, having antagonist interests in respect to slavery. One of these parties, consisting of several states, required as a condition, upon which any constitution should be presented to the states for ratification, a full and perfect security for their slaves as property, when they fled into any of the states of the Union; the fact is not more plainly stated by me than it was put in the convention. The representatives from the non-slave-holding states assented to the condition. The provision under review was proposed and adopted by the unanimous vote of the convention. It, with an allowance of a certain portion of slaves with *the whites, for representative population in congress, and the importation of slaves [*639 from abroad for a number of years, were the great obstacles in the way of forming a constitution. Each of them was equally insisted upon by the representatives from the slave-holding states; and without all of them being provided for, it was well understood, that the convention would have been dissolved, without a constitution being formed. I mention the facts as they were; they cannot be denied. I have nothing to do, judicially, with what a part of the world may think of the attitude of the different parties upon this interesting topic. I am satisfied with what was done; and revere the men, and their motives for insisting, politically, upon what was done. When the three points relating to slaves had been accomplished, every impediment in the way of forming a constitution was removed. The agreement concerning them was called, in the convention, a compromise; the provision in respect to fugitives from service or labor, was called a guarantee of a right of property in fugitive slaves, wherever they might be found in the Union. The constitution was presented to the states for adoption, with the understanding that the provisions in it relating to slaves were a compromise and guarantee; and with such an understanding, in every state, it was adopted by all of them. Not a guarantee merely in the professional acceptation of the word, but a great national engagement, in which the states surrendered a sovereign right, making it a part of that instrument, which was intended to make them one nation, within the sphere of its action. The provision, then, must be interpreted by those rules of construction assented to by all civilized nations, as obligatory in ascertaining the rights grow-

ing out of these agreements. We shall see, directly, how these rules bear upon the question of the power of legislation upon this subject being exclusively in congress; and why the states are excluded from legislating upon it.

The prohibition upon the states to discharge fugitive slaves is absolute. The provision, however, does not contain, in detail, the manner of asserting the right it was meant to secure. Nor is there in it any expressed power of legislation; nor any expressed prohibition of state legislation. But it does provide, that delivery of a fugitive shall be made on the claim of the owner
*640] —that the fugitive *slave owing service and labor in the state from which he fled, and escaping therefrom, shall be decisive of the owner's right to a delivery. It does not, however, provide the mode of proving that service and labor is due, in a contested case, nor for any such evidence of the right, when it has been established, as will insure to an owner the unmolested transportation of the fugitive, through other states, to the state from which he fled. But the right to convey is the necessary consequence of a right to delivery; the latter would be good for nothing, without the former. Proof of ownership gives both, if it gives either or anything; and yet the right might be, in the larger number of instances, unavailing, if it were not certified by some official document, that the right had been established. A certificate from an officer authorized to inquire into the facts, is the easiest way to secure the right to its contemplated intent. It was foreseen, that claims would be made, which would be contested; some tribunal was necessary to decide them, and to authenticate the fact, that a claim had been established. Without such authentication, the contest might be renewed in other tribunals of the state in which the fact had been established; and in those of the other states through which the fugitive might be carried, on his way to the state from which he fled. Such a certificate too, being required, protects persons who are not fugitives from being seized and transported; it has the effect of securing the benefit of a lawful claim, and of preventing the accomplishment of one that is false. Such a certificate, to give a right to transport a fugitive slave through another state, a state cannot give; its operation would be confined to its own boundaries, and would be useless to assert the right in another sovereignty. This analysis of the provision is given, to show that legislation was contemplated to carry it fully into effect, in many of the cases that might occur; and to prevent its abuse, when attempts might be made to apply it to those who were not fugitives. And it brings me to the point I have asserted, that congress has the exclusive right to legislate upon the provision.

Those who contend, that the states may legislate in aid of the object of the provision, admit that congress can legislate to the full extent to carry it into execution. There is, then, no necessity for the states to legislate.
*641] This is a good reason why they should not *legislate; and that it was intended that they should not do so; for legislation by congress makes the mode of asserting the right uniform throughout the Union; and legislation by the states would be as various as the separate legislative will and policy of the different states might choose to make it. Certainly, such an interest as the constitution was intended to secure, we may well think the framers of the constitution intended to provide for by a uniform law.

I admit, however, that such considerations do not necessarily exclude the right of the states to legislate. The argument in favor of the right is, that the states are not, in express terms, prohibited from legislating, and that the exclusion is not necessarily implied. I further admit, if it be not necessarily implied, that the right exists. Such is the rule, in respect to the right of legislation by the states, in all cases under the constitution, when the question of a right to legislate is merely such.

My first remark is, and I wish it to be particularly observed, that the question is not one only of the right of the states to legislate in aid of this provision, unconnected with other considerations bearing directly upon the question. The true question in the case is, by what rules shall the compromise or guarantee be construed, so that the obligations and rights of the states under the provision may be ascertained and secured. It is admitted, that the provision raises what is properly termed a perfect obligation upon all of the states to abstain from doing anything which may interfere with the rights secured. Will this be so, if any part of what may be necessary to discharge the obligation is reserved by each state, to be done as each may think proper? The obligation is common to all of them, to the same extent. Its object is, to secure the property of some of the states, and the individual rights of their citizens, in that property. Shall, then, each state be permitted to legislate in its own way, according to its own judgment, and their separate notions, in what manner the obligation shall be discharged to those states to which it is due? To permit some of the states to say to the others, how the property included in the provision was to be secured by legislation, without the assent of the latter, would certainly be, to destroy the equality and force of the guarantee, and the equality of the states by which it was made. That was *not anticipated by the representatives of the slave-holding states in the convention, nor could it have been intended [*642
by the framers of the constitution. Is it not more reasonable to infer, as the states were forming a government for themselves, to the extent of the powers conceded in the constitution, to which legislative power was given to make all laws necessary and proper to carry into execution all powers vested in it—that they meant, that the right for which some of the states stipulated, and to which all acceded, should, from the peculiar nature of the property in which only some of the states were interested, be carried into execution by that department of the general government in which they were all to be represented—the congress of the United States.

But is not this power of legislation by the states, upon this provision, a claim for each to use its discretion in interpreting the manner in which the guarantee shall be fulfilled? Are there no rules of interpretation, founded upon reason and nature, to settle this question, and to secure the rights given by the provision, better than the discretion of the parties to the obligation? Has not experience shown, that those rules must be applied to conventions between nations, in order that justice may be done? All civilized nations have consented to be bound by them; and they are a part of the laws of nations. Is not one of those rules, the maxim, that neither one or the other of the interested or contracting powers has a right to interpret his act or treaty at his pleasure? Such is the rule in respect to the treaties and conventions of nations foreign to each other. It applies, with equal necessity and force, to states united in one general government.

Especially, to states making a provision in respect to property peculiar to some of them, which has become so interwoven with their institutions and their representation in the general government of all of them, that the right to such property must be maintained and guarded, in order to preserve their separate existence, and to keep up their constitutional representation in congress. Such cannot be the case, unless there is uniformity in the law for asserting the right to fugitive slaves; and if the states can legislate, as each of them may think it should be done, a remedy, by which the right of property in fugitive slaves is to be ascertained and finally concluded. Nor does *643] it matter, that the *rule to which I have adverted as being exclusive of the right of the states to legislate upon the provision, does not appear in it. It is exactly to such cases that the rule applies, and it must be so applied, unless the contrary has been expressly provided. The mode of its application is as authoritative as the rule. The rule, too, applies to the provision, without any conflict with the other rule, that the states may legislate in all cases, when they are not expressly or impliedly prohibited by the constitution. The latter rule is in no way trenched upon, by excluding the states from legislating in this case. This provision is the only one in the constitution in which a security for a particular kind of property is provided; provided, too, expressly against the interference by the states in their sovereign character. The surrender of a sovereign right carries with it all its incidents. It differs from yielding a participation to another government, in a sovereign right. In the latter, both may have jurisdiction. The state yielding the right, retaining jurisdiction to the extent of doing nothing repugnant to the exercise of the right by the government to which it has been yielded.

But it is said, all that is contended for, is, that the states may legislate to aid the object, and that such legislation will be constitutional, if it does not conflict with the remedies which congress may enact. This is a cautious way of asserting the right in the states, and it seems to impose a limitation which makes it unobjectionable. But the reply to it is, that the right to legislate a remedy, implies so much indefinite power over the subject, and such protracted continuance, as to the mode of finally determining whether a fugitive owes service and labor, that the requirements of the remedy, without being actually in conflict with the provision or the enactments of congress, might be oppressive to those most interested in the provision, by interposing delays and expenses more costly than the value of the fugitive sought to be reclaimed. Ordinarily, and when rightly understood, it is true, that the abuse of a thing is no argument against its correctness or its use; but that suggestion can only be correctly made, in cases in support of a right or power abstractly and positively right, and which has been abused under the pretence of using it; or where the proper use has been mistaken. In matters of government, however, a power liable to be abused is always a *644] good reason *for withholding it. It is the reason why the powers of the United States, under the constitution, are so cautiously given; why the express prohibitions upon the states not to legislate in certain cases were expressed; why the limitation upon the former, that the powers not granted are reserved to the states, as it is expressed in the amendment to the constitution. But in truth, any additional legislation in this case by a state, acting as a remedy, in aid of the remedy given by the constitution and

by congress, would be, in practice, in conflict with the latter, if it be a process differing from it; though it might make the mode of recovering a fugitive easier than the former, and much more so, when it made it more difficult. The right to legislate a remedy implies the ability to do either; and it is because it does so, and may be the latter, that I deny all right in the states to legislate upon this subject; unless it be to aid, by mere ministerial acts, the protection of an owner's right to a fugitive slave; the prevention of all interference with it by the officers of a state, or its citizens, or an authority to its magistrates to execute the law of congress; and such legislation over fugitives as may be strictly of a police character.

Admit the states to legislate remedies in this case, besides such as are given by congress, and there will be no security for the delivery of fugitive slaves in half of the states of the Union. Such was the case when the constitution was adopted. The states might legislate in good faith, according to their notions how such a right of property should be tried. They have already done so, and the act of Pennsylvania, now under consideration, shows, that the assertion of a right to a fugitive slave is burdened by provisions entailing expenses disproportioned to his value; and that it is only to be asserted, by arraying against the claim all of those popular prejudices which, under other circumstances, would be proper feelings against slavery.

But the propriety of the rule of interpretation which I have invoked, to exclude the states from legislating upon this provision of the constitution, becomes more obvious, when it is remembered, that the provision was not intended only to secure the property of individuals, but that through their rights, the institutions of the states should be preserved, so long as any one of the states chose to continue slavery as a part of its policy. *The subject has usually been argued as if the rights of individuals only were intended to be secured, and as if the legislation by the [*645 states would only act upon such rights. The framers of the constitution did not act upon such narrow grounds; they were engaged in forming a government for all of the states; by concessions of sovereign rights from all, without impairing the actual sovereignty of any one, except within the sphere of what was conceded. One great object was, that all kinds of property, as well that which was common in all of the states, as that which was peculiar to any of them, should be protected, in all of the states, as well from any interference with it by the United States, as by the states. Experience had shown, that under the confederacy, the reclamation of fugitive slaves was embarrassed and uncertain, and that they were yielded to by the states only from comity; it was intended, that it should be no longer so. The policy of the different states, some of them contiguous, had already become marked and decided upon the subject of slavery; there was no doubt, it would become more so. It was foreseen, that unless the delivery of fugitive slaves was made a part of the constitution, and the right of the states to discharge them from service was taken away, that some of the states would become the refuge of runaways; and, of course, that in proportion to the facility and certainty of any state being a refuge, so would the right of individuals, and the institutions of the slave-holding states, be impaired. The latter were bound, when forming a general government with the other states, under which there was to be a community of rights and privileges for all citizens in the several states, to protect that property

of their citizens which was essential to the preservation of their state constitutions. If this had not been done, all of the property of the citizens would have been protected, in every state, except that which was the most valuable in a number of them. In such a case, the states would have become members of the Union upon unequal terms. Besides, the property of an individual is not the less his, because it is in another state than that in which he lives; it continues to be his, and forms a part of the wealth of his state. The provision, then, in respect to fugitive slaves, only comprehended within the general rule a species of property not within it before. *646] By doing so, the right of individuals, and that of the *states in which slavery was continued, were preserved. It remained in the states, as a part of that wealth, from which contributions were to be raised by taxes laid with the consent of the owners, to meet the wants of the state as a body politic. If this be so, upon what principle shall the states act, by their legislation, upon property, which is national as well as individual; and direct the mode, when it is within their jurisdiction, without the consent of the owners, and without the fault of the states where the owners reside, how the right of property should be ascertained and determined. The case of a fugitive slave is not like that of a contest for other property, to be determined between two claimants, by the remedy given by the tribunals of the state where the property may be. It is not a controversy between two persons, claiming the right to a thing, but the assertion by one person of a right of property in another, to be determined upon principles peculiar to such relation. If the provision had not been introduced into the constitution, the states might have adjudged the right, in the way they pleased; but having surrendered the right to discharge, they are not now to be allowed to assume a right to legislate, to try the obligation of a fugitive to servitude, in any other way than in conformity to the principles peculiar to the relation of master and slave. Their legislation, then, in the way of remedy, would bear upon state as well as individual rights; and I am sure, when the constitution was formed, the states never intended to give any such right to each other. If it has such an effect, I think, I may rightly conclude, that legislation in the case before us is forbidden to the states.

But I have a further reason for the conclusion to which I have come upon this point; to which I cannot see that an answer can be given. The provision contemplates, besides the right of seizure by the owner, that a claim may be made, when a seizure has not been effected, or afterwards, if his right shall be contested; that the claim shall be good, upon the showing by the claimant that the person charged as a fugitive owes service or labor, under the laws of the state from which he fled. The prohibition in the provision, is, that he shall not be "discharged, in consequence of any law or regulation of a state" where he may be. If then, in a controverted *347] case, a person *claimed as a fugitive, shall be discharged, under a remedy legislated by a state, to try the fact of his owing service or labor, is he not discharged under a law or regulation of a state? It is no answer to this question, to say, that the discharge was not made in virtue of any law discharging the fugitive from servitude; and that the discharge occurred only from the mode of trial to ascertain if he owed service and labor. For that is to assume, that provision only prevented discharges from being made by the states, by enactment or law, declaring that fugitive

slaves might be discharged. The provision will not admit of such an interpretation. Nor is it any answer to say, that state regulations to ascertain whether a fugitive owes service or labor, are distinguishable from such as, directly or by construction, would lead to his discharge; for if a discharge be made under one or the other—whether the discharge be right or wrong, it is a discharge under the regulation of a state.

I understood the provision to mean, and when its object and the surrender by the states of the right to discharge are kept in mind, its obvious meaning to every one must be, that the states are not only prohibited from discharging a fugitive from service, by a law; but that they shall not make or apply regulations to try the question of the fugitive owing service. The language of the provision, is, "no person, &c., shall, in consequence of any law or regulation therein," be discharged from such service or labor. The words "in consequence," meaning the effect of a cause—certainly embrace regulations to try the right of property, as well as laws directly discharging a fugitive from service. If this be not so, the states may regulate the mode of an owner's seizing of a fugitive slave, prohibiting it from being done except by warrant and by an officer; thus denying to an owner the right to use a casual opportunity to repossess himself of this kind of property, which there is a right to do, in respect to all other kinds of property, where not in the possession of some one else. It may regulate the quantity and quality of the proof to establish the right of an owner to a fugitive, and give compensatory and punitory damages against a claimant, if his right be not established according to such proof. It might limit the trial to particular times and courts; give appeals from one to other courts; and protract the ultimate decision, until the value in controversy *was exceeded by the cost of establishing it. Such rights of legislation in the states to try [*648 a right of property in a fugitive slave, are surely inconsistent with that security which Judge IREDELL told the people of North Carolina, in the convention, that the constitution gave to them for their slaves, when they fled into other states. Speaking of this clause of the constitution he says, "In some of the northern states, they have emancipated all of their slaves; if any one of our slaves go there, and remain there a certain time, they would, by the present laws, be entitled to their freedom, so that their masters could not get them again; this would be extremely prejudicial to the inhabitants of the southern states; and, to prevent it, this clause is inserted in the constitution." To the same purpose, and with more positiveness, Charles Cotesworth Pinckney said to the people of South Carolina, in the convention of that state, "we have obtained a right to recover our slaves in whatever part of America they may take refuge; which is a right we had not before."

But further, does not the language of this provision, in the precise terms used, "shall not be discharged from such service or labor," show, that the state surrendering the right to discharge, meant to exclude themselves from legislating a mode of trial, which, from the time it would take, would be a qualified or temporary discharge to the injury of the owner? Would not a postponement of the trial of a fugitive owing service or labor, for one month, be a loss to the owner of his service, equivalent to a discharge for that time? And if a state can postpone, by legislation, the trial for one month, may it not do so for a longer time? And whether it be for a longer or a shorter time, is it not a discharge from service, for whatever time it

may be? It is no answer to this argument, to say, that time is necessarily involved in the prosecution of all rights. The question here is not as to a time being more or less necessary—but as to the right of a state, by regulations to try the obligation of a fugitive to service or labor, to fix in its discretion the time it may take.

The subject might be further discussed and illustrated by arguments equally cogent with those already given. But I forbear! For the foregoing reasons, in addition to those given in the opinion of the court, I am constrained to come to the conclusion, that the right of legislating upon
*649] that clause in the constitution, *preventing the states from discharging fugitive slaves, is exclusively in the congress of the United States. I am as little inclined as any one can be, to deny, in a doubtful case, a right of legislation in the states; but I cannot concede, that it exists, under the constitution, in a case relating to the property of some of the states in which the others have no interest; and whose legislators, from the nature of the subject, and the human mind in relation to it, cannot be supposed to be best fitted to secure the right guarantied by the constitution.

I had intended to give an account of the beginning and progress of the legislation of the states upon this subject; but my remarks are already so much extended, that I must decline doing so. It would have shown, perhaps, as much as any other instance, how a mistaken, doubtful and hesitating exercise of power, in the commencement, becomes, by use, a conviction of its correctness. It would also have shown, that the legislation of the states in respect to fugitive slaves, and particularly that which has most embarrasssd the recovery of fugitive slaves, has been in opposition to an unbroken current of decisions in the courts of the states, and those of the United States. Not a point has been decided in the cause now before this court, which has not been ruled in the courts of Massachusetts, New York and Pennsylvania, and in other state courts. Judges have differed as to some of them, but the courts of the states have announced all of them, with the consideration and solemnity of judicial conclusion. In cases, too, in which the decisions were appropriate, because the points were raised by the record.

I consider the point I have been maintaining, more important than any other in the opinion of the court. It removes those causes which have contributed more than any other to disturb that harmony which is essential to the continuance of the Union. The framers of the constitution knew it to be so, and inserted the provision in it. Hereafter, they cannot occur, if the judgment of this court in this cause shall meet with the same patriotic acquiescence which the tribunals of the states and the people of the states have heretofore accorded to its decisions. The recovery of fugitive slaves will hereafter be exclusively regulated by the constitution of the United States, and the acts of congress.

*650] *Apart from the position that the states may legislate in all cases, where they are not expressly prohibited, or by necessary implication; the claim for the states to legislate is mainly advocated upon the ground, that they are bound to protect free blacks and persons of color residing in them from being carried into slavery by any summary process. The answer to this is, that legislation may be confined to that end, and be made effectual, without making such a remedy applicable to fugitive slaves. There is

no propriety in making a remedy to protect those who are free, the probable means of freeing those who are not so. It is also said, the states may aid, by remedies, the acts of congress, when they are not in conflict with them. I reply, congress has full power to enact all that such aid could give; and if experience shows any deficiency in its enactments, congress will no doubt supply it. If there are not now agencies enough to make the assertion of the right to fugitives convenient to their owners, congress can multiply them. But if it should not be done, better is it that the inconvenience should be borne, than that the states should be brought into collision upon this subject, as they have been; and that they should attempt to supply deficiencies, upon their separate views of what the remedies should be to recover fugitive slaves within their jurisdictions.

I have heard it suggested also, as a reason why the states should legislate upon this subject, that congress may repeal the remedy it has given, and leave the provision unaided by legislation; and that then the states might carry it into execution. Be it so; but the latter is not needed, for though legislation by congress supports the rights intended to be secured, there is energy enough in the constitution, without legislation upon this subject, to protect and enforce what it gives.

DANIEL, Justice.—Concurring entirely, as I do, with the majority of the court, in the conclusions they have reached relative to the effect and validity of the statute of Pennsylvania now under review, it is with unfeigned regret that I am constrained to dissent from some of the principles and reasonings which that majority, in passing to our common conclusions, have believed themselves called on to affirm.

*In judicial proceedings, generally, that has been deemed a safe and prudent rule of action, which involves no rights or questions not necessary to be considered; but leaves these for adjudication where and when only they shall be presented directly and unavoidably, and when surrounded with every circumstance which can best illustrate their character. If, in ordinary questions of private interest, this rule is recommended by considerations of prudence, and accuracy and justice; it is surely much more to be observed, when the subject to which it is applicable is the great fundamental law of the confederacy; every clause and article of which affects the polity and the acts of states. Guided by the rule just mentioned, it seems to me, that the regular action of the court in this case is limited to an examination of the Pennsylvania statute, to a comparison of its provisions with the third clause of the fourth article of the constitution, and with the act of congress of 1793, with which the law of Pennsylvania is alleged to be in conflict; and that to accomplish these purposes, a general definition or contrast of the powers of the state and federal governments, was neither requisite nor proper. The majority of my brethren, in the conscientious discharge of their duty, have thought themselves bound to pursue a different course; and it is in their definition and distribution of state and federal powers, and in the modes and times they have assigned for the exercising those powers, that I find myself compelled to differ with them. [*651

That portion of the constitution which provides for the recovery of fugitive slaves, is the third clause of the second section of the fourth article; and is in these words: "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." The paramount authority of this clause in the constitution to guaranty to the owner the right of property in his slave, and the absolute nullity of any state power, directly or indirectly, openly or covertly, aimed to impair that right, or to obstruct its enjoyment, I admit, nay, insist upon, to the fullest extent. I contend, moreover, that the act of 1793, made in aid of this clause of the constitution and for its enforcement, so far as it conforms to the constitution, is the supreme law to the states; and cannot *be contravened by them, without a violation of the constitution. But the majority of my brethren, proceeding beyond these positions, assume the ground, that the clause of the constitution above quoted, as an affirmative power granted by the constitution, is essentially an exclusive power in the federal government; and consequently, that any and every exercise of authority by the states, at any time, though undeniably in aid of the guarantee thereby given, is absolutely null and void.

*652]

Whilst I am free to admit the powers which are exclusive in the federal government, some of them became so denominated by the express terms of the constitution; some, because they are prohibited to the states; and others, because their existence, and much more, their practical exertion by the two governments, would be repugnant, and would neutralize, if they did not conflict with and destroy, each other; I cannot regard the third clause of the fourth article as falling either within the definition or meaning of an exclusive power. Such a power, I consider as originally and absolutely, and at all times incompatible with partition or association; it excludes everything but itself. There is a class of powers, originally vested in the states, which, by the theory of the federal government, have been transferred to the latter; powers which the constitution of itself does not execute, and which congress may or may not enforce, either in whole or in part, according to its views of policy or necessity; or as it may find them for the time beneficially executed or otherwise under the state authorities. These are not properly concurrent, but may be denominated dormant powers in the federal government; they may at any time be awakened into efficient action by congress, and from that time, so far as they are called into activity, will, of course, displace the powers of the states. But should they again be withdrawn or rendered dormant, or should their primitive exercise by the states never be interfered with by congress; could it be properly said, that because they potentially existed in congress, they were, therefore, denied to the states? The prosperity, the necessities, of the country, and the soundest rules of constitutional construction, appear to me, to present a decided negative to this inquiry. Nay! I am prepared to affirm, that even in instances wherein congress may have legislated, legislation by a state which is strictly ancillary, would not be unconstitutional or improper.

*653] *The interpretation for which I contend cannot be deemed a novelty in this court; but rests upon more than one of its decisions upon the constitutional action of state authorities. In the case of *Sturges* v. *Crowninshield*, which brought in question the right of the states to pass insolvent or bankrupt laws, Chief Justice MARSHALL holds the following doctrine (4 Wheat. 192–3): "The counsel for the plaintiff contend, that the

grant of this power to congress, without limitation, takes it entirely from the states. In support of this proposition, they argue, that every power given to congress is necessarily supreme; and if, from its nature, or from the words of the grant, it is apparently intended to be exclusive, it is as much so as if they were expressly forbidden to exercise it. These propositions have been enforced and illustrated by many arguments drawn from different parts of the constitution. That the power is both unlimited and supreme, is not questioned; that it is exclusive, is denied by the counsel for the defendant. In considering this question, it must be recollected, that previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respects sovereign. These states could exercise almost every legislative power; and amongst others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper, to define the powers retained by the states. These powers remain as they were before the adoption of the constitution, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to congress did not imply a prohibition on the states to the exercise of the same power." Again, p. 198, "It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the powers of the states as existing over such cases as the laws of the Union do not reach. Be this as it may, the power of congress may be exercised or declined, as the wisdom of that body shall decide. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It has been said, that congress has exercised this power; and by doing so, has extinguished the power of the states, which cannot *be revived by repealing the law of congress. We do not think so. If the right of the states is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended, by enacting a general bankrupt law. The repeal of that, cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress. [*654

In the case of *Houston* v. *Moore*, 6 Wheat. 48, the following doctrine, was held by Mr. Justice STORY, and in accordance with the opinion of the court, in that case. "The constitution containing a grant of powers, in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of powers, in affirmative terms, to congress, does, *per se*, transfer an exclusive sovereignty in such subjects to the latter; on the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, except where the constitution has, in express terms, given an exclusive power to congress, or the exercise of a like power is prohibited to the states. The example of the first class is to be found in the exclusive legislation delegated to congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to

coin money or emit bills of credit; of the third class, as this court have already held, is the power to establish an uniform rule of naturalization; and the delegation of admiralty and maritime jurisdiction. In all other cases, not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with congress, not only under the eleventh amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority; and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield. Such are the general principles by which my judgment is
*655] guided, in *every investigation of constitutional points. They commend themselves by their intrinsic equity; and have been amply justified by the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them, would be to deliver ourselves over to endless doubts and difficulties; and probably, to hazard the existence of the constitution itself."

In the case or the *City of New York* v. *Miln*, 11 Pet. 102, Mr. Justice Barbour, in the delivering the opinion of the court, lays down the following position (p. 137), as directly deducible from the decisions in *Gibbons* v. *Ogden*, 7 Wheat. 204, and *Brown* v. *State of Maryland*, 12 Ibid. 419: "Whilst a state is acting within the legitimate scope of its power, as to the end to be attained, it may use whatever means, being appropriate to that end, it may think fit; although they be the same, or so nearly the same as scarcely to be distinguished from those adopted by congress acting under a different power; subject only to this limitation, that in the event of collision, the law of the state must yield to the law of congress. The court must be understood, of course, as meaning that the law of congress is passed upon a subject within the sphere of its power." In the same case, the following language is held by Mr. Justice Thompson (p. 145): "In the leading cases upon this question, where the state law has been held to be constitutional, there has been an actual conflict between the legislation of congress and that of the states, upon the right drawn in question; and in all such cases, the law of congress is supreme. But in the case now before the court, no such conflict arises; congress has not legislated on this subject in any manner to affect the question." And again (p. 146), it is said by the same judge: "It is not necessary in this case to fix any limits upon the legislation of congress and of the states on this subject; or to say how far congress may, under the power to regulate commerce, control state legislation in this respect. It is enough to say, that whatever the power of congress may be, it has not been exercised so as in any manner to conflict with the state law; and if the mere grant of the power to congress does not necessarily imply a prohibition of the states to exercise the power, until congress assumes the power to exercise it, no objection on that ground can arise to this law."

*656] *Here, then, are recognitions, repeated and explicit, of the propriety, utility and regularity of state action, in reference to powers confessedly vested in the general government, so long as the latter remains

passive, or shall embrace within its own action only a portion of its powers, and that portion not comprised in the proceedings of the state government; and so long as the states shall neither conflict with the measures of the federal government, nor contravene its policy. From these recognitions, it must follow, by necessary consequence, that powers vested in the federal government which are compatible with the modes of execution just adverted to, cannot be essentially and orginally, nor practically, exclusive powers; for whatever is exclusive, utterly forbids, as has been previously observed, all partition or association. I hold, then, that the states can establish proceedings which are in their nature calculated to secure the rights of the slave-holder guarantied to him by the constitution; as I shall attempt to show, that those rights can never be so perfectly secured, as when the states shall, in good faith, exert their authority to assist in effectuating the guarantee given by the constitution. Fugitives from service, in attempting to flee either to the non-slave-holding states, or into the Canadas, must, in many instances, pass the intermediate states, before they can attain to the point they aim at.

If there is a power in the states to authorize and order their arrest and detention for delivery to their owners, not only will the probabilities of recovery be increased, by the performance of duties enjoined by law upon the citizens of those states, as well private persons as those who are officers of the law; but the incitements of interest, under the hope of reward, will, in a certain class of persons, powerfully co-operate to the same ends. But let it be declared, that the rights of arrest and detention, with a view of restoration to the owner, belong solely to the federal government, exclusive of the individual right of the owner to seize his property, and what are to be the consequences? In the first place, whenever the master, attempting to enforce his right of seizure under the constitution, shall meet with resistance, the inconsiderable number of federal officers in a state, and their frequent remoteness from the theatre of action, must, in numerous instances, at once defeat his right of property, and deprive him *also of personal protection and security. By the removal of every incentive of [*657 interest in state officers, or individuals, and by the inculcation of a belief that any co-operation with the master becomes a violation of law, the most active and efficient auxiliary which he could possibly call to his aid is entirely neutralized. Again, suppose, that a fugitive from service should have fled to a state where slavery does not exist, and in which the prevalent feeling is hostile to that institution; there might, nevertheless, in such a community, be a disposition to yield something to an acknowledged constitutional right—something to national comity, too, in the preservation of that right; but let it once be proclaimed from this tribunal, that any concession by the states towards the maintenance of such a right, is a positive offence, the violation of a solemn duty, and I ask what pretext more plausible could be offered to those who are disposed to protect the fugitive, or to defeat the rights of the master? The constitution and the act of congress would thus be converted into instruments for the destruction of that which they were designed especially to protect. But it is said, that if the states can legislate at all upon the subject of fugitives from service, they may, under the guise of regulations for securing the master's right, enact laws which, in reality, impair or destroy them. This, like every other

argument drawn from the possible abuse of power, is deemed neither fair nor logical. It is equally applicable to the exercise of power by the federal as by the state governments; and might be used in opposition to all power and all government, as it is undeniable, that there is no power and no government which is not susceptible of great abuses. But those who argue, from such possible or probable abuses, against all regulations by the states touching this matter, should dismiss their apprehensions, under the recollection that should those abuses be attempted, the corrective may be found, as it is now about to be applied to some extent, in the controlling constitutional authority of this court.

It has been said, that the states, in the exercise of their police powers, may arrest and imprison vagrants or fugitives who may endanger the peace and good order of society; and by that means contribute to the recovery by the master of his fugitive slave. It should be recollected, however, that the police power of a state has no natural affinity with her exterior relations, nor with those *which she sustains to her sister states; but is con- *658] fined to matters strictly belonging to her internal order and quiet. The arrest or confinement, or restoration of a fugitive, merely because he is such, falls not regularly within the objects of police regulations; for such a person may be obnoxious to no charge of violence or disorder; he may be merely passing through the state peaceably and quietly; or he may be under the care and countenance of some person affecting ownership over him, with the very view of facilitating his escape. Under such circumstances, he would not be a proper subject for the exertion of the police power; and if not to be challenged under a different power in the state, his escape would be inevitable, however strong might be the evidences of his being a fugitive. But let it be supposed, that either on account of some offence actually committed or threatened; or from some internal regulation forbidding the presence of such persons within a state, they may be deemed subjects for the exertion of the police power proper, to what end would the exercise of that power naturally lead? Fugitives might be arrested for punishment, or they might be expelled or deported from the state. Nothing beyond these could be legally accomplished; and thus the invocation of this police power, so far from securing the rights of the master, would be made an engine to insure the deprivation of his property. Such are a portion of the consequences which, in my opinion, must flow from the doctrines affirmed by the majority of the court; doctrines, in my view, not warranted by the constitution, nor by the interpretation heretofore given of that instrument; and the assertion whereof seemed not to have been necessarily involved in the adjudication of this cause. With the convictions predominating in my mind as to the nature and tendencies of these doctrines; whilst I cherish the profoundest respect for the wisdom and purity of those who maintain them; it would be a dereliction of duty in me, to yield to them a direct or a tacit acquiescence; I, therefore, declare my dissent from them.

McLean, Justice.—As this case involves questions deeply interesting, if not vital, to the permanency of the Union of these states; and as I differ on one point from the opinion of the court, I deem it proper to state my own views on the subject.

Prigg v. Pennsylvania.

*The plaintiff, Edward Prigg, was indicted under the first section of an act of Pennsylvania, entitled "an act to give effect to the provisions of the constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping." It provides, "if any person or persons shall, from and after the passing of this act, by force and violence, take and carry away, or cause to be taken or carried away, and shall, by fraud or false pretence seduce, or cause to be seduced, or shall attempt to take, carry away or seduce, any negro or mulatto, from any part or parts of this commonwealth, to any other place or places whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or sevant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony, and shall be fined in a sum not less than five hundred nor more than one thousand dollars, and shall be sentenced to imprisonment and hard labor not less than seven nor more than twenty-one years."

The plaintiff, being a citizen of Maryland, with others, took Margaret Morgan, a colored woman, and a slave, by force and violence, without the certificate required by the act of congress, from the state of Pennsylvania, and brought her to the state of Maryland. By an amicable arrangement between the two states, judgment was entered against the defendant, in the court where the indictment was found; and on the cause being removed to the supreme court of the state, that judgment, *pro formâ*, was affirmed. And the case is now here for our examination and decision.

The last clause of the second section of the fourth article of the constitution of the United States, declares, 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." This clause of the constitution is now, for the first time, brought before this court for consideration.

*That the constitution was adopted in a spirit of compromise, is matter of history. And all experience shows, that to attain the great [*660
objects of this fundamental law, it must be construed and enforced in a spirit of enlightened forbearance and justice. Without adverting to other conflicting views and interests of the states represented in the general convention, the subject of slavery was then, as it is now, a most delicate and absorbing consideration. In some of the states, it was considered an evil, and a strong opposition to it, in all its forms, was felt and expressed. In others, it was viewed as a cherished right, incorporated into the social compact, and sacredly guarded by law. Opinions so conflicting, and which so deeply pervaded the elements of society, could be brought to a reconciled action only by an exercise of exalted patriotism. Fortunately for the country, this patriotism was not wanting in the convention and in the states. The danger of discord and ruin was seen, and felt and acknowledged; and this led to the formation of the confederacy. The constitution, as it is, cannot be said to have embodied in all its parts, the peculiar views of any great section of the Union; but it was adopted by a wise and far-reaching conviction, that it was the best which, under the circumstances, could be

devised; and that its imperfections would be lost sight of, if not forgotten, in the national prosperity and glory which it would secure.

A law is better understood by a knowledge of the evils which led to its adoption; and this applies most strongly to a fundamental law. At an early period of our history, slavery existed in all the colonies; and fugitives from labor were claimed and delivered up, under a spirit of comity or conventional law among the colonies. The articles of confederation contained no provision on the subject, and there can be no doubt, that the provision introduced into the constitution was the result of experience and manifest necessity. A matter so delicate, important and exciting, was very properly introduced into the organic law.

Does the provision in regard to the reclamation of fugitive slaves, vest the power exclusively in the federal government? This must be determined from the language of the constitution, and the nature of the power. The *661] language of the provision is general; it covers the whole *ground, not in detail, but in principle. The states are inhibited from passing "any law or regulation which shall discharge a fugitive slave from the service of his master;" and a positive duty is enjoined on them to deliver him up, "on claim of the party to whom his service may be due." The nature of the power shows that it must be exclusive. It was designed to protect the rights of the master, and against whom? Not against the state, nor the people of the state in which he resides; but against the people and the legislative action of other states where the fugitive from labor might be found. Under the confederation, the master had no legal means of enforcing his rights, in a state opposed to slavery. A disregard of rights thus asserted was deeply felt in the south; it produced great excitement, and would have led to results destructive of the Union. To avoid this, the constitutional guarantee was essential. The necessity for this provision was found in the views and feelings of the people of the states opposed to slavery; and who, under such an influence, could not be expected favorably to regard the rights of the master. Now, by whom is this paramount law to be executed?

It is contended, that the power to execute it rests with the states. The law was designed to protect the rights of the slave-holder against the states opposed to those rights; and yet, by this argument, the effective power is in the hands of those on whom it is to operate. This would produce a strange anomaly in the history of legislation; it would show an inexperience and folly in the venerable framers of the constitution, from which, of all public bodies that ever assembled, they were, perhaps, most exempt. The clause of the constitution under consideration declares that no fugitive from labor shall be discharged from such labor, by any law or regulation of the state into which he may have fled. Is the state to judge of this? Is it left for the state to determine what effect shall be given to this and other parts of the provision? This power is not susceptible of division; it is a part of the fundamental law, and pervades the Union; the rule of action which it prescribes was intended to be the same in all the states. *662] This is essential to the attainment of the objects of the *law; if the effect of it depended, in any degree, upon the construction of a state, by legislation or otherwise, its spirit, if not its letter, would be disregarded. This would not proceed from any settled determination in any state to vio-

late the fundamental rule, but from habits and modes of reasoning on the subject; such is the diversity of human judgment, that opposite conclusions, equally honest, are often drawn from the same premises. It is, therefore, essential to the uniform efficacy of this constitutional provision, that it should be considered exclusively a federal power. It is, in its nature, as much so as the power to regulate commerce, or that of foreign intercourse.

To give full effect to this provision, was legislation necessary? Congress, by the passage of the act of 1793, legislated on the subject, and this shows how this provision was construed, shortly after its adoption; and the reasons which were deliberately considered, and which led to the passage of the act, show clearly that it was necessary. These reasons will be more particularly referred to under another head of the argument. But looking only at the constitution, the propriety, if not the necessity, of legislation is seen. The constitution provides that the fugitive from labor shall be delivered up, on claim being made by the person entitled to such labor; but it is silent as to how and on whom this claim shall be made; the act of congress provides for this defect and uncertainty, by establishing the mode of procedure.

It is contended, that the power to legislate on this subject is concurrently in the states and federal government; that the acts of the latter are paramount, but the acts of the former must be regarded as of authority, until abrogated by the federal power. How a power exercised by one sovereignty can be called concurrent, which may be abrogated by another, I cannot comprehend; a concurrent power, from its nature, I had supposed must be equal. If the federal government, by legislating on the subject, annuls all state legislation on the same subject, it must follow, that the power is in the federal government and not in the state. Taxation is a power common to a state and the general government, and it is exercised by each, independently of the other; and this must be the character of all concurrent powers.

It is said, that a power may be vested in the federal government *which remains dormant, and that in such case a state may legislate on the subject. In the case supposed, whence does the legislature [*663 derive its power? Is it derived from the constitution of the state, or the constitution of the United States? If the power is given by the state constitution, it must follow, that it may be exercised independently of the federal power; for it is presumed, no one will sanction the doctrine, that congress, by legislation, may abridge the constitutional power of a state. How can the power of the state be derived from the federal constitution? Is it assumed, on the ground, that congress, having the power, have failed to exercise it? Where is such an assumption to end? May it not be applied with equal force and propriety to the whole ground of federal legislation, excepting only the powers inhibited to the states? Congress have not legislated upon a certain subject, but this does not show that they may not have duly considered it; or they may have acted without exhausting the power. Now, in my judgment, it is illogical and unconstitutional, to hold, that in either of these cases, a state may legislate.

Is this a vagrant power of the state, like a floating land-warrant to be located on the first vacant spot that shall be found? May a state occupy a fragment of federal power which has not been exercised, and like a tenant

at will, continue to occupy it until it shall have notice to quit? No such power is derived by implication from the federal constitution. It defines the powers of the general government, and imposes certain restrictions and duties on the states; but beyond this, it in no degree affects the powers of the states. The powers which belong to a state are exercised independently; in its sphere of sovereignty, it stands on an equality with the federal government, and is not subject to its control. It would be as dangerous, as humiliating, to the rights of a state, to hold, that its legislative powers were exercised, to any extent and under any circumstances, subject to the paramount action of congress; such a doctrine would lead to serious and dangerous conflicts of power.

The act of 1793 seems to cover the whole constitutional ground. The third section provides, "that when a person held to labor in any state or territory of the United States, under the laws *thereof, shall escape into any other of the said states or territories, the person to whom such labor or service may be due, his agent or attorney, is empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof, to the satisfaction of such judge or magistrate, either by oral testimony or affidavit, &c., that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing said fugitive to the state from which he or she fled." The fourth section imposes a penalty on any person who shall obstruct or hinder such claimant, his agent or attorney, &c., or shall rescue such fugitive, when so arrested, &c.

*664]

It seems to be taken as a conceded point, in the argument, that congress had no power to impose duties on state officers, as provided in the above act. As a general principle, this is true; but does not the case under consideration form an exception? Congress can no more regulate the jurisdiction of the state tribunals, than a state can define the judicial power of the Union. The officers of each government are responsible only to the respective authorities under which they are commissioned. But do not the clauses in the constitution in regard to fugitives from labor, and from justice, give congress a power over state officers, on these subjects? The power in both the cases is admitted or proved to be exclusively in the federal government. The clause in the constitution preceding the one in relation to fugitives from labor, declares that, "a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." In the first section of the act of 1793, congress have provided, that on demand being made as above, "it shall be the duty of *the executive authority, to cause the person demanded to be arrested, &c. The constitutionality of this law, it is believed, has never been questioned. It has been obeyed by the governors of states, who have uniformly acknowledged its obligation. To some demands, surrenders

*665]

have not been made; but the refusals have, in no instance, been on the ground that the constitution and act of congress were of no binding force. Other reasons have been assigned.

Now, if congress may, by legislation, require this duty to be performed by the highest state officer, may they not, on the same principle, require appropriate duties in regard to the surrender of fugitives from labor, by other state officers? Over these subjects, the constitutional power is the same. In both cases, the act of 1793 defines on what evidence the delivery shall be made; this was necessary, as the constitution is silent on the subject. The act provides, that on claim being made, of a fugitive from labor, "it shall be the duty of such judge or magistrate, to give a certificate that the person claimed owes services to the claimant." The constitution requires "that such person shall be delivered up, on claim of the party to whom the service is due." Here is a positive duty imposed; and congress have said in what mode this duty shall be performed. Had they not power to do so? If the constitution was designed, in this respect, to require, not a negative, but a positive, duty on the state and the people of the state where the fugitive from labor may be found (of which, it would seem, there can be no doubt), it must be equally clear, that congress may prescribe in what manner the claim and surrender shall be made. I am, therefore, brought to the conclusion, that although, as a general principle, congress cannot impose duties on state officers, yet in the cases of fugitives from labor and from justice, they have the power to do so.

In the case of *Martin's Lessee* v. *Hunter*, 1 Wheat. 304, this court say, "The language of the constitution is imperative on the states as to the performance of many duties. It is imperative on the state legislatures to make laws prescribing the time, place and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as *well as in other cases, congress have a right to revise, amend or supersede the laws which may be passed by the state legislatures." Now, I do not insist on the exercise of the federal power to the extent as here laid down. I go no further than to say, that where the constitution imposes a positive duty on a state or its officers to surrender fugitives, congress may prescribe the mode of proof, and the duty of the state officers. This power may be resisted by a state, and there is no means of coercing it. In this view, the power may be considered an important one. So, the supreme court of a state may refuse to certify its record on a writ of error to the supreme court of the Union, under the 25th section of the judiciary act. But resistance to a constitutional authority by any of the state functionaries, should not be anticipated; and if made, the federal government may rely upon its own agency in giving effect to the laws. [*666

I come now to a most delicate and important inquiry in this case, and that is, whether the claimant of a fugitive from labor may seize and remove him by force, out of the state in which he may be found, in defiance of its laws. I refer not to laws which are in conflict with the constitution, or the act of 1793. Such state laws, I have already said, are void. But I have reference to those laws which regulate the police of the state, maintain the peace of its citizens, and preserve its territory and jurisdiction from acts of violence.

About the time of the adoption of the constitution, a colored man was

seized by several persons in the state of Pennsylvania, and forcibly removed out of it, with the intent, as charged, to enslave him. This act was then, as it is now, a criminal offence by the law of Pennsylvania. Certain persons were indicted for this offence, and in the year 1791, the governor of Pennsylvania demanded of the governor of Virginia, the persons indicted, as fugitives from justice. The governor of Virginia submitted the case to the attorney-general of that state, who decided, that the offence charged in the indictment was not such a crime as, under the constitution, required a surrender. He also held, "that control over the persons charged ought not to be acquired by any force not specified and delegated by positive law."

*667] The governor of Virginia refused *to arrest the defendants, and deliver them to the authorities of Pennsylvania. The correspondence between the governors, and the opinion of the attorney-general of Virginia, with other papers relating to the case, were transmitted to the president of the United States, who laid them before congress. And there can be no doubt, that this correspondence, and the forcible removal of the colored person which gave rise to it, led to the passage of the act of 1793. It is not unworthy of remark, that a controversy on this subject should first have arisen, after the adoption of the constitution, in Pennsylvania; and that after a lapse of more than half a century, a controversy involving a similar act of violence should be brought before this court, for the first time, from the same state.

Both the constitution and the act of 1793, require the fugitive from labor to be delivered up, on claim being made, by the party, or his agent, to whom the service is due. Not that a suit should be regularly instituted; the proceeding authorized by the law is summary and informal. The fugitive is seized by the claimant, and taken before a judge or magistrate within the state, and on proof, parol or written, that he owes labor to the claimant, it is made the duty of the judge or magistrate, to give the certificate, which authorizes the removal of the fugitive to the state from whence he absconded. The counsel inquire, of whom the claim shall be made? And they represent that the fugitive, being at large in the state, is in the custody of no one, nor under the protection of the state; so that the claim cannot be made, and consequently, that the claimant may seize the fugitive and remove him out of the state. A perusal of the act of congress obviates this difficulty, and the consequence which is represented as growing out of it; the act is framed to meet the supposed case. The fugitive is presumed to be at large, for the claimant is authorized to seize him; after seizure, he is in custody; before it, he was not; and the claimant is required to take him before a judicial officer of the state; and it is before such officer his claim is to be made. To suppose, that the claim is not to be made, and indeed, cannot be, unless the fugitive be in the custody or possession of some public officer or individual, is to disregard the letter and spirit of the act of 1793. There is no act in the statute book more precise

*668] *in its language; and, as it would seem, less liable to misconstruction. In my judgment, there is not the least foundation in the act for the right asserted in the argument, to take the fugitive by force and remove him out of the state.

Such a proceeding can receive no sanction under the act, for it is in express violation of it. The claimant having seized the fugitive, is required

by the act, to take him before a federal judge within the state, or a state magistrate within the county, city or town corporate, within which the seizure was made. Now, can there be any pretence, that after the seizure under the statute, the claimant may disregard the other express provision of it, by taking the fugitive, without claim, out of the state. But it is said, the master may seize his slave wherever he finds him, if by doing so, he does not violate the public peace; that the relation of master and slave is not affected by the laws of the state, to which the slave may have fled, and where he is found. If the master has a right to seize and remove the slave, without claim, he can commit no breach of the peace, by using all the force necessary to accomplish his object.

It is admitted, that the rights of the master, so far at regards the services of the slave, are not impaired by this change; but the mode of asserting them, in my opinion, is essentially modified. In the state where the service is due, the master needs no other law than the law of force, to control the action of the slave. But can this law be applied by the master, in a state which makes the act unlawful? Can the master seize his slave and remove him out of the state, in disregard of its laws, as he might take his horse which is running at large? This ground is taken in the argument. Is there no difference in principle in these cases? The slave, as a sensible and human being, is subject to the local authority into whatsoever jurisdiction he may go; he is answerable under the laws for his acts, and he may claim their protection; the state may protect him against all the world except the claim of his master. Should any one commit lawless violence on the slave, the offender may unquestionably be punished; and should the slave commit murder, he may be detained and punished for it by the state, in disregard of the claim of the *master. Being within the jurisdiction of a [*669
state, a slave bears a very different relation to it from that of mere property.

In a state where slavery is allowed, every colored person is presumed to be a slave; and on the same principle, in a non-slave-holding state, every person is presumed to be free, without regard to color. On this principle, the states, both slave-holding and non-slave-holding, legislate. The latter may prohibit, as Pennsylvania has done, under a certain penalty, the forcible removal of a colored person out of the state. Is such law in conflict with the act of 1793? The act of 1793 authorizes a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it. The law of Pennsylvania punishes a forcible removal of a colored person out of the state. Now, here is no conflict between the law of the state and the law of congress; the execution of neither law can, by any just interpretation, in my opinion, interfere with the execution of the other; the laws in this respect stand in harmony with each other.

It is very clear, that no power to seize and forcibly remove the slave, without claim, is given by the act of congress. Can it be exercised under the constitution? Congress have legislated on the constitutional power, and have directed the mode in which it shall be executed. The act, it is admitted, covers the whole ground; and that it is constitutional, there seems to be no reason to doubt. Now, under such circumstances, can the provisions of the act be disregarded, and an assumed power set up under the constitu-

tion? This is believed to be wholly inadmissible by any known rule of construction. The terms of the constitution are general, and like many other powers in that instrument, require legislation. In the language of this court, in *Martin* v. *Hunter*, 1 Wheat. 304, "the powers of the constitution are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require." This congress have done by the act of 1793. It gives a summary and effectual mode of redress to the master, and is he not *679] *bound to pursue it? It is the legislative construction of the constitution; and is it not a most authoritative construction? I was not prepared to hear the counsel contend, that notwithstanding this exposition of the constitution, and ample remedy provided in the act, the master might disregard the act and set up his right under the constitution. And having taken this step, it was easy to take another, and say, that this right may be asserted by a forcible seizure and removal of the fugitive. This would be a most singular constitutional provision. It would extend the remedy by recaption, into another sovereignty, which is sanctioned neither by the common law nor the law of nations. If the master may lawfully seize and remove the fugitive out of the state where he may be found, without an exhibition of his claim, he may lawfully resist any force, physical or legal, which the state, or the citizens of the state, may interpose. To hold that he must exhibit his claim in case of resistance, is to abandon the ground assumed. He is engaged, it is said, in the lawful prosecution of a constitutional right; all resistance, then, by whomsoever made, or in whatsoever form, must be illegal. Under such circumstances, the master needs no proof of his claim, though he might stand in need of additional physical power; having appealed to this power, he has only to collect a sufficient force to put down all resistance and attain his object; having done this, he not only stands acquitted and justified; but he has recourse for any injury he may have received in overcoming the resistance.

If this be a constitutional remedy, it may not always be a peaceful one. But if it be a rightful remedy, that it may be carried to this extent, no one can deny. And if it may be exercised, without claim of right, why may it not be resorted to, after the unfavorable decision of the judge or magistrate? This would limit the necessity of the exhibition of proof by the master to the single case where the slave was in the actual custody of some public officer. How can this be the true construction of the constitution? That such a procedure is not sanctioned by the act of 1793 has been shown; that an act was passed expressly to guard against acts of force and violence. *671] I cannot perceive how any one can doubt that the remedy *given in the constitution, if, indeed, it give any remedy, without legislation, was designed to be a peaceful one; a remedy sanctioned by judicial authority; a remedy guarded by the forms of law. But the inquiry is reiterated, is not the master entitled to his property? I answer, that he is. His right is guarantied by the constitution, and the most summary means for its enforcement is found in the act of congress; and neither the state nor its citizens can obstruct the prosecution of this right. The slave is found in a state where every man, black or white, is presumed to be free; and this state, to preserve the peace of its citizens, and its soil and jurisdic-

tion from acts of violence, has prohibited the forcible abduction of persons of color. Does this law conflict with the constitution? It clearly does not, in its terms.

The conflict is supposed to arise out of the prohibition against the forcible removal of persons of color, generally, which may include fugitive slaves. *Primâ facie*, it does not include slaves, as every man within the state is presumed to be free, and there is no provision in the act which embraces slaves. Its language clearly shows, that it was designed to protect free persons of color within the state. But it is admitted, there is no exception as to the forcible removal of slaves; and here the important and most delicate question arises between the power of the state, and the assumed but not sanctioned power of the federal government. No conflict can arise between the act of congress and this state law; the conflict can only arise between the forcible acts of the master and the law of the state. The master exhibits no proof of right to the services of the slave, but seizes him and is about to remove him by force. I speak only of the force exerted on the slave. The law of the state presumes him to be free, and prohibits his removal. Now, which shall give way, the master or the state? The law of the state does, in no case, discharge, in the language of the constitution, the slave from the service of his master. It is a most important police regulation. And if the master violate it, is he not amenable? The offence consists in the abduction of a person of color; and this is attempted to be justified, upon the simple ground that the slave is property. That a *slave is property, must be admitted. The state law is not violated [*672 by the seizure of the slave by the master, for this is authorized by the act of congress; but by removing him out of the state by force, and without proof of right, which the act does not authorize. Now, is not this an act which a state may prohibit? The presumption, in a non-slave-holding state, is against the right of the master, and in favor of the freedom of the person he claims. This presumption may be rebutted, but until it is rebutted by the proof required in the act of 1793, and also, in my judgment, by the constitution, must not the law of the state be respected and obeyed?

The seizure which the master has a right to make under the act of congress, is for the purpose of taking the slave before an officer. His possession of the slave within the state, under this seizure, is qualified and limited to the subject for which it was made. The certificate of right to the service of the slave is undoubtedly for the protection of the master; but it authorizes the removal of the slave out of the state where he was found, to the state from whence he fled; and under the constitution, this authority is valid in all the states. The important point is, shall the presumption of right set up by the master, unsustained by any proof, or the presumption which arises from the laws and institutions of the state, prevail; this is the true issue. The sovereignty of the state is on one side, and the asserted interest of the master on the other; that interest is protected by the paramount law, and a special, a summary, and an effectual, mode of redress is given. But this mode is not pursued, and the remedy is taken into his own hands by the master.

The presumption of the state that the colored person is free, may be erroneous in fact; and if so, there can be no difficulty in proving it. But

may not the assertion of the master be erroneous also; and if so, how is his act of force to be remedied? The colored person is taken and forcibly conveyed beyond the jurisdiction of the state. This force, not being authorized by the act of congress nor by the constitution, may be prohibited by the state. As the act covers the whole power in the constitution, and carries out, by special enactments, its provisions, we are, in my judgment, *bound by the act. We can no more, under such circumstances, administer a remedy under the constitution, in disregard of the act, than we can exercise a commercial or other power in disregard of an act of congress on the same subject. This view respects the rights of the master and the rights of the state; it neither jeopards nor retards the reclamation of the slave; it removes all state action prejudicial to the rights of the master; and recognises in the state a power to guard and protect its own jurisdiction, and the peace of its citizen.

*673]

It appears, in the case under consideration, that the state magistrate before whom the fugitive was brought refused to act. In my judgment, he was bound to perform the duty required of him by a law paramount to any act, on the same subject, in his own state. But this refusal does not justify the subsequent action of the claimant; he should have taken the fugitive before a judge of the United States, two of whom resided within the state.

It may be doubted, whether the first section of the act of Pennsylvania under which the defendant was indicted, by a fair construction, applies to the case under consideration. The decision of the supreme court of that state was *pro formâ*, and, of course, without examination. Indeed, I suppose, the case has been made up merely to bring the question before this court. My opinion, therefore, does not rest so much upon the particular law of Pennsylvania, as upon the inherent and sovereign power of a state, to protect its jurisdiction and the peace of its citizens, in any and every mode which its discretion shall dictate, which shall not conflict with a defined power of the federal goverdment.

THIS cause came on to be heard, on the transcript of the record from the supreme court of Pennsylvania, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the act of the commonwealth of Pennsylvania, upon which the indictment in this case is founded, is repugnant to the constitution and laws of the United States, and therefore, void; and that the judgment of the supreme court of Pennsylvania upon the special verdict found in the case, ought to have been, that the said Edward Prigg was not guilty. It is, therefore, ordered and adjudged by this court, that the judgment of the said supreme court of Pennsylvania be and the same is hereby, reversed. *And this court proceeding to render such judgment in the premises as the said supreme court of Pennsylvania ought to have rendered, do hereby order and adjudge that judgment upon the special verdict aforesaid be here entered, that the said Edward Prigg is not guilty in manner and form as is charged against him in the said indictment, and that he go thereof quit, without day; and that this cause be remanded to the supreme court of Pennsylvania with directions accordingly, so that such other proceeding may be had therein as to law and justice shall appertain.

*674]

INDEX

TO THE

MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the Star *pages.

APPEAL.

ARBITRAMENT AND AWARD.

represented, and the purchaser imposed upon by the fraud of the drawer, and those who were co-owners of the land, and co-operators in the sale; the bill accepted had been received *bonâ fide*, and before it was due. There is no doubt, that a *bonâ fide* holder of a negotiable instrument, for a valuable consideration, without any notice of the facts which implicate its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by those facts; and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. *Swift* v. *Tyson*..... *1

2. The holder of negotiable paper, before it is due, is not bound to prove that he is a *bonâ fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proof; and therefore, it is incumbent on a defendant to establish, by way of defence, satisfactory proofs of the contrary, and thus to overcome the *primâ facie* title of the plaintiff..... *Id.*

3. B. & McK., merchants at New Orleans, were the factors of P. & Co. of Huntsville, Alabama, and made advances on cotton shipped to them; in August 1834, P. & Co. were indebted to B. & McK., $1315; and Williams, the agent of B. & McK., agreed with P. & Co., that B. & McK. would advance $18,000 on bills to be drawn between the 20th of April and the 31st July 1835, by P. & Co., and any two of six persons named, among whom were Horton and Terry, two of the defendants in the suit. Before July 31st, 1835, several shipments of cotton were made to B. & McK., by P. & Co., and several bills were drawn by them, jointly with Horton and Terry, and by others without them; all of which were accepted by B. & McK. These bills, with the advances before made, amounted to $29,795, and the proceeds of the shipments were $22,460; B. & McK. applied these proceeds to the liquidation of the bills drawn by P. & Co., to the exclusion of those drawn by them jointly with Horton and Terry; and as these bills exceeded the proceeds of the cotton, they brought an action on a bill drawn June 4th, 1835, by P. & Co., and Horton and Terry, amounting to $3000. The circuit court instructed the jury, that if they believed from the evidence, that, at the maturity of the bill, B. & McK. had sufficient funds of P. & Co. to pay the bill, and Horton and Terry to be accommodation drawers, and sureties only, then, in the absence of any instructions from P. & Co., in regard to the application of the funds, B. & McK. were bound to apply them to pay the bill and could not hold them to pay a bill drawn on them by P. & Co. only, which had been accepted by them, and was not then due: *Held*, that the instructions of the circuit court were correct. *Brandeth* v. *Phillips*..... *121

4. When a factor makes advances, or incurs liability, on a consignment of goods, if there be no special agreement, he may sell the property, in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale, and the consignor had no right to interfere. The lien of the factor for advances and liabilities incurred, extends not only to the property consigned, but, when sold, to the proceeds in the hands of the vendee, and the securities therefor in the hands of the factor..... *Id.*

5. The acceptors of the bill of exchange having, when the bill became due, funds of the drawers in their hands, sufficient to pay the same, the liability of the accommodation drawers was as completely discharged, on payment of the bill, as that of the principals..... *Id.*

CASES CITED.

1. Arredondo's Case, 6 Pet. 706; Percheman's Case, 7 Ibid. 71; Sibbald's Case, 10 Ibid. 321. *United States* v. *Clarke*..... *228
2. Comegys *v.* Vasse, 1 Pet. 196; United States *v.* Macdaniel, 7 Ibid. 1; United States *v.* Fillebrown, 7 Ibid. 50; Emerson *v.* Hall, 13 Ibid. 409. *Milner* v. *Metz*..... *221
3. Faw *v.* Robertson's Executors, 3 Cranch 178; Tucker *v.* Oxley, 5 Ibid. 34; Kennedy *v.* Brent, 6 Ibid. 187; Brent *v.* Chapman, 5 Ibid. 358; Shankland *v.* Corporation of Washington, 5 Ibid. 390; Inglee *v.* Coolidge, 2 Wheat. 363; Miller *v.* Nichols, 4 Ibid 311. *United States* v. *Eliason*..... *291
4. Marbury *v.* Brooks, 7 Wheat. 566, 11 Ibid. 76. *Tompkins* v. *Wheeler*..... *100
5. Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46. *Amis* v. *Smith*..... *303
6. New Orleans *v.* United States, 10 Pet. 662. *Watkins* v. *Holman*..... *25
7. Percheman's Case, 7 Pet. 51; Kingsley's Case, 12 Ibid. 476; Arredondo's Case, 6 Ibid. 741; Forbes's Case, 15 Ibid. 182; Buyck's Case, Ibid. 215; O'Hara's Case, Ibid. 275; Delespine's Case, Ibid. 319. *United States* v. *Miranda*..... *153
8. Thompson *v.* Tolmie, 2 Pet. 157; United States *v.* Arredondo, 6 Ibid. 720; Voorhees *v.* United States' Bank, Ibid. 473; Philadelphia and Trenton Railroad Company *v.* Stimpson, 14 Ibid. 458. *Cocke* v. *Halsey*..... *71

CHANCERY.

See LIMITATION OF ACTIONS.

CONSTRUCTION OF STATE LAWS.

See ESCAPE: REAL ESTATE, 1.

CONSTRUCTION OF UNITED STATES' STATUTES.

CONTRACT.

COSTS.

ESTATES OF DECEDENTS.

EVIDENCE.

FACTOR.

See BILLS OF EXCHANGE, 1–3.

FLORIDA LAND-CLAIMS.

FORTHCOMING BONDS.

FUGITIVES FROM LABOR.

INTEREST.

JURISDICTION.

LANDLORD AND TENANT.

LEGISLATION.

LIMITATION OF ACTIONS.

NEW JERSEY.

OFFICES.

See CONSTITUTIONALITY OF STATE LAWS.

PATENTS.

See FORTHCOMING BONDS, 1–2.

PROBABLE CAUSE.

See SEIZURE, 5.

PROCESS.

REAL ESTATE.

41 U. S.

Set 1