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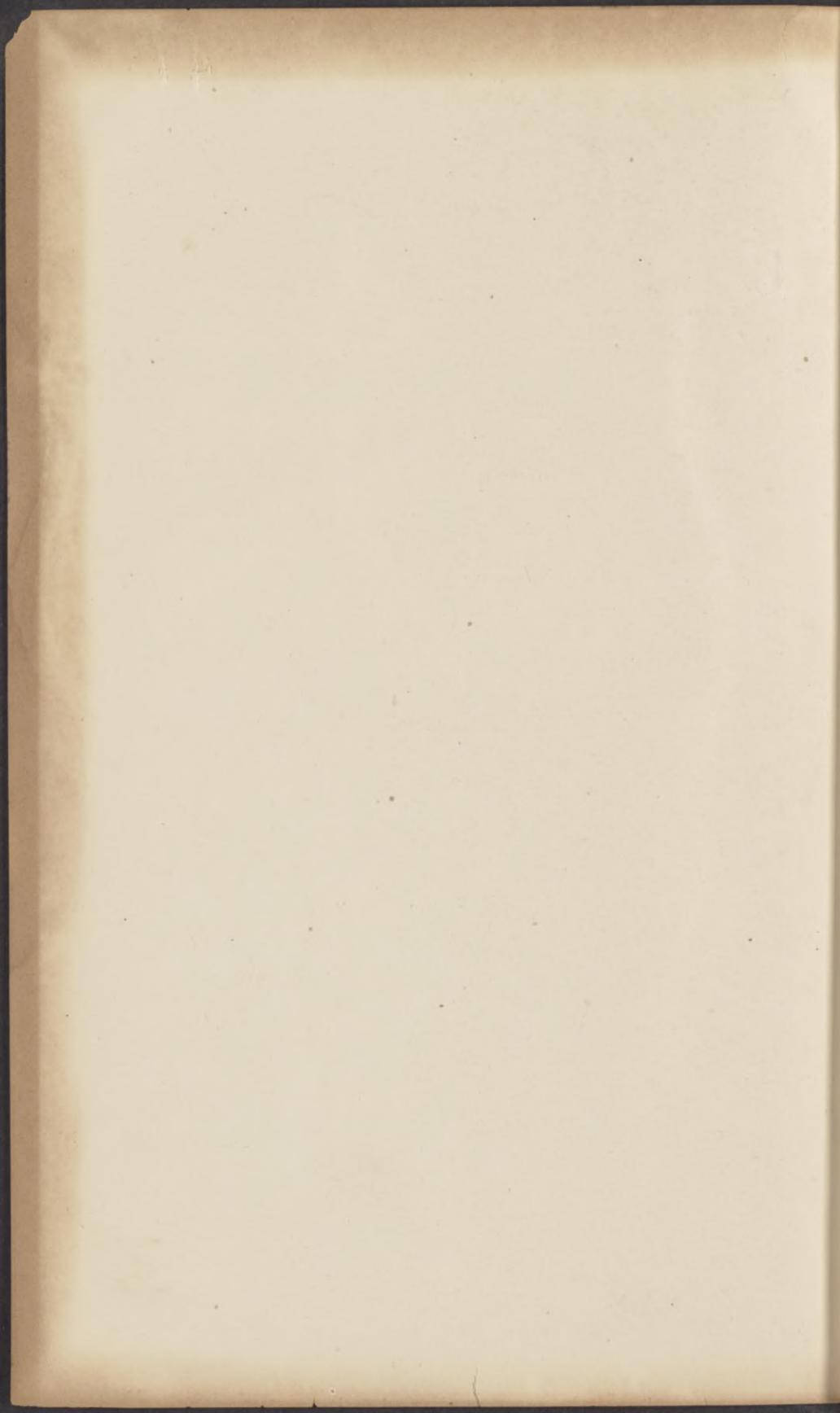


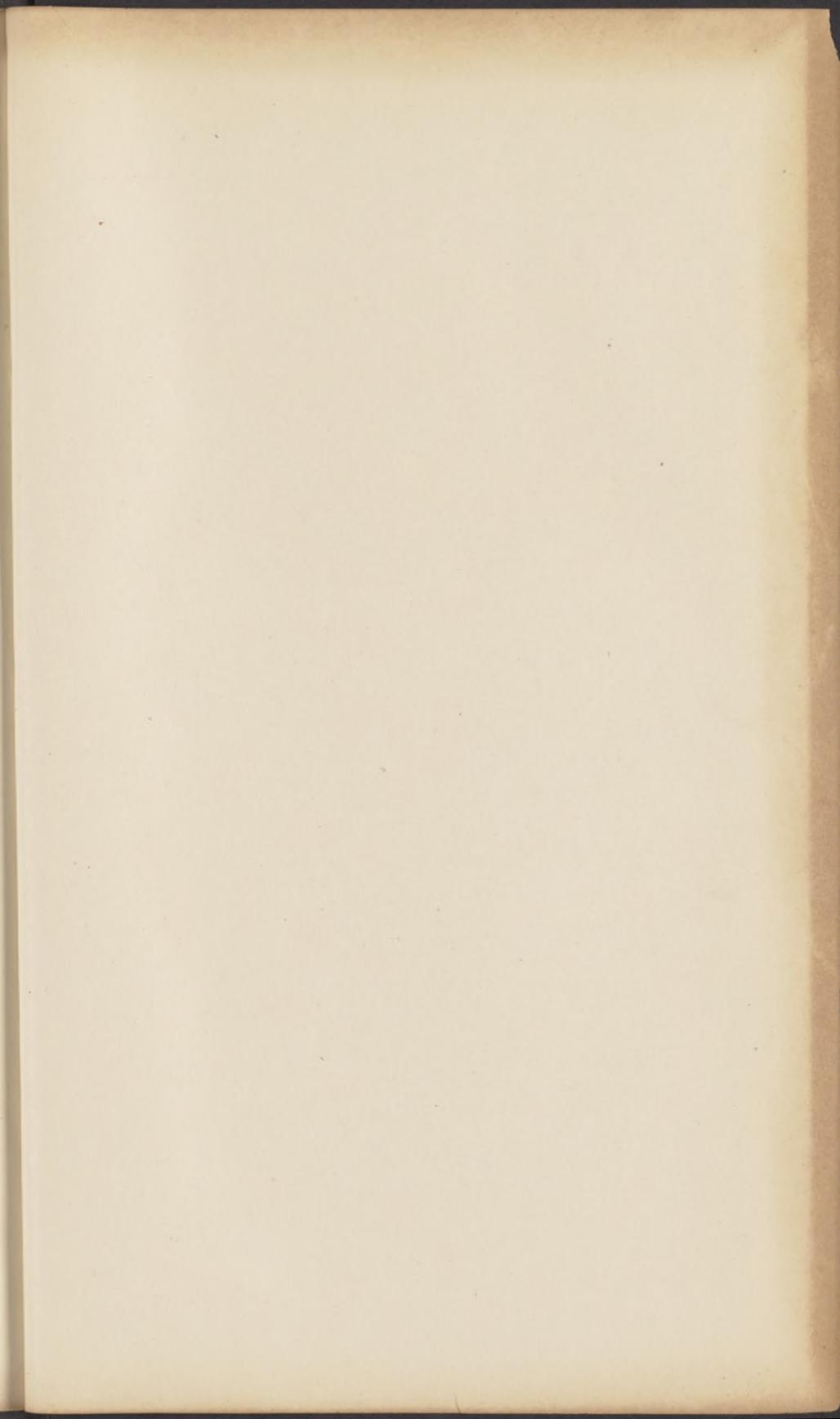
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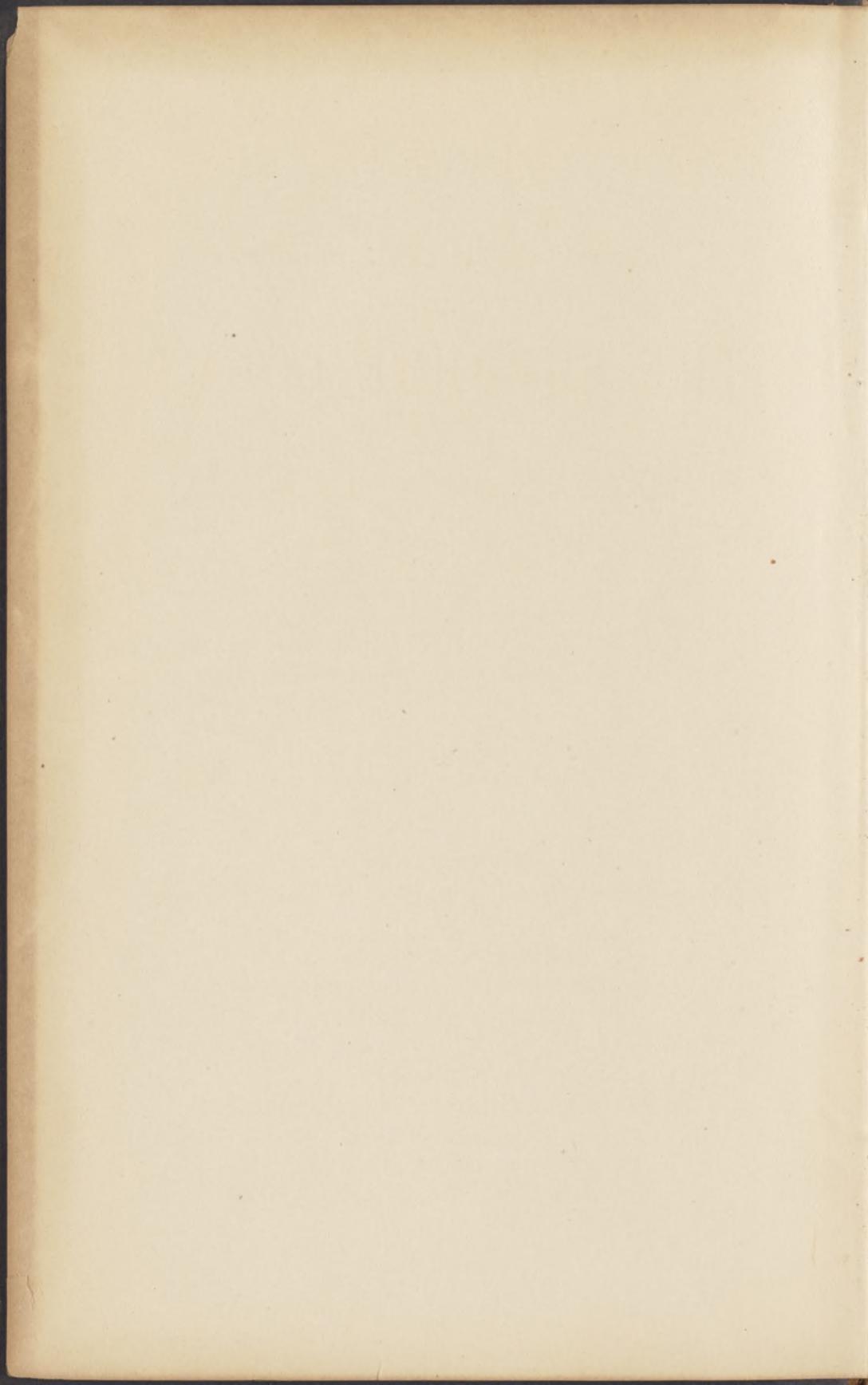
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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN
THE SUPREME COURT
OF
THE UNITED STATES,
JANUARY TERM, 1847.

By BENJAMIN C. HOWARD,
COUNSELOR AT LAW, AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE
UNITED STATES.

VOL. VI.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY
STEWART RAPALJE,
AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.

HON. JOHN McLEAN, Associate Justice.

HON. JAMES M. WAYNE, Associate Justice.

HON. JOHN CATRON, Associate Justice.

HON. JOHN McKINLEY, Associate Justice.*

HON. PETER V. DANIEL, Associate Justice.

HON. SAMUEL NELSON, Associate Justice.

HON. LEVI WOODBURY, Associate Justice.

HON. ROBERT C. GRIER, Associate Justice.

NATHAN CLIFFORD, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

ALEXANDER HUNTER, Esq., Marshal.

*Mr. Justice McKinley was prevented, by indisposition, from attending at this term.

ORDER OF COURT.

- For the 1st Circuit—The honorable LEVI WOODBURY.
For the 2d Circuit—The honorable SAMUEL NELSON.
For the 3d Circuit—The honorable ROBERT C. GRIER.
For the 4th Circuit—The honorable ROGER B. TANNEY, C. J.
For the 5th Circuit—The honorable JOHN MCKINLEY.
For the 6th Circuit—The honorable JAMES M. WAYNE.
For the 7th Circuit—The honorable JOHN MCLEAN.
For the 8th Circuit—The honorable JOHN CATRON.
For the 9th Circuit—The honorable PETER V. DANIEL.

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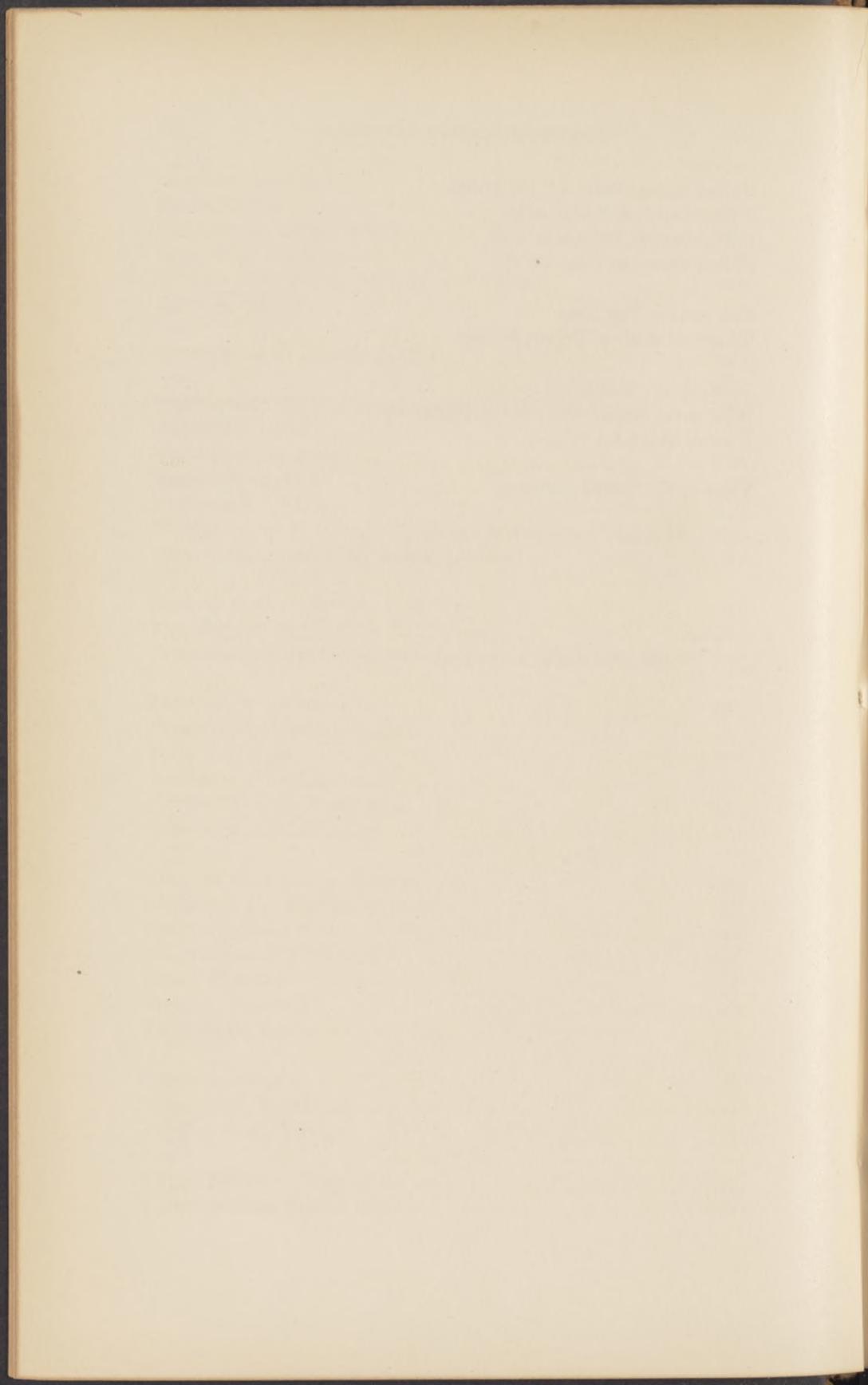
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THE DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,
AT
JANUARY TERM, 1848.

BENJAMIN G. SIMS, PLAINTIFF IN ERROR, *v.* THOMAS
HUNDLEY.

The decisions of this court in *Groves v. Slaughter*, 15 Pet., 449, and *Rowan v. Runnels*, 5 How., 134, again affirmed.

The continuance of a cause, or the refusal to continue it, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. This, also, has been long settled.¹

¹ FOLLOWED. *Spencer v. Lapsley*, 20 How., 267; *S. P. Woods v. Young*, 4 Cranch, 237; *Barrow v. Hill*, 13 How., 54; *Thompson v. Selden*, 20 Id., 194; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206; *Campbell v. Strong*, Hempst., 265; *Bassett v. Jenkins*, 41 Wis., 197; *Succession of Grace*, 29 La. Ann., 694; *Universal Life Ins. Co. v. Bachus*, 51 Md., 28; *Eighty v. People*, 79 N. Y., 546; *Dillon v. Dillon*, 35 La. Ann., 643; *Bush v. Weeks*, 24 Hun (N. Y.), 545.

An appellate court will interfere with the exercise of the discretion of the court below, in refusing a continuance, only upon clear proof of an arbitrary abuse of discretion. *Byers v. McPhee*, 4 Col., 204; *Cox v. State*, 64 Ga., 374; *Pate v. Tait*, 72 Ind., 450. Compare *State v. Poe*, 8 Lea (Tenn.), 647.

The refusal of a continuance on the ground of absence of witnesses, will not be revised in an appellate court where the ground of refusal was that the application appeared to be made in bad faith. *Hannon v. Howe*, 27 Gratt. (Va.), 676. And see *Porter v. State*, 3 Lea (Tenn.), 496.

A refusal to grant a continuance in
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a criminal case, on the ground that a witness by whom the accused expected to prove an *alibi* had a few days before, been confined in child-birth, and being still unable to obey process none had been sued out to produce her, held a proper exercise of discretion by the court below. *Jackson v. State*, 4 Tex. App., 292. But see *Garrold v. State*, 11 Id., 219.

Where a continuance is asked because the time for the return of a commission to take testimony in a foreign country has not elapsed, it is error to refuse it, unless the facts expected to be proved by the foreign depositions be admitted. *Calhoun v. Mechanics' &c. Bank*, 28 La. Ann., 260. But the refusal of a continuance to enable new counsel to obtain papers to be used, merely as memoranda to aid them on the trial, from the possession of the personal representatives of the former deceased counsel, was held not error, such papers not being competent as evidence. *Williams v. Baltimore &c. R. R. Co.*, 9 W. Va., 33. See also *State v. Wilson*, 33 La. Ann., 261. Where, however, one on trial for murder was betrayed by his counsel, and

Sims v. Hundley.

Under the statutes of Mississippi, a protest of promissory notes, and statement of notices given to the parties, being certified under the notarial seal and verified by the affidavit of the notary, may be read in evidence. It is not necessary to introduce the notary, personally, to testify.²

Under a plea of *non assumpsit*, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court.³

allowed only four days for preparation after the appointment of new counsel, the conviction was reversed for refusal of a continuance. *State v. Lewis*, 74 Mo., 222.

Where a material witness beyond the jurisdiction had promised to attend and there was good ground of expectation that his testimony could be obtained within a reasonable time, the refusal of a continuance to a day certain was held to be reversible error. *Brown v. State*, 65 Ga., 332. Compare *Langener v. Phelps*, 74 Mo., 189; *Lillienthal v. Anderson*, 1 Idaho T., 673.

Where one party files an amendment after the jury is impaneled, the opposite party is entitled to a continuance as a matter of right. *Strong v. District of Columbia*, 3 McARTH., 499. Compare *Garlick v. Pella*, 53 Iowa, 646.

In the following criminal cases, convictions were reversed because of refusal of a first continuance, to which, in Texas, the defendant is entitled as a matter of right, on complying with the requirement in Pasch. Dig., art. 2987. *Stephenson v. State*, 5 Tex. App., 79; *Cox v. State*, Id., 118; *Webb v. State*, Id., 596; *McDow v. State*, 10 Id., 98. S. P. in Kentucky, *Morgan v. Commonwealth*, 14 Bush (Ky.), 106; and in Louisiana, *State v. Moultrie*, 33 La. Ann., 1146. Otherwise as to refusal of a third continuance. *Johnson v. State*, 7 Tex. App., 297; *Harris v. State*, 8 Id., 90; *Grisson v. State*, Id., 386.

²FOLLOWED. *Wright v. Bales*, 2 Black, 538. CITED. *Gravelle v. Minneapolis, &c. R'y Co.*, 3 McCrary, 386. S. P. *Brandon v. Loftus*, 4 How., 127. See *Potter v. National Bank*, 12 Otto, 165.

³APPLIED. *Sheppard v. Graves*, 14 How., 511; *Tyler v. Murray*, 57 Md., 438. CITED. *Smith v. Kernochen*, 7 How., 216; *Ganse v. City of Clarksville*, 1 McCrary, 86, n. See *Harris v. Wall*, 7 How., 706; *Vance v. Campbell*, 1 Black, 431.

The plea of non assumpsit, or other plea to the merits, is a waiver of a plea to the jurisdiction. *Basley v. Dozier*, post *23. *S. P. Dake v. Miller*, 15 Hun (N. Y.), 356; *Tupery v. Edmonston*, 32 La. Ann., 1146; *Potter v. Neal*, 62 How. (N. Y.) Pr., 158; *Day v. Floyd*, 130 Mass., 488. Otherwise in Arkansas, where both defenses may be set up in the same answer. *Erb v. Perkins*, 32 Ark., 428; *Erhman v. Teutonia Ins. Co.*, 1 McCrary, 123; and in Wisconsin, *Brown County v. Van Stralen*, 45 Wis., 675; also in Missouri, *Little v. Harrington*, 71 Mo., 390.

So, where the original process is served in a foreign country the question of jurisdiction can only be raised by plea in abatement; it cannot be raised by demurrer, or on writ of error after default. *Wallace v. Cox*, 71 Ill., 548.

A defendant who wishes to contest the citizenship of the parties, in an action in a federal court, can only do so by a plea in abatement; and if he adds thereto a plea on the merits, the plea to the jurisdiction may be stricken out on motion. *Wythe v. Myers*, 3 Sawy., 595. Where, pursuant to special leave of court, a party files a plea to the jurisdiction, his former plea to the merits is thereby withdrawn. *Kern v. Huidekoper*, 13 Otto, 485.

After an action brought in a city court, in which the writ described the defendant as a resident of the city, had been continued for four terms, and then assigned for trial on the general issue, the defendant's attorney learned for the first time that his client was a non-resident of the city. The court permitted him to file a plea to the jurisdiction, sustained the plea and dismissed the case. Held no error, (two judges dissenting). *Charter Oak Bank v. Reed*, 45 Conn., 39.

See also *Davies v. Lathrop*, 13 Fed. Rep., 566; *Gravelle v. Minneapolis &c. R'y Co.*, 16 Id., 436.

Sims v. Hundley.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

In 1835, the following notes were executed:—

\$4,000.

Port Gibson, 2d May, 1835.

On the fifteenth day of February, eighteen hundred and thirty-seven, I promise to pay, to the order of Passmore Hoopes, four thousand dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. SPENCER.

Indorsed: Passmore Hoopes, Benj. G. Sims.

\$5,169.

Port Gibson, May 2d, 1835.

Twelve months after the fifteenth February, 1836, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred sixty-nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. SPENCER.

Indorsed: Passmore Hoopes, Benj. G. Sims.

*\$4,000.

Port Gibson, 2d May, 1835.

On the fifteenth day of February, eighteen hundred and thirty-eight, I promise to pay, to the order of Passmore Hoopes, four thousand dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. SPENCER.

Indorsed: Passmore Hoopes, Benj. G. Sims.

Port Gibson, May 2, 1835.

Twelve months after the 15th February, 1837, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred sixty-nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. SPENCER.

Indorsed: Passmore Hoopes, Benj. G. Sims.

\$3,907.17.

Clinton, December 14th, 1835.

On the first day of January, eighteen hundred and thirty-eight, I promise to pay Thomas Hundley three thousand nine hundred and seven dollars and seventeen cents, for value received.

BENJ. G. SIMS.

All these notes came into the possession of Thomas Hundley. In April, 1838, Hundley brought a suit in the Circuit Court, upon all the notes, against Sims, the plaintiff in error.

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At May term, 1838, Sims, the defendant, filed two pleas, 1, *non assumpsit*, and 2, that the notes were passed to Hundley for the purchase of slaves illegally introduced into the state, in contravention of the second section of the seventh article of the constitution.

The plaintiff joined issue upon the first plea and demurred to the second. The court sustained the demurrer, and the cause went to trial upon the general issue plea.

When the cause was called for trial, the defendant moved for a continuance, and filed an affidavit, which it is unnecessary to state; but the court refused the continuance, to which refusal the defendant excepted.

The bill of exceptions then proceeds as follows:—

The plaintiff then produced the following record of a protest of the said note for \$5,169, which said record is in the words and figures following, to wit:—

State of Mississippi, Claiborne County, ss. :

I, William M. Randolph, notary public, branch Planters' Bank, Port Gibson, duly commissioned and qualified *3] according *to law, and residing in said town, do hereby certify, that on the eighteenth day of February, 1837, I went to the branch Planters' Bank at Port Gibson, and then and there presented for payment the original note, of which the following is a true copy :

\$5,169.

Port Gibson, May 2d, 1842.

Twelve months after the 16th February, 1836, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred and sixty nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. SPENCER.

Indorsed,—PASSMORE HOOPES.

BENJ. G. SIMS.

THOS. HUNDLEY.

And I then and there demanded payment of the said note, according to the tenor and effect, and was answered by the teller of the said bank, that the said note would not be paid, and that no funds were deposited in said bank for that purpose; and the said note was not paid by any person, when payment thereof was demanded as aforesaid. Whereupon, I protested said note for non-payment, and notified the parties thereto of said demand, non-payment, and protest, and that the holder of said note looked to them for payment thereof,

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which notices were given at the time and in the manner following, to wit:—(Copies annexed.)

For Passmore Hoopes, written notice of the above tenor was handed to him at his store in Port Gibson.

For Benjamin G. Sims, a written notice of the same tenor was put in the post-office at Port Gibson, on the same day, directed to him at Clinton, Mi. Which facts, then and there noted by me on my official record, constitute, as herein set forth, a full and true record of all that was done by me in the premises.

[L. S.] In testimony whereof, I have hereunto set my hand and affixed my official seal, this 1st day of June, 1838.

WM. M. RANDOLPH, *Notary Public.*

State of Mississippi, Claiborne County :

Personally appeared before the undersigned, justice of the peace for said county, the above-named Wm. M. Randolph, who made oath, that the foregoing record and certificate contain the truth, to the best of his knowledge and belief.

WM. M. RANDOLPH.

Sworn to before me, this 1st day of June, 1838.

LEWIS CRONLY, *J. P.* [SEAL.]

*NOTICES.

[*4

Port Gibson, 18th February, 1837.

BENJ. G. SIMS :

Please to take notice, that a note drawn by H. N. Spencer, in favor of Passmore Hoopes, for the sum of \$5169, and dated 2d day of May, 1835, was this day protested by me for non-payment, and that the holder looks to you for payment as indorser thereof. Respectfully,

WM. M. RANDOLPH, *Notary Public.*

Port Gibson, 18th February, 1837.

P. HOOPES :

Please to take notice, that a note drawn by H. N. Spencer, in your favor, for the sum of \$5,169, and dated the 2d day of May, 1835, was this day protested by me for non-payment, and that the holder looks to you for payment as indorser thereof. Respectfully,

WM. M. RANDOLPH, *Not. Pub.*

To the introduction of which the defendant, by his attorney, objected, which objection the court overruled, and adjudged the said record sufficient; to which opinion the defendant, by

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his attorney, excepts; and thereupon the other records of protest on said notes of Spencer, indorsed by defendant, were produced and read, and the same being identical in substance with the preceding, it is agreed said exception shall apply to them also; the plaintiff then read said records, proved that said notes were protested on the proper day, and the notices directed to the proper place, and rested his case.

The defendant then offered to prove all the facts stated in his second plea, but the court refused to hear the proof; to which refusal the defendant excepts. The defendant then produced a witness, who proved that the plaintiff in this cause had been known to him about four years last past, during all which time he had resided in (this) Hinds county, Mississippi, and that he had considered, and did then consider, him a resident citizen of the State of Mississippi; and the defendant was proceeding to call another witness, Mr. Cook, deputy-marshal, further to prove the same facts, when the testimony was objected to by the attorney of the plaintiff, upon the ground that it could not be heard under the issue now on trial; which objection the court sustained, and excluded all testimony as to proof of plaintiff's citizenship; to which decision of the court, ruling out said proof that the plaintiff was a citizen of the State of Mississippi, under said plea of *non assumpsit*, the *5] defendant, by attorney, excepts; and thereupon the jury returned *a verdict for the plaintiff; and said exceptions, being found conformable to the facts and agreement of the parties, are signed, sealed, and ordered to be made of record in the cause.

GEORGE ADAMS, [L. S.]
Judge of the U. S. for D. Miss.

Upon this bill of exceptions the case came up to this court.

It was argued by *Mr. Bibb*, for the plaintiff in error, no counsel appearing for the defendant in error.

Mr. Bibb said, that, after the decisions of this court upon the subject-matter of the second plea, as to the meaning of the constitution of Mississippi, he would not argue its sufficiency. But he insisted that the objection made to the evidence offered by the plaintiff, Hundley, of the mere record made out by the said notary, was improperly overruled by the court.

The notary himself, resident of the town and state wherein the protest was made, and wherein the trial was had, ought to have been introduced to testify; and his certificate of protest of an inland bill, of the same state, wherein the parties all lived, and wherein the trial was had, was not legal and suffi-

cient evidence. On this point the cases of *Townsley v. Sumrall*, 2 Pet., 180, and *Chesmer v. Noyes*, 2 Campb., 129, are relied on as conclusive.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought up by writ of error directed to the Circuit Court of the United States for the Southern District of Mississippi, upon a judgment obtained by the defendant in error against the plaintiff for the amount of four notes, dated May 2, 1835, indorsed by the plaintiff in error to the defendant; and also for one other note drawn by the former in favor of the latter, dated December 14, 1835.

It appears by the record that three questions of law were raised at the trial, which are now before this court upon the writ of error, the testimony as to the residence of the plaintiff upon the plea of *non assumpsit* having been properly refused.

The first point relied on as a defence to the action was, that the notes above mentioned were all indorsed and delivered by Sims to Hundley in payment for slaves brought by Hundley into the State of Mississippi as merchandise, and there sold to Sims; and that the sale of slaves so brought into the state was prohibited by the Constitution of Mississippi, and the contract therefore illegal and void.

This question was decided in the case of *Groves v. Slaughter*, *15 Pet., 449, and again in the two cases of [*6 *Rowan v. Runnels*, at the last term, 5 How., 134. And it is the settled law in this court, that contracts of this description, made at the time when these notes bear date, were valid, and not prohibited by the constitution of Mississippi.

The point next in order is presented by the exception taken to the refusal of the court to continue the case to another term, upon the affidavit filed by the plaintiff in error. But this point, also, has been long settled; and it has always been held in this court, that the continuance of a cause, or the refusal to continue, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206, 217, 218.

The remaining point, and the only one relied on in the argument here, is the exception taken to the admission in evidence of the protest and statement of notices given to the plaintiff in error,—the said protest and statement being certified under the notarial seal, and verified by the affidavit of the notary. This, however, like the two preceding points, has been already

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decided by this court; and this case cannot be distinguished from the case of *Brandon v. Loftus*, 4 How., 127.

It is true, that, upon general principles of commercial law, the certificate would not be admissible. But it is made evidence by the statute of Mississippi, and the rules of evidence prescribed by the statute of a state are always followed by the courts of the United States, when sitting in the state, in commercial cases as well as in others.

The judgment of the Circuit Court is therefore affirmed.

Order.

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.

*7] *WILLIAM M. GWIN, LATE MARSHAL, AND JACOB S. YERGER AND ROBERT HUGHES, HIS SURETIES, PLAINTIFFS IN ERROR, v. C. T. AND A. BARTON, DEFENDANTS IN ERROR.

The decision of this court in the case of *Gwin v. Breedlove*, 2 How., 29, reviewed and confirmed, viz.:

That under a statute of Mississippi, relating to sheriffs, a summary process against a marshal might be resorted to, in order to enforce the payment of a debt, interest, and costs, for which he was liable by reason of his default; that the courts of the United States could not enforce the payment of a penalty imposed by the state laws in addition to the money due on the execution; that a marshal and his sureties could not be proceeded against, jointly, in this summary way, but they must be sued as directed by the act of Congress.

Any excess of interest awarded over and above the legal rate is a penalty, and comes within the above rule.¹

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi, under the following circumstances:

At May term, 1843, viz. on the 5th of May, the following notice was filed:

¹See note in 2 How., 29.

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To William M. Gwin, late Marshal of the Southern District of the State of Mississippi, and Jacob S. Yerger and Robert Hughes, his securities in his official bond :

Please take notice that on Wednesday, the 24th day of the present month (May), I will move the Circuit Court of the United States for the Southern District of the state of Mississippi, for a judgment against you for the sum of twenty-nine hundred and twenty dollars thirty-nine cents, being the amount [of] the plaintiffs' money mentioned in the writ of *venditioni exponas*, issued from said Circuit Court on the 14th day of November, 1840, in our favor, against Robert G. Crozier, Thomas J. Coffee, and R. S. Hardy, principals, and James J. King and William H. Shelton, securities, for the said sum of twenty-nine hundred and twenty dollars thirty-nine cents, and which said writ commanded the said W. M. Gwin, then Marshal, to expose the property therein specified to sale, to satisfy the money aforesaid, and interest, and costs due on said execution; and which execution or writ of *venditioni exponas* came to the hands of said Gwin in due time, and upon the same said Gwin voluntarily and without authority omitted to levy the money aforesaid. I will also ask said court for a judgment for interest on the sum aforesaid, at the rate of thirty per centum per annum from the first Monday in May, 1840, till paid.

You may attend and oppose said motion, if you think proper.

Your obt. servt.

C. T. & A. BARTON,

May 5th, 1843.

BY ROBT. HUGHES, *their attorney.*

*On the 23d of May, the defendants filed a demurrer [*8 upon the following grounds, viz. :—

1. There is no law which authorizes the making of such a motion.

2. The citizenship of either plaintiffs or defendants is not set out in the motion, or any part of the record in this cause.

3. If any motion will lie at all in this court against the marshal and his sureties, it must be in the name of the United States for the use of the creditor.

4. The motion does not set out the bond or obligation of the defendants, or in what capacity, to what extent, or upon what kind of obligation, Hughes and Yerger are Gwin's sureties.

5. The motion does not specify any breach of official duty upon the part of Gwin.

6. The motion does not show when any breach of official duty was committed by Gwin, or that the plaintiffs have been damaged thereby, nor to what extent.

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7. The motion does not show or set forth a demand and refusal, upon the part of Gwin, to pay over any money collected by him for plaintiffs.

8. There are many other causes of demurrer which will be assigned at the hearing.

The court below overruled the demurrer, and Gwin and his sureties were allowed to plead over.

Gwin and his sureties put in a plea, "for that heretofore, before the entry of this motion against them, or notice that any such motion would be entered, suits had been instituted in this honorable court in favor of the United States of America against these defendants upon the official bond of said Gwin as marshal, for breaches of the condition thereof, for sums of money collected by Gwin, as marshal, and not paid over by him, in amount larger than the penalty of the bond; which suits are still pending undetermined in said court against these defendants, and judgments upon which cases will satisfy and discharge the penalty of said bond; and to the rendition of judgment in which cases these defendants are liable."

To this plea the plaintiffs demurred, to which there was a joinder.

The court below sustained the demurrer, with leave to plead over, which the defendants declined; and on proof of the plaintiffs, it appeared, to the satisfaction of the court, that on the 14th November, 1840, a writ of *venditioni exponas* was issued against Crozier and others, for the sum of \$2,970.39, by which the marshal was commanded to sell the property in the *9] writ mentioned, to satisfy the debt, interest, and costs; that *said writ came to the hands of the marshal in due time, and upon the same he voluntarily and without authority omitted to levy the money aforesaid, and that payment of the said money, due to the plaintiffs on said execution, was by them, since the return of the said execution, demanded of Gwin; and it also appearing that Gwin gave an official bond, with Yerger and Hughes, his securities, the court therefore gave judgment against Gwin, Yerger, and Hughes, for the amount due on the execution, with interest at the rate of 30 per cent. per annum, from the 1st May, 1841, until paid, and costs of the motion.

The bill of exceptions set out the proceedings on the motion, the *venditioni exponas* bond by Gwin and his sureties; to the reading of which bond the defendants objected, which objection the court overruled, and the defendants excepted.

The plaintiffs then offered Hughes as a witness, which the defendants objected to, as he was one of the defendants in the

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motion, which objection the court overruled, and permitted Hughes to be introduced as a witness; to which the defendants, with the exception of Hughes, excepted.

Hughes then testified, that he was attorney of the plaintiffs; that at the return term of the *venditioni exponas* he went to the office of the marshal, and demanded the money on the same of Mr. Hunt, the office deputy of Gwin. Hunt said the money was not made; that the property mentioned in the *venditioni exponas* had been sold to William H. Shelton, who had promised to pay the money for it, but had failed to do so; and that he had not the money to pay on said *venditioni exponas*; that he did not want any motion against the marshal for said money, and wished a *feri facias* on the judgment of the plaintiffs, for the benefit of the marshal. Hughes also proved that he had called on Gwin and told him he wanted the money; and this being all the evidence on the motion, the court gave judgment against Gwin and his sureties, as above mentioned. To all which proceedings of the court, as well as the rendition of the judgment, the defendants excepted.

The causes of error assigned by the counsel for Gwin were that the court below erred in overruling the demurrer on the part of Gwin and his sureties, in sustaining the demurrer of the plaintiffs below, in admitting the bond, in admitting Hughes as a witness, and in rendering the judgment.

The cause was argued by *Mr. Bibb*, for the plaintiff in error, and *Mr. Johnson*, for the defendant in error.

Mr. Chief Justice TANEY delivered the opinion of the court.

It appears by the record, that this was a summary proceeding, by motion in the Circuit Court of the United States for the *Southern District of Mississippi, against [*10 Gwin, late marshal of the district, and Yerger and Hughes, the sureties in his official bond, for the default of the marshal in omitting to levy the money upon a writ of *venditioni exponas*. This summary process was according to the provisions of a statute of Mississippi regulating proceedings upon executions in the courts of that state,—and which was supposed, it seems, to have been adopted by the courts of the United States, when sitting in the state. The defendants in error recovered a judgment against the marshal and his sureties jointly, in this summary way, for \$2,920.30, with interest at the rate of thirty per cent. per annum from the day on which the *venditioni exponas* was returnable.

It is unnecessary at this time to state particularly the provisions of the statute of the state, or to examine how far these

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provisions can be enforced in a court of the United States. For the subject was fully considered in the case of *Gwin v. Breedlove*, 2 How., 29, and the decision in that case is conclusive upon the case before us.

In the case referred to, the court held, that, so far as the statute of Mississippi authorized a summary process against the marshal himself to enforce the payment of the debt, interest, and costs, for which he was liable by reason of his default, it was adopted by the act of Congress of 1828. But that the courts of the United States could not enforce the payment of a penalty imposed by the State law, in addition to the money due on the execution. And in the same case, the court further held, that such summary proceedings against the sureties of a marshal would be repugnant to the act of Congress of April 10th, 1806; and that if the plaintiff in the execution sought to charge the sureties for the default of the marshal, he must proceed regularly by action, and obtain his judgment in the manner and form pointed out by that law.

The judgment against the marshal and his sureties is, therefore, clearly erroneous. And if the proceeding had been against the marshal alone, it could not have been sustained for the excess of interest awarded over and above the legal rate. For this excess is evidently imposed as a penalty for the default.

The judgment must therefore be reversed.

Order.

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 *11] costs, and that *this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice, and in conformity to the opinion of this court.

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THE UNITED STATES, PLAINTIFFS, v. JAMES AND JOHN G. DANIEL, EXECUTORS OF BEVERLY DANIEL, LATE U. S. MARSHAL.

An action on the case will not lie against the executors of a deceased marshal, where executions had been placed in the hands of the marshal, and false returns made on some of them, and imperfect and insufficient entries on others.¹

The rule respecting abatement is this:—If the person charged has received no benefit to himself at the expense of the sufferer, the cause of action does not survive. But where, by means of the offence, property is acquired which benefits the testator, there an action for the value of the property survives against the executor.²

As to the form of action, none will lie, at common law, against an executor, where the general issue plea is “not guilty.”³

THIS case came up from the Circuit Court of the United States for the District of North Carolina, on a certificate of division of opinion between the judges thereof.

¹ CITED. *Tufts v. Matthews*, 10 Fed. Rep., 611; *Mitchell v. Hotchkiss*, 48 Conn., 19.

Actions for personal injuries do not survive against the executors of the defendant. *Stanley v. Vogel*, 9 Mo. App., 98; *Green v. Thompson*, 26 Minn., 500.

In Ohio, all actions of tort for injuries to property, survive against the executors of the tort-feasor, and the federal courts sitting in that state follow the rule. *Jones v. Van Zandt*, 4 McLean, 599.

Where husband and wife are jointly sued for the tort of the wife, the action will abate upon her death. *Robert v. Lisenbee*, 86 N. C., 136; s. c. 41 Am. Rep., 450.

An action for the seduction of plaintiffs' daughter does not survive against the personal representatives of the defendant. [Learned, P. J., dissenting.] *Holliday v. Parker*, 23 Hun (N. Y.), 71.

The statutory right of action for causing death, abates if the wrong-doer dies before suit begun. *Russell v. Sunbury*, 37 Ohio St., 372; s. c., 41 Am. Rep., 523.

An action against a surgeon for unskillfully treating a compound fracture, does not survive against his executors. *Best v. Vedder*, 58 How. (N. Y.), Pr. 187. Nor does a right of action for wrongful imprisonment of plaintiff, survive the death of the wrong-doer. *Harker v. Clark*, 57 Cal., 245. Nor

does an action for having induced plaintiff, by means of false representations as to the death of his former wife, to marry the defendant; and this notwithstanding an allegation in the complaint that defendant “promised, undertook, covenanted and warranted that he had the right and was in all respects competent to marry.” *Price v. Price*, 75 N. Y., 244. In Maine, actions of trespass on the case survive. (Rev. Stat., ch. 87, § 9.) *Withee v. Brooks*, 65 Me., 14. That under the New York Code (§ 755) an action of replevin does not abate on the death of a sole defendant, see *Roberts v. Marsen*, 23 Hun (N. Y.), 486. But compare *Burnham v. Burnham*, 60 How. (N. Y.), Pr., 310. Where one of two joint defendants in an action of trover dies, this amounts to a severance, and the action cannot be revived against his personal representative. *Gilbreath v. Jones*, 66 Ala., 129.

² APPLIED. *Smith v. Baker*, 1 Bann. & A., 118.

That upon the death of a sole defendant in an action for the infringement of a patent, the right to an injunction fails, and with it the incidental right to an account of profits, see *Draper v. Hudson*, 1 Holmes, 208.

³ At common law an action of tort, where the proper plea is “not guilty” does not survive the death of the defendant. *Knox v. City of Sterling*, 73 Ill., 214.

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In August, 1841, the United States brought an action of trespass on the case against the defendants, as executors of Beverly Daniel, late marshal, and at May term, 1843, a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case stated :

Beverly Daniel being in his lifetime marshal of the District of North Carolina, certain executions, at the instance of the United States, from the District Court of Newbern, came to the hands of one of the deputies of the said marshal, who, in the name and on behalf of his principal, made false returns upon some of them, and imperfect and insufficient entries on others. After the death of Daniel, this action on the case was brought against the defendants, his executors, to recover damages for the said false and insufficient returns; and it is contended, on the part of the defendants, that the action will not lie, and is not sustainable against them as executors, and it is agreed by the parties that judgment shall be rendered for the plaintiffs upon the said verdict, if the court shall be of opinion that such action is sustainable; otherwise, the said verdict to be set aside, and the said action to be discontinued.

The judges being divided in opinion, the cause came up to this court, upon a certificate of such division.

*12] *The cause was argued by *Mr. Clifford* (Attorney-General), on the part of the United States, and submitted on the record by *Mr. Badger*, on the part of the defendants.

Mr. Clifford made two points:—

1st. That *the cause* of action survives against the executors.

2d. That an action on *the case* is an appropriate remedy under the laws of North Carolina, which furnish the rule of decision on this point.

1st. The rule respecting abatement is now nearly confined to that laid down by Buller, viz., that where property is concerned, the action does not abate by the death of the party. Cowp., 371.

The distinction between the cause and the form of action must be borne in mind. The difficulty in this case must have arisen with regard to the form. The record is very imperfect, and does not show whether the rights of property were involved or not. But they were so in fact, and I will assume it to be so. The testator was certainly liable in his lifetime, and I only contend that the cause of action survives where the estate of the testator has been benefited and is therefore responsible. It must have been understood in this case that the deputy-marshal had made the money. The bond of the

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marshal covers the acts of his deputies under the Judiciary Act, and therefore the law presumes the money to be in the hands of the principal. It makes no difference whether the estate of the marshal has been benefited in point of fact or in presumption of law. It is equally responsible in both. He has his remedy against the deputy, and the law presumes that he will right himself. I assume, in this case, that the money had been made. An action for "money had and received" has been sustained. 3 Campb., 347.

But an action for an escape does not survive, because the estate has not been benefited. To support these principles, 13 Mass., 454; 9 Wend. (N. Y.), 29; 1 Pick. (Mass.), 71; 4 Halst. (N. J.), 173; Com. Dig. tit. *Administrator*, B. 15.

The laws of North Carolina furnish the rule of decision whether case will lie (2 How., 29), and these laws sustain the action. 1 Rev. Stat. N. C., 57. This re-enacts the law of 1799. It may be said that the provision in this, which says suits shall not abate, was intended only to apply to suits then brought. But there is no good reason for the exclusion of future suits. 3 Hawks (N. C.), 563; N. C. Rep., 529, 205, 226; 2 Hayw. (N. C.), 182; 1 Rev. Stat. N. C., page 443, sec. 1, 2, 3.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here from the District of North Carolina, on a certificate of a division of opinion by the judges, under the act of Congress.

A jury, having been impanelled to try the issues joined, *found for the plaintiffs, and assessed their [*13 damages at seven hundred seventy-five dollars and eighty cents. This verdict was taken by consent of parties, subject to the opinion of the court on the following case:

"Beverly Daniel, being in his lifetime marshal of the District of North Carolina, certain executions, at the instance of the United States, from the District Court of Newbern, came to the hands of one of the deputies of the said marshal, who, in the name and on behalf of his principal, made false returns upon some of them, and imperfect and insufficient entries on others. After the death of Daniel, this action on the case was brought against the defendants, his executors, to recover damages for the said false and insufficient returns; and it is contended that the action will not lie, and is not sustainable against them as executors, and it is agreed by the parties that judgment shall be rendered for the plaintiffs upon the said verdict, if the court shall be of the opinion that such action is sustainable; otherwise, the said verdict to be set aside, and

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the action to be discontinued." And on a motion being made for judgment, the opinions of the judges were opposed on the point reserved.

No action will lie against an executor for a personal wrong by the testator. Com. Dig., *Administrator*, B. Nor does it lie against the executor of a jailer for an escape. *Ibid.* Waste does not lie against an executor or administrator; nor an action upon a penal statute. So trover is said not to lie against an executor upon a trover and conversion by his testator, though a different form of action will lie for the same cause. Cowp., 371.

If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offence, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. And it is laid down in Cowp., 376, with respect to the form, that no action survives where the plea of the defendant must be "not guilty," but where the case survives, some other form must be pursued.

If the deputy-marshal, in the misfeasance complained of, received money or property, the marshal being responsible for such acts, the cause of action survived against his executors. But this is not the case made in the present action. It is an action on the case requiring the general issue of "not guilty." If a liability were shown against the deceased marshal, it could not be enforced against his executors in this form. No action, *14] where the plea must be that the testator was not guilty, can *lie at common law, against the executor. Upon the face of the record, the action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. 3 Bac. Abr., 539.

The provision in the 10th section of the North Carolina statute, "to prevent the abatement of suits in certain cases,"—which declares that an action of trespass on the case, &c., shall not abate by the death of either party,—does not affect the above question.

This court think that the action, in the form prosecuted, is not maintainable; and they direct the fact to be so certified to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of North Carolina, and on the point or question on which the judges of the said Circuit Court were opposed in

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opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such cases made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the action in the form prosecuted will not lie. It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

 LEWIS A. COLLIER, PLAINTIFF IN ERROR, v. JOHN STANBROUGH.

By the laws of Louisiana, debts which are due to a defendant, against whom an execution has issued, may be seized and sold. But they must first be appraised at their cash value, and if two thirds of such appraised value is not bid, the sheriff must adjourn the sale and again advertise the property. This mode of proceeding was adopted by a rule of the Circuit Court of the United States, and was therefore obligatory upon the marshal. Where the marshal made a sale of some promissory notes secured by mortgage, without an appraisal, and sold them for less than one third of their amount, the sale was void.

THIS case was brought up, by a writ of error, issued under the 25th section of the Judiciary Act, from the Supreme Court for the Western District of Louisiana.

In 1838, David Stanbrough was appointed, by the local authority in Louisiana, curator of the estate of one Harper, deceased.

In 1840, he was sued as curator, in the Circuit Court of the United States for the Eastern District of Louisiana, by the Farmers' Bank of Virginia. Judgment was rendered against him, which became final on default.

*On the 6th of February, 1841, Stanbrough, the [*15 curator, exposed to sale some property of Harper, the deceased, which was in the inventory taken by the Probate Court of Madison, which court granted the order for a sale. Dougal McCall became the purchaser, for the sum of \$11,433.66, divided into three payments of \$3,811.22 each, for which he gave three promissory notes, payable to the order of David Stanbrough, curator, at the Merchants' Bank of New Orleans, on the 1st of January, 1842, 1843, and 1844. And in order to secure the payment of the notes, he executed a mortgage upon the purchased property.

At some time subsequent to this, but when the record does not show, a *feri facias* was issued upon the judgment which the Farmers' Bank of Virginia had obtained against Stan-

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brough, the curator, and a levy was made upon the three notes above mentioned.

On the 31st of December, 1841, David Stanbrough, the curator, filed a petition, in the nature of a bill in chancery, to the Court of Probates in the Parish of Madison, praying, amongst other things, for an injunction to restrain the marshal from further proceedings upon the execution.

On the 10th of March, 1842, the court granted the injunction as prayed for.

On the 1st of April, 1842, Stanbrough filed a supplemental petition, stating that the parties enjoined continued to advertise the notes for sale, praying that proceedings might be had against the parties for a contempt of court, that the editor of the paper might be enjoined from further publication of the advertisement, and that Dougal McCall might be enjoined from paying the notes to any person except the petitioner. An injunction was issued accordingly, on the same day.

This injunction being afterwards dissolved, the marshal proceeded to sell, on the 9th of April, 1842, the property levied upon, being the three notes of McCall given to Stanbrough, the curator. The property was offered for sale and sold to Lewis A. Collier, the plaintiff in error in the present case. A transfer in writing was made of said property by the marshal to Collier. The seizure of the notes was made by notifying David Stanbrough, in whose hands they were, that they were thereby seized by virtue of the execution, but they never came to the corporal possession of the marshal. The transfer was returned to the office of the clerk of the Circuit Court of the United States, and there duly recorded.

On the 30th of July, 1842, Josiah Stanbrough, the defendant in error in the present suit, filed a petition in the Ninth *16] District Court of the State of Louisiana, stating that the first note of *McCall, which became due on the 4th of January, 1842, had been protested for non-payment; that it had been transferred by the curator, the payee, to one Jesse Stanbrough, and by the said Jesse to him, the petitioner.

He therefore prayed for an order of seizure and sale of the property mentioned in the mortgage, for cash enough to pay the note then due, and upon a credit sufficient to meet the other payments as they should become due in succession.

On the same day, an order of seizure and sale was issued in conformity with the prayer of the petition.

On the 14th of December, 1842, Collier filed a petition in the same court, viz., the Ninth District Court of the State of Louisiana, in which he recited the facts in the case, and then alleged that Josiah Stanbrough had illegally and fraudulently

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obtained possession of the note then due; that David Stanbrough, the curator, had become leagued with Josiah Stanbrough to defraud the petitioner and all other creditors of Harper's estate; that if the petitioner was not the legal owner of the notes, then they were the property of Harper's estate; that Josiah Stanbrough never gave any value for them; and, finally praying for an injunction against all parties concerned, which should afterwards be made perpetual.

An injunction to stay further proceedings was accordingly issued.

On the 4th of May, 1843, Josiah Stanbrough filed his answer, denying all the allegations of the petition, and averring that the property of the succession of Harper, whilst administered in the Probate Court of Louisiana, could not be legally subjected to any writ of execution from the federal courts, and claiming twenty per cent. damages.

Before the cause was tried, the following admission of facts was filed, viz. :—

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Ninth District Court of the State of Louisiana, for the Parish of Madison.

The plaintiff in injunction relies upon the following facts, and he cannot go safely to trial without the documents necessary to prove them :—

1. Some two or three years since, a judgment was obtained in the United States Circuit Court for the Eastern District of Louisiana, against David Stanbrough, as curator of the succession of Jesse Harper, deceased, upon a claim against the succession of said Harper, at the suit of the Farmers' Bank of Virginia (perhaps the suit is styled "*The President, Directors, and Company of the Farmers' Bank of Virginia v. David Stanbrough, *curator of the estate of Jesse Harper,*"); all [*17 which will appear by the judgment.

2. Some twelve or fifteen months since, an execution (a *fiери facias*) issued from said United States Circuit Court, at the instance of the plaintiff in said suit, and under said execution a levy was made on the three notes mentioned in the petition of the plaintiff in injunction; and, after due advertisement, the property was offered for sale, and was sold to Lewis A. Collier, the plaintiff in injunction, and a transfer, in writing, was made of said property, by the marshal, to said Collier. The seizure of the notes relied on was made by notifying David Stanbrough, in whose hands they were, that they were thereby seized by virtue of said execution, but they never came to the corporal possession of the marshal; all which will

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appear by the execution, the return of the marshal thereon, and the conveyance of the marshal to Collier as aforesaid.

3. Said transfer was returned to the office of the clerk of said United States court, and there duly recorded.

The statement of facts, on which the plaintiff in injunction relies, as mentioned above, and which facts are hereinbefore enumerated, is admitted by the defendant in injunction to be true.

BEMISS, J. DUNLAP, B. M. BRAWDER,

Attorneys for Defendants.

The plaintiff in injunction admits that the notes in controversy were never appraised, and that the sale was made without appraisement, and that the notes in question belonged to the succession of said Harper, which said succession, at the time the said seizure was made, in manner stated above, was in due course of administration in the Probate Court of the Parish of Madison.

R. C. STOCKTON, *Att'y for Collier.*

The following facts were also admitted, viz. :—

Admitted, that Lewis A. Collier is a creditor of Jesse Harper's estate, and that for two years, at least, the said succession has been insolvent.

Admitted, that the judgment in the case of the Farmers' Bank of Virginia against David Stanbrough, curator of the succession of Jesse Harper, deceased, rendered in the United States Circuit Court of the Eastern District of the State of Louisiana, was made final on default.

Admitted, that David Stanbrough is now, and has been, curator of the succession of Jesse Harper, deceased, ever since the 1st day of January, 1840.

Admitted, that David and Jesse Stanbrough are brothers, and Josiah Stanbrough is the son of Jesse; that they all live within some three or four miles of each other; that *18] Jesse Stanbrough *is security for David on his curator's bond, as curator of Harper's estate.

Admitted, that in the estate of Harper there was an inventory taken by the Probate Court of Madison of said succession of Harper, an order of sale, and sale of the property of Harper's estate, and the notes in dispute are of the proceeds of sale; that all those proceedings took place by order of the Probate Court.

It is admitted, that there is no order on the records of the Court of Probate ordering the estate of Jesse Harper to be insolvent.

Admitted, that Mr. Stockton, a creditor for \$1,000, has never received from the estate of Jesse Harper but \$250.

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On the 16th of May, 1843, the court made the following decree:—

“By reason of the law and the evidence being in favor of the defendant, Josiah Stanbrough, it is ordered, adjudged, and decreed, that the injunction sued out in this case be dissolved; and it is further decreed, that the defendant recover of the said plaintiff, Lewis A. Collier, and his surety, Archibald Matthews, *in solido*, the sum of four hundred and twenty-seven dollars damages, being ten per cent. upon the amount of said defendant’s claim, when enjoined, and that said plaintiff pay the costs of this suit to be taxed.”

From this decree an appeal was had to the Supreme Court of the state, which affirmed the judgment of the District Court, with costs.

A writ of error was sued out to bring the case up to this court, and the following assignment of errors filed:

“Plaintiff assigns for cause, for which the judgment of the honorable the Supreme Court of Louisiana ought to be reversed by the honorable the Supreme Court of the United States, and a judgment rendered in his favor, as prayed for in his original petition, as follows:—

“1. The decision of the Supreme Court of Louisiana denies to the Circuit Court of the United States for the State of Louisiana the power to execute judgments rightfully rendered by said Circuit Court against the representatives of a succession, by proceeding to sell the property of the same, by a writ of *feri facias*, or otherwise.

“2. The Supreme Court of Louisiana erred in assuming authority to inquire into the validity of a judgment or execution from the said Circuit Court, or the manner in which said execution was proceeded on, the constitution and laws of the United States guarantying and conferring on said Circuit Court the power to take cognizance of such cases as [*19 that whereon *execution issued (to wit, the case of the ‘Farmers’ Bank of Virginia v. David Stanbrough, curator,’ &c.), which necessarily includes the power to execute judgments so rendered.

“3. The Supreme Court of Louisiana erred in sustaining the law of that state which requires money demands against a succession to be prosecuted exclusively in the Probate Court, which law, the plaintiff avers, contravenes the constitution and laws of the United States; so far as it requires foreign creditors to prosecute their demands as aforesaid in said state court only is, therefore, so far null and void.

“4. The judgment aforesaid of the Supreme Court of

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Louisiana is, for other reasons, illegal and erroneous, and ought to be reversed."

The cause was argued by *Mr. Bibb*, for the plaintiff in error, and by *Stockton & Steele* and *Mr. Henderson* (in a printed argument), upon the same side. No counsel appeared for the defendant in error. The following points were made and argued by the counsel for the plaintiff in error.

1. The decision of the Supreme Court of Louisiana denies to the Circuit Court of the United States for the State of Louisiana the power to execute judgments rightfully rendered by said Circuit Court against the representative of a succession, by proceeding to sell the property of the same by a writ of *feri facias*, or otherwise.

2. The Supreme Court of Louisiana erred in deciding that a judgment of the Circuit Court of the United States must be presented to the Probate Court of Louisiana for classification, and that said judgment of the Circuit Court was a mere recognition that the deceased owed the plaintiff on said judgment the sum therein adjudged to him, and thus forcing a foreign creditor into a state tribunal to settle the question of the rank which his claim shall hold.

3. The Supreme Court of Louisiana erred in assuming authority to inquire into the validity of a judgment or execution from the said Circuit Court, or the manner in which said execution was proceeded on, the constitution and laws of the United States guarantying and conferring on said Circuit Court the power to take cognizance of such cases as that whereon execution issued (to wit, the case of the "*Farmers' Bank of Virginia v. David Stanbrough, curator,*" &c.), which necessarily includes the power to execute judgments so rendered.

4. The Supreme Court of Louisiana erred in sustaining the law of that state which requires money demands against a succession to be prosecuted exclusively in the Probate Court; *20] which law, the plaintiff avers, contravenes the constitution *and laws of the United States; so far as it requires foreign creditors to prosecute their demands as aforesaid in said state court only is, therefore, so far null and void.

5. The judgement aforesaid of the Supreme Court of Louisiana is, for other reasons, illegal and erroneous, and ought to be reversed.

But as the court avoided a decision upon these important points, resting it upon one which was in some measure collateral, it is deemed proper to omit the arguments of counsel.

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Mr. Justice CATRON delivered the opinion of the court.

Lewis A. Collier filed his petition in the District Court held for the Parish of Madison, in the State of Louisiana, against Josiah Stanbrough and others, alleging that the Farmers' Bank of Virginia had recovered a judgment in the Circuit Court of the United States for the Eastern District in that state, against David Stanbrough, as curator of the succession of Jesse Harper; that an execution issued on the judgment, by which the marshal seized a debt belonging to the succession, due from Dougal McCall, evidenced by three notes of hand, and by a mortgage on land, securing the payment to be made to David Stanbrough, the curator; that the debt, amounting to 11,433 dollars, was seized and sold by the marshal, and said Collier became the purchaser, for the sum of 3,500 dollars, &c.

It is also alleged that a fictitious indorsement had been made on one of the notes by the curator to Josiah Stanbrough, which the petition prays may be annulled, and that the petitioner may have the benefit of his purchase by judgment and execution on the notes and mortgaged property.

The defendants answered, and insisted that the debt was not legally seized or levied upon; and, secondly, that it was not legally appraised or advertised, as required by law.

The facts were agreed, and it was admitted that the notes in controversy were never appraised, and that the marshal sold them to Collier at a cash sale on the first biddings.

In the District Court the law was adjudged to be for the defendants, and Collier's petition was dismissed; and from this judgment he appealed to the Supreme Court of Louisiana, where the judgment was affirmed; and to reverse this latter judgment, the plaintiff prosecuted a writ of error from this court to bring up the record; and this he had a right to do, as his claim of title was founded on "an authority exercised under the United States," which the judgment below drew in question, and the decision was against its validity.

The only question submitted for our consideration is whether the marshal's sale was void, or valid.

*The Supreme Court of Louisiana declared, in its opinion found in the record, and preceding the judgment, "that a creditor residing in another state cannot issue an execution upon the judgment which he has obtained in the federal court against the executor or administrator of an estate, which is admitted in the Court of Probates as insolvent, and take the property out of the hands of such executor or administrator, and leave nothing for the other creditors,"—adding, that, as it was one of the admitted facts that Harper's

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estate had been insolvent for several years before the seizure and sale were made, they were consequently void.

But as this case has been argued here by counsel for the plaintiff, Collier, only, no one appearing for the defendant in error, we deem it proper to forbear touching the delicate question on which the Supreme Court of Louisiana founded its judgment of affirmance. Its great importance in different states, and the difficulties attending it on either hand, because of the conflicts it is likely to produce between the tribunals of the state and the federal courts, strongly impress this court with the propriety of leaving the question open and uninfluenced by the present opinion, as no necessity exists for such a decision in this case. The judgment of the state court pronounced the seizure and sale on the federal execution void; this judgment we are called on to revise, and if we find that it was proper, for the reasons given by the court below, or on other grounds manifestly appearing of record, and equally calling into exercise the jurisdiction of this court, it is our duty to affirm it; and we are of opinion that the judgment of the state court was proper, on another ground.

In Louisiana, the debts due to an execution debtor may be seized and sold on execution, like other movable property, and equally with the immovable property; in respect to lands seized on execution, it is necessary, before they are offered for sale, that they should be appraised by persons appointed for the purpose, and if, when offered at public sale, two thirds of the appraised value is not bid, the officer who is attempting to sell shall not adjudicate the sale, but cease, and re-advertise the property, and again offer it at public outcry on a credit of twelve months; and this mode of proceeding, having been adopted by rule in the Circuit Court of the United States held in Louisiana, governs the marshal of that court. Whether movable property was entitled to the benefit of the provision seems not to have been definitively settled until 1845, in the case of *Phelps v. Rightor and others* (9 Rob. (La.), 541), when it was adjudged by the Supreme Court of Louisiana, *22] that movable property (of the same description that is here in *controversy) could not be legally sold by a sheriff in virtue of an execution, without having been first appraised at its cash value, and that then the cash bid on the first offer must be equal, at least, to two thirds of the appraised value; and for want of such an appraisement and bid, the adjudication of a cash sale on the first offer to sell was void, for want of power in the officer. And it is proper to remark, that, in the case of *Gantly v. Ewing* (3 How., 707), this court declared a similar principle to apply in a case arising under a

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law of Indiana, which provided that the fee simple of real estate should not be sold, until the sheriff had, at the time and place of sale, first offered the rents and profits of the land for a term of seven years at public outcry, and if no bid was had for the rents and profits sufficient to satisfy the execution, then the sheriff should proceed to sell the fee. In that case the sheriff had proceeded to sell the fee-simple estate, without first offering the rents and profits for the seven years' term, and this court held that the sale was void, for want of power in the sheriff to make it before he complied with the previous step, forasmuch as the power to sell the fee simple arose for want of a bid for the term. In principle, that case and the one under consideration cannot be distinguished. In each it was immaterial whether the purchaser had or had not knowledge of the fact, that the officer had not taken the first step, as on that step the power to sell first arose. In this case, no appraisal was had, and the debt on the first bidding was struck off to Collier, for less than one third of the amount called for by the three notes and the mortgage to secure them; and these facts being admitted on the record, it follows that the sale was void, and that the judgment of the Supreme Court of Louisiana must be affirmed.¹

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

*WILLIAM BAILEY, PLAINTIFF IN ERROR, *v.* WILLIAM [*23
B. DOZIER.

Where a bill of exchange is presented for acceptance or payment, which is refused, it is sufficient if the officer who presents it makes a note at the time of the facts which occurred on presenting the bill. The formal protest may be drawn up afterwards, at the convenience of the notary.² Under the laws of Mississippi, a protest is not essential to enable the indorsee of an inland bill of exchange to recover the amount of it. The statute of

¹ See *Erwin v. Lowry*, 7 How., 179, notary himself, and not by his clerk. *Sacridier v. Brown*, 3 McLean, 481.

² But it must be drawn up by the

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Mississippi is similar to the English statutes of 9th and 10th of William III., and 3d and 4th of Anne, and must receive the same construction with them. Before those statutes, the indorsee of an inland bill had a right to recover the amount of it from the drawer. This right was not taken away by them; but they gave an additional right to interest and damages. The common law right remains.³

If a plea to the jurisdiction and a plea of *non assumpsit* be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived.⁴

Although the declaration began with an averment that the drawer and indorser were citizens of the same state (which, of course, would oust the jurisdiction of the Circuit Court), yet, as it afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction.⁵

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

The facts were these :

On the 18th of January, 1838, the following inland bill was drawn :

\$2,670.

Paulding, 18th January, 1838.

Twelve months after date of this my first and only bill of exchange, pay to the order of John D. Fatheree two thousand six hundred and seventy dollars, for value received, and place the same to account of your ob't servant,

WILL. B. DOZIER.

Mr. PIERSON LEWIS,

Jackson, Mississippi.

Indorsed,—J. D. FATHEREE,

Accepted,—PIERSON LEWIS.

Being indorsed by Fatheree and accepted by Lewis, it passed into the hands of Bailey, the plaintiff in error.

On the 21st of January, 1839, when the bill became due, it was presented and protested for non-payment, under the circumstances which will presently be stated.

In April, 1841, Bailey brought suit in the Circuit Court of the United States against Dozier and Fatheree, who were both alleged in the writ to be citizens of Mississippi, Bailey being stated to be a citizen of Virginia. The declaration commenced with stating that Dozier and Fatheree were both

³ FOLLOWED. *Wanzer v. Tupper*, 8 How., 234, 235.

⁴ CITED. *Dred Scott v. Sandford*, 19 How., 519; *Spencer v. Lapsley*, 20 Id., 267; *Ganse v. City of Clarksville*, 1 McCrary, 86n.; *DeSobry v. Nicholson*, 3 Wall., 423. See also note to *Sims v. Hundley*, 6 How., 1.

⁵ Where the pleadings contain a proper averment of the defendant's citizenship, the fact that such averment is not in the declaration is not available on error. *Bradstreet v. Thomas*, 12 Pet., 59; *Teese v. Phelps*, McAll., 17.

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citizens *of Mississippi, but afterwards, in reciting the bill, said, "and then and there requested the said Lewis to pay, twelve months after the date of said bill of exchange, to John D. Fatheree, who is an alien and resident of the republic of Texas," &c. The declaration contained also counts for money "lent and advanced," "paid, laid out, and expended," and "had and received."

To this, the defendant pleaded two pleas. The first was as follows:—

"And the said defendant, William B. Dozier, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, as to him, said Dozier, because he says that the said bill of exchange, in the plaintiff's declaration mentioned, was drawn in the state of Mississippi, to wit, at Paulding, in Mississippi, payable at Jackson, in the said state of Mississippi, and that the drawer and indorser and acceptor thereof were, and yet are, citizens and resident in the state of Mississippi; and said bill is not a foreign bill of exchange; and this the said William B. Dozier is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid.

"And for further plea in this behalf, the said William B. Dozier says, that this court ought not to have or take further cognizance of this action, because he says that the said William Bailey, the plaintiff, is a citizen of the state of Mississippi, to wit, of the county of Rankin, in said state, and this he is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid."

The second plea was *non assumpsit*.

The record showed that the plaintiff joined issue upon the last plea, without taking any notice of the first.

In May, 1843, the cause went to trial, upon this state of the pleadings, after a discontinuance had been entered as to Fatheree, when the jury, under instructions given by the court, found a verdict for the defendant.

The bill of exceptions taken by the plaintiff, after reciting the bill and protest by David H. Dickson, calling himself a justice of the peace and *ex officio* notary public, proceeded thus:—

"The plaintiff then introduced David H. Dickson, the notary, as a witness, who, being first duly sworn, stated on oath, that, on the day the bill fell due, he went to the Union Bank in Jackson, and demanded payment of said bill of the teller of said bank, and was answered by him that there were

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no funds in the bank to pay said bill. Witness did not know *25] where said Pierson Lewis, the acceptor, lived; but on coming out of *the bank a person was pointed out to him as said Lewis, the acceptor of the bill. Whereupon witness demanded payment of said Lewis, who answered that he could not pay the same. Whereupon witness protested said bill for non-payment, as well against the acceptor as all other parties to the same, and on that day deposited in the post-office at Jackson notice of the dishonor of said bill, in season to go out by the next mail, directed to Paulding, Mississippi, for said Will. B. Dozier, the defendant, which is the residence and post-office of said Dozier, who is the drawer of said bill, advising him of the non-payment thereof by the acceptor, and that the holder looked to him for payment.

“On his cross-examination, witness stated, that after he left the bank a person was pointed out to him by the plaintiff as Pierson Lewis, of whom he made demand of payment, which was refused; that the protest now attached to said bill of exchange is not the original protest made out by him on the day of said above-named demand.

“That on making demand of said bill, as above stated, he made out a protest and attached the same to the bill by wafer, and delivered the bill and protest to the plaintiff; that afterwards the plaintiff sent a messenger to him, stating that said protest would not do, and requesting another; and thereupon witness tore the bill away from it, and made out another, differing from the first, and delivered it, also annexed to said bill, to said messenger. That near a year afterward the plaintiff applied, in person, to said witness, and stated that said second protest was also materially defective, and requested witness to make out another; and witness then again separated said bill from said second protest, and made out a third protest, and after wafering the bill thereto, delivered the said bill and protest to the said plaintiff, which last is the protest now read to the jury, and the two rents or mutilations on said bill designate the parts at which it was wafered to each of said protests.

“That the original protest differed from the second, and the third from both the preceding.

“Whereupon the defendant, by attorney, moved the court to exclude said bill of exchange from the jury for the want of valid protest; which motion, after argument, the court sustained, and instructed the jury that the plaintiff could not sustain his action on the bill of exchange, unaccompanied by a protest.

“To which plaintiff's counsel excepted, and tendered this

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bill of exceptions before the jury retired from the box, and prayed that the same may be signed, sealed, and made a part of the record in this cause; which is done accordingly.

“S. J. GHOLSON. [SEAL.]”

*Upon this bill of exceptions the case came up to [*26 this court.

It was argued by *Mr. Bibb*, for the plaintiff in error, and *Mr. Crittenden*, for the defendant in error.

Mr. Bibb, for the plaintiff in error, made four points:—

1st. That the judge erred in excluding the notarial protest from the jury.

2d. The court erred in the instruction given to the jury.

3d. The judge erred in taking upon himself to decide the facts testified by the witness, instead of leaving it to the jurors to respond to the facts properly within their province.

4th. That upon the evidence, the plaintiff was entitled to verdict and judgment; and that the decision of the court, as certified in the bill of exceptions, was erroneous.

No protest of the bill, which was an inland bill, was necessary to enable the plaintiff to sustain his action for the sum named in the bill. *Brough v. Parkins*, 2 *Ld. Raym.*, 992; *Chit. Bills* (9th *Lond. ed.*), 334, 335, 464, 465; 3 *Kent Com.*, 93, 94.

The proof of the demand of payment, of the refusal, and of notice to the defendant of the dishonor of the bill, was sufficient. *Chit. Bills* (9th *Lond. ed.*), 335, 658, 659; *Townsley v. Sumrall*, 2 *Pet.*, 170.

The judge gave to the certificate of protest of an inland bill, made by the notary residing in the state and district wherein the suit was brought and trial had, a magnified dignity, a power of diction, self-sufficient and indispensable, which the law did not allow to a notarial certificate in such a case.

In *Townsley v. Sumrall*, the Supreme Court of the United States said:—“It is admitted, that, in respect to foreign bills of exchange, the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence.” “But where the parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And, accordingly, even in cases of foreign bills, drawn upon, and protested in, another country, where the suit is brought, courts of justice sitting under the common law require that the notary himself should be produced, if

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within the reach of process, and his certificate is not *per se* evidence. This was so held by Lord Ellenborough in *Chesmer v. Noyes*, 2 Campb., 129." *Townsey v. Sumrall*, 2 Pet., 179, 180.

The plaintiff, Bailey, produced the notary, David H. Dickson, as a witness. His statements, upon oath, in chief *27] and *upon cross-examination, proved every fact,—of presentation of the bill at the proper time for payment, the demand of payment thereof made of the acceptor, his refusal to pay, the protest for non-payment, and the notice of the dishonor of the bill sent to the drawer by the first mail after the dishonor of the bill.

When the notary so testified in open court, at the trial, of what importance was the notarial certificate made by him *ex parte*? That the notary made three or three dozen notarial certificates of protest is immaterial. In what respect did the first, second, and third certificates of the notary differ one from another? It is not pretended that they were contradictory the one to another, nor that either was contradictory to the evidence given by the notary to the court and jury when on his oath. In such case, the credibility and weight of the evidence would have been a question of fact proper for the jury to try, and not a question of law to the court.

Supposed omissions were the subjects of the several notarial certificates, not falsehoods.

The evidence, as given at the trial, was sufficient to maintain the action so brought against the drawer of the bill of exchange; and the instruction of the court to the jury was erroneous.

Mr. Crittenden, for the defendant in error, said that the only question in the case related to the sufficiency of the evidence of protest offered by the plaintiff.

By the laws of the State of Mississippi, a protest was necessary and indispensable to the plaintiff's right of recovery. Statute Laws of Mississippi, page 372, 8th section, and page 375, section 17, &c. *Offet v. Vick*, Walk. (Miss.), 100.

The instrument offered in evidence as such was no legal or valid protest, because the justice of the peace (David H. Dickson) who made it had no authority so to do, it not appearing that there was no notary public in Jackson at the time ready to act, and his authority, by law, being only to make protest for want or in default of a notary public. Statute Laws of Mississippi, section 8, page 373.

If Dickson, as a justice of the peace, was, under the circumstances, authorized to protest, the instrument offered in evi-

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dence as a protest, made out near a year after the transaction, cannot be taken or regarded as an authentic or legal instrument, admissible as evidence, especially as it appears that it was neither the first nor second protest made in reference to the same occasion.

*It would be subversive of the security and certainty [*28 of commercial interests and dealings in such transactions, if such an instrument as that offered in evidence in this case should be received and allowed the effect of a legal protest. The first protest, made at the time of the alleged demand and refusal of payment, is *suppressed*. A *second edition* of it, made out some time after, is also suppressed. And the one now offered in evidence is the third edition, fabricated about one year after the transaction. The proof is, also, that each of these *differed* from the other. It is impossible, as it seems to me, that such an instrument can be regarded as a protest, or admitted in evidence as such.

On both grounds,—1st. That Dickson had no authority to protest; and 2d. That if he had, the instrument offered in evidence was no protest,—it seems clear that the instruction of the court was correct, and that therefore the judgment ought to be affirmed.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States held by the district judge in and for the Southern District of Mississippi.

The suit was brought on an inland bill of exchange by the indorsee against the drawers, and resulted in the court below, in a verdict for the defendant on an objection taken to the validity of the protest.

The statute of Mississippi provides for protesting inland bills in case of non-acceptance, or of non-payment by the drawee, after due presentment, in like manner as in case of foreign bills of exchange; and allows five per cent. damages on the amount for which the bill is drawn. (How. & H. Stat. of Miss., pp. 372, § 8; 375, § 17; and 376, § 20.)

On the trial, the notary was called as a witness by the plaintiff, and proved the presentment of the bill at maturity, demand of payment, and refusal, and notice to the drawers. And further, that he drew up the protest in form at the time and delivered it to the holders, but that on account of some alleged defect, which is not stated in the bill of exceptions, it was returned to him, and a second one made out, and delivered, which was also subsequently returned, and a third drawn

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up, which was the protest offered in evidence. It was made out nearly a year after the presentment.

The court below decided that the protest was invalid, and instructed the jury that the plaintiff could not recover, unless the bill had been duly protested according to the requirement of the statute. Whereupon a verdict was rendered for the defendant.

*29] *The bill was presented and the protest made out by a justice of the peace, as a notary *ex officio* ; and on the argument the ruling of the court was sought to be sustained, on the ground, that the power of this officer to protest bills extended only to cases where the notary was absent or could not be procured. But on looking into the laws of Mississippi, it was found that a subsequent statute had given the power to this officer in all cases, without any qualification, and the point was given up. (How. & H., p. 430, § 34.)

The ground of objection, therefore, is narrowed down to the time when, and the circumstances under which, the notarial protest was drawn up, in form. And on looking into the cases and books of authority on the subject, it will be found, that, if the bill has been duly presented for acceptance, or payment, and dishonored, and a minute made, at the time, of the steps taken, which is called noting the bill, the protest may be drawn up in form afterwards, at the convenience of the notary. And it has been held, if drawn up at any time before the trial, it will be sufficient. (Chit. Bills, 334, 436, and cases. Ed. 1842.)

The minute contains a brief record of the facts which transpired on presenting the bill, and the protest, as subsequently made out, is but an extension of them in the customary form. The time of the extension, therefore, would seem to be of no great importance.

For the same reason, if a mistake should occur, no great danger need be apprehended if the notary is permitted to correct it, provided the regular steps have been taken, and noted, to charge the parties. The amendment would not be made from memory, or recollection, but from a written memorandum of the facts.

But, without pursuing this view of the case further, a decisive ground against the ruling of the court below is, that a protest of the bill was not essential to enable the plaintiff to recover.

The statute of Mississippi is taken, substantially, from the 9 and 10 Wm. 3, ch. 17, amended by the 3 and 4 Anne, ch. 9, under which it has always been held by the courts in England that the action at common law was not thereby taken away ;

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but that an additional remedy was given, by which the holder could recover interest and damages on an inland bill in cases where he was not entitled to them at common law. And that if he chose to waive the benefit of the statute, he might still recover the amount due on the bill, by giving the customary proof of default and notice. (2 Ld. Raym., 992; S. C., 1 Salk., 131; S. C., 6 Mod., 80; 2 Barn. & Ald., 696; Chit. Bills, 466.)

*The act of Mississippi is not more explicit and positive in its terms, in respect to the duty of protesting, [*30 than that of the 9 and 10 Wm. 3, as will be seen on a comparison of the two acts, and should receive a similar interpretation. It follows, therefore, from this view, as the plaintiff did not claim the five per cent. damages given by the act, he should have been allowed to recover the amount of the bill, principal and interest, on the testimony of the notary alone, independently of the written protest.

It appears from the record, that the defendant put in two pleas to the jurisdiction in the court below, for the want of proper parties; and also the plea of *non assumpsit*. To the latter, the *similiter* was added, upon which issue the cause went down to trial. No notice was taken of the pleas to the jurisdiction.

It is suggested that this affords ground of error on the record.

The plea of *non assumpsit* in bar of the action operated as a waiver of the pleas to the jurisdiction, which doubtless furnishes the reason why no notice was afterwards taken of these pleas by either party. 3 Johns. (N. Y.), 105; 6 Bac. Abr. tit. *Pl. & Pl.*, let. *a*, pp. 186, 187; Gould, Pl. ch. 5, § 13.

They were virtually abandoned by the defendant.

It was also suggested, that it appeared from the declaration that Fatheree, the payee of the bill, was a citizen of Mississippi, and that the plaintiff deriving title from him, though a citizen of Virginia, could not maintain the action, for want of jurisdiction within the eleventh section of the Judiciary Act.

The answer to the suggestion is, that the fact upon which it is founded is not sustained by the record. The suit was brought, originally, against Dozier and Fatheree, the drawer and payee, indorsers jointly, who are described in the commencement of the declaration as citizens of the state of Mississippi. But in a subsequent part of the declaration it is averred, that Fatheree, at the time the bill was drawn, and also at the time of its transfer to the plaintiff, was an alien, and resident of Texas.

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The suit was discontinued as to Fatheree before the trial, which left it between the plaintiff and the defendant alone.

The plaintiff being a citizen of Virginia, and deriving title through a person competent to maintain a suit in the Circuit Court against the defendant, that court properly took jurisdiction of the case.

In every view taken of the case, we think the court below erred, and that the judgment should be reversed.

Judgment reversed, with *venire de novo* by the court below.

*31]

* Order.

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 to award a *venire facias de novo*.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, PLAINTIFFS IN ERROR, v. HENRY K. MOSS, WILLIAM H. SHELTON, ROBERT A. PATRICK, AND CHARLES LYNCH, DEFENDANTS.

Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial.¹

Judgment having been rendered for the plaintiffs, it was not competent for the court below to strike out the judgment at the next term, on the ground of supposed want of jurisdiction.²

The power of a court over its records and judgments examined and stated.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

¹ FOLLOWED. *Coffee v. Planters' Bank of Tennessee*, 13 How., 189. *Binkley*, 78 Ind., 504. CITED. *French v. Hoy*, 22 Wall., 245; *Schell v. Dodge*, 17 Otto, 630; *Heckling v. Allen*, 15 Fed. Rep., 197.

² FOLLOWED. *Fischer v. Hayes*, 6 Fed. Rep., 69; *United States v. Miltinger*, 7 Id., 189; s. c., 19 Blatchf., 204. DISTINGUISHED. *Sheppard v. Wilson*, post *260, 277; *McClellan v. Newman v. Newman*, 14 Fed. Rep., 635.

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In 1838, the two following notes were executed, viz. :—

\$10,715 $\frac{53}{100}$

Brandon, March 17th, 1838.

Nine months after 1st April, 1838, we, or either of us, promise to pay to Briggs, Lacoste & Co., or order, for value received, ten thousand seven hundred and fifteen $\frac{53}{100}$ dollars, payable and negotiable at the Commercial Bank in Natchez.

H. K. MOSS,
W. H. SHELTON, *Sec'ty.*
R. A. PATRICK,
CHARLES LYNCH.

Indorsed, "Briggs, Lacoste & Co."

\$10,876 $\frac{92}{100}$.

Brandon, March 17th, 1838.

Eleven months after 1st April, 1838, we, or either of us, promise to pay to Briggs, Lacoste & Co., or order, for value received, *ten thousand eight hundred and seventy-six $\frac{92}{100}$ dollars, payable and negotiable at the Commercial Bank in Natchez. [*32

H. K. MOSS,
W. H. SHELTON, *Sec'ty.*
R. A. PATRICK,
CHARLES LYNCH.

Indorsed, "Briggs, Lacoste & Co."

In March, 1840, the Bank of the United States brought suit, in the Circuit Court of the United States for the Southern District of Mississippi, against Henry K. Moss, William H. Shelton, Robert A. Patrick, Charles Lynch, and Charles A. Lacoste. On the same day, a declaration was filed, consisting of five counts, in which all the defendants were averred to be citizens of Mississippi. The first two counts were upon the notes, each count being upon one note. In the first count, the indorsement is thus averred:—"And the said Charles A. Lacoste, together with Charles Briggs and Louis Hermann, who are not sued in this action, not being citizens of this state, by the name and style of Briggs, Lacoste & Co., being partners in trade, using the name and style of Briggs, Lacoste & Co., to whom or to whose order the payment of the sum of money in the said note," &c.; and in the second count, upon the other note, it is thus stated:—"And then and there delivered the same to said Briggs, Lacoste & Co.; and the said Briggs, Lacoste & Co., of which firm the said defendant, Charles A. Lacoste, is a partner, the rest not being citizens of this state, to whom or to whose order the payment of the sum of money in the said note specified was by the same to be

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made, after the making of the said note, and before the payment of the said sum of money therein specified, to wit, on the day and year last aforesaid, and at the district aforesaid, indorsed the same note in writing, by the name of Briggs, Lacoste & Co.," &c.

The other three counts in the declaration were the common money counts.

The defendants all appeared, and pleaded the general issue.

At November term, 1841, on motion of the plaintiffs' attorney, the suit was discontinued as to Lacoste, and a jury, being impanelled, found a verdict for the plaintiffs, assessing the damages at \$26,485.66, for which sum judgment was entered up.

At May term, 1841, the defendants, by their counsel, moved the court to set aside the verdict and judgment rendered in the cause, because the court had not jurisdiction, which motion was sustained. The verdict and judgment were set aside, and the case dismissed for want of jurisdiction, to which decision the plaintiffs filed the following bill of exceptions:

"Be it remembered, that at the present term of this court, the defendants in the above case came into court and moved the court to set aside the verdict and judgment in this case rendered at the last term of this court, and to dismiss the suit for want of jurisdiction of the court; which motion is in the words and figures following:—'The defendants by their attorney move the court to set aside the verdict and judgment rendered in this cause, and to dismiss the suit, because the court had not jurisdiction of the cause.' And thereupon came the plaintiffs and objected to said motion, but the court, without any evidence other than the record in said cause, sustained the said defendants' motion, and ordered said verdict and judgment rendered in this case at the last term of this court to be set aside, and the suit dismissed; to which opinion of the court in sustaining said motion, and setting aside said verdict and judgment, and dismissing said suit, the plaintiffs by their counsel except, and pray that this their bill of exceptions be signed, sealed, enrolled, and made a part of the record in this cause, which is done accordingly.

"J. MCKINLEY. [SEAL.]"

Upon which exception, the cause came up to this court.

The cause was argued by *Mr. G. M. Wharton* and *Mr. Sergeant*, for the plaintiffs in error, no counsel appearing for the defendants in error.

The error assigned is, that the court below erred in setting

aside, at May term, 1842, the judgment rendered at November term, 1841, in favor of the plaintiff.

The judgment was set aside at a term subsequent to that at which it was rendered; and this was done for alleged want of jurisdiction in the court below over the cause of action. The defect of jurisdiction was alleged to arise from the first count of the narration not averring that one of the payees and indorsers of the note, Lacoste, was a citizen of some other state than Mississippi.

That the discontinuance of the suit as to Lacoste was not erroneous, and was a local practice sanctioned by this court, they cited *McAfee v. Doremus*, 5 How., 53. See How. & H. Miss. Dig., 506, for the law of that state. The remaining three counts in the narration were the common money counts, and in them there was no pretence of error.

The first question arising upon the record was as to the power of the Circuit Court to set aside its former judgment. They contended that it was a general rule, that the same court which enters up a judgment cannot set it aside, at a subsequent *term, for errors of law. This would be [*34 tantamount to the power of reversing its own judgment.

The power of setting aside or opening judgments for fraud, irregularity, or misprision of the clerk, they asserted to be a different power.

As authority for their view of the first question, they cited and relied upon the following cases:—

In the courts of the United States,—*Assessors of Medford v. Dorsey*, 2 Wash. C. C., 433; *The Avery*, 2 Gall., 386; *Cameron v. McRoberts*, 3 Wheat., 591; *Jackson v. Ashton*, 10 Pet., 480. *Ex parte Crenshaw*, 15 Id., 119, they said was not a decision the other way, because there the Supreme Court merely revoked its mandate, and declared its former judgment a nullity, as the cause had never been before it. *Washington Bridge Co. v. Stewart*, 3 How., 413; *Jenkins v. Eldridge*, 1 Woodb. & M., 61, were also cited.

In the Supreme Court of Pennsylvania,—*Catlin v. Robinson*, 2 Watts (Pa.), 373; *Stephens v. Cowan*, 6 Id., 511; *Gallup v. Reynolds*, 8 Id., 424.

In New York,—*Barheydt v. Adams*, 1 Wend. (N. Y.), 101; *Soulden v. Cook*, 4 Id., 217.

In North Carolina,—*Anon.*, 2 Hayw. (N. C.), 73; S. C., *Tayl.*, (N. C.), 146; *Id.*, 239; *Bender v. Asken*, 2 Dev. (N. C.), 149; *Skinner v. Moore*, 2 Dev. & B. (N. C.), 138.

The like general rule is settled in England. During the same term, judgments are amendable at common law,—being then in paper, *in fieri*, in the breast of the court. Afterwards,

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they are only amendable under the Statutes of Amendments or Jeofails. See 2 Tidd Pr., 975; 2 Archb. Pr., 243; Id., 202, 203, as to setting aside judgments for irregularity.

If courts were not held strictly to the rule contended for, what would become of acts imposing limitations on writs of error, or of those protecting purchasers at sheriffs' sales?

The second question was this:—Was the judgment entered at November term, 1841, void or irregular, because the foreign citizenship of Lacoste was not alleged in the first count? They contended that this was not the case; it was merely matter assignable as error, upon a writ of error.

They cited, on this point, *McCormick v. Sullivan*, 10 Wheat., 192; *Voorhees v. Bank of United States*, 10 Pet., 449; *Kemp v. Kennedy*, 5 Cranch, 184; *Skillen v. May*, 6 Id., 267.

The courts of the United States are courts of limited, but not of inferior jurisdiction. Their judgments, until reversed on error, are conclusive between parties and privies.

Under this head, they further contended that there was not *35] necessarily a defect of jurisdiction in the Circuit Court over the *first two counts, because it did not appear but that Lacoste was a citizen of another state when the note was indorsed. If he were so then, the jurisdiction of the Circuit Court would not be taken away, although, at the time of the bringing of the present suit, he had become a citizen of Mississippi. The 11th section of the Judiciary Act of 1789 would be fully satisfied by this construction. The right of the assignee of a chose in action to sue in the federal court could not be taken away by his assignor subsequently becoming a citizen of the same state with the defendant.

In the third place, they argued, that, under the statute law of Mississippi governing the case, the judgment of November term, 1841, was not erroneous, and that consequently, on a writ of error, this court would not have reversed the judgment. Although by the common law, where, in a civil suit, one count is good and the others bad, and there is a general finding, judgment will be arrested, yet, by the statute law of Mississippi, a different rule prevails. They referred to the 12th section of the act of 1820. (How. & H., Dig., 591.) The defendant must apply to the court to instruct the jury to disregard the faulty count.

They contended that this statute was binding upon the Circuit Court of the United States for Mississippi. The act of Congress of May 19, 1828 (4 Stat. at L., 218), provides that the forms and modes of proceeding then used in the highest courts of original and general jurisdiction in the states admitted into the Union since 1789 shall be the rules of the United

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States courts held in those states, subject to alterations and additions by said United States Courts, or by the Supreme Court of the United States. The statute of Mississippi was passed eight years before this act of Congress. That state was admitted into the Union in 1817.

But, further than this, the Circuit Court of the United States for the Southern District of Mississippi adopted the practice and proceedings of the state courts by their printed Rules of 1839. See section 30 of those Rules.

This provision of the act of 1820 binds the United States courts in Mississippi, as one of the "forms and modes of proceeding" in that state. In support of this, they cited *United States v. Boyd*, 15 Pet., 187; *McNutt v. Bland*, 2 How., 9; *Gwin v. Breedlove*, Id., 29.

For the distinction between *final* and *mesne* process, as bearing upon this head, they cited *Bronson v. Kinzie*, 1 How., 311; *McCracken v. Hayward*, 2 Id., 608.

They admitted that the statute law of Mississippi (sec. 33, act of 13 May, 1837; How. & H. Dig., 595), which compelled *plaintiffs to sue in one action the drawers [*36 and indorsers of promissory notes who live in Mississippi, does not confer upon the courts of the United States jurisdiction of a case where otherwise they would not have it; nor is such a joint suit maintainable in the federal courts, as has been decided in *Droomgoole v. F. & M. Bank*, 2 How., 241; *Keary v. Same*, 16 Pet., 89, and *Gibson v. Chew*, Id., 315. But inasmuch as the suit had been, before verdict, properly discontinued as to Lacoste, this difficulty was removed, and the action stood as if originally brought against the present defendants alone.

In further proof of the error of setting aside the judgment in the Circuit Court, the three last counts showing jurisdiction, they cited and relied upon *Mollan v. Torrance*, 9 Wheat., 537.

Mr. Justice WOODBURY delivered the opinion of the court.

In this case, at the November term of the Circuit Court for the Southern District of Mississippi, A. D., 1841, a verdict was found for the plaintiffs against the defendants for \$26,485.66. Final judgment was then rendered for that sum.

At the ensuing May term, on motion of the defendants, the court set aside both the judgment and verdict, and dismissed the case for what it considered to be a want of jurisdiction.

To this the plaintiff excepted, and a writ of error is now before us to reverse that decision.

The first question is, whether any want of jurisdiction appears on the record.

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No evidence is reported, nor any defect apparent, which seems to raise any doubt concerning the jurisdiction, unless it be in the pleadings.

The declaration contained the usual money counts,—beside special ones on two notes, made to Briggs, Lacoste & Co., or their order, and by them indorsed to the plaintiffs.

The defendants pleaded that they did not promise as alleged, and a verdict was found against them, without any statement being given of the evidence laid before the jury or the court, though copies of the two notes named in the declaration are printed in the case.

The various questions which this state of the record presents, and which bear upon the jurisdiction, can, when analyzed and separately considered, be disposed of chiefly by adjudged cases, without any labored examination of the principles involved. The special counts on the notes standing alone might not be sufficient, under the 11th section of the Judiciary Act, to give jurisdiction to a Circuit Court of the *37] United States, without an allegation that the promisees resided in a different state from the promisors. **Turner v. Bank of North America*, 4 Dall., 8; and 9 Wheat., 539; *Dromgoule et al. v. Farmers' & Merchants' Bank*, 2 How., 243; and *Keary et al. v. Farmers' & Merchants' Bank of Memphis*, 16 Pet., 95.

But it is very clear, that the money counts aver enough to give jurisdiction to the court below over them, as they state an indebtedness and a promise to pay, made directly by the defendants to the plaintiffs. *Mollan v. Torrance*, 9 Wheat., 539; *Bingham v. Cabbot*, 3 Dall., 41.

It is well settled, likewise, that the notes would at the trial be evidence of money had even of an indorsee. 4 Es., 201; 7 Halst. (N. J.), 141; 6 Greenl. (Me.), 220; 12 Johns. (N. Y.), 90; 8 Cow. (N. Y.), 83; *Wild v. Fisher*, 4 Pick. (Mass.), 421; *Webster v. Randall*, 19 Id., 13; *Ramsdell v. Soule*, 12 Id., 126; *Ellsworth v. Brewer*, 11 Id., 316; 16 Id., 395; *State Bank v. Hurd*, 12 Mass., 172; 15 Id., 69, 433; *Page's Administrators v. Bank of Alexandria*, 7 Wheat., 35; 2 W. Bl., 1269.

But they probably would not alone be sufficient, by the 11th section of the Judiciary Act, to give jurisdiction over them to a Circuit Court of the United States, under these money counts any more than the others, without additional evidence that the original promisees resided in a different State from the promisors. (7 Wheat., 35 *semb.*)¹

¹ CITED. *Bradley v. Rhines*, 8 Wall., 396; *Corbin v. County of Black Hawk*, 15 Otto, 667.

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No decision, however, is made on this point, as from this record we cannot learn but that such additional evidence was given, or that other evidence than the notes was not introduced in support of the money counts.

It is not competent for this court now to presume that neither of these kinds of evidence was offered beside the notes. The inference, on the contrary, is the other way, or the defendants would probably have objected to the jurisdiction at the trial, and the jury not found a verdict for the plaintiffs, or the court not have rendered judgment upon it.

In the next place, if such a state of things did happen as there having been no additional or other evidence, it is clear from the record, that no advantage was taken of it till after final judgment, and at the following term of the court, and then by motion only.

But it was then too late, after final judgment, and at the next term, and by motion only, to set aside the judgment and verdict on account of a supposed want of jurisdiction. At the next term, if no final judgment had yet been rendered, the court might, from its minutes, have had the verdict applied to the counts on which it was in truth found. 2 How., 263; 2 Saund. 171, *b*; Tidd Pr., 901.

And if, in this case, it was found on the two special counts alone, the judgment on the verdict might then have been arrested *for want of proper averments in them [*38 conferring jurisdiction.

So it might have been arrested for a misjoinder of bad counts with good, if the verdict had not been applied to the latter, but remained general. *Hopkins v. Beedle*, 1 Cai. (N. Y.), 347; 5 Johns. (N. Y.), 476; 1 Chit. Pl., 236, 448; 1 Taunt., 212; 2 Bos. & P., 424; Cowp., 276; 3 Wils., 185; 2 Saund., 171, *b*; 3 Mau. & Sel., 110; Doug., 722.

But here jurisdiction did appear on three of the counts, and also final judgment had been rendered in November previous.

The action was not regularly on the docket at the new term in May following, when the court undertook to set the judgment aside. The power of the court over the original action itself, or its merits, under the proceedings then existing, had been exhausted,—ended. *Jackson v. Ashton*, 10 Pet., 480; *Catlin v. Robinson*, 2 Watts (Pa.), 379; 12 Pet., 492; 3 Bac. Abr. *Error*, T. 6; Co. Lit., 260 *a*; 7 Ves., 293; 12 Id., 456; 1 Story Pl., 310; 1 Hoff. Pr., 559; 2 Smith, Ch., 14; 9 Pet., 771; 3 Johns. (N. Y.), 140; 9 Id., 78; *Kelly v. Kezir*, 3 Marsh. (Ky.), 268.

This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on mate-

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rial points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term, is never a sufficient justification for revising and annulling it, at a subsequent term, in this summary way, on motion. See cases *ante*; 2 Gall., 386; *Cameron v. McRoberts*, 3 Wheat., 591; 2 Hayw. (N. C.), 237; *Skinner v. Moor*, 2 Dev. & B. (N. C.), 138; *Wash. Bridge Co. v. Stewart*, 3 How., 413; and *Jackson et al. v. Ashton*, 10 Pet., 480; *Lessee of Hickey et al. v. Stewart*, 3 How., 762; *Henderson v. Poindexter*, 12 Wheat., 543; *Elliot et al. v. Piersol et al.*, 1 Pet., 340; *Wilcox v. Jackson*, 13 Id., 511; *Rose v. Himely*, 4 Cranch, 241.

We would not be understood by this to deprive a court, at a subsequent term, of power to set right mere forms in its judgments. 3 Wheat., 591; 3 Pet., 431; 12 Wheat., 10; *Lawrence v. Cornell*, 4 Johns. (N. Y.) Ch., 542. Or power to correct misprisions of its clerks. *The Palmyra*, 12 Wheat., 10; *Haves v. McConnel*, 2 Ohio, 32; 1 Greenl. (Me.), 375; Com. Dig. *Amendment*, T., 1. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains. *Sibbald v. United States*, 12 Pet., 492; *Newford v. Dorsey*, 2 Wash. C. C., 433; 6 Watts (Pa.), 513; 8 Id., 424; 1 Wend. (N. Y.), 101; 4 Id., 217; 1 Bibb (Ky.), 324; 2 Id., 88; *Weston's case*, 11 Mass., 417; *The Bank v. Wistar*, 3 Pet., 431. Irregularities, also, in notices, mandates, and similar proceedings can still, in some cases, be amended. *Ex parte Crenshaw*, 15 Pet., 123.

*39] *Indeed, any amendments permissible under the Statutes of Jeofails may be proper at subsequent terms (2 Tidd Pr., 917; 2 Arch. Pr., 202, 243); and at times even after a writ of error is brought. 2 How., 243; 3 Johns. (N. Y.), 95; Poph., 102; *Pease v. Morgan*, 7 Johns. (N. Y.), 468; *Cheetham v. Tillotson*, 4 Id., 499; 1 Johns. (N. Y.) Cas., 29; 2 Johns. (N. Y.), 184; 1 Bing., 486; *Douglass v. Bean's Executors*, 5 Id., 60. So it is well settled, that at a subsequent term, when the judgment had before been arrested, an amendment may be made to apply the verdict to a good count if another be bad and the judge's minutes show that the evidence applied to the good count. (*Matheson's Adm. v. Grant's Adm.*, 2 How., 282, and cases cited there.)

So a mistaken entry of a mandate, in a case where the parties were not at all before the court, may be revoked at a subsequent term, the hearing having been irregular and a nullity. *Ex parte Crenshaw*, 15 Pet., 119; 14 Id., 147. But no cause of this kind appears here in the proceedings, and nothing else appears to justify the court in going back to a final judgment of a previous term and summarily setting it aside for an error

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in the law or the facts, and dismissing the whole case from the docket.

The only relief for errors in law in such cases is usually by new trial, review, writ of error, or appeal, as either may be appropriate and allowable by law, or by some other mode specially provided by statute; where, for instance, a judgment had occurred at some previous term by default, through accident or some circumstance which clearly entitles the party to redress. 12 Pet., 492; *Jenkins v. Eldridge et al.*, 1 Woodb. & M., 65, and cases cited; *Anthony et al. v. Love*, 3 Ohio, 306; *Bennet v. Winter et al.*, 2 Johns. (N. Y.) Ch., 205; 3 Marsh. (Ky.), 268; *Southgate v. Burnham*, 1 Greenl. (Me.), 375.

Besides these remedies, judgments entered up by fraud may, perhaps, on due notice, by *scire facias*, or otherwise, be vacated at a subsequent term by the same court, or if offered in evidence be deemed a nullity, should fraud be clearly proved to have taken place. 2 Roll. Abr., 724; 2 Bac. Abr. *Error*, T., 6.

But the present judgment was neither fraudulent nor void on its face, nor even voidable. Had it been rendered on the special counts alone, it might have been voidable by a writ of error, for not alleging jurisdiction in the pleadings. See *ante*, 2 How., 243; *Capron v. Van Norden*, 2 Cranch, 126. But it has been repeatedly settled, that even then, without any plea to the jurisdiction, and after a verdict for the plaintiff on the general issue and final judgment, it is not a nullity, but must be enforced till duly reversed. *Kempe's Lessee v. Kennedy*, 5 Cranch, 185; and *Skillern's Executors v. May's Executors*, 6 *Cranch, 267; *McCormick v. Sullivant*, 10 Wheat., 192; *Voorhees v. Bank of United States*, 10 Pet., 449; 3 Ohio, 306; *Wilde v. Commonwealth*, 2 Metc. (Mass.), 408; *Hopkins v. Commonwealth*, 3 Id., 460. Because it would be a judgment rendered by a court, not of inferior, but only limited, jurisdiction, and the merits would have been investigated and decided by consent. This view is supported by the English doctrine. There, though judgments of inferior courts or commissioners are often void, when on their face clearly without their jurisdiction, and may be proved to be so and avoided without a writ of error (3 Bac. Abr. *Error*, A; 10 Co., 77 a; Hawk P. C. ch. 50, sec. 3); yet the judgment of a superior court is not void, but only voidable by plea on error. Bac. Abr., *Void and Voidable*, C.; 2 Salk., 674; Carth., 276. Even where the record of a circuit court did not contain any averments giving jurisdiction, this court has held that, at a subsequent term, after final judgment, the same tribunal which rendered it could not set it aside on motion. *Cameron v. McRoberts*, 3 Wheat., 591. And we have repeatedly decided as to judg-

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ments of this court, that they could not be changed at a subsequent term, in matters of law, whether attempted on motion, or a new writ of error, or appeal, on the mandate to the court below. *Hunter's Lessee v. Warton*, 5 Cranch, 316; 6 Id., 267; 1 Wheat., 354; *Santa Maria*, 10 Wheat., 442; *Davis v. Packard*, 8 Pet., 323; 9 Id., 290; 12 Id., 491, 343; 15 Id., 84.

Without going further, then, into the reasons or precedents against the course pursued in the court below, the last judgment there, on the motion, must be reversed and the case be reinstated as it stood before.

Order.

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 on the motion dismissing this case 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 to reinstate this case as it stood in that court before the said judgment dismissing the case.

*JONATHAN W. NESMITH AND THOMAS NESMITH, COMPLAINANTS, v. THOMAS C. SHELDON, HORACE H. COMSTOCK, DAVID FRENCH, WILLIAM E. PETERS, JAMES FORTON, ALTA E. MATHER, HENRY B. HOLBROOK, SAMUEL P. MEAD, FRANCIS E. ELDRED, PHOEBE ANN DEAN, CULLEN BROWN, AND CHARLES H. STEWART, DEFENDANTS.

Where it is evident, from the record, that the whole case has been sent up to this court, upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction.¹

¹ Further decision, 7 How., 812. DISTINGUISHED. *United States v. Chicago*, 7 How., 192. FOLLOWED. *Dennistoun v. Stewart*, 18 Id., 569; *Weeth v. New England Mortgage Co.*, 16 Otto, 606. RE-AFFIRMED. *Webster v. Cooper*, 10 How., 54, 55. RELIED ON in dissenting opinion. *Steamer Oregon v. Cooper*, 18 How., 576. CITED. *Daniels v. Railroad Co.*, 3 Wall., 256. *S. P. Wayman v. South-*

ard, 10 Wheat., 1; *Saunders v. Gould*, 4 Pet., 392; *Harris v. Elliott*, 10 Id., 25; *Adams v. Jones*, 12 Id., 207. And the rule is the same even though the various questions in the case are separately stated in the certificate. *White v. Turk*, 12 Pet., 233. In *Luther v. Borden*, 7 How., 47, Taney, C. J., says: "We have repeatedly decided that this mode of proceeding is not warranted by the act of Congress a1-

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*THIS case came up from the Circuit Court of the United States for the District of Michigan, on a certificate of division in opinion between the judges thereof.

The facts were briefly these :

The second section of the 12th article of the constitution of Michigan is in these words, viz. :—

“The legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each House.”

On the 15th of March, 1837, the legislature passed an act entitled, “An act to organize and regulate banking associations.”

Under this act a company was formed and commenced doing business as a banking association, under the name of the Detroit City Bank.

On the 15th September, 1838, Harris, the cashier of the Detroit City Bank, drew a bill of exchange upon the Albany City Bank, in the state of New York, in favor of J. W. and T. Nesmith, for six hundred dollars, payable nine months after date, which bill was protested for non-payment when due.

In February, 1833, whilst the bill was running, the Detroit City Bank became insolvent.

The plaintiffs, Nesmiths, sued the bank upon the bill, and obtained a judgment in May, 1841, in a state court.

The plaintiffs then proceeded, under a statute of the state, against the directors of the bank, and obtained a judgment in July, 1841, in the Circuit Court of the United States. An execution was issued upon this judgment, which was returned wholly unsatisfied.

The plaintiffs then, under the same statute, filed a bill on the equity side of the Circuit Court against the stockholders, being the defendants mentioned in the title of this case, seeking to hold them individually liable, in proportion to the amount which each one held in the stock of the bank.

To this bill the defendants put in general demurrers.

The cause was heard on the bill and demurrers. The following points and questions were made and presented by the complainants :—

*1. Whether the banking associations organized under the act of the legislature of the State of Michigan, [*42 entitled, “An act to organize and regulate banking associa-

thorizing the justices of a Circuit Court to certify to the Supreme Court a question of law which arose at the trial, and upon which they differed in opinion.” In *United States v. Chicago*, 7 How., 192, an exception to

the rule is stated, viz: where the several questions all arise at one time, at one stage in the cause, and involve “little beyond one point.” See also *Ex parte Gordon*, 1 Black, 503.

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tions,' approved March 15th, 1837, and the amended act, entitled, "An act to amend an act entitled 'An act to organize and regulate banking associations and for other purposes,'" approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the constitution of the state of Michigan.

2. Whether said acts of the legislature, or either of them, are in accordance with the provisions of the constitution of the state, and valid, or contrary thereto, and void, in whole or in part.

3. And if so much and such parts of said acts as purport to create corporations, or bodies corporate, are repugnant to the constitution and void, whether the remaining parts of said acts are not valid, and the directors and stockholders of the association, set out in the bill, liable for the debts thereof, according to the provisions of said amended act.

4. Whether the stockholders of the Detroit City Bank are or are not liable in their individual capacity, as corporators, or as members of a joint-stock association, company, or copartnership, to pay the debts due to the complainants, as set forth in the bill.

5. Whether the defendants are, or are not liable to pay the debt due to the complainants, set out in the bill of complaint.

On the part of the defendants, the following points were made:—

1. The Supreme Court of the state of Michigan has decided that the acts under which the Detroit City Bank was organized were intended to authorize the creation of an indefinite number of corporations, by the prospective action of individuals; that they were so far unconstitutional and void, and under them no corporate body could legally come into existence. This decision of the Supreme Court of the state will not be questioned by the Courts of the United States, but will be followed and applied to the latter.

2. If the Detroit City Bank was not validly in existence as a corporation, or artificial person, then it was not exempted from the penalties and restrictions of the laws of Michigan on the subject of unauthorized banking, commonly called the restraining laws.

3. Under the acts last referred to, the claim of the complainants was illegal and forbidden, and could not be the basis of a recovery.

4. The Detroit City Bank having contracted as a corporation, when it was not such, its contracts on that account are invalid.

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*5. If the Detroit City Bank was not a corporation, then the defendants can be liable only as *general partners*.

6. If liable only as general partners, the judgment against the directors is a merger of the whole claim.

7. If the defendants are general partners, the remedy against them *is complete at law*.

8. If the court shall hold that the Detroit City Bank was validly a corporation, and authorized to engage in banking, then it is further contended by the defendants, that the bill which forms the foundation of the claim of the complainants was illegal, because not *payable on demand*.

9. The defendants are not concluded by the judgment against the bank, but may dispute the validity and obligation of the original claim.

Upon all the above points and questions, as made and presented by the complainants and defendants, the opinions of the judges of the Circuit Court were opposed; wherefore, it was ordered that the same be stated, under the direction of the judges, and certified, under the seal of this court, to the Supreme Court, at their next session to be held thereafter.

The case was very elaborately argued in print by *Mr. E. C. Seaman* and *Mr. J. M. Root*, for the plaintiffs, and *Mr. George E. Hand* and *Mr. Theodore Romeyn*, for the defendants. But as the case went off upon a point of jurisdiction, the arguments are omitted.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a certificate of division from the Circuit Court for the District of Michigan. Upon opening the record, it is evident that the whole case has been sent up in this form. It is, indeed, divided into points, but most of them are merely hypothetical, and might never have arisen or required a decision upon them in the Circuit Court. For whether they would or would not arise depended altogether upon the decision of points which precede them in the statement.

This subject has been frequently before the court, and we have repeatedly said, that, under such certificates of division, we have no jurisdiction. Without attempting to enumerate the cases, it is sufficient on the present occasion to refer to *White v. Turk and others*, 12 Pet., 238, and *The United States v. Stone*, 14 Id., 524, which are decisive of this case. It is unnecessary, therefore, to examine the printed arguments that

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have been filed, as the case must be dismissed for want of jurisdiction.

*44]

*Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no point in the case within the meaning of the act of Congress has been certified to this court, it is thereupon now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

DAVID S. STACY, ADMINISTRATOR OF CHARLES S. LEE,
PLAINTIFF IN ERROR, v. J. B. THRASHER, FOR THE USE OF
WILLIAM SELLERS, DEFENDANT IN ERROR.

An action of debt will not lie against an administrator, in one state, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state.¹
The doctrine of privity examined.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

The history of the case is this:

In April, 1836, Charles S. Lee, a resident of the county of Claiborne and state of Mississippi, was sued in the county court of Claiborne, by Christopher Dart and William Gardner, who called themselves late merchants and copartners trading under the style and firm of Dart & Co., and stated the suit to be for the use of Christopher Dart.

It is not necessary to state the cause of action, or trace the progress of the suit minutely.

¹ FOLLOWED. *McLean v. Meek*, 18 How., 18. See note to *Aspden v. Nixon*, 4 How., 467. But the rule does not apply to a judgment against an executor. *Hill v. Tucker*, 13 How., 458; *Goodall v. Tucker, Id.*, 469.

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Lee appeared to the suit.

In December, 1836, his death was suggested.

In July, 1837, Ann Lee took out letters of administration upon the estate of Charles S. Lee, under the authority of the probate court of Claiborne county.

In September, 1837, the suit was revived against the administratrix, by a *scire facias*.

*In November, 1837, she appeared to the suit and pleaded the general issue. [*45

On the first of December, 1838, the cause came on for trial, when the plaintiffs obtained a judgment for \$6,080.99.

On the same day, viz., the 1st December, 1838, Christopher Dart, for whose use the judgment was entered, made an assignment of it to John B. Thrasher, of Port Gibson, the nominal defendant in error in the present case.

After this, however, a new trial was granted by the court of Claiborne county in the suit against Ann Lee, administratrix, which resulted in another judgment, for a different sum of money, in June, 1840.

Another new trial was granted, and in December, 1840, another judgment was rendered against the administratrix for \$6,988.05.

Nothing further appears to have been done for some time. The next fact in the history of the case is, that David S. Stacy, the plaintiff in error in the present case, and a citizen of Louisiana, took out letters of administration upon the estate of Charles S. Lee, in the state of Louisiana. At what particular time these letters were taken out, the record does not show.

In January, 1844, John B. Thrasher, to whom the judgment in Mississippi had been assigned by Christopher Dart, as above stated, filed a petition in the Circuit Court of the United States for the Eastern District of Louisiana, against Stacy, the administrator of Charles S. Lee. Thrasher now stated himself to be suing for the use of William Sellers, and averred that Sellers and himself were both citizens of the state of Mississippi. The petitioner stated himself to be the legal owner, by transfer and assignment, of a judgment for \$6,988.05, which judgment was final and definitive.

In February, 1844, Stacy appeared to the suit and filed the following exceptions and answer, which are according to the practice in Louisiana, and equivalent to a demurrer:

“David S. Stacy, a citizen of the state of Louisiana, residing in the parish of Concordia, administrator of the succession of Charles S. Lee, in the state of Louisiana, under the appoint-

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ment and authority of the Court of Probates of the parish of Concordia aforesaid, being made defendant in the above-entitled suit, appears and pleads as follows, by way of exception:—

“1. That plaintiff in his petition does not allege or show that this honorable court has jurisdiction of this suit, as it is not therein alleged that Christopher Dart, who is declared to be the assignor of the judgment upon which this suit is *46] brought, was either an alien or a citizen of another state than Louisiana, or *could have maintained this suit in this honorable court either against the appearer or the said Charles S. Lee.

“2. Appearer alleges that Christopher Dart and William Gardner, the alleged owners of the claim upon which the judgment was obtained in Mississippi, were citizens of Louisiana, and members of a commercial firm located in New Orleans, and could not have maintained this suit in this honorable court either against the said Lee or against this appearer, and that this court has no jurisdiction of this suit.

“3. That the said William Gardner, one of the joint owners of said claim, was a citizen of Louisiana, and that the said Dart & Gardner could not have maintained a suit upon said claim in this honorable court either against the said C. S. Lee or against this appearer.

“4. That the said C. Dart, under an assignment and transfer of said claim from the said Gardner, could not have maintained a suit thereon in this honorable court.

“5. Appearer further excepts and says, that this honorable court has no jurisdiction over successions in the state of Louisiana, nor over the settlement of said successions and the distributions of the proceeds among the creditors, nor over administrators and others appointed to administer them, nor of the establishment of claims for money against such successions; that the Court of Probate of this state have the sole and exclusive jurisdiction of all these matters; that no property belonging to a succession in the course of administration in the probate court, whose jurisdiction has attached over the subject-matter, can be taken, levied upon, or sold by process from the courts of the United States; nor can said probate courts be ousted or disseized of their said exclusive jurisdiction once obtained, nor the property withdrawn from their control by any other tribunal. That this has been the well-known and settled law of the state for the last twenty years, and that the said Dart & Gardner contracted in New Orleans, in Louisiana, under and in reference to this law, and are bound by it; appearer alleges that this honorable court, for the above

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reasons, has no jurisdiction in this suit, *ratione personæ*, nor *ratione materiæ*, but avers that the Court of Probates of the parish of Concordia has sole and exclusive jurisdiction thereof. Wherefore appearer prays that this suit may be dismissed at plaintiff's costs, &c.

"If all the above exceptions should be overruled, then appearer pleads that the plaintiff has neither alleged nor shown any cause of action against him whatever, nor any indebtedness to the plaintiff by the succession of C. S. Lee in the state of Louisiana.

*"If the above exceptions should be also overruled, then defendant denies generally and specially each and every allegation in plaintiff's petition contained. Wherefore he prays that plaintiff's demand may be rejected with costs, and for general relief in the premises, &c. [*47

(Signed,) D. S. STACY, *Adm'or estate C. S. Lee.*"

On the 26th of February, 1844, Thrasher filed an amended petition, averring that Christopher Dart, the assignor of the judgment, was, at the time of the assignment, an alien, being a citizen of the republic of Texas, and resident therein, and that Charles S. Lee, at the time of said assignment and of his death, was a citizen of Louisiana.

On the 13th of March, 1844, the court overruled the exceptions, and on the 11th of April following gave the following final judgment :

"This cause came on for trial, and the law and the evidence being in favor of the plaintiff, it is ordered, adjudged, and decreed, that the defendant, David S. Stacy, as administrator of the estate of Charles S. Lee, be condemned to pay to the plaintiff, for the use of William Sellers, the sum of six thousand nine hundred and eighty-eight dollars and five cents, with eight per cent. interest thereon per annum from the first day of December, eighteen hundred and forty, until paid, and costs of suit. Judgment rendered April 11th, 1844. Judgment signed April 18th, 1844.

(Signed,)

J. MCKINLEY."

From this decree, a writ of error brought the case up to this court.

The case was argued by *Mr. T. B. Barton*, for the plaintiff in error, and *Mr. Crittenden*, *Mr. Thrasher*, and *Mr. Henderson*, for the defendant in error.

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Mr. Barton, for the plaintiff in error.

The great and important question which the record presents, and to which this argument will be confined, is that to which the last exception is directed.

The petition, with the other proceedings in Louisiana upon the judgment in Mississippi, are not distinguishable from an action of debt, brought under the same circumstances, upon a like judgment, in the courts of those states where the practice is according to the course of the common law. The petition is founded, as the action of debt would be, upon the judgment.

*48] The validity and effect of the judgment must be the same in *both kinds of proceedings. The case involves the question whether a judgment, rendered in one state against an administrator who has taken administration of the assets in that state, and within that jurisdiction, can be made the foundation of an action in another state against a different administrator, whose administration has been taken within the jurisdiction of the latter, of the assets within the latter jurisdiction.

There are some special circumstances in this record which arrest our attention in advancing to the discussion of the main point. Cases of this kind must always be open to remark, and entitled to grave consideration. The judgment rendered against the first administrator, which is made the foundation of a recovery against the administrator out of the assets in another jurisdiction, must be taken to have adjudged that the administrator against whom the judgment was rendered had assets to satisfy the debt. That administrator, in the proceedings against him, must have admitted, by his pleadings, that he had assets; and that will always be the case when he neglects (as was the case in *Dart & Co. v. Lee's Administratrix* in Mississippi) to plead *plene administravit*; or, if assets have been denied by such plea, that issue must have been found against him. A general judgment, therefore, against an administrator, necessarily includes in it the adjudication of assets in the hands of that administrator to the amount of the judgment. According to the rigor of the common law, the judgment in that form would be absolutely conclusive against the defendant's administrator, and against the plaintiff and all others; and the only ulterior proceedings upon such judgment, if not satisfied upon an execution to be levied *de bonis testatoris*, would be against that administrator for a *devastavit*. (2 Lomax Ex., 391, sec. 8, and 451, sec. 21.)

Virginia, and perhaps others of the states, has mollified in some respects, the rigorous conclusion of this common law rule, but without destroying it. In its most mitigated appli-

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cation to such a recovery, the judgment will be at least taken, until the contrary is shown by that defendant, as a judgment that the administrator had assets for the satisfaction of the recovery. For this reason, as well as for other reasons, it is certain that we shall find no case in the English authorities where a judgment has been recovered against one administrator, in which any recovery has been sought against another administrator, unless in cases of an administrator *de bonis non*, or unless in cases of special administrations, such as administrator *durante minore etate*, &c. And for the same reason, it is probable that no such cases can be found in any of the American authorities, even where the rules alluded to [*49 have been *mitigated. It will be found extremely difficult, within the jurisdiction where administration was granted, to conceive any case of that kind. The judgment, then, upon which the petitioner founds his recovery against the administrator in Louisiana, shows upon its face that assets for its satisfaction, in the state of Mississippi, were also adjudged. The very judgment, by showing that matter, an adjudged liability of a sufficiency of estate in Mississippi, shows an exoneration of assets elsewhere than in Mississippi, and that the Louisiana administrator ought not to be charged, by a double recovery, for that which has been already or can be recovered against another representative in Mississippi.

There is also another remark that may be made upon the proceedings in this case,—that the decision, if sustained, must lead to alarming mischiefs in the administration of assets which an intestate has left in two or more states. It seems, from the amended petition, that C. S. Lee, at the time of his death, was a citizen of Louisiana; that was his domicile, and consequently Ann Lee, in Mississippi, was a foreign administratrix. The bulk of an intestate's assets will almost always be found in the jurisdiction of his domicile. The proposition which is contended for to sustain this recovery goes to this extent,—that if an intestate in one state had died, leaving property of the most inconsiderable value in another state, making it necessary that there should be an administration in the latter, a plaintiff, by recovering a judgment against the latter, establishing a debt of the intestate, that judgment, as contended for by the defendant in error, would be conclusive upon the administrator and the assets, in the state of the domicile, at least so far as it established the indebtedness of the intestate. In vain might the domiciliary administrator attempt, in an action brought against him upon that judgment, to prove that the plaintiff had no shadow of claim against the intestate; he

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would be repelled, by force of the judgment, from any such defence.

Is it reasonable, that in the international law of these states under the Constitution and acts of Congress, such ruinous stringency should be given to the judgment of one state in the courts of another?—that a judgment against the foreign administrator, who is regarded only as auxiliary or ancillary to the domiciliary administration, and who is in practice oftentimes, in some of the states, little more than a nominal administrator, shall conclude the primary domiciliary administrator, holding the main bulk of the assets, by establishing against him and against those assets the principal fact in the case, the indebtedness of the intestate, so that they can never be extricated from this rigid conclusiveness of the foreign judgment?

*50] There is a further remark, that the petitioner seeks a recovery upon the Mississippi judgment against “a considerable estate, real and personal,” left by the intestate in the state of Louisiana; estates of both descriptions, it would seem, are liable as assets in the hands, or under the control of the administrator in that state. There is no principle in general jurisprudence, and particularly in the United States, better established, than that land can never be subjected to a foreign jurisdiction. (Story *Conf. of L.*, pages 436, 437, §§ 522, 523.)

To give to the judgments of one state validity and effect in the courts of another, is a wise provision under our system of government. It cannot, however, be overlooked, that to whatever extent force is allowed to them, out of the state which pronounced them, in the jurisdiction of another state, it operates as a restriction or compulsion upon this jurisdiction, making it subordinate to the jurisdiction of a foreign forum. The provision, therefore, which has been alluded to should be jealously guarded by the courts; and unless its application should be shown to be clearly reasonable, the application should be denied. It has before been intimated, that no authority can be found, certainly not in the English law, probably not in the American law, which can govern the precise case now under consideration.

Without attempting to disturb any doctrine heretofore established in regard to the conclusiveness of judgments, and the effect of the judgment of a court of one state, when sued upon or offered in evidence in the courts of another state, it is contended that that doctrine has never been extended to a case like the present, and that it would not be reasonable to give it such application. It is a principle incontrovertibly established in the English jurisprudence, in that of Louisiana (Benjamin and Slidell's *Digest of Louisiana Laws*, page 559,

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et seq.), and in all the other states, that "no one, in general, can be bound by a verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. For (as has been well said) otherwise he has no power of cross-examining the witnesses, or of adducing evidence in support of his rights. He can have no attain, nor can he challenge the inquest, or appeal (or have a writ of error on the judgment). In short, he is deprived of the means provided by the law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice that he should be bound by the results of an inquiry to which he was altogether a stranger." (1 Stark. Law Ev., 217, 6th Am. ed.)

It is not pretended that the administrator in Louisiana was *a party to the proceedings in Mississippi, or [*51 could by any possible means have made himself a party to them. It is incumbent upon the defendant in error clearly to show, before the jurisdiction in Mississippi shall control that of Louisiana, that the administrator of the latter state was, in the proceedings in which judgment was recovered in the former, in privity with the defendant in that suit. The contrary has been distinctly laid down by Justice Story, in his learned treatise on the Conflict of Laws, § 522. That is a direct authority upon the present case. It makes no difference that the judgment in the cases in Rawle, 431, to which he refers, was a judgment rendered in Barbadoes. The matter under consideration involves no discussion, as to the difference between the effect of a judgment when rendered in a state jurisdiction, and when rendered in a jurisdiction out of the United States. The point decided there was, that there was no privity between one administrator and another administrator of the same intestate, when both administrations have been granted by different jurisdictions entirely separate and independent of each other.

The jurisdiction of each state of this Union is sovereign and independent in granting letters of administration, as much so as that of any two foreign states. The grant, when made, invests the administrator under the authority of that state with the proprietorship of the effects of the intestate within that state, but, having no jurisdiction beyond its own limits, it can confer no property upon him out of those limits.

Each administrator, when several administrations are granted in several states, is made the owner of a distinct property, wholly unconnected with any other out of the state. The authority under which each derives his title is a separate sovereign power; and it is exclusively by that authority, not by

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virtue of testamentary appointment of the dead, that they are invested with any interest or control in the respective estates; and it is entirely to the authority from which their rights are alone derived that they are in any manner accountable. In some sense they may severally be said to be a representative of the deceased.

There would be no ground for asserting that these representatives in different states constitute one representative, as several executors under the same will, or administrators under the same jurisdiction, may constitute one executor or administrator, though the assets confided to each may be separated.

It is believed that this doctrine, here attempted to be presented, of the relation in which the separate administrators under different jurisdictions stand in these United States, has *52] been universally recognized by the states, except so far as by *statutory law (showing that the original principle was as here stated) the doctrine has been changed or modified. It would seem necessarily so, not only as regards the relation of the administrator, but as regards the rights of the executor as affecting the assets and the representative of the deceased, for he has no lien upon the fund in the hands of the representative as the *debtor*, but the person of the administrator, who is, in a measure, the officer or bailiff of the court appointing him, in respect of the assets which he has in his hands, is the debtor. (1 Lomax Ex., 345; Ram. Ass., 484.) What constitutes privity between one representative of a dead man and another representative depends upon no peculiar rules springing out of a practice of the probate court, in regard to the representatives of deceased persons, but is to be ascertained upon principles of the common law, as applicable to cases generally, of which a variety of illustrations will be found in the books, especially 1 Stark. Law Ev., 217, *et seq.* Privity between one administrator and another does not depend upon, and cannot be created by, their being each of them the representative of the same intestate, though it be a duty in which they all unite. It has not been so regarded in the English law, which, until the 17th Car. 2, did not regard the administrator *de bonis non* in privity with an executor or administrator, to bring *scire facias* on the judgment which the executor or administrator had obtained. (See authorities, 1 Lom. Ex., 325.) So, if one brings several ejectments against several upon the same title, a verdict against one is not evidence against the rest, because the party against whom the verdict was had might be relieved against it, if it was not good, but the rest could not (1 Stark. Law Ev., 217); as the title under which all these defendants in ejectment claimed is

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the same, each of them, of course, must have held in privity to some one person, from whom all their titles were severally derived; nevertheless, that privity in one common title did not unite them in privity to each other.

The judgment, therefore, in Mississippi, against Ann Lee, administratrix of the assets of Charles S. Lee in Mississippi, could not bind the appellant, D. S. Stacy, administrator of the assets of C. S. Lee in Louisiana.

The rule excluding *res inter alios acta* as a ground of action, or as a bar in the pleadings, it is hardly necessary to remark, extends with equal stringency to exclude such matter as evidence at the trial. (1 Stark. Law Ev. 217; and 1 Greenl. Ev., §§ 522, *et seq.*)

The principle here contended for cannot be evaded by force of the statute of Mississippi, which seems, as is contended for, *to make the judgment recovered in Mississippi against Ann Lee, administratrix, have the effect of being a judgment recovered against Charles S. Lee, the intestate himself, because that suit was instituted against him in his lifetime. That statute enables the plaintiff to revive the suit pending against the intestate, and empowers the court to render judgment for or against such administrator, in the same manner as if the original party were in existence. (How. & H. Dig., 584.) This statute can mean nothing more than in the strongest expressions to remove merely the impediment thrown in the way of the proceedings of the plaintiff by abatement. It did not mean, by strict adherence to the same manner as if the original party were in existence, to preclude the administratrix from pleading pleas peculiarly allowed to executors and administrators,—such as *plene administravit*, generally or specially, no assets, and the like; or to preclude the plaintiff from taking a judgment against the administratrix; and if so, the judgment could not be in the same manner as if the original party was in existence. If the legislature had intended that, it would have adopted a provision like that in the 17th Car. 2, c. 8, s. 1, where a party dies between verdict and judgment, directing that the judgment shall be entered as if both parties were living. (See 1 Lom. Ex. 324, 325.)

The judgment rendered in this very case shows that such has not been the interpretation given to that statute, for it is a judgment, not against the intestate, but against the administratrix. Whatever may be the interpretation to be put upon the statute, it is sufficient here to say, that the judgment taken was not in accordance with any directions that it should be rendered as if the party were living, but that was waived if the statute gave such power, and the plaintiff has taken a

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judgment against the administratrix; and taking it in that manner, the plaintiff subjects himself to all the consequences of that form of judgment.

In conclusion, the plaintiff in error is not precluded from the grounds of error here attempted to be maintained by force of the 32d section of the Judiciary Act of 1789. That section was only intended to apply to proceedings in actions at common law; not to proceedings by petition, according to the practice of Louisiana. Even if it did, the exception taken in the court below cannot but be regarded as tantamount to a demurrer according to the requisitions of that statute. That clause is a transcript of the provisions of 27th Eliz. c. 5, and 4th Anne, c. 16, for the purpose of curing mere defects of form, and requiring special demurrers, leaving matters of substance unaffected by its provisions, to be taken advantage of by general demurrer, *without setting down any special cause, or to be taken advantage of by errors in arrest of judgment, or by writ of error. (See Bac. Abr., *Pleas and Pleadings*; Stephens on Pleadings, 140.)

Mr. Crittenden, Mr. Thrasher, and Mr. Henderson, for the defendant in error, sustained the judgment of the court below upon the same grounds, which are thus explained in the argument of *Mr. Henderson*:

This Mississippi judgment, we say, conclusively established the plaintiffs' demand against the estate of the intestate Lee, not only in Mississippi, but in every state of the Union. We do not say but its ratable priorities and claims, as to order of satisfaction, are to be governed by the local law of the administration. The claim, however, is legally authenticated as against the decedent estate, so as to entitle it to payment and satisfaction, though put to judgment in a different state than that of the administration. 13 Pet., 312.

Notwithstanding all that is said in the books upon original and ancillary administrations in different states, we insist the administrative tribunals of a decedent's effects in no one state can reject the allowance of a creditor's claim from another state, if legally established.

The Constitution of the United States gives to the citizens of each state the privileges and immunities of the citizens of the several states. State tribunals, therefore, cannot regard a co-state creditor as a foreign creditor, and so administer the effects of the decedent within a state, to the exclusive use of creditors within that state. And so it is implied in 3 Pick., 128; and so, undoubtedly, is the requirement of the Constitution of the United States, above quoted.

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The record of this judgment in Mississippi shows that the action was instituted against Lee in his lifetime, who appeared and plead; that before verdict he died, and his widow and administratrix, by the positive requirements of the laws of Mississippi, came in on *scire facias*, plead to, and defended the action. This, in Mississippi, merged the original cause of action, established the debt against the decedent estate, and was and is *res adjudicata*.

The act of Congress of 26th May, 1790, expressly requires that this judgment shall have full faith and credit given to it in every court within the United States, as it has by law or usage in the courts of the state of Mississippi. 1 Stat. at L., p. 122.

It undoubtedly has, in that state, the "faith and credit" of establishing or authenticating the debt against the estate of Lee, regardless of whosoever hands the estate may come to, *or be found in. It is not that it merely [*55 establishes the debt against the administratrix, Ann Lee; but against the estate of C. S. Lee.

The judgment, thus presented, either by suit, in the courts of Louisiana, or to the administrator, in Louisiana, for allowance or payment, must have the same "faith and credit" accorded to it as in Mississippi. 6 Wheat., 129; 7 Cranch., 481; 13 Pet., 312.

Now, this "faith and credit" is not so conceded to a foreign judgment. Hence the case in 2 Rawle (Pa.), 431, which was a judgment from Barbadoes, sued on in Pennsylvania. All the pleas in that case imply the opinion of the pleader, that, had it been a judgment from another state of the Union, the defence could not have been relied on; nor does the court say otherwise.

Another well-established rule of decision sustains the point we contend for; namely, that the judgment of a competent state court merges and extinguishes the original cause of action as to all parties and privies, whether privies by blood or estate in all other states of the Union. 3 Wash. C. C., 17; 1 Pet., 692, 693; 16 Mass., 71.

But a foreign judgment does not so extinguish the cause of action, if again sued on here, as to bar recovery for this cause.

Again: our petition makes no personal demand against the defendant; but, setting forth a claim against the estate of Lee, by authentication of a judgment, duly obtained, in contest with the administratrix in Mississippi, seeks its satisfaction out of Lee's estate in Louisiana, represented by the defendant as administrator. But the spirit of his objections is personal to himself. It is not that he questions but the cause of action

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has been established in judgment, by a court of competent jurisdiction, as against Lee's estate, so far as represented by his administratrix in Mississippi; but defendant objects, the estate is not thereby liable in Louisiana, till he, defendant, has litigated the same question over again. And for what good? Is there in the Constitution of the United States, and the laws of Congress, any sensible purpose or policy that this question should be twice litigated, in order to conclude the estate of Lee, as represented by this administrator, any more than if this judgment had been rendered against Lee, in his lifetime?

Suppose this judgment in Mississippi had been rendered in the United States Circuit Court, and then sued on as now in the United States Circuit Court of Louisiana; could this defence be heard? Now the 31st section of the Judiciary Act *56] of 1789 provides, that where the defendant dies pending the *suit, his representatives may be brought in by *scire facias*, as in this case, and "the court may render judgment against the estate of the deceased party." But what a silly provision of law, if, when they have so rendered judgment, the same controversy shall be tried over again in every other state where the judgment may be carried for enforcement and satisfaction, against the same decedent's "estate."

As this pretended right of defence does not go to bar the original cause of action, it is a mere technical objection, without semblance of merit. For, on any supposition that the first judgment was fraudulently obtained, the defendant here could undoubtedly make that defence by plea. But, with no objection against the justice or integrity of the judgment, that the defendant may re-litigate it from mere caprice is certainly a most idle rule of construction, for no possible good.

The only pretence of legal rule which can be offered in vindication of this claim of the defendant to litigate the original cause of action in this case over again is, that, as between the defendant with whom it was contested in the state of Mississippi, and this defendant in Louisiana, there is no privity; and hence the judgment is not evidence against him.

But we deny the fact that there is no privity. There is, in all truth, and in the *rationale* of the thing, a clear privity of estate. On Lee's death, his estate, everywhere throughout the United States, was liable to payment of his debts. No one anywhere could take possession of this estate, either by lawful administration or by *tort*, that did not hold in privity to the creditor's claim, as verily as to the claims of heirs and distributees. The decedent's estate, to this end and responsibility, is but a unit, though possessed by a dozen administra-

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tors in different states of the Union. And in what sense can an administrator claim to be a privy at all? No connection of blood, nor the agent's claim which he has to the estate, could give him, as administrator, the relation of privy in any legal sense. Had this judgment been granted against Lee in his lifetime, this objection would have the same force. His privy, as administrator on the estate of Lee, would have been precisely what it now is; namely, he would have been no party to the judgment, nor would he be holding any part of the estate, by virtue of his administration in Louisiana, which the judgment directly bound, or could be levied on. Yet, surely, this plea could not avail in such case; and equally clear, on the same principles, it cannot avail here. But if there were any room to distinguish the legal effect of a judgment obtained against the decedent, and one obtained by suit against his administrator, then we reply, that this suit, [*57 having *been instituted against the decedent in person, and who became party to the record, the same privy in succession connects this defendant with this record and judgment, as if the decedent had survived till the verdict was rendered against him.

But the truth is, the doctrine of personal privy has no application here, and can never be interposed, but as to parties who may be affected in their personal rights. A trustee of a legal title for the heirs cannot object to the judgment against the ancestor as incompetent evidence in suit against him to recover the trust property, on the ground that he is not a privy to the judgment. And so of the administrator, who is but a trustee for the creditors and distributees.

If the case in 16 Mass., 71 would seem to conflict with this last position, that of 3 Rand. (Va.), 287 sustains a contrary rule.

The authority of the late Justice Story, in his Conflict of Laws, § 522, has been referred to in support of the defendant's objection. In a clear case of conflict of laws, where the foreign claim was "to affect assets" of the local administrator, to the prejudice of local creditors, the rule insisted on might, to some form and extent, be applicable. But the conflict of laws, as between nations foreign to each other, not bound to recognize each other's judgments, nor to recognize the claim of the foreign creditor on the same ground as the domestic creditor,—such conflict of laws is not predicable of the subsisting relations of these United States. The judgments of the several states under the Constitution and laws of Congress, before referred to, are not foreign to each other in the sense of the common law. And the Constitution of the United States

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secures each creditor of the different states the same rights in prosecuting his claims in any other state, whether against the living man or the estate of the dead, as are secured to the citizens of the state where the same is prosecuted. If, therefore, the rule as now contended for was intended to be asserted by Justice Story as applicable to these states, we are bound to say his assertion is without authority, and against the paramount laws of the Union.

Mr. Justice GRIER delivered the opinion of the court.

John B. Thrasher, the plaintiff below, commenced this action by a petition (according to the practice of the courts of Louisiana) in the nature of an action of debt upon a judgment. He claimed as assignee of a judgment obtained in the Circuit court of Claiborne county, in the state of Mississippi, by Dart & Gardner against Ann Lee, administratrix of S. C. Lee, deceased. David S. Stacy, the defendant below, is the *58] administrator of Lee in the state of Louisiana, where he had his domicile *at the time of his death. In his pleas he has set forth six several grounds of exception against the plaintiff's right to recover, the last of which is in the nature of a demurrer to the declaration, or a denial of the plaintiff's right to recover on the case set forth in his petition. As the decision of this point will be conclusive of the whole case, it will be unnecessary to notice the others.

The question presented by the demurrer is, whether the judgment against Ann Lee, the administratrix of Charles S. Lee in Mississippi, is evidence by itself sufficient to entitle the plaintiff to recover against Stacy, the administrator of the same intestate in Louisiana. Or, to state the point disconnected with the accidents of the case, Will an action of debt lie against an administrator in one of these United States, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?

This is a question of great practical importance, and one which, we believe, has not yet been decided.

The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He cannot, therefore, do any act to affect assets in another jurisdiction, as his authority cannot be more extensive

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than that of the government from whom he received it. The courts of another state will not acknowledge him as a representative of the deceased, or notice his letters of administration. See *Tourton v. Flower*, 3 P. Wms., 369; *Borden v. Borden*, 5 Mass., 67; *Pond v. Makepeace*, 2 Metc. (Mass.), 114; *Chapman v. Fish*, 6 Hill (N. Y.), 554, &c.

It follows as a necessary inference from these well-established principles, "that, where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other administrator." (See Story, *Confl. of L.*, § 522; *Brodie v. Bickley*, 2 Rawle (Pa.), 431.) The same doctrine is recognized in the case of *Aspden v. Nixon* (4 How., 467) by this court.

But it is contended, that, however applicable these principles *may be to judgments against administrators [*59 acting under powers received from states wholly foreign to each other, they cannot apply to judgments against administrators in different states of this Union, because of the provision of the Constitution, which ordains that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The act of Congress of 26th May, 1790, which prescribes the mode of authenticating records, and defines their "effect," enacts, that they "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

The question, then, arises, what is the "effect," or the "faith and credit," given to the judgment on which this suit is brought, in the courts of Mississippi? The answer to this must be, that it is evidence, and conclusive by way of estoppel, 1st, between the same parties; 2d, privies; and 3dly, on the same subject-matter, where the proceeding is *in rem*.

But the parties to these judgments are not the same.

Neither are they privies. "The term privity denotes mutual succession or relationship to the same rights of property." (Greenl. Ev., § 523.) Privies are divided by Lord Coke into three classes,—1st, privies in blood; 2d, privies in law; and 3d, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the same principle, namely, that a party claiming through another is estopped by that

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which estopped that other respecting the same subject-matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims. An executor or administrator, suing or sued as such, would be bound by a verdict against his testator or intestate, to whom he is privy in law. With regard to privies in estate, a verdict against feoffer would estop feoffee, and lessor, the lessee, &c.

An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privy with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts, as in the *60] case of an administrator *de bonis non*, who may be truly said to have an *official privy with his predecessor in the same trust, and therefore liable to the same duties.¹ In the case of *Yare v. Gough*, (Cro. Jac., 3), it was decided that an administrator *de bonis non* could not have *scire facias* upon a judgment obtained by his predecessor on a debt due to the intestate "for default of privy." But in *Snape v. Norgate*, (Cro. Car., 167), it was decided that a *scire facias* would lie against an administrator *de bonis non*, on a judgment against the executor; and the court attempt to make a distinction between that and the preceding case, on the ground that "he cometh in place of the executor;" or in other words, by reason of an official succession or privy. These cases cannot be well reconciled on principle; but the difficulty was remedied in England by the statute of 17 Charles 2, c. 8. The Court of Appeals of Virginia have considered the latter case as founded on more correct principles than the first, and have overruled the doctrine of *Yare v. Gough*. (*Dykes v. Woodhouse*, 3 Rand. (Va.), 287.)

We may assume, therefore, that in the state of Mississippi, as in most other states in the Union, the administrator *de bonis non* is treated as privy with his predecessor in the trust, and estopped by a judgment against him; but the question still recurs as to the effect of a judgment in that state against one who has neither personal nor official privy with the defendant. Each administrator is severally liable to pay

¹ FOLLOWED. *Hill v. Tucker*, 13 How., 467.

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the debts of the deceased out of the assets committed to him, and therein they resemble joint and several co-obligors in a bond. A judgment against one is no merger of the bond, nor is it evidence in a suit against the other. Their common liability to pay the same debt creates no privity between them, either in law or in estate.

It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this:—that the judgment against the administrator is against the *estate* of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a *stranger. A judgment may have the [*61 “effect” of a lien upon all the defendant’s lands in the state where it is rendered, yet it cannot have that effect on lands in another state by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot be even *primâ facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.

It is alleged by those who desire to elude this conclusion, while they cannot deny the correctness of the principles on which it is founded, that it is technical and theoretical, and leads to an inconvenient result. But every logical conclusion upon admitted legal principles may be liable to the same imputation. Decisions resting only on a supposed convenience, or principles accommodated to the circumstances of a particular case, generally form bad precedents. It may be conceded that in this case there is an apparent hardship,—that the plaintiff who has established his claim after a tedious litigation in Mississippi should be compelled to go through the same troublesome process in Louisiana. But the hardship is no greater than if the administrators had been joint and

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several co-obligors in a note or bond. A plaintiff may be fairly presumed always to have the evidence of his demand in his possession, and the ability to establish it in any court. But if a judgment against an administrator in one state, raised up, perhaps, for the very purpose of giving the plaintiff a judgment, should be conclusive on the administrator in another state, the estates of decedents would be subjected to innumerable frauds. And to what purpose is the argument that the defendant may be permitted to prove collusion and fraud, when, in order to substantiate it, he must commence by proving a negative? This would be casting the burden of proof where it ought not to rest, and would cause much greater inconvenience and injury than any that can possibly result from the present decision.

The judgment of the Circuit Court must, therefore, be reversed.

Mr. Justice McLEAN and Mr. Justice WAYNE dissented.

Order.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the *62] Eastern District of Louisiana, and was argued by counsel. On *consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice, and in conformity to the opinion of this court.

MARY ANN VAN NESS, PLAINTIFF IN ERROR, v. CORNELIUS P. VAN NESS, ADMINISTRATOR OF JOHN P. VAN NESS.

The act of Congress, passed on the 27th of February, 1801 (2 Stat. at L., 103), authorizes a writ of error from this court to the Circuit Court for the District of Columbia in those cases only where there has been a final judgment, order, or decree in that court.

Where the Orphans' Court directed an issue to be sent for trial in the Circuit Court, which issue was, "whether the petitioner was the widow of the deceased or not," and the Circuit Court proceeded to try the issue, and the jury, under the instructions of the court, found that the petitioner was not the widow, exceptions to these instructions cannot be reviewed by this court on a writ of error.

The certificate of the finding of the jury, transmitted by the Circuit Court to the Orphans' Court, was not such a final judgment, order, or decree as is

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cluded within the statute. After the reception of the certificate, the Orphans' Court had still to pass a decree in order to settle the rights of the parties.¹

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington.

All the circumstances of the case are fully set forth in the opinion of the court, as delivered by Mr. Chief Justice Taney, from the commencement of which the Reporter extracts the following statement:

A motion has been made to dismiss this case, which is brought here by writ of error directed to the Circuit Court for Washington county, in the District of Columbia.

The case is this: John P. Van Ness, of the same county and District, died intestate, and letters of administration were granted by the Orphans' Court to Cornelius P. Van Ness, his brother, who is the defendant in error.

Shortly after the letters were granted, Mary Ann Van Ness, the plaintiff in error, filed her petition in the Orphans' Court, alleging that she was the widow of the deceased, and praying that the letters granted to the defendant should be revoked, and administration granted to her. The defendant answered, denying that she was the widow of the deceased. The right to the letters depended upon this fact; as by an Act of Assembly of Maryland, passed in 1798, and adopted by Congress when it assumed jurisdiction over this District, [*63 the widow is *entitled to letters of administration, in preference to any other person, where the husband dies intestate.

This act of Assembly (1798, ch. 101, subchap. 8, sec. 20, and subchap. 15, sec. 16, 17) makes it the duty of the Orphans' Court, in a case like this, if required by either party, to direct an issue to be sent for trial to any court of law most convenient for trying it; and the court to which it is sent is authorized to direct the jury, and to grant a new trial if it thinks proper, as if the issue were in a suit therein instituted; and upon a certificate from such court, or a judge thereof, of the verdict or finding of the jury, under the seal of the court, the Orphans' Court is directed to give judgment upon such finding. It is unnecessary to give the words of the act. We state its provisions only so far as they relate to the case before us.

When the answer of the defendant came in, the Orphans'

¹ FOLLOWED. *Brown v. Wiley*, 4 *Bank of Potomac*, 7 How., 227. Wall., 171. CITED. *McLaughlin v.*

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Court, upon the motion of the plaintiff, ordered the following issue to be made up and sent to the Circuit Court for Washington county, to be there tried; that is to say, "whether the said Mary Ann Van Ness be the widow of the said John P. Van Ness or not." No depositions or other testimony were taken on either side in the Orphans' Court.

The Circuit Court proceeded to the trial of the issue, and in the course of the trial sundry directions were given to the jury, to which the plaintiff excepted; and finally, as appears by the eleventh exception, the court instructed the jury that there was no evidence from which they could find that the plaintiff was lawfully married to John P. Van Ness, the intestate. Under this direction, the jury found by their verdict that Mary A. Van Ness was not the widow of the late John P. Van Ness; and this finding was, by order of the court, certified under seal to the Orphans' Court.

This is the case before us, upon the record brought here by the writ of error; and the question to be decided is, whether this court can take cognizance of the case, and inquire whether error has or has not been committed by the Circuit Court in giving the instructions under which the verdict was found.

The cause was argued upon a motion to dismiss the writ of error for want of jurisdiction. *Mr. Coxe* and *Mr. Bradley* for the motion, and *Mr. May* and *Mr. Brent* against it.

Mr. Coxe, in support of the motion, explained the laws of Maryland upon the subject, and referred to the act of 1798, in 1 Dorsey's Laws of Maryland, p. 414, subchap. 15, sec. 17, and also to p. 394, subchap. 8, sec. 20.

*64] The certificate directed to be transmitted to the Orphans' *Court is altogether different from chancery practice, where the verdict is merely to inform the chancellor, who may set it aside and direct a new trial. *Mr. Coxe* referred also to the case in 1 Pet., 562, 565; 2 Id., 243; 5 How., 118; and 3 Id., 681.

Mr. May, against the motion to dismiss.

The widow in this case filed a petition praying for letters of administration to herself, and for a revocation of those previously granted to the brother. If she was the widow, she was entitled to letters in preference to any one else. Act of 1798, chap. 101, subchap. 15, sec. 17; 2 Har. & G. (Md.), 51.

After receiving the certificate from the Circuit Court, the Orphans' Court dismissed her petition. We took an appeal from this dismissal, but the Circuit Court affirmed it.

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It is evident that the appeal carried up nothing but the mere certificate, and under it it was impossible again to bring before the Circuit Court the instructions which had been given at the previous trial. The Orphans' Court never saw these exceptions. If we could have got them into the record which was transmitted from the Circuit Court to the Orphans' Court, then an appeal from the order of dismissal would have carried them again to the Circuit Court and from that court to this. But we could not do it; and if this writ of error should be dismissed, it will follow that instructions were given by the court below which were decisive of the result, and yet there is no mode of having such instructions reviewed by this court. The certificate either established or destroyed the claim, because it was conclusive upon the Orphans' Court. It was, therefore, a final order. The act of 1801 includes final orders. See 2 Stat. L., 106, sec. 8.

This court, in 6 Cranch, 235, decided that any final judgment, order, or decree might be brought up for review.

The act of 1801 has been pronounced comprehensive. 4 Cranch, 396; 8 Cranch, 252.

What are final orders? See 3 Dall., 404; 2 Pet., 464.

The tendency of decisions is to enlarge the power of appeal. 3 Miss., 328; 1 Stew. & P. (Ala.), 171; 1 Mart. (La.), N. S., 75; 4 N. H., 220; 2 Mass., 142; 4 Id., 107, 108; 5 Id., 194; 11 Id., 275.

For the definition of a judgment see 3 Bl. Com., 296.

Mr. Brent, on the same side.

It is admitted by the other side, that she had a right to administer if she was the widow, and that this right was not lost by the fact, that letters had been issued to the brother [*65] previous to her application. The power of the Orphans' Court to revoke letters cannot be questioned. The only point in issue was, whether she was or was not the widow. If the certificate of the Circuit Court had been that she was the widow, it might not have been a final order or judgment, because the Orphans' Court would still have to inquire whether she was competent in other respects to take out letters. For example, whether she was a resident, &c. But as the certificate was against her, it was conclusive of her rights. Mutuality is not necessary. Can there be any doubt of the certificate deciding the question as to her? The Orphans' Court are compelled to obey it. No case ever occurred in Maryland by which the opinion of her courts upon this point can be ascertained. A case did happen involving it; but before a certificate was sent to the Orphans' Court, a special

act of the legislature was applied for and obtained in 1834-5. Under this act, the case was carried to the Court of Appeals, and is reported in 5 Gill & Johnson.

Mr. Brent then made the two following points:—

1. The power of the Circuit Court over this case, sent to it from the Orphans' Court, was as absolute, respecting a control over the jury and granting a new trial, as over a case which originated within itself.

2. The Orphans' Court had no control whatever over the verdict and judgment of the Circuit Court.

What appeal had we? The Orphans' Court could not review the proceedings of the Circuit Court, and yet it was a case where the verdict either established or destroyed the claim. If the present remedy is not applicable, then there is a strange anomaly here in Washington,—that there is no mode of correcting errors where very important rights are involved. The act of 1785, chap. 87, sec. 6, gave to a party aggrieved by any "judgment or determination" a right to appeal to the Court of Appeals. See *Dorsey's Laws of Maryland*. Can there now be, under our system, such a thing as a legalized error? See 5 Har. & J. (Md.), 176. As to what is a final judgment in Maryland, see 2 Har. & G. (Md.), 378; 12 Gill & J. (Md.), 332.

The certificate was in effect a final order, and an appeal from a judgment opens all interlocutory orders. An instruction to a jury is a substitute for the old demurrer to evidence. 3 Peters, 37.

A writ of error must be upon a judgment which settles the whole matter. 11 Co., 38; 21 Wend. (N. Y.), 658, 668; 1 Roll. Abr., 751. Pennsylvania decisions are, 3 Laws of Pennsylvania, 34; 1 Yates (Pa.), 113; 2 Id., 46, 51; 1 Binn. (Pa.), 444. Other cases respecting appeals, 7 Cl. & F., 52.

*66] *The judgment in this case is final. 3 Binn. (Pa.), 276; Add. (Pa.), 21, 121; 5 How., 214; 12 Wend. (N. Y.), 327; 2 Paige (N. Y.), 487; 19 Ves., 499; 2 Dan. Ch. Pr., 747, 1306, 1360; 1 Binn. (Pa.), 444; 5 Serg. & R. (Pa.), 146; 6 Watts & S. (Pa.), 188.

The statute of Pennsylvania is the only one in all the states like that of Maryland; and the courts of Pennsylvania have practically entertained appeals from such issues. If the substance appears in the record, this court will not regard forms, because, if it did, its jurisdiction would fluctuate, and it would be in the power of the court below to oust it of its proper jurisdiction. The right of appeal must exist or not exist when the bill of exceptions is taken, and cannot depend upon the mode in which the judgment is rendered.

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The act of Congress mentions a final order. But here an order was necessary to direct the certificate to be transmitted to the Orphans' Court, and that order was final. If there are two judgments, one for dower and the other for damages, an appeal may lie from one, and not the other. Viner's Abr. tit. *Judgment*, letter P. T.

The Orphans' Court must dismiss our petition on the reception of the certificate. 2 Har. & G. (Md.), 51.

But it is said on the other side, suppose we now succeed, and another trial takes place in the Circuit Court, with a different result, what is the Orphans' Court to do with these two different verdicts? The difficulty is solved by referring to 10 Leigh (Va.), 572.

The act of Congress gives the same jurisdiction to this court in common law cases as in chancery. But in chancery an appeal will lie, although further proceedings may be necessary. 3 Barb. Eq. Dig., 118, and cases there cited; 3 Cranch, 179.

(That part of *Mr. Brent's* argument relating to the amount in controversy is omitted, the decision of the court not involving that point.)

Mr. Bradley, in reply, and in support of the motion to dismiss, maintained the following propositions:—

1. That a writ of error can be issued from this court only in cases provided by statute.

2. That it can be issued only upon a final judgment, according to the common law.

3. There has been no judgment, final or otherwise, in the Circuit Court.

4. That the words "order and decree," in the act of 1801, refer to proceedings in equity; not to orders in a court of common law.

*5. The statute of Maryland of 1798, chap. 101, gives to the courts of law a peculiar, special, and limited jurisdiction, and has not provided any mode for reviewing proceedings under that jurisdiction. [*67

6. That no writ of error could lie to such a court, because there is no judgment of that court, final or otherwise.

In support of these propositions he cited *Wilson v. Daniel*, 3 Dall., 401; *Rutherford v. Fisher*, 4 Id., 22; *Boyle v. Zacharie & Turner*, 6 Pet., 656, 657; *Toland v. Sprague*, 12 Id., 331; *Evans v. Gee*, 14 Id., 1; *Amis v. Smith*, 16 Id., 303; *Smith v. Trabue's Heirs*, 9 Id., 4; *United States v. Goodwin*, 7 Cranch, 108; *United States v. Gordon*, 7 Id., 287; *United States v. Tenbroek*, 2 Wheat., 248; *United States v. Barker*, 2 Id., 395; *Sarchet v. United States*, 12 Pet., 143; *Mayberry*

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v. *Thompson*, 5 How., 121; *Ches. & Ohio Canal Co. v. U. Bank of Georgetown*, 8 Pet., 259; *Brown v. U. Bank of Florida*, 4 How., 465; *Winston v. Bank of United States*, 3 Id., 771; Judiciary Act of 1789, ch. 20, § 22.

Mr. Chief Justice TANEY delivered the opinion of the court. After stating the case, as above recited, the opinion proceeded as follows:—

The appellate power of this court in relation to the Circuit Court for the District of Columbia is regulated by the act of Congress of February 27, 1801. And it authorizes the writ of error to the Circuit Court in those cases only in which there has been a final judgment, order, or decree in that court. Whatever errors, therefore, may have been committed, and however apparent they may be in the record, yet we have not the power to correct them unless the Circuit Court has passed a final judgment, order, or decree in the case before it.

The argument on the part of the plaintiff is, that inasmuch as the verdict was found in obedience to the positive instructions of the court, and as the certificate of the finding of the jury was conclusive upon the Orphans' Court, the order of the Circuit Court to certify the verdict to the Orphans' Court ought to be regarded as a final judgment or order within the meaning of the act of Congress.

It is true the Orphans' Court has no power to grant a new trial, and is bound to consider the fact to be as found by the jury; and consequently the judgment of that court must be against the plaintiff. But the matter in contest in the Orphans' Court is the right to the letters of administration. And it is the province of that court to apply the law upon that subject to the fact as established by the verdict of the jury, and to *68] make their decree accordingly, refusing to revoke the letters *granted to the defendant, and dismissing the petition of the plaintiff. The suit between the parties must remain still pending until that decree is pronounced. The certificate from the Circuit Court is nothing more than evidence of the finding of the jury upon the trial of the issue. It merely certifies a fact, that is to say, that the jury had so found. And the order of the Circuit Court, directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment, order, or decree, in the legal sense of these terms as used in the act of Congress. Certainly it is not a final judgment or order. For it does not put an end to the suit in the Orphans' Court, as that court alone can dismiss the petition of the plaintiff which is there pending; and no other court has the power to pass a

judgment upon it. A verdict in any court of common law, if not set aside, is in all cases conclusive as to the fact found by the jury, and the judgment of the court must follow it; as the Orphans' Court must follow the verdict in this case. Yet a writ of error will not lie upon the verdict.

And if this court should take jurisdiction, and should determine that the Circuit Court had erred in its directions to the jury, what judgment could be given here? Could we give a judgment reversing an order which does nothing more than direct a fact to be certified to another court? If we could do this, it would not reach the judgment in the Orphans' Court, nor exercise any control over it. And a writ of error can hardly be maintained where the judgment of the appellate court would be ineffectual and nugatory.

Neither could it make any difference as to the jurisdiction of this court, if there had been a feigned issue with formal pleadings, and the Circuit Court had entered a judgment upon the verdict. For the judgment would have had no effect upon the rights of either party to the administration in dispute, nor could it exercise any influence upon the decision of the Orphans' Court. And if this court could have regarded the feigned issue as an action regularly brought in the Circuit Court, and upon that ground have taken jurisdiction, the affirmance or reversal of the judgment would have had as little effect upon the proceedings in the Orphans' Court as the original judgment in the Circuit Court. It would indeed decide the right to the fictitious wager stated in the pleadings. But if the judgment of the Circuit Court was reversed, and a *venire de novo* awarded, it would not alter the decree in the Orphans' Court. That court is required by law to act upon the finding of the jury, and not upon the judgment of the Circuit Court. And the reversal of that judgment and a new *finding would not authorize the Orphans' Court [*69 to recall the judgment it had given, and was bound to give upon the original verdict certified by the Circuit Court.

The act of Assembly of Maryland appears to have received in practice in that state the same construction that we have given to it. There is, indeed, no judicial opinion on the subject; but there is no ground for supposing that a writ of error was ever sued out under that law. In 1832, an act was passed authorizing a writ of error in such cases, and staying proceedings in the inferior courts until a decision was had in the appellate court; and this law embraces cases which had been tried before its passage, as well as those which should afterwards take place. But from 1798 down to the passage of this act of Assembly, we can find no trace of a writ of error sued

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out in a case like this. The absence of any such proceeding for so many years is the strongest evidence of the construction put upon the law, and of the opinion entertained by the bar of the state, that the writ would not lie. For many issues from the Orphans' Courts must have been tried during that period of time which would have given rise to the writ of error if it had been supposed to be warranted by the law. The act of 1832, also, embracing as it does prior as well as future cases, would have been altogether unnecessary, if a different construction had been given to the act of 1798.

Upon the whole, therefore, this court is of opinion that there has been no final judgment, order, or decree in the Circuit Court, and the writ of error must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed for want of jurisdiction.

*70] * ROBERT MARSHALL, APPELLANT, v. SUSAN G. BEALL, DEFENDANT.

Where a husband and wife, in order to carry out an ante-nuptial agreement, conveyed personal property to a trustee, with directions to hold a part of it for the sole and separate use of the wife, with a power to the wife to alien or devise it, such part goes, if she dies intestate, to her next of kin, free of all claim on the part of the husband.

But where a legacy was left to a trustee for the benefit of the wife, and the trustee was directed "to let the wife have some part or parcel of the money, occasionally, as she may stand in need, to be paid out to her at the discretion of the trustee," this fund goes to the husband at the wife's death, by the laws of Maryland.¹

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

¹ CITED. *In re McKenna*, 9 Fed. Rep., 35. So where a father's life was insured in favor of his children, one of whom—a married woman—died, it was held that her share of the insurance money passed to her surviving husband, as her personal representative.

Conigland v. Smith, 79 N. C., 303.

Personal property of the wife, exempt from execution in her hands, does not, at her death, vest in her husband, but goes to her administrator. *Wilson v. Breeding*, 50 Iowa, 629.

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In February, 1820, Robert Marshall and Ann Berry, being about to be married, executed the following contract, which was duly recorded.

“Whereas Robert Marshall and Ann Berry, both of Prince George’s county, state of Maryland, are about to intermarry, *its thereof* agreed by the *parties*, before the marriage, that the said Ann Berry shall hold in herself all her right, title, and interest to the following funds of her own; viz.: one hundred and fifty shares of stock in the Patriotic Bank, of which ten dollars have been paid, which stock stands to the credit of Ann Berry; also, one hundred and thirty-seven shares of the stock in the Central Bank of Georgetown and Washington, upon which eleven dollars per share have been paid; and three thousand five hundred dollars in the bonds of Charles Glover.

“Given under our hands and seals, this 17th day of February, 1820.

“ROBT. MARSHALL, [SEAL.]

“ANN BERRY. [SEAL.]

“Witness: JANE H. T. DORSETT.”

Soon after this, the marriage was solemnized.

On the 27th of August, 1823, Marshall and wife executed a deed to Susan G. Beall, which appeared to be unsatisfactory, and to have no influence upon the decision of the case.

On the 1st of May, 1824, Marshall and wife made another deed to Susan G. Beall, who was the sister of Mrs. Marshall, as follows:—

“This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and twenty-four, between Robert Marshall and Ann Marshall his wife, late Ann Berry, of Prince George’s county, in the state of Maryland, of the first part, and Susan G. Beall, of Washington county, in the District of Columbia, of the other part. Whereas, [*71 by *an agreement entered into between Robert Marshall and Ann Marshall, late Ann Berry, dated the 17th day of February, in the year of our Lord one thousand eight hundred and twenty, and previous to the marriage of the said Robert Marshall and Ann Marshall, it was agreed by and between the said parties, that the said Ann Marshall should have and possess, in her own right, the following funds for her own property, to wit: one hundred and fifty shares of stock in the Patriotic Bank, upon which ten dollars per share had been paid; also, one hundred and thirty-seven shares of stock

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in the Central Bank of Georgetown and Washington, upon which eleven dollars per share had been paid, and three thousand five hundred dollars due to the said Ann Marshall, then Ann Berry, by Charles Glover, and which was secured by a mortgage of a tract of land, formerly sold by the said Ann Berry to the said Charles Glover, all which stocks and debts belonged to the said Ann Berry previous to the said marriage, besides considerable other real and personal property; and whereas the said Robert Marshall did, at the same time, agree to make any other or further instrument of conveyance which might be considered necessary fully to assure and convey the said stock and debts above mentioned to the sole and separate use of the said Ann Berry, her heirs and assigns, free and clear from any debts, control, demands, or encumbrances of the said Robert Marshall; and whereas the said bank stock has been sold by the mutual consent and agreement of the said Robert Marshall and Ann Marshall; and whereas judgment has been obtained against the said Charles Glover for two thousand dollars, part of the said three thousand five hundred dollars, with interest and costs, in the name of the said Robert Marshall, and on which execution hath been issued against the property of said Charles Glover, and one other judgment for fifteen hundred dollars, with interest and costs, being the remaining part of the said three thousand five hundred dollars, due by said Charles Glover; and whereas the said Robert Marshall and Ann Marshall have agreed further to dispose of and settle the judgments above mentioned, and the tract of land hereinafter mentioned, by a more full, complete, and formal instrument of writing than the marriage agreement above mentioned, according to the terms, stipulations, and conditions of the present instrument of writing. Now, this indenture witnesseth, that for and in consideration of the premises, and for the more fully, completely, and perfectly carrying into effect the marriage contract between said parties, and for the further consideration of five dollars, to them in hand paid by the said

*72] Susan G. Beall, the receipt whereof is hereby acknowledged, and for divers other good *causes and considerations, them thereunto moving, the said Robert and Ann Marshall have given, granted, bargained, sold, released, and assigned, and by these presents do give, grant, bargain, sell, release, and assign, to the said Susan G. Beall, her heirs, executors, administrators, and assigns, the following tract, piece, or parcel of land, situate, lying, and being in Prince George's county aforesaid, on which the said Robert and Ann Marshall at present reside, being lot number four in the division of the estate of William D. Berry, and containing about

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fifty acres of land, more or less, for and during the joint lives of the said Robert and Ann Marshall, and the survivor of them; likewise the two judgments above particularly recited, against Charles Glover; to have and to hold the said tract of land above mentioned and described for and during the lives of the said Robert and Ann Marshall, and the survivor of them, and the said two judgments against the said Charles Glover, to the said Susan G. Beall, her heirs, executors, administrators, and assigns; in trust, nevertheless, and to and for the following uses, intents, and purposes, to wit: in trust to hold the above-mentioned and described tract of land for the use of the said Robert and Ann Marshall, during their joint lives; and if the said Robert Marshall shall survive the said Ann Marshall, for the use of the said Robert Marshall during his life and no longer, upon the express agreement and understanding that the said tract of land is not to be subject, or liable for the debts, contracts, or engagements of the said Robert Marshall, and in further trust that the said Robert Marshall shall have and receive the said judgment of two thousand dollars, with interest and costs, against the said Charles Glover, to his sole and *separate* use, free and clear of the marriage contract above mentioned, and of all *separate* claim of the said Ann Marshall, and his receipt shall be good and sufficient acquittance and discharge of said judgments; and in further trust, that the said Susan G. Beall shall hold the said judgment of fifteen hundred dollars, with interest and costs, for the sole and *separate* use of the said Ann Marshall, her executors, administrators, and assigns, free and clear from any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and upon the payment of the said judgment, or any part thereof, to invest the said money in stock, or to loan the same on interest, with the approbation of the said Ann Marshall, for the like sole and *separate* use of the said Ann Marshall; and in further trust, that the said Ann Marshall, during the life of her husband, may dispose of said judgment, or the proceeds thereof, and of her right, interest, and estate in the said tract of land after the death of the said Robert Marshall, *either [*73 by her last [will] and testament, or by any instrument of writing, under her hand and seal, in the presence of two witnesses, during her coverture, in the same manner as if she were single. It is further understood and agreed, that said Robert Marshall is to pay and satisfy the judgment of Hodges and Lee against them; and the claim of Mr. McDaniel's estate, if judgment should be recovered; and all fees, costs, and expenses in prosecuting and recovering the two judgments

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against Charles Glover, and all legal expenses of the judgment assigned to him.

“In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

“ROBERT MARSHALL, [SEAL.]
 ANN MARSHALL, [SEAL.]
 SUSAN G. BEALL. [SEAL.]”

In November, 1825, there was paid to the trustee, on account of the judgment for \$1500 reserved as above for the separate use of Ann Marshall, the sum of \$1960.66.

In May, 1832, Ann T. Beall, the mother of Ann Marshall, died. By her will, she gave the following legacy to her daughter:—

“I give and bequeathe to my daughter, Ann Marshall, the sum of four hundred dollars, and hereby appoint my daughter, Susan G. Beall, her trustee, to hold and retain the whole amount in her hands, and let the said Ann Marshall, wife of Robert Marshall, have some part or parcel of the money occasionally, as she may stand in need, but to be paid out to her at the discretion of my trustee, Susan G. Beall.”

During the lifetime of Ann Marshall, Susan G. Beall, the trustee, loaned the sum of \$400 to Amelia T. Dorsett, a third sister, out of the trust fund.

In July, 1833, Ann Marshall, the wife, died, never having disposed of the trust property belonging to her and in the hands of the trustee, in the manner provided for in the deed carrying out the marriage articles.

After her death, her surviving husband, Robert Marshall, sued Amelia T. Dorsett, to recover the four hundred dollars loaned to her by the trustee, as above recited, and obtained a judgment.

In April, 1835, Robert Marshall also filed a bill on the equity side of the court against Susan G. Beall, the trustee, in which he recited the facts as above set forth, averred that the trust fund, with the profits and interest, became vested in him by the death of his wife, and prayed an account by the trustee, with an injunction, &c.

*In April, 1836, Susan G. Beall, the trustee, filed her answer, admitting the facts stated in the bill, but denying that the complainant had any right to the trust fund.

To this answer the complainant filed a general replication.

In November, 1836, Amelia T. Dorsett filed a bill of interpleader, averring substantially the same facts and exhibiting the same documents as had been stated and produced by complainant; alleging that the provision in the deed referred to,

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that the real estate was to be conveyed to complainant if he survived his wife, was null and void, and inoperative against the legal representatives or heirs of said Ann; averring that the said Ann died intestate in July, 1833, without children, and leaving the complainant and another sister, Susan G. Beall, living, and three children of a deceased sister; that they were the only heirs of said Ann, and entitled to the trust property.

That during the lifetime of said Ann, the complainant, with her consent, borrowed of the trustee \$400, part of said trust fund, and gave her note therefor; that, since her death, Marshall had brought suit for the recovery of this money, as surviving husband of said Ann, and by the judgment of the court had obtained judgment for the same; but denied his right to the money, asserting that she, as next of kin of her deceased sister, was entitled to letters of administration on the estate, and if said Marshall had obtained any, they should be revoked.

The bill prayed that the children of her deceased sister may be made parties to the original suit, in which Marshall was complainant; that this bill of interpleader may be filed in said suit; that the said parties may be required to interplead; that the judgment against her may be enjoined, the trust property adjudged to the heirs of said Ann, and the said Marshall be perpetually enjoined, &c., &c.

To this bill the defendants filed the following demurrer:—

Demurrer to Bill of Interpleader.

Whereupon the defendants, by their solicitors, *Coxe & Carlisle*, filed the following demurrer to the foregoing bill of interpleader:

The demurrer of Robert Marshall and Richard H. Marshall, jointly and severally, to the bill of interpleader of Amelia T. Dorsett.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of interpleader contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill; and for cause of demurrer show, *that the said complainant hath not in her said bill of interpleader made such a case as entitles her, in a court of equity, to any relief against these defendants, or either of them, as to the matters contained in said bill of interpleader.

And for further cause of demurrer these defendants show, that although the said complainant's bill is avowedly, and on

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the face thereof, a bill of interpleader, yet the said complainant doth herself claim an interest in the subject-matter in dispute between the various parties named in the said bill of interpleader.

And for further cause of demurrer the defendants show, that the said complainant, although she admits in and by her said bill of interpleader that the subject-matter in dispute, or a portion thereof, is money loaned to, and justly due by, the said complainant to the person who shall be adjudged entitled to the specific fund out of which the said loan was made, yet nowhere in the said bill of interpleader does the said complainant offer to bring the said money so loaned into court. Nor hath the same, or any part thereof, been brought into court, to be subject to the decree or order of the court.

Wherefore, and for divers other good causes of demurrer, these defendants do demur to the said bill of interpleader, and they pray the court to adjudge whether they shall make any other or further answer to the same; and they humbly pray to be hence dismissed, with costs, &c., &c.

COXE & CARLISLE,
Solicitors for defendants.

The cause was then set for hearing by complainant on bill, answer, exhibits, and replication, and upon the demurrer and bill of interpleader, and at March term, 1843, the court passed the following decree:—

“The said bill of injunction, and for general relief, wherein the said Robert Marshall is complainant, and the said Susan G. Beall is defendant, together with the said other bill, by way of cross-bill and bill of interpleader, wherein the said Amelia T. T. Dorsett is complainant, and the said Robert Marshall is defendant, having been regularly set for hearing by consent of the parties, as well upon the said first-mentioned bill, the answer thereto, the replication to said answer, and the several exhibits and papers therewith filed, and in the proceedings mentioned, as upon the last-mentioned bill and the demurrer of the said Robert Marshall thereto, and as if taken for confessed against the other defendants therein named or referred to, this court, upon consideration of the premises, and the *76] arguments of counsel, as well in behalf of the said complainants respectively as of the said *defendants respectively, has ordered and decreed, and now here, on this 23d day of May, 1843, doth order and decree, that the said first-mentioned bill be and the same is hereby dismissed, with costs; that the demurrer of the said Robert Marshall to the last-mentioned bill be and the same is hereby overruled, with

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costs; that the said Amelia T. Dorsett pay to the said Susan G. Beall all the principal sum of money with the interest thereon recovered against her in the name of said Robert Marshall by the said judgment at law in the proceedings mentioned, to be, together with all such personal property, moneys, securities, stocks, and effects as have come or may come to the hands of the said Susan G. Beall as trustee for the deceased Ann Marshall in the proceedings mentioned, in virtue of the marriage contract, and marriage settlement in the proceedings mentioned, and of the last will and testament of Ann T. Beall, also in the proceedings mentioned, accounted, distributed, and paid over to and among the next of kin by blood of the said deceased Ann Marshall, in the order and proportions prescribed by law for the distribution of the personal estate of persons dying intestate among such next of kin; that upon the payment by the said Amelia T. Dorsett, in the manner aforesaid, of the principal and interest of the debt so recovered at law against her in the name of the said Robert Marshall as aforesaid, she be and is hereby exonerated, released, and discharged from the said judgment at law so recovered against her; which the clerk of this court, upon such payment being certified to him by said Susan G. Beall, is hereby authorized and required to enter of record as paid and satisfied pursuant to this decree; and that the said Robert Marshall pay to the said Susan G. Beall her costs in this behalf expended, &c., &c."

An appeal from this decree brought the case up to this court.

It was argued by *Mr. Coxe*, for the appellant, and *Mr. Jones*, for the appellee.

Mr. Coxe contended that the decree was irregular, informal, and erroneous. Upon overruling the demurrer of Marshall to the bill of interpleader, he should have been held to answer, and the case was not ready for a final decree against him. The demurrer itself was good, and ought to have been sustained. This was no regular bill of interpleader. Such a bill only lies where a person has to pay money and is at a loss to whom it ought to be paid. But here the party who files the bill avers an interest in the subject. 1 Madd. Ch. Pr., 239; Story Eq. Pl. §§ 291-293.

Marshall was not bound by the laws of Maryland to take out *letters of administration upon the estate of [*77 his wife. He was administrator by force of law. When he sued Amelia T. Dorsett for the four hundred dollars loaned to her by the trustee, all the matters stated in the bill of interpleader were open as grounds of defence, and having omitted

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to avail herself of them at law, she cannot now bring them into a court of equity.

A bill of interpleader is regarded as an original suit, and therefore demurrable to by one or all the persons against whom it is brought. But in this case it was demurred to by Marshall alone, and the court ordered it to be taken *pro confesso* as to the other parties. It had no right to do this.

Mr. Jones, contra, said that there might be some technical informality in the proceedings, but the right of the wife to her separate estate was fairly presented. The substantial equity was against Marshall, and in favor of the next of kin to the wife. There were two distinct funds which Marshall claimed, arising in different modes, to be governed by different rules.

The bill called an interpleader was miscalled. It was in fact a cross-bill, because the trust fund was placed in danger, and the parties interested in it had a right to be heard. They would have a right of appeal in England. If the decision of the court below is correct in saying that the property of the wife does not belong to Marshall, it is of no consequence to him who gets it. A misnomer of the bill is, therefore, of no value.

It is said that it was irregular for the court to pass a final decree without first calling upon Marshall to answer, after overruling his demurrer. But upon referring to the order of the court, it appears that Marshall had set the cause down for hearing upon the demurrer, &c., and therefore waived all such irregularity. If he chooses to rest his case upon his demurrer, he may do so.

All the questions now involved could not have been raised in a court of law when Marshall sued for the four hundred dollars.

When a married woman has separate property, the question whether the rights of the husband are destroyed, or only suspended, must depend upon the instrument which they execute, as the interpreter of their intentions. Clancy on Married Women, 34.

That the instrument now under consideration is sufficient to vest the property absolutely in the wife, see Clancy, 43, 51; 2 Roper Hus. & W., 157; 2 Story Eq. §§ 1378-1383.

Mr. Coxe, in reply, insisted, that, if these defences had been made at law, the judgment must have been decisive of *78] the husband's *rights. The objection to the bill of interpleader is not technical. The rule is positive, that no such bill shall be filed in such a case. Clancy says there must

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be a manifest intention to give the wife an exclusive right. This is not apparent either in the deed or the will. The will only gives the property to Ann Marshall, but does not exclude the husband.

Mr. Jones referred to 7 Johns. (N. Y.), Ch., 229, and 6 Gill & J. (Md.), 349, to show under what circumstances the court would consider the husband as being shut out.

Mr. Justice CATRON delivered the opinion of the court.

Robert Marshall filed his bill against Suaan G. Beall, to recover two funds held by her as trustee for Ann Marshall, the late wife of the complainant. The larger fund sued for was fifteen hundred dollars, with the addition of some interest that had accrued on it, at the time it was received by the trustee. In 1830, Robert Marshall and Ann Berry, both of Maryland, were about to intermarry, and before the marriage took place agreed in writing that the said Ann should hold in herself all right, title, and interest to the following funds of her own, to wit: one hundred and fifty shares of stock of the Patriotic Bank, on which ten dollars for each share had been paid; also, one hundred and thirty-seven shares of stock in the Central Bank of Georgetown, on which eleven dollars to each share had been paid; and three thousand five hundred dollars in bonds on Charles Glover. The marriage took place, and a portion of the property sought to be secured to the wife by the foregoing agreement having fallen into the hands of the husband, further to secure the wife in some portion of her property, another agreement was made in May, 1834, to which Marshall and wife, and Susan G. Beall, as trustee, are parties. First, the husband and wife conveyed to Miss Beall a tract of land, the property of Mrs. Marshall, to hold in trust for the use of the husband and wife during their joint lives, and for the separate use of the husband for life, if he was the survivor. Then follows the three thousand five hundred dollar debt from Glover, secured by the first articles, and reduced to two judgments. This debt and the land seem to have been the only property left in 1834 to either party. The use of the land was fairly divided; and of the debt from Glover the wife very generously gave the husband the larger portion, "to his sole and separate use, free and clear of the marriage contract of 1830." And then she reserved to herself the smaller judgment of fifteen hundred dollars, in very nearly the same language; the trustee was to hold the fund "for the sole and separate use of the said Ann, her *executors, [*79 administrators, and assigns, free and clear from any control or demand of the said Robert Marshall." The wife retained

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the power of appointment in regard to the land and the fund, but failed to exercise the power. She died intestate, and as by the laws of Maryland the husband was her administrator by mere force of law, he now claims to recover the fund from the trustee, and to retain the money by force of his marital rights. And the question presented for our decision is, whether the husband only made a temporary surrender of his marital rights during the coverture, or whether he abandoned them altogether. This depends on the intention of the parties, as expressed in the marriage articles. By the first agreement we do not doubt the wife desired, and really intended, to retain her property after the marriage as if she was a feme sole; but the agreement was vague, and it is doubtful whether the husband's marital rights did not attach; then he stood as trustee himself, and might, and obviously did, use the property. Under these circumstances, the article of 1834 was entered into, and the wife secured in her separate use as if she was a feme sole; and, in consideration of a division of the wife's property with the husband, he abandoned all claim, founded on his marital rights, to that part secured to the wife. We think that the terms of the agreement of 1834 sufficiently show that the intention of the parties was to carry the title of the fund beyond the period of the wife's death, and to exclude the husband. And in this conclusion we are supported by the opinion of the Court of Appeals of Maryland, in the case of *Ward v. Thompson* (6 Gill & J. (Md.), 349), and in the soundness of which opinion we fully concur.

But there was another fund vested in Miss Beall by the will of Ann T. Beall, the mother of Susan G., the trustee, and of Mrs. Ann Marshall; and as respects this latter fund, also, the court below dismissed the complainant's bill, on the ground, as we suppose, that his marital rights never attached to it. The correctness of this decree depends on the will of Mrs. Beall, the clause of which vesting in trust this legacy is as follows:—

“To my daughter, Amelia Dorsett, the sum of four hundred dollars, loaned to her some years ago. I give and bequeathe to my daughter, Ann Marshall, the sum of four hundred dollars, and hereby appoint my daughter, Susan G. Beall, her trustee, to hold and retain the whole amount in her hands, and let the said Ann Marshall, wife of Robert Marshall, have some part or parcel of the money occasionally, as she may stand in need, but to be paid out to her at the discretion of my trustee, Susan G. Beall.”

*80] The will was made in 1832, and is altogether independent of the marriage articles. Its granting part limits the use of the fund exclusively to Mrs. Marshall's own

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use and benefit; there is no disposition of the property in the event of her death; as, for instance, to the next of kin of the devisee. In *Watt v. Watt*, 3 Ves., 244; *Garrick v. Camden*, 14 Id., 372, and in *Bailey v. Wright*, 18 Id., the cases turned on a provision, that for want of appointment the property should go over to the next of kin of the deceased; and this was held to be a limitation that excluded the husband, he not being of the next of kin. But we think there is no doubt, that, if such a limitation over had not existed, the English courts would without hesitation have adjudged the fund to the husband. Such is the plain inference from these and other cases of the same class. On the wife's death, he is entitled to all the undisposed of choses in action of the deceased wife. This fund was not disposed of at her death; it does not belong to the trustee, and is subject to be distributed according to the laws of Maryland, and by these laws the husband is entitled in exclusion of the next of kin of the deceased wife. As to this fund, the bill will be sustained, and for so much the decree will be reversed. And the bill of Amelia T. Dorsett will also be retained as part of the proceeding in the court below on the cause being remanded there for further proceedings; when the Circuit Court will take an account between the complainant, Robert Marshall, and Susan G. Beall, in which they will charge the complainant with any moneys he may owe said Susan G., and for the balance of the sum of four hundred dollars, with such interest as the court may find to be reasonable and proper; a decree will be rendered for said Marshall, either out of the moneys due from Amelia T. Dorsett, or out of the fund in the hands of Susan G. Beall, the trustee. And it is ordered, that one half the costs of this appeal be paid by the appellant, Robert Marshall, and that the other half of said costs be paid by Susan G. Beall out of the trust fund of fifteen hundred dollars in her hands; and that as to all other costs, the court below shall adjudge their payment on the final decree as in the discretion of that court may be deemed proper.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this case be and the same is hereby reversed, and that this cause be and the same is hereby *remanded to the said Circuit Court, to be

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proceeded with in conformity to the opinion of this court, and that each party pay his own costs in this court.

JOSÉ ARGOTE VILLABOLOS, MARIE ROSE, AND FRANCOIS FELIX, MARQUIS DE FOUGERES, APPELLANTS, v. THE UNITED STATES.

By the act of May 23d, 1828 (4 Stat. at L., 284), relating to private land claims in Florida, appeals from the Superior Court of the Territory of Florida are governed by the laws of 1789 and 1803.

Therefore, where an appeal was not made in open court, and at the term at which the final decree was passed, a citation was necessary, which must be signed by a judge, and not by the clerk. See *United States v. Hodge*, 3 How., 534.¹

The act of 1828, above mentioned, allowed appeals to be prosecuted within four months, and placed them, in other respects, upon the same footing with writs of error under the act of 1803. Writs of error and citations are returnable to the term of the appellate court next following; and unless the writ and citation are both served before the term, the case is not removed to the appellate court.²

Consequently, where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion.³

THIS was an appeal from the Superior Court of East Florida.

The case being dismissed for want of jurisdiction, it is unnecessary to do more than refer to the circumstances, which are fully stated in the opinion of the court.

Mr. Mason, then Attorney-General, had moved at a preceding term to dismiss this case, upon the ground of its being irregularly brought up.

It was now argued by *Mr. Clifford*, Attorney-General, for the motion, and *Mr. Yulee*, against it.

Mr. Clifford, for the motion.

The points relied on by the United States for dismissal of the appeal in this case are,—

1st. That there is no citation issued according to law; the citation in the record being signed by *the clerk* of the Superior Court of East Florida instead of *the judge*, in pursuance of the twenty-second section of the Judiciary Act.

2d. That there is no allowance of the appeal.

¹ CITED. *Murdock v. City of Memphis*, 20 Wall., 625.

² FOLLOWED. *United States v. Curry*, post, *106; *Steamer Virginia v. West*, 19 How., 183. CITED. *Woolridge v. McKenna*, 8 Fed. Rep., 664.

³ DISTINGUISHED. *Mussina v. Carazos*, 6 Wall., 358, 359. FOLLOWED. *Kail v. Wetmore*, 6 Wall., 451; *Edmonson v. Bloomshire*, 7 Id., 309.

1st. The counsel of the appellants contends, that the citation is signed according to the practice of the Territorial courts of Florida, which must govern this question. It is, however, submitted, that the practice of these courts does not afford the rule to govern appeals in land cases under the special jurisdiction, with respect to them, conferred on the judge of the Superior Court of East Florida.

*A slight examination of the acts of Congress on the subject will satisfactorily demonstrate this proposition. [*82

By the sixth section of the act of the 23d May, 1828 (4 Stat. at L., 284), it is provided, that certain claims to land within the Territory of Florida shall be received and adjudicated by the judge of the Superior Court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the district judge and claimants in the state of Missouri, by the act of Congress, approved 26th May, 1824, entitled "An act enabling the claimants to lands within the limits of the state of Missouri, and Territory of Arkansas, to institute proceedings to try the validity of their claims."

And by the seventh section it is enacted, that it shall be lawful for the claimants to land as aforesaid to take an appeal, as directed in the act aforesaid, from the decision of the judge of the district to the Supreme Court of the United States, within four months after the decision shall be pronounced.

And by the twelfth section it is enacted, that the petitions were to be filed within one year from the passage of the act; and if, on account of the neglect or delay of the claimant, they should not be prosecuted to a final decision within two years, they were forever barred both at law and in equity.

A subsequent act was passed on the 26th May, 1830 (4 Stat. at L., 406), which, by its fourth section, in effect, revived the act of 1828.

It was, however, under the act of 1828 that the petition in this case was filed; and it is clear, beyond all controversy, that the forms of proceeding were to be the same as those prescribed to the district judge and claimants in the state of Missouri, by the act of 1824, hereinafter mentioned.

The act of 1824 (4 Stat. at L., 52), the rules of proceeding under which were made the rules of proceeding in the Florida cases, by its first section enacts, that it should be lawful for any person claiming lands in the state of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, "to present a petition to the District Court of Missouri," setting forth their claims. The second section provides, that the proceedings are to be conducted according to

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the rules of a court of equity, and that "in all cases the party against whom the judgment or decree of the said District Court may be finally given shall be entitled to an appeal within one year from the time of its rendition to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

*83] At the time this act passed, the state of Missouri was not embraced within any circuit; but the federal jurisdiction was exercised by the district judge, under the act of the 16th March, 1822 (3 Stat. at L., 653), entitled "An act to provide for the due execution of the laws of the United States within the state of Missouri, and for the establishment of a District Court therein." By the second section, the state of Missouri was created a district, with one judge, to be called the district judge, who should "in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district" under the Judiciary Act and the act of the 2d March, 1793, being the act in addition to the Judiciary Act.

The tenth section of the Judiciary Act (1 Stat. at L., 77) prescribes the mode in which appeals were to be taken from the District Court of Kentucky to the Supreme Court, as follows:—"And writs of error and appeals shall lie from decisions therein to the Supreme Court, in the same causes as from a Circuit Court to the Supreme Court, and under the same regulations."

It is clear, therefore, that citations, in the case of appeals from the District Court of Kentucky, were subject to the rules prescribed by the twenty-second section of the Judiciary Act; that the rules applicable to Kentucky were adopted for Missouri; and that the judge of the Superior Court of Florida was to adjudge these land cases according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants in Missouri. The legislation of Congress on the subject is plain and distinct, as it seems to me, and the local practice of Florida has nothing to do with the question, and furnishes no guide whatever to regulate the proceedings.

It therefore appears to me that the case of the *United States v. Hodge*, 3 How., 534, is directly in point.

2d. No appeal was taken in open court at the term when the decree was made rejecting the claim, or at any other time. The claim was rejected 10th September, 1838. On the 25th November following, the solicitor of the appellants filed in

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the clerk's office a notice of appeal, but no allowance thereof was ever made.

It is insisted that a notice thus filed in the clerk's office, unaccompanied by any other act of the party, and without the knowledge either of the opposing party or of the court, and without any approval by the judge before whom the cause was tried, cannot be regarded as an appeal effectually taken. It was not an appeal in fact, but a mere notice of an intention to *carry up the case for revision. It is not denied [*84 that the right of appeal, when claimed in open court during the term when the cause was tried, is an absolute right, and one which the court has no power to deny; but when subsequently claimed in vacation, it must be approved or allowed by the court, otherwise it might be resorted to for purposes merely wanton, or for delay, and would operate as a surprise upon the opposite party. *Yeaton v. Lenox*, 7 Pet., 220.

The appeal, under the circumstances of this case, was not prosecuted in due time, but must be considered as having been abandoned before the citation was issued.

It is reasonable to conclude, after a delay of more than five years, that the party had waived any right which he acquired by filing the notice of appeal in the office of the clerk of the court. Whatever may be the effect of a notice thus filed, it cannot remain available indefinitely. The appeal must be claimed and allowed within the time prescribed by law. The mere filing of the notice within the time allowed to take the appeal is insufficient to secure the right, unless the appeal be perfected within a reasonable time. The delay of more than five years raises the presumption that the right to appeal had been abandoned, or waived, before the citation was issued, or that the notice was not filed in good faith.

If the party may assert the right in this case, after more than five years have elapsed since the notice was filed, when would the right to prosecute the appeal cease? The practice, if sustained, would introduce great looseness into legal proceedings, and create confusion and uncertainty in the rights of property over which such a notice of appeal was permitted to hang. It is often the main purpose of an appeal to secure a new trial, which it is always desirable to have during the lifetime of the witnesses who testified in the court below. If this practice be sustained, a party might purposely defer his appeal, and wait the events which would deprive his adversary of the testimony upon which he had relied in the former trial.

There must be some limit to the period within which the appeal may be prosecuted. It will be found upon examination, that, in the Florida cases heretofore brought up for

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revision, the appeal in every instance was in fact prayed for in open court, and in presence of the opposing party. In such cases no citation is necessary, and it was wholly immaterial whether the citation was signed according to law, or issued by the clerk. Moreover, in those cases, the opposing counsel having entered their appearance, the defect was cured. It is clear, to my mind, that no aid can be drawn from those precedents to sustain the present proceedings. It appears *85] to be well settled, *that no citation is necessary when the appeal is prayed for and allowed in open court. The San Pedro, 2 Wheat., 142; *Reily v. Lamar*, 2 Cranch, 349; *United States v. Hooe*, 3 Id., 79.

It was not my intention to waive any of the rights of the United States in this case, and I have so apprised the counsel, since the printed argument of the appellants was filed. What I intended to say in the argument, I have now to repeat, and it is, that when the appeal is regularly allowed by the presiding judge within the period prescribed by law, a legal citation may issue and be served after that time, provided it be at least thirty days before the return-day of the writ of error.

I have also to refer to *Parish v. Ellis*, 16 Pet., 451.

Mr. Yulee, against the motion to dismiss.

The objections in this case are very technical.

1. That the citation does not conform to the 22d section of the Judiciary Act of 1789, upon the force of which the case of *United States v. Hodge*, 3 How., 534, was decided.

The act cited has no application to the present case because it possessed no obligation upon the court from which the record comes.

The appeal comes neither from a District nor from a Circuit Court of the United States, to which, alone, the 22d section applies.

The Superior Court of Florida was a legislative, not a constitutional, court. It composed no part of the federal judicature, but was simply a Territorial court, for territorial purposes. Its powers were defined by special enactment of Congress, and within the scope of those powers the Territorial legislature regulated its practice.

No appeal was authorized from the Superior Court of Florida to the Supreme Court of the United States. From the Court of Appeals of the territory only could appeals be made to the Supreme Court. See the organization of the judicial system of Florida, Act of 26th May, 1824, 4 Stat. at L., 45.

No general laws of the United States had force within the

territorial limits, unless expressly extended to that territory by Congress.

The laws of the United States in force in Florida will be found specified in 3 Stat. at L., 657.

The 22d section of the act cited was never considered as of force in Florida, because not applicable to our judicial system, especially so far as the Superior Court was concerned.

The process acts of the United States were, by some, thought to extend there; but this was not a settled opinion. *The citation, however, in this case, conforms [*86 to the process act.

The process of the Superior Courts of Florida was regulated by the legislature of that territory. See Act of 1832, Duval's Compilation of the Laws of Florida, 91.

The citation in this case conforms to that prescription, and was the same which was used in appeals from the Superior Court to the Court of Appeals (the highest tribunal) in Florida.

The act of 1828, conferring upon the Superior Courts special jurisdiction of land claims, and authorizing appeals, directs no form or style of process. The court very naturally and correctly adopted the form prescribed by the legislature of Florida, and by the process act of the United States, and which was used in cases of appeals to the highest territorial tribunal.

The propriety of this course stands conceded by the United States, from which party an objection comes now, at this late stage, with very ill grace.

It happens that the first appeal taken in these Florida land causes was by the United States, and was brought up upon a citation issued at the instance of the United States, in the precise form used in this case. And that the same form has been invariably used in all the Florida land causes, from the commencement to the present time. A large majority of these appeals were at the instance of the United States. See the Records.

The court would now be required to reject that which had been sanctioned by its own practice, and by the assent and direct adoption of the United States, throughout the course of these cases, commencing, I believe, in 1832. This certainly would be pressing a merely formal objection very far.

But, if I am not mistaken, the first motion filed in this cause did not object to the form of the citation. Not having access to the motion I cannot be certain; but, if I am correct in my impression, the objection to the citation, as well as the objection presented in the second point, may be regarded as

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having been waived. See *McDonogh v. Millaudon*, 3 How., 693. Although unnecessary to this case, it may be questioned whether the process act did not virtually repeal the form and style prescribed in the 22d section of the act of 1789 for citations; that is to say, if a citation may be regarded as being a "writ" or "process" within the meaning of the act of 1792, as I think it may be.

2. The next objection is, that the appeal was never granted by the court.

Whether it was or not I am not prepared to say; and if the *87] court consider the allowance of the appeal material, I will ask *a *certiorari*, presuming that all was done in the court below which was necessary to justify citation, though omitted from the transcript of the record forwarded here.

But an allowance of the appeal by the court was totally unnecessary.

The appeal was a right of the party. The court had no power to refuse, and being without any judicial discretion in the matter, there was neither occasion nor propriety in any application to it to grant.

The statute confers upon the party the peremptory right to appeal.

See act of 1828, sec. 7, Stat. at L., vol. 4, page 285; and act of 1824, sec. 3, same volume of laws, page 53.

If a party chose to appeal, and the court refused to send up the record, the Supreme Court would undoubtedly have allowed a mandamus to coerce it.

All that is requisite in the case of an appeal is that enough be done to remove the record. Enough was done for this purpose when the party signified his adoption of the right of appeal allowed by the statute. The statute had made the allowance; an allowance by the court was supererogation.

That such was the impression upon all sides heretofore will be seen by reference to the record in the very last Florida case acted upon in this court, to wit, the case of Darley's Heirs, decided at the last term. It will be seen in that case, that, although the appeal was taken in term time and in open court by the United States district attorney, no application was made to the court for an allowance of the appeal, and no allowance was granted.

In this case, the appeal was taken in vacation, and the mode pursued was the only one practicable.

In fact, the requirement of an allowance by the court would defeat the purpose of the law. The party was allowed four months to decide his mind as to an appeal. The judge was almost continually in motion over a very extensive circuit,

and in attendance upon the Court of Appeals at Tallahassee. A term for trial of land causes occurred only once in the year, and the effect of a requirement such as proposed would have been to send a party in chase of the judge all over the Territory, and to abridge very materially the time intended to be allowed for considering his interest and deciding upon appeal.

3. That the appeal was not prosecuted in due time.

This objection, I understand from the Attorney-General, has been abandoned by him. It requires, therefore, no reply.

But to prevent any impression that the parties interested were indifferent as to their appeal, I will state, as the reason of *the delay in bringing the case up, that the [*88 proprietors of the grant reside in a foreign country (France); that about the date of the appeal, the counsel and agent of the claimants, stricken by the hand of God, had become imbecile in mind and incapable of business; and that it was not until long afterwards the parties in France became sufficiently apprised of his condition to make other provision for their interests.

In reply to the Attorney-General, I have further to say:—

1. It is conceded that the judge of the Superior Court was required, as stated by the Attorney-General, to receive and adjudicate claims to land according to the rules, &c., prescribed to the district judge of Missouri; but it does not by any means result from this, that in citing an appellee the clerk was to use any other form of process than one appropriate to the court.

2. No such delay or injury, as suggested by the Attorney-General, could result to the appellee from the mode of taking an appeal adopted in this case. The party interested can always, at the end of four months (the time allowed for appeal), ascertain if an appeal has been made; and if it has, the 30th rule of the Supreme Court will insure an early docketing and disposal. In this case, the laches of the United States is without excuse; while the delay on the part of the appellants was the result of misfortune.

The case in 16 Peters was from the Court of Appeals, and has no application.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an appeal from the Superior Court of East Florida.

It appears that on the 18th of April, 1829, a petition was filed by the appellants in the Superior Court, claiming title to certain lands under a Spanish grant. The district attorney answered, denying the validity of the claim, and testimony was taken on both sides, and the case proceeded to final hear-

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ing. And on the 10th of September, 1838, the court decreed that the claim was not valid, and that it be rejected.

No appeal was taken at the time, but afterwards, on the 25th of November, in the same year, an appeal was filed in the clerk's office by the solicitor for the appellants. No citation, however, issued, nor was any further step taken in this appeal until August 9, 1844, when a citation issued, signed by the clerk of the Superior Court, which, on the 13th of the same month was served on the district attorney. And under this appeal and citation the record was filed by the appellants in this court, on the 12th day of December, 1844.

A motion has been made on the part of the United States *89] to dismiss this case,—1st, upon the ground that the citation is not *signed by the judge; and 2d, that the appeal was not taken within the time limited by law.

The proceedings in the Superior Court of Florida were had under the act of Congress of May 23, 1828. It has been urged in the argument for the appellant, that appeals to this court in such cases are not governed by the acts of 1789 and 1803, and may be brought up by a citation signed by the clerk. And it was suggested that such had been the usual mode of prosecuting appeals from the Superior Court of Florida, and sanctioned by the practice of this court.

With a view of ascertaining the practice upon this subject, we have caused the records in former cases to be examined; but no case has been discovered in which the appeal was taken in the clerk's office, and the citation signed by the clerk. So far as the examination extended, all of the cases were brought here by appeals taken in open court. And if there are any cases like the present in which this court has treated the appeal as valid, they must have passed *sub silentio* and without having attracted, in this respect, the attention of the court. It is true, that, in all the former cases from the Superior Court of Florida, the citation appears to have been signed by the clerk. But as they were taken in open court, no citation was necessary under the acts of 1789 and 1803. It was so held in the case of *Yeaton v. Lenox*, 7 Pet., 220. And these appeals were therefore regularly before the court,—according to the last mentioned acts of Congress,—the citations signed by the clerk being altogether unnecessary and unimportant. The question is, therefore, now for the first time presented, whether such a citation is sufficient where the appeal is entered in the clerk's office, and not taken in open court.

The laws of Congress upon this subject are, unfortunately, a good deal complicated. But the view taken in the argu-

ment of the Attorney-General is undoubtedly the correct one. The sixth section of the act of 1828 provides that the proceedings in the Superior Court of Florida shall be according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants in the state of Missouri by the act of May 26, 1824; and the seventh section provides that the claimant may take an appeal as directed in the act aforesaid to the Supreme Court within four months after the decision shall be pronounced. The District Court of Missouri, to which the above-mentioned act of 1824 refers, was established by the act of March 16, 1822, and the second section of this act provides that it should in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky District under the *act of March 2, 1793. And the tenth [*90 section of the last-mentioned act directs that writs of error and appeals shall lie from the decisions of the District Court of Kentucky to the Supreme Court in the same causes as from a Circuit Court, and under the same regulations. Thus, in order to determine how appeals must be prosecuted from the Superior Court of Florida, under the act of 1828, we are in the first place referred to the law in relation to the District Court in the state of Missouri, and that law refers us again to the act in relation to the District Court of Kentucky, and that law in express terms refers us to the laws regulating appeals from a Circuit Court of the United States,—that is to say, to the acts of 1789 and 1803. Appeals from the Superior Court of the Territory of Florida, therefore, are governed by these acts; and consequently the case of *The United States v. Hodge*, 3 How., 534, is decisive against the present appeal. When the appeal is not made in open court, and at the term at which the final decree is passed, a citation is necessary; *The San Pedro*, 2 Wheat., 142; and where necessary, the law requires it to be signed by the judge; and we have no power to receive an appeal in any other mode than that provided by law.

But if the citation had been properly signed, it is too late. By the act of 1828, the claimant must appeal within four months; and the act of 1803 subjects appeals to the rules and regulations prescribed by law in cases of writs of error. Now the writ of error is always returnable to the term of the appellate court next following the date of the writ; and the citation required by the act of 1789 (which is a summons to the opposite party to appear) must be returnable to the same term, and unless the writ and citation are both served before the term, the case is not removed to the appellate court, and

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the writ, if returned afterwards, will be quashed. *Lloyd v. Alexander*, 1 Cranch, 365; *Bailiff v. Tipping*, 2 Id., 406; *Wood v. Lide*, 4 Id., 180; *Pickett's heirs v. Legerwood*, 7 Pet., 144; and *Yeaton v. Lenox and others*, 8 Id., 123. It follows that, where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered.¹ *Yeaton v. Lenox*, 7 Pet., 220. The entry of the appeal in the clerk's office is analogous to the issuing a writ of error; it is returnable to the next term of the appellate court; and a citation to the opposite party to appear is necessary. Here the entry of appeal was made in the clerk's office within four months from the date of the decree, and therefore within the time limited by law. The citation might, upon *91] such an entry, have been issued after the expiration of the four months. *But it must be issued and served before the term of this court next succeeding the entry of the appeal. And unless this is done, the case is not brought before this court. There was no such citation in the present case, and the entry in the clerk's office, standing by itself, was not a removal of the case by appeal, according to the act of Congress. There was, therefore, no appeal within the time limited by law.

The construction of the act of 1828 contended for by the appellant would defeat its evident policy and intention. It was the object of the law to obtain a speedy settlement in the judicial tribunals of claims made under Spanish titles, many of which were disputed by the United States, as unfounded or fraudulent. This is manifest from the whole scope of the law; and provisions are introduced for the purpose of compelling the claimants to prosecute their claims to final judgment without any unnecessary delay. And it was to accomplish this object, that, instead of limiting the time for appealing to the Supreme Court to five years, as in the act of 1803, it is reduced to four months. But if this appeal can be maintained, there is no limitation in cases of this kind. For here, after filing his appeal in the clerk's office, it has been suffered to remain there for nearly six years, without any citation to notify the district attorney that an appeal had been prayed, or taking any step to prosecute it. This entry without a citation was a mere nullity.

Upon both of the grounds, therefore, above stated, the appeal must be dismissed.

¹ DISTINGUISHED. *Dayton v. Lash*, 6 Id., 451; *City of Washington v. Denison*, Id., 496; *Edmonson v. Bloomington*, 3 Wall., 50; *Kail v. Wetmore*, 7 Id., 309.

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Order.

This cause came on to be heard on the transcript of the record from the Superior Court of the District of East Florida, and it appearing to the court here that this appeal is barred by the lapse of time, and that the citation is not signed as directed by the act of Congress, it is therefore now here considered and decreed by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Superior Court, to be proceeded in according to law and justice.

* WILLIAM C. BRASHEAR, PLAINTIFF IN ERROR, v. JOHN Y. MASON, SECRETARY OF THE NAVY, DEFENDANT.

Under the joint resolutions of Congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The transfer of the navy of Texas related exclusively to the ships of war and their armaments. A mandamus against the Secretary of the Navy will not lie at the instance of an officer, to enforce the payment of his pay.¹

¹ CITED. *Ex parte De Groot*, 6 Wall., 497. S. P. *United States v. Guthrie*, 17 How., 284.

It is well settled that a *mandamus* will not lie to the head of a department to compel the performance of any other than a purely ministerial act. *Decatur v. Paulding*, 14 Pet., 497; *United States v. Seaman*, 17 Id., 225. In *Reeside v. Walker*, 11 How., 272, a *mandamus* to the Secretary of the Treasury, to compel the payment of a debt due by the United States, was refused, because no appropriation had been made. See also *Commonwealth v. Boutwell*, 13 Id., 526. In *United States v. The Commissioner*, 5 Wall, 563, and in *The Secretary v. McGarrahan*, 9 Id., 298, the writ was refused, to compel the Secretary of the Interior to issue a patent for land.

Mandamus to the fiscal officers of the state, was denied a creditor of the state, in *State v. Dubuclet*, 28 La. Ann., 85, and in *State v. Brown*, Id., 106. In *State v. Smith*, 8 So. Car., 127, it is held that a *mandamus* requiring a fiscal officer of the State to make payment of a demand, will be refused, unless the relator shows that the respondent is in charge and control of funds legally applicable to the

demand. Compare *State v. Clinton*, 28 La. Ann., 47; *Same v. Same*, Id., 72; *Buffington v. Clinton*, Id., 132; *State v. Johnson*, Id., 932; *State v. Hobart*, 12 Nev., 408; *McLaughlin v. County Comm'rs*, 7 So. Car., 375; *Chalk v. Darden*, 47 Tex., 438; *Milliner v. Harrison*, 32 Gratt. (Va.), 422; *State v. Hoffman*, 35 Ohio St., 435; *Ambler v. Auditor-General*, 38 Mich., 746; *Peters v. Massey*, 33 Gratt. (Va.), 368; *Pritchard v. Woodruff*, 36 Ark., 196. The performance of even a mere ministerial duty by a public officer, will not be compelled by *mandamus*, where the evidence shows that his ability to perform such duty depends on the co-operative action of a third person who is not before the court. *State v. Cavanac*, 30 La. Ann., Pt. I., 237. The writ will lie to compel the State Auditor to draw a warrant on the treasurer: whether payment of the warrant be made or not, rests with the latter officer. *State v. Clinton*, *supra*; *State v. Jumel*, 30 La. Ann., Pt. II., 861. A governor of a State will not be compelled by *mandamus* to issue state bonds, ordered to be issued, by the legislature. *Jonesboro', &c., Turnp. Co. v. Brown*, 8 Baxt. (Tenn), 490; but the performance of

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THIS case was brought up by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

It was an application to the Circuit Court for a mandamus, under circumstances which are thus stated by that court in its opinion.

William C. Brashear petitioned the court for a rule on John Y. Mason, Secretary of the Navy of the United States, to show cause why a mandamus should not issue, commanding him, as Secretary of the Department of the Navy, to cause payment to the petitioner of his just dues as an officer in the navy for the time past since the annexation of Texas to the United States.

The petitioner states, that, in pursuance of the constitution and laws of the republic of Texas, he was, on the 23d of June, 1845, by the then president of the said republic, commissioned as a commander in the navy of the republic, and forthwith entered into service under orders from the department of war in Texas, and continued in that service from the 23d of September, 1844, thenceforth, and was so in service when the joint resolution of the Congress of the United States passed for annexing Texas to the United States was approved, and when the said state of Texas was admitted into the Union and Confederacy of the United States of America, and was actually in service and a commander in the navy of Texas when the ship Austin, brigs Wharton and Archer, and schooner San Bernard, armed vessels of war of and belonging to the Texan navy, were delivered over to the United States, under the terms and articles of compact and agreement between the United States of America and the republic of Texas; and as such he is advised that he is in good faith, and in accordance with the said articles of agreement, compact, and treaty of annexation, an officer in the navy, and entitled to his pay and emoluments from the United States.

The petitioner further states, that he never has resigned his commission, nor been cashiered, nor dismissed; that he has *93] regularly reported himself for duty under the said commission *to the Secretary of the Navy of the United States, and has demanded his pay as an officer, but the Secretary of the Navy of the United States has hitherto refused, and yet refuses, to pay him, or to recognize him as an officer

a mere ministerial duty, not resting in the governor's discretion, may be enforced by the writ. *Gray v. State*, 72 Ind., 567; and see *Berryman v. Perkins*, 55 Cal., 483; *People v. Cul-*

lom, 100 Ill., 472. In Pennsylvania, the courts have no power to issue this writ to state officers. *Commonwealth v. Wickersham*, 90 Pa. St., 311.

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of the navy. He states further, that he is informed and advised by counsel learned in the law, that for his pay and emoluments as an officer of the navy of Texas, transferred to the United States by the terms of the annexation aforesaid, he is entitled to have and receive, up to the 1st of October, 1847, the sum of \$2,100; whereof he has received from the treasury of the United States no more than the sum of \$689.20, which was paid him by order of the Secretary of the Navy of the 19th of March, 1847. And he is also advised, that he is entitled to his continuing pay and rank as an officer in the navy of the United States, by virtue of the said agreement, compact, treaty, and transfer before mentioned.

Notwithstanding all which, the Secretary of the Navy of the United States refuses to order payment to him for the time past since the said annexation and transfer, or to recognize him as an officer in the navy of the United States.

That part of the second section of the joint resolution of the 1st March, 1845, for annexing Texas to the United States, which is applicable to this case, is in the following words:—

“Said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence, belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to, or may be due and owing, said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of the said republic of Texas; and the residue of said lands, after discharging the said debts and liabilities, to be disposed of as the said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States.”

The Circuit Court overruled the motion for a mandamus, and rejected the prayer of the petition, to which judgment Brashear excepted, and upon this exception the case came up to this court.

It was argued by *Mr. Bibb* and *Mr. Jones*, for the plaintiff in error, and by *Mr. Clifford* (Attorney-General), for the Secretary of the Navy.

A portion of the argument on behalf of the plaintiff in error was as follows:—

*Whether the applicant has a right to the money which he demands by his petition and motion depends [*94

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upon the proper meaning and effect of that part of the convention for annexation and union which relates to the cession by Texas of her "navy," and the acceptance thereof by the United States.

The proposition flowed from the United States to Texas. Texas accepted, and made the concession and delivery, in compliance with her sense of the proposition; and the United States accepted.

The first question is, What is the sense in which this condition was presented by the United States, and the sense in which Texas accepted?

This may be solved by considering, first, the meaning of the word "navy," as established by general use; second by the circumstances of the parties proposing and accepting; third, by the conduct of the parties in acting under the convention immediately after it was ratified.

1. As to the meaning established by use, "navy" is a mixed mode of speech, a complex idea, including the insensible, inert matter whereof the vessels of war are composed; also the armaments and equipments; and also the active, living bodies and minds necessary to give mobility, direction, utility, and efficiency to the *vis inertiae* of the vessels and armaments.

Inanimate matter cannot think, plan, protect, drive off, pursue, blockade, and give safe convoy. Officers and sailors are indispensably necessary to make a navy.

The idea of a navy composed solely of vessels and guns, without officers and seamen, is as absurd as the idea of an army composed solely of muskets, swords, pistols, and big guns, without officers and soldiers to wield them.

The law of the United States entitled "An act for the better government of the navy of the United States" (2 Stat. at L., 45), contains forty-two articles to rule and govern the officers and privates in the navy of the United States, which is an authoritative definition, not to be gainsaid, that officers and privates are component parts of a navy. The law of the navy is to govern the officers and the privates who compose the navy, not to govern ships and guns, that cannot offend nor commit crimes, nor be the subjects of accusation before naval courts-martial.

2. As to the circumstances of the parties proposing the cession and making the cession of the navy and navy-yards, docks, ports, and harbors, the United States, by their Constitution, had power "to provide and maintain a navy;" *95] their *situation, interests, and duties imperiously demanded the execution of that power. The state of Texas, if

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admitted into the Union, could no longer keep ships of war in time of peace without the consent of Congress; and yet a navy would be essential to guard and protect the coasts and harbors of Texas after the union, as it had been before the proposed conditions and guarantees for the union. The people and government of Texas could not, did not, understand the proposal to cede the navy to the United States as intended to destroy it, any more than that the proposal to cede the ports and harbors was intended by the United States for the purpose of obstructing or rendering them useless. The natural sense in which they were presented, understood, and accepted was, that the navy, ports, and harbors were to be maintained, preserved, and used for their several and appropriate purposes.

But the circumstances under which the people and government of Texas were, in relation to their navy, so well known to public history and to fame, forbid the idea that the United States intended the proposal, or that Texas would have acceded to it, as containing a violation of the obligations due to the officers of the navy, who had so repeatedly, so gallantly, so gloriously, and so usefully fought the enemies of Texas, beat off the foes who came to invade, pursued them into their own ports and harbors, there blockaded them, and levied contributions to assist the means of Texas in their war of independence. The many naval battles between the vessels of war of Texas and those of Mexico, in the year 1836, and after, in which the navy of Texas fought against the very superior force of the Mexicans, always sustaining the honor of the flag, and adding new brilliancy to the lone star, were just foundations of national pride, as well as of national gratitude towards the navy. The belief, that, by the proposal for ceding the navy of Texas to the United States, the officers would have been deprived of their commissions and pay in the navy so transferred, turned adrift to seek a precarious subsistence in some other calling, for which their long and gallant services in the navy of Texas had unfitted them, would of itself have been cause for rejecting the proposal on the part of Texas. Such fell ingratitude would have tarnished the escutcheon of Texas. The words of the proposal, the circumstances of the parties to the convention, the end proposed, left no ground for suspicion, that such an act of injustice and ingratitude to the officers of the navy was concealed in the proposal made by the United States.

3. The conduct of the parties in acting under the convention immediately after it was ratified.—The government *of Texas issued an order to the commander [^{*96} of the navy for delivery to the United States; the United

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States received the navy for officers, privates, and vessels, and kept them in service and pay for the time shown in the petition and the documents. Texas had no standing army, nor officers of a regular army upon permanent establishment. She had some companies of rangers enlisted as volunteers for the limited period of three months, not expired when Texas was admitted into the Union. These rangers, with the noted gallant Major Jack Hays at their head, were turned over to the command of General Taylor, served out the time for which they had been enrolled, and performed under his command eminent services well known to fame.

Such were the actings and doings by the parties to this convention, when the mutual sense of its meaning was fresh in memory, and the faith of the treaty prevailed.

The word "navy," as used in the Constitution of the United States, has never been supposed by any one to mean ships only. By established usage, and by various acts of Congress, "navy" comprehends both ships and men.

There is nothing in the convention itself, nor in the circumstances attending the parties, nor in the end proposed, which requires that the terms of the convention should be understood in a confined, restrictive sense. On the contrary, all the circumstances unite in requiring the expressions to be taken in the most extensive sense. For surely the authors of the proposal, and the party accepting it, did use the word "navy" in its extensive sense, because it was applied to the existing navy of Texas, known to be armed, officered, and manned; known to have gloriously fought the battles of Texas, and kept in check the naval power of Mexico, which nation had not then acknowledged the independence of Texas, but kept up the threat to subdue the spirit of the revolted province and subject it to the Mexican power.

The counsel for the plaintiff in error then proceeded to show, from several other considerations, that the word "navy" must be construed to include officers and men.

Mr. Clifford (Attorney-General), contra.

There are several views of this question, either of which, as it seems to me, is conclusive against him. He claims pay as an officer of the United States navy.

It is contended that the joint resolution of March, 1845, makes him such officer. The construction contended for by the petitioner is founded entirely on the meaning which he puts upon the word "navy," which in my judgment is entirely erroneous, and cannot be sustained. The resolution contained the terms of a compact between two sovereign and indepen-

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dent States, and by its second condition clearly contemplated *nothing more than an agreement as to the public property, means, resources, and liabilities of Texas. It was the *public property*, and that alone, which was embraced in that provision. Texas was to retain certain public property, and meet her own liabilities; all the residue of her means of public or national defence was to be "*ceded*" to the United States,—a term of grant evidently applicable to *property* and not to *persons*. No ingenuity can change the obvious meaning and sense of a law so plainly written.

The condition, it will be observed, is confined to acts to be done by Texas, and not to duties to be assumed by the United States. Texas binds herself, by acceding to the terms of the resolution, to cede her navy and other public property. The petitioner held a commission under Texas, and had taken the oath of allegiance to her. This did not establish any such relation between the officer and the government as authorized the government to transfer him to the United States, into official responsibilities to which he had not assented, and to which his commission did not bind him. Still less can the United States be held to have taken him into their service by that condition, which imposed on them no duties. The construction contended for would be placing the United States in the attitude of proposing impossible conditions to the government of Texas, for how could Texas cede the services of her citizens?

By a proviso in the naval appropriation act of 4th August, 1842 (5 Stat. at L., 500), it is declared, "That, until otherwise ordered by Congress, the officers of the navy shall not be increased beyond the number in the respective grades that were in the service on the 1st day of January, 1842." The construction contended for is inconsistent with this provision of law, and no implication arising under the resolution of March, 1845, can be held as repealing it. This test as to the intention of Congress is conclusive.

But, further, the construction contended for is wholly inconsistent with the power of appointment, which, by the Constitution, is vested in the President, by and with the advice and consent of the Senate. It is unnecessary to consider any of the qualifications annexed to that provision of the Constitution, as it is very certain they can have no application to the present case. It will not be disputed, that officers in the navy of the United States, under existing laws, must be appointed and commissioned by the President.

Congress has no power, either by treaty or by act of ordi-

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nary legislation, to abrogate this constitutional provision. It
*98] is presumed no authority can be found for the pretension, that *Congress can supersede the necessity of an appointment by the President, by and with the advice and consent of the Senate, in order to constitute an officer in the navy of the United States; and certainly no person can be entitled to pay as such, without a commission from the President, under the existing laws. Such a proposition, so subversive of the Constitution, cannot be seriously entertained.

What was the remedy sought by the petitioner? It was, that the Circuit Court should issue a writ of mandamus, directing the Secretary of the Navy to pay a sum of money to the petitioner, which he alleges is due to him as an officer of the United States navy. At all times this remedy is used by the court with extreme caution, and never in a doubtful case; and only to compel the performance of a mere ministerial act, or to do some specific thing enjoined by law, in which the party has no discretion. Surely this is not a case in which this power of the court should be exercised.

The petitioner has mistaken his remedy. Congress appropriates money for the pay of officers and men of the United States navy; and the right of an officer to pay attaches as a necessary consequence to the rank conferred by his commission. Has he established his rank? Certainly not.

But even if he has established his rank, the Secretary of the Navy can neither pay him nor withhold his pay; that is a question for the accounting officers of the treasury, over whom, in this respect, the navy department can assume no control. The sum stated by the petitioner as received by order of the Secretary of the Navy was paid out of the contingent fund of the department for services rendered by the petitioner, which might have been performed by any citizen holding no commission in the navy. That fund is not chargeable with the pay of officers and men, as is too well known to require any reference to the law. The appropriation for pay is under the general superintendence of the Secretary of the Treasury, and no account for such pay can be allowed until it shall have been passed by the accounting officers in the last-named department. The sum paid to the petitioner was for *services rendered* in taking charge of the property of the United States, and not as being due him as an officer. The petitioner's account as presented shows this. The Secretary of the Navy expressly refused to recognize the petitioner as an officer of the navy of the United States. See Secretary's letter.

The reasons assigned by the Circuit Court for refusing the

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rule are so entirely satisfactory and conclusive, in the view which I take of the question, that I deem it wholly unnecessary to pursue the argument, and have only to append [*99 a copy *of that opinion for the consideration of the court, and to ask their attention to the fact, which appears by the record, that Brashear's commission in the Texas navy bears date *subsequent* to the passage of the joint resolution of Congress.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court held in and for the District of Columbia.

The plaintiff made application to the court below for a mandamus against the defendant, to compel the payment of \$2100 arrearages of pay due him from the government as a commander in the navy of the United States, which application was founded on the following state of facts :

The plaintiff was appointed a commander in the navy of the republic of Texas on the 23d of September, 1844, and continued in its service down to the annexation of the republic to the United States, in pursuance of the joint resolutions of Congress, March 1, 1845, and until Texas was admitted into the Union as one of the states of the confederacy, and was in the actual service of that republic at the time when its navy, consisting of four vessels of war, was delivered over to the authorities of the United States, according to the terms of annexation.

The plaintiff insists, that, according to the terms and conditions of the compact between the two countries, on the transfer of the navy of Texas to the United States, and their acceptance of the same, he became an officer of the United States navy, and entitled to his pay and emoluments as such.

He further states, that he had reported himself to the Secretary of the Navy for duty, and had demanded his pay of the same ; but that the Secretary had refused to recognize him as an officer of the navy, or to make any payment to him as such.

The court below refused the mandamus, and dismissed the application.

The case is now before us for review.

It is not pretended that there has been any stipulation, either by act of Congress or by treaty between this government and Texas, by which the officers of her navy were to become incorporated into the navy of the United States, as a consequence of the annexation ; but it is supposed to result from a proper construction and understanding of one of the

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stipulations contained in the second joint resolution of March 1, 1845. The part material is as follows:—

“Said state (Texas), when admitted into the Union, after ceding to the United States all public edifices, fortifications, *100] barracks, ports and harbors, navy and navy-yards, docks, magazines, *arms, armaments, and all other property and means pertaining to the public defence belonging to Texas, shall retain all the public funds,” &c. (5 Stat. at L., p. 797.)

The argument is, that the term “navy” properly includes, not only the vessels of war, their armaments and equipments, but also the usual complement of officers and crew on board the respective vessels; and that it is in this sense the term is used, and should be understood, in the joint resolutions.

We think not, but, on the contrary, are of opinion that it relates exclusively to the ships of war and their armaments belonging to the naval establishment of Texas, which, according to the compact, were to become the property of the United States.

The two governments were not negotiating about persons holding public employments in Texas, or in respect to any place or provision for that class, on the breaking up of the old government and its reconstruction for admission into the Union, but in respect to her public property, which she was, generally, disabled from holding, under the Constitution of the United States, after her admission, as it fell under the jurisdiction and direction of the federal government.

The resolution provides for ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, &c., and all other property and means pertaining to the public defence.

The phraseology is appropriate for the purpose of conveying the property of the one government to the other, but exceedingly inapt and unfortunate if intended to embrace persons or public officers, as contended for by the plaintiff.

The argument in favor of including the officers of the navy of Texas in the transfer of the ships might be urged with equal force by the officers and hands in charge of the navy-yard, or of those at the time in charge of the fortifications; for the term “navy,” in the connection in which it is used, no more includes, *ex vi termini*, the officers and crew on board, than the term “navy yard” includes the officers and hands in charge of that part of the public property, or the term “fortifications” includes the officers and soldiers of the republic engaged in manning them.

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The construction contended for we think altogether inadmissible, and properly rejected by the court below.

We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States navy, a mandamus would not lie in the court below to enforce the payment.

The Constitution provides, that no money shall be drawn from the treasury but in consequence of appropriations made *by law. (Art. I., § 9.) And it is declared by [*101 act of Congress (3 Statutes at Large, p. 689, § 3), that all moneys appropriated for the use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of these departments, countersigned by the second comptroller.

And, by the act of 1817 (3 Stat. at L., p. 367, §§ 8, 9), it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the object for which they are respectively appropriated, and no others. (2 Stat. at L., p. 535, § 1).

Formerly, the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury, countersigned by the comptroller.¹

In the case of *Mrs. Decatur v. Paulding* (14 Pet., 497), it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear, in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also,

¹ FOLLOWED. *United States v. Boutwell*, 3 MacArth., 182.

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was under the control of the secretary, and the moneys payable on his own warrant.

Still the court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the secretary, on the ground that the court below had no jurisdiction over the case, and, therefore, the question not properly before this court on the writ of error.

The court say, that the duty required of the secretary by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties; that in general, *102] such *duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.¹

The court distinguish the case from *Kendall v. The United States* (12 Pet., 524), where there was a mandamus to enforce the performance of a mere ministerial act, not involving, on the part of the officer, the exercise of any judgment or discretion.

The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy.

Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.

The secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be apportioned among the parties entitled to it.

These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which

¹ FOLLOWED. *United States v. Dinsman*, 7 How., 129; *Reeside v. Seaman*, 17 How., 230; *United States v. Walker*, 11 Id., 290; *The Secretary v. Guthrie*, Id., 304. CITED. *Wilkes v. McGarrahan*, 9 Wall., 312.

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the general creditors of the government, to the payment of whose demands the particular fund is applicable, are interested, as well as the government itself. At most, the secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.

It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals.

For these reasons, we think the writ of mandamus would *not lie in the case, and therefore, also, properly [*103 refused by the court below, and that the judgment should be affirmed.

Order.

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

THE HEIRS OF C. AND M. DE ARMAS, APPELLANTS, v. THE UNITED STATES.

An order of the District Court, sustaining a demurrer to a petition because it is multifarious, and because the names of the persons claiming or in possession of the land which the petitioners allege to belong to them are not set forth, is not a final judgment or decree from which an appeal lies to this court.¹

¹ CITED. *Chappell v. Funk*, 57 Md., 480. *S. P. Miners' Bank v. United States*, 5 How., 213; *Slagle v. Bodmer*, 58 Ind., 465; (but see *Matter v. Campbell*, 71 Id., 512); *Cowan v. East Tennessee, &c. R. R. Co.*, 6 Baxt. (Tenn.), 69; *Fire Dept. Benev. Assoc. v. Farwell*, 5 Bradw. (Ill.), 240; *Parsons v. Parker*, 3 MacArth., 9. A decision overruling a demurrer to the declaration is not final, and therefore not appealable. *Blakely v. Fiske*, Hempst., 11; *Conniff v. Kahn*, 54 Cal., 283; *Church v. Amer. Rapid*

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THIS case came up by appeal from the District Court of the United States for the District of Louisiana.

It was a petition in the District Court relating to land, the circumstances of which it is unnecessary to state any further than they are referred to in the opinion of the court, as the case went off upon a point of jurisdiction. It was argued by *Mr. S. S. Prentiss* and *Mr. Perin*, for the appellants, and *Mr. Clifford* (Attorney-General), for the United States.

That part of the argument of the Attorney-General which related to the point of jurisdiction was as follows:

On the part of the United States it is contended, that the Supreme Court has no jurisdiction under the second section of the act of 1824, or under any other act, unless in cases where the judgment or decree in the court below made *final* disposition of the suit.

This point has been repeatedly ruled, on the twenty-fifth section of the Judiciary Act, by the unanimous judgment of the court, and is believed no longer to be an open question. *Huxton v. Moore*, 2 Wheat., 433; *Gibbons v. Ogden*, 6 Id., 448; *Weston et al. v. City Council of Charleston*, 2 Pet., 449; *Winn's Heirs v. Jackson et al.*, 12 Wheat., 135.

"The word *final* must be understood as applying to all judgments and decrees which determine the particular cause." *Weston et al. v. City Council of Charleston*, before cited, on pages 464, 465.

*104] *The act of 1824 follows very closely the requirements of the Judiciary Act in this respect. The second section provides,—“And in all cases the party against whom the judgment or decree of the said District Court may be finally given shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and

Teleg. Co., 47 Superior (N. Y.), 558. Nor is an order overruling a reply to a counter-claim, as frivolous. *Jones v. Ludlam*, 74 N. Y., 61. But in New York it is held that a judgment for plaintiff on the ground of the frivolousness of defendants' demurrer, is final and appealable. *Manufacturers' &c. Bank v. Kiersted*, 6 Daly (N. Y.), 160. And see *Elwell v. Johnson*, 74 N. Y., 80. But an order sustaining or overruling a demurrer is not appealable, until a judgment, either final or interlocutory, has been entered upon it. *Miller v. Sheldon*, 15 Hun (N. Y.), 220; *Lacustrine Fertilizer Co. v. Lake Guano &c. Co.*, 16 Id., 484; *Cambridge Val-*

ley Bank v. Lynch, 76 N. Y., 515; *Commercial Bank v. Spencer*, Id., 155; *Garner v. Harmony Mills*, 45 Superior (N. Y.), 148. And, in Connecticut, a decision on demurrer to the return of an alternative *mandamus*, awarding the writ, is final and appealable. *New Haven &c. Co. v. State*, 44 Conn., 376. Where a demurrer to a bill in equity is to the entire bill, an order overruling it is appealable. *Chappell v. Funk*, 57 Md., 465; *Hecht v. Colquhoun*, Id., 563. In Alabama any decree sustaining or overruling a demurrer to a bill or cross-bill, is appealable. *Winn v. Dillard*, 57 Ala., 167.

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conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

The appeal is allowed only to the party against whom the judgment or decree may be finally given; and, further, to place the point beyond doubt, in case no appeal be taken, it is specially provided that the judgment or decree of the District Court shall be final and conclusive.

In this case no final decree was made. Some points in the demurrer being sustained, the petitioners appeal. The petition is not dismissed, but, from aught that appears in the record, is still open to a rehearing. It is clearly within the discretionary power of the district judge to allow the appellants to amend and avoid the objections raised. At all events, the final decree has not been passed, and no appeal will lie.

The record does not show that the proceedings in the court below are closed; consequently no case is made within the provisions of law authorizing an appeal. The petition and pleadings are still within the control of the court below.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by appeal from the District Court of the United States for the District of Louisiana.

It appears that a petition was filed by the appellants, claiming an inchoate title to certain lands, under Spanish grants, which they alleged the United States were bound to perfect; but that these lands had been sold by the United States to divers persons unknown to the petitioners. They therefore prayed that the validity of their claim might be inquired into, and that they be allowed to locate the same number of arpents upon the public domain, according to the provisions of the act of Congress of May 26, 1824, § 11, which was extended to Louisiana by the act of June 17, 1844.

The proceedings upon this petition, as stated in the record, appear to have been irregular and confused, and it is unnecessary to state them at large. It is sufficient to say, that the district attorney demurred to the petition, setting forth various causes of demurrer, that the petitioners afterwards amended their petition, and that the district attorney again [*105 demurred; *and after various other proceedings, the record states that "the following judgment was entered on the minutes:—

"The demurrers to the original and to the amended petition of petitioners, submitted to the court yesterday, having been considered by the court, it is now ordered, adjudged, and

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decreed, that the 4th ground of demurrer set forth in the demurrer to the original petition be sustained, and that the 1st, 2d, 3d, 5th, 6th, 7th, and 8th grounds set forth in said demurrer be overruled, it appearing that said last-mentioned grounds of demurrer have been removed by petitioners' amended petition.

"It is further ordered, that the 1st and 2d grounds of demurrer, set forth in the demurrer of respondents to the amended petition of petitioners, be sustained, and that the 3d ground of demurrer, set forth in said demurrer to said amended petition, be overruled."

The grounds of demurrer sustained by the District Court were, that the petition was multifarious, and that the names of the persons claiming or in possession of the land which the petitioners alleged belonged to them were not set forth.

The appeal was taken from the judgment above recited. But evidently that judgment is not a final judgment or decree. For the petition is not dismissed, nor is the title of the petitioners to the land claimed by them finally adjudicated, nor their right to locate the same number of arpents upon the public domain. Nothing is decided but a question of pleading and a question as to proper parties. The petition appears to be still pending in the District Court; and the objections upon which the court decided against the petitioners might be removed, if the appellants desired it, by an application to the court for leave to amend. But if the petitioners did not move for leave to amend, and preferred taking the opinion of this court upon the questions decided against them in the District Court, then, under the opinion given by that court upon the demurrer, it should have proceeded to pass a final decree dismissing the bill. An appeal from that decree would have brought the case legally before this court, and authorized it to examine the grounds upon which the decree had been made.

But as there is no final judgment or decree, we have no jurisdiction, and consequently the appeal must be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel; and it appearing to the court here that there has been no final judgment or decree of the said District Court in this cause, *106] it is thereupon now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed for the want of jurisdiction.

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 THE UNITED STATES, APPELLANTS, v. THOMAS CURRY AND
 RICE GARLAND.

The 9th section of the act of 26th May, 1824, relative to the action of the Attorney-General in cases of appeal, is only directory, and its non-observance does not vitiate an appeal, provided it be taken by the district attorney and sanctioned in this court by the Attorney-General.

An attorney or solicitor cannot withdraw his name, after it has been entered upon the record, without the leave of the court, and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself.

The opinion of the court in the case of *Villabolas v. The United States*, (*ante*, p. 81) again asserted; viz: that the appellant must prosecute his appeal to the next succeeding term of this court, and whenever the appeal is taken by entering it in the clerk's office, the adverse party must be cited to appear at that time.¹

Therefore, where an appeal was filed in the clerk's office in November, 1846, and there was no citation to the adverse party to appear on the 7th of December, 1846 (the commencement of the succeeding term of this court), the case was not removed upon that appeal.

A party may take a second appeal where the first has not been legally prosecuted. But in the present case, the order of the court cannot be construed as a grant of a second appeal.

The appeal must therefore be dismissed, on motion.

THIS was an appeal from the District Court of the United States for Louisiana, involving the title to a large body of land in that state. The proceedings of the District Court are sufficiently set forth in the opinion of the court and in the argument of *Mr. Curry*, to which the reader is referred.

Mr. Curry moved to dismiss the appeal, as having been irregularly brought up.

The motion was argued by *Mr. Curry* and *Mr. Jones*, in favor of it, and *Mr. Clifford*, Attorney-General, against it.

Mr. Curry said that the proceedings in this case were had under the law of Congress, passed the 26th May, 1824, "enabling claimants to land (within the State of Missouri, &c.) to institute proceedings to try the validity of their claims," &c.; which is revived by the act of the 17th June, 1844, by "An act to provide for the adjustment of land claims within the states of Louisiana, &c." The first of these acts is in the 4th volume of the Statutes at Large, p. 52; the last one is to be found in the 5th volume of the same work, p. 676.

The appeal is from the United States District Court for Louisiana, sitting as a court of equity, under the provisions of the first-recited act.

¹ FOLLOWED. *Steamer Virginia v. ridge v. McKenna*, 8 Fed. Rep., 664. *West*, 19 How., 183; *Edmonson v. See also Brown v. Evans*, 8 Sawy., *Bloomshire*, 7 Wall., 309; *Kail v. 504; Harris v. Ferris*, 18 Fla., 82. *Wetmore*, 6 Id., 451. CITED. *Wool-*

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*The second section of this act provides, "that every petition or suit shall be conducted as in a court of equity, &c.; and in all cases the party against whom the judgment or decree of said District Court may be finally given shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties," &c.

The ninth section of said act has this provision:—"That it shall be the duty of the district attorney of the United States for the district in which the suits authorized by this act shall be instituted, in every case where the decision is against the United States, and the claim exceeds one thousand acres, to make out and transmit to the Attorney-General of the United States a statement containing the facts of the case, and the points of law on which the same was decided; and if the Attorney-General shall be of opinion that the decision of the District Court was erroneous, it shall be his duty to direct an appeal to be made to the Supreme Court of the United States, and to appear and prosecute the said appeal in that court; and it shall be the further duty of the district attorney to observe the instructions given to him by the Attorney-General in that respect."

The decree of the District Court of Louisiana sought to be appealed from was rendered and signed on the 26th day of June, 1846.

On the 5th of November, 1846, the following petition was filed, upon which the following proceedings of the court took place, viz. :—

To the Hon. T. H. McCaleb, judge of the District Court of the United States for the District of Louisiana:

The petition of the United States respectfully shows, that it is believed there is error in the judgment rendered against them in this honorable court on the twenty-sixth day of June last, 1846, in the matter of *Curry and Garland v. The United States*.

Wherefore they pray that your honor may be pleased to allow an appeal to be taken from said judgment to the Supreme Court of the United States.

(Signed,) THOMAS J. DURANT, *Att'y U. S.*

Judge's orders thereon.

Let this petition be filed and an appeal granted as prayed for.

(Signed,) THEO. H. MCCALED, *U. S. Judge.*

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*Let the said appeal be returnable on the second Monday of January, 1847.

(Signed,) THEO. H. McCALEB, *U. S. Judge.*

Let the return day of the appeal in this case be extended to the third Monday of February next, 1847.

(Signed,) THEO. H. McCALEB, *U. S. Judge.*

And on the 13th day of February, 1847, the following entry was made on the minutes, to wit:—

Saturday, February 13th, 1847.

Present, the Hon. T. H. McCaleb.

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 THE UNITED STATES. }

Upon motion of Thomas J. Durant, United States district attorney, that the land cause No. 1, and entitled as above, appeal has been granted from the judgment rendered therein to the Supreme Court of the United States, at Washington, and that the said appeal has been made returnable on a subsequent day during the present session of the Supreme Court, and not on the first day of said term, as the practice generally is; to the end that said case of appeal might have its chance of being tried during the present session; and as no object will be gained by issuing citation to the appellees, directing them to appear at any other time than on the first day of the said term of said court, it is therefore ordered, that the order upon the said petition of appeal in said cause be so amended as to make it returnable on or before the commencement of the next annual session of the Supreme Court.

Mr. Curry further said, that no citation upon this order was issued until the 14th of August, 1847. But at that time the year within which an appeal could be taken had expired for more than a month. The citation was also irregularly served. The following extract from the record shows the date of the citation, and its irregular service.

United States District Court for the District of Louisiana.

To Thomas Curry and Rice Garland, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States of America, to be holden at Washington city, on the first Monday of December next, pursuant to an order of appeal granted on the thir-

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teenth day of February, 1847, by the district judge of the United States for the District of Louisiana, in a certain *109] suit *wherein you are plaintiff and the United States are defendants, to show cause, if any there be, why the decree rendered on the second day of May, 1846, against the said appellants and in your favor, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal, at New Orleans, this fourteenth day of August, A. D. 1847.

THEO. H. MCCALED, *U. S. Judge.*

Marshal's return.

Rec'd, August 27th, 1847, and on the 8th September, 1847, served copies of the above citation on Wm. C. Hammer, in person, at New Orleans, said Wm. C. Hammer's name appearing on the docket as attorney for the above-named plaintiffs.

WM. SHEARER, *D'y U. S. Marshal.*

Filed 15th November, 1847.

Mr. Curry therefore moved to dismiss the appeal, on the three following grounds, viz. :—

1. Because it was taken and entered in the clerk's office on the 5th November, 1846, and no citation issued or was served before the next term of this court after the appeal was entered; nor did any issue until the year allowed to appeal in had elapsed. Consequently there was no appeal within the year. See the case of *Villabolas v. The United States*, decided at the present term of this court.

2. There was no service of the citation of appeal, even if it had issued in time, on the appellees, as is required by law.

3. That no appeal has been directed to be made to the Supreme Court of the United States in this case by the Attorney-General, so far as the record shows, in the manner prescribed by the 9th section of the act of 26th May, 1824.

Mr. Clifford (Attorney-General) contended, on the part of the United States, that the appeal was not taken in fact until the 13th February, 1847; that an appellant may withdraw an appeal and renew it; that the appeal was prayed in open court, when no citation was necessary; that the citation was not necessarily a part of the record, and therefore was no part of a writ of error; that if served at any time before the return day, the service is good.

For these and other views he referred to 4 La., 318; Code of Practice, art. 594; 2 Smith, Ch. Pr., 14, 37; 2 Cranch, 33;

6 Binn. (Pa.), 106; 6 Mass., 435; 5 How., 295; 4 Cranch, 180; 3 Pet., 459; 7 Id., 147.

Mr. Jones, in support of the motion, contended, that the 9th section of the act of 1824 had not been complied with; *that the right of appeal was limited and not absolute, under the 2d and 9th sections of that act; that the public interest required that frivolous cases should not be brought up; that the service upon an attorney was not sufficient; that it depended on the rules of the court to make it so, and here there were no rules; that a reference to the record would disprove that the 13th of February, 1847, was the time of appeal, and show that this order was merely a modification of an existing appeal.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this case for want of jurisdiction.

The appeal was taken from a decree of the District Court of the United States for the Louisiana District, confirming to the appellees certain lands which they claimed under a Spanish grant. The decree was made on the 2d of May, 1846. But a new trial was afterwards granted, in order that third persons, who also claimed title to the land, might have an opportunity of intervening in the suit, according to the practice of the Louisiana state courts. Subsequently, however, the petition of the intervenors was withdrawn, and another decree was passed and signed on the 26th of June, 1846, again confirming the title of the present appellees. It is not material to this inquiry whether the first or second decree is to be regarded as the final one in the District Court.

This proceeding by new trial (instead of rehearing, as in chancery) and intervention was irregular. And the court seems to have followed the Louisiana state practice, when the acts of Congress direct that the proceedings in such cases shall be conducted according to the rules of a court of equity. 5 Stat. at L., 676; 2 Id., 53.

On the 5th of November, 1846, the district attorney presented a petition to the district judge, praying an appeal, who thereupon passed an order, indorsed on the petition, directing it to be filed and the appeal granted. Further orders of the district judge are also indorsed on the petition,—one directing the appeal to be returnable to the second Monday of January, 1847; another extending the time to the third

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Monday in February; and another dated the 13th of February, 1847, in the following words:—

“Upon motion of Thomas J. Durant, United States district attorney, that the land cause No. 1, and entitled as above, appeal has been granted from the judgment rendered therein to the Supreme Court of the United States, at Washington, and that the said appeal has been made returnable on a *111] subsequent day during the present session of the Supreme Court, and not *on the first day of said term, as the practice generally is; to the end that said case of appeal might have its chance of being tried during the present session; and as no object will be gained by issuing citation to the appellees, directing them to appear at any other time than on the first day of the said term of said court, it is therefore ordered, that the order upon the said petition of appeal in said cause be so amended as to make it returnable on or before the commencement of the next annual session of the Supreme Court.”

Afterwards, on the 14th of August, 1847, a citation was issued, requiring the appellees to appear in this court on the first Monday in December then next following. The citation states the decree from which the appeal was made to have passed on May 2, 1846, and refers to the order above recited as an appeal granted on the day the order bears date. It was served, as appears by the return of the marshal, on the 8th of September following, on the attorney whose name appeared on the docket as the attorney for the petitioners, who are the present appellees. But the affidavit of the attorney has been filed here, stating that he was not at that time their attorney, —that his fee had been paid, and he had been discharged from all duty as attorney or counsel for the parties, and had so informed the marshal at the time of the service.

In this state of the facts, several objections have been made to the validity of this appeal. Two of them may be disposed of in very few words.

It is said that the record does not show that this appeal was taken by the direction of the Attorney-General, according to the provisions of the 9th section of the act of May 26, 1824. We think there is no force in this objection. That section is merely directory to the officers of the United States, and intended to guard more effectually the public interests. And if the appeal is taken by the district attorney, and sanctioned in this court by the Attorney-General, it is sufficient, even though it should appear (which it does not in this instance) that the appeal was taken without his previous direction.

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So, too, as to the service of the citation on the attorney. It is undoubtedly good, and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to withdraw *his name after the case was finally decided. For if that could be done, it would be impossible [*112 to serve the citation where the party resided in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting an attorney to embarrass and impede the administration of justice, by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke.

The remaining objection is a more serious one. Has this appeal been taken and prosecuted within the time limited by the acts of Congress? The District Court appears to have acted in relation to the appeal, as it did in its previous proceedings, under the erroneous impression that it must follow the practice of the Louisiana state courts; without adverting to the acts of Congress which conferred on the court the special jurisdiction it was exercising, and which prescribe the manner in which it shall be exercised. There was no necessity for the petition to the district judge to grant the appeal. It was a matter of right given by law after final decree, which the court could not refuse. Nor had it any power to prescribe the time or manner in which the record was to be transmitted, and the case brought before this court. That, too, is regulated by acts of Congress, which the court can neither change nor modify. All the orders, therefore, upon this subject, were unauthorized and void. And the validity of the appeal depends altogether upon the laws of the United States, without reference to the laws of Louisiana or orders of the District Court.

The acts of Congress concerning appeals in cases of this description were fully considered by the court in the case of *Villabolo v. United States*, decided in the early part of the present term, and the previous decisions of this court referred to and examined. And the court in that case held that the appellant must prosecute his appeal to the next succeeding

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term of this court, and the adverse party be cited to appear at that time, whenever the appeal is taken by entering it in the clerk's office. In the case before us, the appeal was filed in the clerk's office, November 5, 1846. The next succeeding term of this court commenced on the 7th of December in the same year. But there was no citation to the adverse party to appear at that time, and consequently the case was not removed to this court upon that appeal. The citation which issued on the 27th of August, 1847, would not bring up an appeal returnable to December term, 1846.¹

It is true, that, although this appeal was not prosecuted, yet the district attorney might have taken another appeal at *113] any *time within a year from the date of the decree, and brought it up by a citation returnable to the December term, 1847. The right of a party to take a second appeal where the first had not been legally prosecuted was decided in the case of *Yeaton v. Lenox*, 8 Pet., 123. In that case, the first appeal was dismissed by the court, for the want of a proper citation. And the appellant, before the expiration of the time limited by law for appealing, entered a second appeal in the Circuit Court, and cited the adverse party to appear at the term of this court next following the second appeal; and the second appeal was held good. If, therefore, the order of February 13, 1847, could, as contended for in the argument, be regarded as a second appeal, the case would be regularly before the court, upon the citation issued in the August following. But, after very carefully considering that order, the court think that no just construction of its language will authorize us to regard it as a second appeal. It was evidently nothing more than a motion to extend the time for returning the appeal previously taken; and the court directs that its former order be so amended as to make the citation returnable to the next term of this court. The citation which afterwards issued, in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order. It appears, like the preceding ones, to have been made under the impression that the District Court had the power to regulate the time and manner of bringing up the appeal.

It has been said that this objection is a mere technicality, and may be regarded rather as a matter of form than of sub-

¹ FOLLOWED. *Castro v. United Dennison*, Id., 496; *Dayton v. Lash*, States, 3 Wall., 50; *Kail v. Wetmore*, 4 Otto, 112.
6 Id., 451; *City of Washington v.*

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stance. But this court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court.¹ And as this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.

Mr. Justice WOODBURY dissented.

* *Order.*

[*114

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, and it appearing to the court that this appeal has not been prosecuted in the manner directed and within the time limited by the acts of Congress, it is therefore now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed.

THOMAS DAVIS, PLAINTIFF IN ERROR, v. WILLIAM M. TILESTON AND COMPANY.

Where a bill in equity sought to enjoin a judgment, and charged that the complainant had a good defence which he did not know of at the time when judgment at law was rendered against him, and charged also that he was entitled to pay the debt in the depreciated notes of a particular bank, of which advantage it was attempted to deprive him by fraud and collusion, and this bill was demurred to, it was error in the court below to sustain the demurrer.¹

¹ FOLLOWED. *Saltmarsh v. Tut-hill*, 12 How., 339; *Carroll v. Dorsey*, 20 Id., 207. CITED. *Ex parte Val-landigham*, 1 Wall., 251; *United States v. Young*, 4 Otto, 259.

¹ CITED. *Hentig v. Sweet*, 27 Kan., 175.

Unless complainant has an equitable defence of which he could not avail himself, or was prevented by fraud or

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accident, and not his own negligence, from availing himself of a legal defence at law, the court will not relieve. *Hendrickson v. Hinckley*, 17 How., 443; s. c., 5 McLean, 211; *Sedam v. Williams*, 4 McLean, 51; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Hungerford v. Sigerson*, 20 How., 156; *Crim v. Handley*, 4 Otto, 652; *Cairo & C. R. Co. v. Titus*, 12 C. E. Gr. (N. J.), 102; *Smith v. McLain*, 11 W. Va., 654; *Sauer v. Kansas*, 69 Mo., 46; *Harner v. Price*, 17 W. Va., 523; *Fisher v. Greene*, 5 Col., 541.

Merely to show that injustice has been done by the judgment is not enough: it must appear that this resulted notwithstanding the close attention and diligence of complainant. *Cairo & C. R. Co. v. Titus*, 12 C. E. Gr. (N. J.), 102; *Prater v. Robinson*, 11 Heisk. (Tenn.), 391; *Holmes v. Steele*, 1 Stew. (N. J.), 173; *Cairo & C. R. Co. v. Holbrook*, 92 Ill., 297; *Hays v. Urquhart*, 63 Ga., 323; *Carolus v. Koch*, 72 Mo., 645; *Devinney v. Mann*, 24 Kan., 682; *Platt v. Sheffield*, 3 Ga., 627; *Noble v. Butler*, 25 Kan., 645.

If complainant had a defence at law, which he omitted to set up, such omission must be satisfactorily accounted for. *Sample v. Barnes*, 14 How., 70; *Wynn v. Wilson*, Hempst., 698; *Creath v. Sims*, 5 How., 192; *Maxwell v. Kennedy*, Id., 210; *Walker v. Robbins*, 14 Id., 584; *Green v. Darling*, 5 Mason, 202; *Sheets v. Selden*, 7 Wall., 416; *Howell v. Motes*, 54 Ala., 1; *O'Connor v. Sheriff*, 30 La. Ann., Pt. 1., 441; *New Orleans v. Morris*, 3 Woods, 103; *Kirby v. Pascault*, 53 Md., 531; *Miller v. Clements*, 54 Tex., 351; *Rider v. Morsell*, 3 MacArth., 186; *Northeastern R. R. Co. v. Barrett*, 65 Ga., 601.

It is not enough to allege in the bill that the complainant was wrongfully deprived of an opportunity of making defence in the action at law, unless a defence would have been available; the bill should show that the judgment was unjust and one which ought not to be enforced. *Bradley v. Richardson*, 2 Blatchf., 343; s. c., 23 Vt., 720. S. P. *Lemon v. Sweeney*, 6 Bradw. (Ill.), 507.

An equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, upon the ground that the opposite party and his witnesses conspired together to obtain the judgment by perjury and fraud, and that the judgment was obtained by false evidence. The proper remedy, in such a case, is a motion for a new trial. The fraud which will justify equitable interference in setting aside a judgment or decree, must be actual and positive, not merely constructive; it must be fraud occurring in the concoction or procurement of the judgment or decree, which was not known to the party at the time, and for not knowing which, he is not chargeable with negligence. *Ross v. Wood*, 70 N. Y., 8.

As to how far a court of equity will go, in the inquiry as to fraud in procuring the judgment at law, see *Doughty v. Doughty*, 12 C. E. Gr. (N. J.), 315; *Henwood v. Jarvis*, Id., 247; *Rickle v. Dow*, 39 Mich., 91; *Driskill v. Cobb*, 66 Ga., 649.

The fact that the judgment was recovered through the mere negligence of complainant's attorney (uncoupled with fraudulent contrivance) after answer duly served, in failing to attend the trial, will not afford a reason for enjoining the judgment, even though the attorney be peculiarly irresponsible. *Rogers v. Parker*, 1 Hughes, 148. S. P. *Kern v. Strausberger*, 71 Ill., 413; *Newman v. Morris*, 52 Miss., 402; *Ruppertsberger v. Clark*, 53 Md., 402.

Where defendant was induced to withdraw an equitable plea on plaintiff's promise to do the equity set up therein, which promise plaintiff failed to keep, the judgment was enjoined. *Markham v. Angler*, 57 Ga., 43. S. P., *Baker v. Redd*, 44 Iowa, 179. See also *Harris v. Western & C. R. Co.*, 59 Ga., 830; *Purviance v. Edwards*, 17 Fla., 140. But see *Collier v. Falk*, 66 Ala., 223.

Judgment on two notes, obtained by fraudulent representations that the suit was brought to recover on one of them only (the other note having been paid), restrained. *Hinckley v. Miles*, 15 Hun (N. Y.), 170.

A surety who is prevented from set-

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In the year 1838, Thomas Davis, the plaintiff in error, received three thousand dollars from the Aberdeen and Pontotoc Railroad and Banking Company in the notes of that institution, and gave his bond for the delivery of seventy-five bales of cotton at the town of Burlingham, on the Tallahatchie River, on or before the 1st day of the ensuing March. According to his own statement in the bill which he afterwards filed, he paid \$1,685.50, and delivered eighteen bales of cotton, subject to the order of the company. The precise time of this payment and delivery was not stated.

On the 12th of December, 1839, William M. Tileston and Charles N. Spofford, residing in New York, and carrying on business under the name of William M. Tileston & Co., obtained a judgment in the District Court of the United States for the Northern District of Mississippi against the

ting up payment of the bond in suit, by plea *puis darrein continuance*, should be relieved from a judgment thereafter obtained against him. *Humphreys v. Leggett*, 9 How., 297.

While the existence of a defence, the risk of losing evidence, or the apprehension of a multiplicity of suits, may not either of them, separately, be a sufficient ground for restraining suits at law, especially where proof of extrinsic facts is not necessary to establish the defence, yet when all those elements are combined, and extrinsic proofs are necessary to the defence, a proper case for relief is made. *Town of Springport v. Teutonia Savings Bank*, 75 N. Y., 397, 405.

The collection of a judgment will not be enjoined to enable the complainant to interpose a set-off or counter-claim of an unliquidated nature, which arose out of an entirely distinct transaction. *Jackson v. Bell*, 4 Stew. (N. J.), 554; s. c., 5 Id., 411.

The collection of a judgment that is erroneous merely, and not void, will not be enjoined: appeal is the proper remedy. *Earl v. Matheney*, 60 Ind., 202. S. P. *Burke v. Wheat*, 22 Kan., 722.

But a judgment void for want of jurisdiction, will be enjoined, notwithstanding complainant's right to a reversal on appeal or writ of error. *Follansbee v. Scottish-American Mortgage Co.*, 7 Bradw. (Ill.), 486. And chancery will enjoin a judgment rendered by a justice disqualified by reason of consanguinity, &c., unless the objection was waived by agreement in

writing between the parties. *Smith v. Pearce*, 6 Baxt. (Tenn.), 72.

Where a defendant is only entitled to a credit for part of the judgment debt, the collection of the judgment should only be restrained *pro tanto*. *Levy v. Steinbach*, 43 Md., 212.

In *Stanton v. Embry*, 46 Conn., 65, the court enjoined proceedings on a judgment rendered against the complainant while he was sick and unable to attend the trial.

In *Chambers v. Penland*, 78 N. C., 53, it is held that the remedy of a defendant aggrieved by a judgment is not by injunction, but by an application for relief to the court wherein the judgment was rendered.

Proceedings in state courts cannot be stayed by injunction from the federal courts, except in cases arising under the bankrupt laws. (Rev. Stat., § 720.) *Haines v. Carpenter*, 1 Otto, 254; *Watson v. Jones*, 13 Wall., 679; *Diggs v. Walcott*, 4 Cranch, 179; *Rogers v. Cincinnati*, 5 McLean, 337; *Butchers' Assoc. v. Slaughter-house Co.*, 1 Abb. U. S., 338; *Ex parte Campbell*, Id., 183; *Amy v. The Supervisors*, 11 Wall., 136. And, conversely, the state courts cannot enjoin the judgments or proceedings of the federal tribunals. *McKim v. Voorhies*, 7 Cranch, 279; *City Bank v. Skelton*, 2 Blatchf., 14; *Riggs v. Johnson County*, 6 Wall., 166; *United States v. Council of Keokuk*, Id., 514; *The Mayor v. Lord*, 9 Id., 409; *The Supervisors v. Durant*, Id., 415; *Amy v. The Supervisors*, 11 Id., 136.

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Aberdeen and Pontotoc Railroad and Banking Company, for a sum of money, the amount whereof is nowhere stated in the record.

Upon this judgment, a writ, called a writ of garnishment, was issued by way of execution, and served upon Davis. This writ was returned, duly executed, to June term, 1840.

At December term, 1840, judgment was rendered against Davis and his securities, as debtors to the Aberdeen and Pontotoc Railroad and Banking Company for \$1,861 and costs.

*115] *A *feri facias* was issued upon this judgment in favor of Tileston & Co., returnable to June term, 1841,

On the 10th of June, 1841, Davis paid, on account of the judgment, \$242.77, which was duly credited.

At December term, 1841, a return was made of property levied upon, with its valuation, but no further proceedings appear then to have taken place.

In July, 1843, Davis filed a bill on the equity side of the court against Tileston & Co., to enjoin the judgment obtained against him at December term, 1840. The bill recited the above facts, and then proceeded thus:—

“Your orator further states unto your Honor, that, before the rendition of the said judgment upon the said garnishment in favor of William M. Tileston & Co. against your orator, he paid upon the said cotton bond \$1,685.50, or about that sum, and delivered at the town of Burlingham, according to his contract, eighteen bales of good cotton, averaging in weight about five hundred pounds, and subject to the order of the said Aberdeen and Pontotoc Railroad and Banking Company, and which cotton was shipped on board of steamer Big Black, Steilling, master, without the orders of or being subject to the control of your orator; and said cotton was left by said steamer at the house of and in the care of Young & Richards, Vicksburg, Miss., and by them twelve of said bales were shipped to George Buchanan, of New Orleans, for the benefit of and on account of the said Aberdeen and Pontotoc Railroad and Banking Company. The remaining six bales were shipped and sold in New Orleans, from the said house of Young & Richards in Vicksburg, for the benefit of and in the name of one Dickens, for between fourteen and fifteen cents per pound; and the said Dickens was found by your orator on the western bank of the Mississippi River, in the state of Arkansas, about forty miles above Memphis, Tennessee; and the proceeds of the sale of the said six bales of cotton were collected from him by your orator, amounting to about four hundred dollars, but not one cent has ever been collected for the twelve bales shipped to Buchanan, for and on account of

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the said bank, or applied by said bank to the credit of your orator's bond.

"Your orator further states, that, relying upon the statements of the agents of the said bank, solemnly made and often reiterated, that they knew nothing about the twelve bales of cotton or any other part of the eighteen bales shipped as before stated, he did not know of the shipment of said twelve bales of cotton from Young & Richards, Vicksburg, to Buckanan, of New Orleans, for and on account of the said Aberdeen and Pontotoc Railroad and Banking Com- [*116 pany, until long after the *rendition of said judgment in December, 1840, against your orator, as a debtor to said bank, in favor of the said William M. Tileston & Co., and was kept from his legal and lawful defence and credits, on the trial of said garnishment, by the false assurances of the bank and its agents, so made to your orator as aforesaid, and, as your orator fully believes, intended for and made to lull him to sleep, and impose upon his general credulity and confidence in his fellow-man where the least show of honesty is to be discovered. Your orator further states unto your Honor that he was not apprised of, but wholly ignorant of the fact, that the said twelve bales of cotton were shipped by the agents of the said bank from Vicksburg to New Orleans, as above stated, until by a critical examination, about a year or thereabouts since, through his agent, the facts were ascertained to be as before stated."

The bill then proceeded to charge a fraudulent combination between the bank and Tileston & Co., by setting up a fictitious claim against the bank for the purpose of depriving Davis of the benefit of paying the bank in its own depreciated notes, and finally averred that the only part of the debt still due was \$809.47, which he tendered in the notes of the bank.

An injunction was issued according to the prayer of the bill.

In June, 1844, the defendants filed a demurrer, and assigned the following causes:—

1st. The bill shows that the complainant had a full and complete remedy at law, which he has neglected.

2d. That the bill shows that complainant knew, at the time he answered the garnishment against him, that no credit had been given for said cotton, and having at that time acquiesced in the conduct of the bank, and acknowledged himself indebted to the amount of defendant's judgment, he cannot now re-open the judgment in this court to be heard, to deny what might and ought to have denied in his said answer to said garnishment.

3d. That it appears, by complainant's own showing, that

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judgment was rendered against him on his answer at December term, 1840; that he made a payment and satisfaction of said judgment by the execution and forfeiture of a forthcoming bond in May, 1841; that as late as between June and December, 1841, he took the benefit of the valuation law on said execution, and postponed further action by the said defendants for twelve months thereafter, without ever settling up the matter contained in his bill, or claiming any deduction or offset from the said judgment in favor of defendants.

4th. That the pretended charge of fraud is not specifically stated, but is vague, uncertain, and indefinite in general.

*117] 5th. That the said bill seeks to offset the judgment of defendants against said complainant on his answer, and to pay and discharge the same with the bills and liabilities of the Aberdeen and Pontotoc Railroad and Banking Company, obtained by him after he has acknowledged himself indebted in his answer, and after judgment has been rendered against him in favor of defendants, and after he has executed a forthcoming bond, and the same has been forfeited and become a new judgment against him in favor of defendants, and after he has availed himself of the valuation law on said judgment.

6th. That the said bill shows no equity on its face.

There being a joinder in demurrer, the case was, on the 11th of June, 1844, set down for hearing on the bill and demurrer at the next term of the court.

On the 2d of December, 1844, a rule for decree *pro confesso* was entered, and on the 3d of December, the defendants, Tileston & Co., filed their answer, which it is not necessary to recite.

On the 6th of December, 1844, the final decision of the District Court was signed and ordered to be enrolled, as follows:—

“This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: that the demurrer of the defendants to the said bill of complaint of the complainants be sustained, and the said bill dismissed.

“It is further ordered, adjudged, and decreed, that the defendants go hence and recover of the complainants the costs in and about this cause expended, for which execution may issue.”

The complainant appealed from this decree to this court.

The cause was argued by *Mr. R. Davis*, for the appellant, and *Mr. S. Adams*, for appellees.

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Mr. Justice WOODBURY delivered the opinion of the court.

The judgment in this case below was founded entirely on the bill in chancery and the general demurrer to it.

There is in the record an answer filed a few days previous to the judgment. But the cause having before been set down for a hearing on the bill and demurrer, the answer does not appear to have been at all considered,—for that or some other reason,—and is not referred to in the decision.

The only question for consideration by us, then, is, whether the judgment dismissing the bill on the demurrer was correct.

Upon a careful examination of the facts and principles involved, *we feel constrained to come to the [*118 conclusion that it was not correct. We are reluctant to form this conclusion, because, on examining the contents of the bill, it does not in some aspects of it appear free from what is exceptionable, and the answer, if open to consideration now, would show a denial of most of its material allegations.

But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defence to the bill. The grounds of our judgment are as follows:

The demurrer, by admitting the truth of the allegations in the bill, admits these facts:—

1st. That the complainant had a good defence to a large part of the original judgment recovered against him, as garnishee of the bank, and which he did not know at that time.

2d. That he was entitled to pay to the original creditor, the bank, its own notes in discharge of any balance due to it, and which were under par, and that, through fraud between the bank and the respondents, the demand against him was assigned to them, and he sued as garnishee of the bank, in order to exclude the payment in its notes.

The former judgment having been in the District Court of the United States, these grounds for an injunction against the further enforcement of it till the mistake as to the defence is corrected, and the balance allowed to be satisfied in notes of the bank then held, or an equivalent to their value at the time of the judgment, seem equitable on these allegations, thus admitted.

The respondents can, *ex æquo et bono*, claim to stand in no better condition than the bank. If there was a further good

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defence against the bank, there was against them. And if in any material respect they and the bank fraudulently combined, by or in that suit, to deprive the debtor of any legal advantage, the least which can be done in equity is to restore him to it.

What is the answer to this view? Not that the demurrer does not in law admit the goodness of a further defence, and one not known at the judgment, and likewise the existence of fraud by those parties, but that the statement of the defence is not entitled to full credit, is contradictory, and develops culpable neglect to enforce the defence, and that the fraud is not set out with sufficient detail.

*119] But so far as regards the credibility to be given to the statement *of the further defence in the bill, that statement cannot be impugned on a demurrer. The truth of it can be doubted only where a denial of it is made in an answer, or proof is offered against it, neither of which is now before us. The next objection, founded on some supposed contradictions in the bill, as if not knowing the existence of the defence when he delivered the cotton on which it is founded, can be reconciled on various hypotheses, which need not here be detailed. For, however this may be, we think the allegations sufficiently distinct on a general demurrer.

The validity of the defence as alleged is resisted as the last objection, and rests on the ground, that he had an opportunity to make it at law and omitted to improve it. This principle is conceded to be correct, if the defence was then known. But the bill avers he was ignorant of the existence of the defence when the judgment was recovered. This excuse in some instances might not avail him at law. It has been settled, that in an action at law, if the party omits to make a defence which existed to a part or all of the cause of action, he can afterwards have no redress in a separate legal proceeding. *Tilton v. Gordon*, 1 N. H., 83; 7 T. R., 269; 1 Ld. Raym., 742; 9 Johns. (N. Y.), 232; 2 N. H., 101; 12 Mass., 263. In such case, he can sometimes obtain relief by a petition for a new trial, but seldom in any other manner.

In certain instances, if the defence arose out of something subsequent to the original cause of action, such as a part payment of money, or a delivery of property to be applied in part payment, and the creditor neglected to make the application, it has been held that this may be treated even at law as a distinct transaction, the creditor having thus rescinded or failed to fulfil his promise to apply the money, and a separate action be then maintained to recover it back. *Snow v. Prescott*, 12 N. H., 535; 7 Id., 535.

However this should be at law, there is strong equity

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and substantial justice in it, and much more in cases where, as is usual, the debtor is defaulted, having no defence to the original cause of action, and supposes that the creditor, in making up judgment, will deduct all payments and all promised allowance, and does not discover the neglect to do it till after execution has issued.

The present application being in equity and not at law, a party in the former is clearly entitled to an injunction, if there was accident, or mistake, or fraud, in obtaining the judgment.

So ignorance of a defence goes far, sometimes, to repel negligence, though standing alone it may not be a sufficient ground *for such relief. See 1 Bibb (Ky.), [*120 173; Cook (Tenn.), 175; 4 Hayw. (N. C.), 7; 4 Mun. (Va.), 130; 6 Hamm. (Ohio), 82; *Brown v. Swann*, 10 Pet., 498, 502; 2 Swan., 227; *Thompson v. Berry*, 3 Johns. (N. Y.), Ch., 395.

On this point, however, we give no decisive opinion, because all of us are not satisfied that a clear remedy can be given at law on these facts by a separate action, and as we have jurisdiction of this cause on the other ground of fraud, we advert to this merely as being one of the plausible reasons in favor of an injunction, till the whole matter between the parties can be further investigated. (See reasons for this course in *United States v. Myers*, 2 Brock., 516; 1 Wheat., 179; 2 Cai. (N. Y.), Cas., 1; 10 Johns. (N. Y.), 587; 1 Paige (N. Y.), 90.)

The existence of fraud in obtaining the original judgment, which is the other ground assigned for relief, is next to be considered. It is not only alleged generally, but in the details, so far as already specified, in this opinion. A general allegation of it in the bill would have been sufficient, if so certain as to render the subject-matter of it clear. (*Nesmith et al. v. Calvert*, 1 Woodb. & M., 44; *Smith v. Burnham*, 2 Sumn., 612; and *Jenkins v. Eldridge*, 3 Story, 181.) The demurrer admits the fraud thus set out, and the law is undoubted, that our jurisdiction in equity extends over frauds generally, and in a special manner one like this, to which it is doubtful whether any remedy existed by law when defending the original action. 2 Cai. (N. Y.) Cas., 1; 10 Johns. (N. Y.), 587; 1 Paige (N. Y.), 90; 2 Stew. (Ala.), 420.

The character of this fraud, as admitted by the demurrer to exist, is one of great injustice to the community, it being equitable, no less than legal, in Mississippi, by an express statute, for debtors of a bank to make payment to it in its own bills. (Laws of Miss., A. D. 1842, p. 140.)

It seems generally allowable, even on common law princi-

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ples, as a set-off. See the express declaration to that effect by this court in *The United States v. Robertson*, 5 Pet., 659; see also *Planters' Bank v. Sharp et al.*, at this term.

Looking probably to a transaction much like the present, the court, in 5 Pet., say,—“So far as these notes were in possession of the debtor at the time he was summoned as a garnishee, they form a counter claim, which diminishes the debt to the bank to the extent of that counter claim.” But how the balance is to be paid in respect to notes, the court forbore to give any opinion (p. 684).

Any assignment or other proceeding got up with the fraudulent intent of preventing the exercise of that right, as is here *121] alleged and admitted, cannot receive the countenance of this court. *But we do not decide on the extent at law to which such a defence can be made in Mississippi, or in respect to the manner of paying the balance; as all our conclusions here rest entirely on the averments and the admission of their correctness by the demurrer.

In coming to our conclusions, we by no means would be understood, as before intimated, to approve all the language or forms of allegation adopted in this bill. But we are forced to think that enough is stated in it, in substance, to give us jurisdiction, and to entitle the complainant to relief, when the statement is not denied by the respondents.

The judgment below in favor of the demurrer is, therefore, reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause be heard on the bill and answer, if no evidence is desired to be put in; or on these and such evidence as the parties may wish to offer.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court sustaining the demurrer to the bill of complaint be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said District Court, in order that leave may be given to the respondents to withdraw their demurrer, and that the cause may be heard on the bill and answer, if the parties do not desire to put in any evidence, or

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on the bill and answer and such evidence as the parties may wish to offer.

*HENRY MATHEWSON, RESPONDENT AND APPELLANT, [*122
 v. JOHN H. CLARKE, ADMINISTRATOR OF WILLARD
 W. WETMORE, APPELLEE.

Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits.¹

The language of the complainant in his bill, "that he became interested in a ship and cargo at and from Gibraltar," is decisive of the question of time when his interest commenced, and shows that he had no interest until she arrived at Gibraltar.

Where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent., and also one-tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo had no right to traffic upon his own account, for his own benefit.

If the master and supercargo, after the loss of his first vessel, charters another and uses the capital of his partners in prosecuting his trade, informing his owners thereof and expressing his willingness to continue the business upon the same terms as before, to which they did not object, such continuance of the business must be governed by the same rules which regulated the transactions in the first ship.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island.

The record was very voluminous, being a printed volume of more than five hundred pages, which contained numerous letters and accounts relating to trading voyages to different and distant parts of the world, from October, 1820, to November, 1826. There were three reports from masters in chancery in the court below, and a supplemental report made to this court by agreement of counsel and sanction of the court. The arguments of counsel referred to a great number of these transactions, of which it is impossible to give any other than a general outline.

In the year 1820, there were in Providence, Rhode Island, two mercantile houses, one known by the name and firm of Edward Carrington & Co., and the other by that of Cyrus Butler. The house of Edward Carrington & Co. was composed of Edward Carrington and Samuel Wetmore.

In October, 1820, these two houses made the following agreement with Henry Mathewson, the present appellant:

¹ CITED. *Setzer v. Beule*, 19 W. Va., 288.

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“This agreement witnesseth: That whereas Messrs. Lynch, Hill & Co., of the republic of Chili, have contracted and agreed with his Excellency, General San Martin, commander-in-chief of said republic, to furnish to him, or said government, a quantity of military stores, which contract has been assigned to Cyrus Butler and Edward Carrington & Co., who have undertaken to furnish the same. Wherefore the said Cyrus Butler and Edward Carrington & Co. on the one part, and Captain Henry Mathewson on the other part, all of *123] Providence, in the *state of Rhode Island, on the 12th day of October, A. D. 1820, make and enter into the following agreement and stipulations, viz. :—

“1st. The said Henry Mathewson agrees to take the command of the ship or vessel the said Butler and Carrington & Co. shall provide for said expedition, and at all times to act as captain and supercargo thereof.

“2d. The said Mathewson is to proceed to Europe, attend to the purchase of said military stores, proceed therewith in said ship to Chili and Peru, deliver the same, receive the payment therefor, and do all and every thing that may be necessary and advisable for the faithful accomplishment of said contract, both as regards the delivery of the military stores and the receiving the payment therefor, whether the said payments shall be in cash or in produce of the republics; and with the said payments, proceed to such ports in China, Europe, or the United States as may be considered most advantageous, and according to the instructions and recommendations of said Butler and Carrington & Co. Providing, further, that, should any circumstance have occurred, or should occur, to prevent the contract being complied with on the part of the Chilian or Peruvian government, or by General San Martin or his successor, then the said Mathewson is to use his best abilities and exertions to dispose of said military stores in the most advantageous manner, and to [the] best profit; and the proceeds of such sale embark on board said ship, and proceed therewith to such ports in China, Europe, or the United States as may be considered most advantageous, and according to the recommendations and instructions of said Carrington & Co. and C. Butler.

“3d. The said Butler and Carrington & Co., on their part, promise to allow and pay the said Mathewson fifty dollars per month, as wages as navigator and master of the ship, and also the sum of seven hundred dollars as commission for attending and procuring the purchase of said military stores in Europe, for delivering and making the sale of the same in Chili or Peru, receiving the payment either in cash or produce of the

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republics, and delivering the same in China, Europe, or the United States,—he conforming always to the instructions and recommendations of said Butler and Carrington & Co. The said Mathewson is to have allowed him all travelling expenses and charges that attach to business.

“It is further mutually agreed between the aforesaid parties, that after delivering or depositing the proceeds of the aforesaid military stores, and completing and finishing the aforesaid agreement, according to the tenor thereof, a new voyage and adventure is to be begun in the following manner:—

*“1st. The said Henry Mathewson is *then* to be admitted an owner in said ship of one tenth part, at the [*124 rate of her first cost in the United States, including repairs on hull, sails, and rigging, that may be put on after her purchase, either in [the] United States, Europe, or elsewhere; and also owner of one tenth part of her cargo, on such new voyage and adventure.

“2d. Said Butler and Carrington & Co. agree to sell said Mathewson, and he agrees to purchase, one tenth of the ship, on the terms heretofore described in article first.

“3d. Said Cyrus Butler and E. Carrington & Co. agree to furnish the sum of fifty thousand dollars (as a cargo for said ship) at the port where the said ship shall deliver and deposit the proceeds of said military stores.

“4th. The said Mathewson is to allow said Butler and E. Carrington & Co. interest, at the rate of six per cent. per annum, for his one tenth of ship and cargo, from the time the proceeds of the military stores (heretofore mentioned) are delivered or deposited in manner as heretofore stipulated.

“5th. The said Mathewson is, in this new voyage, to have liberty to proceed to such ports, countries, and places, backward and forward, for trade, freight, or other employment of the ship and cargo, as he may think most for the interest and advantage of the concern in said ship and cargo.

“6th. In this new voyage, as before described, it is mutually agreed, the said Mathewson shall have fifty dollars per month, as wages as commander and navigator of said ship, to commence with the new voyage, and as supercargo a commission of five per cent. on the net amount [of] all property safely returned to the United States, Canton or Europe, proceeding from the original stock of fifty thousand dollars, together with one tenth of all the profits and earnings made in the voyage or voyages, freights or otherwise.

“7th. It is agreed that the wages and commissions specified and agreed for in the sixth article are to be in full of all services and privileges, to Captain Mathewson, as master and

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supercargo during the voyage or voyages heretofore specified or otherwise.

“It is understood, the said Mathewson is to have no privilege in the first voyage heretofore specified, and that the wages and commissions of seven hundred dollars allowed on that voyage are to be paid in the United States at the end of voyage.

(Signed)

CYRUS BUTLER,
EDWARD CARRINGTON & Co.,
HENRY MATHEWSON.”

*125] In pursuance of this agreement, Mathewson repaired to *Europe, and in December, 1820, at the Texel, received the ship Mercury and her cargo from the other parties. He also received two sets of instructions, one genuine, and the other fictitious, to be used in case of capture. The true instructions commenced in this way:—

“Providence, November 13, 1830.

“CAPT. HENRY MATHEWSON :

“Sir,—We herewith hand you the letter of Messrs. Lynch, Hill & Co., of Valparaiso, to Edward Carrington & Co., under date of June 15, 1820, accompanied with a contract made by their Mr. Lynch with General San Martin, commander-in-chief of the Chilian and Peruvian armies, and in behalf of said government. You will observe, on perusal of the letter and contract, that the muskets, carbines, and sabres, expressed in the first article in the contract, are to be furnished by Lynch, Hill & Co. themselves, and that the same articles mentioned in the second article are the ones intended to be supplied by ourselves, and are the same as we directed to be purchased by yourself in Europe, viz. :

20,000 muskets, of good proof.

7,000 carbines.

7,000 cavalry sabres.

“The prices, you will observe, are stipulated at eight and a half dollars for the muskets, six dollars for the carbines and cavalry sabres, to be imported into Peru free of duties, and the proceeds, or payment for the same, is also allowed to be exported free of duties. The delivery of the said arms to be at any one port in Peru in possession of the patriots under General San Martin, or where, on your arrival at any one of said ports, General San Martin may determine, on the coast of Peru. You will observe the contract provides that any articles, the produce of Peru, may be received in payment (at the current market price) for the arms; always by the agreement and consent of both contracting parties, and that the same

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may be exported free of duties. You will also observe, that the *duties* on the import of any *other* articles of merchandise by said Lynch, into the port of Peru, are to be admitted towards the payment of the said arms. You will also observe it is understood, that if the payment is made in specie for said arms, it is permitted to be exported free of duties."

The instructions then proceeded to tell him how to arrange his cargo, what to do when he got to Valparaiso, and continued thus:—

"In the execution of this business it will require your best *attention and circumspection to weigh well all [*126 points and circumstances, and in conjunction with Lynch, Hill & Co., pursue that course best calculated to have the contract complied with, taking care at the same time, as much as possible, to have the payment therefor placed under favorable circumstances; or if circumstances should have occurred to defeat the expedition, and with it destroy the hope of having the contract complied with, you are then to adopt the next best plan to make the sales of our property to the best advantage. If the contract is complied with by General San Martin, we should recommend your fully loading the ship with copper (taking the same as payment towards the arms, particularly as it is to be allowed export free of duties); and taking copper may facilitate and help the government, and be the means of getting payment before the expiration of the eighty days limited in the contract, and taking the balance in specie, and proceed immediately to Canton; or if the contract is not complied with, and you should make the sale in Chili, or other place where copper can be procured at not exceeding fifteen or sixteen dollars the quintal on board, we should then also recommend your loading with copper, particularly if it should aid you in making sales of the arms; and then taking the balance in specie, and proceed direct for China. After having disposed of the arms, and obtained the payment for the same, it will be of much importance that you reach China as direct, and with as little delay as possible. In order that a second deposit may be had for the property, and that a new voyage may be begun anew, without any regard to the present one, after reaching Canton you will deliver all our property to Messrs. S. Russell & Co., except the fifty thousand dollars, which you are to retain as a capital for the ship in any future operations you may think it advisable to undertake, either by trading or freighting, according as you think most profitable for all concerned; perhaps a cargo from China for Chili or Peru may be a good investment. However,

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after you get to Canton, and take the fifty thousand dollars as a capital, you must be your own master, and do that which is best."

The instructions then proceeded to provide for many contingencies, and concluded with a general reference to conversations between the parties before Mathewson left the United States.

The fictitious instructions provided entirely for a trading voyage to Columbia River, thence to Canton, &c.

In April, 1821, having purchased a cargo of arms, Mathewson sailed from Bremen, in the ship Mercury, for Valparaiso, and arrived there in August of the same year.

*127] *From Valparaiso he went to Lima, where he arrived in September.

On the first of June, 1821, a transaction occurred at Providence which was the basis of this litigation. Willard W. Wetmore (and his administrator, the present defendant in error) claimed to have been admitted on that day as a partner in the firm of Edward Carrington & Co., and the following entry upon their books was produced upon the call of the defendant Mathewson.

"Providence, June 1st, 1821.

Day-book.

Edward Carrington & Co.—New concern.

Edward Carrington \$3,
 Samuel Wetmore \$2000,
 W. W. Wetmore \$1000,"

And commencing on the first page, under date of 1st June, 1821, and continuing through several pages, Edward Carrington & Co., old concern, are credited with the sum of \$118,987.32, for their interest in various adventures and shipments then outstanding.

The corresponding ledger is headed, "New concern, ledger A," and commences with the same date.

Let us return to the voyages of Mathewson.

At Lima he sold his cargo of arms, and was detained there nearly ten months waiting for payment from the Peruvian government.

In June, 1822, having chartered the Mercury, at Lima, to a person by the name of Rodolpho, he sailed with the proceeds of the arms for Gibraltar, by way of Rio de Janeiro, and arrived at Gibraltar in November, 1822.

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In December, 1822, he sailed from Gibraltar, on a trading and freighting voyage, with freight and merchandise for the joint account of the owners.

Arrived at Rio, February, 1823.

Sailed from Rio, February, 1823.

Arrived at Valparaiso, April, 1823.

Arrived at Callao, July 1, 1823.

Left Callao, September, 1823.

Arrived at Arica, October, 1823.

Left Arica for Callao, October 25, 1823.

Arrived at Callao, December, 1823.

Sailed from Callao for Canton, January 1, 1824.

Arrived at Canton, April 10, 1824.

Left Canton for South America, July 11, 1824.

*Arrived at Monterey, October 25, 1824.

Left Monterey for Mazatlan, January 1, 1825.

[*128

Arrived at Mazatlan, January 21, 1825.

Left Mazatlan for Lima, March 20, 1825. Arrived at Guayaquil, June 3, 1825, where the ship, being injured in a gale and decayed by age, was condemned and sold.

On the 12th of September, 1825, Mathewson embarked at Guayaquil with goods and money for Lima, in the steamboat Tilica, which was blown up and destroyed on the passage.

In November, 1825, being at Lima, Mathewson chartered three-fourths of the ship Superior. He claimed to do this upon his sole responsibility and risk, and therefore to be entitled to all the profits, allowing to Butler, Carrington & Co. only the interest upon such portion of the partnership funds as were invested in the adventure.

In November, 1825, he sailed from Lima to Canton, where he arrived in March, 1826. Leaving there in June, he returned to Valparaiso, where he arrived in October, and consigned all his property, individual as well as joint, to Alsop, Wetmore & Co., who sold it at a large profit.

In June, 1827, he arrived in Providence, having been absent nearly seven years.

During all these voyages, Mathewson claimed to have received sums of money for himself upon various accounts; such as presents and gratuities from the persons with whom he dealt; from Spaniards for assisting in concealing their money; a deposit from a man named Martinez, to be invested in military clothing for him at Gibraltar, but who could never afterwards be found or heard of; from passengers for taking care of their money; presents from several persons for transporting specie from the shore without full duties; and profits upon all these sums, invested upon his own account in articles of

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trade sold and reinvested from time to time, paying freight for the same.

In 1830, Willard W. Wetmore, of New Haven, in Connecticut, filed a bill on the equity side of the Circuit Court of the United States for the District of Rhode Island against Mathewson, claiming to have been admitted by Edward Carrington & Co. as a member of their firm in June, 1821, and calling upon Mathewson to render an account of his agency as master and supercargo of the ship Mercury, on a voyage by him prosecuted before he became part owner of said ship; and of his agency as master, supercargo, and part owner of said ship and her cargo after he became a part owner; and also of his employment of the funds of the owners of the Mercury, after her con-
*129] demnation and sale, in the ship Superior, three fourths of which he *chartered at Lima in November, 1825. The bill also called for a discovery of all his transactions during the adventures.

This bill was afterwards amended by the insertion of the following clause after the claim to have been admitted as a partner in June, 1821, viz.:—“(amendment—and then and there became the assignee and purchaser of one fourth of nine twentieth parts of said ship Mercury and her cargo and of one fourth of nine twentieth parts of all the rights of all the rights of said Edward Carrington & Co. in and to said contract with the said Mathewson, and, as such, entitled to a discovery and relief against the said Mathewson).”

In September, 1830, Mathewson filed his answer, to which exceptions were taken, and in February, 1831, filed a further answer. In these answers he denied that the complainant ever was a partner in the house of Edward Carrington & Co., or that he ever had any interest in the ship Mercury and cargo, or in the concerns of said adventure. The answers then went into a minute detail of all the transactions which had occurred during all these voyages, and had annexed to them a hundred and seven accounts with different persons, explaining the shipments, sales, freight, purchases, remittances, &c., &c.

At November term, 1831, the cause was referred to Samuel Eddy, as master in chancery, “to take and state an account between the complainant and the defendant, Henry Mathewson, touching and concerning the concerns and business of the partnership subsisting between the parties in said cause, and all the other matters and things charged in said bill of complaint.”

At June term, 1832, Samuel Eddy, Richard K. Randolph, and John H. Ormsbee were appointed masters under the above interlocutory decree.

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In 1834, whilst the cause was pending before the masters, Wetmore, the complainant, died, and letters of administration upon his estate were granted to John H. Clarke, a citizen of Rhode Island, the laws of that state not permitting a person residing out of the state to become the administrator of a citizen thereof. Clarke, the appellee in the case now before the court, filed a bill of revivor. Mathewson appeared, and moved to dismiss the suit on the ground of want of jurisdiction, inasmuch as the administrator and respondent were citizens of the same state. The Circuit Court dismissed the bill; but the cause being brought up to the Supreme Court, this judgment was reversed, and the cause remanded for further proceedings. The report of this case will be found in 12 Pet., 164.

In January, 1839, Charles F. Tillinghast was appointed a third master, in the place of Samuel Eddy, to act in conjunction with the other two.

*In November, 1840, the masters made a very elaborate report to the court, accompanied by numerous depositions, in which report they found a balance due from Mathewson to the administrator of \$8,098.52. To this report Mathewson filed twenty-six exceptions. [*130

At June term, 1841, the master's report was referred back to the same masters, to re-examine and review and reconsider the same, with liberty to either party to introduce further evidence; the plaintiff to have leave to amend his bill, and the defendant to file his answer to the amendment within twenty days. Whether or not it was at this stage of the proceedings that the plaintiff amended his bill by inserting the part included within brackets, as set forth in the preceding part of this statement, the record does not show. But on the 9th of September, 1841, Mathewson filed a further answer, denying that Wetmore was or ever had been a copartner in the firm of Edward Carrington & Co.; denying that he, Wetmore, had ever asked an account from the defendant previously to filing the bill, and denying that Wetmore had ever been admitted by the defendant as a co-partner in said ships and adventures in any manner whatever.

At November term, 1841, the masters made their second report, finding a balance due by Mathewson to Clarke, as administrator, of \$8,568.52. This report was accompanied by a great mass of additional evidence. To this report Mathewson filed twenty-four exceptions.

At the same term, viz., November, 1841, the court ordered this report of the masters, so far as respected the matters in the sixteenth exception, to be referred back to them for further inquiry.

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In conformity with this order, the masters filed a third report correcting the preceding one by making an additional allowance, and reporting the entire balance due by Mathewson to be \$8,685.66²/₁₆.

At June term, 1842, Mathewson filed six exceptions to this third report.

At November term, 1842, the following decree was made by the Circuit Court, viz. :—

“This cause came on to be heard upon the report of the masters made in this cause at the November term, A. D. 1840, of this court, and upon the exceptions filed thereto; and upon the report of the masters made in this cause at the November term, A. D. 1841, of this court, and the exceptions filed thereto; and upon the masters’ report in this cause, filed in the clerk’s office of this court on the 11th day of April, A. D. 1842, and the exceptions filed thereto, and counsel being heard thereon:

*131] * “In consideration whereof, it is ordered, adjudged, and decreed, that the exceptions to the first-mentioned report be disallowed, and that the said report do stand and be confirmed, except so far as the same is altered by the report aforesaid made to the November term, A. D. 1841, of this court, and the report aforesaid filed in the clerk’s office of this court on the 11th day of April, A. D. 1842.

“It is further ordered, adjudged, and decreed, that the exceptions to said report, made at the November term, A. D. 1841, of this court, be disallowed, and that said report do stand and be confirmed, except so far as the same is altered by the said report, filed in the clerk’s office of this court on the 11th day of April, A. D. 1842.

“It is further ordered, adjudged, and decreed, that the exceptions to the said report, filed in the clerk’s office of this court on the 11th day of April, A. D., 1842, be disallowed, and that said last-mentioned report do stand and be confirmed.

“It is further ordered, adjudged, and decreed, that the said John H. Clarke, administrator on the estate of the said Willard W. Wetmore, in his said capacity of administrator, have and recover of the said Henry Mathewson, the sum of eight thousand six hundred and eighty-five dollars and sixty-six cents, said sum being the amount found due by said last-mentioned report, together with costs, and that execution issue therefor.

“Let this decree be filed in the clerk’s office in this cause.

“JOSEPH STORY,
Ass. Jus. of the Sup. Ct. of U. States.

“JOHN PITMAN,
District Judge U. S. R. I. District.”

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From this decree an appeal brought the case up to the Supreme Court.

Whilst the cause was pending in the Supreme Court, an order was passed, at December term, 1845, directing the masters to review their report. They accordingly made a supplemental and fourth report, addressed directly to the Supreme Court, in which they admit an error in their preceding accounts, from not giving Mathewson a sufficient credit for his commissions and his interest in the copartnership. Correcting this error, they find the amount due by Mathewson to Clarke, including interest up to January 1, 1846, to be \$6,241.44. This report was made a part of the record, by agreement of counsel.

In the argument of the case in this court, the exceptions taken to the first report of the masters were not insisted upon any further than they were included in the exceptions to the second; and the exceptions to the third were entirely waived. *None being taken to the fourth, which was made to this court, the argument was confined exclusively to the exceptions to the second report, which have been already stated to have been twenty-four in number. [*132

The cause was argued by *Mr. Albert C. Greene* and *Mr. Webster*, on the part of Mathewson, the appellant, and *Mr. R. W. Greene* and *Mr. Whipple*, for the appellee.

Mr. Albert C. Greene gave a history of the case, and of all the voyages which had taken place. He then classified the exceptions so as to include all which related to or depended upon the same general principle of law. And, first, with respect to the right of the complainant to sue. This being a limited copartnership, consisting of the sum of \$50,000 and the ship, he maintained the three following propositions:

1. That being a limited copartnership, no third person can be admitted without the consent of all the copartners.
2. That no assignment of an interest in a copartnership fund to a third person can give to such third person any right against the rest of the partners, where the right to assign is not provided for in the agreement.
3. That Wetmore, not being an original party, cannot be a party to any suit at law or equity founded on the original agreement.

1st. The relations which exist between partners are either provided for specially by agreement, or result, by operation of law, from a union of funds. They may contract for what they choose,—for example, that one of them shall not enter

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into a particular branch of business; or they may stipulate for the right to assign, in which case an assignee is in the enjoyment of full rights, flowing from the original agreement. But if the contract is silent upon this point, the law does not permit a third person to be introduced without the assent of the other parties. If we were at law, it is clear that no action would be maintainable, and the same rule must prevail in equity. The relations between partners are of a confidential character, and therefore it is reasonable that no stranger should be brought in. These relations are also mutual. In case of loss, each partner has a right to look to his associates, and ought not to be compelled to rely upon a person whom he may be unwilling to trust. The only evidence of the copartnership of the complainant, Wetmore, is the entry upon the books of Carrington & Co. There was no assignment, no letter informing Mathewson, who was then absent on one of the voyages, nor did he know anything of it until the service of the subpoena in this case. See Collyer Part., 4, 101; 14 Johns. (N. Y.), 318; 6 Madd., 5.

*133] *2d. No assignment can be made where it is not provided for in the articles.

There is no evidence here of any assignment to Wetmore which does not show him to have been also admitted as a partner, if it is valid for any purpose. Suppose there was such evidence, what could partners assign except choses in action, which the assignee would be unable to enforce? But the claim here is, that the new partner has the same rights as the old, and has the same right to forbid certain things to be done. If the relation of partner cannot be assigned together with choses in action, then the suit must fail, because the ground of the complainant's claim is that Mathewson had no right, under his agreement, to do certain things which he has done. But this relation cannot be assigned. Mathewson never agreed that any one else should be his master. He had no claim for any thing against Wetmore, and therefore Wetmore can have none against him.

If these two propositions can stand, the third follows of course.

The next general proposition arises from the second and third exceptions, and is this: that Mathewson has a right to the profits upon purchases which he made whilst detained at Lima. If his partners had ratified his acts, the profits would have inured to the common benefit, and Mathewson was willing that this should be done. But we say that his partners should have decided when he asked them; whereas they always avoided saying whether they would sanction his acts

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or not. The reasoning of the masters is not good. They say, that, as Mathewson's inducements to the purchase were to hasten the settlement of his own cargo, the profits ought to belong to his owners. But they should have adopted or rejected his acts when he informed them what he had done and solicited their sanction.

A general proposition arises under the sixth exception. Martinez had placed money in the hands of Mathewson to be employed for him at Gibraltar. The purchases were made, but Martinez could never more be heard of. To this money we say the other partners have no right whatever. (*Mr. Greene* here examined all the evidence on this subject.)

The next general proposition is, whether and how far Mathewson had a right to trade upon his own private account at the same time that he was trading upon the partnership funds. The masters say that he must not carry his own property in the same ship, although they admit that he has a right to traffic for himself, and send his commodities in another ship to the same market. We apprehend that the true rule [*134 is this; that *a partner must not place himself in such a situation that his own private interests will necessarily conflict with those of his partners. Collyer Part., 100; 6 Madd., 369; 4 Beav., 534; 1 Sim. & S., 124; found also in 1 Cond. Eng. Ch. Cas., 124.

The ninth and eleventh exceptions raise a general question, what were the rights and duties of Mathewson after the loss of the Mercury. We contend that his contract was to take command of that ship, in which he became a part owner. After its loss, he had a right to engage in any thing new, and chartering the Superior was a fresh adventure altogether. If his partners chose to ratify his acts, he was willing to include them; but the evidence in the case shows that they disowned them. The profits must therefore belong to Mathewson alone.

Mr. R. W. Greene, for defendant in error, took up the exceptions in numerical order, and examined each one in comparison with the evidence. The general scope of his argument was to show that the voyage was a very hazardous one on the part of the shippers, who had planned the whole series until the termination; that Mathewson had no right to receive presents from his consignees; that it is always suspicious when vendors make presents; that Mathewson was especially debarred from all privileges by the agreement; that he had full power to obtain payment for the arms in any mode, and if the purchase of the Nancy was necessary to accomplish this, it was within his instructions; that he himself thought so, because, when

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about to do it, he wrote to his partners hoping not to be censured; that his receipts for his own cargo were in fact in this new purchase; that it was a direct breach of duty to receive the money of Spaniards, in the disturbed condition of the country, and might have led to the forfeiture of the property under his control; that he risked the whole cargo for his own private advantage; that he concealed all these matters until the exceptions to his first answer compelled him to disclose them in the second; that he had no right to carry goods on his private account to the same market with those of his partners; that their interests must necessarily clash; that he could not fairly have realized the sum of \$57,000, which the evidence shows that he did; that he only charged himself with half freight; that the accounts show that he settled with his consignees as if the whole goods belonged to him, and therefore could easily claim, as his own, whatever part he chose; that his average when the steamboat was destroyed was wrong; that the evidence showed that no such man as Martinez had ever existed; that with respect to the profits by *185] the voyage in the Superior, the original voyage, as planned, *was not ended; that Mathewson had no right to trade and speculate upon the money of his partners, but if the voyage was over, he ought to have sent it home; that in fact the partnership was not concluded, but the ship Mercury was only one instrument to carry it on; that Mathewson's letters show this; that in the voyage of the Superior he made 100 per cent. for himself, and only 40 per cent. for his partners.

With respect to the right to sue, *Mr. Greene* drew a distinction between the two voyages. As to the first voyage, the assignee had a right to sue in his own name. 2 Story Eq. Jur., p. 391, § 1055.

The owner had a right to assign, and the present assignment is sufficient. 2 Story Eq. Jur., pp. 381, 382, § 1047.

As to the right to sue on the new voyage.

It has been said, on the other side, that no new member can be introduced into a firm without the consent of all. But in this case one of the members of the partnership was itself a firm, viz., Carrington & Co., with which the contract was made. The admission of Wetmore did not change the name of the firm. Besides, the contract gave to Mathewson the exclusive control over the business. There was therefore no necessity for consultation. The partners at home had nothing to do but to receive the proceeds. The reason of the rule does not apply. But if we claim as assignee, we have a right

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to an account. All property is transferable in equity, and the bill was amended so as to include the rights of an assignee.

Mr. Whipple, on the same side.

With respect to the right to sue, we do not say that the complainant was a partner in the voyage of the *Mercury* in any other mode than as he was a member of the firm of Carrington & Co. It has been said, that a partner cannot introduce a stranger into the firm without the consent of the rest. We admit it. But the contract here was between Butler, Carrington & Co., and Mathewson. There was no contract between Mathewson and Carrington himself, or Samuel Wetmore individually. It was with the firm. Carrington's order alone would not have been binding, and in case of his death, the business would be wound up by his surviving partner. The property involved was not liable for Carrington's debts until all the partnership claims upon it were satisfied. If Carrington had drawn an order for money upon Mathewson, he ought not to have paid it, because he knew that all their share of the property belonged to Carrington & Co., and not to Carrington personally. A change in the component members of the firm could make no difference in the rights of Mathewson. The *power to control him was just the same after as before it. In case of loss, the firm of Carrington & Co. would have to contribute, and a portion of this must fall upon the new member. He ought, therefore, to share in the profits. The only question is, whether an assignee can sue a partner. But in equity, a bill for a specific performance would lie. All that would be necessary in such a case would be to bring in all the parties who had an interest in the subject.

Mr. Whipple then took up and enlarged upon the following propositions:

1. The answer of Mathewson was overthrown and discredited by counterbalancing testimony.
2. There was no difference in principle between Mathewson's right to trade in the *Mercury* and in the *Superior*.
3. He had no right to trade upon his own account in either, because it was expressly prohibited by the contract, and because it was at war with the duties which he had undertaken to perform.

These propositions *Mr. Whipple* illustrated at great length.

Mr. Webster, in reply and conclusion, gave a particular narrative of the course of the suit, and the transactions between the parties. The first proposition raised by the exceptions is

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that the complainant has no right to maintain this suit. We say that he had no interest whatever except as a partner, and that he cannot become so without our consent. It is necessary here to make a distinction between the first and second voyage. Mathewson was not a partner during the first voyage of the Mercury, and after that was over, became a partner to the amount of one tenth. It may be said, that, if Mathewson was not then a partner, our objection to the complainant's right to sue for the first voyage does not apply. But the answer to this is twofold:—

1. Because this bill counts on a special agreement, to which Wetmore, the complainant, was no party. His claim as assignee does not aid him in this.

2. Wetmore never had a particle of interest in the first voyage of the Mercury. This terminated at Gibraltar, in November, 1822, and in December following a new voyage was commenced. But it does not appear from the record that the Mercury and her cargo constituted any part of the \$118,987 which was credited to the old concern when a change of the books took place, in 1821. On the contrary, the following extract from the record shows that the Mercury was not brought into the new partnership until the 7th of February, 1824.

*137]		*E. Carrington & Co.,—old concern,		CR.
1824, 7th Feb.	By ship Wm. Baker, as cash,	July, 1821 . . .		\$7,000
	“ Nancy, “	June, 1821 . . .		3,500
	“ Trumbull, “	Jan'y, 1823 . . .		3,500
	“ John Brown, “	July, 1822 . . .		3,612 50
	“ Fame, “	May, 1823 . . .		1,500
	“ Integrity, “	June, 1821 . . .		7,500
	“ Mercury, at Gibr.,	Dec'r, 1822 . . .		5,000
	“ Lion, “	1821 . . .		14,500
	“ General Hamilton,	1822 . . .		2,300
	“ George, “	1821 . . .		10,000
	“ Panther, “	1822 . . .		22,000
				\$80,412 50
	By adventure ship Mercury, voyage from Gbr. to			
	Chili, \$50,619.18,—for one half			\$25,309 59

Consequently Wetmore never had any interest in the first voyage. The transfer at the bottom of the account is for one half of the outfit, but does not include any profits at all. He has no right to call upon Mathewson for any explanation of his proceedings.

With respect to the subsequent voyages, the right of the complainant to sue is sustained upon two grounds:—

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1. That Carrington & Co. had admitted him as a new partner in their firm; and,

2. That the complainant was an assignee.

1st. The authorities already cited, Tidd, Collyer, Johnson, and Maddock, are clear, that no new partner can be admitted without the consent of all.

2d. It is said that he was an assignee. But he says himself in the bill that he was a partner. The amendment to the bill, putting his claim upon the ground of being an assignee, does not vary the facts in the case. He was just as much an assignee without putting that in. But his claim to be assignee is only an evasion of a well-settled rule of law. Every new partner can claim to be assignee. In this case he would be a very strange one. He had as much right to control the others' shares as they had to control his. He could draw bills of exchange, settle accounts, &c. I had supposed that an assignment of a chose in action was recognized upon the principle that the assignor had nothing more to do with it. But not so here. Carrington & Co. had as much power over the property as they had before. There was no transfer of any distinct and specific interest. If Carrington & Co. had failed, what would have become of the thing assigned? It is said that the change was of no consequence to Mathewson. But the answer is, that the rule is general. We are not bound to show any reasons. If we were bound to do so, they might be given. Who knows whether or not Wetmore [*138 was an enemy of Mathewson? Some *unfriendly things were done afterwards; for example, they wrote to Alsop to take the business out of Mathewson's hands. How can we know that Willard Wetmore did not do this? It is said, also, that he was not a new partner, because he was only admitted to be a partner in the house of Carrington & Co., which house *eo nomine* was a member of the copartnership, and that therefore the copartnership remained unaltered. But this makes a commercial firm a corporation. If a contract be made with a firm composed of three persons, and then a fourth be admitted, can all four sue on the contract? Certainly not. The names of the partners must all be set forth in the declaration. They cannot sue in their commercial name. It is only a corporation that can do this. If the complainant had no interest in the first voyage, it disposes of the 2d, 3d, 6th, and 12th exceptions.

The 7th, 9th, and 11th relate to the right of Mathewson to trade upon his own private account. The objection to his doing so is maintained under the 7th article of the agreement, which says that he is to have no privileges. One privilege of

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a captain is to carry his goods without being charged with freight. This article had nothing to do with the subject. Mathewson carried nothing out, and could only trade on his commissions. What he acquired in this way he could certainly bring home by paying freight. There are some facts in the case which are important.

1. He had only a limited capital to trade upon for his owners, not enough to fill the ship.

2. It was always contemplated that she should earn freight by carrying other goods.

3. The freight thus earned was for the benefit of her owners.

4. The ship was never full.

5. There is no allegation that Mathewson did not load the ship properly.

How Mathewson made his money is entirely immaterial. There is no pretence that he took it from his owners. He has accounted for the whole \$50,000. There was no loss or damage of any kind by him. He squandered nothing. On the contrary, his owners made a very large sum of money through his care and skill. But the opposite counsel say that he could not carry his own goods in his own ship. Why not? If he paid freight to any one else, the owners would lose that much. They might then justly have complained. The sound rule of law is, that the master of a vessel must not place himself in a situation where his interest necessarily clashes with that of his owners. Such was not the case here. It is also said, that *139] he should have attended to nothing else than the concerns of his *owners. But he was detained at Lima for ten months without a possibility of expediting the business of his ship. Was he to sit down and think for his owners all this time?

We regard Mathewson's later voyages as being out of the contract altogether. The parties probably never contemplated using any other ship than the Mercury. When he chartered three fourths of the Superior, he told his owners of it. They acknowledged the receipt of his letters in which he said that it was upon partnership account, and yet they held their peace upon the subject of sanctioning it. This they had no right to do. The rule is, that where an agent acts clearly beyond the scope of his authority, mere silence on the part of his principal does not ratify the act. He must prove a positive assent. Suppose all this property had been lost. The owners did not ratify the proceeding until all danger was over, and the adventure had been found profitable. But it was then too late. If this chartering was beyond the contract, and the owners claim

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the profits because Mathewson said he did it for the partnership, they must take the whole of his admissions together.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court of Rhode Island.

Wetmore, the complainant, states in his bill, that on the 12th of October, 1820, Cyrus Butler, Edward Carrington, and Samuel Wetmore, merchants, doing business under the name of Edward Carrington & Co., of one part, and Henry Mathewson, of the other, all of Rhode Island, entered into an agreement in relation to a certain commercial adventure; that, in pursuance of the agreement, the ship Mercury was procured, and in December, 1820, Mathewson, as master and supercargo, received her at the Texel, in Europe, with instructions under the contract; and having purchased the cargo, as directed, he sailed the 30th of March, 1821, to Valparaiso, in Chili, and to other ports and places in Chili and Peru, as required in the agreement; sold the cargo, and with the proceeds sailed to Gibraltar, at which place he arrived in November, 1822, and there sold the cargo, having completed his first voyage.

The complainant further states, that at Gibraltar, in November, 1822, Mathewson commenced a new voyage or adventure in said ship, and, according to the terms of said agreement, became and was an owner in the ship and cargo of one tenth part thereof. And Butler, Carrington & Co., in pursuance of the agreement, furnished the ship with a cargo of the value of fifty thousand dollars; and Mathewson sailed on the new voyage from Gibraltar, as master and supercargo, on the 28th of December, 1822. He proceeded to the ports of Rio Janeiro, Valparaiso, *and other places, backwards and [*140 forwards, for trade, freight, and the employment of the ship, until the 10th of June, 1825, when, at the port of Guayaquil, in South America, the ship Mercury was condemned as unseaworthy, and ordered to be sold.

The complainant further states, that, about the 1st of June, 1821, he entered into co-partnership with Carrington & Co., and thereupon became and was interested in the ship Mercury and cargo, and in all the concerns of said adventure, according to the terms of said agreement, at and from Gibraltar, as aforesaid, in the proportion of one fourth of nine twentieth parts thereof, and then and there became a partner therein with Mathewson and the other defendants, and so continued to be until the said adventure ended, and until the dissolution of the partnership. In this part the bill was so amended as to enable the complainant to claim as an assignee, &c.

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Mathewson is further represented, in December, 1825, as having chartered at the port of Chorillas, or some other place in South America, three fourth parts of the ship Superior, Captain Andrews, on account and for the concern of the ship Mercury, and shipped on board of her a part or the whole of the proceeds of the sales of the ship Mercury and cargo, &c., on the terms and conditions of the agreement, and proceeded therewith to the port of Payta, and to other places backwards and forwards, until the 8th of November, 1826, at the port of Lima, where the charter-party expired, the voyages were ended, and the partnership dissolved.

And the complainant alleges that Mathewson had not rendered a full and fair account of his transactions and of the profits; and the bill prays that he and the other defendants may come to a full and fair account, &c.

None of the defendants, except Mathewson, answered the bill. The accounts were referred to masters at different times, and various reports were made. And the case comes before this court on exceptions to the masters' reports.

Instead of taking up the exceptions, the general principles on which they are founded will be considered.

It is first objected, that the complainant cannot sustain this suit, as he was not a member of the copartnership, and could not be without the consent of Mathewson. The general principle is admitted, that the individuals who compose the partnership cannot be changed without the consent of the whole. And it does appear that Mathewson had no knowledge that the complainant was a partner, or had any interest, in the concern, until some time after his return to the United States. *141] The complainant, therefore, could not be considered or treated as a *partner in prosecuting a partnership claim, or in any other procedure involving the rights of the original partnership.

But the complainant does not represent himself to be a partner in any other light than to show the extent of his interest. He seeks to enforce no right of the firm; but, alleging that the partnership was long since dissolved, he asks that the share of the profits to which he may be entitled shall be decreed to him. And in the amended bill he represents himself to be the assignee of a certain interest in the capital, and consequently entitled to a proportionate share of the profits.

If the firm were still in operation, the complainant, not being a member of it, could have no right or power to dissolve the partnership or to maintain this suit. His remedy would be against Carrington & Co., with whom he made the contract.

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But the partnership, or whatever it may be styled, having been dissolved, the complainant must be considered as having a certain interest in the fund to be distributed. On this ground he may maintain the suit, although Mathewson may never have had notice of his interest until the bill was filed. The allegation in the bill is, that the defendant has in his hands funds which belong to the complainant. And as it is stated and proved that the business was transacted by Mathewson, without the particular knowledge of the other parties in interest, he may be called on in the form of this bill to account for and pay over to the complainant any moneys in his hands which belong to him. The object seems to be merely to ascertain the distributive share to which the complainant may be entitled, as the answers of the defendants, except Mathewson, have not been required.

The next inquiry is, At what time did the interest of the complainant in the ship Mercury and her cargo accrue?

It is claimed for the complainant, that from the 1st of June, 1821, when his alleged contract of partnership was entered into, his interest in the ship and cargo attached. If this be so, he will be entitled to participate in the profits of the first voyage of the Mercury.

There is no written evidence of the contract between the complainant and Carrington & Co., and we must ascertain the commencement of the contract from the statements in the bill, the books of the company, and other evidence in the case.

The complainant states that Butler and Carrington & Co. furnished the "ship with specie and a cargo for the new adventure, according to the terms of said agreement, of the value of fifty thousand dollars; and the said Mathewson sailed from said port of Gibraltar on said new voyage or adventure in said ship, as master and supercargo, with said *specie and cargo on board, on or about the 28th [*142 of December, 1822."

And in the succeeding paragraph the complainant alleges, that about the 1st of June, 1821, he entered into copartnership with the said Edward Carrington & Co., and thereupon became and was interested in the said ship Mercury and cargo, and in all the concerns of said adventure, according to the terms of said agreement, at and from Gibraltar as aforesaid.

This language would seem to be too explicit to be misunderstood. The new voyage or adventure is spoken of from Gibraltar; and the complainant alleges, that, by virtue of his contract, he became interested in the said ship Mercury and cargo in all the concerns of said "adventure," "at and from Gibraltar." And this view is confirmed by a reference to the

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books of the company, in which the old concern is credited,—
 “By adventure ship Mercury, voyage from Gibraltar to Chili,”
 \$50,619.18; for one half, \$25,309.59.

The partnership of the complainant with Carrington & Co. seems to have embraced some ten or eleven vessels; in some, if not in all of which, except the Mercury, the interest of the complainant may have attached at the time of the contract. But, however this may be, we are satisfied that he had no interest in the Mercury, by his own showing, until the new voyage commenced from Gibraltar, in December, 1822.

It seems that Mathewson, as master and supercargo, having funds, traded on his own account, in all the voyages he made; by which means he accumulated as profits a large sum. That trade, it is insisted, was incompatible with his duties as a partner, and was prohibited by his contract.

In the first voyage, which was ended at Gibraltar in November, 1822, Mathewson was to receive “fifty dollars per month as wages as navigator and master of the ship, and also the sum of seven hundred dollars as commission,” &c. And he was “to have no privilege in the first voyage.”

In the new or second voyage, Mathewson was to have “fifty dollars per month as wages as commander and navigator of said ship, to commence with the new voyage, and as supercargo a commission of five per cent. on the net amount of all property safely returned to the United States, Canton, or Europe, proceeding from the original stock of fifty thousand dollars, together with one tenth of all the profits and earnings made in the voyage or voyages, freights or otherwise.” And it was “agreed that the wages and commissions specified and agreed for,” as above, “are to be in full of all services and privileges to Captain Mathewson, as master and supercargo, during the voyage or voyages specified.”

*143] Usage has given to the masters of vessels and others certain privileges of transportation and traffic, which are denied to Mathewson by the terms of the contract. He agreed that the wages and commissions should be in “full of all services and privileges.” The privileges here referred to cannot be limited to the mere right of the master to transport on board of his vessel articles of a certain weight or bulk without charge, but to all privileges whatsoever which by usage he might claim. The compensation to be paid was in full for the relinquishment of any usage or privilege of traffic, as well as for services to be rendered. This seems to be the import of the agreement. And when we consider the nature of the trust vested in Mathewson, the propriety of such an arrangement is clear.

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He was to be the acting partner in the voyages contemplated, having under his control the large capital invested, with power to trade from port to port, and to buy and sell as he should deem best for the interest of the company. He was entitled, for his part of the capital, to a ratable proportion of the profits. Now, is it reasonable to be supposed that the merchants with whom he was associated would allow him to be engaged on his own account in a commercial enterprise in which he might secure to himself the profits of the trade, and throw upon his partners the loss? This is not like the case where the master, having merely the command of the ship, exercises his privilege. The supercargo is the agent of the owners, and disposes of the cargo and makes purchases under their general instructions on his own responsibility.

But Mathewson was master and supercargo, exercising full powers over the vessel and cargo. He purchased and sold where he could do so to the best advantage; and for his entire services in this agency, and for the management of the ship, he was paid. Now, can an agent, thus acting for his principals, engage in a traffic on his own account? He buys for himself and his principals at the same market, and sells at the same. On the one side, he is interested in a small portion of the profits, and in a commission of five per cent. On the other, he realizes the entire profits, deducting therefrom the common charge of freight. In the purchases and in the sales, under such circumstances, the agent would be influenced, as may be reasonably supposed, by his own interests. From the accounts rendered, it appears that a much larger profit was realized by Mathewson on his private sales than on the sales for the company. Whether this resulted from the more judicious purchases or sales in the private enterprise, it shows that the traffic was inconsistent with the general agency. It was a rival interest, hostile to the interest of the company, exercised by their *agent, and without their approbation or knowledge. This the law will not sanction. [*144 It requires not only a *bonâ fide* action by an agent, but that he shall be free from those selfish motives which conflict with the interests of his principals.

After the condemnation and sale of the ship *Mercury*, three fourths of the *Superior* were chartered by Mathewson, and it is insisted, that any restrictions on his private trading, in the contract, on board of the *Mercury*, cannot be applied to similar transactions on the *Superior*, that the contract of partnership terminated on the sale of the *Mercury*, and that if the new adventure on board of the *Superior* be sanctioned, it must be

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taken subject to the conditions imposed by Mathewson, one of which was his private trading.

It does not appear from the contract or the correspondence of the parties, that any other ship than the Mercury was named or referred to, in which the commercial enterprise contemplated was to be carried on. And it may be said that the condemnation of that vessel ended the adventure. But Mathewson, without the authority or knowledge of his company, chartered another vessel, and used their capital in the enterprises in which he was subsequently engaged. Of necessity they sanctioned this procedure, as a disavowal of it would have limited their claim, at least in effect, to the personal responsibility of their agent.

In his letter dated at Guayaquil, 16th August, 1825, to Carrington & Co., Mathewson says:—"If I can get the ship Superior "at a fair charter, I shall return back to Canton by the way of Manilla, with the intention of returning to this coast again," &c. And again,—“Should I take the ship Superior, I expect to have the same interest in the voyage as I had in the Mercury, and wish you to keep my property constantly insured.” A similar expectation is expressed in a letter dated Lima, 10th November, 1825.

And again, in a letter dated at Lima, 16th November, 1825, after giving an account of the loss occasioned by the explosion on board the steamboat Tilica, he says:—"I have chartered three fourths of the ship Superior, Captain Andrews, for a voyage to Canton via Manilla, and back to this coast. Copy of the charter-party inclosed, which I hope will be satisfactory to you. I expect to have the same interest in the charter of this ship as I had on the former voyage in ship Mercury, and wish you to keep my interest insured."

Butler and Carrington & Co. wrote a letter to Mathewson, dated Providence, July 10th, 1826, in answer to various letters received from him, in which they speak discouragingly of the adventure in the Superior, decline sending *145] another ship, as *requested by him, and advise him to return home in the Superior, making the best disposition he can of their property, &c. At the date of this letter, the Superior was probably on her return voyage, as she arrived at Valparaiso on the 5th of October following. There was no dissent from the terms proposed by Mathewson in his three letters, above referred to, and of course the law implies an acquiescence. Indeed, from the directions given by the company in regard to their property, a sanction, though a reluctant one, and somewhat indirect, was given to the proceedings of their agent, as connected with the Superior. The

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refusal to advance money to Mr. Mathewson, under the circumstances, does not seem to have any direct bearing on this point.

It is claimed for Mathewson, that the company purposely avoided sanctioning his acts in regard to the Superior, until the result of the adventure should be known, when they could act as their interests might dictate.

The use of the capital of the company, which subjected it to the hazards of trade, under the circumstances, would, on equitable principles, entitle the company to the profits of the enterprise. But looking at the declarations of Mathewson about the time the ship Superior was chartered, and the nature of the enterprise undertaken, we feel authorized to say, that the relation of the parties to each other was not changed by this adventure. The rule applied to the Mercury, in regard to the rights of the complainant and the responsibilities of the defendant, must be applied to the Superior.

After the appeal was taken to this court, errors being discovered in the report of the masters, by consent, their report was returned to them for correction. And in their report to this court, dated the first of January, 1846, they say that they erred in their former report, in not making to Mathewson allowance for his commissions, and for his one tenth of the profits and earnings.

This last report finds a balance due to the complainant of two thousand nine hundred fifty-eight dollars and three cents; to which they add interest from the 1st of July, 1827, to January 2d, 1846, making three thousand two hundred eighty-three dollars and forty-one cents; which sum being added to the above balance makes the sum of six thousand two hundred forty-one dollars and forty-one cents.

From this sum must be deducted any amount charged for or against the defendant, by the masters in their reports, as the profits of trade or otherwise on his private account during the first voyage of the Mercury. And under the views expressed in this opinion, the complainant being interested in the Mercury *and her cargo in her voyage from Gib- [*146 raltar, in December, 1822, the exceptions to any items charged against the defendant and allowed to the complainant, arising out of any private trading by the defendant on board the Mercury, and afterwards on board of the Superior, are overruled. The exceptions which apply to allowances made to the complainant against the defendant, growing out of the first voyage of the Mercury, ending at Gibraltar, are sustained.

The decree of the Circuit Court is reversed, and the cause is remanded to that court, with instructions to enter a decree in pursuance of this opinion.

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LEWIS CURTIS AND GEORGE GRISWOLD, TRUSTEES OF THE
 APPALACHICOLA LAND COMPANY, APPELLANTS, v. JOHN
 AND JAMES INNERARITY.

Where there was a sale of wild lands in Florida, occupied by Indians, and the purchasers gave a mortgage to secure the payment of some outstanding instalments of the purchase-money, the fact that the purchasers had not complete possession of the lands is not a sufficient objection to their being charged with interest from the time when the money was due.

They had paid a large part of the purchase-money before the execution of the mortgage, without raising this objection, and the parties to the contract of sale knew that the Indians had possession of the lands as hunting-grounds. The purchasers in a former suit averred that they had peaceable possession, and the vendors cannot be held responsible for a subsequent disturbance.

The doctrine of the civil law, viz., "that the vendee is not liable for interest where he received no profits from the thing purchased," applies only to executory contracts where the price is contracted to be paid at some future day, and the contract is silent as to interest.

Nor is it an objection to the allowance of interest, that the purchaser was put to much trouble and expense to obtain a recognition of his title.

The claim to be released from interest, upon the ground that there was no person legally authorized to receive it, is not supported by the facts in this case.

Where the vendor gave a power of attorney to an agent to receive a payment from the purchasers on account, and the agent gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved of the acts of the agent, the payment is not good, even on account, against the vendor.

The purchasers, by making a payment in this way, upon certain terms which were not within the power of attorney, constituted the agent their agent. For two years afterwards, they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was then too late.

THIS was an appeal from the Court of Appeals for the Territory of Florida.

All the material facts in the case are set forth in the opinion of the court.

The case was argued at the preceding term by *Mr. Webster* and *Mr. Berrien*, for the appellants, and by *Mr. Westcott* and *Mr. Jones*, for the appellees.

*147] *Mr. Webster* opened the case, on the part of the appellants, by stating all the circumstances of it. He then contended that the appellants were not properly chargeable with interest during the interval between the death of John Forbes in 1822, in Cuba, and there being a personal representative of his estate in the United States. There was nobody to whom a payment could rightfully have been made. Moreover, the purchasers did not come into possession until 1835, when a decree of this court confirmed their title. Pre-

viously to that, both the commissioners and courts in Florida had rejected it. By the rules of the civil and Spanish law, the land when sold was warranted, and when this is the case, and the purchaser cannot get possession, no interest is payable. 1 Domat, 399, §§ 3, 4, 5, 75, 76, 79; 2 Wash., C. C., 204.

Under such circumstances, if notes are given for the purchase, chancery will restrain the vendor from collecting the notes until the incumbrances are cleared away. Of course, interest would not run during this time. 2 Johns. (N. Y.), Ch., 546; *Colin Mitchell's case*, 9 Pet., 711.

We are entitled to a credit for the money paid to Blount under his power of attorney. The power was ample to receive money. If he went beyond it, it is an affair between his principal and himself. But the power extended to the receipt of the money which we paid. If what he did beyond his power can be separated from what he did within it, then the latter is good *pro tanto*. If it cannot be separated, perhaps the whole act is void. It is for the court to say whether the payment on our part of a specific sum of money cannot be distinguished from the releases which he gave. Story Agency, 204, § 170.

If he had power to receive money on behalf of the mortgagee, he had power also to state an account and to give a receipt. So far his acts must be good, because a line can be drawn between them and his other acts.

Mr. Westcott, for the appellees, said that some of the facts stated by the opposite counsel did not appear upon the record. He therefore recapitulated the circumstances of the case as they were exhibited by the record. The instalments were all payable in London according to the contract, and in deciding that they were not, the court below erred, for the acts of the parties and the terms of the contract showed the contrary. The mortgage was made in consequence of a settlement between Forbes and Mitchell for money then due. All prior payments were presumed to be adjusted and taken into the account. It was given for the last two instalments, and the *time extended. The interest upon this extension [*148 would amount to a large sum, and the parties must be presumed to have had it in their minds. But it is said that we are not entitled to interest, because the contract was executed in Florida, and by the civil law no interest accrues until the vendee is placed in possession. Also, because there was no person legally authorized to receive the interest. With regard to the first point, where is the evidence, in this record, of any difficulty in obtaining possession? The record of a

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former case tried in this court shows that these parties then said they had been in undisturbed possession. The petitioners in that case were the assignees of Colin Mitchell.

It is said, also, that by the civil law a sale implies a warranty, and Domat is cited. But Domat does not give the laws of Spain which prevailed in Florida. It might be admitted that the civil law implies a warranty where there is a sale of personal property. But it is not the rule as to sales of property where deeds are required. The French law is not the same with the Spanish. For example, Domat says it is not necessary that the vendee must be ousted, to entitle him to bring an action against the vendor. This may, perhaps, have been Roman law, but it is not Spanish. Johnson's Laws of Spain, 216, 217; in brackets, 195.

The Spaniards seem to have derived their law from the same source from which the common law of England came. In both, there must be an actual eviction. But in this case, the appellants say that they were disturbed in their possession by the United States, when the decision of this court shows that the United States had no title.

The contract is said to have been for the purchase and sale of wild lands which yielded no fruits. 1 Domat, book 3, sec. 14, p. 422, enumerates four classes of cases where interest is chargeable. One is when it depends on the agreement. It is true that in our case nothing is expressly said about interest, either in the contract or mortgage. But the intention of the parties must be the guide, and that can be gathered from the contract. The civil and common law agree in this. If the time of payment was fixed by the mortgage, new security taken and the time extended, these circumstances take the case out of the rule respecting wild lands, because they supervene upon the original contract. It was executed after the treaty with Spain was concluded. The change of flags took place in July, 1821. But in February, 1820, it was known that a treaty was concluded. Mitchell's purchase was in anticipation of the treaty. Is it a case, then, to be governed by *149] the civil law, contrary to the intention of the parties and to the equity of the *case? The court below allowed five per cent. interest. But in August, 1822, the laws of Florida (p. 48) gave six per cent. The case cited from Wash. C. C., 250, is not in point. I refer to the same book, p. 253. On the general subject of interest, all the cases are cited in 2 Fonbl., 423; in brackets, 425.

But another reason given for not being charged with interest is, that there was no person authorized to receive the money. It is true that Forbes had no administrator in Florida

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until 1837; but he had an executor in Havana, and the contract was made there. The law is, that the party must show that he was willing and ready to pay before he can be excused. 3 Leigh (Va.), 619; Pow. Mortg., 367, 368; 2 Tomlin's Law Dict. 247; 1 Ves., 222; Burge Com., 754.

In the record, the appellants admit their liability to pay interest, and in the settlement with Forbes they actually pay five per cent. interest. If they put it upon the ground of a tender, we reply that a tender must be strictly made, so that the tender of a less sum is no bar to interest. Powell on Mort. above; 3 Kent's Com., 450; 6 Rand. (Va.), 465.

Payments must first be applied to interest. 1 Halst. (N. J.), 408; 1 Dall., 124.

As to Blount's power of attorney, he had only authority to receive money on account. He is prohibited in six different places from giving a release in full. Such powers must be strictly construed. Story Agency, 63.

The appellants knew that we claimed \$57,000, and yet took a release in full for \$13,000. What did good faith require of them? Certainly, to notify Innerarity; and yet, although the money was paid in October, 1839, he did not know it until May, 1840. As soon as he knew it, he disavowed it. The appellants purposely concealed it. (*Mr. Westcott* here examined many parts of the record to show this.)

With respect to the number of instalments of £375 each which ought to be deducted, the appellants never claimed more than one in their answer, and yet the court allowed them two.

Mr. Jones, on the same side, said that most of the original parties were dead. The affirmative of the questions raised had to be proved by the appellants. They were sued below on a plain question of mortgage, and ought to have presented their defence long ago. Persons and documents were then existing, to clear up things which are now dark. The contract was made in 1817 between Forbes and Mitchell, both residing in the same jurisdiction. The first instalment was provided for, leaving a balance of \$50,000. Two years afterwards, a mortgage *was made, and now the appellants [^{*150} wish to go behind the contract and mortgage too. Their claim is against strong presumption, and requires strict proof.

Mr. Berrien, in reply and conclusion, said that the evidence in the cause is very defective; but it is not the fault of the appellants. It is owing to the prosecution of a stale demand by the other side, after the evidence to resist it has in a great degree perished. The pleadings, also, are very irregular, and

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the record is strangely arranged; but the questions at issue can be discovered and fairly represented. The bill of Innerarity to foreclose, the answer of Curtis, the amended bill of John Innerarity, and the answer to it, are sufficient, without the proceedings upon the cross-bill, to make the question intelligible. These proceedings show that it is a bill to foreclose a mortgage by John Innerarity, as the administrator of Forbes, claiming \$76,000; this claim is then reduced to \$67,000, and subsequently to \$28,000. In this last, we say there is error in the following points, and that the decree ought to be reversed:—

1st. Because interest is calculated on each instalment from the respective days of payment, when it ought only to have been allowed from the time of the demand made by filing the bill of foreclosure, or, at most, from the grant of letters of administration on the estate of John Forbes to John Innerarity, one of the complainants.

2d. Because the balance alleged to be due on an unpaid bill of exchange, given by Colin Mitchell, which was not secured by the mortgage, together with damages and interest, are allowed in the decree.

3d. Because the court refused to allow a deduction of £375 to be made from the amount due on the mortgage, notwithstanding the written acknowledgment of John Forbes that such deduction should be made.

4th. Because the court refused to allow, as a payment on the mortgage, the sum of thirteen thousand three hundred and fifty-seven dollars and seventy-three cents, received from the appellants by Thomas M. Blount, the agent and attorney of John Innerarity.

5th. Because costs are decreed against the appellants.

The date of the letters of administration is not in the record, but it must have been between 1835 and 1837.

1. Interest upon the two instalments.

The condition of the property was and is notorious. It was wild land, inhabited by Indians, and the record shows it. In the former case, which has been referred to, it is true that *151] there was an averment that the parties had been in undisputed possession, *but it was inserted merely to give the court jurisdiction, and is contradicted by the evidence. The Indians were quiet whilst the Spanish government lasted, but became turbulent as soon as the change took place. The purchasers could not get possession of the property. By the civil law, interest is not payable, although a term be fixed for payment, which term has expired, unless the purchaser is put into possession, or the thing purchased is

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capable of producing fruits. 1 Domat, p. 397, 2d ed., tit. 5, sec. 1, art. 3.

The Spanish law must govern the case. But the same doctrine is maintained in our country. 2 Wash. C. C., 253.

In Domat, p. 398, art. 5, it is said that if the cause produces no revenue, interest is due only where there is a demand. This court will officially take notice of acts of Congress and treaties, and these prohibit any exercise of ownership by claimants until the title is settled. It has been said that there was no warranty in the deed. But by the civil law a warranty is implied. 1 Domat, p. 75, tit. 2. sec. 10; *ibid.* p. 76.

By our own law, any disturbance would be a ground for an injunction to stay the collection of the purchase money. 2 Johns. (N. Y.) Ch., 546.

Interest is given for money which is due and payable. But if it is not payable, according to the above case in Johnson, then no interest can be charged.

In the next place, interest cannot be claimed because from 1822 to the grant of letters of administration (say in 1837) there was no person legally entitled to receive a payment or to release the mortgage. Forbes's executor in Cuba must be excepted from this remark; but an offer of payment was made to that executor and refused. The refusal is alleged in the bill, and admitted in the answer. How can the debtor be charged with interest, when, if he sought to pay his debt, there was no one to whom he could pay it who could give him a legal receipt? It is said that the debtor must give notice to the creditor that he had the money ready. But in the cases referred to, there was some person authorized to receive such a notice; but here there was not. It is also said that we did pay interest, and therefore acknowledged our liability to pay. It is true that interest was paid, but by whom, and when? It was only when letters were taken out, and was not paid by the mortgagor, but by the drawer of a bill of exchange,—by Colin Mitchell; the mortgagor never paid any, and Colin Mitchell had no legal title. If interest is due, therefore, it can only be due from 1837.

2d point. As to the bill of exchange.

The bill was not produced in the court below, but the court *say that payment was made by the parties. [*152 But the payment was made by Colin Mitchell, and not the parties in the case. The judge therefore erred in a matter of fact. Payment of the bill could not have been enforced in a suit to foreclose the mortgage. It was given for the first instalment due upon the mortgage, and must have been received either as payment or as collateral security. If as

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payment, then a lesser security than the mortgage has been accepted, and it is just as if we had paid in cash. If it was taken as collateral security, the bill should have been returned when not paid. Under a bill to foreclose the mortgage, it is impossible to collect damages on a protested bill of exchange. They should have sued the drawer, Colin Mitchell, at law upon the bill.

3d point. As to the £375.

The court below say that we claim two allowances of £375, whereas we formerly claimed only one.

(*Mr. Berrien* here entered into many calculations upon this matter.)

4th point. As to Blount's authority.

The true rule upon this subject has been quoted by Mr. Webster from Story on Agency, §§ 166, 170. Where the acts of the agent within his authority are distinguishable from those beyond it, the former are good, and the latter only are void.

We say, 1st. That the authority was substantially executed.

2d. That the acts within the power are distinguishable from those beyond it.

The power which Blount had necessarily included a power to state an account and show what balance was due; and the receipt of \$13,000 was clearly within the scope of his authority. The court below say that the payment was clogged with a condition which Innerarity could not accept, and therefore he was not bound to bear the loss. But there is nothing in the record to sustain this. Blount was president of a bank, was Innerarity's solicitor in the case, and his bosom friend. Innerarity says he did not know of this transaction until 1840, and the counsel on the other side complain that we were guilty of a fraud in not giving notice. But why should we give notice? The presumption was that the agent would report to his principal. We paid the money, and took a receipt. It was not our duty to give notice of it to the principal.

Mr. Justice GRIER delivered the opinion of the court.

It would contribute nothing to a clear apprehension of the merits of this case to enumerate the various bills, answers, *153] cross-bills, &c., constituting the very voluminous and confused *mass of pleadings and documents spread upon our paper books. The pleadings have been consolidated, by agreement of the parties. We may, therefore, consider the case before us as a bill by John Innerarity, administrator of the estate of John Forbes, deceased, against the trustees of the

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Appalachicola Land Company, for the foreclosure of a mortgage given under the following circumstances:—

On the 4th of December, 1818, John Forbes, acting as the executor of William Panton and Thomas Forbes, and as agent of their respective heirs, covenanted to sell to Colin Mitchell "two undivided thirds of a certain tract of land ceded by the Creek Indians unto the house of trade of which said Forbes was the principal partner, lying upon and between the rivers Appalachicola and Appalachee, and containing about one million two hundred thousand acres, for the consideration of \$66,666.66, to be paid in the following manner:—One fourth, or \$16,666, on the 1st of May next, in the city of London, valuing the same at four shillings and sixpence sterling each dollar; the remainder, or \$50,000, in four equal yearly instalments, reckoning from the date," &c.

This agreement was made and executed in the island of Cuba, where John Forbes then resided. Colin Mitchell purchased for himself, Carnochan, and others, and subsequently took the title in his own name, and continued to hold it till 1820, when he transferred it to Octavius Mitchell, who held it as trustee for the company then or afterwards known as the Appalachicola Land Company. On the 9th of October, 1820, Octavius Mitchell executed a mortgage to John Forbes for the last two instalments of \$12,500 each, due, by the agreement, on the 8th of December, 1820, and the 8th of December, 1821; but further time appears to have been given in the mortgage for these two payments, as they are made payable on the 9th of March, 1821, and the 9th of March, 1822. This mortgage is on the undivided half of the land conveyed to Mitchell, and is the subject of the present suit.

John Forbes, the mortgagee, died in Cuba, in May, 1822, having made a will and appointed executors, who qualified and acted as such in that place, but never proved the will nor obtained letters testamentary in Florida.

John Innerarity first obtained letters of administration in Florida, on the estate of John Forbes, on the 5th of July, 1836.

That there is a balance due and unpaid on this mortgage seems to be admitted; but the parties differ widely in their estimates of its amount. The Superior Court for the county of Escambia, where this case originated, adjudged the balance *due on the mortgage to be \$50,159.60. On [*154 appeal to the Court of Errors of the territory, that court decreed the balance due to be \$28,500. From that decree both parties have appealed. At present, we can notice only

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the exceptions taken by the mortgagors, whose appeal is now under consideration.

They have insisted on three several exceptions to the decree of the Court of Appeals, which will be noticed in their order.

1. Because interest was allowed from the time the money secured by the mortgage became payable, when it should have been allowed only from the time of filing the bill for foreclosure.

2. Because the court refused to allow a credit of £375, which John Forbes admitted should be deducted from the amount claimed.

3. Because a payment of \$13,357.73, made to Thomas M. Blount, was not allowed as a credit.

We shall consider these exceptions in their order, stating the facts of the case bearing on each of them so far as may be necessary to their elucidation.

I. As to the interest.

As the contract for the purchase of these lands, and the mortgage given to secure the balance of the purchase-money, were executed in the island of Cuba, the court below allowed the current and legal rate of interest of that place (five per cent.) from the time the respective payments became due.

It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said, that such is the implied contract of the parties. (See 2 Fonbl. Eq., 423. 1 Domat, book 3, tit. 5.) The appellants themselves seem to have been fully aware of the justice of this rule, as in all their communications with the mortgagees they have admitted their liability to pay interest, and in their bill, filed in 1837, to have satisfaction entered on the mortgage (which makes a part of the record of this case), they offer "to pay interest at five per cent. from the 8th of *155] December, 1821." This may not of itself be a sufficient reason *for disallowing their present exception, if founded in justice, but it affords a strong presumption that it has no such foundation.

The reasons alleged in support of this exception are, first,

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that the mortgagors had not possession of the land, or at least received no profits from it, and that, in either case, by the civil law, the purchaser is not bound to pay interest. But we are of opinion that this objection is founded on a mistake both of the law and the fact. The mortgage was given more than two years after the sale to the mortgagors and title executed to them. A large portion of the purchase-money had been paid, and no objection made, that the purchasers had not all the possession of which the land was capable. Both parties knew that, although the Indians had ceded their title, they still continued a transient occupancy of the lands for hunting-grounds. They may have infested the lands, and rendered it dangerous for the owner to occupy them in time of war; but their possession was not what the law would term adverse, not being with claim of title. There was no covenant by the vendor to expel or exterminate the Indians; the purchasers received such possession of the land as could be given them, *cum onere*. It was not expected that the Indians should attorn to them or pay them rent. The purchasers of over a million of acres of wild land did not expect to make profits by actual cultivation or reception of rents. Their expectation of profit was from the increase in value of the lands from efflux of time and the progress of improvement. These profits they have realized, doubtless to the amount of more than a thousand per cent. on their original investment. Moreover, the record of the Forbes case, decided in this court (and read in evidence in this case, by consent), shows that, in 1828, eleven years after the purchase, the appellants, or those under whom they claim, declared under oath that they had had "peaceable possession" of the land ever since their purchase.

If, since that time, or before it, an actual *pedis possessio* of these lands may have proved difficult or dangerous, owing to Indian wars, it surely cannot be seriously argued, that any warranty, expressed or implied, either by the civil or the common law, makes the vendor liable for the acts of a public enemy, or for a detention or disturbance of the possession by the act of the sovereign power. The purchasers have received full seizin and possession of these lands in the year 1819, under a title proved to be good and indefeasible; the execution of this mortgage is an assertion of the fact; they have neglected to comply with their contract to pay the money secured by the mortgage for ten years, at least, without any apology; and it would be a strange doctrine indeed, [*156 and one *equally unknown to the civil as to the common law, that an accidental disturbance of the possession by the public enemy, happening so many years after such default

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of payment, could retroact to justify its previous detention or operate as a defence to the payment either of principal or interest.

Besides, if it were true that, during all this time, the vendee was unable to have such a possession of his land as to receive profits from it, the doctrine of the civil law, as quoted by the learned counsel for the appellant,—“that the vendee is not liable for interest where he received no profits from the thing purchased,”—has no application to the present case. It applies only to executory contracts, where the price is contracted to be paid at some future day, and the contract is silent as to interest. In such a case, the civil law will allow interest from the date of the contract of sale, if the vendee has had possession and received profits from the thing purchased. In this it differs from the common law, which would not allow interest before the day fixed for payment, unless specially contracted for. But where the purchaser has contracted to pay on a given day, and neglects or refuses so to do, both law and equity subject him to interest as the measure of damages for the breach of his contract.

A second objection made to the payment of interest is, that the purchasers incurred much trouble and expense in obtaining any acknowledgment of their title from the United States, and, although it was finally decided by the Supreme Court of the United States that their title was valid, yet that the courts of Florida had declared it invalid, and thus caused a cloud to hang over it for two or three years, which hindered the settlement, improvement, and sale of the lands.

It is hard to conceive on what grounds these facts should constitute a defence to the payment of interest. The vendor *did* not, and no sane vendor *would*, covenant that his vendee should enjoy the property in all future time, free from unjust interruption or oppression either by the sovereign power of the state, the public enemy, or individual trespassers. At the time this company purchased this claim from Forbes, the United States and Spain were in treaty for the cession of Florida; and doubtless it was the prospect of this change of sovereign, and the anticipated increase in value in consequence thereof, that moved them to purchase this large claim on speculation, and to covenant to pay the money for it, without waiting to see whether the United States would confirm the title, or without exacting from the vendors any covenant for the payment of any expenses to be incurred in obtaining the confirmation of their title by the new sovereign.

*157] *It may be admitted, also, that a court of equity would have enjoined the vendor from enforcing the

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collection of the purchase-money while the decree of the Florida court as to the title remained unreversed, from an apprehension of a total failure of consideration; yet as that judgment *was* reversed, and as the vendee was never evicted or put out of possession, he could have no claim to be released from paying interest, even during the time his title was thus unjustly subject to a cloud, much less for any term preceding its existence, or since its removal. As we have already said, there was no covenant in this sale, nor is there in this or in any sale, either of real or personal property, any implied warranty by the vendor that his vendee shall enjoy it forever free from all unjust or illegal interference either by the sovereign, or the citizen, or the public enemy.

If the money secured by this mortgage had been paid when it became due, the mortgagee could have retained it with good conscience, and the mortgagor could have shown no right to recover it back on the ground of failure of consideration; for the consideration has not failed, and the title to the lands sold is indefeasible. And such being the case, it is hard to perceive any reason why the mortgagor should not be liable to the legal damages for detaining money which he was bound to pay.

Another reason urged against the allowance of interest in this case is founded on the allegation, that, from the death of Forbes, in 1822, till 1836, when John Innerarity took out letters of administration in Florida, there was no person to whom the mortgagors could legally make payment. But this argument is founded on a mistake of facts, as it appears clearly by the record, that, whenever the mortgagors were ready or willing to pay, they found persons ready to receive and give them a good and sufficient acquittance.

John Forbes was a trustee, as to this money, for the heirs of Panton and Thomas Forbes. When the mortgagors called on the executors of John Forbes to make a partial payment on the mortgage, they declined to receive it, but directed the payment to be made to the *cestui que trusts*, which was accordingly done. In October, 1823, one half of the first instalment was paid to William H. Forbes, acting for himself and the other heirs of Thomas Forbes. In the same year, also, the mortgagors paid to James Innerarity, who represented the heirs of Panton, the sum of \$2,680.81, and in February, 1825, the further sum of \$2,080.87. There is no evidence of any tender of the balance, either to the executors of Forbes or to the *cestui que trusts*.

This objection is therefore without foundation; and this *exception to the decree of the Court of Appeals [*158 is overruled.

II. The second exception is to the refusal of the court to allow a credit of £375, claimed by the mortgagors.

After three of the five instalments into which the price of the lands was divided had been paid, but before the execution of the mortgage to secure the last two, it was discovered that John and James Innerarity, who were owners of one fifth of the Panton interest (or one tenth of the two thirds sold), would not assent to the sale made by John Forbes. Whereupon, as appears by all the testimony and the admissions of the parties, it was agreed to refund to the purchasers a proportional amount (being one tenth) of the purchase-money. Accordingly, three several sums of £375 were refunded to John Carnochan, who then represented the purchasers. "Besides which," says Forbes, in his letter of 10th of December, 1819, "you will have to deduct from the acceptances due in 1820 and 1821 *two* similar sums at these distinct periods." On the trial below, the mortgagees insisted, that, as the mortgage was given for the balance due on the purchase nearly a year after the above-stated letter of Forbes, the fair presumption would be, that all the deductions for the defect of title in the Panton share had been already made, as the parties were fully aware of the difficulty, and had already refunded large sums on account of it; and, as further time was given in the mortgage for the payment of the last two instalments, it would not be probable that the parties had inadvertently given a security for a larger sum than was due. On the contrary, the mortgagors contended that they were entitled to a credit for two sums of £375, according to the admission in Forbes's letter. The Court of Appeals allowed them a credit for one sum of £375, but refused to allow the other; which constitutes the ground of the second exception to the decree.

As the correctness of the position taken by either party, on this point, can be subjected to the test of mathematical calculation based on admitted facts, we are of opinion that this exception has not been sustained. The whole amount of purchase-money for the two thirds conveyed was £15,000 sterling. The deduction for the Innerarity interest was one tenth, or £1,500, which would make *four* instalments of £375 each. As the mortgage is given for the last two instalments without any deduction, and as it is admitted that three instalments of £375 each were refunded, it is plain that the fourth sum of £375 was not deducted from the mortgage, and equally plain that John Forbes was mistaken when he said *159] that *two* sums of £375 remained yet to be deducted. The origin of this *mistake can easily be discerned. The first payment was one fourth of the whole purchase

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money, or £3,750; the one tenth refunded was £375; but as the remaining three fourths were divided into *four* instalments, each of £2,812 10s., the deduction from each would be but £281 5s. He overlooked the fact, that the last four instalments, being each one fourth less than the first, the amount to be deducted would be diminished in the same ratio. The oversight or mistake of Forbes in 1819 is not greater than that of both parties in 1820, when they included in the mortgage £375 which they knew was not due. But as the fact is fully established, that the only subject of deduction was one tenth of the whole, and that three sums of £375 had been refunded, and no more, the admission of Forbes, on the one side, and the presumptions of fact drawn from the execution of the mortgage, on the other, must both yield to the certainty of arithmetic.

III. The third and last ground of exception urged by the appellants is the refusal of the court to allow them a credit for the sum of \$13,357.75, paid to Thomas M. Blount, the agent and attorney of John Innerarity.

Some two years after the commencement of the litigation between these parties, the appellants made a payment to Thomas M. Blount of \$13,357.75, under the following circumstances.

It was admitted by both parties that a large sum was due on the mortgage, but they differed widely as to the amount. Innerarity, being willing to receive any amount which the mortgagors were willing to pay, and give them a general credit for so much paid on account, without compromising his right to recover the whole amount claimed by him, gave a power of attorney to Thomas M. Blount, who was going to New York, where the appellants resided, "to receive from the trustees of the Appalachian Land Company, in the city of New York, any sum or sums of money on account of and in part payment of the mortgage, &c., and to give such receipt or receipts, release or releases, therefor, as may be deemed requisite to exonerate the said trustees from so much of the said mortgage as may be paid by them on account and in part payment," &c., &c.

With this power of attorney, Blount proceeded to New York, and, instead of receiving such sums as the mortgagees might choose to pay on account, and giving such receipts or releases as he was authorized to give, he assumed to adjust and settle with the company the whole balance due on the mortgage, and to act as if he had been authorized to arbitrate and decide all the matters in variance between the parties, in the controversies then pending in the courts of Florida.

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For the sum of \$4,832.35, he gave the mortgagors a discharge for the balance *of the first instalment, including the disputed item of damages on the bill of exchange, claims, &c. And for a further sum of \$8,525.38 he gave a discharge of one half the last instalment. Both Blount and the appellants well knew that Innerarity had uniformly and tenaciously claimed a much larger amount as due on each of these items; and they ought to have known, that, even if no more was justly due on them than the amounts paid, Blount had no authority to compromise or adjudicate on the justice of Innerarity's claim. Besides these sums of money which are stated in Blount's release to be the whole consideration thereof, he received also a written contract of Messrs. Curtis and Griswold, to pay a further sum of \$5,000, on certain conditions; but to whom, or how, or on what contingency, it is difficult to discover from any thing that appears on the face of the paper, or the evidence in the cause.

Soon after this transaction (on 20th January, 1840), Innerarity gave notice by letter to the appellants, that he repudiated the act of Blount, and says:—"So soon after his return as I saw Mr. Blount, he informed me of the provisional arrangement that he had made with you, subject to my approval. But this involved the suspension of the sum of \$5,000, with the corresponding interest, &c., for which your contingent bond was proposed, &c., with the preliminary, however, of the cancellation of the moiety of the mortgage. This proposition, I confess, startled me," &c.

The appellants, though thus informed by Innerarity that he considered "Blount as placed in the position of their agent," and that he was unwilling to ratify "this provisional arrangement," nevertheless proceeded to put on record in Florida the release given them by Blount. When this came to the knowledge of Innerarity, he again addressed them, by letter of 19th May, 1840, as follows:—"I addressed you a letter on the 20th of January last, and subsequently on the 25th of February, by original and duplicate, in which I advised you, that, having learned from T. M. Blount that he had an arrangement with you subject to my approval, as he stated to me and others, in relation to a discharge of one moiety of the mortgage, &c., I did not feel at liberty, as the representative of the interest of others, for the reasons stated in my said letter of 20th of January, to sanction the provisional contract which he made. To these letters I have received no answer, but to my great astonishment have just seen the deed of release given to you on the 19th of September, by Mr. Blount, in which he proposes to act as my attorney, and which deed professes

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to discharge the trustees from one moiety secured by the above-mentioned *mortgage. In so doing, Mr. Blount has transcended his authority as my attorney, as will appear by reference to my letter of attorney, &c., &c. Feeling it to be my duty to disavow this unauthorized assumption of my attorney, and not less my duty to give you timely warning to protect yourselves from injury, I hereby notify you that I disavow and repudiate the deed of release, &c. I have not received, nor will not receive, any part of the money paid by you to Mr. Blount; but will look to you and the original security for the debt due under the said mortgage."

The receipt of these letters is admitted by the appellants in their answer to a supplemental bill filed by Innerarity (June 12th, 1840), for the purpose of having Blount's release delivered up, and the whole transaction between him and the trustees declared fraudulent and void. On the 6th of July, 1840, Carnochan, one of the trustees, filed his cross bill to make Blount a party, and praying that, inasmuch as the money paid to him by the trustees had not been applied to the purpose for which it was designed, it may be paid into court and held under their control. On the 9th of April, 1841, the appellants filed another cross bill, insisting on the full power of Blount in the transaction, and praying the court to confirm and establish the release, and to order satisfaction to be entered on the mortgage accordingly.

And finally, on the 27th of June, 1841, after it was ascertained that Blount and the Bank of Pensacola (of which he was president, and in which he had deposited the money) were both insolvent, and that the money paid to him was lost, the appellants, in their answer to the cross bill, *for the first time*, offer "to waive the said release," and "be satisfied that payment shall be held and regarded as on account of the mortgage generally, and be credited *pro tanto*."

On these facts, the appellants contend that they are entitled to a credit for the money paid to Blount, because he was authorized to receive it; and although the settlement he made and the release he gave may be void for want of authority, yet his acts, so far as they were authorized, were valid and binding on his principal.

"Regularly it is true," says Lord Coke, "that when a man doth less than the commandment or authority committed unto him, then, the commandment or authority being not pursued, the act is void. And when a man doth that which he is authorized to do, *and more*, then it is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations." (Co. Litt., 258 a). And

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“Lord Coke is well warranted,” says Mr. Justice Story (Story *Agency, § 166), “in suggesting that there are exceptions and limitations. Where there is a complete execution of the authority, and something *ex abundanti* is added which is improper, then the execution is good and the excess only is void. But when there is not the complete execution of the power, or when the boundaries between the excess and the rightful execution are not distinguishable, then the whole would be void.”

It is contended, in the present case, that the excess and the rightful execution are easily distinguishable, and that the receipt of the money was a valid act and binding on his principal, though the settlement and release were void. But we are of opinion, that the appellants have not put themselves in a condition to have the benefit of this principle. Blount's power of attorney was a bare authority to receive money on account of the mortgage then in litigation, if the appellants chose to pay him any, leaving all the questions in dispute between the parties open to future adjustment. But the mortgagors refuse to pay him money on the conditions on which he was authorized to receive it, and give a valid acquittance. On the contrary, the money given to Blount is on their own terms, and in consideration of a settlement, arrangement, and release, which they knew, or ought to have known, Blount had no authority to make. The money paid, the bond given, the receipt taken, discharging them from the balance claimed on the bill of exchange and from one half of the last instalment, constitute one transaction. Having advanced the money on their own terms and conditions, and not on those tendered by Innerarity, they put him into a situation in which he must either affirm or repudiate the whole transaction. For if he accepted the money, they might insist that he could not reject the consideration on which it was given, on the familiar principle of the law, “that the principal cannot ratify a transaction of his agent in part, and repudiate it as to the rest.” (Story Agency, § 250). Besides, by thus undertaking to enter into a treaty with Blount which they knew could not be binding without the assent of Innerarity, they in fact constituted Blount their ambassador or agent to obtain its confirmation. They had a perfect right to refuse to pay money on the terms dictated by Innerarity in his letter of attorney; and Innerarity had an equal right to refuse it on their terms. And when informed by him, soon after the transaction, that he considers Blount as their agent, and that he had proposed this transaction as a provisional arrangement subject to the

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approval of Innerarity, they keep silence till he again repudiates the transaction and files a bill to set it aside, and never intimate a willingness *that Innerarity shall receive the money on the terms he offered, till near two years afterwards, when the money was lost by the insolvency of Blount and the bank. This assent of the appellants to the terms of Innerarity came too late, after the money had been lost by their obstinate pertinacity in endeavors to compel him to accept it on their own terms. [*163

We are of opinion, therefore, that the Court of Appeals have not erred in refusing to credit the appellants with this sum as a payment on the mortgage.

The decree of the Court of Appeals of Florida is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Territory of Florida, and was argued by counsel. On consideration whereof, it is now here considered and decreed by this court, that the decree of the said Court of Appeals in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum, and that the time of redemption be extended to six months from and after the filing of the mandate of this court in this case in the court below.

NELSON F. SHELTON, APPELLANT, v. CLAYTON TIFFIN AND
LILBURN P. PERRY.

Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state unless the contrary appear. And this principle is strengthened when the individual lives on a plantation and cultivates it with a large force, claiming and improving the property as his own. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive upon the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient.¹

The facts, that the party and his wife were residents of Louisiana for more than two years before the commencement of the suit; that he was absent only once, on a visit to a watering-place; that he resided the greater part of the time on a plantation which he claimed as his own; that he constructed

¹The obtaining a right to vote or change of domicile. *Burnham v. Rangeley*, 1 Woodb. & M., 7.

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upon it a more secure and comfortable dwelling-house; that he observed to a witness that he considered himself a resident,—are sufficient to justify the Circuit Court of Louisiana in exercising jurisdiction in a suit brought against that party by a citizen of Missouri.

Where fraud is alleged in a bill, and relief is prayed against a judgment and a judicial sale of property, a demurrer to the bill, that relief can be had at law, is not sustainable.²

Where a citizen of Virginia sued, in the Circuit Court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of

*164] Missouri is at liberty to *show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity.

A judgment of a state court, that the debt had been extinguished, given in an action which was not brought for the recovery of the debt, and which action, moreover, had been discontinued by the plaintiff, cannot be set up in bar of proceedings in the Circuit Court for the recovery of the debt, which proceedings had been commenced when the judgment of the state court was given.

Where a worthless promissory note is imposed upon the vendor as part of the cash payment, it would seem that, if any fraud has been practised upon the vendor by the vendee, the amount of the note still remains an equitable lien upon the land.

THIS was an appeal from the Circuit Court of the United States for East Louisiana, sitting as a court of equity.

On the 1st of August, 1837, Clayton Tiffin and Lilburn P. Perry received a deed of a tract of land on the western bank of the Mississippi River, about five miles above the town of Vicksburg, and containing six hundred and forty-four acres.

On the 10th of April, 1838, Tiffin and Perry sold the same land, together with a large number of negroes, to Samuel Anderson, for the sum of seventy-five thousand dollars. The sale was stated to be for cash. But in fact the payment was to be made in this way:—

Funds supposed to be as good as cash, . . .	\$35,000
Notes secured by mortgage,	40,000
	\$75,000

John M. Perry, the father of Lilburn P. Perry, and father-in-law of Tiffin, became the agent to receive these funds. The \$35,000 was again divided into two classes, viz., a debt of \$13,000, which was due to Anderson by Lilburn P. Perry and John M. Perry, and which debt became thus extinguished, and a note for \$18,282.65, given by Austin, Ragan, and Bohannon, payable to Anderson on the 1st April, 1839.

The sum of \$35,000 being thus arranged, the balance of \$40,000 was not provided for until sometime afterwards, viz.,

²See note to *Davis v. Tileston*, ante *114.

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on the 1st of March, 1839, when Anderson gave the following notes:—

\$13,333. On or before the first day of January, 1842, we promise to pay Lilburn P. Perry the just and full sum of thirteen thousand three hundred and thirty-three dollars, value received, for land and negroes purchased of Clayton Tiffin and Lilburn P. Perry; for the true payment of which we bind ourselves, our heirs, &c., firmly by these presents. Given under our hands and seals, this the first of March, 1839.

SAMUEL ANDERSON. [SEAL.]

Ne varietur, July 9th, 1839.

RICHARD CHS. DOWNES, [SEAL.]

J. judge parish Madison, Louisiana.

(*Indorsed.)

[*165

For value received, I assign the within note to Clayton Tiffin, October 22d, 1839.

L. P. PERRY,

For his agent J. M. PERRY.

216. Filed 23d Nov., 1839.

JOHN T. MASON, *Clerk.*

\$13,333 $\frac{00}{000}$. On or before the first of January, 1843, we promise to pay Lilbourne P. Perry the just and full sum of thirteen thousand three hundred and thirty-three dollars, value received, for land and negroes purchased of Clayton Tiffin and Lilbourne P. Perry; for the true payment of which we bind ourselves, our heirs, &c., firmly by these presents. Given under our hands and seals, this the first day of March, 1839.

(Signed,) SAMUEL ANDERSON, [SEAL.]

Ne varietur, July 9th, 1839.

RICHARD CHS. DOWNES, [SEAL.]

J. judge parish Madison, Louisiana.

(Indorsed) 216. Filed Nov., 1839.

JOHN T. MASON, *Clerk.*

\$13,333 $\frac{00}{100}$. On or before the first of January, 1844, we promise to pay Lilbourne P. Perry the just and full sum of thirteen thousand three hundred and thirty-three dollars, value received, for land and slaves purchased of Clayton Tiffin and Lilbourne P. Perry; for the true payment of which we bind ourselves, our heirs, &c., firmly by these presents.

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Given under our hands and seals, this the first day of March, 1839.

(Signed,) SAMUEL ANDERSON, [SEAL.]
 Ne varietur, July 9th, 1839.

RICHARD CHS. DOWNES, [SEAL.]
J. judge of parish Madison, Louisiana.

(Indorsed) 216. Filed 28 Nov., 1839.

JOHN T. MASON, *Clerk.*

On the 9th of July, 1839, the remaining part of the agreement was carried into effect, by Anderson's executing a mortgage to Lilburn P. Perry, and in favor of whomsoever may become the legal holder and owner of the above notes, of the property, land, and slaves, which had been conveyed to Anderson by the deed from Tiffin and Perry.

On the same 9th of July, Anderson executed another mortgage, reciting that he was justly indebted to Nelson F. Shelton, of Goochland county, in the State of Virginia, in the sum of \$45,550, and mortgaging the same property to secure *166] it,—*“it being understood that this mortgage is posterior to that granted by the said Samuel Anderson in favor of Lilburn P. Perry on this day.” This sum of \$45,550 was divided into two notes, payable on the 1st of January, 1845, and 1st of January, 1846. Whilst upon the subject of this last mortgage, it may be as well to say that another was substituted for it, with the consent of all parties, on the 17th of March, 1840, in which Robert Anderson, of Virginia, was also included, as a creditor to the amount of \$3,000. This, like the other, referred to the prior mortgage given to Perry.

It is proper now to go back a few months in the order of time.

In January, 1839, Hillery Mosely and William W. Bouldin, citizens of Virginia, filed a petition in the Circuit Court of the United States against John M. Perry, and Lilburn P. Perry, alleging that the Perrys were indebted to the petitioners in the sum of \$7,560, upon a promissory note. As the proceedings upon this suit, as far as the appearance of Lilburn P. Perry was concerned, were drawn into question, it is better to go through with this branch of the case entirely before recurring to any other part of it. On the 12th of January, an order of court was directed to Lilburn P. Perry, commanding him to file his answer within ten days, to which the marshal made the following return:—

“Defendant, L. P. Perry, could not be found, after diligent search and inquiry. Returned Feb. 23, 1839.

“J. P. WALDEN, *Deputy Marshal.*”

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A writ of arrest was then issued, directing the marshal to seize the bodies of John M. Perry and Lilburn P. Perry, and confine them until they should give security not to leave the state without permission of the court, to which the marshal made the following return:—

Marshal's Return.

Received 12th January, 1839; and on the 18th same month, arrested and took defendant, John M. Perry, into my custody, from whence he was released by giving bond, with Z. H. Rawlings, Charles Johnson, and H. Lewis, as sureties, in the parish of Madison, 450 miles from New Orleans, in the Eastern District of Louisiana; which bail bond is herein returned; and Lilburn P. Perry could not be found, after diligent search and inquiry, and executing this writ in all other things as the law directs. Returned February 23d, 1839.

(Signed,)

J. H. HOLLAND, *Marshal.*

*After this, B. A. Crawford, calling himself "attorney for defendants," filed an answer for John M. Perry [*167 and Lilburn P. Perry, and the cause regularly proceeded to trial, Mr. Crawford attending to it in all its stages as attorney for both defendants. In June, 1839, it was tried, and the jury found a verdict for \$7,560. In July, a *fi. fa.* was issued, the return to which was, "no property." In October, an *alias* was issued, to which the marshal made the following return, viz.:—

Marshal's Return.

Received 23d day of October, 1839, and on the same day made demand of the amount of the within *fi. fa.*, at the residence of the within-named defendants, John M. Perry and Lilburn P. Perry, which was refused. I seized, on the 23d day of November, 1839, a debt due by Samuel Anderson to the within-named Lilburn P. Perry, for forty thousand dollars. There was three notes given by said Anderson to said Perry, and mortgage on fifty slaves and six hundred and forty acres of land, to receive the payment of said debt to satisfy this *fi. fa.*, and after advertising the said claim ten entire days from the last day of the notice of seizure, and having appraisers appointed according to law, who appraised said property to be worth twenty-eight thousand dollars, cash valuation, on the 10th day of December, 1839, and then, on the same day, offered the property for sale for cash, and repeatedly crying it,—there was no sale for want of a bid to the amount required by law, and then I advertised the same property, and sold the same on the 4th day of January, 1840, on a credit of

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twelve months, when Samuel Anderson became the purchaser thereof for the sum of five thousand dollars, he being the highest and last bidder, for which he gave his bond, with John B. Bemiss and Aaron Lilly as security; which bond I received, and the said bond is herewith returned; four hundred and thirty miles from New Orleans.

(Signed,)

M. MARIGNY, *U. S. Marshal.*

By JOHN N. DONOHUE,

Deputy U. S. Marshal.

In January, 1840, a *capias ad satisfaciendum* was issued against both the Perrys for the balance of the judgment after deducting the proceeds of the sale to Anderson, to which writ the marshal made the following return:

Marshal's Return.

Received Thursday, the 16th January, 1840, and after diligent search and inquiry, the within-named defendants, John *168] M. Perry and Lilburn P. Perry, could not be found in the *Eastern District of Louisiana,—distance five hundred miles from New Orleans.

(Signed,)

M. MARIGNY, *U. S. Marshal.*

By JOHN N. DONOHUE,

Deputy U. S. Marshal.

The marshal soon afterwards executed the following conveyance to Anderson:—

STATE OF LOUISIANA, *Parish of Madison:*

Whereas I, John N. Donohue, deputy United States marshal in and for the Eastern District of the State of Louisiana, by virtue of a writ of *feri facias* issued from the Circuit Court of the United States for the Ninth Circuit in and for district and state aforesaid, at the suit of *Mosely and Bouldin v. John M. Perry and Lilburn P. Perry*, I did seize a certain debt owing by Samuel Anderson to said Lilburn P. Perry, as evidenced by three promissory notes, dated 1st of March, 1839, due in the years 1842, 1843, and 1844, each for the sum of thirteen thousand three hundred and thirty-three dollars, payable by said Samuel Anderson to the said Lilburn P. Perry, which notes are “*paraphin*” on the 9th of July, 1839, together with the mortgage intended to secure said notes or debts, recorded in the office of the parish judge of the parish of Madison, in the parish and state aforesaid, in the record-book of conventional and legal mortgages, pages 27 and 28, where

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there are fifty slaves and six hundred forty acres of land mortgaged to secure the payment of said notes and mortgage, seized as the property of said Lilburn P. Perry, and having exposed the same to public sale as aforesaid, on a credit of twelve months, when Samuel Anderson became the purchaser thereof at the price of five thousand dollars, for which he gave his bond with John B. Bemis and Aaron Lilly as his securities, payable in twelve months after the date thereof, all in due form of law, and which bond I hereby acknowledge to have received.

Now, therefore, know all men by these presents, that I, the said deputy as aforesaid, do, in consideration of the premises, and by virtue of the act in such cases made and provided, grant, bargain, sell, assign, and set over to the said Samuel Anderson, his heirs and assigns, all the right, title, and interest or demand, which the said Lilburn P. Perry had, in and to the said debt, notes, and mortgage, as before described, on the twenty-third day of November, A. D. 1839, or at any time since, or to any part thereof; to hold the same to the said Samuel Anderson, his heirs and assigns for ever, hereby subrogating (as far as my act in the premises can) said Samuel to all the rights which the said Lilburn P. Perry had [*169 or has, in, *under, and to the aforesaid mortgage; and the said Samuel Anderson being present hereby accepts this conveyance, and hereby specially mortgages the above-described debt and mortgage to secure the final payment of the purchase-money, and all interest and costs that may accrue in the premises.

Done and passed in the state and parish aforesaid in presence of John B. Bemiss and Aaron Lilly, competent witnesses, who have signed with me, said deputy U. S. Marshal, and Samuel Anderson, this 4th day of January, 1840 and said Samuel Anderson before signing.

(Signed,)

JOHN N. DONOHUE.

Having traced this suit to its termination, we must turn our attention to another.

On the 23d of November, 1839, Lilburn P. Perry, by Martin, Richardson, and Stacy, his attorneys, filed a petition in the District Court in and for the parish of Madison, setting forth Anderson's indebtedness to him upon the mortgage and notes above described for \$40,000, and stating his belief that Anderson was about to leave the state of Louisiana, and that he would, unless restrained by the conservative process of the court, remove his property out of the state before the debt or any part of it became payable. He therefore prayed for a

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writ of attachment to be levied upon the plantation, crops, and negroes. At the time of filing this petition, Perry filed also the original promissory notes, being three in number, for \$13,333 each, payable 1st of January, 1842, '43, '44. With the petition was filed also the affidavit of John M. Perry, signing himself "agent for L. P. Perry," who was stated to be absent from the State of Louisiana.

The attachment was ordered and issued; but on the 27th of November, John M. Perry filed in court the following, viz.:

Instructions.

LILBURN P. PERRY }
 v. } 9th District Court.—An attachment.
 SAMUEL ANDERSON. }

I, John M. Perry, acting as agent for Lilburn P. Perry, plaintiff in above-entitled suit, hereby direct Thomas B. Scott, of the parish of Madison, to return the writ of attachment now in his hands, in the suit of *Lilburn P. Perry v. Samuel Anderson*, No. 216, on the docket of said District Court for the parish of Madison, to the clerk's office of said court, without making any seizure or service on said writ of *170] attachment; and I furthermore hereby direct said sheriff and clerk, that all proceedings had, or to be had, under said attachment, be dismissed and discontinued.

(Signed,)

JOHN M. PERRY,
*Agent for L. P. Perry, Clayton Tiffin,
 J. H. Martin, Geo. W. Grove.*

Received on the 27th November, A. D. 1839, and served on the 28th of same month and year, by handing a certified copy of this writ of attachment to the defendant, Samuel Anderson, in person, at the court-house in Richmond, and then was instruct[ed by] the plaintiff in this case not to levy the attachment, but to return it to the clerk's office, as will be seen by reference to the within order from him. Service \$2.

(Signed,)

T. B. SCOTT, *Sheriff.*

The cause remained in this condition for nearly a year, when Anderson filed the following answer, on the 18th of November, 1840:

LILBURN P. PERRY }
 v. } SAMUEL ANDERSON. }

The defendant came into court, and for answer to plaintiff's petition in this suit filed, denies all and singular the allega-

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tions therein contained and set forth. And for further answer thereto he says, that the notes mentioned and appended to plaintiff's petition were executed and delivered to the petitioner, as set forth therein; also, that the mortgage set forth was executed as set forth, and for the purposes as shown in said mortgage.

This defendant for further [answer] sets forth, that on the 23d day of November, A. D. 1839, John N. Donohue, deputy United States marshal, in virtue of a writ of *feri facias*, then in his hands, which issued from the Circuit Court of the United States for the Ninth Circuit, in the Eastern District of Louisiana, at the suit of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, seized upon the several promissory notes mentioned in, and appended to, plaintiff's petition, and the mortgage securing the same; and afterwards, to wit, on the 4th day of January, A. D. 1840, proceeded to sell the said notes and mortgage, in satisfaction of the said *feri facias* of *Mosely and Bouldin v. John M. Perry and Lilburn P. Perry*, when this defendant became the purchaser of said notes and mortgage, at the last and highest bid. All of which will more fully appear by the annexed copy of said marshal's sale, which is herewith filed, and made part of this answer.

This defendant further shows, that, at the time of the seizure of the said notes and mortgage, they were due and payable *to Lilburn P. Perry only, and were his property at the time of said seizure by the deputy marshal as aforesaid. And defendant further shows, that the indorsement made on the back of one of the notes due on the 1st of January, 1842, was not made at the date thereof, to wit, on the 22d of October, 1839, but was made after the said seizure so made by the marshal as aforesaid; and said assignment was only dated for the purpose of evading said seizure. All of which this defendant will be prepared to show on the trial of this suit.

This defendant therefore shows and alleges, that by virtue of the purchase made by him at the marshal's aforesaid, the said debt, mentioned and shown by said note sued on, and the mortgage securing, have been discharged and extinguished by confusion, and by this defendant's becoming the owner of the said debt and mortgage.

Defendant therefore prays that plaintiff's demand be rejected, and that the notes sued on and mortgage may be decreed to be discharged and extinguished by the confusion created by said sale, as before set forth.

(Signed,)

JOHN B. BEMISS, *Att'y for def'ts.*

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The cause remained in this position for nearly a year, a bill having been filed in the mean time, viz., on the 21st April, 1842, in the Circuit Court of the United States, by Tiffin and Perry against Anderson and Shelton. This bill (which is the present case) will receive particular notice after the history of the proceedings in the Parish Court shall have been finished.

On the 11th of May, 1842, the following motion was made in the Parish Court:—

Motion to withdraw notes filed, and it is ordered by the court, that L. P. Perry, the plaintiff in this suit, show cause on Thursday, the 19th instant, why the application should not be granted.

Answer.

LILBOURN P. PERRY	} Ninth District Court, parish of Madison.
v.	
SAMUEL ANDERSON.	

The plaintiff, Lilbourne P. Perry, for cause against the rule taken upon him by Samuel Anderson, why the notes sued on should not be withdrawn and delivered up to said Anderson, shows, that the plaintiff has taken a voluntary nonsuit in the above cause, after issue joined, which issue has never been either tried or decided; but that plaintiff now stands on the record as the owner of said notes, and he denies that said Anderson can have an order of this court for the delivery to him of said notes until it shall have been decided in a suit, regularly brought for that purpose, that said Anderson [*173 is the owner of said notes, which issue he denies can be tried upon the said defendant's rule to show cause; wherefore, and for other reasons equally apparent, he prays that defendant may be discharged at his costs.

D. S. STACY, *Att'y for pl'ff.*

On the 19th of May, 1842, the court overruled the above exceptions, and ordered the trial of the rule to proceed; when a motion was made on the part of Perry for a continuance, and an affidavit of John M. Perry filed in support of the motion. The affidavit stated the absence of a material witness, viz., Crawford, the attorney in the suit of Mosely and Boulding against John M. Perry and Lilburn P. Perry, and that he expected to prove by him that he, Crawford, put in an answer by mistake for the said Lilburn P. Perry, and that he, said Crawford, never had any authority from the said Lilburn P. Perry, or from any duly authorized attorney or agent of said Lilburn P. Perry, to put in said answer, or to make any answer or plea of any description whatever, or in any manner

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whatever to represent said Lilburn P. Perry in said suit. John M. Perry also filed the following affidavit:—

“John M. Perry, agent and attorney in fact of the plaintiff in the above-entitled suit, makes oath, that he is the agent of Lilburn P. Perry, the said plaintiff; that said Lilburn P. Perry is absent at this time from the state of Louisiana, and he, said Lilburn P. Perry, resides in the state of Missouri, and has resided in said state of Missouri for several years past; that Lilburn P. Perry has not been within the vicinity of the state of Louisiana for nearly or quite two years past, and that ever since the said Lilburn P. Perry left the state of Louisiana, which affiant believes was in the fall of the year 1838, and became a resident in the state of Missouri, affiant has been, as he is now, the agent and attorney in fact of the said Lilburn P. Perry.

“Affiant swears, that not until Wednesday, the 18th day of May, in the year 1842, was affiant apprised that any such motion as that now before the court, made on the part of Samuel Anderson, had been made, nor had affiant any knowledge that any such motion was intended to be made on the part of said Anderson, or any one claiming under him.

“Affiant swears further, that Bennet A. Crawford, who resides in the city of New Orleans, is a witness whose testimony is material for the substantiation of the claims of the said Lilburn P. Perry on the trial of said motion; that the said Lilburn P. Perry cannot go safely to trial without the *174] evidence of said Crawford, and that he expects to prove by said Crawford *such facts as will show the said Anderson has no title in and to said notes.

“Affiant swears, also, that since he was informed of the existence of said motion, he has not had time to procure the testimony of said Crawford, and that he cannot procure said testimony of said Crawford in time to go to trial at the present term of this court, but he, affiant, expects to procure said testimony of said Crawford so as to go to trial at the next term of this honorable court; and finally, that this affidavit is not taken for the purpose of delay, but only to obtain substantial justice.

“JOHN M. PERRY.”

The court having ordered the trial of the rule to proceed, the counsel of Perry declined to make any further appearance, and took a bill of exceptions, which was signed by the judge.

Anderson then offered in evidence the proceedings consequent upon the judgment in the case of Mosely and Boulding

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against John M. Perry and Lilburn P. Perry, the execution, the sale to Anderson, and the deed to him by the marshal, all of which have been stated above.

On the 19th of May, 1842, the court rendered the following judgment:—

“On a rule to show cause.—By reason of the law and the evidence being in favor of the defendant, and against the plaintiff, Lilburn P. Perry, and the defendant’s answer to the plaintiff’s petition, and the evidence being considered, and the defendant, Samuel Anderson, having proved to the satisfaction of the court, that he has, since the institution of this suit, become the true and legal owner of the three notes sued on, and the indebtedness set forth in plaintiff’s petition having been extinguished by confusion, it is ordered, adjudged, and decreed, that the defendant, Samuel Anderson, have judgment in his favor, and against the plaintiff, Lilburn P. Perry, and that said Samuel Anderson be decreed to be the true and legal owner of the said three notes, the same being extinguished by confusion, and that the same be adjudged and decreed to be delivered up to said defendant, Samuel Anderson, and that the said L. P. Perry pay the costs of this suit, to be taxed. Done and signed in open court, this

1842.

“THOS. CURRY,

District Judge, Ninth Judicial District.”

From this judgment an appeal was prayed and granted to the Supreme Court of the state of Louisiana.

On the 3d of December, 1842, Anderson received the original notes from the clerk of the court.

*We must now turn our attention to another suit. [^{*175}

It has been already stated, that on the 17th of March, 1840, Samuel Anderson acknowledged himself indebted to Nelson F. Shelton, of Virginia, to the amount of \$45,550, and to Robert Anderson, also of Virginia, to the amount of \$9,000, and that he mortgaged all the property which he had purchased from Tiffin and Perry to secure those debts, making this last mortgage posterior to that to Tiffin and Perry.

On the 3d of April, 1841, Nelson F. Shelton and Robert Anderson filed a petition in the Ninth District Court for the state of Louisiana, holding sessions in and for the parish of Madison, setting forth the mortgage, and praying that the sheriff might be ordered to seize and sell, for cash, so much of the mortgaged property as would pay their respective debts.

On the 12th of April, 1841, the judge issued the order, as prayed.

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On the 10th of July, 1841, the sheriff returned that he had offered the property at public auction, "and Nelson F. Shelton, sen'r, and Robert Anderson, the plaintiffs herein, being present, bid for said property the sum of thirty-six thousand dollars, which being the highest bid or offer made, and being over and above two thirds of the cash valuation of the same, the said property was adjudicated to Nelson F. Shelton, sen'r, and Robert Anderson, at and for the said sum of thirty-six thousand (\$36,000) dollars, subject to all the privileges and mortgages encumbering the same; wherefore, in virtue of the premises herein set forth, and of the law in such case made and provided, and for and in consideration of the price above described, I, Thomas B. Scott, sheriff as aforesaid, do sell, transfer, and convey unto the said Nelson F. Shelton, sen'r, and Robert Anderson, in proportion to the claim of each plaintiff in said writ of seizure, all the right, title, and interest of the said defendant, Samuel Anderson, in and to the before described, and all the appurtenances thereunto belonging, unto them, the said Nelson F. Shelton, sen'r, and Robert Anderson, and their heirs or assigns forever.

"In testimony whereof, I have hereunto set my hand, at the parish of Madison, state of Louisiana, on this the sixteenth day of June, eighteen hundred and forty-one, in the presence of Alexander T. Steele and Edmond Cavalier, competent witnesses, who have signed with me the said sheriff.

(Signed,)

THO. B. SCOTT,

Sheriff of the Parish of Madison, Louisiana."

It is not necessary to insert in this statement two suits *176] which are inserted in the record, which were carried on, one in the *Circuit Court of the United States by Tiffin, upon his own account, against Anderson, upon three promissory notes, amounting in the whole to \$12,065, and the other in a court of Mississippi by Anderson, for the use of Clayton Tiffin, against Austin, Ragan, and Bohannon, upon the note for \$18,282, which Anderson had considered a part of his cash payment, as above narrated. Both these suits ended in judgments which produced no fruits.

We come now to the suit in the Circuit Court, which was the basis of the present appeal.

On the 21st of April, 1842, Clayton Tiffin and Lilburn P. Perry filed a bill on the equity side of the Circuit Court of the United States. They state themselves to be residents of the city of St. Louis and citizens of the state of Missouri, and file the bill against Samuel Anderson, Robert Anderson, Nelson F. Shelton, Hillery Mosely, and William W. Bouldin. The bill

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recites the sale to Samuel Anderson, the deficiency in the cash payment, the execution of the notes and mortgage by Anderson, the suit against him by Lilburn P. Perry, the suit against Perry by Mosely and Bouldin, the judgment, the sale of the whole interest to Anderson for \$5,000, the foreclosure of Shelton's mortgage with an intent to defraud, and then avers, that, at the institution of the suit by Mosely and Bouldin against Perry, the latter was not a citizen of Louisiana, but of Missouri; that he was never served with process, and never employed any one to appear for him; that the judgment was thereby wrongfully recovered, and is void; that admitting the validity of the judgment, yet the subsequent proceedings were irregular; that the land and slaves never were the sole property of Perry, and that Anderson knew it; that the first note was specially indorsed to Tiffin as a part of his share; that this was done before it was seized as being the property of Perry. The bill then prayed that the judgment of Mosely and Bouldin might be set aside, that their mortgage might be foreclosed, and for general relief, and for an injunction.

The defendants, Samuel Anderson and Nelson F. Shelton, demurred to the bill for want of equity, which being overruled, they severally pleaded to the jurisdiction of the court, that said Shelton, and all the other defendants except Samuel Anderson, were citizens of the state of Virginia. Upon these pleas, evidence was taken on both sides, and on that evidence the pleas were overruled.

The defendants who had pleaded and Robert Anderson then put in their answers to the bill. The grounds of defence set up and relied upon by the defendants were,—

1st. That it was part of their original contract of purchase *that the complainant would receive, in satisfaction of the cash payment, the debt due to Samuel Anderson by John M. and L. P. Perry, and the note on Austin, Ragan, and Bohannon; that complainants knew the drawers and the value of the note, and that, but for their agreement to receive these notes, he would not have given the price at which he purchased; and that, therefore, they have no right to claim of him any thing on account of their failure to collect said note of the drawers.

2d. That, before the execution of the three notes secured by the mortgage, Samuel Anderson and John M. Perry gave three notes, for about the aggregate amount of \$12,000, to the said Clayton Tiffin, with the understanding and agreement, that thereafter, when the said mortgage notes were executed, one of them was to be given to him for the said three first-mentioned notes, which were then to be surrendered up. That

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this had not been done. On the contrary, the complainants retained all the three mortgage notes, and that said Clayton Tiffin had not only not surrendered the three other notes given to him, but had sued on them in the same United States Circuit Court, and had recovered judgments thereon, and that, therefore, the mortgage debt ought to be credited by the amount of those judgments.

3d. That Samuel Anderson had, in good faith, purchased and paid for the said three mortgage notes, amounting to \$40,000, when seized and sold on the 4th of January, 1840, by the marshal, under execution from the same United States Circuit Court, on a judgment therein obtained by Mosely and Bouldin against the said Lilburn P. Perry and John M. Perry; that the said Lilburn P. Perry appeared to that suit by a licensed attorney-at-law; that all the proceedings in the suit, and in virtue of the execution, were regular and legal; and that the sale under said execution, and his purchase, had been decided to be valid by the District Court of the Ninth District of Louisiana (a state court), in a suit of Lilburn P. Perry against the said Samuel Anderson; and that thereby the said mortgage debt was "extinguished by confusion," as was adjudged by the said state court; and that, on the faith of the validity of said proceedings, the said defendants, Nelson F. Shelton and Robert Anderson, had instituted a suit, in April, 1841, in the said District Court for the Ninth District of the state of Louisiana, on a mortgage in their favor, given to them by the said Samuel Anderson (subsequent, however, to the mortgage given to the complainants), and on the 14th of June, 1841, by virtue of an order of seizure and sale in the said suit, caused the said mortgaged property (the same previously *178] mortgaged to complainants) to be sold by the sheriff, and became themselves the *purchasers (at the price of \$36,000), and took possession under their purchase. To prove all this, they refer to the record of said suit, and rely on these several purchases of Samuel Anderson, and of Nelson F. Shelton and Robert Anderson, as extinguishing or precluding the claim of the complainants.

The complainants filed a general replication.

With respect to the third ground of defence, the testimony of Mr. Crawford was taken, who, it will be recollected, was the attorney who appeared for Lilburn P. Perry in the suit against him by Mosely and Bouldin.

Evidence of Mr. Crawford.

1st. Are you a counsel and attorney at law, practising as

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such at the bar of the state of Louisiana, and were you in the year 1839?

He answers, Yes.

2d. Did you appear in your aforesaid capacity in the defence of a suit instituted by Mosely and Bouldin, in _____, 183____, against John M. Perry and Lilburn P. Perry, in the Circuit Court of the United States for the Eastern District of Louisiana?

To the 2d. He answers, Yes.

3d. Will you please state if you ever received any authority, either directly or indirectly, from Lilburn P. Perry, or from any one on his behalf, to appear and represent and defend his interest in said suit?

To the 3d. He answers, he has no recollection of having received any authority, either directly or indirectly, from Lilburn P. Perry, or from any one on his behalf, to appear and represent and defend his interest in said suit, other than what might be inferred in a letter from John M. Perry, informing him that he would see upon the records of the court of the United States a suit, commenced against him and others by H. Mosely and Bouldin, and his wish to employ him to defend it. In no other part of his letter is reference made to the name of Lilburn P. Perry.

4th. Were you, or not, employed by John M. Perry alone for his defence, without any direction or request to appear on behalf of Lilburn P. Perry; and was, or not, your appearance on behalf of the defendants in said suit an inadvertence on your part?

To the 4th. He answers, he was employed by J. M. Perry in said letters aforesaid, and without any directions or request to appear on behalf of Lilburn P. Perry, other [than] what may be inferred from the letters aforesaid. Deponent regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertence on his part.

*5th. Did you, or not, know, at the time of your said appearance, that the said Lilburn P. Perry had never [*179] been served with process of citation in said suit, and that, at the time of its institution, he was a citizen of Missouri, residing in the city of St. Louis?

To the 5th. Deponent did not know, at the time of his said appearance, that Lilburn P. Perry had never been served with process of citation, and only presumed that it has been done; and accordingly misled him, as far as it has been done in the answer of John M. Perry. Deponent did not know, of his own knowledge, that, at the time of the institution of the said suit, Lilburn P. Perry was a citizen of St. Louis, Missouri.

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Cross-Interrogatories.

1st. If you filed an answer and amended answer to the suit of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, in the federal court, early in 1839, in the name of both defendants, did you never receive any instructions from Lilburn P. Perry to do so, or as to the suit? Did he never converse with you about the suit, either before or since? Did he never write to you in relation to it, either before or since?

To the first cross-interrogatory, he saith: In relation to the answers referred to in the said interrogatory, deponent has no recollection of having received any instructions from Lilburn P. Perry on the subject; nor of his having conversed with him about the suit before filing said answers; nor of his having conversed with him about the said suit until after the rendition of judgment against him; nor of his having ever written to him in relation to it, either before or since its institution.

2d. Was not John M. Perry his agent or attorney in fact? Did you not see in his hands authority to act for Lilburn P. Perry? Have you not reason to believe, and what reason, that he had authority to defend that suit?

To the 2d cross-interrogatory. Deponent does not know that John M. Perry was agent, or attorney in fact; deponent never saw in [his] hands any authority to act for Lilburn P. Perry; deponent had no reason to believe that John M. Perry had authority to defend the said suit for Lilburn P. Perry.

3d. Was not John M. Perry the father of Lilburn P. Perry? Was he not his agent generally in Louisiana? Did not Lilburn P. Perry at some time avow and ratify the act done by John M. Perry for him?

To the 3d cross-interrogatory. John M. Perry has been regarded as the father of Lilburn P. Perry; deponent has no knowledge of his being his agent generally in Louisiana; deponent has no knowledge that Lilburn P. Perry ever avowed or ratified the acts done by John M. Perry for him.

*180] *4th. Was there any defence for Lilburn P. Perry which John M. Perry did not make? Are you not satisfied that the claim of Mosely and Bouldin against him was perfectly just?

To the 4th cross-interrogatory. I know of no other defence for Lilburn P. Perry, than what is stated in my answers to the interrogatories of the plaintiff, and in my answers to the foregoing cross-interrogatories. I have no personal knowledge of the claim of Mosely and Bouldin, and have not heard or seen any thing to satisfy me that it is just.

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5th. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer.

To the 5th. I do not know, nor can I set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of my examination, or the matters in question in the cause.

On the 27th of June, 1843, the Circuit Court pronounced the following decree:

TIFFIN AND PERRY <i>v.</i> SAML. ANDERSON ET ALS.	}	Circuit Court, United States.—In Equity, June, 1843.
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This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, that the complainants are justly, legally, and equitably entitled to payment of the sum prayed for in their bill of complaint, as the unpaid consideration-money for the purchase of the plantation and slaves described in said bill, and purchased from the complainants by the respondent, Samuel Anderson; that said sum has not been paid, satisfied or extinguished, notwithstanding the allegations and matters of defence set forth in the answer of the respondents; that the entire property mortgaged by the respondent, Samuel Anderson, to the complainant Lilburn P. Perry, is in law and equity subject to the payment of said sums; that the lien and mortgage exist upon said property, in the possession of the respondents, Robert Anderson, and Nelson F. Shelton, the third possessors thereof, notwithstanding the matters of defence which they have severally set forth in their answer to the bill of complaint. And therefore, in order to carry into effect this decree, and secure to the complainants their legal and equitable rights, it is ordered, that the marshal of this *court do forthwith take into his possession the [*181 property described in the mortgage from Samuel Anderson to Lilburn P. Perry, and restore the same to the possession of the complainants, or their legal representative; and if, within sixty days thereafter, the said respondent shall well and truly pay, or cause to be paid, the complainants, or their legal representative, the sum of forty thousand dollars, with interest thereon from the first day of January, 1842,

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until paid, the same being the unpaid consideration for the purchase of said property from the said complainants, then said property shall be relinquished to respondents.

And it is further ordered, that the complainants, upon being restored to the possession of said property, do give bond, in the sum of twenty thousand dollars, conditioned for the restoration of said property, and the proceeds thereof, from the time of their being placed in possession by the marshal, to the respondents, in case said respondents shall see cause to appeal from this decree to the Supreme Court of the United States, and the decree of this court be reversed upon said appeal.

It is further ordered, that the respondents pay the costs of this suit.

(Signed,)

THEO. H. McCALEB, *U. S. Judge.*

An appeal from this decree brought the case up to this court.

It was argued by *Mr. Jones*, for the appellant, Shelton, and *Mr. Crittenden*, for Tiffin and Perry; but the length to which this case has already reached renders it impossible to give any other than a very brief sketch of their arguments.

Mr. Jones, for the appellant, objected to the jurisdiction of the court upon two grounds:—

1. Four of the five defendants are averred, in pleas and answers under oath, to have been citizens, not of Louisiana, but of Virginia, at the time of the institution of the suit; and two of them, Mosely and Bouldin, being *admitted* not to have been citizens of Louisiana, we maintain that the other two, R. Anderson and Shelton, are *proved* to have been in the same predicament. But we hold the admitted defect of citizenship in the first two above fatal to the jurisdiction, whatever may be the weight of evidence as to the citizenship of the other two.

2. The case made out by the bill is not one susceptible of relief in equity; but one wherein a plain, adequate, and complete remedy might have been had at law.

Taking up the second point first, he contended that it was not a case where equity would interpose, because the Louisiana *182] code gives a more simple remedy. The object of the complainants is to set aside the judgment of Mosely and Boulden against Perry. This can be done by an action of nullity and rescission. Code of Pr., 604-616; 7 Cranch, 88, 90.

1st point. There are five parties here, and four not citizens of Louisiana. But parties must be of the same state with each other. 3 Cranch, 267; 5 Wheat., 424, 434.

There is a difference between citizenship and residence in a

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state. Merely residing there does not confer citizenship. In Louisiana, a person wishing to acquire citizenship must give notice. 2 Dig. Laws La., 308.

As to setting aside the judgment, the rule is, that a party may justify under a judgment. 6 Pet., 8; 10 Id., 449; 6 Cranch, 173; 4 Dall., 8; 4 Cranch, 328.

The fact of an attorney's having authority to appear is not traversable. The only remedy to the party aggrieved is an action against the attorney. 1 Tidd, 95; 3 How., 343.

Mr. Crittenden, for the appellees, said that the objection to the jurisdiction of the court, founded on the allegation that there was a sufficient remedy at law, could not be maintained. How has this court lost this branch of its equity jurisdiction? In Pennsylvania, they try equity cases in an action of ejectment; but this court has not considered this as a sufficient reason for waving its equity jurisdiction. So, in Louisiana, law and equity are all mixed up together. Besides, here is an equitable lien on the property for the cash payment, which can only be enforced in equity.

As to citizenship. The proof is, that the parties lived in Louisiana for three years, and built a house upon the property. We found them there. They claim the option of being citizens. A citizen of the United States residing in any state is a citizen of that state. 6 Pet., 762.

As to the judgment of Mosely and Bouldin. Perry was represented in court by an unauthorized attorney, and therefore the judgment does not bind him. 9 Wheat., 829; 1 T. R., 62; 2 Desau. (S. C.), 380; *Caldwell v. Shields*, 2 Rob. (La.); 6 Johns. (N. Y.), 296; Id., 317, 318; 2 Watts (Pa.), 493; 3 Pa., 75 (Judge Grier says this has been overruled); 3 Rob. (La.), 94; Code of Pr., art. 605.

Even if the judgment was valid, the sale was not made according to law. If the property was immovable, then the requisite notice has not been given. Code of Pr., art. 670.

Slaves are considered immovable. Civil Code, art., 461. Here every thing was sold, land, slaves, and notes. Civil Code, art. 462, 2424, 3249.

All formalities must be complied with in a forced sale. 3 La., 421; 4 Id., 150, 207; 11 Mart. (La.), 610, 675; 8 Mart. (La.), N. S., 246.

*The thing sold was the entire debt of \$40,000. But [*183 it did not all belong to the defendant, and was bought for \$5,000 by the very man who owed the \$40,000, and who must have known that one half belonged to Tiffin. The evidence shows that Anderson knew that the first note had been

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indorsed to Tiffin. (Mr. *Crittenden* here referred to and commented upon it.)

By the Civil Code, art. 2622, Anderson must be a trustee for his vendor, who can reclaim the property by repaying what it cost. Story Eq., §§ 789, 1211, 1212, where cases are cited; Grat. (Va.), 188; 2 Myl. & C., 361; 7 Dana (Ky.), 46; Civil Code, art. 21, 1958-1960, 2619.

(Mr. *Crittenden* then commented upon the proceedings of the parish court.)

Mr. *Jones*, in reply and conclusion.

As to the judgment of Mosely and Bouldin. It is objected, that the defendant never was served with process; but that is cured by an appearance. Was there one? The record says yes. A sworn attorney appeared and answered for both defendants. If the correctness of this is impeached, it is for the other party to do it, and they must do it clearly. There must be the plainest evidence. Crawford is the only witness. We might object to the interrogatories. They are all leading ones. But he shows that he had authority. He was employed to defend the suit. What suit? Against both defendants. He refers to letters. Why did he not produce them? Is there any evidence that John M. Perry had no authority to employ counsel? There is not. Why did he not swear so? He was as good a witness as Crawford. In an affidavit, John M. Perry swears that he is the agent and attorney of Lilburn P. Perry. A bond is signed L. P. Perry, "by his attorney, John M. Perry." Crawford's evidence is therefore only negative.

(Mr. *Jones* then proceeded to reply to the other arguments of Mr. *Crittenden* upon the facts of the case.)

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery from the Circuit Court for the Eastern District of Louisiana.

On the 10th of April, 1838, the complainants below sold to one Samuel Anderson a plantation and negroes situated in the parish of Madison, Louisiana, for seventy-five thousand dollars. Thirty-five thousand dollars of this sum were paid in part by surrendering a note which Anderson held against Lilburn P. Perry, the complainant, and his father, John M. Perry, for thirteen thousand dollars; and by the assignment *184] of a note on H. R. Austin, J. B. Ragan, and Wylie Bohannon, of the State of *Mississippi, for eighteen thousand two hundred eighty-two dollars and sixty five cents, payable to Samuel Anderson on the 1st of April, 1839.

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A mortgage was executed on the plantation and slaves, to secure the payment of forty thousand dollars, the residue of the purchase-money. At the same time, three notes or bonds were executed to Lilburn P. Perry by Samuel Anderson, each for the sum of thirteen thousand three hundred and thirty-three dollars, payable on the first day of January, 1842, 1843, and 1844.

On the 11th of January, 1839, Mosely and Bouldin, citizens of Virginia, instituted a suit in the Circuit Court against L. P. Perry and John M. Perry, and obtained a judgment against them for seven thousand five hundred dollars. An execution was issued, in virtue of which, under the laws of Louisiana, the marshal levied upon the three notes above stated and the mortgage, which were sold by him, on a credit of twelve months, to Samuel Anderson, the mortgagor, for five thousand dollars.

Some time after this purchase, Robert Anderson, the father of Samuel, and Nelson F. Shelton, his uncle, having procured a judgment against Samuel Anderson in the State court of Louisiana, sold the mortgaged property and slaves, and they became the purchasers thereof and have the possession of the plantation and slaves under the purchase, claiming that the mortgage by Anderson to Perry has been extinguished.

The decree of the Circuit Court was entered against Samuel Anderson, Robert Anderson, and Nelson F. Shelton *et al.*, that within sixty days they should pay to the complainants forty thousand dollars, with interest from the first day of January, 1842, and in default of such payment that they should deliver to the complainants the possession of the plantation and slaves. From this decree Shelton only has appealed.

The defendants pleaded that the Circuit Court had no jurisdiction of the case, as Mosely and Bouldin, Robert Anderson, and Shelton were citizens of Virginia, and the complainants were citizens of Missouri. Shelton being the only appellant, the objection of citizenship must be limited to him.

Under the act of Congress, jurisdiction may be exercised by the courts of the United States "between a citizen of the State where the suit is brought, and a citizen of another State." "But no person shall be arrested in one district for trial in another, in any civil action." If Shelton be not a citizen of Louisiana, having raised the question of jurisdiction by a plea, this suit cannot be sustained against him.

In the declaration or bill an allegation of citizenship of the parties must be made, as it has been held that an averment of residence is insufficient. But the proof of [*185 citizenship, when denied, may be satisfactory, although all the

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privileges and rights of a citizen may not be shown to have been claimed or exercised by the individual.

Shelton and wife, they having no children, became residents of Louisiana in the fall of 1840, more than two years before the commencement of this suit. Since their residence commenced, they have been absent from the state only once, a short time, on a visit to a watering-place in Mississippi. They have resided the greater part of the time on the plantation in controversy, cultivating and improving it by the labor of the slaves. Within this time, a more comfortable and secure dwelling-house has been constructed. In the winter of 1840 or 1841, Shelton observed to a witness, that he considered himself a resident of the State of Louisiana.

There is no proof that he has voted at any election in Louisiana, or served on a jury. At one time he refused to vote, but that was after this suit was commenced. Some of the witnesses say that he sometimes spoke of returning to Virginia, whether on a visit or to reside there permanently does not appear.

Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such State, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, as in the case of Shelton, claiming and improving the property as his own.

On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. The facts proved in this case authorize the conclusion, that Shelton was a citizen of Louisiana, within the act of Congress, so as to give jurisdiction to the Circuit Court.

The defendants also demur to the plaintiff's bill, on the ground, that the complainants have plain and adequate relief at law.

The demurrer is clearly unsustainable. Fraud is alleged in the bill, and relief is prayed against a judgment and a judicial sale of the property in controversy. These and other matters stated in the bill show, that, if the complainants shall be entitled to relief, a court of equity only can give it.

*186] The great question in the case arises out of the judicial sale *of the mortgage debt to Anderson, the mort-

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gagor, under a judgment obtained by Mosely and Bouldin against L. P. Perry and John M. Perry. If by this sale the mortgage debt has been extinguished, no relief can be given to the complainants.

Had the Circuit Court which rendered that judgment jurisdiction of the case? The plaintiffs were citizens of Virginia, John M. Perry was a citizen of Louisiana, and L. P. Perry, of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants, and defence was made to the action. This being done by a regularly practising attorney, it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process, and appear voluntarily.¹

John M. Perry acted in some matters as the agent of L. P. Perry; but it does not appear that he had authority to waive process and defend the suit. And Crawford, the attorney, testified, that "he had no recollection of having received any authority directly or indirectly from L. P. Perry, or from any one in his behalf, to defend the suit. He received a letter from John M. Perry, informing him that he would see upon the records of the court of the United States a suit commenced against him and others by Mosely and Bouldin, and he wished to employ him to defend it." And he says, that "he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertence on his part."

This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. Had the entry been, that L. P. Perry came personally into court and waived process, it could not have been controverted. But the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property.

An execution sale under a fraudulent judgment is valid, if the purchaser had no knowledge of the fraud. But in this

¹ QUOTED. *Lavin v. Emigrant Ind. Sav. Bank*, 18 Blatchf., 25.

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case L. P. Perry was not amenable to the jurisdiction of the court, and did no act to authorize the judgment. He cannot, therefore, be affected by it, or by any proceedings under it.¹

*187] *In this view, it is unnecessary to consider the objections to the procedure under the execution. The debt of forty thousand dollars was sold as the property of L. P. Perry, when one of the notes had been assigned to Tiffin, and an equal interest in the other two belonged to him. Of this, Anderson, the purchaser, had notice. It would be difficult to sustain this sale on legal principles. Anderson, it is insisted, at the marshal's sale, purchased a "litigious right," and by article 2622 of the Civil Code, "he against whom a litigious right has been transferred may be released by paying the transferee the real price of the transfer, together with interest from its date."

The judgment being void for want of jurisdiction in the court, no right passed to Samuel Anderson under the marshal's sale; consequently the mortgage remains a subsisting lien. Nor is this lien affected by the mortgage subsequently executed by Samuel to his father, Robert Anderson, and his uncle, Shelton. After the mortgage to the complainants was supposed to be extinguished by the judicial sale, Robert Anderson and Shelton procured in a state court a foreclosure of their mortgage which had been previously given on the plantation and slaves, and they became the purchasers at the sale for thirty-six thousand dollars. If this procedure were *bonâ fide*, the purchase was made subject to the prior mortgage.

On the 23d of November, 1839, a bill was filed in the District Court for the parish of Madison, by L. P. Perry, against Samuel Anderson, representing the debt due, secured by mortgage, and that he was in possession of the plantation and slaves; and, fearing that he might remove the slaves or other property, an attachment was prayed. No service was made of this writ, and the suit was discontinued, the 28th of November, 1839. A judgment seems to have been irregularly entered by default, the 17th of November, 1840, and on the next day an answer was filed by Anderson, setting up the sale and extinguishment of the mortgage debt, and praying that the notes and mortgage might be decreed as extinguished, and be delivered up. Afterwards, on the 20th of May, 1841, this suit was dismissed by the order of the court. And on the 19th of May, 1842, motion having been previously made and argued in the District Court, on proof that "the defendant, Samuel Anderson, since the institution of this suit has become the

¹ CITED. *Osborn v. Michigan Air Line R. R. Co.*, 2 Flipp., 506.
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true and legal owner of the three notes sued on, and the indebtedness set forth in plaintiff's petition having been extinguished by confusion, the court decreed that they should be delivered up." And this decree is relied on as a bar to the present suit.

At the time the above decree was made, this suit was pending *in the Circuit Court, to enforce the payment [188 of the notes directed to be given up by the District Court. The object of the petition before that court was not the recovery of the money, for the notes were not due when it was filed, but to prevent Samuel Anderson from removing the negroes, wasting the crops, &c., on the plantation. But this petition had been discontinued for more than a year, when Anderson filed his answer, setting up his purchase of the notes under a judicial sale, and that the mortgage debt was extinguished. And on this case, made in the answer in no way responsive to the petition, which had long before been abandoned, the parish judge, on motion, founded his decree that the mortgage debt was extinguished, and directed the notes to be delivered up.

It is difficult to characterize in proper terms this proceeding of the state court. The petition having been abandoned, there was no pretence of jurisdiction for the subsequent steps taken at the instance of Anderson. There was nothing in the petition, had it not been abandoned, which would have authorized such a procedure. The circumstances under which this judicial action was had show a fraudulent contrivance, on the part of Anderson, to defeat his adversaries by the interposition of the state court. The whole case was pending in the Circuit Court of the United States, and this interference of the state court was wholly unauthorized and void.

The Mississippi note for eighteen thousand two hundred and sixty-five dollars, which was assigned to complainants in part payment of the purchase-money, was worthless. The parties to it were insolvent when it was assigned to the complainants, which fact was known to the assignor, Samuel Anderson. He acted fraudulently in representing the note to be good, when he knew it was valueless. By his own confession, after the assignment, the fraud is established.

It is insisted, that, this note having been imposed upon the complainants as a good note, by the fraudulent representation of Anderson, they as vendors have an equitable lien on the plantation and slaves for the amount of it. If the receipt of a note of a third person in payment of the purchase-money be a waiver of an equitable lien on the real estate conveyed, yet it would seem, where a fraud had been practised in the assign-

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ment of the note, there would be no waiver. But however this may be, it is not strongly urged, as it is believed that the mortgage debt, with the interest, will be nearly equal to the value of the plantation.

The history of this case shows a successful course of fraudulent combination, rarely exhibited in a court of justice. Samuel Anderson purchased the plantation and slaves of the complainant, *for seventy-five thousand dollars. He gave up a note on L. P. Perry for thirteen thousand dollars, which was in fact the only payment of any value. The Mississippi note was worthless, and the mortgage debt he purchased, on a credit of twelve months, for five thousand dollars. He must have received more than that sum as the product of the plantation. So that in fact he acquired the plantation and negroes for thirteen thousand dollars, which he purchased at seventy-five thousand dollars. By this operation he saved of the purchase-money sixty-two thousand dollars. Such a result must strike every one as having been procured through fraud.

It is unnecessary to consider the means through which Robert Anderson, the father of Samuel, and his uncle Shelton, acquired title to the above property. The lien of the complainants' mortgage is paramount to any title or lien which they assert.

No deductions will be made from the mortgage for the five thousand dollars which Samuel Anderson may have paid to Mosely and Bouldin, under whose judgment he purchased the mortgage debt. He has received from the products of the plantation, while in possession of it, more than that sum. But if this were not the case, his fraudulent act in the transfer of the Mississippi note is a sufficient ground for the refusal of the credit.

In their decree, the Circuit Court directed the sum of forty thousand dollars to be paid, with interest from the first day of January, 1842. In this the court erred. The three notes were each for thirteen thousand three hundred and thirty-three dollars; the first being payable the first of January, 1842, the second, the first of January, 1843, and the third, the first of January, 1844. The interest should have been calculated on the notes from the time they respectively became due. With this modification of the decree of the Circuit Court, a decree will be here entered, to be transmitted to the Circuit Court, and if the money shall not be paid within ninety days from the filing of this decree in the Circuit Court, the mortgage shall be foreclosed, and the complainants put in possession of the property.

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Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the said Circuit Court erred in directing the interest to be computed on the (\$40,000) forty thousand dollars from the first day of January, 1842, instead of computing the interest on each of the three *several notes for (\$13,333 $\frac{1}{3}$) [*190 thirteen thousand three hundred and thirty-three dollars and thirty-three and a third cents from the times the said notes respectively became due; and that if the money shall not be paid within ninety days from the filing of the mandate of this court in the said Circuit Court, that then the said mortgage shall be foreclosed, and the complainants put in the possession of the property, and that in that case the equity of redemption therein be forever barred and precluded; and that if the said money, with interest as aforesaid, be duly paid as aforesaid, that then the said mortgage should be held discharged, and Nelson F. Shelton put in possession of the said property. Whereupon it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, that each party pay his own costs in this court, and that this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

WILLIAM T. PEASE (IMPLEADED WITH JOHN CHESTER AND TARLETON JONES), PLAINTIFF IN ERROR, v. WILLIAM DWIGHT.

Where a promissory note was payable to the order of several persons, the name of one of whom was inserted by mistake, or inadvertently left on when the note was indorsed and delivered by the real payees, one of whom was also the maker of the note, the indorsee had a right to recover upon the note, although the names of all the payees were not upon the indorsement, and had a right, also, to prove the facts by evidence.¹

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Michigan. On the 1st of January, 1837, the following promissory note was executed:

¹ DISTINGUISHED. *Rowe v. Putnam*, 131 Mass., 282.

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Detroit, January 1, 1837.

Two years from date I promise to pay to the order of Walter Chester and Pease, Chester & Co. one thousand five hundred dollars, for value received, at the Farmers and Mechanics' Bank of Michigan, with interest.

(Signed,)

JOHN CHESTER.

Indorsed by Pease, Chester & Co., but not by Walter Chester.

The firm of Pease, Chester & Co. was composed of William T. Pease (the plaintiff in error), John Chester, and Tarleton Jones.

*191] *The note having passed into the hands of William Dwight, a citizen of Massachusetts (the defendant in error), and not being paid at maturity, Dwight brought suit in the Circuit Court against Pease, Chester and Jones. The course which Pease took will be stated presently. Chester pleaded bankruptcy, which was demurred to, but the demurrer overruled, and the plea sustained. Jones was a citizen of Illinois, and could not be found.

There were several counts in the declaration, but the only one upon which judgment was rendered, and which it is material now to state, was the following:—

“For that whereas one John Chester heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and thirty-seven, at Detroit, in said district, made his certain promissory note in writing, bearing date the same day and year aforesaid, and thereby then and there promised, two years from the date thereof, to pay to the order of Walter Chester and the said defendants, under the copartnership name and style of these said defendants, Pease, Chester & Co., one thousand five hundred dollars, for value received, at the Farmers and Mechanics' Bank of Michigan, with interest; and then and there delivered the said promissory note to the defendants; who then and there, using their copartnership name and style of Pease, Chester & Co., indorsed said note, and delivered the same to the plaintiff; and the said plaintiff avers, that the said John Chester was one of the said persons using the name and style of Pease, Chester & Co., and that the name of the said Walter Chester was inserted in the said promissory note as one of the persons to whose order the said sum of money should be payable by the said John Chester, for the purpose of, and with the intention on the part of the said John Chester, of procuring the said Walter to indorse the said note for the accommodation and benefit of the said John Chester, and for no other purpose; that the said note

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was never delivered to the said Walter Chester, and that the said Walter Chester never had at any time any interest or property, or any rights therein, or to the money specified and mentioned therein.

“That the said note was by the said John Chester delivered to the said Pease, Chester & Co. alone, who received the same and indorsed it solely, who waived the indorsement of the said Walter Chester, and having solely indorsed the same, delivered the said note, so indorsed as aforesaid, to the said plaintiff. And the said plaintiff avers, that afterwards, and when the said promissory note became due and payable, according to the tenor and effect thereof, to wit, on the fourth day of January, *in the year eighteen hundred and thirty-nine, at the said Farmers and Mechanics’ Bank of Michigan, the said note was presented and shown to and at the said bank for payment thereof, and payment thereof requested; but that neither the said John Chester, nor any other person, did or would pay the said sum of money therein specified, but then and there wholly neglected and refused to do so; of all which said several premises the said defendants then and there had due notice.”

Pease demurred to this count, and filed the following causes of demurrer:—

“1st. Because it is not averred in said first count, that Walter Chester, *one of the joint* payees of the said promissory note described in said counts, ever indorsed or delivered the same to the said plaintiff, or any other person whatever.

“2d. For that said first count is in other respects informal, insufficient, and defective.”

Dwight put in a joinder in demurrer.

In November, 1845, the Circuit Court overruled the demurrer, entered up judgment for the plaintiff, and assessed his damages at \$2,427 and costs. To review this judgment, a writ of error brought the case up to this court.

It was argued by *Mr. Bates*, for the plaintiff in error, Pease, and by *Joy* and *Porter*, with whom was *Mr. Ashmun*, for the defendant in error, Dwight.

The argument on behalf of the plaintiff in error was as follows:

The first count of the declaration sets forth the particular circumstances under which the note was made and indorsed, and the demurrer of course admits them to be true. John Chester, the maker of the note, was one of the firm of Pease, Chester & Co.; he made the note with the intention of pro

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curing the indorsement of Walter Chester and Pease, Chester & Co., as accommodation indorsers for his benefit. Walter Chester declined to indorse the note, and then John Chester indorsed his note with the copartnership name of Pease, Chester & Co., and delivered it to De Garmo Jones, who delivered it to the plaintiff.

The demurrer which was originally interposed to the first and second counts (the second having been subsequently *nolle pros'd*) sets forth as the ground of demurrer, that the first count does not set forth a right of action in the plaintiff, as there was no indorsement or transfer of the note by Walter Chester, one of the joint payees thereof, and that no right *193] of action can be acquired to a promissory note, made payable to order of joint *payees, without the indorsement by them and each of them; that in no other manner can there be a legal transfer of such a note, or the cause of action thereon. This is the only point involved in the decision of the court below, and which this court is now called upon to revise. The plaintiff claims to recover as the holder of a negotiable note; and such is the instrument declared on in the count under examination. He does not seek to recover on a special contract, but on a note, transferred and delivered by the single indorsement of one of the joint payees. (Does the first count show a right to recover as against the other joint indorsers?) He claims to recover, too, against William T. Pease, one of the firm of Pease, Chester & Co., who, he states, were mere accommodation indorsers of John Chester. It is quite unnecessary to cite to this tribunal the general rule laid down in all the books:—"If a bill or note be payable to several persons not in partnership, the right to transfer is in all collectively, not in any individually; and an indorsement by and in the name of one only will not give the indorsed a right to sue." (Bayl. Bills, 49.)

Chit. Bills, page 123, says:—"If a bill has been made or transferred to several persons not in partnership, the right of transfer is in all collectively, and not in any individually." *Carvick v. Vickery*, 2 Doug., 653, p. 134, note; *Smith v. Whiting*, 9 Mass., 334; 7 Cow. (N. Y.), 126; 9 Greenl. (Me.), 85. Story, in his volume on Promissory Notes, page 131, section 125, lays down the same rule in the following language:—"If a note be made payable or indorsed to several persons not partners, as to A, B, and C, then the transfer can only be by a 'joint indorsement' of all of them." In Story Bills, section 197, page 218, the same rule is again laid down in the following language:—"If a bill be made payable or indorsed to several persons not partners, as to A, B, and C, then the

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transfer can only be by a 'joint indorsement' of all of them."

Such is the rule established by all the elementary writers, and the decisions of the courts of England and this country, on the subject. It is not pretended, nor does the count demurred to set forth, that Walter Chester was a partner of Pease, Chester & Co. Such was not the fact, and the pleadings show it. Of course this note could only be transferred or assigned to the plaintiff by the indorsement of both Walter Chester and Pease, Chester & Co., the joint payees thereof.

Let us now examine briefly the only case cited by the attorneys of the plaintiff on the argument of this demurrer in the court below, the only case on which that decision can be sustained, and the court will see, by a glance at the [*194 facts, that it *has no real application to the present case, that it contains no exception whatever to the general rule cited from the authors above referred to.

What are the facts of that case, as set forth in 4 Car. & P., 466, *Leaf and others v. Gibbs*. That was an action brought by the payee of two promissory notes made by the defendant and two ladies, named Gibbs and White, which were given in payment of an account due from Gibbs and White. The defendant signed the notes, with the understanding, at the time of his signature, that his mother should sign them with him, as a joint and several promisor; but she refused to do so. The notes were, so far as we can discover from the report of the case, joint and several notes, to which the defendant had placed his name. On the trial, the plaintiffs and the payee proved that the defendant had placed his name there with the understanding that his mother was to unite as a maker. The defendant was liable on the face of the notes by their tenor as a joint and several maker. He sought to establish as a defence, that, at the time of the making, he agreed to sign with his mother, a fact of course known to the payees; and the court properly charged the jury, that, if they were satisfied from the evidence adduced that he had not waived, by his own conduct, the joint and several signatures of his mother, they must find for him, the defendant. In this case, we insist there is no legal liability of the defendant on the note set forth in the declaration, without the joint indorsement of Walter Chester, which was never obtained. There can be no legal liability, as indorser of the note set forth in this case, without the joint indorsement of all the payees of it. There can be no legal transfer to the plaintiff, or any one else, of the note set forth in the first count, unless it is done by the joint indorsement of Walter Chester and Pease, Chester & Co. In

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the case of Leaf and Gibbs, the defendant was liable on the face of the note itself; here the defendant is not; there he set up facts dehors the note, to show that he was discharged; here we rely on the face of the note itself. The two cases are as entirely dissimilar in the facts set forth as they are in the principles of law which govern them. The case cited in no particular sustains the principles contended for by the plaintiff's counsel in the present case.

The argument on behalf of Dwight, the defendant in error, was as follows:

The declaration in this cause is against the defendants as indorsers of a promissory note made by John Chester, payable *195] to the order of Walter Chester and the defendants, and avers *that the note was made by John Chester, payable to the order of Walter Chester and the defendants, with the intention of procuring Walter Chester to indorse the same as an accommodation indorser; that the said note never was delivered to said Walter Chester; that he had no property therein, had no interest in the moneys specified therein, and was in no way whatever interested in the said note; but that the said note was delivered to the said defendants alone, who indorsed and delivered the same to the said plaintiff, and expressly waived the indorsement of the said Walter Chester. The presentment and notice are also alleged in the usual form.

The facts stated by *Mr. Bates* in his brief, as to *Mr. Chester's* indorsing the copartnership name of the defendants and transferring the note to *Jones*, and that *Walter Chester* declined to indorse the note, are not in the declaration, and are not true.

The facts alleged in the declaration are admitted to be true by the demurrer, and are unquestionably true.

The question, then, is, whether, upon the facts alleged and admitted to be true, the plaintiff is entitled to recover; and of this we think there can be no question.

It strikes us that the question is simply this, viz. :—Where a promissory note has been made payable to four individuals, with the intention to procure all to indorse it, and three actually conclude to indorse it without the other, can they strike out the name of the other payee, and whose name was inserted only for the purpose of procuring him to indorse for accommodation? This is the legal effect of indorsing and delivering the note without his joint indorsement, and an express waiver of his indorsement at the time, which is tantamount to an agreement by the three to become liable without him. The making of a promissory note is not the making of a contract,

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nor is an indorsement for accommodation a contract; it is the delivery which gives effect to all; it is then that the contract becomes operative. Now, what was the contract at the time of delivery to the plaintiff? Chester had made his note payable to the order of Walter Chester and the defendants, with the intent to procure Walter to indorse solely and only for his accommodation. The defendants, among whom was John Chester, the maker of the note, finding some difficulty in procuring Walter's indorsement, conclude to forego it, he having no interest whatever in the matter, and indorse it themselves without him; the plaintiff agrees to take the note with their indorsement alone. Now up to this time there is surely no contract at all in virtue of the paper; but now it is delivered and accepted, upon the full understanding by all parties [*196 that Walter Chester should be *no party to the security, although, in the hurry of a commercial transaction, the pen was not drawn across his name before delivery.

Now, was he ever in any way a party to the note, either as payee or indorser? He had no interest in it which would entitle him to have it delivered to him. It was not delivered to him, or to another for his benefit, which alone would make him a party to it. It is not by delivery, then, that he is a party to it. He did not indorse it, which would have made him a party. In legal effect, therefore, he never did become a party to it; and the transaction, so far as he is concerned, is precisely the same as if his name had never appeared upon the paper, or had been struck out at the time of delivery.

It was delivered to the defendants, which made them parties to it. It was by them indorsed, and with a waiver of the indorsement of Walter Chester. It was accepted with a waiver. What was the contract, then, which took effect?

Let it be remembered that the maker of this note is one of the firm of Pease, Chester & Co., the indorsers; that it was payable by one of the firm to the order of the copartnership and another person, whose name was to be procured to strengthen the note; that it never passed from the hands of the maker, and therefore never took effect, till the maker, together with his copartners, indorsed and delivered it, and waived the indorsement of the other intended surety.

How can it be pretended that Walter Chester was ever a party in any way to this note? and how can the doctrine of the cases cited on the other side, which say that all parties to a note as payees must indorse it in order to transfer it, apply? It is undoubtedly true, that parties jointly interested in a promissory note as payees, holding property in the note, must join in the indorsement to pass the property in the note. Two

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cannot transfer the property of three. All this is clear and unquestionable. But here Walter Chester never was in law a party, and never had any property in the note in fact, as admitted by the defendants themselves, in their demurrer.

In this view of the facts, it is similar to the case of a bond, reciting in the body that one person is bound as principal and four others as sureties, evincing an intention, at the time of writing the bond, of procuring four sureties. The bond in fact is signed by only three sureties, and by them is executed and delivered with the knowledge that the other does not execute it, and whose execution of it by the others is waived, but whose name is through inadvertence not struck out of the instrument. This point has been decided. See *Duncan v. United States*, 7 Pet., 443.

*197] It is the same as if the note had read, "We, John Chester as principal, and Walter Chester and Pease, Chester & Co. as sureties, agree to pay to the order of William Dwight," &c., and the parties had signed it except Walter, and delivered it, waiving his signature and consenting to become bound without him. There can be no doubt in such a case. See *Leaf et al. v. Gibbs*, 4 Car. & B., 466; same case, 19 Eng. Com. L., 475.

In the case before the court, it having been the understanding clearly of all parties, that Walter's signature or indorsement should be waived, it was competent for Dwight to strike his name out of the body of the note, as being no party to it; and in legal effect he is no more a party to the note than if his name had been struck out at the time of delivery. His name has been permitted to remain, though legally there never was any contract with him; and we may recover upon the facts as well as if we had struck out his name, and declared upon the note as payable to Pease, Chester & Co. alone, which in legal effect was the case.

But we may set out the instrument in the declaration, either as it is written, and let the court say what the legal effect is, or we may set it out according to its legal effect.

This, too, is an action against the men who indorse and deliver the note, and waive the indorsement of the other party. They deliver the note in its present shape as a good contract, and now resist a suit upon the ground that there is no transfer. They do not deny the contract, but say we cannot sue the maker, because Walter Chester has not indorsed. We say they have contracted, and therefore we sue them. They ought to be, if they are not, estopped from denying our right to maintain an action against them.

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Mr. Justice WAYNE delivered the opinion of the court.

We think that the only point presented by the record in this case for the decision of the court was rightly ruled by the Circuit Court.

That point is, whether a promissory note payable to the order of several persons, one of whom inceptively refused to be a payee of it, and who was treated by the drawer and other payees, both in the delivery of the note and in its negotiation, as no party and having no interest in it, can be transferred by the indorsement of the real payees, so as to give the ownership of it to the indorsee, and a right of action upon it *ex directo*, under the statute of 3 and 4, Anne c. 9.

The statute is, that "any person, to whom a promissory note that is payable to any person or his order is [*198 indorsed or *assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money, either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange."

The statute requires a transfer to be made by the indorsement of the person to whom the note is payable, and the interpretation of it is, that, where a note is payable to the order of several persons not in partnership, all must separately sign their names as indorsers. The object being, that, before an indorsee shall recover the contents of the note in his own name, he shall show he has acquired a property in it, by a transfer from those who were the original payees, or from others who were their indorsers. The statute is not merely a form, requiring all the payees to indorse, but a substantial requisition, upon the presumption that all the payees upon the face of the paper have an interest in it, and that they have indorsed it. We have then, the rule, and the reason of the rule. And it seems to us, that to permit it to comprehend a case of an undertaking between the real parties, because a name had been mistakenly inserted, or had been inadvertently left upon the face of the paper, when the note was delivered to the real payees by the drawee, would be to wrest the statute out of its meaning, and to sacrifice the substantial intention of it merely to form. The statute meant to deal with real parties. The omission to erase the name in such a case does not lessen the drawer's obligation to pay his note to the real payees, or their right of action upon it against the drawer as a note of hand. If, then, the real payees shall indorse the note to a third person, they are within the words of the statute as indorsers, and the indorsee, in an action against them

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or the drawer, may be permitted to prove the real character of the undertaking, by showing that the name of a person had been inadvertently left upon the paper as a payee, who had refused to be such, and who had been waived as a party to the note, both by the drawer and the real payees, when the contract had been completed between them by the delivery of the note. In the case before us, the declaration recites the particular circumstances under which the note was made and indorsed. The demurrer admits them. That is, that the paper had been indorsed by the real payees of it, but not by the nominal payee, who never was an actual payee nor ever had any interest in the note by being in any way a party to it. It would really be going very far to say, that the statute giving the indorsee a right of action for such sum of money, either against the person signing *199] such note or against any of the persons who indorsed the same, did not *mean it to be exercised because a person's name was upon the face of the paper who never had been a party to it. No such decision has been made. It may be because no case of this kind has ever occurred before. We can find none like it. In the absence of all authority against our conclusion, we must take upon ourselves the responsibility of announcing it as an original application of the statute to this case, and for any case of a like kind which may occur, without intending it to go further. We think, however, that the interpretation is sustained by what has been the practice under the statute in some other particulars,—that it is within the spirit of the principle upon which the statute has been administered. For instance, the statute requires the indorsement of a note to be made by the person to whom it is payable, and one of several partners may indorse in the partnership name; but though a note be made payable to a partnership, a transfer in the name of one partner alone will pass the partnership interest, if it be proved that it has been the practice of the firm to indorse for them in the name of one only. *South Carolina Bank v. Case*, 8 Barn. & C., 436. So if one partner transfer in the name formerly used by the partnership. *Williamson v. Johnson*, 1 Barn. & C., 146; 2 Dowl. & Ry., 281.

Also, where a bill is drawn upon a firm, and one partner writes "Accepted," adding only his own name, it will bind the firm, if they were in partnership at the time of the acceptance. An indorsement by the cashier of a bank of a note payable directly to the bank is good, upon the ground that he represents the interest of the bank in it, though he is not officially or otherwise a payee upon the face of the note. In

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Goddard v. Lyman, 14 Pick. (Mass.), 268, it is said a negotiable note payable to three persons may be legally transferred by indorsement by two of them to the third payee and a stranger, and, if this were doubtful, the indorsement of the third payee to the stranger will clearly pass the property to him. In *Snelling v. Boyd*, 5 Mon. (Ky.), 173, it is said, one of several joint holders of a bill of exchange may transfer the whole interest in it by indorsement. Where the maker of a promissory note indorsed the same, for his own benefit, in the payee's name, by virtue of a parol authority for that purpose communicated to him by the payee, it was held to be well indorsed, and that the payee was liable upon such indorsement in the same manner as if it had been made by himself in his own hand. *Turnbull v. Trout*, 1 Hall (N. Y.), 336. The foregoing, it will be perceived, are all of them cases in which parol proof has been admitted to show the character of the agencies by which notes or bills have been transferred or accepted, without any one of *the notes having been indorsed within the exact letter of the statute, though [*200 all of them are within its spirit.

But we rely altogether in this case upon the fact, that the note was transferred by the indorsement of those who were its real payees,—by those who had the absolute property in it. We think the true meaning of the statute is, that such as have the property in the note have the right to indorse, though there shall be a name upon the paper of another person, which was inserted by mistake as a payee, or inadvertently left in when the note was delivered, and that in an action by the indorsee he should be permitted to prove such a fact. Upon this point of the right of those to indorse who have the absolute property in a bill or note, we will cite what was said by the learned Chief Justice Willes in the conclusion of his opinion in the case of *Stone v. Rawlinson*, Willes, 562: "On the strength of this case I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill, made payable to one or his order, may assign it as he pleases, within the provision of the statute, and such assignee may maintain an action in his own name; the executor or administrator of a person to whom such bill is made payable has the absolute property in it, and therefore he may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name." This was said in answer to an objection, that an executor or administrator cannot assign a promissory note made payable to a person or order, so as to enable the indorsee to bring an action in his own name. So, a bill or note made payable or

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indorsed to a feme sole, who afterwards marries, or where it is made during the coverture, the right of transfer vests in the husband, so as to give his indorsee a right of action upon it in his own name, and the husband may be sued as an indorser. Neither the case of the executor nor that of the husband is within the letter of the statute, but both are according to the spirit and intention of it, to permit indorsements to be made by those who have a property in promissory notes, so as to enable their indorsee to maintain an action in his own name.

The judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, 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.

*201] *SAMUEL L. FORGAY AND ELIZA ANN FOGARTY,
WIFE OF E. W. WELLS, APPELLANTS, v. FRANCIS
B. CONRAD, ASSIGNEE IN BANKRUPTCY OF
THOMAS BANKS.

A decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes, and then said decree concluding as follows, viz.: "and so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises, and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs,"—was a final decree within the meaning of the acts of Congress, and an appeal from it will lie to this court.¹

¹ APPLIED. *Ex parte Farrars*, 13 So. Car., 259. DISTINGUISHED. *Norton v. Hood*, 12 Fed. Rep., 765. EXPLAINED. *Barnard v. Gibson*, 7 How., 657; *Craighead v. Wilson*, 18 Id., 202; *Beebe v. Russell*, 19 Id., 287; *Huntington v. Moore*, 1 New Mex. T., 474. CITED. *French v. Shoemaker*, 12 Wall., 98; *French v. Hay*, 22 Id., 245; *Chicago &c. R. R. Co. v. Fosdick*, 16 Otto, 71, 83; *Guardian Savings Bank v. Reilly*, 8 Mo. App., 548.

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But a decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court, is interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be finally adjudicated. From such a decree no appeal lies.²

The attention of the Circuit Court is called to the propriety of merely announcing their opinion in an interlocutory order, and withholding a decree setting aside titles and conveyances until the case is ready for a final decree.

The difference between the English and American practice upon this subject explained.

Where the defendants claimed separate pieces of property, conveyed at different times by separate conveyances, and the decree against them was several, it was not necessary for all to join in an appeal.³

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

The facts of the case are set forth in the opinion of the court.

Mr. Sergeant moved to dismiss the appeal, because the decree of the court below was not final, and because the appeal was not regularly brought up. On the second point, he said that there were several defendants, one only of whom had appealed. But all the parties must join. 7 Pet., 399. He referred to the court, however, upon this point, to *Todd v. Daniel*, 16 Pet., 521. A case must not come up in fragments. 3 Pet., 307; 3 Dall., 188.

To show that the decree was not final, he referred to *The Palmyra*, 10 Wheat., 502; *Chace v. Vasquez*, 11 Id., 429; *Brown v. Swann*, 9 Pet., 1; *Young v. Grundy*, 6 Cranch, 51; *Rutherford v. Fisher*, 4 Dall., 22; *Lea v. Kelly*, 1 Pet., 213; *Young v. Smith*, 12 Id., 287.

Mr. May, contra.

Against the motion to dismiss, it is submitted,—

1st. There are proper parties to this appeal.

The appellants have separate and distinct interests, and the *decree is several. *Todd v. Daniel*, 16 Pet., [*202 523; *McDonough v. Dannery*, 3 Dall., 188, 193, 198.

On order of court. The petition for an appeal by appellants alone is found in the record, p. 198. This was notice to the other defendants below of the appeal.

2d. The decree is final.

It decides the title of all the property in dispute, decrees that it be delivered up to the complainant, and that execution

² APPROVED. *Grant v. Phoenix*, 16 Otto, 432. CITED. *Bostwick v. Brinkerhoff*, 16 Id., 4.

³ APPLIED. *Brewster v. Wakefield*, 22 How., 129. CITED. *Simpson v. Greeley*, 20 Wall., 157.

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issue, &c. *Wilson v. Daniel*, 3 Dall., 404. The whole law of the case, so far as the appellants are concerned, is settled by the decree; nothing is left to be done but the ministerial duty of stating an account, which in this case is in the nature of an execution to carry out the decree; the principles of the account are prescribed. It is like the case of *Ray v. Law*, 3 Cranch, 179 (explained in 10 Wheat., 503). *Whiting v. Bank of the United States*, 13 Pet., 15.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this appeal, upon the ground, that the decree in the Circuit Court is not a final decree, within the meaning of the acts of Congress of 1789 and 1803.

The bill was filed by the appellee, as the assignee in bankruptcy of a certain Thomas Banks, in the Circuit Court of the United States for the District of Louisiana, against the appellants, and Banks the bankrupt, and three other defendants. The object of the bill was to set aside sundry deeds made by Banks for lands and slaves, which the complainant charged to be fraudulent, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which he alleged had been received by one or more of the defendants, as specifically charged in the bill, which belonged to the bankrupt's estate at the time of his bankruptcy.

The case was proceeded in until it came on for hearing, when the court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him eleven thousand dollars, received from the bankrupt in fraud of his creditors, and "that the complainant do have execution for the several matters aforesaid, in conformity with law and the practice prescribed by the rules of the Supreme Court of the United States." The decree then directs that the master take an account of the

*203] profits of the lands and slaves ordered to be delivered up, from the time of the filing *of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants (who has not appealed) in fraud of the creditors of the bankrupt, and concludes in the following words:—"And so much of the said bill as contains or relates to matters hereby referred to the master for a report is re-

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tained for further decree in the premises: and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs."

Among the deeds set aside as fraudulent is one from the bankrupt to Ann Fogarty, otherwise called Ann Wells, for two lots in the city of New Orleans and sundry slaves which she afterwards conveyed to Forgay, the other appellant. Both of these deeds are declared null and void, and the lots, with the improvements thereon, and the negroes, directed to be delivered to the complainant for the benefit of the bankrupt's creditors. This part of the decree is one of the matters of which the complainant was to have execution. But the account of the rents and profits of this property is, like other similar accounts, referred to the master, and reserved for further decree.

The appeal is taken by Samuel L. Forgay and Ann Fogarty, otherwise called Ann Wells; and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to them at different times and by separate conveyances, as mentioned in the proceedings. And it was not, therefore, necessary that they should join in this appeal. *Todd v. Daniel*, 16 Pet., 523.

The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.¹

In the case of *Whiting v. The Bank of the United States*, 13 Pet., 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground, that the decree of foreclosure and sale was final upon the merits, and the ulterior *proceedings but a mode of executing the original [*204 decree. The same rule of construction was acted on

¹ APPLIED. *Bronson v. Railroad Co.*, 2 Black, 531.

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in the case of *Michoud and others v. Girod and others*, 4 How., 503.

The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the Circuit Courts. If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury.¹ For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defence of their rights. We think, upon sound principles of construction, as well as upon the authority of the cases referred to, that such is not the meaning of the acts of Congress. And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.²

This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver,³ or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily

¹ See *Barnard v. Gibson*, 7 How., 657.

³ CITED. *Grant v. Phoenix*, 16 Otto, 431, 432.

² FOLLOWED. *Thompson v. Dean*, 7 Wall., 346.

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made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court *until the rights of the parties [*205 concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled. We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal.

In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practised in the English chancery jurisdiction and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise, where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.

In the case before us, for example, it would certainly have been proper, and entirely consistent with chancery practice,

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for the Circuit Court to have announced in an interlocutory order or decree the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon *206] the titles and conveyances in contest. But there could be no necessity* for passing immediately a final decree annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal, and the object and policy of the acts of Congress upon this subject carried into effect.

These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced; but in order to call the attention of the Circuit Courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen, that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the Circuit Court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one.¹

Order.

On consideration of the motion filed by *Mr. Sergeant*, of counsel for the appellee, to dismiss this appeal, and of the arguments of counsel thereupon had, as well against as in support of the said motion, it is now here ordered by this court, that the said motion be and the same is hereby overruled.

¹ APPROVED. *Railroad Co. v. Swasey*, 23 Wall, 411. CITED. *United States v. Girault*, 11 How. 32.

 Perkins v. Fourniquet et al.

JOHN PERKINS, APPELLANT, v. EDWARD F. FOURNIQUET
AND WIFE, AND MARTIN W. EWING AND WIFE.

Where the Circuit Court decreed that the complainants were entitled to two sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to this court.¹

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana, the circumstances of which are stated in the opinion of the court.

**Mr. Henderson* and *Mr. Fendall* moved to dismiss [*207 it, for want of jurisdiction, because the decree of the Circuit Court was not a final decree. The motion was opposed by *Mr. Mayer* and *Mr. Coxe*.

Mr. Henderson, in support of the motion.

The record shows that the appeal taken in this case is upon an interlocutory decree to account, and before any account taken or any final decree made.

The appellees move to dismiss the case, for the reason, that in this state of the record this court has no jurisdiction. Appeal lies only from a "final decree." Act of 1789, sec. 22; 9 Pet., 1-3; 2 How., 64.

It seems this court, in the case of *Michoud et al. v. Girod*, 4 How., 534-537, did entertain an appeal from an interlocutory decree, but the fact, it is presumed, escaped notice. The like omission is noticed as having occurred in the case of the *Washington Bridge Co. v. Stewart*; but the court say, had the defect been noticed the appeal would have been dismissed. 3 How., 424. The appeal in this case, being now shown to be prematurely taken, will of course be dismissed.

Mr. Mayer and *Mr. Coxe*, against the motion, referred to and commented upon the cases in 4 How., 524; 3 Id., 424; 3 Cranch, 179; 4 Id., 216; 10 Wheat. 503, in which last the court review the former cases.

¹ Further decisions, 7 How., 160; 14 Id., 313; 16 Id., 82. APPLIED. *Chappell v. Funk*, 57 M.L., 481. FOLLOWED. *Craighead v. Wilson*, 18 How., 200; *Quidnick Co. v. Chaffee*, 13 R. L., 401. CITED. *West v. Smith*, 8 How., 413; *United States v. Gerault*, 11 Id., 28; *Railroad Co. v. Soutter*, 2 Wall, 443; *Magic Ruffle Co. v. Elm City Co.*, 2 Bann. & A., 513.

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Mr. Fendall, in support of the motion, cited and remarked upon the following authorities:—Judiciary Act, 24 September, 1789, sec. 22, 1 Stat. at L., 60; *Canter v. American Insurance Company*, 3 Pet., 318; *Rutherford v. Fisher*, 4 Dall., 22; *Young v. Grundy*, 6 Cranch, 51; *Houston v. Moore*, 3 Wheat., 433; *Gibbons v. Ogden*, 6 Id., 448; *The Palmyra*, 10 Id., 502; *Weston v. City of Charleston*, 2 Pet., 464, 465; *Boyle v. Zacharie and Turner*, 6 Id., 648; *Brown v. Swann*, 9 Id., 1; *Young et al. v. Smith*, 15 Id., 287; *McCullum v. Eager*, 2 How., 61; *Pepper et al. v. Dunlap*, 5 Id., 51; *Mayberry v. Thompson*, 5 Id., 126; *Clagett v. Crawford*, 12 Gill & J. (Md.), 275.

Mr. Chief Justice TANEY delivered the opinion of the court.

This, like the case just decided, is a motion to dismiss the appeal, upon the ground, that the decree in the Circuit Court was not a final one.

In the preceding case, we have stated the construction which this court has given to the acts of 1789 and 1803 upon this subject; and we have stated it more fully than the case itself *208] required, in order that the Circuit Courts might distinctly understand *the opinion entertained by this court, and to prevent, in future, appeals from decrees and orders merely interlocutory in their character. Appeals from decrees of this description appear to be a growing evil, imposing at every term useless labor upon the court, and subjecting the parties to unnecessary expense and delay. For, having no jurisdiction in such cases, they are not legally before the court upon the appeal, and must of course be dismissed without any decision upon the matters in dispute.

The case now before us may be stated in a few words. It is an appeal from the Circuit Court of the United States for the District of Louisiana; and it appears by the record that Harriet J. Fourniquet and Mary T. Ewing are two of seven heirs and representatives of Mary Perkins, who was the wife of the appellant, and who died about twenty years before the filing of this bill; that the appellees above named were the children of a former marriage, and with their respective husbands filed the bill now before us, against the appellant, charging that, during the marriage of the appellant with their mother, there existed a community of acquests and gains in certain property, and praying that the appellant might be compelled to account and pay over the amount due them as heirs of their mother. The appellant denied, in his answer, that any community existed, and the case was proceeded in to hearing, when the Circuit Court passed a decree declaring that the community did exist, and that the appellees, as heirs

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of their deceased mother, had a right to recover two sevenths of all their mother's rights of community which accrued during her marriage with the appellant; and also two thirds of one seventh, as representatives of so much of the interest of a deceased brother; and referred the matter to a master in chancery, to take and report an account of the acquets and gains; and prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken; and the decree concludes by reserving all other matters in controversy between the parties until the coming in of the master's report.

This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, wherever the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the master, or a partition made, cannot be prescribed by the court until it first determines the rights of the parties by an interlocutory order or decree; and the case cannot proceed to final hearing without it. [*209 And the appellant is *not injured by denying him an appeal in this stage of the proceedings. Because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time.

The decree in the case before us being interlocutory only, the appeal must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. And it appearing to the court here that the decree of the said Circuit Court is an interlocutory and not a final decree, it is therefore now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed for the want of jurisdiction.

 Pulliam et al. v. Christian.

SAMUEL T. PULLIAM AND OTHERS, APPELLANTS, v. EDMUND CHRISTIAN, ASSIGNEE IN BANKRUPTCY OF WILLIAM ALLEN.

A decree of the Circuit Court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree,—is not such a final decree as can be appealed from to this court.¹

THIS was an appeal from the Circuit Court of the United States for Eastern Virginia.

The circumstances of the case are stated in the opinion of the court.

It was argued by *Mr. Lyons*, for the plaintiff in error, and *Mr. Brooke* and *Mr. Myers*, for the appellees.

It is not deemed necessary to insert the arguments of counsel upon the merits of the case.

Mr. Lyons stated the case, and argued the preliminary question of jurisdiction, as follows:

William Allen, of the city of Richmond, a merchant-tailor, [*210 being very much embarrassed in his affairs, though he believed *himself solvent, on the 20th day of January, 1842, executed a conveyance to the plaintiffs, as trustee, by which he conveyed his whole property of every kind, for the purpose of satisfying his debts. The conveyance provides for all the creditors of Allen full satisfaction of all their debts, if the assets be sufficient, but divides them into two classes, and the first is to be fully paid before the second receives any thing. The trustees took possession of the trust-subject, and proceeded to convert it into money. On the 13th of August, 1842, the said Allen filed his petition, praying to be declared a bankrupt. His petition was allowed, and on the 7th of September, 1842, he was declared a bankrupt, and on the 11th of January, 1843, he was duly discharged by the decree of the court, after due notice to all persons interested, to show cause against the discharge.

On the 23d of August, 1842, two of the creditors of Allen

¹ FOLLOWED. *Craighead v. Wilson*, 18 How., 201. CITED. *Chappell v. Funk*, 57 Md., 481.

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notified the trustees that they intended to impeach the deed under the bankrupt law, and claim an equal distribution of the funds; and on the 20th of September, 1842, Edmund Christian, the general assignee in bankruptcy in Virginia, exhibited his bill before the Circuit Court of the United States for the Eastern District of Virginia, in which he impeached the deed as fraudulent within the meaning of the bankrupt law, and prayed that it might be set aside.

The trustees and many of the creditors answered the bill, denying that the deed was made in contemplation of bankruptcy, and denying that it was embraced by the bankrupt law, or could be reached by any proceeding under it, as it was made before the law went into operation, and therefore made when there was no bankrupt law. The Circuit Court held that the deed was fraudulent within the meaning of the bankrupt law, and decreed that it should be set aside; and that the trustees should surrender the entire trust-subject in their hands to the plaintiffs, and render an account before a commissioner of the court. From this decree the appeal was taken, and the question upon the merits is, whether the word "future," in the second section of the bankrupt law, can properly be construed to embrace conveyances which were made before the law went into operation.

Before proceeding to consider this question, a word may be bestowed upon a preliminary point, which is alluded to by the counsel for the appellee in their note, but not formally made, viz.: whether the appeal in this case was well taken, being, as it is said, from an interlocutory decree. It is submitted, that, on this point, there can be no difficulty. The decree may be regarded as interlocutory in one sense, that is, as being made before the cause is finally ended and removed from the docket *of the court; but in respect to its own effect [*211 and operation the decree is a final one, because it adjudges and determined the rights of the parties to the property in controversy, and all that remains now to be done is in execution of this decree. The finality of a decree does not depend upon its termination of the whole *case*, but upon its effect in settling the principles of the cause, and adjudicating the rights of the parties to the subject in controversy. The decree in this cause performs all these functions. It settles all the principles of the cause. It adjudges the rights of all the parties, plaintiffs and defendants, to the subject, and it directs the defendants who have the subject to deliver it up to the plaintiffs. All that remains now to be done is simply in execution of that decree. A judgment is not interlocutory because execution must be made of it. The decree might

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have directed the assignee to distribute the fund, as soon as received from the defendants, among the creditors of Allen, or the next decree may do it, and yet not end the cause, and when the fund is distributed an appeal may be wholly unavailing, because the payees of the fund may be insolvent.

Again. Why should the parties be continued in expensive litigation in the court below, as the consequence of the decree already pronounced, if that decree be erroneous, and when no such litigation and expense will be incurred if that decree be set aside and a correct decree pronounced?

The counsel for the appellees submitted the question of jurisdiction to the court without arguing that branch of the case.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery from the Circuit Court of the Eastern District of Virginia.

This case arises under the bankrupt law. William Allen, a merchant-tailor in Richmond, being embarrassed, conveyed his whole property to the plaintiffs, as trustees, to pay his debts. In the trust-deed he divides his creditors into two classes, the first of which was to be fully paid before the second received any thing. Shortly after this, he took the benefit of the bankrupt law. The assignee in bankruptcy filed his bill to impeach the above conveyance, as fraudulent under the bankrupt law.

In their decree, the Circuit Court ordered that the deed executed by Allen, as above stated, should be set aside. And, without deciding how far the trustees may be liable to the assignee for the sums received for the proceeds of the *212] property, which may have been paid over by them to the creditors of *Allen before they received notice, &c., the court ordered and decreed that the trustees should deliver over the property conveyed to them which had not been disposed of, and that they render an account to one of the commissioners of the court of all the property which came to their hands, or either of them, by virtue of said deed, and of moneys paid to the creditors, &c.; which account the said commissioner is directed to state and settle, and report the same to the court, with any matters specially stated deemed pertinent by himself, or which may be required by the parties, in order to a final decree.

This decree is final only as to the trust-deed. All the matters arising under the trust are referred to a commissioner for a statement of the account, to enable the court to enter a final decree. There is no sale or change of the property ordered

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which can operate injuriously to the parties. Under such circumstances, the decree not being final as to the whole matter in controversy, the appeal must be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel. On consideration whereof, and it appearing to the court here that the decree of the said Circuit Court in this cause is an interlocutory and not a final one, it is thereupon now here ordered, adjudged, and decreed by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction.

THE PRESIDENT AND DIRECTORS OF THE BANK OF THE
METROPOLIS, PLAINTIFFS IN ERROR, *v.* THE PRESIDENT,
DIRECTORS, AND COMPANY OF THE NEW ENGLAND BANK.

Referring to the case of the Bank of the Metropolis against the New England Bank, reported in 1 Howard, 234, the following instructions to the jury upon the second trial would have carried out the opinion of this court, viz.:

1st. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills or notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.

2d. And if the Bank of the Metropolis had not notice that the Commonwealth was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

3d. But if the jury found, that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were, from time to time, suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis is entitled to retain against the New England Bank for the balance of account due from the Commonwealth Bank.¹

THIS case was brought up by writ of error from the Circuit

¹ CITED. *United States v. State Bank*, 6 Otto, 35; *Wool v. Boylston Nat. Bank*, 129 Mass., 360.

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Court of the United States for the District of Columbia, sitting for the county of Washington.

It was the same case which was before this court at January term, 1843, and is reported in 1 How., 234. It is unnecessary, therefore, to state again the facts of the case which existed prior to that report.

The Supreme Court having reversed the judgment of the Circuit Court, and directed it to award a *venire facias de novo*, the cause came up again for trial in the Circuit Court, at March term, 1844. The result of the second trial was a judgment in favor of the New England Bank for \$4,245.24, with interest upon parts of this sum from various times.

The evidence offered on the part of the plaintiff, and also that on the part of the defendant, are stated in the bill of exceptions, with a reference to a great number of letters and accounts. This evidence must be inserted in substance, in order to render intelligible the prayers to the court. The first prayer was made by the defendant, and does not appear to have been excepted to by the plaintiff, although granted by the court; but the plaintiff then made a prayer for himself, which was also granted by the court, and excepted to by the defendant, and upon this exception the case came up. But the case cannot be fully understood without spreading all this upon the report of it.

Evidence on the part of the plaintiff, viz.: the New England Bank.

On the trial of this cause, the plaintiffs, to maintain the issue on their part joined, offered evidence tending to show, that, from the year 1834 to the year 1838, there had been extensive mutual dealings between the Bank of the Metropolis, in the city of Washington, and the Commonwealth Bank, a bank in Boston, in the state of Massachusetts, at which place the plaintiff's bank is also situated; that both of these banks (the Metropolis and the Commonwealth) were selected by the government of the United States as deposit banks, and in consequence became extensively employed as agents for other banks, and for individuals, in the transmission of negotiable *214] paper for collection *in the manner usual among such institutions; that the usage well known and established universally in the District of Columbia, and throughout this country, in such cases, is for the holder of negotiable paper to indorse and deliver it, without any consideration, to a bank (or, if the bank is the holder, to another bank), to be indorsed and delivered by such bank with which it has been so deposited to another bank, and so on to transmit it from

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bank to bank till it reaches its place of destination; that when it is paid, the proceeds are credited to the bank by which it was last indorsed, and by that bank to its indorser, and so on back to the owner; but it is not usual for the banks to remit the precise amount so collected at the time of such collections, but to place the same to the general credit of the bank from which it was received, to be settled by drafts or otherwise, as might be most convenient for such banks respectively; and in case of non-payment, the costs thereof and postage are charged from the one bank to the other till the owner is charged therewith; that it is also the usage and custom of the banks receiving such paper to treat it in all respects as they do their own paper, but it is not usual for any bank to purchase negotiable paper from another bank. That the said Bank of the Metropolis and the said Commonwealth Bank were extensively engaged in collecting and remitting to each other for collection, on account of other banks and individuals, negotiable paper, deposited with either for that purpose, and in that business they conformed to the usage aforesaid in the mode of transmitting such paper by indorsement, and also in the mode of keeping their accounts of such business; and it was the uniform practice of the said Commonwealth Bank, in transmitting such paper, to accompany the same with a letter, advising the Bank of the Metropolis that it was "forwarded for collection" (letters copied in pages 22, &c.); but in some instances they transmitted negotiable paper by letters in the following form (copied in pages 25, &c.); that in the course of the said dealing between the said two banks, repeated instances occurred in which the Bank of the Metropolis directed the said Commonwealth Bank to deliver to third parties negotiable paper, which had been forwarded by the former to the latter; and such direction was complied with, and the paper delivered according to such order, without reference to the state of the accounts between the said two banks; and also, that either of the said two banks drew upon the other, from time to time, or directed remittances to be made, without having regard to the negotiable paper which had been before them, or was expected to be remitted for collection.

*215] They further offered evidence tending to show, that, during *the fall of the year 1837, the plaintiffs, being the holders of certain negotiable paper coming due in the District of Columbia, at various times during the said fall and winter, indorsed and delivered such paper to the said Commonwealth Bank, without consideration, as the agent of the plaintiffs for that purpose, and according to the usage and

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custom above stated, to be transmitted by said Commonwealth Bank to the said District for collection; and the said Commonwealth Bank, from time to time, as it received the said paper from the plaintiffs, indorsed and delivered the same, without consideration, and according to the said usage and custom, to the said defendants, and in delivering them to defendants, they advised defendants that such paper was forwarded for collection.

That on the 13th day of January, 1838, there were in the hands of the defendants certain bills and notes, the property of the plaintiffs, and which had been indorsed and delivered by plaintiffs to the Commonwealth Bank, in manner and according to the usage and custom above stated, for collection, without consideration, and which had been indorsed by the last-mentioned bank to the Bank of the Metropolis, and forwarded to the said defendants in letters, advising them in every instance that the said paper was forwarded for collection; that on the said 13th day of January, 1838, the said Commonwealth Bank gave to the plaintiffs an order in writing, addressed to the defendants, as follows (copied in pages 27, &c.); that the said letter was immediately forwarded by due course of mail to, and received by, the defendants; that the said negotiable paper amounts to the sum of \$4,466.75; that none of the said paper was due or had been paid to the defendants at the time of the receipt by them of said order of the 13th January, 1838, except the sum of \$241.01, and that sum had been carried to the credit of the Commonwealth Bank in the general account with said bank, and that the residue of the said paper was afterwards, and before the bringing of this suit, paid to the said defendants; that the said negotiable paper, in the said order of the 13th January, 1838, mentioned, was part of the paper indorsed and delivered in the fall of 1837, as above stated, to the Commonwealth Bank by the plaintiffs, according to the usage and custom above stated, without consideration, to be collected for the plaintiffs, according to the said usage and custom, and was, at the time of such delivery, and ever after, the property of the plaintiffs.

And the plaintiffs further offered in evidence the following deposition of Charles Hood, viz.:—

*216] “I, Charles Hood, now of Dorchester, in the county of Norfolk, *in Massachusetts, formerly of the city of Boston, in the county of Suffolk, on oath depose and say, that I was cashier of the Commonwealth Bank from the time of its commencing to the time of its closing business; said bank having been a bank established by law in the Commonwealth

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of Massachusetts, and having transacted business in Boston. I further depose and say, that the papers exhibited by me to the magistrate taking my deposition, for the purpose of being annexed thereto, and marked A, B, and C (copied in pages 33, &c.), are original accounts current rendered by the Bank of the Metropolis, in Washington city, to said Commonwealth Bank.

“The said papers are all the accounts rendered by the said Bank of the Metropolis to the said Commonwealth Bank, which I can now find; said Bank of the Metropolis rendered one or more accounts subsequent to these, which I cannot find, the same having been lost or mislaid. I cannot find any previous account rendered by said Bank of the Metropolis. The principal part of the items on the credit side of said account consists of checks and drafts drawn by said Bank of the Metropolis on said Commonwealth Bank; each draft or check being indicated in the account by its number. I further depose and say, that there was not, to my knowledge, at any time any agreement or understanding between said two banks, that the balances due, from time to time, from one bank to the other, should be suffered to remain in the hands of either, to be met by the proceeds of negotiable paper already transmitted, or expected to be transmitted, in the usual course of business between them. If there had been any such understanding or agreement between said banks, I have not the least doubt I should have known it. There was no usage or practice between said banks to allow any such balances due to the Commonwealth Bank to remain undrawn for, to be met by the proceeds of negotiable paper transmitted, or expected to be transmitted. I do not know of any usage or practice on the part of the Bank of the Metropolis to allow balances due to said bank from the Commonwealth Bank to remain undrawn for, to be met by proceeds of paper transmitted, or to be transmitted, in the usual course of business between said banks. I further depose and say, that, in fact, the Commonwealth Bank drew on the Bank of the Metropolis for its balances as often as its business or convenience required, without reference to the negotiable paper held at the time, or expected to be transmitted in the usual course of business, for payment or collection, between said banks. This practice was uniform. I further depose and say, that, in pursuance of an understanding between said banks, each of them occasionally [*217 overdrawed upon the other, as its convenience required. I further depose and say, the two papers exhibited by me to the magistrate taking this deposition, for the purpose of being annexed thereto, marked D, E (copied in page 55, &c.), are

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true copies of letters transmitted by said Commonwealth Bank to said Bank of the Metropolis, at or about the time of their respective dates. I further depose and say, that the said two banks were, among others, originally selected as deposit banks by the government. The deposit banks became extensively the agents of other banks and institutions, for the purpose of making collections in various and distant parts of the United States. It has never been the practice of banks, as far as I know, to purchase negotiable paper held by other banks, and take the indorsement of such other banks, or without such indorsement.

“CHARLES HOOD.”

The plaintiffs also offered in evidence a great number of letters and accounts which had been transmitted between the Bank of the Metropolis and the Commonwealth Bank.

The evidence offered on the part of the Bank of the Metropolis was as follows:—

“ And the said defendants, in order to maintain and prove the issue on their part, gave to the jury competent and legal evidence tending to prove that it is and has long been the uniform practice and usage of the banks in the District of Columbia, when commercial paper is transmitted to it for collection by banks or individuals, when indorsed by the party so remitting it, and in the absence of information that any other person or party has an interest therein, to treat and deal with the party so making the remittance as the owner of the same, the proceeds, when received, are credited to his account, and he is charged in said account with all the expenses attending the same, as costs, protests, postage, &c. That this usage and practice uniformly prevailed in the dealings between the said Commonwealth Bank and the Bank of the Metropolis; that they mutually transmitted funds and paper of different kinds to each other, government drafts, certificates of deposit, bills, notes, and drafts of private individuals; that all, of every description, were carried into the general accounts current between the two institutions, which are both banking institutions, regularly and duly chartered, and engaged exclusively in the business of banking; that, in the account current, each bank was regularly credited by the other with the proceeds of all such commercial paper thus received by it from the other, when collected, and charged with the costs of collection, pro-
*218] tests, and postage connected with the same. That on
the 13th *of January, 1838, the said Bank of the Metropolis was in the possession of the bills, drafts, notes, &c., being all commercial and negotiable paper, enumerated and mentioned in the said letter from C. Hood of that date, the same

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having been, from time to time, transmitted by said Commonwealth Bank to said Bank of the Metropolis, in the course of their said mutual dealings and business, in letters; which letters from said Commonwealth Bank, so far as they are deemed material, are as follows (copied in the record). That each of said drafts, bills, notes, &c., was indorsed by the payees thereof, respectively, to the New England Bank, specially indorsed by the cashier of said New England Bank to the cashier of the Commonwealth Bank, and by him likewise specially indorsed to the cashier of the Bank of the Metropolis; that the same had all been transmitted within the two or three months preceding the said 13th of January; that all said paper was indorsed and transmitted in the same form in which paper the property of the bank remitting the same was indorsed and sent. That the said Commonwealth Bank failed, and became publicly insolvent, early in January, 1838, before the said letter of the 13th of January was written; that said letter contained and gave the first information, or notice, ever received by the Bank of the Metropolis, that said New England Bank was, or claimed to be, the owner of said paper so held by the Bank of the Metropolis. That the accounts between said parties, so kept as aforesaid, were regularly received by, and transmitted from, said banks respectively (the Commonwealth and Metropolis Banks), and no objection was ever made to the form or manner thereof, the last of which is here inserted (A, defendants' statement, copied in the record); that the balances were sometimes large, sometimes small, sometimes in favor of the one, sometimes of the other; that on the 24th of November, 1837, the balance was in favor of the Commonwealth Bank to the amount of \$2,200; that at the time the said letter of 13th of January, 1838, was written and received, the balance due to the Bank of the Metropolis was \$3,541.17½."

Defendants' Prayer.

Whereupon the defendants, by their counsel, prayed the court to instruct the jury,—

That if, from the evidence aforesaid, they shall find that the course of dealing between the said Commonwealth Bank and the Bank of the Metropolis, as stated in said evidence, actually existed, and had continued for several years prior to January, 1838; that their dealings had been mutual and extensive; that accounts current existed between them, in which they were respectively *credited with the proceeds of all [*219 notes, bills, drafts, &c., transmitted to the other for collection when the same were received, and charged with all the expenses attending the same, as postage, costs of protests, &c.;

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that from time to time such accounts were regularly transmitted from each to the other, which accounts were mutually acquiesced in without objection; that the balances on the account current fluctuated from time to time, according to the amount of money, bills, notes, &c., remitted; that upon the credit of such negotiable paper thus transmitted or expected to be sent, or upon the credit of such mutual dealings, each party was in the practice of drawing and accepting drafts and orders on or by the other; that said banks uniformly received the notes, bills, drafts, &c., transmitted by the other for collection, and always regarded and treated them as the property of the other; that the notes, drafts, and bills enumerated in the letter from C. Hood to G. Thomas of the 13th of January, 1838, were all so received, regarded, and treated; that the defendants had no notice or knowledge, until the receipt of said letter of the 13th of January, 1838, that said Commonwealth Bank was not the absolute and only owner of the same, or that plaintiffs had any interest in, or claim to, the same; that said Commonwealth Bank became insolvent some few days prior to the said 13th of January, 1838, at which time the Bank of the Metropolis had in its possession, so held and received in the course of said mutual business, the notes, bills, &c., mentioned in said letter of 13th of January, 1838; that in the course of said mutual business, it was the practice and usage of each of said banks (the Commonwealth and Metropolis) to draw upon the other, as its exigencies or conveniences required, even beyond the amount of the balances then due to it on general account, which drafts it was also their usage and practice to accept and pay on the credit of anticipated remittances of negotiable paper or funds, or on the credit of such mutual dealings and course of business; and it was also the practice and usage of both said banks to suffer and permit ascertained balances to lie undrawn for on the same credits; that at the time the said Commonwealth Bank became insolvent, and when said letter of January 13th, 1838, was written and received, there was a balance of \$2,900 or other sum due on said general account from said Commonwealth Bank to the Bank of the Metropolis;—then the defendants were entitled to hold and retain the said notes, drafts, bills, &c., so in their possession, and the proceeds of the same, when received, until the tender or payment of such balance; and the plaintiffs are not entitled to recover in this action, until they show, to the *220] satisfaction of the jury, that before action brought *such balance was paid or tendered to said defendants. Which was given.

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Defendants' Bill of Exceptions.

And thereupon, and after the court had given the said instruction to the jury on the prayer of said defendants, the plaintiff prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the notes mentioned in the said letter, dated the 13th day of January, 1838, from Charles Hood, cashier of the Commonwealth Bank, to George Thomas, cashier of the Bank of the Metropolis, were received by the said Commonwealth Bank from the said plaintiffs, and were at the time of such receipt the property of the plaintiffs.

That they were deposited by the plaintiffs with the said Commonwealth Bank, to be transmitted by it for collection only.

That the said Commonwealth Bank received the said notes only as the agent of the plaintiffs, and without giving any consideration for them, or receiving any compensation as such agent to transmit them for collection, and never had any right, title, or interest in, or claim or lien upon, the said notes, except as agent as aforesaid.

That the said Commonwealth Bank, as agent as aforesaid, and not otherwise, did in fact transmit the said notes to said defendant for collection only.

That the said notes were indorsed by the cashier of the plaintiffs, as cashier, and by the cashier of the said Commonwealth Bank, as cashier, in the mode and form commonly used by banks in the United States in the transmission of negotiable paper deposited with, and transmitted through, such banks for collection.

That the usage to deposit in one bank such paper so indorsed to be transmitted, and for such deposit bank to indorse such paper in the manner aforesaid, and to transmit the same so indorsed to another bank, is a common usage throughout the United States, and that the custom so to indorse such negotiable paper is universal.

That the Bank of the Metropolis and the said Commonwealth Bank were extensively engaged as the agents of other banks, and with each other, in the transmission for collection and in the collection of negotiable paper belonging to third parties, in the years 1836 and 1837, in various and distant parts of the United States; and that the common form of indorsement used in the transmission of such negotiable paper by the said Commonwealth Bank and the Bank of the Metropolis was such as was *used by the said Commonwealth Bank in the indorsement and transmission of

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said notes, for the proceeds of which this suit is brought; and that neither of the said banks, under the said usage and custom, held the other liable upon such indorsement.

That the said notes last mentioned were transmitted to the said Bank of the Metropolis in letters, notifying the defendants that they were transmitted for collection in the form commonly used by said banks in transmitting negotiable paper for collection, and with no other intention as to who was the real owner of such negotiable paper; then it is competent for the jury to infer, from the facts aforesaid, that the defendants had notice that the said paper was transmitted by the said Commonwealth Bank as agent, and not as the owner thereof. And if the jury shall so find, then the plaintiff is entitled to recover, notwithstanding the jury shall find that the said Commonwealth Bank and the Bank of the Metropolis treated each other as the true owners of the paper so remitted; and notwithstanding they shall further find that balances were, from time to time, suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited, or expected to be transmitted, in the usual course of dealing between them; and notwithstanding the course of dealing stated in the instruction heretofore given at the instance of the defendants.

To the giving of which instruction, as prayed, the counsel for the defendant objected; but the court overruled such objection, and instructed the jury as requested; to which the defendant by his counsel excepts, and prays the court to seal this bill of exceptions, which is accordingly done, this sixth day of September, 1844.

W. CRANCH, [SEAL.]
JAMES S. MORSELL. [SEAL.]

Upon this exception, the case came up to this court.

It was argued by *Mr. Coxe*, for the plaintiff in error, and *Mr. Bradley*, for the defendant in error.

Mr. Coxe, for the plaintiff in error.

This cause was before this court in 1843, and is reported in 1 Howard, 234.

The proceedings remain as they originally stood. The evidence on the second trial is supposed to be substantially the same as on the first.

On the former argument, this court decided, that, wherever a banker has advanced money to another, he has a lien on all *222] the paper securities which are in his hands for the amount of *his general balance, unless such securities

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were delivered to him under a particular agreement. 1 How., 239. That the paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without consideration, as its agent, in the ordinary course of business, it being usual, and indeed necessary, so to indorse it in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank; and, without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or owner. *Id.*

The instructions asked of the court by the parties respectively are found in the present record, pp. 31-33. The court gave both, as asked. In the defendant's statement, the facts given in evidence are detailed. In the instruction given at the instance of plaintiff, some portion of these facts is stated. The main difference between the two seems to consist in this: In the defendant's prayer, the supposed state of facts to be found by the jury includes this,—“that the defendant had no notice or knowledge, until the receipt of said letter from C. Hood to G. Thomas, of the 13th January, 1838, that said Commonwealth Bank was not the absolute and only owner of the same, or that plaintiff had any interest in or claim to the same.”

In the plaintiff's prayer, the court is called upon to instruct the jury, that “it is competent for them to infer, from the facts aforesaid, that the defendant had notice that the said paper was transmitted by the Commonwealth Bank as agent, and not as the owner;” and so finding, their verdict should be for plaintiff.

The main, if not the entire ground upon which the plaintiff below rested, to establish this fact of notice, is the usage to deposit in one bank indorsed paper to be transmitted to a distant bank for collection, and for the bank with whom such deposit is made to indorse and transmit the same, as was done in this case.

The prayer to the court below, offered on the part of the Bank of the Metropolis, was in nearly the words of this court in the former case. (*Mr. Coxe* then read and compared the prayer with the opinion of the court in 1 How., 234.)

Mr. Bradley, for the defendant in error, laid down the following propositions:—

1st. There was evidence to go to the jury to sustain each

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one of the propositions stated in the prayer granted by the *Circuit Court, and the granting of which is alleged as error.

2d. The inference which the court instructed the jury it was competent for them to draw was fully justified by those propositions. And,

3d. If that inference was drawn by the jury, the instruction of the court was right.

In maintaining these propositions, it is proposed to show,—

1st. That the Commonwealth Bank was the agent of the defendant in error for a particular purpose, in the course of a well-known and long-established business, the usages of which required the employment of sub-agents, who are responsible directly to the principal, and the plaintiff in error was sub-agent.

2d. That no agreement or understanding between the agents could destroy, or in any manner impair, the rights of the principal, he being known, and not a party or privy to such agreement.

3d. That no lien could have existed in favor of the plaintiffs in error for any balance, general or otherwise, due to them from their correspondent, the Commonwealth Bank, which could attach to the negotiable paper, or the proceeds thereof, of the defendants in error, forwarded to them by that bank for collection, in the course of the regular business of collecting.

4th. There is abundant evidence to show, that the sub-agents, the plaintiffs in error, knew, or might and ought to have known, that they were not the property of the Commonwealth Bank, but had been forwarded for account of others. And,

There is no error in the instruction given by the Circuit Court.

On the first proposition, *Mr. Bradley* cited 9 East, 12; 7 Bing., 284; 6 Mass., 430; 19 Ves., 299; 1 Rose, 154, 243, 232; 1 Bos. & P., 648, 546.

The Commonwealth Bank was an agent in the course of a well-understood and long-established business, the course of which required the employment of sub-agents. Its whole authority was to appoint a sub-agent. *Triplett v. Bank of Washington*, 1 Pet., 28, 30, 35.

The known usages of trade and business often become the true exponents of the nature and extent of an implied authority; for in all such cases the presumption is, the agency is to be exercised according to the practices which are allowed and justified by such usages, &c. 2 Kent Com., lect. 41, pp. 614, 616 (4th ed.); *Wilshire v. Sims*, 1 Campb., 258; *Young v. Cole*, 4 Scott, 489.

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*A person who employs a broker must be supposed to give him authority to act as other brokers in like cases. *Dalton v. Tatham*, 10 Ad. & E., 27, 29, 30.

A person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may be ignorant of the rules.

Every authority as agent carries with it or includes all the powers which are necessary or proper or usual as a means to effectuate the purposes for which it was created. In every case it embraces the appropriate means to accomplish the end. *Elkins v. Macklish*, Amb., 184, 186; *Paley Ag. (Lloyd's)*, 198, note, 290, 291; 1 *Livermore*, 103, 104; *Story Ag.*, §§ 97, 85.

And in many cases the power to delegate his authority is implied from the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done. *Story Ag.*, § 14, cites *Coles v. Trecothick*, 9 Ves., 234, 51, 52; 1 *Bell Com.*, 387-391; *Shipley v. Kymer*, 1 Mau. & Sel., 484; *Cockran v. Irlam*, 2 Id., 301, 303, note; *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.), 386; *Johnson v. Cunningham*, 1 Ala., N. S., 249. And wherever any express or implied authority to appoint a sub-agent is given or allowed by the principal, a privity is created between them. *Livermore*, ch. 2, § 4, pp. 56-59; *Story*, 201; *Goswell v. Dunkley*, 1 Str., 681; and see *Brandy v. Coswell*, 2 Bos. & P., 438; *Cockran v. Irlam*, 2 Mau. & Sel., 301, 303, note; *Merrick v. Barnard*, 1 Wash. C. C., 479; *Foster v. Preston*, 8 Cow. (N. Y.), 198.

Second point. That no agreement or understanding between the agents could destroy, or in any manner impair, the rights of the principal, he being known and not a party or privy to such agreement. 10 Ad. & E., 27, 29, 30; 1 *Pet.*, 25; 15 *Wend.* (N. Y.), 486; 22 *Id.*, 216 *et seq.*; 12 *Conn.*, 303.

3d. That no lien could have existed in favor of the plaintiffs in error for any balance, general or otherwise, due to them from their correspondent, the Commonwealth Bank, which could attach to the negotiable paper, or the proceeds thereof, of the defendants in error, forwarded to them by that bank for collection, in the course of the regular business of collecting. *Story*, Agency, § 360 and cases there cited; *Id.*, §§ 362, 379, 381.

Upon the 4th point, *Mr. Bradley* entered into a minute examination of the letters and accounts.

The grounds of the former decision were two.

1st. That the Bank of the Metropolis received the paper without any notice that it was the property of a third person,

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and treated it as if the Commonwealth Bank was the true owner, *and was therefore factor, broker, or banker, of the Commonwealth Bank.

2d. That balances were from time to time suffered to remain in the hands of these banks respectively, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them.

But there is abundant evidence in the present record to show,—

1st. Notice.

2d. That they drew without regard to the balances, and also without regard to the negotiable paper.

1. As to evidence of notice.

1st. The forms of the indorsements showed that there was a bank before the Commonwealth Bank, and it “is not usual for any bank to purchase negotiable paper from another bank.”

2d. All this paper was transmitted in letters notifying the Bank of the Metropolis that it was “forwarded for collection,” while in regard to other paper they adopted a different form.

3d. The usage.

4th. That the parties did not hold each other liable on the indorsements.

5th. That they were indorsed and forwarded by the Commonwealth Bank to the Bank of the Metropolis, without consideration, and with notice *that they were for collection*.

2. They drew without regard to the balances, and therefore advances were not made on the faith of the notes. This is shown by the accounts current between the parties, by the correspondence between the cashiers, and by the deposition of Mr. Hood, all of which are in the record.

Mr. Coxe, in reply, said that this court had formerly decided, that unless the Bank of the Metropolis had notice of the ownership of the bills, it had a right to hold them for its lien. Was there such notice? The plaintiffs below had tried to make it out, but only made out such a usage as had appeared to this court on the former trial. All the five points discussed by the counsel on the opposite side were before the court in the former case.

(*Mr. Coxe* then made an examination of them in order to show this.)

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was before the court at January term, 1843, and is reported in 1 How., 234. The judgment of the Circuit

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Court was then reversed, and the case remanded, with directions to award a *venire facias de novo*.

*Upon the second trial some additional testimony appears to have been offered, and two instructions given by the court to the jury, one upon the prayer of the defendant, the other upon the prayer of the plaintiff, to the last of which the defendant, who is now the plaintiff in error, excepted; and the judgment of the Circuit Court being against him, he has again brought the case here by writ of error. [*226

The opinion expressed by this court in reversing the former judgment and remanding the case is summed up in the following paragraph, in 1 How., 240 :

“If, therefore,” say the court, “the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be and treated each other as the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account.”

The only question now open upon this second writ of error is, whether the Circuit Court, in their instructions to the jury, have conformed to this opinion. We have examined them with a good deal of care, and regret to find them so complicated and involved, that we have some difficulty in ascertaining the meaning of the Circuit Court. It would seem to be almost impossible for a jury acting under such instructions to comprehend distinctly the issues of fact upon which they were to find their verdict. Indeed, as we understand these two instructions, the last paragraph in the second seems to this court to be inconsistent with the direction contained in the first. And if the last instruction stood by itself, without any reference to the first, it might perhaps be construed to be substantially the same with the directions given by the Circuit Court at the former trial, which were reversed upon the former writ of error.

It is not usual in remanding a case to state in the opinion of this court the particular manner in which the instructions to the jury should have been framed, but to state in the opinion the principles of law which govern the case as it appears in the record, and leave it to the Circuit Court to apply them to the case, as it may appear in evidence upon the second trial, in such manner and form as it may think advisable. From

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the manner, however, in which the directions of the Circuit Court appear in the record before us, upon the trial under the *227] mandate, we may perhaps prevent future difficulty by stating the *form in which instructions to the jury might have been given so as to carry into effect the opinion of this court, and enable the jury to understand more clearly the points in issue before them. Of course we do not mean to prescribe this form to the Circuit Court when the case again comes before it, because the testimony then offered may differ materially from that now contained in the record. But if, instead of the complex instructions under which the case was decided at the last trial, the following directions had been given, it would have conformed to the opinion of this court when the case was formerly before it, and at the same time have enabled the jury to understand more distinctly the matters of fact in dispute between the parties, and submitted to them for decision:

1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.

2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of the dealings between the two banks.

3. But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank.

We re-state the former opinion of this court in this form,

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because we presume it must have been misunderstood by the Circuit Court. And as it was not followed in the proceedings under the mandate, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

* Order.

[*228

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

RICHARD BEIN AND MARY, HIS WIFE, APPELLANTS, v.
MARY HEATH.

The Civil Code of Louisiana (article 2412) enacts, that "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage.

Where a wife mortgaged her property to raise money, and the question did not turn upon her doing so as the surety of her husband, it was not necessary for the lender to prove that the proceeds of the loan inured to her separate use.

The fact of the application of the money may be proved to show the character of the transaction, with a view of establishing collusion or fraud.

The decisions of the state courts of Louisiana upon this subject examined.

Where a wife mortgaged her property, and then sought relief in chancery upon the ground that the contract was void in consequence of her disability to contract, and it was shown that the lender acted in good faith; proceeded cautiously under legal advice, under assurances that the loan was for the exclusive use of the wife, to whom the money was actually paid; the interest upon the loan paid for several years; the mortgaged property insured by her, and the policy assigned to the mortgagee;—a bill to relieve her from the contract cannot receive the sanction of a court of equity.¹

But it is no objection to such a bill, as a rule of pleading, that the husband is made a party to it with the wife. He acts only as her *prochein ami*.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of Chancery.

¹ DISAPPROVED. *Henry v. Gauthreaux*, 32 La. Ann., 1113. CITED. *Klein v. Glass*, 53 Tex., 44.

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The facts are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Crittenden* and *Mr. Johnson*, for the appellants, and *Mr. Bradley* and *Mr. Jones*, for the appellee. There were also printed briefs for the appellee filed by *Mr. Eustis* and by *Messrs. Elmore* and *King*.

Mr. Crittenden, for the appellants, stated the substance of the case as follows:

The bill in this case was filed by the appellants, Bein and *229] wife, to enjoin proceedings under a writ of seizure and sale *taken out by the appellee, Mary Heath, to sell certain property of the appellant, Mary Bein, under a mortgage from the latter, dated the 8th May, 1838, to secure two notes drawn by her in favor of her husband, and by him indorsed,—the one for \$10,711.71, the other for \$535.59.

The complainants allege that these notes were given for a loan obtained by Richard Bein, the husband, for his own use, and which was so applied; and that in such a case, by the laws of Louisiana, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, is not binding, but void.

The answer of the appellee denies the averment of the bill as to the purpose of the loan, or the use of the money, and evidence was taken on both sides.

And then he contended,—

1st. That the loan was for the exclusive use of the husband, and that it was so applied.

2d. That being for such use, and so applied, the notes and mortgage were void as against the wife, and her property; and that, consequently, the injunction prayed by the bill should have been made perpetual.

Upon the first point, *Mr. Crittenden* said, that Mrs. Bein was a widow when she married Bein, that she was worth \$85,000 and free from debt. Her revenue was ample, as she had only two or three children. Bein was a merchant and speculator, in fact insolvent at the time of the loan, although apparently engaged in business. Soon afterwards he became openly an insolvent, and divided little amongst his creditors. In May, 1838, when the loan was made, the witnesses say he could not raise money upon his own responsibility. For whom is it likely, then, that the loan was made? The husband was surrounded with unpaid bills and pecuniary embarrassments of every description. The question is for whom the money was borrowed, and that is the only question under

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the Louisiana law. We do not find in the record that the wife wanted money. On the contrary, the husband was pressing Heath for the money. A lawyer was consulted, who said the loan must be made to the wife, and an effort was made to give the affair that semblance. Hence the interlineation in the mortgage. Can these written papers prevent the wife from showing the truth of the transaction? Bein paid to one person \$4,000 in that same month of May, and also paid other people. But he had no means to pay them with except this loan. He owed Sherman & Co. a debt, which he paid. Not a dollar went to the benefit of the wife. But according to the forms of the transaction, she received the money. It was paid by a check *to her, which was placed in her own hands. What is the law of Louisiana in such a case? (*Crittenden* then cited the article 2412 of the Civil Code, and all the state authorities set forth in the opinion of the court, upon which he commented.)

Mr. Bradley, for the appellee, made the following points:—

1. The loan was made to the wife.
2. She could borrow money and mortgage her property; or,
3. If not loaned to her, it was a fraud practised by the complainants on the defendant.
4. In either case she can have no relief in equity, and there is no error in the decree rendered by the Circuit Court; and,
5. This is a bill by husband and wife, respecting her *separate* property, in which he is indirectly charged with seeking to injure her. Their interests are adverse. It is his suit. They are improperly joined. Advantage of this can be taken at the hearing, and the bill must be dismissed.

The marriage contract shows that the wife had power to contract. Having this power, she admits that she made this contract in the most formal manner known to the laws, holding out the idea that the loan was for her benefit. We do not say that she can be a surety for her husband. The court ought to protect her in her rights, but there are also other persons to be protected, who were dealing fairly in the transaction. Can she now say, that she led the other party into a snare, and that this other party must show that the money was actually expended for her sole benefit? The question is, Upon whom is the burden of proof? We say that the complainants must show that the money did not, in fact, go to her use. We have her declaration before the notary that it was so. In none of the cases which have been cited can such a formal admission be found. The books and payments of the

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husband cannot be admitted to contradict this notarial act of the wife. Civil Code, art. 2233-2235; 8 Mart. (La.), N. S., 693, 694; 10 Mart. (La.), 439.

The letters of Heath show that he thought he was making the loan to the wife. These letters were ruled out below, but exceptions were taken. Stark. Ev., 57, 62-64; Story Ag., §§ 131, 135.

The declaration of the husband was to the same effect, and he could act for his wife. Civil Code, art. 2330-2333. In this case he was her proper agent. Id., art. 2340, 2362, 2363; 2 Rob. (La.), 20; 11 La., 258; 7 Mart. (La.), N. S., 144.

There was collusion and fraud between the husband and wife to cheat Heath. Civil Code, art. 1841, defines fraud. 1 Story Eq., 384, 385.

*231] *If the other side are right in saying that the lender must look to the manner in which the money is spent, then all married women, under such circumstances, would be placed under the supervision of trustees who might be strangers. She was not a surety for her husband, because he owed us nothing. After borrowing the money, if she chose to lend it to him, she brought herself within the provision of the civil law. Ulpian, book 16, tit. 1.

Bein was insolvent in 1840, two years after the loan was made. But the interest was paid for four years afterwards.

In the admission of facts upon the record is this:—

“It is also admitted that the first four years’ interest on the loan was regularly paid, and that for that time the policy of insurance on the house mortgaged to secure the loan was regularly assigned, in conformity with the contract of loan.

(Signed,)

R. HEATH,

R. HUNT, *Compt's sol.*

(Signed,)

ELMORE & KING,

Att'ys for Respondents.”

Who paid the interest all this time? The policy, too, was made out in the name of the wife, and indorsed by her. She was returned, also, as a creditor in her husband's schedule. She must, therefore, have been acquainted with the whole affair.

But it has been said, that the decisions in Louisiana require that we should have seen that the money was expended for the wife's separate use. (*Mr. Bradley* here critically examined these authorities.)

In point of fact, although we are not bound to show it, the record does prove that the money was actually used for her

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benefit. On the 29th of May, seventeen days after the money was borrowed, Bein paid \$5,500 on account of an elder mortgage, which secured a debt of \$15,000 due to the wife.

On the 5th point of the brief, the misjoinder of parties, *Mr. Bradley* cited 1 Sim. & S., 185; 2 Id., 464; 2 Keen, 59, 70-72; 5 Sim., 551-553.

Messrs. Elmore & King filed the following analysis of the Louisiana authorities.

Darnford v. Gros & Wife, 7 Mart. (La.), 489.—Decided under the law of Toro.

Lombard v. Guillett and Wife, 11 Mart. (La.), 453.—In this case, there was no proof that the husband authorized the wife to sign the note with him, nor did she sign the act of mortgage, although it was given by the husband, upon her property.

**Banks v. Trudeau*, 2 Mart. (La.), N. S., 39.—In this case, the wife was admitted and proved to be surety for her husband. The case was decided upon the law of Toro. (Wife might bind herself with the husband, provided she renounced the law of Toro.)

Perry v. Gerbeau and Wife, 5 Mart. (La.), N. S., 19.—In this case, the wife was surety.

Sprigg v. Bossier, 5 Mart. (La.), N. S., 54.—The note sued on was given for property purchased by the husband, and she was surety merely.

McMickem v. Smith and Wife, 5 Mart. (La.), N. S., 431.—The note sued on was given in part for negroes sold to the husband, and in part for a balance then due by him on another obligation to plaintiff.

Hughes v. Harrison, 7 Mart. (La.), N. S., 251.—The note sued on was given "for their and plantation use." The wife was surety merely for her husband, for part of the debt. The case was remanded, to enable the plaintiff to prove how much was for the wife's use and benefit.

Brandegge v. Kerr and Wife, 7 Mart. (La.), N. S., 64.—This action, although decided in the year 1828, was brought on a note for \$1,800, dated August 31st, 1821, and due three years after date. This I know, from having examined the record in the Supreme Court. The case was consequently decided under the law of Toro, which had not been repealed before the execution of the note. The court say the husband and wife were bound jointly and severally. This made the case fall completely within the law of Toro. There was no evidence that the note was given for the wife's benefit. Upon this the court lays great emphasis, and upon it in fact, decides the case.

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The court decided, that the circumstance that she received the money was not sufficient evidence that it was for her separate use and benefit. As the law then stood, the wife was not bound at all on the contract or note; it was a nullity on the face of it. She was only bound for what was used for her separate benefit, upon a *quantum meruit*. Her receiving the money did not at all prove that the note was made for her separate use, or that the money was applied to her separate use.

By our law, as it now stands since the repeal of the law of Toro, there is no impropriety in a wife binding herself conjointly with her husband, provided it be not for a debt contracted by him. A husband may be surety for the wife for debts contracted for her separate benefit, and he may be bound jointly with her for such a debt. The prohibition of article 2412 does not extend, as it did under the law of Toro, to the form of the instrument, but only to a joint contract for the husband's debt.

*233] *To determine, then, whether a contract falls within the prohibition of that article 2412, two things have first to be ascertained.

First. Whether the wife has bound herself for her husband, or as his surety; and,

Second. Whether the debt was contracted by him before or during the marriage. Both of these conditions are absolutely necessary, to bring any case within the prohibition of that article.

It will be seen from the above, that the law under which the case of *Brandegge v. Kerr and Wife* was decided was very different from the law as it now stands. The facts differed still more widely from the case before the court. In the case of *Brandegge v. Kerr and Wife*, there was no evidence that the contract was the wife's; there was no notarial act showing this. As the law then stood, the check being given to her was not sufficient evidence of this. In our case, the evidence is conclusive that the original contract was made by the wife. The note and mortgage were not given for a debt of the husband, but of the wife.

Pilie v. Patin et al., 8 Mart. (La.), N. S., 693.—In this case, the wife was clearly shown to have been surety merely for her husband, for a preëxisting debt due to the plaintiff, and at his solicitation gave a mortgage, in which the facts were purposely misrepresented to evade the law. This was clearly proved.

The plaintiff was a party to the whole transaction. In the case before the court, Sherman Heath believed the loan was

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really made for the benefit of Mrs. Bein, and that the representations enumerated in the act were true.

Guasquet v. Dimitry, 9 La., 585.—This case was widely different, in all its features, from the case before the court. The court decided that a renunciation made by the wife was done for the benefit of the husband, and that the act was prohibited by art. 2412, Civil Code; that the wife was, in fact, surety for her husband.

Davidson v. Stuart et al., 10 La., 146.—In this case, the court decided, that, although the land for which the note was given was purchased in the name of the wife, yet still it was community property.

Being community property, the husband had as much right to sell or otherwise dispose of it as if it were in his own name; consequently, the price due for it was a debt of the husband's.

Firemen's Insurance Company v. Cross and Wife, 4 Rob. (La.), 509.—In this case, the court say that the money was borrowed for the husband's benefit, that the wife never received a dollar of it, and that the plaintiffs were aware of these facts.

*It will at once be perceived that the case differed [*234 widely from our case, where there is not a particle of evidence showing that Sherman Heath knew this money was borrowed for Bein's benefit. On the contrary, the evidence shows that he believed it was for Mrs. Bein's benefit.

Maddox v. Maddox, Ex., 12 La., 14; *Martin v. Esther Drake*, 1 Rob. (La.), 219; *Petit Pain v. Therese Palmer, Id.*, 220.—In these cases no principle was decided different from that decided in the others above cited; and they are relied on by the defendant to show that it must be proved by the evidence whether the loan was made to the husband or the wife.

It is proper to give the views of *Mr. Eustis*, also, upon this subject, who filed a printed brief, as has been already stated. The following is an extract from that brief:

Some confusion exists in the decisions of the Supreme Court of Louisiana which have been made under the dominion of the Spanish laws. These laws have since been abrogated. They, however, require some explanation, so far as this subject is concerned.

The 61st law of Toro provided:—"From henceforth it shall not be lawful for the wife to bind herself as security for her husband, although it be alleged that the debt was converted to her benefit; and we do also order, that when the husband and wife shall obligate themselves jointly in one contract, or severally, the wife shall not be bound in any thing, unless it shall be proved that the debt was converted to her

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benefit, and then she shall be bound in proportion to what shall have been so applied." 7 Mart. (La.), 489; *Novissima Recopilacion*, 10, 11, 3.

By the laws of Spain, the wife could bind herself jointly and severally with her husband, provided she renounced this law, in which case (of renunciation), to render her liable, it was not necessary to prove that the debt inured to her benefit. *Banks v. Trudeau*, 2 Mart. (La.), N. S., 40.

Wives were not bound by agreements entered into jointly, or jointly and severally, with their husbands, unless it be shown that they have renounced those laws made for their protection, or that the contract has been profitable to them. *Perry v. Grebeau et ux.*, 5 Mart. (La.), N. S., 19.

In the case of *Darnford v. Gros and Wife*, cited 7 Mart. (La.), 489, the court held that this law of Toro was not repealed by the Civil Code of 1809, which contained no repealing clause, and no provision incompatible with this law.

But the Civil Code of 1825, which is now in force, contained a general repealing clause (art. 3521), which *235] abrogated the *Spanish laws, and among the rest this law of Toro. A subsequent statute destroyed every vestige of the Spanish laws, that is, the laws as contradistinguished from the jurisprudence. The Civil Code, which repealed this provision of the law of Toro, reenacted it, but without the exception concerning the burden of proof; thus, in article 2412, it is provided, that the wife, whether separated in property from her husband or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. That is, in other words, the wife cannot be the surety of the husband.

The effect of the repeal of the law of Toro would undoubtedly leave the wife entirely at liberty to charge her separate estate, except as prohibited in the article 2412, and in all cases the proof would rest upon the general principles of the law of evidence.

The Supreme Court of Louisiana have never considered or adjudicated on this subject of the repeal of the law of Toro; it was never presented by counsel in the different cases cited by the defendant's counsel.

The cases antecedent to and including that of *Brandegge v. Kerr and Wife* (7 Mart. (La.), N. S., 64) were all decided under the law of Toro. This case, though decided in 1828, was on a note dated the 31st of August, 1821, and consequently regulated as to its obligations by the law under which it was made.

If we look back to the reason and origin of these laws

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which prohibit women from contracting, it will be found that they were made for the purpose of preventing the weakness and good faith of women from being surprised, but were never held to reach a case where any indirection or equivocation of conduct should be apparent; still less, one in which the exemption of the woman from responsibility would produce the grossest injustice. Such was the sense of the Roman laws on this subject, and such has been their interpretation, in modern times, in those countries in which the Roman jurisprudence is adopted.

Merlin says expressly, that if the wife make use of any deceit or fraud, the privilege of the *senatus velleianum* is denied to her, which is intended to protect good faith, and can never be made to cover any obliquity of conduct. Merlin, Rep. de Jurisprudence, vol. 30, p. 349; verbo, *senatus consultum Vellein*.

The decisions relied upon by the complainants are believed to turn upon the question of fact, whether the debt was or not that of the husband. If it was the husband's debt, the wife *could not bind herself to pay it. The [*236 article of the Code is positive. But if the debt was hers, there is a valid obligation on her part to pay it out of her separate estate.

In Louisiana, the law considers marriage, so far as relates to property, as a civil contract only. Civil Code, tit. 4, art. 87.

Parties may regulate their rights as to property, during marriage, as they please, provided certain rules of public policy are not violated thereby. Civil Code, art. 2305.

The wife is under no disability of contracting with the consent of her husband. Civil Code, art. 124.

The matrimonial conventions of the parties must be made before marriage; but the husband, during marriage, may convey to the wife property to replace that which may have been alienated by him, as was done in this case. Record, pp. 43, 44.

By the Roman law, no effect was produced by marriage on the property of the parties which they possessed at the time of marriage, unless the contrary was provided by an express stipulation. Institutes of the Roman Law, by Mackeldey, § 516.

There was no fictitious confusion of persons produced by marriage; it was an institution which raised the wife to the rank of the husband, and rendered her children legitimate. *Ib.*, 515.

The dotal property was transferred to the husband, but that which was not so transferred remained under her absolute and unlimited control. *Ib.*, 517, 529.

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Here, then, we have a party, laboring under no disability whatever, who has made a contract. Is this contract within the prohibition of article 2412? Did she bind herself for her husband's debt, or for her own? Like every other question of fact, this must be solved by the evidence. So far as the complainant is concerned, it is obvious that she and her agent loaned the money, in good faith, to Mrs. Bien, and not to her husband. Her husband was insolvent at the time; who, therefore, would lend him money? We find part of the money loaned applied to the extinguishment of an incumbrance of an estate, which, for all the purposes of this inquiry, must be considered as hers.

On the 12th of June, 1838, in the act of transfer of the Nayades Street property from her husband, the Hobson mortgage for \$15,000 is mentioned as existing on the property, which the husband binds himself to have released. The application of part of the money borrowed from the complainant to the extinguishment of this mortgage is proved by the concurrent testimony of several witnesses. *Sewell and Wife v. Cox*, MS. case.

*237] In the embarrassed and complicated state of the affairs of the husband, it is in the power of no one but himself to trace with certainty the result of any single payment, so as to ascertain who was, or who was not, ultimately benefited by it. But that this was the debt of his wife, and not his, and that by no use of the money on his part did either the complainant or his wife become his creditor, we have his solemn oath, made under the penalties of the bankrupt act.

We have the declarations and the acts of the parties themselves, coincident with their respective obligations, which, in a matter of equity, is surely conclusive in a case where no duress or deception is even alleged.

Mr. Johnson, for the appellants, in reply and conclusion.

The case divides itself into the following points:—

1st. For whom was the loan made, and to whose benefit did it inure? Not *to* whom it was made, but *for* whom. This is a question of fact.

2d. Whether, if made for the husband, and inuring to his benefit, the contract is void. This is a question of law.

This latter point gives rise to the two following subdivisions:—

1. On which party the *onus probandi* rests to show the nature of the loan. And,

2. If that *onus* is on the wife, whether she has not sufficiently shown that it did not inure to her benefit.

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1st. For whom was the loan made? Many facts in the case are not disputed. One of them is, that from the middle of 1837, to May, 1838, the husband was insolvent and unable to borrow. The answer says that Heath would not have loaned the money to him. When Bein became openly insolvent, he had no assets. It is a fact, also, which cannot be disputed, that the record does not show a single word to have passed between the wife and the lender, or between the wife and Smith the attorney. She never spoke at all except through the mortgage. Smith says he warned Heath, but it does not appear that he cautioned Mrs. Bein, or informed her of her rights. Mr. Bein was brought to the office, and he said every thing that was said. What became of the money? If it is found in the hands of the husband, it is a proof that it was obtained for his benefit. It is surprising that the opposite counsel have referred to Bein's schedule when he became insolvent, because it shows that he received every cent of the money. The amount of the loan was \$10,711.71. In the schedule is the following:—

Creditors.	Residence.—Nature of debt.	Amounts.		Remarks.
Mrs. Mary Bein	New Orleans,—for amount rec'd from sale of house, Canal Street.	\$18,785.00		
	Amount received from sale lot, Union Street,	6,950.00		
	Amount of money received,	10,711.71		
			\$36,446.71	
	Cr. By amount refunded by sale of house on Nayades Street	26,000.00		
	Less her assumption of bond to Bank of Louisiana,	10,000.00		
		16,000.00		
	Am't of R. A. Martin's draft,	654.13		
	“ of O. Osborne's note,	233.22		
	“ M. Connoher's account	118.00		
“ James Varin's do.	35.00			
		17,040.35		
	Balance due Mrs. Bein,	19,406.36		

The amount of money received by him from Mrs. Bein, being exactly that of the loan, shows that it was the same money. Moreover, the counsel upon the opposite side put the following cross-interrogatory to the brother of Mr. Bein :

“Cross-interrogatory 8th. Have you never known Richard Bein to represent that this money was borrowed from some one else than the person you have named? If yea, from whom did he represent that it was borrowed?”

To which the witness answered:—

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"8th. To the eighth he answers, that he never knew said Richard to represent said money, or any money, as borrowed at that time, May, 1838, from any one else than from Sherman Heath."

The counsel on the other side have made this answer evidence.

(*Mr. Johnson* then entered into arithmetical calculations, from parts of the record, to show that this money was totally lost to Mrs. Bein.)

2d. Is not such a contract void by the laws of Louisiana in force after the repeal of the law of Toro? The policy of these laws is evident. They are not to protect the wife against strangers, with whom she might contract, but against the arts of the husband, against his fraud or force. He might induce her to contract in her own name, and this is what the law intended to prevent. A similar principle prevails in other states, where a private examination of the wife is required. But the laws of Louisiana intended to strike deeper and to prevent the evil by avoiding the contract altogether. The substance of the law of Toro is preserved. It is made the *239] duty of the lender to see where the money goes. 7 Mart. (La.), 489. Both *laws make the illegality of the contract depend upon the application of the money. If this construction is not given to the present law of Louisiana, the protection thrown around married women is destroyed altogether, because the husband may induce them to assume any form of contract.

(*Mr. Johnson* here entered into a critical examination of the Louisiana cases, to show that they made the contract stand or fall by the fact, to whose benefit the loan inured.)

Upon the point whether there was a misjoinder in the bill, *Mr. Johnson* read and remarked upon the cases in 1 Sim. & S., 185; 2 Id., 464; 2 Keen, 59, 70; where the whole practice of the court is stated.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court for the Eastern District of Louisiana.

The bill was filed by the appellants, Bein and wife, to enjoin proceedings under a writ of seizure and sale taken out by the appellee, Mary Heath, to sell certain property of the appellant, Mary Bein, under a mortgage from the latter, dated 8th of May, 1838, to secure two notes drawn by her in favor of her husband, and by him indorsed,—the one for \$10,711.71, the other for \$535.50.

These notes, the complainants allege, were given for a loan

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obtained by Richard Bein, the husband, for his own use, and which was so applied; and that in such a case, by the laws of Louisiana, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, is not binding, but void.

The answer of the appellee denies the averment of the bill, as to the purpose of the loan or the use of the money.

It is objected, that, the suit being brought in the name of the husband and wife, it must be considered the suit of the husband, and that a decree would not bind the wife.

On looking into the bill, it appears that the name of the husband is used only as the *prochein ami* of his wife. He asks no relief. The wife prays an injunction against the sale of the mortgaged property, and a rescission of the mortgage and notes, and a release from all liability thereon. The bill was sworn to by the wife, and a rule was entered on the attorneys of the defendant, to show cause why the injunction should not be granted in favor of Mary Bein, and at a subsequent day the writ was granted. An injunction bond was given by the wife, with security, the name of the husband being used only as authorizing the wife to execute the bond. And so throughout the proceedings the wife is treated as the party in interest, the name of the husband being formally used.

*Where the wife complains of the husband, and asks relief against him, she must use the name of some [*240 other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice, within the discretion of the court.¹ It is sanctioned in the 63d section of Story's Equity Pleadings, and by Fonblanque. The modern practice in England has adopted a different course, by writing the name of the wife with a person other than her husband, in certain cases.² From the frame of the bill, no doubt is entertained that the decree will bind the wife.

Prior to the marriage of Bein and wife, they entered into a marriage contract, in which it was stipulated that neither should be liable for the debts of the other; and each reserved the right of selling and disposing of their property, after marriage, as they might deem proper, with the consent of the other. The wife brought into the marriage, and settled upon herself, as stated, property, real and personal, estimated to be

¹ FOLLOWED. *Douglas v. Butler*, 6 Fed. Rep., 228. ² CITED. *Barber v. Barber*, 21 How., 589.

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worth eighty-eight thousand six hundred and thirty-five dollars. This contract was entered into in accordance with the Louisiana law.

The loan was negotiated on the 8th of May, 1838, at which time it is proved that Richard Bein was known to be much embarrassed, and, as it appears in proof subsequently, was actually insolvent. In the act of mortgage Mrs. Bein declared that she was justly indebted unto Sherman Heath in the full sum of ten thousand seven hundred and eleven dollars and seventy-one cents, being a loan of money made to her, and for her sole benefit, &c. This act had all the sanctions required by law. On the 10th of the same month, a check, payable to Mrs. Mary Bein, or order, for the above sum, was drawn by S. Heath & Co. on "The Citizens' Bank of Louisiana," and handed to Mrs. Bein.

It appears that Heath had knowledge of the embarrassments of Bein, and consulted with J. W. Smith, a lawyer, who is a witness, how the loan could be legally made. He was informed that it must be made for the sole benefit and use of the wife, and that the husband should not be interested in or benefited by it. Heath stated that the money belonged to his mother, and he did not wish to receive more than the legal interest, for fear of difficulty; and that he had rather loan the money to Mrs. Bein, believing it to be safe, than to let other persons have it at higher rates. Afterwards, Heath and Bein being present, the witness stated to them that the loan would not be legal unless it was for Mrs. Bein's sole use *241] and benefit; "that no loan could be made legally to him under cover of a *loan to his wife, and that it must be a *bonâ fide* contract with Mrs. Bein." Bein then, in the most positive manner, informed Heath that the proposed loan was a real *bonâ fide* loan to Mrs. Bein, that there was no cover or concealment about it. Witness examined the act of mortgage, and filled up the check and handed it to the notary.

For nearly five years Mrs. Bein paid the interest on the loan, kept the property insured, and assigned the policy annually.

On the 2d of April, 1840, Richard Bein filed his petition for the benefit of the insolvent act, attached to which was a schedule of his debts; and among others, a debt due to his wife for the same amount above loaned to her. It appears that Bein paid several debts of large amounts shortly after the loan was negotiated, but, independently of his own statements, there is no positive evidence that these payments were made with the money loaned.

The article 2412 of the Civil Code of Louisiana declares,

—"The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

Under this law, a mortgage given by the wife to secure a loan made to the husband, or to the wife covertly for his use, is void. As the loan in question was made to the wife, which appears from the mortgage and the check for the money, a question in the case is, whether these forms were adopted to charge the wife, in fraud of the law, for the benefit of the husband.

No fraud or mistake is alleged in the bill. The complainant states that the loan was made by her husband for his benefit, that she became his surety in violation of the law of Louisiana, and was induced, contrary to her wish, to mortgage her property for the payment of the money. On these grounds, the court are asked to declare the mortgage void.

If this bill be sustainable, it must be on the peculiar provisions of the Louisiana law. In ordinary cases it would be demurrable. Where a feme covert, by the forms of law, has conveyed her property, she can avoid the effect of such conveyance only by showing mistake or fraud. And this must be alleged in the bill. On ordinary principles, an individual is estopped from denying a fact which he has admitted in a sealed instrument.

In making the loan, Heath acted with great caution. He was agent for his mother. He proceeded under legal advice, and consummated the agreement in the presence of his counsel. Bein was known to be irresponsible; consequently Heath *did not rely upon him for payment. The acts [*242 Heath in negotiating the contract, and the account he gave of it, all show that he acted in good faith, and in full confidence that the loan was made to Mrs. Bein. The mortgage was executed by her, under the most solemn declaration "that the money was borrowed for her benefit,"—her attention being specially directed to the clause of the mortgage which so declares, as appears from a marginal note,—sanctioned by the notary, and signed also by other persons. And the check for the money was paid to the mortgagor.

From these facts, it is clear that Heath is not chargeable with collusion. And there is nothing on the face of the contract to excite suspicion. On such a transaction, the mortgagee may well stand and claim the benefit of the security until it shall be impeached by the mortgagor. This is attempted to be done, not by proof of fraud or mistake, but on the ground that the loan did inure to the benefit of the

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husband, and not to the benefit of the wife. This is a matter subsequent to the contract, and involves the inquiry, whether the person making a loan, with the utmost fairness and caution, to the wife, must, to charge her, see that the money is applied to her use.

The article, which declares that the wife cannot become the surety of her husband, does not superadd the above important condition as to the application of the money. It is not in the law, unless it shall have been put there by judicial legislation. The fact, that the money borrowed was paid to the husband or was used for his benefit, as a matter of evidence, may be proved to show the character of the transaction. And, connected with other facts, it may conduce to establish collusion or fraud. But to treat this supposed requisite as a matter of law, under the above article, would violate every known rule of construction. With this general remark, we will examine the Louisiana decisions on this point.

The case of *Brandegge v. Kerr and Wife*, 7 Mart. (La.) N. S., 64, in facts and principle is said to be similar to the one under consideration. That was an "action on the note of the wife indorsed by the husband, alleged to have been received from the wife on a loan made to her by a check delivered to her." And the court say, "that the circumstance of the wife having a separate advantage in the contract, being of the essence of her obligation, must be proven by some other evidence than proof of her having touched the money." And in conclusion they say,—“Being of opinion that there is no fact in evidence from which it is possible to infer that the plaintiff’s money was employed for the separate use of the wife,” *243] &c., “we conclude that the wife is not bound.” The court also say,—“We cannot distinguish *this paper from a note joint and several of husband and wife, for they are bound jointly and severally, and the plaintiff has prayed for a judgment joint and several.”

It must be admitted, that the court, in the above case, consider proof of the application of the money to the use of the wife as essential to bind her. And unless that case, in its facts or the law under which it was decided, shall be shown to differ from the facts and law of the case under consideration, it will constitute a rule of decision in this case.

If this action were on the notes given by Mrs. Bein and indorsed by her husband, in that respect, and also in the payment of the money to the wife, the cases would be similar. But in the case before us, the action is on the mortgage, in which there is no liability of the husband, and no decree is asked against him. It is true, notes were given similar to that

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given in the case cited, but the notes of Mrs. Bein, though indorsed by her husband, must be considered as connected with the mortgage, which explains the nature of the transaction. And in addition to this, there is evidence that the contract was made with Mrs. Bein, under the strongest assurance that the loan was made for her sole benefit, and under a full conviction by Heath that it was so made. In these important particulars, there is a difference between the cases. The case cited seems to have rested on the face of the note and the check.

But still the ground, as to the application of the money, remains unanswered.

In the above decision, the case of *Darnford v. Gros and Wife*, 7 Mart. (La.), 465, is cited, and it is the only authority referred to in the opinion of the court. The decision in that case was founded on the 61st law of Toro. It is cited by the court as follows:—"From henceforward, it shall not be lawful for the wife to bind herself as security for her husband, although it should be alleged that the debt was converted to her benefit; and we do also order, that when the husband and wife shall obligate themselves jointly in one contract, or severally, the wife shall not be bound in any thing, unless it shall be proved that the debt was converted to her benefit, and she shall then be bound in proportion to what shall have been so applied." "But if the debt so applied to her use served only to procure that which her husband was obliged to supply her with, such as food, clothing, and other necessaries, then we say that she shall not be bound in any thing."

The above action was founded on a promissory note subscribed by the wife conjointly with her husband. And the court say, "that the restriction imposed by the Spanish laws on the obligations contracted by the wife jointly with her husband *has not ceased to be in force, and that, [*244 according to it, when the creditor wishes to compel her to the performance of such an obligation, he must prove that the debt was converted to her benefit."

The law of Toro was repealed, with all other Roman, Spanish, and French laws in Louisiana, in every case provided for in the Civil Code by article 3521. The Civil Code was adopted in 1825. But as the case first cited, of *Brandege v. Kerr and Wife*, was decided in 1828, after the repeal of the law of Toro, it is contended that the decision could not have been governed by that law. But it seems, from the statement of one of the counsel, that the contract was made under that law. The reference to the case of *Darnford v. Gros and Wife* shows, as above stated, that the decision against Kerr and

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wife was made under the law of Toro. This appears clearly from the language of the court.

Great reliance is placed on the case of *The Fireman's Co. v. Julia Louisa Cross*, 4 Rob. (La.), 509. That action was instituted on a promissory note for \$7,000, drawn by the defendant, and secured by mortgage on her paraphernal property. It was proved "that no portion of the money loaned was ever paid to the defendant, but that it was paid by the plaintiffs to different persons on orders given by the husband."

The facts in that case show that the wife was the surety of the husband. And the court very properly held, that such proof was admissible, although in the mortgage the wife stated the loan was made to her. Article 2256 declares, "that parol evidence shall not be admitted against or beyond what is contained in the acts," &c. But this was held not to apply to contracts made *in fraudem legis*.

In their opinion the court say,—“We are satisfied that the money borrowed was intended for, and was applied to the use of, the defendant's husband.” “This case,” they observe, “is much stronger than that of *Brandegee v. Kerr and Wife*, in which it appeared that the wife had actually received the money, but there was no proof of its having turned to her separate advantage.”

The citation of the case against Kerr and wife is a seeming sanction of the ground on which that case was decided. But the case before the court did not turn upon the application of the loan, as it was clear that the husband received the money, and applied it, by orders on the plaintiffs, to the payment of his own debts. This shows the intent with which the loan was made, and also that the facts were known to the plaintiffs. The reference seems to have been made to the case of Kerr and wife generally, without adverting to the law under which it was decided.

*245] *Of the same character was the case of *Pascal v. Sarvinet et al.*, decided in 1846 and reported in manuscript.

The husband and wife, by a decree, were separated in property, after which she delegated to him extensive and general powers for the management and administration of her affairs. Two years after this, the husband, under this power, executed the notes and mortgage in question, “stating in the act that the sum was due by his wife, in consequence of a loan made to her by the defendant, and which he, as her agent, acknowledged to have received.” And the court say,—“There is no proof that any part of this loan passed into the hands of the plaintiff, or that it was applied or turned to her benefit. She

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was not personally present at the execution of the act, and is not shown to have been aware that the loan had been made or the mortgage granted."

From these facts, there would seem to have been no mode by which the wife could be bound, except by showing that the money was applied to her use. This, on being shown, would, it is supposed, have confirmed the agency. It would have established the *bonâ fide* character of the act done by the husband. As a matter of evidence, then, to explain the nature of the transaction, proof that the loan accrued to the benefit of the wife was necessary to bind her.

It must be admitted, that the general language of the court covers the ground assumed by the counsel for the appellant. They say,—“It has been settled, by repeated decisions of the late Supreme Court, that it is incumbent on the party claiming to enforce the contract of a married woman to show that the contract inured to her separate advantage.” And they cite the case of *Brandegge v. Kerr and Wife*, and repeat, “that the circumstance of the wife having a separate advantage in the contract, being of the essence of her obligation, must be proved.”

In answer to these remarks, it may be said, that the case turned upon the suretyship of the wife, and not upon the application of the money. The act was done by the husband without the knowledge of the wife, which shows that it was done for his benefit.

It was held, 2 Mart. (La.), N. S., 39, that the wife may bind herself jointly and severally with her husband, provided she renounces the law of Toro in due form. And that, when this is done, the creditor need not prove that the engagement turned to her advantage. But she cannot bind herself as surety for her husband, not even by binding herself *in solido* with him. That decision was made in 1823.

In *Gasquet et al. v. Dimitry*, 9 La., 585, it was held, “where the wife signs an act of mortgage with her husband, *given to secure a debt for his benefit, in [*246 which she renounces formally all her rights, privileges, and mortgages on the property, ceding and transferring them to her husband’s creditor, was a contract entered into by the wife conjointly with her husband, binding herself for his debt, which, being prohibited by article 2412, was void.”

The court in their opinion say,—“The counsel for the appellant, in support of the position, that the agreement on the part of the wife to renounce her claims on the mortgaged property is null and void, relies upon article 2412.” After citing the article, they observe,—“The question thus pre

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sented is to be decided by us without reference to the laws of Toro, which have no longer here the force of laws, and independently of former decisions of this court while guided by the Spanish jurisprudence; but we are called on to say what, in our opinion, is the law of the land on this subject, as established by the code standing by itself."

On a rehearing of the above case, the court held that the wife was the surety of the husband, within "the sense of article 2412, and that the act was consequently void." And it appears that the legislature, being dissatisfied with the decision, passed an act declaring "that married women aged twenty-one years shall have the right to renounce, in favor of third persons, dotal, paraphernal, and other rights," in a certain form, &c.

In the case of *E. Montfort v. Her Husband*, 4 Rob. (La.), 453, it was held, "that the purchaser of dotal property, legally alienated, has nothing to do with the investment of the proceeds, and that the husband alone has the administration of the dowry. If he misapplies it, there is a lien of the wife on his property."

The law of Toro declared,—“The wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit.” In reference to this provision, the court said, in the case of *Darnford v. Gros and Wife*, above cited,—“Whether that restriction was attended with inconvenience is not for us to consider. Our duty is to declare the law, not to modify it.” But that law being repealed, and another substituted in its place, declaring only “that the wife should not be bound as the surety of the husband,” it is not to be supposed that a citation of decisions made under the law of Toro by the court, in cases where the wife was clearly the surety of the husband, was designed essentially to modify the substituted act. That, in many cases, as a matter of evidence, to charge the wife, it may be necessary to prove that the loan *247] was applied to her use, may be admitted. But, under the above article, *we think that such evidence cannot be required as a matter of law. The cases cited did not turn upon that ground.

But there is another view arising from the facts of this case, which will now be considered.

This is a suit in chancery, and it is governed by the general principles of such a proceeding. No new principle is introduced to affect the relation of the parties, or to modify rights growing out of their contract.

It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court

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can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity.¹ And we suppose that this principle applies to the case under consideration. A *feme covert*, acting on her own responsibility, under the liberal provisions of the Louisiana law, may act fraudulently, deceitfully, or inequitably, so as to deprive her of any claim for relief. This results from the capacity to make contracts with which the laws invest her.

Heath, the agent, as has already been said, acted in good faith. He proceeded deliberately, under legal advice, and there is no ground to charge him with unfairness or collusion against Mrs. Bein. Assurances were made to him, in the presence of his counsel, by Bein, acting in behalf of his wife, that the loan was for her; that it was *bonâ fide*, and without any concealment. Resting upon these and other assurances, the contract of loan was made, the mortgage was executed by Mrs. Bein, and the money paid by Heath to her, under the direction and sanction of his counsel. Now if these representations were false, and Heath was thereby induced to part with the money, can the complainant have a standing in equity?

Such a proceeding would be fatal, it is supposed, under the law of Toro. For if it were admitted, that, to make the loan binding on the wife, it must be proved to have inured to her use, yet if, through the fraudulent intervention of the husband, she negotiated the loan, giving to it her special sanction, equity would not relieve her. A doctrine contrary to this would enable the wife to practice the grossest frauds with impunity.

For nearly five years after the loan, the interest was punctually paid by Mrs. Bein, the house and lot were insured, and the policy annually assigned for the benefit of the mortgagee. These facts, connected with the representations which induced Heath to loan the money, show, if the loan was in fact for the husband, a deliberate fraud on her part. Under such circumstances, we think the complainant cannot invoke the aid of a court of chancery. She has acted against conscience, [*248 in procuring *the funds of the mortgagee. The law protects her, but it gives her no license to commit a fraud against the rights of an innocent party.

In the repeal of the law of Toro, and in substituting in its place article 2412, the legislature gave the most unequivocal

¹ APPLIED. *Kitchen v. Rayburn*, 19 Wall., 263.

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evidence against the policy of that part of the repealed law which required proof to charge the wife that the money borrowed was applied to her use.

But in affirming the decree of the Circuit Court, we place our opinion upon the unconscientious acts of the wife. The decree of the Circuit Court is affirmed.

Mr. Chief Justice TANEY, Mr. Justice NELSON, and Mr. Justice GRIER dissented from the opinion of the court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause, be and the same is hereby affirmed, with costs.

JOHN D. BOWLING, PLAINTIFF IN ERROR, v. JILSON P. HARRISON.

Where the holder of a protested note and the party entitled to notice reside in the same city or town, notice should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business.¹

The term "holder" includes the bank at which the note is payable, and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest.

A memorandum upon the note, that the "third indorser, J. P. Harrison, lives at Vicksburg," was not sufficient to go to the jury as evidence of an agreement upon his part to receive notice through the post-office.

A usage, to be binding, should be definite, uniform and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract.²

¹ APPLIED. *Carolina Nat. Bank v. Wallace*, 13 So. Car., 352. S. P. *John v. City Bank*, 62 Ala. 529. But a notice by mail, which was in fact received in due time, is sufficient. *Hyslop v. Jones*, 3 McLean, 96; *Hill v. Norvell*, Id., 583. S. P. *Dicken v. Hall*, 87 Pa. St., 379.

In New York, it is held that where the indorser resides in a place other than that where the demand is to be made, notice of dishonor may be served by mail, notwithstanding he and the holder reside in the same place.

Wynen v. Schappert, 6 Daly (N. Y.), 553; s. c. 55 How. Pr., 156. And in South Carolina the rule is, that notice of non-payment may be sent by mail to an indorser residing in the same city or town with the holder, if the note is payable at a bank whose custom it is to give notice in that manner. *Carolina Bank v. Wallace*, 13 So. Car., 347; s. c. 36 Am. Rep., 694.
² S. P. *Trott v. Wood*, 1 Gall., 443; *Oelrichs v. Ford*, 23 How., 49; *Pierpont v. Fowle*, 2 Woodb. & M., 24.

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THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

It was a suit by the indorsee of a promissory note against the indorser. Bowling, the indorsee, lived in Maryland, and Harrison, the indorser, in Mississippi.

The note was as follows :

\$5,800.

Vicksburg, November 26, 1836.

Two years after date, I promise to pay to the order of W. M. Pinckard five thousand eight hundred dollars, for value received, negotiable and payable at the office Planters' Bank, Vicksburg.

(Signed,)

A. G. CREATH.

*Indorsed :—"Pay Pinckard and Payne, or order. [*249 W. M. Pinckard." "Pay J. P. Harrison, or order. Pinckard and Payne." "Pay John D. Bowling, or order. J. P. Harrison."

At the foot of said note, and on the face thereof, was the following memorandum :—"Third indorser, J. P. Harrison, lives at Vicksburg."

At May term, 1840, suit was commenced by Bowling against Harrison, and the cause came on for trial at May term, 1842. The jury, under the instructions of the court, found a verdict for the defendant, when the following bill of exceptions was taken by the counsel for the plaintiff :

Bill of Exceptions.

The plaintiff proved, by Alexander H. Arthur, a witness, who was sworn, that said memorandum was in the handwriting of the defendant, J. P. Harrison, and thereupon said memorandum was read to the jury. The plaintiff then proved, by said Arthur, that said note was deposited in the office of the Planters' Bank at Vicksburg, Mississippi, on the 29th day of November, 1838, for collection, and that on that day, the 29th day of November, 1838, he demanded payment thereof of the teller of said bank, who refused to pay the same ; that on the same day he deposited in the post-office at Vicksburg a written notice of the non-payment of said note, directed to said defendant, Jilson P. Harrison ; informing him of the non-payment of said note. The said witness further stated, that he acted as the agent of the Planters' Bank in making demand of payment, and giving notice of non-payment of said note. Said witness further stated, that Jilson P. Harrison, the defendant, lived in the town of Vicksburg, in which is and was the office of the Planters' Bank, when the note sued on

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was payable at the date of the maturity of said note. That for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note appointing some place at which notice would be received; and if there was a memorandum on the note designating a place where notice was to be served, then the notice was left at such place. That this usage applied to notes discounted or deposited in bank for collection. That the language of these agreements was generally as follows:—"Indorser will receive notice at Vicksburg post-office," &c., though sometimes they were in the language of the one attached to the note sued on; that seeing the defendant's name written at the foot of this note sued on, he supposed it to be an undertaking on his part *250] to receive notice through the Vicksburg *post-office according to the usage of the bank, and accordingly gave him notice of the non-payment of the note, by depositing the same in the Vicksburg post-office, addressed to him at Vicksburg, and that he gave no other notice of the non-payment of the note to defendant. This being all the evidence in the cause, the court instructed the jury, that to charge an indorser, if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by the custom and usage of the bank at which the note is made payable, notice of non-payment was left at the post-office. That the memorandum attached to the note sued on was not a sufficient agreement to receive notice at the post-office, and dispense with personal service on the indorser. The court further instructed the jury, that the custom and usage of the bank, as proved in this case by the witness, Arthur, was not sufficient to dispense with personal notice. To which opinion of the court, the plaintiff, by his attorney, excepted before the jury retired from the box, and presented this his bill of exceptions, and prays that the same be signed, sealed, enrolled, and made a part of the record in this cause, which is done accordingly.

J. MCKINLEY. [SEAL.]

Upon this exception the case came up to this court.

It was argued by *Mr. Jones*, for the plaintiff in error, and by *Mr. Crittenden* and *Mr. Fendall*, for the defendant.

Mr. Jones, for the plaintiff in error.

The single objection, and the only question raised in the

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court below, turned on the point of diligence in the matter of serving the notice on defendant.

Upon this evidence, the court below delivered the following instructions to the jury:—

1. "That to charge an indorser, if he lived in the town where the note was payable, the notice must be personal, unless he had agreed to receive it elsewhere; or unless, by the custom and usage of the bank where the note was payable, notice was left at the post-office."

3. "That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post-office, and to dispense with personal service on the indorser; and that the custom and usage of the bank, as proved in this case, was not sufficient to dispense with personal notice."

Against these instructions the plaintiff contends,—

1. That the rule, allowing service of the notice through the *post-office, is quite erroneously enunciated [*251 in the first of said instructions; which vitiates that mode of service, because the indorser lived in the same town where the note was payable. He insists, that, as the indorser and indorsee had their separate residences in different towns and states, the precise relations between the parties existed, and all the circumstances concurred, which were proper and necessary to bring the case within the very terms of the rule allowing service of the notice through the post-office; that the post-office at Vicksburg, where the indorser lived, was the proper and only post-office to which the notice could have been sent for delivery, within the terms of the rule; and that the circumstance of the bank where the note was payable happening to be situate in the same town was utterly immaterial.

2. Had it been necessary (and we hold it clearly unnecessary) to invoke the aforesaid memorandum and the bank usage in support of the notice through the post-office in this case, then we should insist that the aforesaid memorandum, with the aforesaid evidence of the bank custom and usage, was sufficient and proper to be left to the jury as evidence, to be weighed and considered by them, of the defendant's consent to waive personal service of the notice, and to receive it through the post-office; consequently, that such evidence was far too peremptorily ruled out, and the instructions so ruling it out trenching very far within the true boundaries of the jury's province and function.

Mr. Crittenden, for the defendant in error, said that it was not proved where the plaintiff lived; but the place of his

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residence was a matter of no consequence. The rule as to parties referred to the parties to the note, and not parties to the suit.

For the insufficiency of the notice, he referred to *Bank of Columbia v. Lawrence*, 1 Pet., 583; *Williams v. Bank of the United States*, 2 Id., 101; *Wilcox, &c., v. McNutt*, How. (Miss.), 776; 6 Id., 615; *Ireland v. Kip*, 10 Johns. (N. Y.), 490; 11 Id., 231; *Smedes v. Utica Bank*, 20 Id., 372; 7 How. (Miss.), 565.

With respect to the rule having been dispensed with by agreement of parties, it is evident that the person who gave the notice was misled. He supposed that it was an agreement that it should be sent through the post-office; but it cannot be so construed, nor would a jury be justifiable in putting such a construction upon it. The court, therefore, was right in withholding the evidence from the jury.

*252] **Mr. Fendall*, on the same side.

In this case two questions are presented by the record. The first is, Was the notice sufficient in law? The second is, If the notice was not sufficient in law, is it made sufficient by any lawful usage, or by any agreement between the parties?

As to the first question:—It is not denied, on the other side, that where the party entitled to notice and the holder reside in the same place, notice must either be given to the party entitled to it personally, or must be left at his dwelling or place of business. But it is said, in this case, Bowling, the holder, resided in Maryland, and Harrison, the party entitled to notice, at Vicksburg; and that, the parties thus residing in different places, the notice sent through the post-office is sufficient.

It is a good answer to this, that the record does not show that Bowling and Harrison did reside at different places. It describes Bowling as a "citizen of the state of Maryland," which he may have been, and yet have been *residing* at Vicksburg when the note was dishonored. The judicial presumption arising from the record is, that he was then residing at Vicksburg. A fact so important, according to the argument on the other side, as his residence at a different place, and so capable of being proved, would, it may be fairly supposed, have been proved, if it existed.

But another and a conclusive answer is, that the Planters' Bank, the agent for collecting the note, was in Vicksburg, the place where Harrison resided. The note was made payable at the Planters' Bank at Vicksburg, where it was the duty of the holder to be, and demand payment. He was there, either

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personally or by his agent, who resided in Vicksburg, and did demand payment at the bank. The notice given by the collecting bank, being an act within the scope of its agency, was the act of Bowling, the holder of the paper. "For all the purposes of the law, the agent or banker is, in such cases, treated as substantially a distinct and independent holder. Indeed, upon any other ground, it would be impracticable for the real holder, in many cases, to make due presentment, and give due notice of the dishonor of the note, so as to charge the antecedent indorsers, especially if he lived at a distance from the place where the presentment and dishonor took place." Story Prom. N., § 326, 2d ed.

The general rule on the subject of notice is so well settled, that, even were it merely arbitrary, public policy and commercial convenience require that it should be strictly observed. But it is not arbitrary. It rests on a sound principle. "The object of the notice is to afford an opportunity to the drawer to obtain security from those persons to whom they are entitled *to resort for indemnity." 3 Kent Com., 107 [*253 (2d ed.). It follows as a corollary to this proposition, that the notice should be early, and either personal to the party entitled to it, or sent to a place where he is most likely to receive it promptly. As he is presumed to be habitually at his dwelling and place of business, and may not go or send regularly to the post-office, a notice left at one or the other of the former places is more likely to reach him, and reach him promptly, than when left at the post-office. Hence the general rule, that the notice must either be personal, or be left at the dwelling or place of business of the party noticed. "The law," says Judge Story, "requires that the notice should be either personal, or at the domicile or at the place of business of the indorser, so that it may reach him on the very day on which he is entitled to notice." Story Prom. N., § 322. So far is the doctrine carried in England, that notice must be given at the earliest moment, "*omissis omnibus aliis negotiis*," and so as, if practicable, to be actually received, that, "in some cases where the indorser's residence is unknown, but he is known to resort during certain hours at a certain place, as at the Royal Exchange, the Bank of England, Corn Exchange, or any public office, the notice ought to be given during those hours." Chit. Bills, 516 (8th Am. edit., ch. 10). Where the party noticing and the party noticed reside in different places, the law allows the notice to be sent by post; but one reason of this is, that, in many cases, the notice will be sooner received by post than if otherwise conveyed. The adjudged sufficiency of a notice sent through a letter-carrier or penny-post, though

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the parties reside in the same city or town, has been sometimes treated as a relaxation of the rule, or an exception to it. It is so, however, only apparently; the letter-carrier or penny-post being treated merely as an agent or messenger for delivering the notice. Story Prom. N., § 323.

The general principle is not affected in its application to this case by the authorities cited on the other side. In the *Bank of Columbia v. Lawrence*, 1 Pet., 584, the question was as to the sufficiency of a notice sent by mail to a person residing in a place different from that where the demand was made. In *Williams v. The Bank of the United States*, 2 Pet., 101, the question was, whether notice left, under certain circumstances, at the house of a neighbor of the party noticed, was sufficient. In *Miller v. Hackley*, 5 Johns. (N. Y.), 375, the parties resided in different places. So, too, in *Munn v. Baldwin*, 6 Mass., 316, in which it was held that notice sent by mail was sufficient; and that putting a notice in the post-office is *254] conclusive *evidence of notice. So, too, in *Cryler v. Nellis*, 4 Wend., 398, the parties resided in different places; and there being two post-offices in the place where the noticed party resided, having distinct designations, it was held that a notice sent by mail, and directed to him merely at the place where he resided, was insufficient. The rule is precisely stated in the passage cited yesterday from Bayl. Bills, 276, 277 (2d Am. edit.):—"The sufficiency of a notice sent by the mail is well established in the United States, where the person to be charged resides in a different town or place from that in which the presentment is made. But where he resides in the same place, a notice to him must be personal, or left at his residence or place of business." In many of the cases cited to this passage by the editor, the reasoning of the court substantially sustains the principle as stated in the text; and one of them, that of *Smedes v. Utica Bank*, 20 Johns. (N. Y.), 382, is conceded to do so. In this case, it is observable that the court cite *Ireland v. Kip*, 10 Johns. (N. Y.), 382, as affirming the rule in the terms stated in Bayley. The citation is from the reporter's marginal statement. The words of the court's opinion are different. The case came again before the same court; and they speak of the rule as applying "where the parties reside in the same city or place." *Ireland v. Kip*, 11 Johns. (N. Y.), 232. Thus it appears that in this case, as reported in 10 Johns. (N. Y.), the reporter correctly apprehended the court, and that the court considered the rule requiring notice to be personal, or left at the dwelling, &c., "where the parties reside in the same city or place," as being only another form of the rule requiring the notice to

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be personal or left at the dwelling, &c., where the party noticed resides in the same place where the presentment is made. And so Judge Story is to be understood in his statement of the rule. Story Prom. N., § 312 (2d edit.). Among the authorities cited by that learned judge is the passage in Bayley to which we have referred. In the case of *Burrows et al. v. Hannegan*, 1 McLean, 310, cited by Judge Story, the question was as to the sufficiency of the demand. But the remarks of the court are equally applicable to the notice. In the case of the *Louisiana State Bank v. Rowel et al.*, 18 La., 508, it was held, that, where the indorser lived within three miles of the post-office, notice put there was not sufficient. In that case the brief and lucid exposition given by the court of the law merchant on the subject of notice, taken in connection with Story on Promissory Notes, as to the legal identity of the noticing party with his agent, fully sustains the rule as we assert it. In *Porter v. Boyle et al.*, 8 La., 170, where the indorser resided in a *fauxbourg* of New Orleans, notice of *protest addressed to him and deposited in the city post-office was held to be insufficient, without showing reasonable diligence in endeavoring to give him personal notice. Though the question now before the court is admitted to be one of general commercial law, unaffected by any local law of Mississippi, the cases of *Wilcox & Fearn v. McNutt*, 2 How. (Miss.), 776; *Patrick v. Beazley*, 6 Id., 609; and *Hogatt v. Bingaman*, 7 Id., 568, which were cited yesterday, have all the weight which elaborate investigation, able reasoning, and consistent adjudication can give to authority. The first of them appears to have been decided before the note in controversy was due. The decision of the highest court in the state had settled the law, so far as such a decision could settle a question not of local jurisprudence. It may be properly referred to here as an impressive, but in this instance disregarded, caution to holders of negotiable paper. In the last of the three Mississippi cases, the principle of the two preceding decisions was reaffirmed; the counsel for the holder of the paper conceding, as a rule beyond denial, that if parties live in the same town, or have a place of business therein, the notice must be personal, or at the dwelling-house or place of business; and the court say, that notice of the demand and protest of negotiable paper cannot be given through the post-office, unless the same is to be transmitted by mail. The court here substantially reassert the general principle, that the mail is a legal instrument of notice in excepted cases only. The holder is not required to give personal notice or to leave it at the dwelling, &c., where the party to be charged lives at

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a distance ;—but if he lives in the place where the demand is made, it is as easy to take the notice to him personally, or to his dwelling, &c., as to take it to the post-office ; and in such case the general rule prevails.

As to the second question :—

This point, though not pressed in argument, has not been abandoned.

The general rule as to usage is, that usage prevails only where the law is silent. Chit. Bills, 56 (8th Am. edit.). In one of the Mississippi cases which we have cited, the court rebuke the attempt of a few notaries to set up their particular practice as a usage. *Wilcox & Fearn v. McNutt*, 2 How. (Miss.), 784.

But in this case the practice of the Planters' Bank in giving notices was proved to be conformable to law. The witness says, "that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicks-
*256] burg to have notice served personally upon the indorsers resident *in Vicksburg, unless there was a memorandum on the note appointing some place at which notice would be received." In this case, at the foot of the note were written, in the handwriting of the defendant, the words, "Third indorser, J. P. Harrison, lives at Vicksburg." This unsigned memorandum the witness "*supposed* to be an undertaking on his part to receive notice through the Vicksburg post-office," &c. The natural inference from the memorandum is exactly the reverse, namely, that the indorser, having designated the place of his residence and there stopped, expected, should the note be dishonored, the legal incident to follow of notice to himself personally, or left at his dwelling or place of business. The supposition of the witness, who appears to have been the notary employed to protest the note, was a mere guess, and a very wild one. It was not evidence. Had there been *any* evidence of an agreement on the part of Harrison to waive his legal right to personal notice, and to receive notice through the post-office, the court, we admit, ought to have let it go to the jury; whose province it is to determine on the sufficiency of evidence. But here there was *no* evidence of such an agreement, and the court, in substance, so told, and properly told, the jury. It was clearly the province of the court to determine the legal import of the written memorandum.

Mr. Jones, in reply and conclusion, insisted that the rule was, that, if the parties lived in the same town, the notice must be personal; but if in different towns, the post-office was the proper medium. 1 Pet., 583; 5 Johns. (N. Y.), 584;

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6 Mass., 315; 4 Wend. (N. Y.), 398, where all the cases are examined. Either Bowling or the bank must be considered as the holder of the note. If Bowling was the holder, he was entitled to have the note sent to him in Maryland, upon its non-payment, and it would then become his duty to notify the indorser, Harrison, through the post-office. But instead of this, he, through his agent, placed the notice at once in the post-office at Vicksburg. If the bank was the holder, then the case comes under the rule which requires the holder to notify the last indorser, who is then to notify the preceding one, and so on. The bank should, therefore, in this case, also have sent a notice to Bowling in Maryland, whose duty would have been to notify Harrison through the post-office. But why not take a short cut?

It is said that Bowling's residence is not proved. But the declaration avers it, and it is too late now to doubt it.

Mr. Justice GRIER delivered the opinion of the court.

The first assignment of error in this case is to the instruction *given by the court to the jury,—“That, [^{*257} to charge an indorser if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the post-office.”

As the only question on the trial of the cause was the sufficiency of notice left at the post-office at Vicksburg to charge an indorser residing there, and not whether a copy left at his dwelling-house or place of business would be proper, the phrase “personal notice” was evidently intended and understood to include the latter in opposition to the former. This instruction is, therefore, not objected to on the ground of any inaccuracy of expression on that point. But the complaint is, that the rule of law on this subject was erroneously enunciated by the court, in stating the conditions under which a personal service of notice on an indorser is required to be “residence in the town where the note was made payable.”

It is true, the terms in which the rule of law on that subject is usually stated differ from those used by the court on this occasion. In *Williams v. United States Bank*, 2 Pet., 101, it is thus stated by this court:—“If the *parties* reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business.”

Mr. Justice Story (Story Bills, § 312) states the rule in

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these words:—"Where the *party entitled to notice* and the *holder* reside in the same town or city, the general rule is, that the notice should be given to the party entitled to it, either personally, or at his domicile or place of business."

The indorsee or owner of the note in this case resided in Maryland, and the indorser in Vicksburg; and it is contended that, as they are the only *parties*, and do not reside in the same place, the rule is inapplicable to the case.

But we are of opinion, that, whether we regard the reasons upon which this rule is founded, or a correct construction of the terms in which it is usually stated, the instruction given by the court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them.

The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling. Depositing a notice in the post-office affords but presumptive evidence of its reception, and is permitted to be *258] substituted for the former only where the latter would be too *inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice; and therefore, in the practical application of the rule, the relative position of the person giving the notice and the party receiving it forms the only criterion of the necessity for relaxing it.

A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last indorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest, and gives notice of its dishonor to the indorsers; if they live in the same town or city where the bank is situated and the demand made, and "*where the note was payable,*" he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest post-office, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

This practical application of the rule is correctly stated by the court in their instruction to the jury as connected with

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the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the "holders" of this note for collection, and were bound to give notice to all the indorsers. (*Smedes v. The Utica Bank*, 20 Johns. (N. Y.), 372.) The notary, also, who held the note as agent of the owner for the purpose of making demand and protest, may be properly considered as the "holder" within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances, also, the rule has been stated in the terms used by the court below. (See Bayl. Bills.)

An exception is taken, also, to the instruction of the court,—“That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post-office, *and to dispense with personal notice on the indorser; and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice.”

The memorandum is in the following words:—“Third indorser, J. P. Harrison, lives at Vicksburg.” The only direct evidence of usage was, “that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place.” This is, in fact, no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg post-office; and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconception, of this memorandum. The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage.

It is true, the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion.

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It is of the utmost importance to commercial transactions, that the rules of law on the subject of notice which is to charge an indorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform, and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows, that notaries, in many places, fall into loose ways of performing their duties, either through negligence or ignorance; and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note, "The indorser, J. P. Harrison, agrees to receive notice at the Vicksburg post-office," as to write it in its present form; and one can hardly conceive of the possibility of a well-known and established usage, that a written memorandum should be construed without any regard to its terms or plain *260] meaning. Those who affirm the existence of such a strange usage should be held to *strict proof of it; and the court were right in not submitting it to the jury to infer such an improbable and unreasonable custom, by forced or astute construction of equivocal expressions from a willing witness.

Let the judgment be affirmed.

Order.

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.

JOHN C. SHEPPARD AND OTHERS, PLAINTIFFS IN ERROR,
v. JOHN WILSON.

The statutes of Iowa provide a mode for taking bills of exceptions, by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception, *non pro tunc*, after the trial.

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Such is also the English practice under the Statute of Westminster 2, and such is the practice recognized by this court.

Therefore, where a bill of exceptions was signed two years after the trial (but not *nunc pro tunc*), the Supreme Court of Iowa were right in striking it out of the record.¹

Where, after verdict, a motion was made for a new trial, which was held under a continuance, and an entry was afterwards made that the motion was overruled, and judgment entered on the verdict, but, at the time of such entry and judgment, the court was not legally in session, it was no error in the court, at a subsequent and regular term, to treat the entry thus irregularly made as a nullity, to decide the motion, and enter up judgment according to the verdict.

The difference between this case and that of the *Bank of the United States v. Moss* (*ante*, *31) pointed out.

A continuance, relating back, may be entered at any time, to effect the purposes of justice.

THIS cause was brought up by writ of error from the Supreme Court of the territory of Iowa.

It was an action commenced in the District Court of Scott county, in the territory of Iowa, by Wilson against Sheppard and others, for a breach of a contract for hiring a steamboat. It is not necessary to state the facts in the case, or any other circumstances than those upon which the decision of this court turned.

¹ The notes of the judge taken during the trial do not constitute a bill of exceptions; they are only memoranda from which the bill may afterwards be drawn up and sealed. *Pomeroy v. Bank of Indiana*, 1 Wall., 592. The bill should be tendered during the trial, or immediately afterwards during the same term; the subsequent signing of it is a matter of consent or special order. *Bradstreet v. Thomas*, 4 Pet., 102; *Brown v. Clarke*, 4 How., 4; *Phelps v. Mayer*, 15 Id., 160; *Dredge v. Forsyth*, 2 Black, 563; *Kellogg v. Forsyth*, Id., 571; *Muller v. Ehlers*, 1 Otto, 249; *Eagle Manuf. Co. v. Draper*, 14 Blatchf., 334; *Herbert v. Butler*, Id., 357; *Rhoades v. Drummond*, 3 Col., 374; *Webster v. Barnett*, 17 Fla., 272. See also *Whalen v. Sheridan*, 18 Blatchf., 308; *Marye v. Strauss*, 6 Sawy., 204. But the exceptions must be taken at the trial, and this must appear from the bill, whenever signed. *Walton v. United States*, 9 Wheat, 651; *Brown v. Clark*, *supra*; *Phelps v. Mayer*, *supra*; *United States v. Gibert*, 2 Sumn., 22; *United States v. Breitling*, 20 How., 252; *Barton v. Forsyth*, Id., 532; *Turner v. Yates*, 16 Id., 14; *Stanton v. Embrey*, 3 Otto, 548; *Simpson v. Dall*, 3

Wall., 460; *United States v. Wilkinson*, 12 How., 246.

Where the bill is not signed nor sealed the judgment will be affirmed. *Mussina v. Cavazos*, 6 Wall., 355; *Young v. Martin*, 8 Id., 354. S. P. *Galvin v. State*, 56 Ind., 51; *Cross v. Kemp*, 58 Ga., 194; *Denver v. Capelli*, 3 Col., 235. But if the bill be signed it need not be sealed. *Generes v. Campbell*, 11 Wall., 193; *Contra, Rankin v. Sanderson*, 35 Ohio St., 482.

The fact that the bill was not signed in time, is not ground of dismissal if the delay was not caused by the fault of the appellant or his attorney. *Horn v. Buck*, 48 Md., 358.

In Kansas, the bill must, in all cases, be settled and signed at the term at which the trial was had. It cannot, after that term, be signed *nunc pro tunc*. *State v. Bohan*, 19 Kan., 28. S. P. in Texas, *Farrar v. Bates*, 55 Tex., 193.

If the truth of the case is fairly stated in the bill, *mandamus* will lie to compel the judge to sign it. *Page v. Clopton*, 30 Gratt (Va.), 415; *Henry v. Davis*, 13 W. Va., 230; *State v. Gunter*, 30 La. Ann., Pt. I., 536; *State v. Reel*, 68 Mo., 106. S. P. *Garibaldi v. Carroll*, 33 Ark., 568. But see *People v. Blades*, 10 Bradw. (Ill.), 17.

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On the 7th of October, 1841, the cause came on for trial in the District Court of Scott county, when the jury found a verdict for the plaintiff, and assessed his damages at \$1,837.50.

*261] A bill of exceptions, containing a recapitulation of the evidence *upon both sides and sundry prayers to the court, is found in its proper place in the record; but the date of its signature by the judge is the 21st day of December, 1843, whereas the trial took place in October, 1841.

A motion for a new trial was made by the counsel for the defendants upon several grounds, which it is not necessary to specify.

In April, 1842, the court commenced in Scott county on the 4th, and in Clinton county, in the same district, on the 11th. But on the 12th of April, whilst the court was in session in Clinton county, the following entries were made in Scott county:—

JOHN WILSON v. JOHN C. SHEPPARD et al.—*Assumpsit.*

And now come the parties by their attorneys, and the defendants move for judgment on the motion for a new trial, made and argued at the last term of this court in this cause, and held under advisement until the present term.

Judgment.

It is considered by the court, that said defendants take nothing by their said motion; and thereupon the plaintiff moves the court for judgment upon the verdict rendered by the jurors aforesaid at the last term of this court in this cause. It is therefore considered by the court, that the plaintiff recover of the defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages aforesaid in form aforesaid assessed, besides his costs by him about his suit in this behalf expended, and that execution issue therefor.

Appeal granted.

And thereupon, the said defendants, by their attorney, pray an appeal, which was allowed.

Whether or not this appeal prevented the District Court of Scott county from correcting the erroneous entry was one of the questions before this court.

At October term, 1842, the following proceedings took place in the District Court of Scott county:—

Plaintiff's Motion for Judgment.

And afterwards, to wit, on the third day of October, in the

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year of our Lord 1842, the said plaintiff filed in the court aforesaid the following motion for judgment in this cause, to wit:—

WILSON v. SHEPPARD AND OTHERS.

And now, at this day, October term, 1842, comes the said plaintiff, by Mitchell & Grant, his attorneys, and moves the *court to enter up judgment in this cause, as of the [*262 last fall term of this court.

MITCHELL & GRANT, for Plaintiff.

Second Judgment.

And afterwards, to wit, on the 7th day of October, in the year last aforesaid, the following proceedings were had, to wit:—

WILSON v. SHEPPARD AND OTHERS.—*Assumpsit.*

This day came the said plaintiff, by his attorney, and it appearing to the court, that, at a previous term of this court, to wit, the October term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit: they find the issue for the plaintiff, and assess his damages at the sum of eighteen hundred and thirty-seven dollars and fifty cents.

Appeal prayed by Defendants.

Whereupon, a motion was made by the attorney for defendants for a new trial herein, which motion was, at said October term, taken under advisement by the court; and it further appearing to the court, that this court has not at any time since decided said motion, but that said motion was continued under advisement until the present term, that the order of continuance at last term was not entered of record. It is therefore ruled, that said order of continuance be entered "*nunc pro tunc*"; and the court, having now fully considered the said motion for a new trial, doth overrule the same. And it is further considered by the court, that the plaintiff have and recover of and from the said defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages in manner and form aforesaid assessed, together with his costs by him about his suit in that behalf expended, and that a special execution against the property attached issue therefor; thereupon the defendants prayed an appeal to the Supreme Court.

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To this judgment of the District Court, the counsel for the defendants took a bill of exceptions, with a view to carry the case up to the Supreme Court of Iowa.

In January, 1844, the case came before the Supreme Court of Iowa, when the counsel for Wilson moved to strike from the record, and reject from the consideration of the court, the bill of exceptions filed and dated in December, 1843; which motion the court sustained.

The counsel for Sheppard then moved for a mandamus, *263] directed to the judge of the District Court of Scott county, requiring *him to sign and seal, *nunc pro tunc*, the bill of exceptions tendered on the original trial. But the court refused to grant the mandamus.

After some other proceedings, which it is not necessary to state, the Supreme Court of Iowa, in January, 1845, affirmed the judgment of the District Court of Scott county.

To review this affirmance, a writ of error brought the case up to this court.

It was argued by *Mr. Clement Cox* and *Mr. Learned* (in print), for the plaintiffs in error, and by *Mr. Grant*, for the defendant.

The counsel for the plaintiffs in error assigned twelve causes of error, the last six of which are as follows:—

7th. The court erred, in entering an order for a continuance of this cause, *nunc pro tunc*, on motion therefor, at the October term, 1842, and in rendering a judgment upon the verdict of the jury at said term, upon a mere motion of the plaintiff.

8th. The court erred, in rendering a judgment at the October term, 1842, the second judgment in this record, after a writ of error had been sued out and served, and made a super-seedeas by the allowance of a judge of the Supreme Court, which was then pending.

9th. The Supreme Court erred, in expunging from the record the defendant's bill of exceptions, tendered at the trial of the cause before the District Court of Scott county.

10th. The Supreme Court erred, in refusing the writ of mandamus, on the motion of the plaintiff in error, to the judge of the District Court of Scott county, requiring the said judge to sign and seal, *nunc pro tunc*, the bills of exceptions tendered at the trial of this cause before the District Court, by the defendants below, or show cause against the said motion.

11th. The said Supreme Court erred, in reversing the judgment of the District Court, rendered upon the verdict of the

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jury on the 12th of April, 1842, on the ground that the superseas bond did not appear in the record with the writ of error.

12th. The Supreme Court erred, in affirming the judgment of the District Court, rendered on the 7th of October, 1842, being the second judgment rendered in said cause, and which said judgment was rendered when a writ of error was pending, and after the cause had been removed thereby from the jurisdiction of said District Court.

The argument on behalf of the plaintiffs in error, upon the above points, was as follows :

We will now examine the 7th and 8th errors assigned, as *they are connected in substance, and inquire what [*264 this first judgment of April was in its character.

Suppose the plaintiffs in error had acquiesced in this judgment, and had not taken any steps to have it reversed, could not the plaintiff below have enforced his judgment? Was it not a final judgment in the cause, conclusive on its face, upon the parties to it, upon the subject-matter embraced in the suit? Suppose the plaintiff below had issued his execution, levied it upon property, and sold the same in satisfaction of the judgment, while the judgment remained unreversed, and without any superseas to restrain its operations, could an action have been maintained against the officer for levying upon, taking, and selling the defendant's property in satisfaction of the judgment debt? We say it could not; and the defendant in error thought so, too, for he did issue his execution upon this judgment, which appears by the records, and the officer made his full return thereof before the writ of error to reverse the judgment was sued out. In 6 Pet., 8, the Supreme Court decide,—“If execution issue upon an erroneous judgment, the party who acts under it is justified until it is reversed, for it is the act of the court.” So in 9 Pet., 8, the court say,—“A judgment of a court of competent jurisdiction,” (which means, I suppose, a court having a legal jurisdiction of the subject-matter of the suit,) “while unreversed, concludes the subject-matter of it between the parties to it.” In 3 Cranch, 300, the court decide, that “a judgment of a court of competent jurisdiction, although obtained by fraud, has never been considered void, and all acts done under such judgments are valid as respects third persons.” Such judgments, then, by these authorities, would protect the sheriff acting under the authority of an execution to enforce them. Such is the case of the first judgment rendered in this cause, as the record will show. Again, in 3 Dall., 401, the court say, that “although a judgment of an inferior court be defective, yet, if in its

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nature it is final, and one on which an execution can issue, the party is entitled to his writ of error." This judgment of the 12th of April, 1842, was not only final by its terms, but it was one on which an execution could issue,—one on which the plaintiff below did actually issue, and have a legal return of his execution, and one on which we were entitled to a writ of error. We obtained our writ of error, and made it a supersedeas, as the record proves.

The court erred, then, in rendering a judgment at the October term, 1842, in this cause, after a writ of error had been sued out and was pending, and which was made a supersedeas *265] to the former judgment by allowance of a judge of the Supreme *Court. We contend that the writ of error was a supersedeas, and stayed all proceedings of the District Court upon this judgment after its date; that the District Court was, from that hour, held in abeyance in relation to the whole cause and every matter connected with it, until the writ of error was disposed of in the appellate court. For this point I refer to 1 Blackf. (Ind.), 483, where the court say,—“A writ of error is a supersedeas, so far as to stay all proceedings until the writ of error is disposed of.” If this be law,—and the books are full of similar decisions,—then we say that the District Court of Scott county had no power, at the October term, 1842, nor at any subsequent term, to render the second judgment in this cause, which was brought there to be reversed by the second writ of error appended to the record, even if the cause was otherwise open for the action of the court, and a judgment might have been legally rendered at that term. But I contend that the District Court had no power or legal authority to alter or amend a final judgment, at a subsequent term after it is rendered. It can only amend as to mere form. We refer the court to 1 Ohio, 375, where this doctrine is fully laid down; also to 2 Id., 32, and 3 Id., 306. In both of these last cases, the same principles are decided. In 2 Wash. C. C., 433, the court decide, that, “where there is error in entering a judgment, the court, at a subsequent term, cannot set it aside, unless it was entered by misprision of the clerk, by fraud.” This is a strong case, from high authority, and is as directly in point, it seems to me, as language can make a case. In 3 Marsh. (Ky.), 268, the court say,—“A court possesses no power, at a subsequent term, to modify, set aside, or alter, on motion, a judgment of a previous term. This proceeding must be by writ of error.” In the case at bar, the court not only set aside a final judgment rendered at a preceding term, but in defiance of a writ of error issued to reverse that judg-

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ment; and this was done on the motion of the party who voluntarily asked to have the erroneous judgment, as he termed it, rendered.

In 1 Greenl. (Me.), 369, the court decide, that "the judgment of a court of competent jurisdiction cannot be affected by entries on the record, except upon a writ of error." How much less, then, should an entire judgment be annulled, however erroneous it may be, and a new judgment entered at a subsequent term, upon a mere motion, and without any rule for the opposite party to show cause against it, as was the case at bar. It is decided in 1 Blackf. (Ind.), 168, that "a grant erroneously made, until it is reversed, is a bar to a suit." The reasoning, from all these authorities, seems to me to be this,—*that an act done by legal authority, appearing on its face to have been correctly done, however erroneous, can only be corrected in a legal manner, and by the proper tribunal in whom the law has vested the power to correct the error complained of. [*266

We contend that the court had no power, at the October term, 1842, to enter any judgment whatever in this cause; that the court had not then any jurisdiction over it. The cause has been discontinued from the docket of the court, and could not be brought before the court again, either by motion or by any other process, but by a writ of *procedendo* from the Supreme Court, reversing the judgment of April upon a writ of error. After the judgment of April, the case was no longer on the docket of the court, and the court had no authority to enter a continuance, *nunc pro tunc*, to regain a jurisdiction over the cause, when its judicial functions had ceased to exist in relation to it. As well might the court docket a new case, *nunc pro tunc*, with all its previous proceedings made out in form, and proceed to render a judgment upon motion, without a rule to the opposite party to show cause against it, as to do what appears by this record was done, so far as either proceeding would be justified by the law. For an authority that there was a discontinuance of this cause, and that the District Court could not again assume any jurisdiction over it, except the case had been remanded from the Supreme Court, I refer the court to Graham's Pr., 493, to 8 Petersd., 387, and the cases there referred to. In the first case, where a *venire* was returnable on the first day of the term, and the distringas was dated the day after, the court held it to be a discontinuance, because every process must be tested on the day it is awarded. Here there was a space of one day, when the court had no jurisdiction over the case, and it was adjudged a discontinuance. In the case at bar, there were six months

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when the court had no jurisdiction over the action, and execution had been issued and returned, and a writ of error was pending; yet the court resumed a jurisdiction, entered a continuance contrary to the fact, when the case was never intended to be continued in contemplation of law, and rendered a judgment. So, in 8 Petersd., No. 13, 390, the court say,—“There is a discontinuance, because the action was not regularly continued from term to term.” Here, in the case at bar, the record shows that there was not any continuance of the cause whatever. In No. 15, same page, the court say,—“On a writ of error, if a continuance be not alleged, it shall be intended a discontinuance, for it is so in fact.”

*267] How the court could preface their second judgment by the *declaration, that no judgment had been rendered on the verdict, when the first judgment was staring it in the face, is, to me, inconceivable. It is something more than a legal fiction.

We think the Supreme Court erred, in rejecting the bills of exceptions referred to in the 9th error assigned. In the statute of Iowa of January 25th, 1839, section 19, entitled “An act regulating practice in the District Courts,” &c., page 375, will be found the law of the territory relating to bills of exceptions. The statute simply requires that they should be reduced to writing during the progress of the trial. The other provisions of the statute are not material to this cause. This was done in our case. See the transcript, page 24. The bills were prepared during the progress of the trial; they were then reduced to writing, as the exceptions arose. The counsel not agreeing to all the facts stated in the bills, they were submitted to the court for correction, in its discretion, according to the facts, and to sign, seal, and deliver them into the office of the clerk, with the papers in the cause, in the event that the motion for a new trial, held under advisement, should not prevail. The court *mis*laid the bills, but never *refused* to sign them. At length they were found, signed, and returned, as seen by the record. The Supreme Court rejected them because they were not filed in time.

We hold it to be both law and universal practice, that when any controversy arises between parties, in settling a bill of exceptions, an application can only be made to the court to correct the bill, according to the facts, which the court is always presumed to possess and retain. The bills become a part of the record of the court, and are always under its control, and the court is as much bound, as an important part of its duty, to see its bills correctly made out, as it is to inspect and correct any other portion of its records and proceedings.

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In relation to this matter, all that we could do was to reduce our exceptions to writing, as *we* understood the facts to be. If the other party objected to any of our statements, a reference could alone be made to the court to decide the matter between us, and to correct the bills according to the facts. This we did, and in proper time, under the statute. We submitted our bills to the court for its judgment upon them. The court held them, with the papers in the cause, to decide the motion for a new trial. The court mislaid the bills, found them again, signed and sealed them, as we had prepared them, without an alteration; the best evidence, one would think, that they were deemed, by the court, to be correct.

But the Supreme Court rejected them because they were not *in time, although the judge held them in his hands from the time of the verdict until he signed and filed them. Was it our fault that they were not sooner in the record? The cause had not come on for trial before the Supreme Court, upon the writs of error. We then applied for a mandamus to the judge below, to sign the bills, *nunc pro tunc*, as of the term of the trial, and when they were placed in his possession. This would have taken them out of the objection to our exceptions. But the court overruled our motion. In the haste with which this argument has been prepared, I have not been able here to refer the court to authority upon this point of our case. Most of the decisions of the courts, arising upon the subject of bills of exceptions, are based upon the particular facts of each case, or limited by statutory provisions;—a case analogous to the one at bar is, probably, not to be found reported.

The eleventh error assigned has been noticed in a previous part of this argument. That the court erred, in reversing the first judgment of April 12th, 1842, upon the ground assumed by the court, we cannot doubt. We think the court erred, in a still greater degree, in affirming the second judgment of the 7th of October; the second judgment, which is our 12th specific error assigned. If the District Court erred, in reversing its own judgment at a subsequent term, or striking it out of the record after an execution had been issued and returned, and after the cause had been removed from the jurisdiction of the court by a writ of error that was then pending, it seems to us that the Supreme Court doubly erred in sustaining both proceedings, and in affirming the second judgment.

Mr. Grant's argument, for the defendant in error, upon the above points, was as follows:—

The 9th assignment of error is the first one for the consid-

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eration of this court, to wit:—"Striking the bill of exceptions of 21 December, 1843, from the records of the Supreme Court."

In discussing this point, we make this preliminary question, that this bill of exceptions is not a part of record here, and the propriety of rejecting it cannot be examined by the court. True, the clerk has sent it here, but unless it be a part of the record, the court will not examine it.

"Nothing but what constitutes the record of the court below will be examined here."—*Davis v. Packard*, 6 Pet., 411.

"The plaintiff relies, for a reversal of the judgment, on his having been entitled to a continuance, in consequence of an affidavit alleged to have been made in his behalf, and on his having objected to the cancelling the order of continuance. *269] These grounds of error, however, do not appear of record. The *affidavit and objection of the plaintiff could only be shown by a bill of exceptions. The transcript of the record, to be sure, contains a copy of the affidavit of continuance, together with a statement of the clerk, that he objected to proceeding to trial after the order of continuance, and that he tendered a bill of exceptions to the opinion of the court ordering the trial, which the court refused to sign. These circumstances, however, are only the statements of the clerk, and constitute no part of the record."—*Wilson v. Coles*, 2 Blackf. (Ind.), 403.

The bill of exceptions filed with the record in the Iowa Supreme Court, was stricken from the record; it constituted a part of the record no longer, and to make it a part of the record here, it must have been embodied and made a part of the bill of exceptions to the decision of the Iowa Supreme Court. It was not. See record, pages 32 and 33.

On this point, we refer to the following authorities:—*Huston v. Brown*, 1 Blackf. (Ind.), 429; *Henderson v. McKee*, Id., 347; *Hays v. McKee*, 2 Id., 11; *Vallandigham v. Fellows*, 1 Scam. (Ill.), 283; *Huff v. Gilbert*, 4 Blackf. (Ind.), 20.

A bill of exceptions is a "pleading of the party, and is to be construed most strongly against him who alleges the exception."—*Rogers v. Hale*, 3 Scam. (Ill.), 6.

"A bill of exceptions is the method of placing on the record matters which properly do not belong to it, and it should contain the matter so intended to be placed on the record. A reference in the bill is not sufficient. *Berry v. Hale*, 1 How. (Miss.), 315.

"When the clerk transcribed certain records intended to be placed in the bill of exceptions, and stated that they were the records and executions referred to in the bill of exceptions;

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held, it did not spread them on the record."—*Maundrig v. Rigby*, 4 How. (Miss.), 222.

The bill of exceptions in this case, pages 32 and 33, does not identify the paper referred to.

"The bill of exceptions refers to some extrinsic paper or document, which is said to be marked B, and to be considered part of the bill of exceptions; but what that document is we do not know, for, in looking through the record, we find no document which has such a mark, or is otherwise identified. It is true, there is in the subsequent history of the case a document, but it has no mark of identity with the one referred to by the judge in the bill of exceptions."—*Oliver v. State*, 5 How. (Miss.) 14-18.

"Nothing which does not properly belong to the record is part of it, unless inserted in the bill of exceptions."

A bill of exceptions, stating that "the following evidence *was offered," then adding, "here insert the [*270 same," is incomplete, and does not make part of the record the evidence thus attempted to be embraced in it, though contained in the transcript of the record. *Rankin v. Holloway*, 3 Sm. & M. (Miss.), 614.

"It is said there was a motion to quash the writ, and that the motion was improperly overruled; but as the writ is not inserted in the record, we have no means of examining the objection, and must presume the decision correct."—*State Bank v. Brook*, 4 Black. (Ind.), 485.

[Opinion in the text, near bottom of page; there is no reference to it in the marginal note.]

The bill of exceptions of the District Court of Scott county was stricken from the records of the Supreme Court of Iowa; how can it be made a part of the record here, unless included in the bill of exceptions taken to their decision? Strike it out of pages 16 *et seq.*, and what is there in the bill of exceptions, pages 32 and 33, to bring it before this court?

But admit that it is properly here, we say that the 9th error is not well assigned; the Iowa Supreme Court decided correctly in striking it from the record.

The plaintiffs in error, in their printed argument by *Learned*, produce no authority on this point, place great stress on the supposed fact, nowhere existing in reality, and nowhere appearing on the record, that the exceptions were by counsel reduced to writing during the progress of the trial, and by inference tendered to the court, and that the Iowa Supreme Court rejected the bill of exceptions, because it was not filed during the trial.

"Most of the decisions of courts," says *Learned*, for plain-

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tiffs in error, "on the subject of bills of exceptions, are based upon the particular facts of each case, or limited by statutory provisions. A case analogous to the one at bar is, probably, not to be found reported." If by this he refers to his side of the case, we shall not deny it, but we show both authority and statutory provisions in favor of rejecting the bill of exceptions. The words, "*no entry of record*," that the bill of exceptions was tendered at the trial, are emphasized in the statement of the counsel for the plaintiffs in error, thereby intending, we suppose, to convey the idea that it appears in some other way.

"The statement of the bill of exceptions, as to the time when it was taken, will prevail over the memorandum of the clerk."—*Carpnew v. Carravan*, 4 How. (Miss.), 370.

"The bill of exceptions must show affirmatively that the exception was taken at the trial, and if it does not so appear, the error will be fatal."—*Patterson v. Phillips*, 1 How. (Miss.), 572.

*271] Perhaps Howard's Mississippi Reports are not high enough authority for counsel. Hear the opinion of this court.

"It is not necessary," under laws of the United States, "that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the court, and may afterwards, during the term, be reduced to form, and signed by the judge; but in such case it is signed *nunc pro tunc*, and purports on its face to be the same as if actually reduced to form and signed during the trial; it would be a fatal error if it were to appear otherwise."—*Walton v. United States*, 9 Wheat., 651.

The bill of exceptions in this cause was taken, reduced to writing, "signed and sealed this 21st December, 1843," in record, pages 23 and 24. The trial took place in October, 1841, nearly two years before.

It appears conclusively from the bill of exceptions, that it was not taken or tendered during the progress of the trial.

The statutory provisions of the territory of Iowa will not assist the plaintiffs in error. Indeed, they are perfectly conclusive on this point in favor of the defendant in error.

The act of the Legislature of Iowa, approved January 25, 1839 (see first edition of Iowa laws, printed at Dubuque, in 1839), section 19, provides (375 of the statutes):—

"If, during the progress of any trial, in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said bill of exceptions, and to sign and seal the

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same; and said bill of exceptions shall thereupon become a part of the records of such cause; and if any judge refuse to allow and sign said bill of exceptions tendered, and the same is signed by three or more disinterested by-standers, or attorneys of said court, the judge shall then permit the said bill to be filed, and become part of the record," &c.

Mr. Grant then examined the cases from Missouri and Illinois, which states had statutes similar to Iowa, citing 7 Mo., 351; 3 Scam. (Ill.), 6, 17, 24, 63; 2 Id., 253-256, 490. And cited, also, 9 Johns. (N. Y.) Ch., 345; 3 Cow. (N. Y.), 32.

This court has decided no less than fifteen causes on bills of exceptions, down to 13 Pet. We will cite only such as bear directly on the case at bar.

Walton v. United States, 9 Wheat., 657, has been referred to. *Ex parte Martha Bradstreet* is, to our mind, conclusive for our client.

"On the trial of a cause in the District Court of New York, exceptions were taken to the opinions of the court, delivered during the progress of the trial; and, some time after [272] the trial *was over, a bill of exceptions was tendered to the judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time altering the bill so tendered, so as to conform to his recollections of the facts, and inserting in the bill all that he deemed proper to be contained in the same; which bill, thus altered, was signed by the judge.

"A rule was granted to show cause, and the judge returned the foregoing facts.

"By the court. This is not a case in which a judge has refused to sign a bill of exceptions. The judge has signed such a bill of exceptions as he thinks correct. The object of the rule is to compel the judge to sign a particular bill of exceptions which has been offered him. The court granted a rule to show cause, and the judge has shown cause by saying he has done all that can be required of him," &c.

"The law requires that a bill of exceptions should be taken at the trial. If a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to file it after the term must be understood to be matter of consent between the parties, unless the judge has made an express order in term, allowing such a period to prepare it." *Ex parte Martha Bradstreet*, 4 Pet., 102.

10th error. "The Supreme Court erred in refusing the motion of the plaintiff in error for a mandamus to the judge of

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the District Court." How comes this assignment of error in the case of *Sheppard et al. v. Wilson*, defendant in error, here?

That was an *ex parte* proceeding against Judge Thomas Wilson of the District Court, to compel him, by mandamus, to sign a bill of exceptions. Has any writ of error been sued out against Judge Wilson? Has he been cited to appear here? The proceedings against him form no part whatever of the suit of *Sheppard et al. v. John Wilson*; but if they did, and this court can examine the question, it is settled by the case of *Ex parte Martha Bradstreet*.

The counsel for *Sheppard et al.* made a motion for a writ to compel Judge Thomas S. Wilson to sign and seal a particular bill of exceptions, or show cause; the motion is based on a statement of facts, *ex parte*, which shows that no exceptions were tendered during the trial; that the next day after the trial the bill was tendered, and, the parties not being able to agree as to the bill, Sheppard's counsel delivered the bill to the court, requested the judge to correct, and, when corrected, to sign it.

*273] The bill of exceptions was not tendered during the trial, as *the law of Iowa requires. No other time was appointed or allowed for tendering, as the laws of the United States require. It was not, when tendered after the trial, such an one as the judge could sign until he had corrected it by his notes. In other words, the party requested the judge to do what the law requires him to do,—to prepare a correct bill of exceptions; and because the judge neglected to prepare a new one, they wish the court to compel him to sign a particular bill, which they admit was imperfect.

But a mandamus will not lie, in Iowa, to a judge, to compel him to sign a bill of exceptions. This writ issues only when there is no other adequate remedy. By the laws of Iowa of 1839, already quoted, if the judge refuses to sign a bill of exceptions, the by-standers may do it; and if the judge refuse to allow it, when signed by them, to be placed on the record, the Supreme Court, on affidavit, admits it to the record. No mandamus can issue in Iowa in such a case; the legislature have provided a party another remedy.

(The remainder of *Mr. Grant's* argument is omitted.)

Mr. Justice GRIER delivered the opinion of the court.

When this case was before this court at the last term, on a motion to dismiss the writ of error (see 5 How., 211), one of the reasons urged was,—“That, Iowa having been admitted into the Union as a state since the writ of error was brought, the act of 1838, regulating its judicial proceedings as a terri-

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tory, is necessarily abrogated and repealed; and consequently there is no law in force authorizing this court to reëxamine and affirm or reverse a judgment rendered by the Supreme Court of the territory, or giving this court any jurisdiction over it." And the court there say,—“This difficulty has been removed by an act of Congress, passed during the present session, which authorizes the court to proceed to hear and determine cases of this description.” It afterwards appeared that this court had been misinformed on this subject, and that by mistake the state of Iowa had been omitted in the act of 22d February, 1847. Since that time (at the present session of Congress), an act has been passed to remedy this omission (see act of 22d of February, 1848), and the court have proceeded to hear and determine the case on the errors assigned.

Of the numerous errors assigned in this case, but three can be noticed as coming properly under the cognizance of this court. The cause was originally tried before the District Court of Scott county, and removed, by writ of error, to the Supreme Court of the territory of Iowa. That court struck from the record the bills of exceptions alleged to have been taken on the *trial in the court below. Consequently, the matters said to be contained in those bills are not before this court. [*274

But bills of exceptions were taken by the plaintiffs in error to the ruling of the Supreme Court of Iowa, in rejecting the bills sealed by the District Court, and in refusing to grant a mandamus to the judge of the District Court to sign a bill of exceptions *nunc pro tunc*; and this rejection and refusal are now assigned for error in this court. It has been questioned whether the action of the Supreme Court of Iowa on these points is the proper subject of a bill of exceptions, or can be reviewed in this court. But as we perceive no error in the course pursued by the court, it will be unnecessary to notice these objections.

The case was tried in the District Court of Scott county at October term, 1841, and the bill of exceptions which was struck from the record was dated on the 21st of December, 1843. It did not purport to have been taken on the trial, nor was there any evidence on the record that any exceptions were taken or noted by the judge. And, assuming the fact as stated by the counsel for the defendant below, that he had taken the exceptions during the trial, and had reduced them to form afterwards, yet the bill was not settled during the term in consequence of objection made to certain matters therein by the opposite counsel; and the judge, though he

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signed a bill two years after the trial, refused to sign it *nunc pro tunc*, as if taken on the trial.

The act of Assembly of Iowa regulating the practice of their courts provides, that "if, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exceptions, and to sign and seal the same; and the said bill of exceptions shall thereupon become a part of the record of such cause; and if any judge of the District Court shall refuse to allow or sign such bill of exceptions tendered, and the same is signed by three or more disinterested by-standers or attorneys of said court, the judge shall then permit the said bill to be filed and become a part of the record; if the judge refuse, the Supreme Court of the territory may, when such cause is brought before them by writ of error or appeal, upon proper affidavit of such refusal, admit such bill of exceptions as part of the record."

This act requires that the exceptions must be taken during the progress of the trial, reduced to writing, and tendered to the judge, and gives ample remedy to the party injured, in case of a refusal to sign them or permit them to be made a *275] part of the record. If the party does not avail himself of the remedy *given him by the act, he has no one to blame but himself. It is true, judges may, and often do, sign bills of exception after the trial, *nunc pro tunc*, the bills being dated as if taken on the trial; but the propriety of their refusal to do so on particular occasions depends on so many circumstances which cannot appear on the record, and are known only to themselves, that we ought not to presume they have acted improperly in the exercise of their discretion. Certainly a judge ought not to be called on to make up a bill of exceptions two or more years after a trial, where the counsel have disagreed as to the facts, and failed to settle the exceptions at the term in which the cause was tried. It is too plain for argument, also, that a bill purporting to be taken more than two years after the trial cannot properly be made a part of the record, by any possible construction of this act. It is much more stringent in its requirements as to the time and mode in which a bill of exceptions shall be obtained and placed on record, than the Statute of Westminster 2, which first gave the bill of exceptions. Yet under that statute, the courts have always held that the exception should be taken and reduced to writing at the trial. Not that they need be drawn up in form; but the substance must be reduced to

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writing whilst the thing is transacting. 1 Bac. Abr., tit. Bill of Exceptions.

The practice is well settled, also, by the decisions of this court. See *Ex parte Martha Bradstreet* (4 Pet., 106); and the case of *Walton v. The United States* (9 Wheat., 657), which is precisely parallel with the present. There the objection was made, that the bill of exceptions was not taken at the trial, but purported on its face, as in this case, to have been taken and signed after judgment rendered in the cause. "It is true," say the court, "that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court. So that, in fact, it might be true that the objection was made, and yet not insisted upon by way of exception. But the more material consideration is, that the bill of exceptions itself appears, on the record, not to have been taken at all until after the judgment. It is a settled principle, that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say that it is necessary (and in point of practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge.¹ [*276 And so, in fact, is the general *practice. But in all such cases, the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to writing during the trial. And it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before verdict."

These cases are conclusive as to the correctness of the proceedings of the Supreme Court of Iowa, in striking out the bill of exceptions and refusing to award a mandamus to compel the district judge to sign a bill *nunc pro tunc*. It will be unnecessary, therefore, for this court to express any opinion on the questions, whether, under the peculiar provisions of the statute of Iowa, a party who had neglected to pursue the course pointed out by it would be entitled, under any circumstances, to the remedy of a mandamus; and if so, whether a

¹ FOLLOWED. *Phelps v. Mayer*, 15 How., 161. CITED. *Suydam v. Williamson*, 20 How., 439.

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refusal by the Supreme Court to grant it could be alleged for error in this court.

The only other assignments of error which can be noticed by this court are those numbered 11 and 12:—"That the Supreme Court erred in affirming the action of the District Court in regard to the judgment of April 12, 1842, on the ground that the supersedeas bond did not appear on the record with the writ of error. And in affirming the judgment rendered by the District Court at October term, 1842."

To understand the nature of these objections, it will be proper to state that this case was tried in the District Court of Scott county, at October term, 1841, and a verdict rendered for the plaintiff; and the defendants having moved for a new trial, the case was continued under a *curia advisare vult*. Owing to a mistake (the cause of which it is unnecessary to explain), the court did not meet at the time appointed by law for the April term in Scott county, but on the week following, which had been fixed for the term of a neighboring county. On the 12th of April, 1842, an entry was made on the record, overruling the motion for a new trial, and rendering a judgment on the verdict. The mistake was soon after discovered, and the defendants sued out a writ of error to reverse this judgment, as being *coram non judice*; but before the writ was served, at the next regular term of the District Court, in October, 1842, that court, treating the entry made on the record in April as a nullity, because entered by the clerk without any authority from the court, made the following entry of judgment:—

"This day came the said plaintiff, by his attorney, and it appearing to the court that, at a previous term of this court, *277] to wit, the October term, 1841, the issue previously joined in this *cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit:—They find the issue for the plaintiff, and assess his damages at the sum of \$1,837.50; whereupon a motion was made by the attorney for the defendants for a new trial herein, which motion was, at said October term, taken under advisement by the court. And it further appearing to the court, that this court has not, at any time since, decided said motion, but that said motion was continued under advisement until the present term; that the order of continuance at last term was not entered of record; it is therefore ruled that said order of continuance be entered, *nunc pro tunc*. And the court, having now fully considered the said motion for a new trial, doth overrule the same, and it is further considered by the court, that the plaintiff have and

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recover," &c. (completing the entry of a judgment in the usual form).

In this action of the court we can see no error, or any just ground of complaint on the part of the plaintiffs in error. If the court had ordered the prior entry, made in April, to be stricken from the record, as a mistake or misprision of the clerk, being made without the authority or order of the court, the record could not have been successfully assailed. The court certainly had full power to amend their records, and are the sole judges of the correctness of the entries made therein; and although they have not said in direct terms that this entry should be erased or stricken from the record, they have done so by violent implication, when they adjudged that the court had never decided the motion for a new trial, and treat the record as if the entry of the 12th of April was not upon it, or had been entirely erased from it. The objection, that the record was beyond the reach of amendment, because the writ of error had become a supersedeas and removed it to the Supreme Court, is not founded in fact. The writ of error had not been served on the court, and the record was therefore legally, as well as physically, in possession of the District Court, and subject to amendment. In order to a supersedeas, the statute of Iowa evidently requires a service of the writ upon the court below, and not only so, but "that one of the judges of the Supreme Court shall indorse upon the transcript of the court below allowance of said writ of error for probable cause; and in such cases, the party issuing such writ shall give bond to the opposite party, with good security," &c. There is no evidence on the record, that any of these requisites had been complied with.

It is, perhaps, hardly necessary to state that this case bears no resemblance to that of *The United States Bank v. Moss*, *decided at this term. There, the Circuit Court [*278 had set aside a regular valid judgment entered by the court at a former term, after a verdict and trial on the merits; not on the ground that the clerk had made the entry by mistake or without proper authority from the court, but because of some supposed error in law. This case exhibits a question of amendment, and nothing more; it was, therefore, wholly within the discretion of the court below, who were acquainted with all the facts, and belonged appropriately and exclusively to them. *Matheson v. Grant*, 2 How., 263, 284. Besides, the action of the court wrought no injury to the plaintiffs in error. If they had removed the record to the Supreme Court by the first writ of error before this amendment was made, and obtained a reversal of the judgment because it was entered without the

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authority of a properly constituted court, the Supreme Court would have remitted the record, with orders to proceed and enter a regular judgment on the verdict.

The objection, that the court below could not make this amendment for want of a continuance, is hardly worthy of notice. The entry of C. A. V. operates as a continuance, and if it did not, a continuance could be entered at any time to effect the purposes of justice. Such technical objections have long ceased to be of any avail in any court, and are entirely cut off by the statute of jeofails of Iowa of 24th January, 1839, section 6.

The judgment of the Supreme Court of Iowa must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the territory of Iowa, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*279] * THE UNITED STATES, PLAINTIFFS IN ERROR, v.
A. HODGE AND LEVI PEARCE.¹

Where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record.

Where a mortgage was given by a postmaster to secure the post-office department, and the Circuit Court was asked to instruct the jury, that, according to the true interpretation of the mortgage, there was contained therein no stipulation or agreement to extend the time, or preclude the government from suing the principal and sureties upon the postmaster's bond, and the court refused, upon the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage; this was error in the court. It is the duty of the court to construe all written instruments given in evidence, as a question of law.²

Payment under this mortgage could not be enforced until after the lapse of six months from its date. But its acceptance by the government did not release the sureties upon the bond, because, in order to discharge the surety by giving time, the time which is given must operate upon the instrument which the surety has signed. The mortgage here was only a collateral security, which was beneficial to the surety.³

¹ Further decision, 13 How., 478.

² REVIEWED. *Neilson v. Lagow*, 12 How., 108.

³ FOLLOWED. *Firemen's Ins. Co. v. Wilkinson*, 8 Stew. (N. J.), 179.

CITED. *United States v. Campbell*, 10 Fed. Rep. 820; *Sayre v. King*, 17 W. Va., 574.

See also *The Maggie Jones*, 1 Flipp., 638.

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A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits the right should be waived upon the record, before the motion for a new trial is heard.

The practice in Louisiana allows the sureties to be sued without joining the principal.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

It was an action brought against the defendants in error, as the security upon the bond of the postmaster of the city of New Orleans. The facts of the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Clifford* (Attorney-General), for the United States, and by *Mr. May* and *Mr. Brent*, for the defendants in error. Of the argument of the Attorney-General the reporter has no notes.

Mr. May and *Mr. Brent*, for the defendants in error, divided their argument into three heads, viz:—

I. That the mortgage discharged the defendants from all liability on their bond to the plaintiffs.

II. That the exceptions were not properly taken.

III. That the action was erroneously brought.

Before entering upon the argument, the preliminary remark was made, that although the court below may have erred in refusing to instruct the jury, yet if the party was not prejudiced by it, this court would not reverse. 5 Pet., 135; 9 Gill and J. (Md.), 439.

If in point of law the judgment ought to be affirmed, the court will affirm it, notwithstanding error. 8 Pet., 214.

I. The mortgage discharged the defendants from all liability on their bond.

*This proposition involves three, viz:—

1st. The facts attending the execution of the mortgage. [*280

2d. The law authorizing it.

3d. The law applying to and expounding it.

With respect to the first subdivision, viz., the facts, the counsel examined the record, to show that the execution of the mortgage was concealed from the sureties; that it was exhibited to the Postmaster-General, and by him referred to the auditor, in whose office it was filed on the 19th November, 1839, and nothing further was done until the 7th January, 1840.

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2d. The law authorizing it. (This branch of the argument is omitted, as the court did not appear to question it, inasmuch as the acceptance of the mortgage is considered to be the act of the United States.)

3d. The law applying to and expounding it. This is the important inquiry in the case. The defendants were sureties of Ker, who was the principal in the bond, on which this suit is brought. The United States agree with the principal, without the knowledge or consent of the sureties, in order to secure the payment of his debt, and agree for a large and valuable consideration to give him time for the payment of the debt. The United States receive from the principal a mortgage of valuable property to secure the whole of their debt. This discharges the sureties, because time for the payment of the debt is given, and it is a higher security for the debt.

It is a general rule of law, lying at the foundation of all these contracts, that "a party taking a surety is bound to notice the nature of his engagement, and protect him." Hence, the law on this subject is very strict. 7 Price, 132; Pitman Pr. & S., 167, 170, 182, 183; 3 Meriv., 277; 1 Moo. & P., 759; Holt N. P., 84; 2 McLean, 74; 10 Pet., 266, 268; 7 Johns. (N. Y.), 337; 7 Taunt., 53; 2 Marsh, 363.

That time for the payment of the debt is given by this mortgage, the following authorities show. 12 Wheat., 554, 505; 5 How., 206; 3 Wash. C. C., 71; 3 Younge & Coll., 188, 189; 7 Har. & J. (Md.), 103; 8 Bing., 156.

A creditor, by giving time of payment, undertakes that he will not during the time given receive the debt from any surety of the debtor; for the instant any surety paid it, he would have a right to demand and recover it from his principal. 4 Bing., 719.

If giving time might injure the surety, he is discharged. It is not necessary that in point of fact he is injured. The law is the same even if he is benefited. He is the judge of that. 7 Price, 225, 232, 234.

*281] This mortgage was also a higher security for the debt. In Louisiana, it amounted to a judgment. Code of Practice, art. 732, 733; 6 Mart. (La.), N. S., 465; 15 Pet., 170.

A judgment is a security of a higher nature, and merges a bond. 1 Chit. Pl., 49, 50; 1 Pet., C. C., 301; 18 Johns. (N. Y.), 477; 11 Gill & J. (Md.), 14, 15; 6 Cranch, 253; 2 Har. & J. (Md.), 474.

This mortgage is then a confession of judgment, with a stay of execution for six months, and will discharge the surety. 6 Munf. (Va.), 6; 3 Call. (Va.), 69; 6 Gill & J. (Md.), 168.

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III. The action was erroneously brought. (The counsel cited many cases from the English authorities and from other states, to show that all the obligors should have been sued, and the following authorities from Louisiana. Code of Practice, 330, note; 4 Mart. (La.) N. S., 435; 4 La., 107; 2 Rob. (La.), 389.)

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court for the Eastern District of Louisiana.

William H. Ker, being appointed postmaster of the city of New Orleans, in 1836, gave a bond, with the defendants as his security, in the sum of twenty-five thousand dollars, for the faithful discharge of his duties as postmaster. Having failed to perform those duties, an action was commenced on the bond against his securities, alleging a large defalcation by Ker, and claiming the penalty of the bond.

In their defence the defendants set up a mortgage which was executed by Ker the 15th of August, 1839, on property real and personal, to secure the payment to the post-office department of a sum not exceeding sixty-five thousand dollars, or such sum as might be found due on a settlement, from and after six months from the date of the mortgage. This instrument, which gives time for the payment of the indebtedment by Ker, it is pleaded, releases the defendants as the sureties of Ker.

A jury, being impanelled, found a verdict for the defendants. A motion for a new trial was made and overruled. No exception lies to this decision. The motion is made to the sound discretion of the court.

The questions arise on certain instructions to the jury prayed for by the district attorney; none were asked by the defendants.

It is objected, that it does not appear that the exceptions were taken on the trial, and signed by the judge during the term. The bill of exceptions states, that, "on the trial of the *cause, the district attorney requested the court [*282 to charge the jury," &c., and at the close, "to which opinions of the court, refusing to charge as requested, the district attorney excepts, and prays that the bill of exceptions, with the documents referred to therein, be signed, sealed, and made a part of the record, which is accordingly done," and which is signed by the judge. Upon its face, this bill of exceptions appears to have been regularly signed; and the court cannot presume against the record.

The first, fifth, seventh, ninth, and tenth instructions,

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refused by the court, are not so connected with the case as to require a consideration. Nor is it deemed necessary to consider the instructions given as asked or as modified by the court, until we come to the eleventh and last prayer. In this the district attorney requested the court to instruct the jury, "that, according to the true interpretation of said mortgage, there was and is contained therein no stipulation or agreement to extend the time, or preclude the government from suing the principal and sureties on said bond." This the court refused to give, on the ground that the jury were the proper judges of the fact whether time was given, on a perusal of a mortgage. In this the court erred. It is its duty to construe all written instruments given in evidence, as a question of law.

Payment under the mortgage could not be enforced until after the lapse of six months from its date. And it appears that the mortgage was designed to cover the whole amount of Ker's defalcation. But the important question is, whether this mortgage suspended the legal remedy of the department on the official bond of the postmaster. There is no provision in the mortgage to this effect. And it cannot be successfully contended, that taking collateral security merely can suspend the remedy on the bond. The holder of a bill of exchange, by taking collateral security of the drawer, not giving time, does not release the indorser. *James v. Badger*, 1 Johns. (N. Y.) Cas., 131; *Kennedy v. Motte*, 3 McCord (S. C.), 13; *Hurd v. Little*, 12 Mass., 502; *Ruggles v. Patten*, 8 Id., 480.

Giving time for payment, to discharge the indorser, must operate upon the instrument indorsed by him. Now if the post-office department had, by the mortgage, suspended the right of action on the bond for the time limited in the mortgage, it might have released the sureties. But no such condition is expressed, and none such can be implied. The mortgage does not purport to be given in lieu of or in discharge of the bond. It is merely a collateral security, which operates beneficially to the defendants. For if they shall pay the *283] defalcation of Ker, or so much of it as shall amount to the penalty of the *bond, and the mortgaged property shall be sufficient to cover the whole indebtedment, there can be no question that the sureties would be subrogated to a due proportion of the rights of the department in the mortgage.

The principle is in no respect different from that which arises on a promissory note or bill, where collateral security is taken. In the authorities above cited, it was considered that, where an indorser takes an indemnity for indorsing a note, he waives a notice of demand. But if the holder of the note

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take additional security from the drawer, the indorser is not released. And it cannot be material of what character the collateral security may be. It may consist of promissory notes not due, a mortgage payable on time, or any thing else, it does not affect the remedy on the original instrument. This can only be done by an express agreement, for a valuable consideration. The remedy on the collateral instrument is wholly immaterial, unless it discharges or postpones that on the original obligation. There is no such condition in the mortgage under consideration, and consequently it can in no respect affect or suspend the remedy of the post-office department on the bond.

If the remedy on an instrument is suspended, for a valuable consideration, the indorser or security is released, because his right to discharge the obligation and be subrogated to the rights of the holder of the paper is also suspended. But a contract to give time is void, and does not release the security, unless it be founded upon a valuable consideration. It must be a contract which a court of law or equity can enforce. Now there is no contract in the mortgage which suspends the right of action on the official bond. Consequently, no injury is done to the sureties on that bond. They are left free to act for their own interests, as they could have acted before the mortgage. The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured. But by no possibility can they be injured in the case under consideration. On the contrary, it is clear that the mortgage may operate beneficially to them, if they shall pay the amount of their bond. And the Circuit Court should have instructed the jury to this effect.

The motion for a new trial was not a waiver of a writ of error. In some of the circuits there is a rule of court to this effect. But effect could be given to that rule only by requiring a party to waive on the record a writ of error, before his motion for a new trial is heard. In the greater part of the circuits no such rule exists. It does not appear to have been adopted in Louisiana.

*It is insisted that "the action is brought wrong; [*284 and that, if the judgment be reversed, the plaintiffs cannot recover, because of the nonjoinder of Ker as a defendant."

The action against the sureties, omitting the principal, is sustained by the Louisiana practice. In *Maria Griffing, Adm'x, v. Caldwell*, 1 Rob. (La.), 15, it was held that a creditor has the right, but he is under no obligation, to include the

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principal and surety in the same suit. And in *Smith, Adm'r*, v. *Scott*, 3 Rob. (La.), 258, it is said a surety, who binds himself with his principal, *in solido*, is not entitled to the benefit of discussion, and may be sued alone for the whole debt. So in *Curtis v. Martin*, 5 Mart. (La.), 674, it is laid down, that the surety may be sued without the principal.

In *Barrow v. Norwood*, 3 La., 437, the court held, where the obligation is joint, all the obligors must be made parties to the suit. But that was not a case of suretyship. The action was brought against one of three indorsers.

On the grounds above stated, the judgment of the Circuit Court is reversed, and the cause remanded for other proceedings, conformably to this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

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JOHN D. BUSH, APPELLANT, v. JACOB MARSHALL AND
WILLIAM B. WHITESIDES.

Where the holder of a preëmption right to lots in the town of Dubuque sold them to another person, the facts, that the vendor had received certificates of his right, although the land-officers were not satisfied with their sufficiency, and that the vendor acted as the undisputed owner, were sufficient to negative the charge of fraud in his representing his title to be good. The relinquishment, by the vendor, of his title to the United States, with a view to a public sale and completion of his title, was not fraudulent towards the vendee, if it was the purpose of the vendor to enable himself to convey a perfect title to his vendee.

If, at the public sale, the vendee himself became the purchaser, he became a trustee for his original vendor; and if, at the public sale, the original vendor became the purchaser, the title inured to the benefit of his vendee.

*285] *THE following statement of the case was the brief of *Mr. Howard*, who argued it.

This was an appeal from the Supreme Court of Iowa Territory, sitting as a court of equity, under the following circumstances.

On the 2d of July, 1836, Congress passed an act (chap. 262, 300

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5 Statutes at Large, 70) for laying off the town of Dubuque, amongst other towns, under the direction of the surveyor-general. The 1st section directed lots to be laid out in a certain manner, and a plat returned to the Secretary of the Treasury, and within six months thereafter the lots should be sold to the highest bidder. The 2d section directed the lots to be classed according to their value into three classes, viz. at \$40, \$20, and \$10 per acre, respectively; and gave a right of preëmption to those persons who had obtained a permit to settle, or who had actually occupied and improved the lots, paying for the lot according to its class.

On the 3d of March, 1837, Congress passed another act (chap. 36, 5 Statutes at Large, 178), amendatory of the former, substituting a board of commissioners for the surveyor. They were empowered to "hear evidence, and determine all claims to lots;" to reduce the evidence to writing, which they were directed to file with the register and receiver, together with a certificate in favor of each person having the right of preëmption. Upon payment for the lot being made to the receiver, the receiver was directed to give a receipt for the same, and the register to issue a certificate of purchase, to be transmitted to the commissioner of the general land-office, as in other cases of the sale of public lands.

The 3d section directed the register and receiver to expose the residue of the lots to public sale, after advertising, &c.

On the 8th of February, 1839, Marshall and Whitesides sold to Bush a preëmption right to two lots in the town of Dubuque, viz. No. 7 and No. 194. The deed is not upon the record, but the consideration is stated in the bill, and admitted in the answer (Rec. 3, 6), to have been three thousand dollars, one half of which, viz. \$1,500, was paid in cash by Bush. To secure the payment of the other half, Bush executed a mortgage to Whitesides, and also gave his promissory note to Marshall for \$1,790, payable on or before the 1st of October, 1839. Of this \$1,790, \$1,500 was for the purchase of the lots, and the remaining \$290 was for rent in arrear, which was transferred to Bush.

It appears from the evidence of B. R. Petrikin, the register in the land-office in the town of Dubuque, that "Bush came frequently to the land-office to enter the lots No. 7 [*286 and No. *194, under the preëmption law, but was not allowed to do so by the land-officers, because the proof filed by William B. Whitesides with the commissioners, under the law laying off the town of Dubuque, did not satisfy the land-officers as being sufficient to maintain a right under the law in favor of Whitesides' preëmption."

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It appears, also, from the same evidence, that the land-officers "had received instructions from the general land-office, to expose all lots to public sale where the claimants should relinquish their right to preëmption (under the law laying off the town) to the United States."

In September, 1840, the lots in the town of Dubuque were offered at public sale. Bush went to the land-office, and protested against the lots No. 7 and No. 194 being offered at public sale.

Previous to the sale, however, it appears, from the testimony of Dougherty, that a "committee of arrangements had been appointed for the purchase of lots in the town of Dubuque;" that there was a "public bidder," who was a person selected by the claimants to lots in the town of Dubuque, to purchase the lots they claimed, as they were offered at the public sale.

It appears from the evidence of Dougherty, that the committee of arrangements called on Bush, and informed him that the committee desired him to make his relinquishment to lot No. 7, which he positively refused to do. The committee then erased the name of Bush, and inserted the name of Whitesides, and informed Whitesides immediately of the same; when he, the said Whitesides, came before the committee, and made his relinquishment to said lot.

It appears, also, from the testimony of Petrikin, the register, that Whitesides came to the land-office, and produced the deeds in relation to the property before the officers of the land-office, and the said officers considered that the said Whitesides had a right to relinquish his preëmption right, and thereupon the said Whitesides did relinquish; in consequence of which the lots No. 7 and No. 194 were put up at public sale.

The following statement of facts was agreed upon in the court below:

It is agreed the following statement of facts may be used, in the same manner as if the same were proved by witnesses on the hearing of the above causes:—

1st. That the lots mentioned in the foregoing pleadings were sold at a public sale of lots in the town of Dubuque, by the United States, in last, at which sale John D. Bush, above named, became the purchaser of lot No. 7, and the above named William B. Whitesides of lot No. 194.

*287] *2d. That said lots would not have been put up and sold at said sale, unless the said William B. Whitesides had relinquished all claim to the same to the United States previous to said sale; and that said Whitesides did thus relin-

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quish, previous to the same being put up to sale, and for the express purpose of having them sold at said sale.

3d. That said Bush objected and protested to said Whitesides against the said Whitesides thus relinquishing.

4th. That previous to said sale, and at the time of said relinquishment, and subsequent thereto (but previous to the sale), said Bush was informed by E. C. Dougherty and Whitesides, and by said Whitesides' agent, that his object in having the said lots put up to sale was expressly with a view that the title to them might be perfected in said Whitesides, so that he could make a good title to said Bush, upon said Bush paying the purchase-money for said lots. And also, that said Whitesides, by himself, or agent duly authorized for said purpose, did propose and offer to said Bush, that if said Bush would bid for said lots, and agree that his purchase should be under the contract for them set out in the pleading in the above causes, said Whitesides would make no opposition to his so doing, but was perfectly willing said Bush should become the purchaser with this understanding; but that said Bush utterly refused so to do; when said Bush was informed by said Whitesides, or by his agent, that said Whitesides would bid for said lots at said sale, in order to enable him to comply with his contract with said Bush. That said Whitesides and Bush were the only bidders for said lots at said sale, and that Philip S. Dade was the bidder for said Whitesides, of which the said Bush, previous to and at the time of said sale, was advised and informed. That the memorandum at the foot of the deed or mortgage, that said Bush was to furnish the money to pay for said lots, was there inserted by the express agreement and understanding of said Bush, at the time of executing said deed and mortgage.

The public sale took place in September, 1840, after Bush had refused to purchase under his contract. At the sale, the public bidder and Bush were the only bidders for the two lots No. 7 and No. 194, the public bidder bidding for Whitesides, of which Bush was informed previous to and at the time of said sale. The lot No. 7 was bid off to Bush, and No. 194 to Whitesides.

In April, 1841, Whitesides and Marshall filed a bill in the District Court of Dubuque county, praying a foreclosure of the mortgage and sale of both lots. After an answer and a general replication, the court decreed for the complainants, and ordered both lots to be sold. An appeal was taken to the Supreme *Court of Iowa, where the decree of [*288 the court below was affirmed, and the cause was brought by appeal to this court.

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It was argued by *Mr. Berry* (in a printed argument) and *Mr. Howard*, for the appellant, and *Mr. May*, for the appellees.

Mr. Justice GRIER delivered the opinion of the court.

This suit originated in the District Court for Dubuque county, in the Territory of Iowa. It was a bill in chancery to foreclose a mortgage given by the appellant, Bush, to Whitesides. The property mortgaged consisted of two lots (numbered 7 and 194) in the town of Dubuque, which Whitesides had sold and conveyed on the same day to the mortgagor, for the sum of \$3,000; and the mortgage (dated 8th February, 1839) was given to secure the sum of \$1,500, the balance of the purchase-money.

At the time of this transaction, the United States had not yet offered the lands on which the town of Dubuque was situated for sale. But notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements, under the expectation of the grant of a right of preëmption from the government, or, at least, that they could complete their title by purchase from it, when the lots should be offered for sale.

These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the forms usual for passing a title in fee. On one of the lots which was the subject of the mortgage in question, a tavern-house and other improvements were erected, for which the tenant paid a rent of seventy dollars per month at the time of this purchase. The deed from Whitesides to Bush was not put in evidence, but, from the recitals of the mortgage and admissions of the answer, it appears to have been a deed in fee simple, with a covenant of general warranty. The mortgagor is estopped by his deed from denying seizin, and cannot make out a sufficient defence unless by proving payment of the money, want of consideration, or fraud which will avoid the contract.

Accordingly, the appellant, in his answer, has set up two grounds of defence by way of avoidance of his deed. First, fraudulent misrepresentation by the vendor to induce him to make the purchase; and, secondly, want of consideration from failure of title.

1st. The fraudulent misrepresentation charged consists of *289] three particulars. First, that the vendor represented, "that he *held a valid preëmption right to the lots, by virtue of the laws of the United States in relation to town lots in the town of Dubuque;" secondly, that he represented that the fixtures in the tavern, to wit, the bar shelves and counter,

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formed a part of the property sold, whereas they were claimed and taken away by Hale, the tenant, and the house much injured by the moving and tearing away of said fixtures; and thirdly, that by falsely representing Hale, the tenant, to be punctual in his payments, Bush was prevailed on to give his note to the complainants for the sum of \$290, for the rent of the unexpired term; whereas Hale was not punctual, and defendant was unable to collect the rent from him.

The latter two of these charges may be summarily disposed of by the remark, that there is no evidence in the case of any representations by the complainants on the subject; and as the matter alleged in the answer is not responsive to the bill, but set up by way of avoidance, the defendant was bound to prove it.

But the first is the one chiefly relied on in the argument, and deserves more particular notice.

It is proved by Davis, the scrivener who drew the deed and mortgage, that Whitesides told Bush "that he, Whitesides, had a preëmption to the property." Was this representation false? The only evidence on the subject is in the testimony of Petrikin, the register of the land-office, who swears, "that the commissioners, appointed under the act of Congress laying off the towns of Dubuque, &c., filed in the land-office certificates in favor of Whitesides' preëmption to these lots, No. 7 and No. 194." He states also, "that the land-officers had instructions from the general land-office to expose all lots to public sale, where the claimants should relinquish their right of preëmption to the United States." He states, moreover, "that the land-officers were not satisfied with the regularity or sufficiency of Whitesides' certificate;" but whether these doubts or opinions were well founded or not does not appear from any testimony in the case. The facts, also, that Whitesides was permitted to relinquish the preëmption right to the United States, and that no other person laid any claim to the possession and preëmption of these lots except Whitesides, and Bush, claiming under him, are conclusive, when taken in connection with evidence of a certificate in his favor by the commissioners, to show that the representation of Whitesides was not false or fraudulent, and that defendant has wholly failed to support this allegation, as set forth in his answer.

But it has been contended, that this relinquishment, made by Whitesides to the United States against the consent [*290 of Bush, *was fraudulent, and injurious to the interests of Bush. To this argument two answers may be given, either of which is conclusive. First, that there is no allegation in the pleadings on the subject; and, secondly, the evidence

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clearly shows, that, although Whitesides did relinquish his preëmption to the United States, and that, too, without the consent of Bush, yet the act was not fraudulent, as it was not intended, and did not tend, to do any injury to Bush. Whitesides, by his warranty, was bound, under penalty of \$3,000, to obtain a good title for Bush, cost what it may, while Bush was bound to pay only the minimum or preëmption price. The relinquishment of his preëmption right by Whitesides was not intended as an abandonment of his claim, but was a plan adopted by himself, in common with the other claimants of lots in Dubuque, as the most convenient method of obtaining a title. By thus suffering them to be exposed to auction, they ran the risk of being compelled to pay more than the minimum or preëmption price for a title, but could not get it for less. The record admits that Bush knew "that Whitesides' object in having the lots put up to sale was expressly with a view that the title to them might be perfected in said Whitesides, in order that he could make a good title to Bush." It is not easy to apprehend how fraud can be predicated of the conduct of Whitesides, who, it is admitted, was using every endeavor to fulfil his contract, and obtain a good title for his vendee. As to the alleged fraud on the government by the conduct of the people in Dubuque on this occasion, it is sufficient to say that the question is not raised in the pleadings, nor the fact proved in the evidence.

We are of opinion, therefore, that the appellant has wholly failed to show any fraud or misrepresentation on the part of his vendors, which would justify a court of chancery in annulling an executed contract.

Indeed, the facts of the case tend rather to show that the fraud, if any, in this transaction, may be more justly charged to the party who is so liberal in imputing it to others.

If Bush could have thwarted Whitesides in his endeavors to procure the legal title for him, if he could hold the lot on which the tavern-house and improvements were situated (and valued at \$2,200) for his bid of less than twenty dollars, and then recover the \$2,200 from Whitesides, on his warranty, he will have effected what is commonly called a speculation; but one in the perpetration of which he ought not to expect the aid of a court of equity. The anxious disavowal of an intention "to defraud or wrong the complainants," contained in the *291] defendant's answer, was not called out by any charge *in complainants' bill, but seems rather to have resulted from a consciousness that his conduct was justly liable to such an imputation.

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II. The other ground of avoidance is failure of consideration.

The answer alleges, that, at the public sale by the United States, lot No. 7 was purchased by defendant himself, and therefore the vendor is unable to comply with his contract by making him a title, and, moreover, that Whitesides has become the purchaser of lot No. 194, and therefore he, Bush, was without title to it.

This defence seems founded on an entire mistake or ignorance of the law; as the facts alleged lead to a directly contrary conclusion, and show that the defendant has a complete legal title. If Whitesides sold to him with covenant of warranty, and afterwards purchased the legal title, as the answer asserts, with regard to lot No. 194, then is the title vested in Bush, the vendee, by estoppel, and no further conveyance is necessary.

As to lot No. 7, Bush, having obtained possession under Whitesides, cannot, by the purchase of an outstanding title, defeat the claim of his vendor. It is a well-established rule of equity, "that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." "Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title by the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." (See *Galloway v. Findlay*, 12 Pet., 295, and cases there cited.)

In the present case, the vendee has bought in, for twenty dollars, the legal title to a property worth more than two thousand, the possession of which he received from his vendor; and not only so, but, contrary to good faith and fair dealing, he has interfered to overbid his vendor, who was using every endeavor to purchase the title for the use of his vendee, in fulfilment of his own covenants. The appellant has paid no more (or, if more, so little as to be unworthy of notice) than he agreed to pay for the purpose of getting the legal title. He has got a good title to the property, and ought in justice and equity to pay for it the full consideration which he has covenanted to pay.

The decree of the Supreme Court of Iowa must therefore *be affirmed, with costs, with leave to the [292] appellees to sell the mortgaged property in the mode prescribed by law, unless the appellant shall pay the amount of

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said decree, with interest thereon and the costs, within sixty days from the filing of the record in this case in the proper court of the state of Iowa.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the territory of Iowa, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Supreme Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum, with leave to the appellees to sell the mortgaged property in the mode prescribed by law, unless the appellant shall pay the amount of said decree, with interest thereon, and the costs, within sixty days from the filing of the mandate in this case in the proper court of the state of Iowa.

CHARLES McMICKEN, PLAINTIFF IN ERROR, v. AMOS WEBB, MARY ANN SMITH, IN HER OWN RIGHT AND AS TUTRIX, &C., AND IRA SMITH, IN HIS OWN CAPACITY AND AS TUTOR TO THE MINORS, CATHARINE AND SARAH SMITH.

Where a promissory note, payable to a firm, was signed by one of the partners in the firm together with two other persons, and suit was brought upon it against these two other persons in the name of the payee partner, upon the ground, that the note was intended for his individual benefit, and that the insertion of the name of the firm as payees was an error, it was clearly his duty to prove such error upon the trial.

If these two other persons were merely sureties (a fact for the jury), proof of such error would not make them liable beyond the terms of their contract, unless they were privy to and agreed to the same. Neither a court of law nor equity will lend its aid to affect sureties beyond the plain and necessary import of their undertaking. This is the doctrine of this court, of the state courts, and of England.¹

The payee partner having brought into the evidence the terms upon which the partnership was dissolved, by which it appeared to be his duty to collect the assets, pay the debts, and settle the concerns of the partnership, it was competent for the jury to judge whether the note was given provisionally and designed to abide the settlement of the affairs of the firm, and if so, then it became necessary for the payee partner to prove the fulfilment of these duties before any right of action upon the note accrued to him.

The note being drawn by one of the partners payable to his own firm, this drawer partner was entitled to one half of it, and the obligation of the sureties was diminished *pro tanto*.

¹ S. P. *McGill v. Bank of United States*, 12 Wheat., 512; s. c. 1 Paine, 661; *Farrar v. United States*, 5 Pet., 373; *Leggett v. Humphreys*, 21 How., 67; *Brown v. Burrows*, 2 Blatchf., 340; *Cage v. Cassidy*, 23 How., 109; *Swan-son v. Ball, Hempst.*, 39; *United States v. Cheeseman*, 3 Sawy., 424. And the contract is to be construed strictly. *Miller v. Stewart*, 9 Wheat., 680.

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Where the plaintiff excepted to the opinion of the court, which opinion was more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although there may have been error in the instructions, provided that error consisted in giving the plaintiff too much.²

*THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana. [*293

It was formerly, in a preliminary stage of it, before this court, and is reported in 11 Pet., 25.

The facts of the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Coxe*, for the plaintiff in error, and *Mr. Jones*, for the defendant.

Mr. Justice DANIEL delivered the opinion of the court.

The record in this cause being encumbered with matter deemed wholly irrelevant to the true points in controversy between the parties, much of this matter the court will pass over, embracing within its view such portions of the record only as regularly present those points, and the rulings of the Circuit Court with respect to them. In this view, little else need be presented except the pleadings in the cause, the note on which this action is founded, the fact of a copartnership between the plaintiff in error and James H. Ficklin, and the agreement comprising the terms on which the copartnership was dissolved, these three last mentioned documents being referred to in the pleadings and appealed to by the parties on both sides of this cause to sustain the positions on which they respectively rely; and lastly, the instructions prayed by the parties and given by the Circuit Court.

This is, according to the peculiar proceedings in the state of Louisiana, an action at law, although, from the mode of proceeding by petition, from the introduction into that petition of various matters de hors the instrument set out as the immediate cause of action, and from the converting in one proceeding parties standing *sui juris* with those who sustain a representative character, it bears a striking resemblance to a suit in equity.

The petition states, that, some time in the year 1815, the

² An application of the well settled rule that errors which have not injured the appellant or plaintiff in error will be disregarded on appeal or error. *Randon v. Toby*, 11 How., 493; *Thomas v. Lawson*, 21 Id., 343; *Chandler v. Von Roeder*, 24 Id., 225; *The Water Witch*, 1 Black, 494; *Blackburn v. Crawford*, 3 Wall., 175; *Johnson v. McLain*, Hempst., 59; *Fisher v. Reider*, Id., 82; *Wilson v. Eads*, Id., 284. But the error must be plainly shown to have been non-prejudicial. *Deery v. Cray*, 5 Wall., 795.

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plaintiff and one James H. Ficklin formed a copartnership and transacted business under the name of McMicken and Ficklin; that about the 8th of September, 1817, the said copartnership was dissolved by mutual consent; that at the time of said dissolution there was a stock of goods on hand, which said Ficklin took and purchased at cost, with five per cent. addition thereon, and for the payment of one half of said stock of goods he gave to the petitioner a promissory note, dated September 20th, 1817, due and payable on the 1st day of March, 1819, to the order of McMicken and Ficklin, for the sum of \$4,866.93 $\frac{1}{2}$, executed by said Ficklin, by Jedediah *Smith, and Amos Webb, the defendant, whereby the drawers became bound to pay the whole of the said note, which note is annexed as a part of the petition.

The petitioner then proceeds as follows:—

“Your petitioner further shows that said obligation was erroneously made payable to McMicken and Ficklin, though in truth and in fact said note was dated and executed subsequent to the said dissolution of said firm, and was made towards and in behalf and for the sole and individual benefit of your petitioner, the joint name, or the name of the late firm, being used and intended for your petitioner’s sole benefit,—said Ficklin being in no wise a party or interested therein except as one of the obligors.

“Your petitioner further shows, that since the execution of the said note or obligation, the above-mentioned Jedediah Smith, one of the coobligors thereof, died, leaving his wife, the said Mary Ann Smith, and two minor children, Catharine and Sarah, all of whom now own and possess all the property and estate by the said Jedediah Smith left at his decease.

“The mother in right of her community, and said minors as heirs, and the said Mary Ann Smith, the widow of said deceased, has since married one Ira Smith, the said defendant herein, by reason of which said several premises, the said Mary Ann, Catharine, and Sarah have become obligated and bound, *in solido*, to pay your petitioner the whole amount of said note or obligation, together with interest, according to the tenor and effect thereof, which they refuse, though often and amicably demanded to pay.”

The note on which this action was instituted and referred to in the petition is in the following words:—

ST. FRANCISVILLE, Sept. 20th, 1817.

\$4,866.93 $\frac{1}{2}$. On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-

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six dollars ninety-three and a half cents, being for value received, with ten per cent. interest after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

The only remaining documentary evidence referred to in the petition, and in accordance with which it is alleged that the note in question was executed, is found in the agreement entered into by McMicken and Ficklin upon the dissolution of their copartnership, and is in the following words:—

*“Memorandum of an agreement, made and entered into this 8th day of September, 1817, between Charles [*295 McMicken, jun., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm of McMicken & Ficklin; that they have this day by mutual consent dissolved their copartnership aforesaid, and that Charles McMicken, jun., is put in full possession of all the books, notes and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all the dues and demands owing to the said firm, either at law or otherwise, by exchange or re-exchange of notes or accounts, or any other mode he may think advantageous to the concern; and when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same, until full and final payment and settlements are made; and to employ at his discretion such person or persons as he shall think necessary, for the completion of the business; and that James H. Ficklin take all the goods on hand at cost, with an advance of five per cent. on the whole amount, payable as follows, viz., three thousand by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in the same manner (or some good house in New Orleans in their stead) for any further sum to meet the one half of the whole amount of goods, payable on the 1st day of May, 1818, and for the remaining half he gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st March, 1819; and by the non-compliance of James H. Ficklin in giving the aforesaid acceptances and note, this agreement to remain null and void, so far as the sale of the goods to him; and all the sales of goods by him, for the period of thirty days, the time allowed him to comply with the foregoing, shall be carried to the joint benefit of the last firm.

“In witness whereof we hereunto subscribe our names, the day and date above written.

“JAMES H. FICKLIN,
CHARLES McMICKEN.”

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Several pleas were interposed by the defendants or respondents below to the demands in the petition. The court deem it necessary to advert to such of these pleas only as are connected with the points comprised in the rulings of the judge at circuit.

Thus in the 3d plea it is denied that the note in question was made to the petitioner, and that Ficklin, Webb, and Smith ever promised to pay the money therein mentioned to McMicken alone, or that the note was made on behalf of *296] McMicken, or that the partnership name of McMicken and Ficklin was intended *to be used for the benefit of McMicken alone. They insist upon the contract as apparent on the face of the note, and call for strict proof of the allegations of the petitioner. They aver that it was well known that Webb and Smith signed the note as sureties,—that, if there ever was any consideration for their obligation, it has failed, and that neither Ficklin, as principal, nor Webb and Smith, as sureties, were ever bound to pay this note.

4. They plead further, and *specially*, a want of consideration, averring that Ficklin, as partner, was entitled to one half the stock; that he paid McMicken for one half by drafts and acceptances, mentioned in the article of dissolution, which were paid; that the demand of McMicken for the note of Ficklin, Webb, and Smith for the other half was a fraudulent contrivance, or an error or misconception of the parties, and could form no legal consideration for the note.

5. They further plead, that the note was executed by Ficklin, as principal, and Webb and Smith, as sureties, to McMicken and Ficklin, of which firm Ficklin was a partner; that by the dissolution of the firm one half of Ficklin's responsibility was extinguished by confusion, and Webb and Smith became thereby absolved *pro tanto*; that, under the agreement for the dissolution, McMicken had received \$10,000 more than was requisite to pay the debts of the firm, for which excess he was accountable by the above agreement, and that thereby the note, to which Webb and Smith were mere sureties, was paid.

They further plead, that the note became due by its terms on the 1st day of March, 1819; that Ficklin died in 1817, leaving a will and appointing executors; that his estate has been regularly represented by executors since his death, and that by the laches of McMicken, in not settling the affairs of the concern or suing on the note from 1819 to 1835, he is barred by his negligence and by lapse of time.

And, lastly, they insist that, upon the dissolution of the firm of McMicken and Ficklin, McMicken had received all the books, notes, and claims due to the firm, and bound himself to

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settle all the affairs of the concern out of these funds, so far as they should prove adequate; that Ficklin was to take the goods on hand, to pay McMicken for one half of that stock in certain acceptances, and to execute his note, with Webb and Smith as sureties, for the remaining half in value, subject to a contingent responsibility upon the settlement of the concern by McMicken; that McMicken had not made such settlement according to the terms of the agreement of dissolution, and therefore had no right of action against the representatives of Ficklin or the respondents.

*At the trial of this cause, the following instructions [*297
prayed for by the defendants were given by the court,
and made the subjects of exception by the plaintiff:—

1st. That as plaintiff had alleged that there was error in making the note sued on, drawn in favor of and payable to McMicken and Ficklin, and that said note ought properly to have been made in favor of Charles McMicken only, plaintiff could not recover without proving such error and mistake; and if no such error or mistake was proved, the verdict of the jury ought to be in favor of defendants; for, without such proof, McMicken alone could not recover on a note drawn in favor of McMicken and Ficklin.

2d. That if the jury were satisfied that Webb and Smith were originally only sureties, and that whatever consideration there was for the note passed between McMicken as one party, and Ficklin as the other party, in such case an express written contract on the part of sureties is to be strictly construed in their favor, and they could only be made liable on their contract in the form and manner in which they had entered into it; and no proof of any error or mistake, as between the principal parties to the contract, could make mere sureties liable beyond the terms of the contract, unless they were privy to and agreed to the same; and if plaintiff could only recover against the principal party to the contract sued on by showing error or mistake in that contract, the verdict of the jury as regarded the sureties should be in their favor.

4th. That if the jury believed that the note sued on grew out of the settlement of the partnership affairs of McMicken and Ficklin, and was given provisionally in relation thereto, and that McMicken had charged himself with the settlement of the partnership affairs, that then McMicken cannot recover on this note without a final liquidation and settlement of the partnership affairs; and that if, under the circumstances aforesaid, McMicken persists in submitting the suit on this

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note to the decision of the jury, their verdict ought to be for the defendant.

5th. That if the jury believed that the note sued on was given to attend on a settlement and liquidation of the partnership affairs of McMicken and Ficklin, and McMicken charged himself with the liquidation and settlement of the partnership affairs of McMicken and Ficklin, and that McMicken has received partnership assets sufficient to pay the debts of the partnership, in such case plaintiff McMicken ought not to recover, and the verdict of the jury ought to be for the defendants.

6th. That if the jury believed that Ficklin was a partner *298] of the house of McMicken and Ficklin, to whom the note was *payable, and that the said house has long since been dissolved, and that the same Ficklin was principal debtor, and Amos Webb and Jedediah Smith were only sureties in the note sued on, that these facts created a confusion of the characters of creditor and debtor; and whenever such event happened, there was a payment of the note to the extent of the correlative characters of debtor and creditor, which in this case was one half.

7th. That if the jury believed that the note sued on was given in pursuance of the terms of the dissolution of partnership between McMicken and Ficklin, and under an implied agreement that, if the debts due to the partnership were not sufficient to pay the debts due by the partnership, then Ficklin and his sureties were to make good and supply one half of the deficiency, and that McMicken charged himself with the liquidation of the partnership affairs in 1817, and that McMicken had not rendered an account of such liquidation before bringing this suit, it was competent for the jury to say that there was such a laches, neglect, and default on his part as discharged the sureties.

1st. We can perceive no objection to the ruling of the court in this instruction; neither argument nor authority can be called for, to sustain a position so elementary and so trite as that the allegation and proof must correspond. In this case, the petitioner alleges a separate and exclusive right in himself; the proof which he adduces discloses an equal right in another. He avers this discrepancy to be the result of error; he must certainly reconcile this contradiction, or his claim is destroyed by conflict with itself.

2d. This second instruction we hold to be correct. Even as between principals, a court will not bind parties to conditions or obligations to which they have not bound themselves, according to a fair interpretation of their contract. How far

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any written contract may be explained, as between parties confessedly principals, by evidence *aliunde*, is a nice and difficult question, always approached with doubt and caution; but as against a surety, neither a court of law nor a court of equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not, as against him, assist in completing an imperfect or defective instrument, much less will it add a new term or condition to what he has stipulated.¹ He must be permitted to remain in precisely the situation in which he has placed himself; and it is no justification or excuse with another, for attempting to change his situation, to allege or show that he would be benefited by such change. He is said to possess an interest in the *letter* of his contract. *That this is the doctrine in England we see in the cases of *Nisbet v. Smith*, 2 Bro. Ch., 579; *Rees v. Berrington*, 2 Ves., 540, and *Boulbee v. Stubbs*, 18 Id., 20. It is the doctrine of this court, so declared in the case of *Miller v. Stewart et al.*, 9 Wheat., 680. It is probably the doctrine of all the states; *vid. Croughton v. Duvall*, 3 Call. (Va.), 69; *Hill v. Bull*, 1 Gilm. (Va.), 149. If, then, Webb and Smith were mere sureties in the note declared on, the plaintiff could not, by setting up another contract as formed or as intended to be formed between himself and Ficklin, transfer the responsibility of these sureties to such contract, differing in its terms from that which they had in fact executed.

4th and 5th, which should be numbered the 3d and 4th instructions. These two instructions are essentially the same. The petitioner, in his count or petition, sets out the fact of the dissolution of the firm of McMicken and Ficklin, and refers to the agreement of dissolution as evidence of the conditions on which it took place, and of the rights vested and the obligations imposed by that agreement. It is from this document that we gather the facts of the transfer of the goods on hand to Ficklin, in consideration of the acceptances to be procured and of the note to be executed by him, with Webb and Smith as his sureties, and the further facts of McMicken's possession of all the books, notes, and accounts of the firm, and of his obligation to collect the resources and to pay the debts and settle all the affairs of the concern, so far as the means placed at his command were adequate for these ends. The above facts, disclosed by the petition and the agreement of dissolution, were certainly competent evidence for the consideration of the jury, and from which they might infer the purpose for which

¹ APPLIED. *Smith v. United States*, 2 Wall., 235.

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the note to McMicken and Ficklin was executed, the duty of McMicken to settle the partnership affairs, and to pay the debts of the concern with the funds placed at his disposal; and if they should infer from these facts, that the note executed to McMicken and Ficklin was given provisionally, and designed to abide the settlement of the affairs of the firm, and that McMicken was bound by the agreement of dissolution to liquidate and settle the affairs of the firm, then the jury were bound to find that the fulfilment of these obligations on the part of McMicken should precede any right of action on the note, and that, without proof of such fulfilment, they were equally bound to find for the defendants.

6th. This instruction affirms a position, as to which, we presume, there can be no room for difficulty or doubt; namely, that on the note given by Ficklin to his own firm of McMicken *300] and Ficklin, with Webb and Smith as sureties, Ficklin, as a partner, *was entitled to one half, upon the dissolution of the firm, and that thereupon, *pro tanto*, the obligation of these sureties would cease, as Ficklin could have no right of action against himself to compel payment to himself.

7th. With regard to the instruction numbered 7, given on the prayer of the defendant, we deem it to be in substance the same with Nos. 3 and 4, which having been already examined and approved, it is unnecessary to review in detail the same questions in the last instruction.

There is, also, though not designated by any number, what is denominated in the record an "additional charge" prayed by the defendants. This, upon examination, being found a mere general legal proposition in the language of the 2094th article of the Civil Code, and no immediate application or connection of which to the pleadings or testimony in this case being attempted nor being perceived by the court, it is passed by as immaterial and unimportant.

On the part of the plaintiffs, there are instructions prayed, and designated on the record as No. 2 and No. 3; and in No. 2 by the irregular ordinal arrangement of 4th and 7th; in No. 3 in the arrangement of 1st, 2d, and 3d.

Instruction 4th, in the first division, is in the following words:—"That the defendants to this suit, having bound themselves *in solido*, cannot claim the right or oblige the plaintiff to discuss the property of Ficklin or his succession. (Civil Code, art. 3015, 3016.) The court below very properly disposed of this prayer (as it might have disposed of what was called the additional charge prayed on behalf of the defendants), by justly remarking, that its applicability to the cause was not perceived, as the defendants were not endeavoring to

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interfere with the property or affairs of Ficklin any farther than to assert the true import and character of their own contract with McMicken and Ficklin, which they had an unquestionable right to do.

With regard to the prayers 1st, 2d, and 3d, in No. 3, although their relevancy to the true issues taken in this cause is not shown, and the opinion of the court is perhaps not sustainable with respect to them, yet as that opinion, so far as expressed, is more adverse to the defendants than to the plaintiff, and the defendants have not asked its reversal, no right can be recognized in the plaintiff to complain that he has failed to obtain all he required, when he has already obtained too much. Upon an examination of this somewhat anomalous and confused record, we have come to the conclusion, that the judgment of the Circuit Court should be, and it is hereby accordingly affirmed.

** Order.*

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

THE PLANTERS' BANK OF MISSISSIPPI, PLAINTIFFS IN ERROR,
v. THOMAS L. SHARP, EDWARD ENGLEHARD, AND HENRY
HAMPTON BRIDGES, DEFENDANTS IN ERROR.

MATTHIAS W. BALDWIN, GEORGE VAIL, AND GEORGE
HUFTY, MERCHANTS AND PERSONS IN TRADE UNDER
THE NAME, STYLE, AND FIRM OF BALDWIN, VAIL &
HUFTY, PLAINTIFFS IN ERROR, v. JAMES PAYNE, AB-
NER E. GREEN, AND ROBERT Y. WOOD, DEFENDANTS
IN ERROR.

Where a bank was chartered with power to "have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind soever, nature, and quality, and the same to grant, demise, alien, or dispose of for the good of the bank," and also "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," &c., and, in the course of business under this charter, the bank discounted and held promissory notes, and then the legislature of the state passed a law declaring that "it shall not be lawful for any bank in the state to transfer,

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by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant,"—this statute conflicts with the Constitution of the United States, and is void.¹

THESE two cases were both brought up, by writ of error issued under the twenty-fifth section of the Judiciary Act, from the High Court of Errors and Appeals for the state of Mississippi.

They were kindred cases, and were argued together. Although the court pronounced an opinion in each case separately, yet the dissenting opinion of Mr. Justice Daniel treats them as they were argued, and hence it becomes necessary to blend the two cases together. The facts in each case will be stated, then the arguments of counsel, and then the opinions of the court, with the separate opinion of Mr. Justice McLean, and the dissenting one of Mr. Justice Daniel.

PLANTERS' BANK v. SHARP AND OTHERS.

*302] On the 10th of February, 1830, the legislature of Mississippi *passed "An act to establish a Planters' Bank in the state of Mississippi."

The sixth section of the charter enacts, among other things, that the bank "shall be capable and able, in law, to have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, not exceeding in the whole six millions of dollars, including the capital stock of said bank, and the same to grant, demise, alien, or dispose of for the good of said bank."

The seventeenth section gives power "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the states in the nature of discount on real property, secured by mortgage," &c.

The twenty-second section enacted, "that it shall not be lawful for said bank to discount any note or notes which shall not be made payable and negotiable at said bank."

By a supplement to the charter, passed in 1831, and accepted by the bank, it was provided that "such promissory notes

¹ DISTINGUISHED. *Grand Gulf R. R. & Co. v. Marshall*, 12 How., 167. LIMITED. *McIntyre v. Ingraham*, 35 Miss., 56. CITED. *Davis v. Tileston*, ante, *120; *Pennsylvania College*

Cases, 13 Wall., 214; *Edwards v. Kearzey*, 6 Otto, 601; *Blackburn v. S. M. & M. R. E. Co.*, 2 Flipp., 542; *Collins v. Collins*, 79 Ky., 91. And see *Marvine v. Hymers*, 12 N. Y., 223.

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shall be made payable and negotiable on their face at some bank or branch bank."

On the 24th of May, 1839, Sharp, Engelhard, and Bridges gave their promissory note to the Planters' Bank for one thousand dollars, due twelve months after date. A copy of the note is not to be found in the record, but the declaration states it to have been "payable and negotiable at the office of the Planters' Bank of the state of Mississippi, at Monticello."

On the 21st of February, 1840, the legislature of Mississippi passed "An act requiring the several banks of the state to pay specie, and for other purposes," the seventh section of which was as follows:—"It shall not be lawful for any bank in this state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant."

In October, 1841, the Planters' Bank brought a suit upon the note in the Circuit Court of Lawrence county (state court). The defendants pleaded the general issue, and a jury was sworn. The declaration and note having been read, the defendants filed the following plea:—

"And now, at this day, that is to say, on the second day of the term aforesaid, until which day this cause was last continued, come the said plaintiffs, by attorney, and the said defendants, *by attorney; and the said defendants [*303 say, that since the last continuance of this cause, that is to say, since the sixth day of the May term, 1842, of this court, from which day this cause was last continued, and before this day, that is to say, on the 10th day of June in the year 1842, at the county aforesaid, the said plaintiffs then and there being the owners of the said note sued on in this cause, and then and there being a bank within the state of Mississippi, and within the intent and meaning of the statute of this state, entitled, 'An act requiring the several banks in this state to pay specie, and for other purposes,' transferred the aforesaid note to the United States Bank of Pennsylvania, contrary to the statute in such cases made and provided; and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiffs ought further to be answered in this said action, and that the same may abate.

"Personally appeared in open court Thomas L. Sharp, one of the defendants in the above-stated case, who, being duly sworn, upon his oath says, that the matters and things set forth in the above plea are true in substance and fact. Sworn to and subscribed in open court. THOMAS L. SHARP."

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The plaintiffs demurred to this plea, upon the following grounds:—

1st. Because said plea is not assigned by counsel.

2d. Because said plea does not state the day, year, time, and place of the transfer of said note.

3d. Because the plaintiffs have a right by law to deal in promissory notes, bills of exchange, &c., secured by charter.

4th. Because the statute, the title of which is recited in said plea, is, so far as relates to transfers of notes, bills receivable, or other evidence of debt, unconstitutional.

5th. That said plea does not state to what terms said cause was continued.

6th. That said plea does not allege that said note was transferred for value received.

7th. That said plea is a plea in bar of this action, but does not conclude in manner and form as provided by law.

8th. That said plea was not presented until issue joined under the plea of *non assumpsit*, and the declaration and note read, and a jury impanelled to try said issue.

9th. That the statute referred to in said plea does not affect the plaintiffs.

10th. That the said defendants did not tender the costs of suit in said case, up to the time of their tendering said plea, with said plea.

*304] *11th. That said plea is not entitled in this cause.

12th. That the affidavit subjoined to said plea is not sufficient.

The defendants having joined in demurrer, the court, after argument, overruled it, and leave being granted to the plaintiffs to reply to the plea, an issue was joined in short by consent, and the cause proceeded, when the jury found a verdict for the defendants.

A bill of exceptions was taken by the plaintiffs' counsel, as follows, viz.:—

“Be it remembered, that on the trial of the above cause at the term aforesaid, after the case was submitted to the jury, and after the plaintiff had introduced his evidence upon the issue joined, the defendant introduced a witness, who proved that, since the suit in the above case was instituted, the note had been transferred to the United States Bank of Pennsylvania, the defendants offered a plea, in the words and figures following, to wit: [Then followed the plea above recited.]

“To the reception of said plea the counsel for the plaintiffs objected, which objection was overruled; to which opinion of the court the counsel for plaintiffs except, and having reduced

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their exceptions to writing before the jury retired, pray the same may be signed [and] sealed.

"Given under my hand and seal this 6th December, 1842.

(Signed,) A. G. BROWN. [SEAL.]"

Upon this exception, the case was carried up to the High Court of Errors and Appeals, which, at December term, 1842, pronounced the following judgment:—

"This cause having been submitted at a former term of this court, and the same having been duly considered by the court, it is ordered and adjudged, that the judgment of the Circuit Court of Lawrence county, rendered against the plaintiffs in error at the December term thereof, A. D. 1842, be and the same is hereby reversed, because rendered as a judgment in bar; and this court, proceeding to render the judgment that should have been pronounced by the court below, doth order and adjudge, that the plaintiffs in error, the plaintiffs in the court below, take nothing by their writ, and that the suit be abated."

To review this judgment, a writ of error brought the case up to this court.

BALDWIN, VAIL, AND HUFTY, v. JAMES PAYNE ET AL.

Matthias W. Baldwin, George Vail, and George W. Hufty, co-partners, brought this action on the 15th April, 1841, [*305 in the *Circuit Court of Jefferson county, Mississippi, against James Payne, Abner E. Green, and Robert Y. Wood, the makers, and the Mississippi Railroad Company, the indorsers, of two certain promissory notes, each in the sum of \$6,283.95, payable at the Merchants' Bank, New Orleans, the first, sixty days after December 4, 1839, and the other ninety days thereafter. The notes were without date on their face, and were discounted, at the instance of Payne, one of the makers, by the Mississippi Railroad Company, under their banking powers, on the said 4th December, 1839, to whose order they were made payable, and were by said company, on the 1st day of April, 1841, indorsed over, transferred, and delivered to the plaintiffs, for a valuable consideration.

The defendants, Payne, Green, and Wood, were served with process, and appeared and pleaded the general issue. They also pleaded the following special plea, viz.:—"That the said promissory notes, in the declaration of the said plaintiffs mentioned, were executed and delivered by them, the said defendants, to, and discounted by, the Mississippi Railroad Company, on the 4th day of December, in the year 1839, at the county aforesaid, and thereby became and were the

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property of the said Mississippi Railroad Company, to wit, on the day and year aforesaid, at the county aforesaid; and that the said promissory notes continued to be and were the property of the Mississippi Railroad Company from the day and year last aforesaid until and after the 26th day of April, in the year 1840, at the county aforesaid; after which 26th day of April, in the year 1840, to wit, on the 1st day of April, in the year 1841, at the county aforesaid, the said Mississippi Railroad Company, by their indorsement thereon, transferred the said two promissory notes, in the said declaration mentioned, to the said plaintiffs; and this they are ready to verify. Wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them."

To this special plea the plaintiffs demurred, and the defendants joined in demurrer.

The Circuit Court, on the 11th of November, 1842, sustained the demurrer, and awarded judgment of *respondant ouster*, but the defendants refusing further to plead, the court thereupon gave judgment upon said demurrer to the second plea for the plaintiffs.

On the same day, the cause, being dismissed as to the Mississippi Railroad Company, came on for trial before a jury, on the general issue, against the other defendants; and a special verdict was found, as follows, viz. :—"We, the jury, find that *306] defendants, James Payne, Abner E. Green, and Robert Y. Wood, *executed the two several promissory notes (described in the plaintiffs' declaration) on the 4th day of December, 1839, and on the same day delivered the said notes to the Mississippi Railroad Company, to be discounted for and on account of said James Payne; one of which said notes is for the sum of \$6,283.95, payable sixty days after the said 4th of December, 1839, to the order of the said Mississippi Railroad Company, at the Merchants' Bank in the city of New Orleans; and the other of the said notes is for the sum of \$6,283.95, also payable ninety days after the said 4th of December, 1839, to the order of the said Mississippi Railroad Company, at the Merchants' Bank in the city of New Orleans. That said two notes were discounted by said Mississippi Railroad Company, under their banking powers, on the said 4th day of December, 1839, at the instance of the first drawer, said James Payne, and the proceeds thereof were received by him, and the said company thereby became the holder of said notes. That the said notes, or either of them, were not paid at maturity, and were presented for payment at maturity, and protested for non-payment, and that no part of them, nor any interest has been paid by said defendants, or either of them.

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That the Mississippi Railroad Company, on the 1st day of April, 1841, being indebted to the plaintiffs, Baldwin, Vail, and Hufty, transferred and delivered said two several promissory notes to said plaintiffs, for a valuable consideration, in payment of said debts. If, upon the facts, the court is of opinion that the law is in favor of the plaintiffs, we find for the plaintiffs, and assess their damages at \$15,300.90. But if, upon these facts, the court is of opinion that the law is for the defendants, Payne, Green, and Wood, then we find in their favor."

The Circuit Court gave judgment, upon this special verdict, in favor of the plaintiffs; and the defendants thereupon took a writ of error to the High Court of Errors and Appeals. The cause was argued in the Court of Errors, and on the 11th day of November, 1844, the said court rendered their final judgment, viz.:—"That the judgment of the Circuit Court of Jefferson county be reversed and for nothing held, and that the defendants in error, the plaintiffs below, take nothing by their writ, and that the suit is abated."

The charter of the Mississippi Railroad Company was conferred by an act of the legislature of Mississippi, approved February 26th, 1836, entitled "An act to incorporate the Mississippi Railroad Company." By the first section of a supplementary act, passed May 12th, 1837, the company were "authorized and empowered to exercise all the usual rights, powers, and privileges of banking which are permitted to banking *institutions within this state, subject to [*307 the limitations and restrictions hereinafter mentioned." And by section eighth of said supplementary act, the company were, among other things, made capable "to purchase and sell real and personal estate, and to hold and enjoy the same to any amount not exceeding in value at any time \$500,000 over and above the property in and necessarily connected with said railroad." By the same section, its "banking privileges, rights, and powers were secured to said company until the 30th day of December, 1858."

The Planters' Bank of the state of Mississippi was an incorporated banking institution, existing within said state at the date of the foregoing charter.

From the above statement of these two cases, it is apparent that in the first one, viz., that of the Planters' Bank, the suit was in the name of the original payees of the note, and in the second, it was in the name of the indorsees, being brought in both cases against the makers of the notes. The main question in both was the constitutionality of the statute of Mississippi passed on the 21st of February, 1840.

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The two cases were argued, as has already been remarked, together, by *Mr. Wharton* and *Mr. Sergeant*, for the plaintiffs in error, and by *Mr. Coleman*, *Mr. Gilpin*, and *Mr. Webster*, for the defendants in error.

The counsel for the plaintiffs in error made the following points in the case of the Planters' Bank.

1. That by the final judgment of the High Court of Errors and Appeals of Mississippi in this suit, there was drawn in question the validity of the act of that state of the 21st day of February, 1840, on the ground of its being repugnant to the Constitution of the United States, and that the decision was in favor of the validity of the act.

2. That by said judgment in this suit, there was drawn in question the construction of the tenth section of the first article of the said Constitution, which declares that "no state shall pass a law impairing the obligation of contracts," and the decision was against the title and right specially set up and claimed by the plaintiffs in error, under such clause of the Constitution.

3. That the charter and supplemental charter of the Mississippi Railroad Company is a contract, within the meaning of the Constitution, between the people of the state of Mississippi, and the stockholders of the corporation and all claiming under the charter.

4. That the said charter authorizes the bank to trans-
*308] fer *notes, bills receivable, and other evidences of debt, belonging to it, and to destroy this right impairs the obligation of the aforesaid contract.

5. That the charter is an unqualified contract, and is all inviolable in point of obligation; and that the power to acquire and transfer its property aforesaid may, of right, be exercised with freedom from all restraints not contained in the charter, nor imposed by the law of Mississippi when the charter was granted; of which restraints there were none.

6. That the said law of Mississippi cuts off all suit in case of transfer, and is therefore unconstitutional.

7. That the said act is repugnant to the Constitution of the United States, unconstitutional, and void.

In the case of Baldwin, Vail, and Hurty, the following was an additional point:

That the plaintiffs in error were the holders of certain promissory notes put in suit by them, which they had purchased for value from a company that by its charter had the right to sell and transfer them, and that the judgment of the High

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Court of Errors and Appeals in favor of the defendants below, on the mere ground that the plaintiffs had possession of said notes by transfer from the Mississippi Railroad Company, impaired both the obligation of the contract between the state and the company, and that between the makers of said notes and the holders.

Mr. Wharton, for the plaintiffs in error, stated the circumstances of each case and the difference between them. The point was the same in both, viz., the right to transfer the notes, and the validity of the statute which forbid it. In the case of the Planters' Bank the judgment of the state court was, that the statute not only disabled the bank from transferring, but also that the bank itself had lost the right to sue, in consequence of such a transfer having been made whilst the suit was pending. The suit in this case was in the name of the original payees. In the other case the suit was brought by the indorsees. The transfer was pleaded as a defence, and the court sustained it. Therefore the judgment of the state court was, in the two cases, that neither the payee nor indorsee could maintain an action where a transfer had been made. We say that this decision is contrary to the Constitution of the United States. The principles upon which we stand are elementary. The state law was passed in 1840, after the grant of the charter and after the execution of the notes.

(*Mr. Wharton* then entered into a history of the decisions of this and other courts upon the following propositions:)

*1st. That a charter is a contract between a state and the corporation. 6 Cranch, 87, decided in 1810. A grant is an executed contract, and a repeal of the law cannot set it aside. 9 Cranch, 43, in 1815.

A legislative grant is not revocable. 4 Wheat., 518, in 1819; 1 Greenl. (Me.), 79, in 1820.

A statute granting corporate powers, when accepted, becomes a contract. 15 Mass., 245, in 1819; 8 Wheat., 464, in 1823; 10 Conn., 522, in 1835.

2d. A bank charter is as much a contract as any other charter. This precise point has not often been made. The right of a state to incorporate a bank has been made a question in one case only, viz., Peck (Tenn.), 269; Minor (Ala.), 23, in 1820; 2 Stuart (Ala.), 30, in 1829.

In both the last cases the court say that a bank charter is a contract between the state and stockholders, and cannot be changed unless with the assent of both parties. 4 Pet., 514, in 1830, where the tax was held constitutional, but the court

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say that the contract with the bank must be protected. See p. 560. 3 Wend. (N. Y.), 351, in 1832; 11 Pet., 257, in 1837.

A bank owned wholly by a state is constitutional. 9 Wheat., 407, in 1824.

Such a contract is protected by the Constitution. 3 How., 133.

3d. No state can pass a law impairing the obligation of a bank charter. This is a corollary from the other two propositions.

What, then, was the contract in these cases? The power to the Planters' Bank is given in words as comprehensive as possible. The only limitation is as to the amount of property to be held. The railroad charter refers to and adopts the bank charter. In both, there was a power to receive these notes, to hold them, and to alien or sell them. Before the restraining statute was passed, it would not have been easy to doubt these powers. The words, "grant, demise, alien, or dispose of," are as comprehensive as any words that could be used. "Goods, chattels, and effects" must include promissory notes. "Goods and chattels" would do so, but "effects" is still stronger. The legal meaning of "effects" is explained in Cowp., 299. Also 13 Ves., 39, 47, *n*.

Corporations, unless restrained by their charter, have control over their property, and may alienate it. 1 Kyd Corp., 108; 1 Sid., 161, cited by Kyd; Co. Litt., 44 *a*, 300 *b*; 10 Co., 306; 2 Kent Com., 281 (4th ed.); 3 Pick. (Mass.), 239; 1 Ves. & B., 226, 337, 340, 344; 2 Bland (Md.), 142; 5 Hamm. (Ohio), 205; 5 Wend. (N. Y.), 590; 1 Watts (Pa.), 385; 6 *310] Gill & J. (Md.), 305; *11 Vt., 385; 2 Stew. (Ala.) 401; 2 Wheat., 372; 5 Watts & S. (Pa.), 223.

The next question is, What did the legislature do to impair these rights? It said that the suit should abate. It is true, there was no final judgment in bar, but the right of maintaining an action was cut off for ever. If both judgments of the state court are correct, then neither the original payee nor the transferee can sue. No one can sue. If the legislature had merely forbidden the transfer, and suffered the original right of property to remain in the bank, then the bank could have sued for the use of the transferee. But the court have said that the fact of transfer abates the suit brought in the name of the bank.

The legislature could not do this. 1 Murph. (N. C.), 58, in 1805; 2 Hayw. (N. C.), 310, 374; 2 Mass., 142, 143, in 1806; 7 Cranch, 184, in 1812; 15 Mass., 447, in 1819; Peck (Tenn.), 1; 6 Wheat., 131; 6 Greenl. (Me.), 112; 2 Pa., 184; 2 Yerg. (Tenn.), 534; 7 Gill & J. (Md.), 7, 134; 2 Fairf. (Me.), 118.

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This court usually adopts the state construction of state laws. 10 Wheat., 152; 11 Id., 361; 3 Wash. C. C., 313.

If, then, this court adopts the Mississippi construction of this statute, all suits upon the notes are cut off; the contract is destroyed entirely. There is no difference between taking the whole or a part, if the obligation of the contract is impaired. What is the obligation of a contract? See 4 Wheat., 197, 207; 4 Litt. (Ky.), 34, 47; 12 Wheat., 318.

The Constitution refers to a legal, and not a moral obligation, and depriving the party of all remedy impairs the legal obligation. 8 Mass., 430; 2 Gall., 141; 2 Greenl. (Me.), 294; 3 Pet., 290; 8 Wheat., 17; 1 How., 316, 317; 2 Id., 608.

Mr. Coleman, for the defendants in error, laid down the following propositions:—

1. That the presumption is always in favor of the validity of a law; and that its invalidity or unconstitutionality must be clearly demonstrated by the party attacking it.

2. That corporate powers are to be strictly construed; and that corporations possess only such powers as are specifically granted them, or are necessary for the exercise of those expressly granted.

3. That neither by the charter of the Mississippi Railroad Company, nor by that of the Planters' Bank, nor by those of any of the other banks of Mississippi which were incorporated prior to the year 1837, has the power to transfer promissory notes been expressly given.

4. That the power to transfer promissory notes is not necessary to the exercise or enjoyment of any of the powers that have been expressly granted to said company.

*5. That the transfer or negotiation of promissory notes is not a legitimate banking operation; but, on the contrary, is subversive of the very end and object for which these institutions are chartered. [*311

6. That the seventh section of the act of 1840 is neither a partial law, nor does it divest vested rights; and that even were it liable to both these objections, they alone would not render it unconstitutional.

And as a conclusion necessarily flowing from the maintenance of the foregoing propositions, we hold, lastly,

That the seventh section of the act of 1840 neither directly nor incidentally impairs the obligation of any contract entered into by the state of Mississippi with the Mississippi Railroad Company, and is therefore a valid and constitutional law.

Upon the 1st point. 4 Dall., 19; 6 Cranch, 128. The propositions laid down by the counsel on the opposite side are not

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controverted. We admit all three, but say that the contract is not impaired.

Upon the 2d point. 4 Pet., 168; 2 Cranch, 167; 4 Wheat., 636; 15 Johns. (N. Y.), 358; Ang. & A. 192 (2d ed.), sec. 12; 2 Kent, 298, 299. Kent says that the modern doctrine is so. The cases cited on the other side are exploded.

3d point. If the argument upon the other side should be correct as to the Planters' Bank, it does not follow that it is so as to the railroad company, because only the usual banking powers are conferred upon the latter, and the power to transfer notes is not a usual banking power. The purposes and objects of the company could be attained without this power.

Moreover, to construe the word "effects" as including promissory notes will make two clauses of the charter inconsistent with each other. The capital was three millions, and the amount of notes issued was not to exceed three times the amount of capital paid in. Therefore the bank had a right to issue nine millions. But the sixth section limits the amount of property which it can hold to six millions. If notes are included within the "effects" of the bank, and it can hold only six millions, then the two sections are inconsistent with each other; and the only mode of reconciling them is to construe the words "property" and "effects" as exclusive of the banking capital. 3 Sm. & M. (Miss.), 677,—this case; 8 Rob. (La.), 417, 420,—a construction of this same statute.

4th and 5th points. The power does not necessarily follow. If so, to what granted power is this implied one necessary? The bank may keep its notes till they are due, and then collect them. It does not necessarily belong to the *jus disponendi*. Neither is it necessary to the right of acquisition.

*312] *In the case of Baldwin, Vail, and Hufty, the notes were the property of the transferee. But no case decides, that, if the original party had recovered possession of the note, a suit could not be maintained upon it. In the case of the *Planters' Bank*, why did not the bank reply to the plea, that it had regained possession of the note? This would have brought the question fairly up. The object of the legislature was not to destroy the note, but merely to repeal its negotiability, conferred first by the statute of Anne, and afterwards by the legislature of Mississippi. How. & H., 373, sec. 12.

The argument upon the other side would be sound, if by the charter the bank acquired an indefeasible right to transfer notes; and it is said to be so because no existing statute then prohibited transfers. But the property of negotiability

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is not essential to a note. It was regulated by a general act of the legislature, and might with propriety have been repealed.

6th. The objection that this law is partial, and relates only to banks, is not properly made here. This court has nothing to do with such a question. But the proposition is denied, that it is a partial law. 6 Cow. (N. Y.), 512, 169; 15 Wend. (N. Y.), 436.

Mr. Gilpin, on the same side, said, that the only question before the court was whether or not the law of Mississippi impaired the obligation of its contract with the bank. If it did, no court would be more ready to condemn it than the State Court of Mississippi. In this very case that court say:—"Legislation which impairs chartered rights is not only at war with the Constitution of the United States, but it is repugnant to a similar provision in our state constitution, and on that account would be inoperative. But if both these instruments were silent as to the power to impair the obligations of contracts, such legislation is essentially repugnant to the protective spirit of a well-organized government. In a government like ours, such power is totally out of the range of legislative authority," &c., &c.

No state goes further to uphold this clause of the Constitution than Mississippi. 1 How. (Miss.), 189; 6 Id., 672; 4 Sm. & M. (Miss.), 507.

Does the law in question impair the obligation of a contract? It only modifies the previous law relating to the assignment of debts or property, bearing only on assignments which took place after the passage of the law; it protects the debtor by saying that he shall not be exposed to different liabilities than those which he took upon himself; it adheres to the original contract; it leaves parties in the same situation where they placed themselves; it changed no obligation, but only forbade *the transfer of that obligation to any [*313 one else. All that it took from a promissory note was the benefit of a statutory regulation. The common law gave no right to transfer such property. According to Coke, choses in action were not assignable. The right exists only by the Statute of Anne, and courts have always confined the privilege to the letter of the law. 5 Pet., 597; 16 Mass., 452; 14 Id., 108.

The statute of Mississippi, of 1822, made notes transferable, and her courts recognize this as the only foundation of the right to transfer. 7 How. (Miss.), 391; 2 Sm. & M. (Miss.), 249.

With this public statute existing, the Planters' Bank was

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chartered. It was to perform banking operations, and nothing else.

The sixth section enumerates its powers, and, if the right to transfer exists, it must be found here.

The seventeenth prescribes its banking duties,—to “receive money,” &c.; not a word about the transfer of notes.

The twentieth says it may issue bank-notes.

The twenty-second limits its issue to three times the amount of capital paid in and deposits.

The thirty-first says it may sell securities, when they are mortgages. In all this, there is no right to transfer.

There is a distinction, all through the charter and the supplement, between corporate powers and banking powers. The first are only given to enable to execute the latter.

But if the argument upon the other side be sound, the bank could do anything. Under the general head of acquiring property, it might make a railroad.

The railroad company had less power than the bank. Its duties are specifically pointed out, and it is authorized to purchase and sell bills of exchange, but not a word about notes.

In 1840 (Pamphlet Laws, 13, 21), the legislature passed laws to remedy the evils of banks, to limit their issues, forbid dealing in cotton, stocks, &c. Are these all violations of the charter? In 1843, the legislature appointed commissioners to take charge of the assets of banks. The object of the law of 1840 was to give notice that notes were not transferable, but that the obligors should be protected. The assignee, therefore, took these notes knowingly. But the assignee of a bond cannot sue upon it after receiving notice that it is not to be transferred. Another object of the legislature was to compel the banks to receive their own depreciated paper in payment of debts. The borrowers had received this paper, and an assignment would cut off the right of set-off. The policy of all these laws will be defeated if the statute is overthrown.

*314] *The following have been adopted as principles in construing state laws:—

1st. The presumption is in favor of a state law. 1 Dall., 14.

2d. A contract between a bank and a state must be construed strictly. 2 Cranch, 167; *Osborn v. Bank of United States*, 9 Wheat., 738; 13 Pet., 587; 15 Johns. (N. Y.), 383; 2 Cow. (N. Y.), 700.

In the case before us, we are dealing with the contract between the bank and state, not that between the parties to the note. If it were the latter, the rule is, that a party taking a note after it is due takes it *cum onere*. 4 Dall., 370; 13 Pet., 65.

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The railroad company had no power to transfer vested in it by the charter. If it had the right at all, it must be found in the charter as an express grant, or it must have been held by the municipal law, which is always subject to be repealed.

As to the first branch. If granted in the charter, it must be found in the words "usual powers of banking." Does this clause include a power to sell? Even if the Planters' Bank had it specially, it would not pass to the railroad company under this general clause. In other states, the power to sell is not considered one of the usual banking powers. 1 Rev. Stat. N. Y., 178, sec. 6; 9 Mass., 54; 2 Cow. (N. Y.), 710.

What is the doctrine of this court, as expressed in the cases which have been decided? There are only thirteen where laws have been held unconstitutional, and not one of them is like the present.

(*Mr. Gilpin* here went through a critical examination of all the cases referred to by the opening counsel.)

Mr. Webster, on the same side, referred to all the laws of the state relating to the case, and also to a territorial act passed in 1812, and afterwards adopted by the state. This made bonds and notes assignable, whether drawn to order or not, but made the assignee liable to all equity occurring before notice of assignment.

Bills of exchange were exempted from the operation of the law of 1840. Why? Because the sale of them is expressly granted in the seventh section of the supplemental act. Selling them might be one of the mischiefs intended to be guarded against. But the legislature found the power within the charter, and therefore did not attempt to interfere with it.

In the case of the railroad notes, there was a special verdict. The counsel on the opposite side complain of it as a case of hardship. But how it is it made out? In December, 1839, two notes were given, one payable in 60, and the other in 90 days. *They were discounted on the same day. [*315 Neither was paid. They were protested, and remained so for more than a year. The bank then stopped payment itself. On the 1st of April, 1841, the bank indorsed these notes to the plaintiffs in error. So the jury find. But there is no purchase stated, no money paid. They were transferred to pay a previously existing debt. If the plaintiffs lose this suit, therefore, they are no worse off than they were before. They took the notes to see what they could make out of them, with the law staring them in the face. There is no hardship in the case.

The charter of the railroad company gave all necessary

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powers. If a case could be shown where it was necessary to sell notes, then the transaction would be within the charter. But it is difficult to make out such a case. The incidental powers of a corporation only reach and include what is necessary. 2 Kent, 298 (4th ed.); Ang. & A., 195 (2d ed.), chap. 5, sec. 2, and the cases there cited.

The amendatory act must be construed by the same rule. The power must be given by express grant, or it must be essential to the proper exercise of some granted power.

1. As to an express grant. There is none such found; on the contrary, it is excluded by the clearest indications of the act.

2. It is not essential. On the contrary, the exercise of it would be dangerous and subversive of the grant.

It has been said, that the express power is in the first and eighth sections of the amendatory act; that the "usual powers of banking" refer to the Planters' Bank, and that the word "effects" includes promissory notes, and the words "dispose of" are equivalent to "transfer." But the court of Mississippi did not think so. The declaration says the notes were "indorsed" to the plaintiffs. The words of the law are, that they shall not be "transferred." These two things are not identical. An indorsement is a new contract. The indorser parts with the paper and makes himself liable.

But the seventh section is still stronger. It says that they may "negotiate checks, drafts, and bills of exchange." If promissory notes were intended to be included, here was the place to put them in.

If the sixth section included every thing, why insert this at all? The seventeenth section says, "may discount bills of exchange and notes," "may renew notes." This supposes that the notes are lying in the bank, or they cannot be renewed. The twenty-second section says that all notes must be payable at the bank. This also infers that they must be there at all times.

*316] *The limitation of the power to issue would be effectually destroyed if the bank could sell and indorse notes, because there is no limit to such a proceeding. It is true, that the liability is contingent; but still it has ruined many corporations.

Is the power to transfer notes essential to the proper business of banking? On the contrary, it is entirely subversive of it. It is indorsing other people's paper,—mere brokerage. When the paper is assigned, interest upon it ceases to the bank. No well-conducted bank is ever reduced to such an emergency as to be obliged to sell paper.

(*Mr. Webster* illustrated this by a reference to 3 Anderson's

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History of Commerce, 143, for a history of the Bank of England, and then examined the decisions of this court which were alleged to be hostile to the positions which he had assumed.)

Mr. Sergeant, for plaintiffs in error, in reply and conclusion, spoke first of the merits of the cases. The makers of the notes had been represented to be willing to pay in the depreciated notes of the bank. Why did they not? The note fell due and remained in the bank for a long time, during which they could have paid in the notes of the bank. But they were now seeking to avoid the payment of a just debt by setting up the policy of the state. We ask for the benefit of the Constitution of the United States, which is paramount to Mississippi laws. The principles of this court are now adopted by the courts of the states, and it is a mistake to say that they are not acceptable to the people. The states say, pass the law, and if it is wrong the Supreme Court will overthrow it. If in these cases we ask, Did you not make these notes? the answer must be, Yes. Did you not promise to pay? Yes. Have you any defence but the one now set up, viz., the policy of the state? No. But if a whole community are set free from paying their debts, it is a policy which no one ought to wish to establish. This is a far-fetched defence. The defendants have reconciled their own consciences to it, but they are under the influence of self-interest. The aggregate of claims involved is two millions of dollars, every one of which is as just as this one. The Planters' Bank was chartered in 1830. Afterwards there were four more, the last in 1837. All these banks had an extensive capital, but the Planters' Bank was the favorite of the state. It was visible and felt everywhere. A mighty machine was set up, and its accounts have now to be settled with the people of the United States. Then came the railroad company, which commenced as such, and was afterwards vested with banking powers. The object of the supplementary charter was to add to, and not diminish, its powers. It conferred the powers *usual for banking purposes," [*317 "authority to deal in bills of exchange." It has been said that this excludes "notes." But by a fair construction it includes them; because it says, also, "checks, bills," &c., and then gives the same power over these checks, &c., referring to notes. There is no sense in the section upon any other construction. They have had a whirlwind in Mississippi, but they sowed the wind. The notes were given in 1839. Then everything was right enough. The bank could not collect them, because the debtors would not pay. What was the

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bank to do? Keep them in its drawer, and suffer its own creditors to remain unpaid? Keep its harvest locked up in the barn, and not give one sheaf to its creditors? There was no use in keeping the notes. They were given for a real consideration, and when suit was brought, there was no pretence of any defence. The record shows that there was none. There was no usury connected with them, and they were negotiable on their face. The result of the two suits together shows that all remedy by suit is lost. This court, in *Bronson v. Kinzie*, said that no additional burden should be put upon the creditor; but here his remedy is entirely gone.

The statute says that the bank shall not transfer any "note, bill receivable, or other evidence of debt." But it cannot pass these things to its creditor without transferring them, nor can it make a general assignment to trustees without transferring its choses in action. The laws of Mississippi do not prohibit debtors from giving preferences.

This act is retrospective. It acts upon existing contracts. But this is in opposition to the judgment of this court in the case of *Bronson v. Kinzie*. The opinion of learned and unlearned men would concur in this. We need only take the notes and the statute, and present the case to any mind. The answer must be, that the claimants are now without remedy, and that they are so in consequence of the law of 1840. Up to the time of assignment, the plaintiff was justly a creditor. Now, his claim is extinguished forever.

The object of the statute has been stated to be, to compel the banks to pay specie. But how can they do this, when they are prohibited from selling the things which will bring them specie? The charter required the bank to take paper which was "payable and negotiable at the bank." How negotiable? The law merchant describes this quality as passing from hand to hand by indorsement and delivery. The object must have been to give the bank the best kind of paper, such as it could use in an emergency by selling. It has been said *318] that the word "enjoy," in the charter, does not imply the *power of selling property; but how can a hungry man enjoy a dollar in his pocket without spending it?

It is an error to say that notes were not negotiable at common law. There never was a time in England when they were not so. The Statute of Anne only enabled the transferee to sue in his own name.

The state might as well have said that all bonds, mortgages, notes, &c., should be at once void, as to have declared this one so. If the legislature intended to protect debtors, the system of ethics has become inverted. Hitherto it has been

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thought to be the duty of a legislature to take care of creditors also.

They do not profess here to act only upon the remedy. They root up the contract. Before the act of 1840, the bank had these notes in hand, and they were negotiable. The act stopped their negotiability. It has been said that there is no authority in the charter to negotiate notes. Why? Because the legislature knew that all individuals had the right, and where a corporation was created, it would necessarily have it also. One great duty of a corporation is to pay its debts. Will it be said on the other side, that it cannot do so unless expressly authorized in its charter? Under what law can it make a general assignment? A corporation has no faculty to do wrong. If it can use any other species of property to pay its debts, much more can it use that kind which is most readily applicable, most convenient, and most proper, namely, its own evidences of debt.

Mr. Justice WOODBURY delivered the opinion of the court.

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The question to be considered in this case is, whether an act of the legislature of Mississippi, passed February 21st, 1840, impaired the obligation of any contract which the state or others had previously entered into with the Planters' Bank.

If it did, the clause in the Constitution of the United States, expressly prohibiting a state from passing any such law, has been violated, and the plaintiffs in error are entitled to judgment.

But, on the contrary, if that act does not impair the obligation of any contract, the judgment below in favor of the defendants must be affirmed.

In considering this question, no peculiar liberality of construction in favor of a corporation, so as to render that an encroachment on its rights which is not clearly so, seems to be demanded of us by any more sacredness in the character of a *corporation or its rights than in that of an [*319 individual; but rather, that its charter as a public grant is not to be construed beyond its natural import. 8 Pet., 738; 3 Id., 289; 4 Id., 168, 514. The inviolability of contracts, however, and the faithful protection of vested rights, are due to the one no less than the other, and are both involved in the present inquiry, so far as affecting, by way of principle or precedent, all the various and vast interests of this kind existing over the whole Union.

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Mr. Madison denounced laws impairing the obligation of contracts as among those not only violating the Constitution, but "contrary to the first principles of the social compact and to every principle of sound legislation." (Federalist, No. 44.)

Again, in *Payne et al. v. Baldwin et al.*, 3 Sm. & M. (Miss.), 677, one of the cases now before us, it is truly admitted, that, "in a government like ours, such power is totally out of the range of legislative authority."

At the same time, it is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the judiciary should be strong to uphold them.

Certainly it will be only when they depart from limitations or qualifications of this character, and so use their own rights as to impair the prior rights of others, that a check must be used, however unpleasant to us, by declaring that the constitutional restrictions of the general government must control a statute of a state conflicting with them, and thus, for harmony and uniformity, make the former supreme, in compliance with the injunctions imposed by the people and the states themselves in the Constitution. Governed by such views, we proceed to the examination of the questions arising here, by ascertaining, first, what powers the legislature of Mississippi granted to the plaintiffs, and then what powers it has taken away from them.

On the 10th of February, 1830, "An act to establish a Planters' Bank in the state of Mississippi" passed, and, among other privileges, in the sixth section, granted that the bank "shall be capable and able, in law, to have, possess, receive, *320] retain, and enjoy, to themselves and their successors, lands, *rents, tenements, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, not exceeding in the whole six millions of dollars, including the capital stock of said bank, and the same to grant, demise, alien, or dispose of, for the good of said bank."

The seventeenth section gives power, also, "to receive money on deposit, and pay away the same free of expense,

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discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the states in the nature of discount on real property, secured by mortgage," &c.

Doing business with these powers, amounting, as it has been repeatedly settled, to a contract in the charter for the use of them (see cases in the West River Bridge, at this term), the bank, on the 24th of May, 1839, took the promissory note on which the present suit was instituted, and, on the 10th day of June, 1842, transferred it to the United States Bank, having first commenced this action on it, the 11th of October, 1841.

But in the meantime, after the execution of the note, though before its transfer, the legislature of Mississippi, on the 21st day of February, 1840, passed a law, the seventh section of which is in these words:—"It shall not be lawful for any bank in this state to transfer by indorsement or otherwise any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant." (See Acts of 1840, p. 15.) This law constitutes the only defence to a recovery in the present case by the plaintiffs. But they contend it is invalid, because, by the Constitution, art. 1, § 10, "no state" shall pass any law "impairing the obligation of contracts;" and this law does impair it, in this instance, in two respects. First, in the obligation of the contract in the charter with the state; and secondly, in the obligation of the contract made by the signers of the note declared on with the bank.

To decide understandingly these questions, it will be necessary to go a little further into the true extent of those two contracts under the powers held by the bank, and likewise into the true extent of the subsequent act of the legislature affecting them.

That promissory notes are to be regarded as either goods, chattels, or effects, within the sixth section of the charter, can hardly be questioned, when it includes these "of what kind soever, nature, and quality." This addition evidently meant to remove any doubt or restriction as to the meaning of those *terms, as sometimes employed in connection with peculiar subjects, and to extend the description by them to every kind of personal property belonging to the bank. This construction would go no further than sometimes has been done in England, holding the words *goods and chattels* to

include choses in action, as well as other personal property (12 Co., 1; 1 Atk., 1182), and by the word *goods* alone, in a bequest, it has been held that a bond will pass (Anonymous, 1 P. Wms., 127).

So, in respect to *effects*, it has been held, when the word is used alone, or *simpliciter*, it means all kinds of personal estate. 13 Ves., 39, 47, note; *Michell v. Michell*, 5 Madd., 72; *Hearne v. Wigginton*, 6 Id., 119; Cowp., 299. But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*. Here, however, instead of restraining terms being used with it, those most broad and enlarging are added, being "effects of what kind soever, nature, and quality." *Hotham v. Sutton*, 15 Ves., 326; *Campbell v. Prescott*, 15 Id., 500; 3 Id., 212, n.

The same rule prevailed in the civil law, under the term *bona mobilia*. (1 P. Wms., 267.) And by that law, as well as the common law, promissory notes or choses in action come under the category of movable goods or personal property, as they accompany the person. 2 Bl. Com., 384, 398.

The bank was allowed, also, by the seventeenth section, "to discount bills of exchange and notes;" and, in truth, promissory notes usually constitute a large portion of the property of such institutions. Such notes, also, not only by general usage and established forms, are, in most cases, made to run to banks or their order, and must be expected to run so when the banks please; but it is expressly provided, by the twenty-second section of this charter, that "it shall not be lawful for said bank to discount any note or notes which shall not be made payable and *negotiable* at said bank," &c. And, again, by an amendatory act, accepted by the bank, it was provided, on the 9th of December, 1831, "that such promissory notes shall be made payable and *negotiable* on their face at some bank or branch bank."

But why made negotiable, if no right was to exist to negotiate or transfer them? The bank, then, as the legal holder of such notes, possessed a double right "to dispose" of them; first, from the express grant in the charter itself, empowering them, as to their "goods, chattels, and effects, of what kind soever, nature, and quality," "the same to grant, demise, alien, or dispose of, for the good of said bank" (sixth section); secondly, by an implied authority, incident to its charter and business, and the express requirement that the

*322] notes should be * "negotiable on their face." We do not refer to the next ground because it is necessary to resort to implication or analogy to establish an authority in the bank under its charter to make a transfer of its notes, when it pos-

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sesses that authority by the very words and spirit of the contract made in the charter by the state.

But to make the correctness of this conclusion from the specific words of the charter stronger and undoubted, it will be found to be the natural, useful, and proper view of its powers as a bank, under all sound analogy and necessarily implied authority.

To reach this end, it is not indispensable to hold that corporations in modern times possess numerous incidental powers, equal to those of individuals, as was once the doctrine (Kyd Corp., 108; 2 Kent Com., 281, and cases in those treatises); but seems now in some respects overruled. *Earle v. Bank of Augusta*, 13 Pet., 519, 587, 153; 2 Cranch, 167; 12 Wheat., 64. But merely to hold, as it often has been in late years, that what is necessary and proper to be done to carry into effect express grants, and which is nowhere forbidden, may in most cases be lawful.

Though such a power as this last to Congress is expressly added in the Constitution of the United States, yet it has been considered by some that it would exist as a reasonable incident, under reasonable limitations, without any such express addition. 2 Kent Com., 398, and cases there cited.

Thus a corporation, if once organized, has the implied power to make contracts connected with its business and debts, and through agents and notes as well as under its seal. *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299; 8 Wheat., 338; 12 Id., 64; 11 Pet., 588.

So it may hold and dispose of property even in trust, if not inconsistent and unconnected with its express duties and objects. *Vidal et al. v. Girard's Ex'rs*, 2 How., 127.

Hence a power to dispose of its notes, as well as other property, may well be regarded as an incident to its business as a bank to discount notes, which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed on the authority to transfer them.

Not that a banking corporation has under its charter a constructive power to follow another independent branch of business, such as manufacturing or foreign trade, but merely the business of banking, and to do such acts as are necessary and proper or usual to carry that business into effect, and such as are in harmony with the letter and spirit of its charter.

*Nor even that it can adopt any course as an incident, [*323 and as necessary and proper, which is merely convenient, or which is expressly forbidden by the charter, or so

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forbidden by any previously existing laws in the state of a general character.

But in discounting notes and managing its property in legitimate banking business, it must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house, and for any "goods and effects" connected with banking which it may properly own. It is its duty to pay in some way every debt. 6 Gill & J. (Md.), 219. This court, in the *United States v. Robertson*, 5 Pet., 650, has expressly recognized the authority of a bank to give bonds and assignments to pay its deposit debtors. In that case, "the directors agree to pledge to the government of the United States the entire estate of the corporation as a security for the payment of the original principal of the claim," &c. (p. 648). And such a pledge or transfer was held there to be valid.

It is said, in opposition to this, Why should a bank be considered as able to incur debts? or why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities? Such inquiries overlook the fact, that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates, or bank-book credits to individuals, are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank-notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge. See *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 307; 13 Pet., 593.

It may, to be sure, independent of justifications like these, not be customary for banks to dispose of their notes often. But in exigencies of indebtedness and other wants under pressures like those referred to, it may not only be permissible, but much wiser and safer to do it than to issue more of its own paper, too much of it being already out, or part with more of its specie on hand, too little being now possessed for meeting all its obligations. Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of business. (Ang. & A. Corp., p. 104, § 9; 4 Johns. (N. Y.), Ch., 307; 2 Kent Com., 283; 11 Serg. & R. (Pa.), 411.) Both

*324] may sell notes to liquidate their debts, both sell their lands *acquired under mortgages foreclosed, or acquired under the extent of executions not redeemed. Both, too, must

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be able to sell all kinds of their property, when proceeding to close up their business, or find it impracticable. Nor is there any pretence here that any clause in the charter of this bank restricted it from selling its notes or other property under any circumstances, and much less under those, connected with indebtedness and with banking, which have just been referred to. It will be seen, in this way, that all analogies seem to sustain the right which exists by the express grant in this charter, to "alien and dispose of" all its "goods, chattels, and effects, of what kind soever, nature, and quality, for the good of said bank." But to avoid differences of opinion, we place the right here solely on the express grant. It ought, perhaps, to be added, that the courts of Mississippi once put a more limited construction on this charter. *Baldwin et al. v. Payne et al.*, 3 Sm. & M. (Miss.), 661.

But as that very case is now before us for revision, on the ground that it was erroneous, we feel obliged, for that and other reasons, which need not be here enumerated, to put such construction on the charter, and on the law supposed to violate it, as seems right according to our own views of their true intent.

Having thus ascertained the extent of the contract made by the state with the bank in the charter, we proceed next to examine the character and scope of the contract between the maker of the note and the bank.

We have already seen that the bank was not only authorized, but expressly required, to discount notes which were negotiable, or, in other words, which contained a contract or stipulation to pay them to any assignee. Nor is it pretended there was any law of Mississippi, when this charter was given or when this note was taken, which prohibited selling it, and passing to an assignee all the rights, either of property or of bringing a suit in his own name, which then existed with individuals and other banking institutions.

What law existed on this point when the note was actually transferred is not the inquiry, but what existed when it was made, and its obligations as a contract were fixed. The law which existed at the transfer, so far from being the test of the force of a contract made long before, and under different legal provisions, is the violation of it, and the very ground of complaint in the present proceeding.

This contract, then, by the bank with the maker, when executed, enabled the former to sell or assign it, and the indorsee to collect it, not only by its express terms, but by the general law of the state, then allowing transfers of negoti-

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able *paper and suits in the name of indorsees. How. & H. Laws, 373.

Indeed, independent of the last circumstance, it is highly probable, that, by the principles of the law of contracts and commercial paper, such choses in action may be legally assigned or transferred everywhere, when not expressly prohibited by statute. This was done before the Statute of Anne, in England. And it is done since, as to paper both negotiable and not negotiable, independent of that statute.

If such notes cannot be sued in the name of the indorsee, when running to order, without the help of a statute, they certainly can be sued in the name of the payee, for the benefit of the indorsee, when the transfer is legal in its consideration and form.

The state itself, by passing this law prohibiting the transfer of notes by banks, recognizes the previous right, as well as custom, to transfer them; otherwise, the law would not be necessary to prevent it. Nor is this law supposed to have been founded on any prior abuse of power in negotiating or selling its notes, which, if existing, might obviate the above inference. But it is understood, from the record and opinions of the state court, that the design of the law was to secure another provision of statute not previously existing, but made by the legislature at the same time, requiring banks to receive their own notes in payment of their debtors, though below par. That design, too, would still recognize the prior authority to sell or transfer.

We are not prepared to say that a state, under its general legislative powers, by which all rights of property are held and modified as the public interest may seem to demand, might not, where unrestricted by constitutions or its own contracts, pass statutes prohibiting all sales of certain kinds of property, or all sales by certain classes of persons or corporations. 14 Pet., 74. Such has often been the legislation as to property held in mortmain or by aliens or certain proscribed sects in religion.

This is, however, very invidious legislation, when applied to classes or to particular kinds of property before allowed to be held generally. Legislation for particular cases or contracts, without the consent of all concerned, is of very doubtful validity. *Merrill v. Sherburne et al.*, 1 N. H., 199. Under our system of government, and the abuses to which in various ways and to various extents that kind of legislation might lead, several of the state constitutions possess clauses prohibitory of such a course, where it affects contracts or vested rights, and more especially does the Constitution of

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the United States expressly forbid any such legislation, whenever it goes to impair *the obligation of a contract. Hence, the general powers which still exist under other governments, or might once have prevailed here in the states, to change the tenure and rights over property, and especially the *jus disponendi* of it, cannot now, under the Federal Constitution, be exercised by our states to an extent affecting the obligation of contracts. [*326

The next and final question, then, is, Did the act in question impair the obligation, either of the contract by the state with the bank, or of the contract by the maker of the note with the bank?

We have already ascertained the true extent of both of these contracts before this act passed; that by the state with the bank clearly allowing it to take negotiable notes, and to sell or transfer them, and that with the maker clearly enabling the bank to assign his note, and a recovery to be had on it after a transfer, by the assignee. In this condition of things, with this note taken and held, accompanied by such rights and obligations, the legislature of Mississippi passed the law already quoted, and now under consideration. It expressly took away the right of the bank to make any transfer whatever of its notes, and virtually deprived an assignee of them of the right to sustain any suit, either in his own name or that of the bank, to recover them of the maker.

The new law, also, conferred in substance on the maker a new right to defeat any action so brought, which he would otherwise have been liable to. These results vitally changed the obligation of the contract between him and the bank, to pay to any assignee of it, as well as changed the obligation of the other contract between the state and the bank in the charter, to allow such notes to be taken and transferred. It is true that this new law might bear a construction, that the transfer was only a voidable act, and not void, and that, if cancelled or waived, a recovery might afterwards be had on the note by the bank; and this seems to have been the view of some of the court in 3 Sm. & M. (Miss.), 681, as well as in *Hyde et al. v. The Planters' Bank*, 8 Rob. (La.), 421. Yet the state court in Mississippi appears finally to have thought it meant otherwise, and to have decided that no suit at all can be sustained on such a note by any body after a transfer. This was the view which they think influenced the legislature. See *Planters' Bank v. Sharp et al.*, 4 Sm. & M. (Miss.), 28. We are disposed to acquiesce in the correctness of this construction, as it seems to conform nearest to the real designs of the legislature. But this view is not adopted, because a deci-

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sion by a state court on a state statute, though generally governing us, is to control here in the very cases which, on account of that decision, are brought here by appeal or writ of error.

*327] *The rights of a party under a contract might im-
properly be narrowed or denied by a state court, with-
out any redress, if their decision on the extent of them cannot
be reviewed and overruled here in cases of this kind; while
their decision, if restricting or enlarging the prohibitory act,
might more safely stand, as doing no injury in the end, if we
hold the act null wherever it is construed by them or us so as
to conflict with prior rights obtained under contracts. See
Commercial Bank v. Buckingham's Ex'rs, 5 How., 317.

If the state courts of Mississippi should hereafter adopt the
dissenting opinion of Judge Sharkey, in 4 Sm. & M. (Miss.),
28, and go back to what they appear to have before held, in
3 Id., 661,—namely, that the right to sue by the bank, after a
transfer, was not taken away, if the plaintiff replied that the
transfer had been rescinded, and the interest was now solely
in the bank,—and should that construction be adopted here,
the force of this new law, as impairing the obligation of the
contract, might not be so extensive and clear as now. But
still it would seem to impair the contract in some respects;
yet whether in such way and extent as to render the obliga-
tion itself changed must be left to be decided definitively
when such a case is presented for our decision. In the present
instance, however, as before explained, the extent and opera-
tion of the prohibitory law being regarded as forbidding any
transfer whatever, and, if it takes place, as barring every kind
of remedy on the note, the decisive question may be repeated,
How can this happen without injury to the plaintiff's con-
tracts? When every form of redress on a contract is taken
away, it will be difficult to see how the obligation of it is not
impaired. *Green v. Biddle*, 8 Wheat., 76; 1 How., 317;
4 Sm. & M. (Miss.), 507; *King v. Dedham Bank*, 15 Mass., 447.

If any right or power be left, under the note, by this act,
after a transfer is made, it is of no use, when it cannot be
enforced and no benefit be derived from it, but an action
abated *toties quoties* as often as it is instituted. 8 Wheat., 12;
1 Bl. Com., 55. In the mildest view, a new disability is thus
attached to an old contract, and its value and usefulness
restricted; and these of course impair it. *Society for Propa-
tating the Gospel v. Wheeler*, 2 Gall., 139.

One of the tests that a contract has been impaired is, that
its value has by legislation been diminished. It is not, by the
Constitution, to be impaired at all. This is not a question of

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degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.¹ *The Commercial Bank of Rodney v. The State of Mississippi*, 4 Sm. & M. (Miss.), 507. So, if the obligation of a contract is to be regarded *as the duty imposed by it, [328 here the duty imposed by the state to adhere to its own deliberate grant, and the duty imposed on the signer of the note to make payment to an assignee, as well as to the bank itself, are both interfered with and altered.

In answer to this supposed violation of the contract between the maker of the note and the bank, some objections have been urged which deserve further notice here.

It is sometimes stated, with plausibility, that states may pass insolvent laws, suspending or taking away actions on contracts, where the debtor goes into insolvency, and hence, by analogy, can do it here. But there another remedy is still given on the contract, before the commissioners of insolvency, and a payment is made *pro rata*, as far as means exist. Here there is no other remedy given, or any part payment made. Indeed, it seems that a forfeiture of all right to recover on the note, in any way, is inflicted here as a penalty for making that very transfer which the bank before, by the act of incorporation, as well as by the note itself, was authorized to make. Again, state insolvent laws, if made, like this law, to apply to past contracts and stop suits on them, have been held not to be constitutional except so far as they discharge the person from imprisonment, or in some other way affect only the remedy. When so restricted, they do not impair the obligation of the contract itself, because the obligation is left in full force and actionable, and future property, as well as present, subjected to its payment, and the body exonerated only as a matter connected merely with the form of the remedy. *Cook v. Moffat*, 5 How., 316, and cases there cited. The case in 8 Rob. (La.), 421, appears also to have been one on a note executed after the prohibitory law, and not, as here, before. But where future acquisitions are attempted to be exonerated, and the discharge extended to the debt or contract itself, if done by the states, it must not, as here, apply to past contracts, or it is held to impair their obligation. *Ogden v. Saunders*, 12 Wheat., 213; *Sturges v. Crowninshield*, 4 Id., 122; 6 Id., 131; 2 Kent Com., 392; *Bronson v. Kinzie*, 1 How., 311; *McCracken v. Hayward*, 2 Id., 608; 1 Cow. (N. Y.), 321; 16 Johns. (N. Y.), 237; 1 Ohio, 236; *Cook v. Moffat*, 5 How., 308, 314.

¹ QUOTED. *Merchants' Nat. Bank State v. Young*, 29 Minn., 547; *Von v. Jefferson County*, 1 McCrary, 361; *Hoffman v. Quincy*, 4 Wall., 553.

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Congress alone can do this as to prior contracts, by means of an express permission in the Constitution to pass uniform laws on the subject of bankruptcy; and which laws, when not restrained by any constitution or clause like this as to states impairing contracts, may in that way be made to reach past obligations.

*329] The misfortune here is, that the legislature, if meaning *merely to insure to bill-holders of the bank, when debtors, the privilege of paying in the bills of the bank (as is supposed, 4 Sm. & M. (Miss.), 1, 90), have not said so, and no more, by providing that promissory notes, though assigned by banks, should still be open to set-offs by their debtors of any of their bills which they then held. This would have been equitable, and no more, probably, than they would be entitled to, on common law principles, if an assignee purchased, as here, after the promissory notes fell due, and perhaps with a knowledge of the existence of such a set-off.

Chief Justice Marshall, in *The United States v. Robertson*, 5 Pet., 659, says, independent of any statute, "every debtor may pay his creditor with the notes of that creditor. They are an equitable and legal tender." Equally just and reasonable would have been a declaratory law as to the allowance of such bills as a set-off, where an assignment had been made collusively between the parties with a view to prevent such a set-off. 8 Rob. (La.), 421.

But instead of resorting to such measures, the legislature adopted a shorter and more sweeping mode of attaining the end of preventing assignments which might embarrass or defeat set-offs. They did it by cutting off all assignments whatever, and all remedies whatever upon them. And they accompanied this by another statute, enabling debtors of the bank who held its notes, when their debts fell due, to pay in them, or set them off, and even virtually authorized them to make payment in depreciated bills or notes afterwards bought up for that purpose, and thus to gain an undue advantage over set-offs by other debtors in other matters.

The act as to this last topic was passed the next day after the act prohibiting transfers. Mississippi Laws, 2 February, 1840, p. 21, sec. 2. It was in these words:—"All banks above alluded to, and all other banks in this state, shall at all times receive their respective notes at par in liquidation of their bills receivable and other claims due them." These two acts, though undoubtedly well meant, and designed to give an honest preference to bill-holders (see Sharkey's dissenting opinion) as to a paper currency which ought always to be kept on a par with specie, were unfortunately,

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in the laudable zeal to avert a great apprehended evil, passed, without sufficient consideration of the limitations of the powers imposed by the Constitution of the Union on the state legislatures, not to impair the obligation of existing contracts. Nor was it necessary to go so far to secure any legitimate results. Some other laws are referred to, which are upheld and which affect the whole community, and seem to violate some of the important incidents of contracts [*330 *between individuals, or between them and corporations. But it will usually be found that these are such laws only as relate to future contracts, or if to past ones, relate to modes of proceeding in courts, to the form of remedy merely, to priority to some classes of creditors (5 Cranch, 298); to the kind of process (9 Pet., 319; 10 Wheat., 51); to the length of the statute of limitations (6 Id., 131; 2 Mason, 168; 3 Johns. (N. Y.) Ch., 190; 4 Wheat., 200; 1 How., 315); to exempting the body from imprisonment (4 Wheat., 200), or tools and household goods from seizure (16 Johns. (N. Y.), 244; 1 How., 15; 11 Mart. (La.), 730); or affecting some privilege attached to the person or territory (Story Confl. of L., 339, &c.), and not to the terms or obligations of any part of the contract itself (*Cook v. Moffat*, 5 How., 295; *Towne v. Smith*, 1 Woodb. & M., 132; 7 Greenl. (Me.), 337; 3 Burge on Col. & For. Law, 234, 1046).

And if, in professing to alter the remedy only, the duties and rights of a contract itself are changed or impaired, it comes just as much within the spirit of the constitutional prohibition. *Bronson v. Kinzie et al.*, 1 How., 316; 2 Id., 612; 2 Madison Papers, 1239, 1581.

Thus, if a remedy is taken away entirely, as here, or clogged "by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired." *Green v. Biddle*, 8 Wheat., 75. And the test, as before suggested, is not the extent of the violation of the contract, but the fact, that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone. 2 How., 612; 8 Wheat., 1.

Having, it is believed, assigned sufficient reasons to show that the obligation of both of these contracts was impaired, it is now proposed briefly to refer to a few precedents bearing on the correctness of this conclusion, chiefly in respect to the most important of the contracts,—that between the state and the bank. On an examination of the various decisions which have taken place in this court on the violation of the obligation of contracts, it will be found that this case does not come within the principle of any of those where the decision was

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that the new laws were no violation; but, on the contrary, is much like several where the decision annulled them as a clear violation. Thus, where a new law has taken the property of a corporation for highways under the right of eminent domain, which reaches all property, private or corporate, on a public necessity, and on making full compensation for it, and under an implied stipulation to be allowed to do it in all public *331] grants and charters, no injury is committed not atoned for, nothing is done not allowed *by preëxisting laws or rights, and consequently no part of the obligation of the contract is impaired. See case of the West River Bridge, and authorities there cited in 6 How., 507.

So, when the legislature afterwards tax the property of such corporations, in common with other property of like kind in the state, it is under an implied stipulation to that effect, and violates no part of the contract contained in the charter. *Armstrong v. Treasurer of Athens County*, 16 Pet., 281. See *Providence Bank v. Billings*, 4 Pet., 514; 11 Id., 567; 4 Wheat., 699; 12 Mass., 252; 4 Gill & J. (Md.), 132; 4 T. R., 2; 5 Barn. & Ald., 157; 2 Railway Cases, 23.

So, when no clause existed in a charter for a bridge against authorizing other bridges near at suitable places it is no violation of the terms or obligation of the contract to authorize another. *Charles River Bridge v. Warren Bridge et al.*, 11 Pet., 420.

Nor is it, if a law make deeds by femes covert good when *bonâ fide*, though not acknowledged in a particular form; because it confirms rather than impairs their deeds, and carries out the original intent of the parties. *Watson v. Mercer*, 8 Pet., 88.

Or if a state grant lands, but makes no stipulation not to legislate further upon the subject, and proceeds to prescribe a mode or form of settling titles, this does not impair the force of the grant, or take away any right under it. *Jackson v. Lumpkin*, 3 Pet., 280.

Nor does it, if a state merely changes the remedies in form, but does not abolish them entirely, or merely changes the mode of recording deeds, or shortens the statute of limitations. 3 Pet., 280; *Hawkins v. Barney's Lessee*, 5 Id., 457.

It has been held, also, not only that a legislature may regulate anew what is merely the remedy, but some state courts have decided that it may make banking corporations subject to certain penalties for not performing their duties,—such as paying their notes on demand in specie, and that this does not violate any contract. *Brown v. Penobscot Bank*, 8 Mass., 445; 2 Hill (N. Y.), 242; 5 How., 342. It is supposed to help

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enforce, and not impair, what the charter requires. But on this, being a very different question, we give no opinion.

But look a moment at the other class of decisions. Let a charter or grant be entirely expunged, as in the case of the Yazoo claims in Georgia, and no one can doubt that the obligation of the contract is impaired. *Fletcher v. Peck*, 6 Cranch, 87.

So, if the state expressly engage in a grant, that certain lands shall never be taxed, and a law afterwards passes to tax *them. *State of New Jersey v. Wilson*, 7 Cranch, [*332 164. Or that corporate property and franchises shall be exempt, and they are then taxed. *Gordon v. Appeal Tax Court*, 3 How., 133.

So, if lands have been granted for one purpose, and an attempt is made by law to appropriate them to another, or to revoke the grant. *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, Id., 292.

Or if a charter, deemed private rather than public, has been altered as to its government and control. *Dartmouth College v. Woodward*, 4 Wheat., 518.

Or if owners of lands, granted without conditions or restrictions, have been by the legislature deprived of their usual remedy for mesne profits, or compelled to pay for certain kinds of improvements, for which they were not otherwise liable. *Green v. Biddle*, 8 Wheat., 1.

Or if, after a mortgage, new laws are passed, prohibiting a sale to foreclose it, unless two thirds of its appraised value is offered, and enacting further that the equitable title shall not be extinguished till twelve months after the sale. *Bronson v. Kinzie*, 1 How., 311; *McCracken v. Hayward*, 2 Id., 608.

These last cases in Wheaton and Howard are very near in point to the present one, though, in my view, a less strong and decisive encroachment on a previous contract than this is.

So are the cases very near where all remedy whatever is taken away, and it is held that the obligation of the contract is thus impaired. See some before cited, and 8 Mass., 430; 2 Gall., 141; 2 Greenl. (Me.), 294; 1 How., 311; 3 Pet., 290; 2 How., 608.

The whole usefulness and value of a note or contract is in this way destroyed, and that without any reference to the contract itself. For these reasons, the judgment below must be reversed.

BALDWIN ET AL. v. PAYNE ET AL.

This case involves several of the questions just discussed in that of the *Planter's Bank v. Sharp et al.*

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Some of the points of difference are merely nominal; as, for instance, that the charter of the Mississippi Railroad Company, which transferred the notes in this case, is different. But, it being subsequent in date to the charter to the Planters' Bank, and with "all the usual rights, powers, and privileges of banking which are permitted to banking institutions within the state," the court seemed, by mutual consent of parties, to regard those conferred on the Planters' Bank as extensive as any, and therefore a correct guide here.

*333] *Other differences may be more material in appearance, as that the transfer in this case was found by the special verdict to have been in payment of a debt of the bank; and another, that the suit here is in the name of the indorsee, and not, as in the former case, in the name of the promisee.

Its being assigned in payment of a debt is, however, no more than was presumed might have been the truth in the other case. And its being sued in the name either of the indorsee or payee can make little difference on the final construction given by the state court to the prohibitory law in the action of the *Planters' Bank v. Sharp et al.* That construction, we have seen, was, that it is the transfer itself which is prohibited and made in some degree penal, rather than the action in the name of the indorsee being all which is prohibited. It will be remembered, also, that if the state might be able, by a general repealing law, to prevent a suit in the name of an indorsee, without impairing any contract in the charter itself, as is argued for the defence, it could hardly do this without impairing the other contract, between the bank and the maker, by which the latter promises to pay any indorsee.

Certainly the new prohibitory law ought not to have accepted more than a repeal of the statute allowing suits by indorsees of negotiable paper in their own name. Then the indorsees of notes negotiable, as of notes not negotiable, would still possess a right to sue their notes in the names of the payees.

In such a case, there would be some plausibility in the idea, that, though the action would not lie in the name of the indorsee, yet if it could in the name of the payee, for and on his account, the prohibitory law would chiefly affect the remedy, and not the right of action in some form or other.

But even then, if the obligation or force or duty of the contracts, whether with the bank by the state, or with the maker, was impaired in any degree, though under cover of affecting the remedy only, it would come within the constitutional restriction.

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But how much more must it so come in this case, as well as the other, where, instead of merely changing the obligation so as to render a recovery on the contract not permissible in the name of an assignee, but more inconvenient, expensive, dilatory, and often difficult, in the name of another, the payee, the state court of Mississippi hold, that the legislature, by the prohibitory law of 1840, not only meant to abate a suit in the name of an indorsee, but in the name of the payee, if a transfer had once been made. Substantially, they consider any suit on the note, by any body, after it has once been transferred, as *illegal, and the right to enforce the contract to be lost or forfeited forever. [*334

This view of the statute of 1840 being regarded as established in Mississippi, renders it clear that in this case, as well as the case of the *Planters' Bank v. Sharp et al.*, the law under which this action has been abated must be considered as having impaired the obligation of contracts, and therefore to be in this respect unconstitutional, and the judgment of the state court erroneous.

The judgment below, must, therefore, be reversed, and as a special verdict was found in this case, judgment must be entered on it in favor of the original plaintiffs.

Mr. Chief Justice TANEY and Mr. Justice DANIEL dissented.

Mr. Justice McLEAN.

So far as the seventh section of the act in question has been construed, by the Supreme Court of Mississippi, to invalidate the note between the bank and the payee, it is unconstitutional. The fair import of the provision takes away only the negotiability of the instrument. But the courts of Mississippi have decided, where a note has been assigned in violation of the statute, that no suit can be sustained on the note, either in the name of the assignee or of the payee. This impairs the obligation of the contract, which the Constitution inhibits.

The argument, that, where the bank attempts to transfer a note by a void indorsement, it must be reindorsed to enable the bank to sue in its own name as payee, is unsustainable. A void indorsement is no indorsement, and it can have no effect on the validity of the note. The section declares, that "it shall not be lawful for any bank in this state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if shall appear in evidence, upon the trial of any action upon such note, bill receivable, or other

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evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant."

The object of the statute was to secure the right of the debtors of a bank to pay their debts in its own paper. This they could not do, if the notes, before they were payable, had been assigned by the bank. No fair construction of the seventh section can authorize a forfeiture of the note, by reason of the illegal indorsement. It is, therefore, unnecessary to consider whether such a provision would be constitutional.

The bank had the power, under its charter, to assign promissory notes. If this were not so, the law to prohibit the *335] assignment *would have been unnecessary. There being no express power in the charter of the bank to indorse notes, it must be considered as exercising the power under the general law making notes negotiable; and in this respect it must stand on the same ground as an individual. And this presents the question, whether the repeal of the law making notes negotiable by banks can affect notes executed before the repeal. A majority of the judges hold that a provision so construed is void, as it impairs the obligation of the contract. I dissent from this conclusion.

An individual holds a note, which, under the statute, is negotiable; but the statute is repealed. Does this take away the negotiability of the note? I think it does. There can be no doubt of this, unless such a construction shall impair the obligation of the contract. Now, what obligation is violated by this construction? It is said, that the maker of the note promised to pay to the assignee of the payee. This is admitted. But until the note be assigned, there can be no assignee. The indorsement is a new contract between the indorser and the indorsee; and when this contract is made, it can no more be impaired than the contract between the maker and the payee of the note.

A promise to pay A. B. or his assignee is no contract with the assignee, until the new contract of assignment be made. The promise is to pay to the indorsee, if the payee of the note shall indorse it. But the payee is under no obligation to indorse the note. And if there be no obligation, how can it be impaired? A contract binds a party either to do or not to do a certain thing. The maker of the note on a certain contingency, binds himself to pay the indorsee, and that contingency depends upon the will of the payee; but until that will is exercised, there is no obligation by the maker. The payee has power to bind the maker of the note to pay its contents to some other person; but

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until that power is exercised, there is no contract which can be impaired.

Suppose a power of attorney was given to A by B, to enable him to bind B, by a written instrument, to do a certain thing which may legally be done, but, before the instrument is executed, the thing is made unlawful; does this impair the obligation of the contract? The instrument contemplated has no existence; B cannot complain that he has not been bound to do the act, and on what ground can A complain? Is his contract impaired? He has no contract. He had the power to make a contract, which he failed to exercise. And this is the principle involved in the case now under consideration. The payee had a discretionary power to bind the maker of the *note, but he did not exercise it until the assignment of the note was made illegal. Is [*336 a mere power of attorney to make a contract within the Constitution? It is essential, to constitute a contract, that there shall be two parties bound by it. Now the payee is not bound to assign the note, though the maker has authorized him to assign it. This, then, is a mere power to make a contract, which may or may not, at the discretion of the payee, be exercised. It is a mere unexecuted power to make a contract, and is, in my judgment, not within the Constitution.

If the charter of the bank had contained a special provision, authorizing it to assign promissory notes, no subsequent act of the legislature could repeal or modify such provision, against the consent of the bank.

Mr. Justice DANIEL.

Differing from the majority of the court in the decision just pronounced, I might, nevertheless, have been disposed to acquiesce in that decision, had it related to questions merely of property or of individual interests; but embracing as it does a construction of the Constitution, and annulling at the same time a legislative act of a sovereign state, I cannot feel warranted in yielding by silence a seeming approbation of conclusions which my judgment entirely repels. My deliberate opinion, then, is, that the statute of Mississippi of February 21st, 1840, by its seventeenth section, comes not in conflict with the tenth section of the first article of the Constitution; that it in no wise impairs the obligation of any contract between the state and the Mississippi Railroad Company, formed by grant of the charter of that company, nor as existing with the plaintiffs in error as claiming under them. An elaborate review of the arguments on which the pretensions of the plaintiffs in error are urged is not here deemed necessary, nor

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will I enter much in detail upon the reasons by which those arguments appear to be met and overthrown, but will content myself with succinctly stating the decisive conclusions of my own mind upon the only question properly presented by this record, and the legal grounds on which those conclusions are bottomed. The rights of the plaintiffs in error, whatever they may be, it must be borne in mind, are derived from the charter of the Mississippi Railroad Company, or from that of the Planters' Bank of Mississippi, as supposed to possess rights and powers more comprehensive than those vested in the former company; but from whichever of those companies the plaintiffs in error may choose to deduce their rights, these must be restricted to *337] the rights and authority vested in the source from which they are *drawn. Both the Mississippi Railroad Company and the Planters' Bank of Mississippi are corporations created by statute, deriving their existence and every power and attribute they ever possessed from the laws which gave them existence, and from these only. The doctrine has been long and repeatedly affirmed by this court, that, in interpreting the powers and rights of corporations, an essential distinction must be taken between corporations existing by the common law (often, nay, necessarily, traceable to a remote and obscure antiquity), and those which are created by statute, whose constitutions and powers are defined and ascertained by accessible and visible proofs. Into the composition or practices of the former, tradition, implication, or usage may enter, and thus give room for assumptions of power; with respect to the latter, no such rule, or rather misrule, has obtained or been permitted, especially by the settled decisions of this day. The adjudications of this court, as has been already stated, are too explicit to admit of doubt on this subject. Thus, in the case of *Head and Amory v. The Providence Insurance Co.*, 2 Cranch, 127, Chief Justice Marshall says,—“Without ascribing to this body (the Insurance Company), which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur, to ascertain its powers, and to determine whether it can complete a contract by such communications as are in this record.”

In the case of *Dartmouth College v. Woodward*, 4 Wheat., 636, it is said by the court, that “a corporation is an artificial being, invisible, intangible, and existing only in contempla-

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tion of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." In the case of *The Bank v. Dandridge*, 12 Wheat., 64, this court said,—“Whatever may be the implied powers of aggregate corporations at the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.” In the case of *The Bank of Augusta v. Earle*, 13 Pet., 587, the several authorities just mentioned are cited in the opinion of the court; all of them approved, and none of them, *it is presumed, will be questioned as [*338 not laying down the law with perfect accuracy.

Such being the well-settled rule of this court with respect to statutory corporations, let us inquire into its operation on the case before us. Neither by the charter granted to the Mississippi Railroad Company, nor to the Planters' Bank of Mississippi, nor to any other banking corporation within the state, was the power ever directly given to assign bonds, bills, or promissory notes. Is this power necessarily implied in any of the express grants contained in the charters now under consideration? It is admitted on all sides that the clause in this charter of the Planters' Bank which authorizes the bank to discount bills of exchange and notes, and to make loans, contains no such direct grant; but it is said that the bank is authorized to possess and receive lands, rents, tenements, hereditaments, goods, chattels, and effects, to a certain amount, and to grant, demise, alien, or dispose of the same for the good of the bank; and that this authority confers the power of assigning notes discounted by the corporation. Could the doctrine of implied powers, in contravention of the express decisions of this court just cited, be extended in its utmost latitude to these statutory corporations, still it would seem difficult, even by the greatest violence of construction, to torture the language of this charter into an expression of the meaning here ascribed to it. The right to acquire and to dispose of effects cannot, by the natural import of language, nor by any received intendment, be made to signify the power to discount bills and notes; much less can it be interpreted to mean the power to transfer bills and notes discounted, or securities of any description, and beyond this even, the power (in opposition to the principles of the common law in reference to choses in action) of investing the assignee with the right of maintaining an action at law in his own name. The extravagance of the construction contended for on behalf of

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the plaintiffs may be seen by bringing it to another test. Let it be supposed that the charters of these companies contained not one word about rights and powers of banking, as then permitted to other corporations in the state of Mississippi; suppose, too, they had been silent as to any right to discount bills and notes, and had been limited to the simple power of receiving and possessing goods, chattels, and effects, and of disposing of such effects for the good of the bank; would it be pretended that, under this latter provision, the power of discounting bills or notes, or of discounting at all, was given by the mere import of the word effects,—that the power of *339] receiving and disposing of effects meant the power of discounting bills and notes? This can *hardly be pretended. If, then, this term be not synonymous with the words bills and notes when taken in connection with the power of discounting and of making loans, how can it become so by being connected with the right of acquisition and enjoyment, or with the *jus disponendi*? The power to sell or assign discounted notes cannot be deduced from the clause in the charter which authorizes the exercise of the usual banking powers granted to the banks of Mississippi, first, because in no charter granted by the state is it shown that such a right is expressly conferred; secondly, it is manifest that a traffic in the sale of its own paper, or in notes or bills discounted, is conformable neither with the regular functions of a bank, nor reconcilable with the purposes of its institution. Banks are usually created for the purpose of making loans, and this in a medium, in theory at least, equal to money; not for the purpose of borrowing, or of raising means to eke out their daily existence by selling off their securities or their own paper. Their establishment rests upon the idea of their possessing funds of their own as the foundation of their credit and of their circulation. The practice of becoming brokers for the sale of their own paper or the paper of their customers, to put themselves in funds, is not, therefore, one of their regular functions, and can flow only from an abuse of these functions, and is a perversion of the legitimate ends of their creation. So, too, it is entirely inadmissible to place this practice of brokerage by the bank upon the mere absence of an inhibition in the charter; such a mode of reasoning cuts up entirely the admission, that the banks have no power except such as is expressly granted or necessarily implied. The fallacy of the idea, that the right to dispose of effects conferred by the charter of the Planters' Bank implied the right of an habitual and unrestricted sale or brokerage of discounted notes, is exposed by adverting to another provision of the charter, by

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which the amount of effects of every kind which the bank was permitted to acquire and dispose of was positively limited to a specified amount. The power of the bank being thus restricted, that power could by no sound reasoning be made coincident or coextensive with regular and permanent operations on the part of this corporation; for if its banking powers were deducible from such a limited privilege, or were dependent upon it, of course, when this permitted limit should be attained, the operations of the bank would be at an end. It is clear, therefore, that these corporations, restricted as are all statutory corporations under the decisions of this court, to the express grants contained in their charters, and to implications necessary to and inseparable from those grants, [*340 never were by the provisions *of their charters invested with the power to assign bills or notes, and much less by such assignment to invest their assignee with the right of suing at law; that whatever power of assignment these corporations at any time may have possessed, and whatever the effect implied in such assignment, both were conferred upon them in common with all other persons, natural or artificial, within the state, by a general public law, subject at all times to modification or repeal by the authority which enacted it. *Vid.* section 12 of the statute, How. & H. Laws of Mississippi, p. 373.

The actual repeal of such a statute cannot correctly be regarded as the violation of any vested right, or the impairing of the obligation of a contract, for no one can claim to have a perfect and vested right, through all future time, in the mere capacity to do an act, from the absence of a law forbidding that act. A pretension like this would forestall and prevent legislation upon every subject. A wholly different state of things would have existed had the assignment to the plaintiffs been made anterior to the repeal of the statute, for then the rights of these parties would have been vested and complete; but the assignment was in this instance subsequent, by more than a year, to the passage of the repealing statute, was a new and separate contract, and entered into with necessary knowledge of its provisions, and made apparently in defiance thereof. This view of the question is clearly and forcibly presented by the Supreme Court of Louisiana in the case of *Hyde and another v. The Planters' Bank of Mississippi*, 8 Rob. (La.), 416, a case arising upon the laws and charters now under consideration, and in all its features essentially, nay, *mutato nomine*, literally, the same with the present. It has been said, that, in the case from 8 Robinson, the note was made after the enactment of the repealing statute. I think that this statement is not warranted by the statement of

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facts in that case. Certainly the reasoning of the court rests on no such hypothesis, for it covers the whole of the language and policy of the statute of Mississippi, and vindicates them to the utmost extent. In this case, the note was assigned after the enactment of the repealing law, and with full knowledge thereof, and the assignment was an independent and posterior contract which the law had forbidden. The question, then, as to the validity of the statute of Mississippi seems to resolve itself into this inquiry,—whether a sovereign state of this Union possesses the right within her own territory to regulate the formation of contracts, to define the rights and interests such contracts shall give to the parties thereto, and to declare the modes and extent in and to *341] which these may be enforced by her own tribunals. *To such an inquiry I can give none but an affirmative answer; and any other, I feel assured, is not evoked either by the language or spirit of the Federal Constitution, and would be highly unjust and inconvenient with respect to the states.

With regard to the plaintiffs in error, no injustice nor hardship of any kind is perceived in enforcing against them the provisions of the statute of 1840. In the first place, they have, with full knowledge of the law, placed themselves directly in the attitude of resistance thereto; for they have entered into an agreement explicitly inhibited upon grounds of public policy, and this long after such inhibition was proclaimed to every person within the state. In the next place, there surely can be no merit in a combination, the effects and manifest purposes of which were to deny to the holders of the notes of these banking corporations the power of making payment to them in their own currency, and to enable the latter to seize or to appropriate to themselves or their favorites the substance of those very note-holders to whom such right of payment was denied. A proceeding thus subversive of justice has not been heretofore sanctioned by this court, and in one instance has been, to a certain extent,—indeed, as I think, to the whole length of the present case,—directly condemned. The case of the *United States v. Robertson*, 5 Pet., 641, was a case in which a judgment had been recovered by the United States against the Bank of Somerset for an amount of money which had been deposited by a collector in that bank. By an act of Congress of the year 1818, it was provided, that, in any suit thereafter instituted by the United States against any corporate body for the recovery of money upon any bill, note, or other security, it should be lawful to summon as garnishees the debtors of such corporation, who were required to state on oath the amount in which they

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stood indebted at the time of serving such summons, for which amount judgment should be entered in favor of the United States, in the same manner as if it had been due and owing to the United States. On the 9th of February, 1819, a year after the act of Congress giving the remedy by attachment to the United States, the legislature of Maryland passed an act declaring that, in payment of any debt due to or judgment obtained by a bank within that state, the notes of such bank should be received. Attachments were laid in behalf of the United States, after their judgment against the Bank of Somerset, on debts in the hands of various debtors to the bank, and on some of these attachments judgments had been obtained. It was contended in behalf of these garnishees, that they had a right to discharge their debts in the notes of the Bank of Somerset, as well in those cases in [*342 *which judgment had been obtained on attachment by the United States as in those wherein there were no judgments. Upon this question Chief Justice Marshall, in delivering the opinion of the court (p. 659), remarks, first, upon the act of Congress of 1818,—“That it operates a transfer from the bank to the United States of those debts which might be due from the persons who should be summoned as garnishees. They become, by the service of the summons, debtors of the United States, and cease to be debtors of the bank. But they owed to the United States precisely what they owed to the bank, and no more.” 2. “That the act of the legislature of Maryland of 1819, so far as respects debts on which judgments have not been obtained, embodies the general and just principles respecting effects, which are of common application. Every debtor may pay his creditor with the notes of that creditor. They are an equitable and legal tender. So far as these notes were in possession of the debtor at the time he was summoned as garnishee, they form a counter claim, which diminishes the debt due to the bank to the extent of that counter claim. But the residue becomes a debt to the United States, for which judgment is to be rendered. May this judgment be discharged by the paper of the bank? On this subject the court are divided. Three of the judges are of opinion, that, by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank, which original right remains in full force against the United States, who come in as assignees in law, and not in fact, and who must therefore stand in the place of the bank. Three of the judges are of opinion, that the right to pay the debt in the notes of the bank does not enter into the contract.” May not this

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decision, I inquire, be considered as substantially covering the whole ground of the case before us? For, after stating that the garnishees became by the service of the summons the debtors of the United States, and ceased to be debtors of the bank, it goes on to declare, that they owed to the United States what they owed the bank, and nothing more; that, by the just and general principles of set-off, every debtor may pay his creditor with the notes of that creditor, which as to him are an equitable and legal tender. And by the unanimous declaration of the court, not until after the claim against the garnishee was carried into a judgment, and after the allowance of all rights of tender and set-off in the notes of the bank, could payment be coerced from him in any other medium than the notes of the bank. One half the court deemed the garnishee, even after judgment, entitled to the same privileges against *343] the creditor of the bank which he possessed *against the bank itself. This right, as between note-holders and the assignees of a failing or insolvent bank, is fully sustained by the Court of Appeals of Maryland in the case of *The Union Bank of Tennessee v. Ellicot, Morris & Gill*, 6 Gill & J. (Md.), 364, and in that of *The Bank of Maryland v. Ruff*, 7 Id., 448, in which last case the authority of this court is relied on. But, at all events, the principles of these decisions are broad enough to vindicate the legislation of Mississippi, and the objects of that legislation, against the imputation of oppression or hardship as respects these plaintiffs, and all who may occupy a similar position, if legislation can need vindication or apology, the purposes of which are to prevent, if possible, the paper of these corporations, spread over the community by them, from utterly perishing on the hands of the note-holder, and to disappoint dishonest combinations to set the public laws at defiance, and, further, to oppress and ruin the note-holder by taking his property, and leaving him the worthless and false and simulated representatives of an equivalent. I am of the opinion, that the judgment of the Supreme Court of Mississippi should in both these cases be affirmed.

Order.

THE PLANTERS' BANK v. SHARP ET AL.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the state 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 High Court of Errors and Appeals in this cause be and the same is hereby reversed, with

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costs, and that this cause be and the same is hereby remanded to the said court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

Order.

BALDWIN ET AL. v. PAYNE ET AL.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the state 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 High Court of Errors and Appeals reversing the judgment of the Circuit Court of Jefferson county in this cause be and the same is hereby reversed, with costs, and held as entirely void, and that the said judgment of the said Circuit Court of Jefferson county be in all things affirmed and remain [*344] in full force and virtue, the said judgment of the said High Court notwithstanding; and that this cause be and the same is hereby remanded to the said High Court of Errors and Appeals, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

THE NEW JERSEY STEAM NAVIGATION COMPANY, RESPONDENTS AND APPELLANTS, v. THE MERCHANTS' BANK OF BOSTON, LIBELLANTS.

A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound.¹

Admiralty has jurisdiction *in personam* as well as *in rem*, over controversies arising out of contracts of affreightment between New York and Providence. The rights of the shipper of the specie may be controlled by a valid contract between the express carrier and steamboat company.

¹ ADHERED TO. *Morewood v. Enquist*, 23 How., 493. DISTINGUISHED. *New Orleans &c. R. R. Co. v. Faler*, 58 Miss., 915. FOLLOWED. *Ormsby v. U. P. R'y Co.*, 2 McCrary, 54. CITED. *Bacon v. Robertson*, 18 How., 486; *Garrison v. Memphis Ins. Co.*, 19 Id., 315; *Moore v. Amer. Transp. Co.*, 24 Id., 38, 39; *Walker v. Western Transp. Co.*, 3 Wall., 152; *Railroad Co. v. Lockwood*, 17 Id., 361, 363; *Bank of Kentucky v. Adams Express Co.*, 3 Otto, 188; *Insurance Co. v. Railroad Co.*, 14 Id., 153; s. c., 1 Flipp., 250, 256; *Packard v. Taylor*, 35 Ark., 409; *People ex rel. Ohlen v. N. Y. L. E. & W. R. R. Co.*, 22 Hun (N. Y.), 537; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y., 374; *Railroad Co. v. Barrett*, 36 Ohio St., 453; *Black v. Goodrich, Transp. Co.*, 55 Wis., 322. See *The Genessee Chief v. Fitzhugh*, 12 How., 464; *Steamboat New World v. King*, 16 Id., 478; *Jackson v. Steamboat Magnolia*, 20 Id., 314, 322, 338. See also *Phoenix Ins. Co. v. Erie &c. Transp. Co.*, 10 Biss., 28; *The Hadji*, 16 Fed. Rep., 864.

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THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island, in the exercise of admiralty jurisdiction.

In February, 1839, the state of New Jersey chartered a company by the name of the New Jersey Steam Navigation Company, with a capital of five hundred thousand dollars, for the purpose of purchasing, building, repairing, and altering any vessel or vessels propelled by steam, and in the navigation of the same, &c., &c.; under which charter they became proprietors of the steamboat Lexington.

On the 1st of August, 1839, the following agreement was made:—

“This agreement, made and entered into this 1st day of August, A. D. 1839, in the city of New York, by William F. Harnden, of Boston, Massachusetts, on the one part, and Ch. Overing Handy, President of the New Jersey Steam Navigation Company, of the other part, witnesseth:

“That the said William F. Harnden, for and in consideration of the sum of two hundred and fifty dollars per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via Newport and Stonington, not to exceed once on each day, from New York and from Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st of December, A. D. 1839, and from this date.

*345] “The following conditions are stipulated and agreed to, as *part of this contract, to wit:—The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company.

“Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:—

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“Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be, and is transported, in respect to it or its contents, at any time.’

“Further, that the said Harnden is not to violate any provisions of the post-office laws, nor to interfere with the New Jersey Steam Navigation Company in its transportation of letters and papers, nor to carry any powder, matches, or other combustible materials of any kind, calculated to endanger the safety of said boats, or the property or persons on board of them.

“And that this contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month’s notice given in writing.

“Further, that a contract made by the said Harnden with the Boston and New York Transportation Company, on the 5th day of July, A. D. 1839, is hereby dissolved by mutual consent.

“In witness whereof, the said William F. Harnden has hereunto set his hand and seal, and the President of the said New Jersey Steam Navigation Company has hereto affixed his signature and the corporate seal of the company.

“WM. F. HARNDEN, [L. S.]
CH. OVERING HANDY, *President*.

“Sealed and delivered in presence of
ROSWELL E. LOCKWOOD.”

It is proper to remark, that, prior to the date of this agreement, Harnden had made a similar one with the Boston and *New York Transportation Company, which became [*346 merged in the New Jersey Steam Navigation Company on the 1st of August, 1839. Harnden, having begun to advertise in the newspapers in July, 1839, whilst his contract with the Boston company was in force, continued to use the name of that company in the following advertisement, which was inserted in two of the Boston newspapers until the end of the year 1839:

“Boston and New York Express Package Car.—Notice to Merchants, Brokers, Booksellers, and all Business Men.

“Wm. F. Harnden, having made arrangements with the New York and Boston Transportation, and Stonington and Providence Railroad Companies, will run a car through from Boston to New York, and *vice versa*, via Stonington, with the mail train, daily, for the purpose of transporting specie, small

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packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes, and bills, and will transact any other business that may be intrusted to his charge.

"Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany, and Troy, will be forwarded immediately on arrival in New York.

"N. B. Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care, nor is any risk assumed by, or can any be attached to, the Boston and New York Transportation Company, in whose steamers his crates are to be transported, in respect to it or its contents, at any time."

The above-mentioned contract with the New Jersey Steam Navigation Company being about to expire, Harnden addressed letters, on the 7th and 16th of December, to the president, expressing a desire to renew it, and, on the 31st of December, received a letter from Mr. Handy, the president, renewing the contract for one year from the 1st of January, 1840.

The New Jersey Company also published the following notice:—

"Notice to Shippers and Consignees.

"All goods, freight, baggage, bank-bills, specie, or any other kind of property, taken, shipped, or put on board the steamers of the New Jersey Steam Navigation Company, must be at the risk of the owners of such goods, freight, baggage, &c.; and all freight consisting of goods, wares, and merchandise, or any *347] other property landed from the steamers, if not taken away *from the wharf without delay, will be put under cover at the risk of the owners of said goods, freight, baggage, &c., in all respects whatsoever."

The bills of lading, or receipts given by the company, were in the following form:—

"New Jersey Steam Navigation Company.

"Received of _____ on board the steamer
master

marked and numbered as in the margin, to be transported to
and there to be delivered to
or assigns, danger of fire, water, break-
age, leakage, and all other accidents excepted; and no package

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part of the boiler and the forward part of the engine. In looking through the scuttle I saw blaze and smoke, as if she was on fire there. I can't say whether or not the main deck was on fire at that time. I next returned to the wheel-house, and hove the wheel hard over a-port, which would sheer the boat to the southward, for the purpose of running the boat ashore to the nearest land, which was Long Island shore. Just as I got the wheel hove a-port, Captain Childs came in and put his hand on the spoke of the wheel. As he took hold of the wheel, the starboard wheel-rope gave way. Within an instant from that time, the smoke broke into the wheel-house, so that we were obliged to leave it. Captain Childs went out of the wheel-house and went aft, and I did not see anything of him after that. I then stepped out, and called to some of our people on the fore-castle to get out the fire-engine. They got it out. I then told them to get out the hose and fire-buckets. The fire then spread so between decks that they could not get at the hose or buckets. I then went to the life-boat, and found some men there casting off the lashings with which she was fastened to the promenade deck. I caught hold of the lashings, and told them not to cast them off till we had attached a hawser to the boat. I sang out to some one on the fore-castle to pass up a hawser to attach to the boat, which was done. I then told them to take the hawser attached to the boat, and to fasten it to the forward part of the steamer. The fire then was burning up through the deck and around the life-boat, and I cut the lashings, and told the men to throw the boat overboard; I then jumped down on to the forward deck, caught hold of the hawser, and found that it was not made fast to the steamboat, as directed. I found the boat was getting away from us, and I sang out to the people about there to hang on to the hawser, or we should lose her. They

*349] let go of the hawser, one after another, until they let the boat *go. The promenade deck was at that time all of a blaze to the bulkhead. It was about fifteen or twenty minutes after I first heard of the fire that the life-boat was let go. The life-boat was somewhat burnt before she was thrown over. The next thing I, with the others on the fore-castle did, was to empty the baggage-cars, and attach lines to them, and throw them overboard for any one to save himself that could. Some of those on the fore-castle drew water with what buckets we had, and threw it on the fire. I then took the flag-staff and another spar that we had knocked off the bulwarks, and fastened them to those two spars to make a raft to get on to. I threw the raft overboard, and several persons, some two or three, got on to it; but it was not buoy-

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ant enough to hold them up. That was all we could do, excepting to throw water, which we did as long as we could. The boat was then nearly burnt to the water's edge, and the forward deck was burnt and had fallen in. We then got cornered up so that we had no chance to throw water, and were obliged to leave the boat to burn. Those left on the fore-castle, some eight or ten in number, then asked me what they could do to save themselves. I then told them that I saw no chance; that we had done all that we could do. We then began to get overboard; some hung on to the crates at the forward part of the boat, and some got on to the guard. I got down on to the raft I have before mentioned. I found it sinking under me, and I lifted myself up again by a piece of rope which I had, and which I whipped over a spike. Then I jumped from the raft on to the piece of guard; and from this guard I got on to a bale of cotton. I found a man by the name of McKinney on the bale. After I had got on, a man standing on this piece of guard asked if there was room on the bale of cotton for another man. I made him no answer. He jumped to get on to it, and in doing so knocked off McKinney. I hauled McKinney on to the bale again, and the man returned to the guard. I found the bale was lashed to this piece of guard, and I took my knife and cut away the lashings; I took up a piece of board which was floating by, and shoved the bale clear of the guard, and let it drift down the Sound before the wind. McKinney froze to death about daylight the next morning, and fell off the bale. Between eleven and twelve o'clock the next day, I was picked up by the sloop Merchant, Captain Meeker. When I first heard that the boat was on fire, I had been in the wheel-house, after taking my tea, for about twenty-five or thirty minutes."

On the 10th of February, 1842, the Merchants' Bank filed a libel in the District Court of the United States for the District of Rhode Island, against the New Jersey Steam Navigation *Company, as the owners of the Lexington, [*350 for "a cause of bailment, civil and maritime." As the libel is not long, and the circumstances of this case are peculiar, it is deemed proper to insert it.

"To the Honorable John Pitman, Judge of the District Court of the United States within and for the District of Rhode Island.

"The libel and complaint of the President, Directors, and Company of the Merchants' Bank of Boston, a corporation incorporated by the legislature of the Commonwealth of Massachusetts, against the New Jersey Steam Navigation Com

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pany, a corporation incorporated by the legislature of the state of New Jersey, owners of the steamboat Lexington, for a cause of bailment, civil and maritime :

“ And thereupon the said President, Directors and Company of the Merchants' Bank of Boston do allege and articulately propound as follows :—

“ First. That the respondents, in the month of January, in the year of our Lord one thousand eight hundred and forty, were common carriers of merchandise on the high seas from the city of New York, in the state of New York, to Stonington, in the state of Connecticut, and were then owners of the steamboat Lexington, then lying at the port of New York, in the state of New York, and which vessel was then used by the respondents as common carriers, as aforesaid, for the transportation of goods, wares, and merchandise on the high seas from the said port of New York to the said port of Stonington, in the state of Connecticut.

“ Second. That the complainants, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, on the thirteenth day of January, A. D. 1840, contracted with the respondents for the transportation, by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of certain gold coin, amounting to fourteen thousand dollars, and of certain silver coin, amounting to eleven thousand dollars, to the libellants belonging ; and the said respondents then and there, for a reasonable hire and reward, to be paid by the libellants therefor, contracted with the libellants that they would receive said gold coin and silver coin on board of the said steamboat Lexington, and transport the same therein on the high seas from said New York to said Stonington, and safely deliver the same to the libellants.

*351] “ Third. That the libellants, on the said thirteenth day of *January, A. D. 1840, at said New York, delivered to the said respondents on board of the said steamboat Lexington, then lying at said New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of said steamboat the said gold coin and silver coin, for the purpose of transporting the same by water on the high seas from said New York to said Stonington, and to deliver the same to the libellants as aforesaid.

“ Fourth. That the steamboat Lexington sailed from said port of New York, with the said gold coin and silver coin on

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board, on said thirteenth day of January, A. D. 1840, and bound to said port of Stonington; yet the respondents, their officers, servants, and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging, and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents, so carelessly, improperly, and negligently managed and conducted the said steamboat Lexington during her said voyage, that, by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments, and of such careless, improper, and negligent conduct, the said steamboat, together with the said gold coin and silver coin to the libellants belonging, were destroyed by fire on the high seas, and wholly lost.

"Fifth. That by reason of the destruction of the said steamboat Lexington, and of the said gold coin and silver coin, the libellants have sustained damage to the amount of twenty-five thousand dollars.

"Sixth. That the said New Jersey Steam Navigation Company are possessed of certain personal property within the said Rhode Island district, and within the ebb and flow of the sea, and within the maritime and admiralty jurisdiction of this court, to wit, of the steamboat called the Massachusetts, her tackle, apparel, furniture, and appurtenances, and of other personal property.

"Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this court, in verification whereof, if denied, the libellants crave leave to refer to the depositions and other proof to be by them exhibited in the cause. Wherefore, the libellants pray that process, in due form of law, according to the course of admiralty and of this court in causes of admiralty and maritime jurisdiction, may issue against the respondents, and against the said steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, *or any other property to the respon- [*352 dents belonging within the said Rhode Island district; and that the said property, or any part thereof, may be attached and held to enforce the appearance of the respondents in this court, to answer the matters so articulately propounded, and to answer the damages which may be awarded to the libellants for the causes aforesaid; and that this court would be pleased to pronounce for the damages aforesaid, and to decree such damages to the libellants as shall to law and justice appertain."

On the same day, a monition and attachment were issued,

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directing the steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, or any other property to the respondents belonging, within the Rhode Island district, to be attached. All of which was done.

In May, 1842, the respondents filed their answer, which is too long to be inserted. The substance of it was,—

1st. They admitted the ownership of the Lexington, and her being used for the transportation of passengers, goods, wares, and merchandise between New York and Stonington.

2d. They denied any contract whatever with the libellants.

3d. They denied that the libellants ever shipped, or that the respondents received from the libellants, any gold and silver coin whatever.

4th. They asserted that whatever goods were received on board the Lexington were received under the advertisements and notices mentioned in a previous part of this statement.

5th. That the usage and custom of the company was to be held responsible for ordinary care and diligence only; and that this usage, being well known to the libellants, constituted a part of the contract of shipment.

6th. That the bill of lading, heretofore mentioned, was a copy of all the bills of lading given by the company, which was well known to the libellants.

7th. That the notice above mentioned was posted up on board the steamboat, and on the wharf, and in the office of the company, of which facts the libellants were informed.

8th. That the Lexington was accidentally destroyed by fire.

9th. They denied that the cotton was improperly stowed; that the engine, machinery, &c., were imperfect and insufficient; that the officers carelessly, improperly, or negligently managed the boat; or that by reason of these things the boat was lost. The contrary of all these things was averred; and they further averred, that they had complied with the requisitions of the act of Congress passed on the 7th of July, 1838.

*353] *In verification of this last averment, they filed the inspection certificate, dated on September 23d, 1839.

On the 18th of October, 1842, the District Court pronounced a *pro forma* decree, dismissing the libel with costs, from which an appeal was taken to the Circuit Court.

Under the authority of the Circuit Court, commissions to take testimony were issued, under which a vast mass of evidence was taken on both sides.

The libellants offered evidence to prove the following positions:—that the furnaces were unsafe and insufficient; that there was no proper casing to the steam-chimney, nor any safe lining of the deck where the chimney passed through; that

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dry pine wood was habitually kept in a very exposed situation; that, especially, there was a very improper stowage or disposition of the cargo on board, considering what that cargo was; that the boat had no tiller chain or rope, such as the act of Congress, as well as common prudence, required; that there were on board no fire-buckets, properly prepared and fitted with heaving-lines; that the fire-engine was in one part of the boat, while the hose belonging to it was kept or left in another, and where it was inaccessible when the fire broke out; and that in other respects the respondents were guilty of negligence the more culpable, as the same boat had actually taken fire in her last preceding voyage, and no measure of caution had been taken to prevent a recurrence of the accident.

The respondents, on the contrary, offered evidence to rebut that adduced in support of the above, and particularly that the boat, hull, engine, boiler, and general equipment were good; that the most experienced men had been employed, without regard to expense, in putting her into complete order; that she had a captain, pilot, and crew equal to all ordinary occasions, and that respondents were not liable if they did not prove fit for emergencies which might appall the stoutest; that the boat was well found in tool-chests; that there were on board a suction-hose, fire-engine, and hose, as required by the act of Congress; that they were stowed in a proper place; that sufficient reasons were shown why they were not available at the fire; that there were three dozen and a half of fire-buckets on board; that the steering apparatus was good; that the loss of the boat did not result from her not having "iron rods and chains" instead of "wheel or tiller ropes;" that the parting of the wheel-ropes, if occasioned by the fire, did not contribute at all to her loss.

At November term, 1843, the cause came on to be heard before the Circuit Court, when the court pronounced the following decree:

"This cause came on to be heard upon the libel, the answer *of the respondents, and testimony in the case. [*354 The respondents submitted to a decree.

"Whereupon it is ordered, adjudged, and decreed, that the said libellants have and recover of the said respondents the sum of twenty-two thousand two hundred and twenty-four dollars, and costs of suit, and that execution issue therefor according to the course of the court."

An appeal from this decree brought the case up to this court.

It was argued by *Mr. Ames* and *Mr. Whipple*, for the plain

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tiffs in error, and *Mr. R. W. Greene* and *Mr. Webster*, for the defendants. The arguments extended over a wide field, and it is impossible to give them *in extenso*. All that can be done will be to place before the reader the leading views of the respective counsel, and the reasons in support of them.

The brief filed by *Mr. Ames* and *Mr. Whipple* appears to contain these views and authorities. It was as follows:

The libel, after stating that the respondents, as common carriers of merchandise from the city of New York to Stonington, in the state of Connecticut, were owners of the steamboat *Lexington*, used by them for carrying on their said business, states, in articles second and third:—

“Second. That the complainants, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, on the 13th day of January, A. D. 1840, contracted with the respondents for the transportation by water, on board of the said steamboat *Lexington*, from the said port of New York to the said port of Stonington, of certain gold coin amounting to fourteen thousand dollars, and of certain silver coin amounting to eleven thousand dollars, to the libellants belonging; and the said respondents, then and there, for a reasonable hire and reward, to be paid by the libellants therefor, contracted with the libellants that they would receive said gold and silver coin on board of the said steamboat *Lexington*, and transport the same therein, on the high seas, from said New York to said Stonington, and safely deliver the same to the libellants.

“Third. That the libellants, on the said 13th day of January, A. D. 1840, at said New York, delivered to the said respondents, on board of the said steamboat *Lexington*, then lying at said New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of said steamboat, the said gold *355] coin and silver coin, for the purpose of transporting the same by *water, on the high seas, from said New York to said Stonington, and to deliver the same to the libellants, as aforesaid.”

The libel then proceeds to state the loss of the *Lexington*. whilst on her voyage from New York to Stonington, on the 13th of January, 1840, and of the gold and silver coin on board, by fire, and attributes the loss to the improper stowage of the gold and silver coin, the imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equip-

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ments of the boat, and her careless, improper, and negligent management and conduct by the officers, servants, and agents of the respondents; and by reason thereof claims damages to the amount of twenty-five thousand dollars.

The proceeding is *in personam*, the process being a warrant of attachment and monition, both the attachment and monition being special.

The appellants contend that the decree of the Circuit Court for the Rhode Island district should be reversed, and the libel dismissed, on the following grounds:—

First. That the contract set forth in the libel, and claimed to be proved, and for breach of which damages are sought therein,—to wit, a contract to carry the gold and silver coin of the libellants, in the steamboat of the respondents, from the city of New York to Stonington, in the state of Connecticut,—is not a contract within the admiralty and maritime jurisdiction of the courts of the United States; and hence that this court, sitting as a court of admiralty, has no jurisdiction of this cause.

Second. That, in fact, the libellants did not deliver to the respondents, and the respondents did not receive from the libellants, the said gold and silver coin to carry, but that the contract of the libellants was wholly with one William F. Harnden, a carrier and forwarder on his own account and risk, and as such contracted with and paid by the libellants; and hence, that if the libellants have any cause of action for the loss of their said coin, it is against Harnden, and not against the respondents, there being no privity of contract between the libellants and respondents.

Third. That if, in their own name, which we deny, the libellants could pursue the respondents, it could only be by virtue of and under the contract of Harnden and the respondents, for the transportation on board of the boats of the respondents of Harnden's express crate; and that, by virtue of this contract, Harnden was the insurer of his own crate, whilst on board the respondents' boats, using said boats as his own.

Fourth. That although, under these circumstances, we cannot *be liable for any degree of negligence, or [*356 for want of sufficiency in our boat and equipments, to the libellants, with whom we did not contract, and for whom we did not carry, we deny, as a matter of fact, the charge made against us in the libel in this respect, and contend that our boat was staunch and strong, and well equipped, and that her loss by fire was not occasioned by any deficiency in her equipments, or any unskilfulness or negligence in her conduct.

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First point. We say that this court, as a court of admiralty, has no jurisdiction of the contract set forth in the libel,—a carrying contract, stated and claimed to have been made in the city and within the body of the county of New York, and to be performed by the respondents by a trip of their boat, in which she passed round the head of New York harbor, up the East River, through a portion of Long Island Sound, to Stonington, *infra fauces terræ*,—land-locked the whole way.

It is well settled that this court will judicially notice geographical facts relating to causes before them. In *United States v. La Vengeance*, 3 Dall., 297, this court took judicial notice of the position of Sandy Hook. See, too, *The Apollon*, 9 Wheat., 374. In *Steamboat Jefferson*, 10 Id., 428, and in *Peyroux v. Howard*, 7 Pet., 342, this court took judicial notice of the fact that the tide ebbed and flowed at New Orleans.

The general question of the jurisdiction of the courts of the United States as courts of admiralty, and especially in relation to contracts, has been much discussed; and we refer the court, for the general learning and argument upon this subject, to the late Judge Winchester's opinion in *The Sandwich*, 1 Pet., Adm., 233, *n.*; Hall's Adm. Pr., Introduction; and to the opinions of the late Mr. Justice Story, in *De Lovio v. Boit*, 2 Gall., 398, &c., and *The Schooner Volunteer*, 1 Sumn., 550, in which a very enlarged admiralty jurisdiction is contended for; and to the very able and critical opinions of Mr. Justice Johnson, late of this court, in *Ramsay v. Allegre*, 12 Wheat., 611; and of Mr. Justice Baldwin, late of this court, in *Bains v. The Schooner James and Catharine*, 1 Baldw., 544; and to 1 Kent Com., 367–377, 5th ed., where a very restricted jurisdiction over contracts is held to have been given to the courts of the United States by the provisions of the Constitution.

Upon this subject, and in relation to the case at bar, we submit to the court the following points and considerations:

The Constitution of the United States provides, article 3, sec. 2, that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of *357] the United States, and the treaties made, or which shall be made, *under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

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By this clause, the judicial power of the United States is to extend to "all cases of admiralty and maritime jurisdiction;" and whether, considering the letter of the clause, or the nature of the cases embraced in it, the jurisdiction of the courts of the United States is held to be exclusive. *The Sandwich*, 1 Pet., Adm., 233, note (Judge Winchester); *Martin v. Hunter's Lessee*, 1 Wheat., 333; *Bains v. Schooner James and Catharine*, 1 Baldw., 544; 1 Kent Com., 377, 5th ed.

If this jurisdiction be not imperatively exclusive, by force of the Constitution, it may, at least, become exclusive at the option of Congress; and hence the question of its extent becomes greatly interesting, both as to the jurisdiction of the states and of the common law; or, in other words, to the *right of trial by jury*.

The jurisdiction is given over "all cases," without reference to the citizenship of the parties, which indicates the extent; and it is not given over "all admiralty and maritime cases," but over "all cases of admiralty and maritime jurisdiction," which indicates the limit of the jurisdiction.

The word "jurisdiction" is necessarily used in direct reference to some court, and the reading of the clause, therefore, is, "all cases of which admiralty and maritime courts have been accustomed to exercise jurisdiction;" the words "admiralty" and "maritime" being synonymous,—the one describing the jurisdiction by the name of the court, the other by the nature of the causes tried in it.

The jurisdiction of courts is necessarily a matter of artificial law, dependent upon convenience, circumstances, policy; and is usually parcelled out by positive regulations.

With regard to the Continental maritime courts, and the courts of admiralty in England, this has been especially the case.

Though founded on the customs and usages of the Mediterranean Sea, collected in the Consulat, these customs and usages were adopted and modified to suit the different countries of Europe, by positive regulation, and courts established with jurisdiction and rules of decision marked out by the code of each state or commercial city. *Us et Coustumes de la Mer*, published at Bordeaux, 1681; *Sea Laws*, 254-256, 376, 377.

*Though some matters are within the jurisdiction of all maritime courts, yet it is obvious that on a great variety of subjects the codes differ; and that there is no universal maritime law fixing with precision the jurisdiction of courts of admiralty or maritime courts.

To what source, then, are we to go to ascertain what cases are committed to the courts of the United States by the terms

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“cases of admiralty and maritime jurisdiction,” used in the Constitution?

We submit, first, that we are not to go to the codes or laws of France, Spain, Holland, the Hanse Towns, &c.,—to countries of the civil law,—to ascertain the meaning of these terms, thus adopting a varying standard of jurisdiction; but, as in other cases, to the law of the parent country, England,—the country from whence this was settled, and from whence we derive, in general, all our laws and institutions.

Second. That, except as a matter of curious speculation, it is of no importance—to the question before us it is of no importance—to ascertain what was anciently or originally the jurisdiction of the English admiralty; but that the question is, as a matter of fact, what was it, at earliest, at the settlement of the country, or, latest, at the period of the American Revolution; and from the course and practice of courts of admiralty in this country, what was understood to be the extent of admiralty jurisdiction at the time of the adoption of the Constitution of the United States, when the words referred to were used in that instrument.

Third. That, to the question before the court, it is of no importance, whether, in the struggle between the courts of common law and admiralty, the former, carrying out acts of Parliament, or, by their own inherent power of prohibition to inferior tribunals, transgressing their rightful jurisdiction, restricted the jurisdiction of the English admiralty within narrower limits than it anciently or originally claimed and exercised; so that, as a matter of fact, it was restricted in its jurisdiction within those limits at the periods above referred to.

Fourth. That it is of no importance to consider the question, whether the terms of the statutes of Richard II. render them applicable, as statutes, to this country; inasmuch as they, with the decisions under them, formed a part of the law of England, fixed the relative jurisdiction of the courts of admiralty and common law, and had fixed it centuries before the settlement of this country.

We might with much more reason contend, that the royal order of King Edward I. and his lords, and of King Edward *359] III., and of his solemn convocation of judges, which were intended *to restrain the courts of common law, or the inferior manorial jurisdictions, were of no binding force upon this country, as invasions of the ancient law of England, than can be contended on the other side, that solemn acts of Parliament, passed so many years ago, are to be disregarded, as showing the ancient state of the English law.

Fifth. That at the settlement of this country, and at the

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Revolution, it is perfectly notorious that the courts of admiralty in England not only did not exercise, but did not claim to exercise jurisdiction over such contracts as the one set forth in the libel.

We do not refer to the claims of civilians in their treaties, in which they claimed every thing in general terms. Sea Laws, 208, extracts from Godolphin's View of the Admiral's Jurisdiction.

From such contracts as that set forth in the libel, the courts of admiralty were expressly excluded by the terms of the acts of Richard II., confirmed and explained by the acts of Henry IV. and Elizabeth. See Acts; Sea Laws, 229, 234, 235, and in 6 Vin. Abr., 520, 521.

These acts were plainly and pointedly intended to restrain the jurisdiction of admiralty on waters within the body of a county, and especially within all ports and havens. See Brownlow, part 2, p. 16; Sea Laws, 333. See cases collected in 2 Gall., 429, 447, and 6 Vin. Abr., 523-527.

Dr. Browne admits, what some other civilians deny, that ports, creeks, and havens are within the restraining acts of Richard II. and Henry IV., and that the admiralty jurisdiction was excluded from these places by those acts. 2 Bro. Civ. & Adm. Law, 92; 3 Dunlap, 33. See, too, opinion of Sir Chris. Robinson, in The Public Opinion, 2 Hagg. Adm., 398.

Indeed, the whole criticism by Judge Story in *De Lovio v. Boit*, of the decisions under the statutes of Richard, is intended to show rather that they were decided wrongly, than that they did not decide that the admiralty had no jurisdiction over contracts made in ports and havens.

The undoubted doctrine of the common law courts, since these statutes at least, has ever been, that the jurisdiction of admiralty over contracts is confined to contracts made upon the *high sea*, to be executed upon the *high sea*, of matters in their own nature maritime. 2 Gall., 437.

One great point of dispute between the common lawyers and the civilians, in the construction of the statutes of Richard II., was the meaning of the words "things done upon the sea," in stat. 13, Richard II., and "things done and arising within the bodies of counties," in stat. 15, Richard II.

*The civilians, and with them agrees Judge Story, [*360 contended that the words "things done upon the sea" meant "things done touching the sea;" i. e., maritime affairs and transactions.

They liken these words to the words of the French ordinance of 1400, which gives the admiralty of France "connoissance et jurisdiction de tous les faits de la mer," &c., and

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to the words of the French ordinance quoted by Selden, "pour raison ou occasion de faits de la mer;" that is, Selden says, "ab aliquam causam a re maritima ortam;" and because "tous les faits de la mer" means maritime transaction, in the French ordinance, the argument is, that the words "choses faits sur la mer" mean the same thing in the English statute. 2 Gall., 439.

Unlike the French admiralty jurisdiction, the English admiralty jurisdiction, over contracts at least, originally depended upon the place where made or transacted; and even, it would seem, upon the occupation of the parties to them. See Order of King Edward I.; 2 Gall., 402, n. 16; Black Book of Admiralty, quoted by Judge Story, Id., 405.

Sixth. That, as a matter of fact, the courts of admiralty in this country, previous to the adoption of the Constitution of the United States, so far as their decisions have been considered of value enough to be published, never did exercise jurisdiction over contracts of the character of that set forth in the libel, but held themselves confined to the limits of the jurisdiction of the English courts of admiralty. *Clinton v. Brig Hannah*, Bee, 419, decided by Judge Hopkinson in 1781; *Shrewsbury v. Sloop Two Friends*, Id., 435, decided by Judge Bee in 1786. See also *The Brig Eagle*, Bee, 78, and *Pritchard v. The Lady Horatia*, Id., 168, the former decided in 1796, and the latter in 1800, after the adoption of the Constitution; in the latter of which, the ground of the jurisdiction of the court in the case before it is noticed, and the English cases relied on and reviewed.

Seventh. The terms of the commissions of courts of vice-admiralty in this country, in former times, and of the judges of admiralty in England, afford no index to the true limits of their jurisdiction. They were mere matters of form, and Lord Stowell, speaking of his own commission as judge of the High Court of Admiralty, says,—“It is universally known, that a great part of the powers given by that commission are totally inoperative.” *The Apollo*, 1 Hagg. Adm., 312, 313. See, too, *Schooner Volunteer*, 1 Sumn., 564, 565.

Eighth. No case has yet been decided by the Supreme Court of the United States, affirming the admiralty jurisdiction of the court over a contract of this character.

*361] *The decisions of the Supreme Court upon the subject of their admiralty jurisdiction may be arranged in four classes:—

1. Cases of material men, proceeding *in rem*, for repairs done or materials furnished.

The *General Smith*, 4 Wheat., 438, was the case of a mate-

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rial man proceeding *in rem* in the domestic port of the ship. The libel was dismissed upon the ground, that upon a ship, in a domestic port, the maritime law gave no lien for materials found, &c., the credit being personal; and hence, that the proceeding *in rem* could not be maintained. See the *obiter dictum* of Mr. Justice Story in this case, in substance, that, if the libel had been *in personam*, it would have been sustained; commented on by Mr. Justice Johnson in *Ramsay v. Allegre*, 12 Wheat., 611.

The case of *Peyroux v. Howard*, 7 Pet., 324, was a libel *in rem* against a domestic vessel in the port of New Orleans, brought by a material man, to enforce a lien given by the local law of Louisiana in such cases.

These decisions conform to the decisions of *Clinton v. Brig Hannah*, *Shreusbury v. Sloop Two Friends*, and *Pritchard v. The Lady Horatia*, before cited from Bee, which suppose that the remedy in admiralty depends upon the fact of a lien.

The third resolution of the agreement of February 4th, 1632, between the judges of the King's Court of Westminster and the judge of the Court of Admiralty and the attorney-general, concerning the jurisdiction of the English admiralty, was in these words:—

“If suit be in the Court of Admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as, for his interest, makes himself a party, no prohibition is to be granted, though they be done within the realm.” Dunlap's Adm. Prac., 14; Hall's Adm. Prac., 24, 25, Introduction.

In the time of Charles I., it seems that the English admiralty had jurisdiction to enforce a lien in favor of material men, by a proceeding *in rem*. 6 Vin. Abr., 527.

2. Cases of possessory, and, perhaps, petitory suits concerning vessels.

The case of the *Steamboat Orleans v. Phæbus*, 11 Pet., 175, 184, was a libel *in rem*, in the nature of a possessory suit, brought by one part-owner of a vessel against the others, praying that the vessel might be sold, and he paid his advances and freight in account with the other part-owners, and his proportion of the proceeds of the sale. The court below, strangely enough, decreed an account and sale. It being shown that the boat was employed in plying between New Orleans and Maysville, *on the Ohio River,—i. e., [*362 her substantial employment being in waters without the ebb and flow of the tide, though she touched waters where the tide ebbed and flowed at one terminus of her trips, New

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Orleans—the libel was dismissed by this court for want of jurisdiction.

Undoubtedly had her substantial employment been on waters where the tide ebbed and flowed, the court would have entertained the suit so far as to decree a stipulation in favor of the part owner, for his security, though the account and sale were out of the course of admiralty.

Possessory suits, in relation to vessels, have always been entertained by the English Courts of Admiralty without prohibition.

“Until some time after the Restoration,” says Lord Stowell, “the courts of admiralty exercised jurisdiction over petitory suits, when it was found by other courts that it belonged exclusively to them; since which it has been very cautious not to interfere at all in questions of this sort.” *The Aurora*, 3 Rob. Adm., 133, 136.

Pursuing the same subject in the case of *The Warrior*, 2 Dods. Adm., 288, he reaffirms the above in regard to petitory suits, and adds:—“The jurisdiction over causes of possession was still retained; and although the higher tribunals of the country denied the right of this court to interfere in mere questions of disputed titles, no insinuation was ever given by them that the court must abandon its jurisdiction over causes of possession.” See, too, 2 Bro. Civ. and Adm. Law, 113, 114, 397; Dunlap’s Adm. Prac., 24, 29, 30.

3. Cases of mariners’ wages.

The Steamboat Jefferson, 10 Wheat., 429, was a libel *in rem* for wages earned on board a steamboat plying between Shippingport, in Kentucky, and places up the Missouri River, which was dismissed by this court for want of jurisdiction over the contract, as one not relating to service performed on waters in which the tide ebbed and flowed.

If the service had been substantially performed on tide-waters, the admiralty would have had jurisdiction; such contracts being within the acknowledged jurisdiction of the English admiralty. 2 Bro. Civ. and Adm. Law, 36, 37; Dunlap, 26, 27.

4. Cases of salvage.

Hobart et al. v. Drogan et al., 10 Pet., 108, 119, 120, 121, was a case of salvage.

Salvage has always been deemed within the jurisdiction of the English admiralty. See the case of *The Joseph Harvey*, 1 Rob. Adm., 306, in which Sir William Scott says,—“It *363] is allowed *that the court may, in case of pilotage as well as salvage, direct a proper remuneration to be made.”

Andrews v. Wall, 3 How., 568, was also a case of salvage,

the proceeds being in possession of the court, and ordered to be distributed according to an agreement of consortship between the salvors. As his Honor, Judge Story, observed, in delivering the opinion of the court, it has always been held in the English admiralty, as incidental to the jurisdiction of the court over the subject of salvage, that the court has power to entertain supplementary suits in relation to the proceeds in their possession, and to order them to be paid over to the parties interested according to their right.

Ninth. We know of no case, out of the first circuit, in which the jurisdiction of the court in admiralty over such a contract as this has been affirmed.

The Sloop Mary, 1 Paine, 671, was a libel to enforce a bottomry bond, executed by the owner and master in the West Indies, to enable him to purchase a cargo. One question was, whether the case was within the admiralty jurisdiction of the court, the bond being made by the owner as owner of the vessel, since as master he could not have made such a bond for the mere purchase of cargo, but only for necessary supplies and repairs. The court sustained their jurisdiction, upon the ground that this was a maritime contract, the vessel being hypothecated for the payment of the sum loaned, and the payment being contingent upon the safe arrival of the vessel.

In *Wilmer v. Smilax*, 2 Pet. Adm., 295, the District Court of Maryland sustained jurisdiction of a libel on a bottomry deed executed by the owner in a home port. This is going farther than this court has intimated it felt authorized to go. 4 Cranch, 328.

That the English admiralty has always had undisputed jurisdiction over bottomry bonds, and of all contingent hypothecations of cargo and freight, is well settled; the jurisdiction depending, not upon the consideration of the contract, but upon whether the payment be contingent upon the arrival of the vessel. *The Barbara*, 4 Rob. Adm., 1; *The Zodiac*, 1 Hagg. Adm., 325; *The Atlas*, 2 Id., 48; *The Murphy*, 2 Bro. Civil & Adm. Law, 530; Dunlap's Adm. Prac., 27, 28.

Second point. That, in fact, the libellants did not deliver to the respondents, and the respondents did not receive from the libellants, the said gold and silver coin to carry, but that the contract of the libellants was wholly with one Wm. F. Harnden, a carrier and forwarder on his own account and risk, and as such contracted with and paid by the libellants; and hence, that if the libellants have any cause of [*364 action for the *loss of said coin, it is against Harnden, and not against the respondents, there being no privity of contract between the libellants and respondents.

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Harnden was the collector of drafts, &c., for the Merchants' Bank, in the city of New York, and carrier of the specie in question.

His business was that of a carrier and forwarder of specie, small packages, &c., collector of drafts, purchaser of goods, &c., carried on in offices kept by him in New York and Boston, and how he did his business as a carrier is proved by Harnden, 118, 121; Lockwood, 102, 105.

His mode of carrying between New York and Stonington is shown by his agreements with the respondents, owners of boats plying between those places.

The agreement of August, 1839, provides "that the said William F. Harden, for and in consideration of the sum of \$250 per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via. Newport and Stonington, not to exceed once in each day, from New York and from Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st December, A. D. 1839, and from this date.

"The following conditions are stipulated and agreed to, as part of this contract, to wit:—The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, on the boats of said company.

"Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:

"Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to
*365] his care; nor is any risk assumed by, nor can any be attached to, *the proprietors of the steamboats in which his crate may be, and is transported, in respect to it or its contents, at any time." Schedule I, printed rec. 128. Harnden

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applies for renewal of contract, by letter, of date Boston, December 7, 1839, schedule I, printed rec. 129; Handy replies by letter, of date New York, December 9, 1839, schedule K, printed rec. 130; Harnden's letter, of date Boston, December 17, 1839, schedule L, printed rec. 130; Handy's letter, of date New York, December 31, 1839, schedule M, printed rec. 130, 131. To this Harnden makes no reply, waiting until he came to New York, Harnden's deposition, printed rec. 121, answer to third cross-interrogatory. He was kept back by bad weather (Lockwood's deposition, printed rec. 104, answer to twenty-second interrogatory); but under same contract, with same advertisements, continues to transport his crate in the boats of the New Jersey Steam Navigation Company, as before; and on coming to New York, on the 24th of February, 1840, formally renews the contract as proposed by Handy in his letter of December 31, 1839. During the interval between the date of this letter and the 24th of February, 1840, the Lexington was lost. See Harnden's deposition, 120; Brigham's, 28, answers to first, second, third, and fourth cross-interrogatories; Id., 141; Lockwood's, 104, twenty-third interrogatory; schedule N, printed rec. 131, 132. Harnden had acted as carrier for the bank before this transaction. Harnden's deposition, 120, answers to thirteenth, seventeenth, and eighteenth interrogatories, and to tenth cross-interrogatory.

He was not our agent, but did business for himself. They employed him, and not us, and were bound to know in what character he acted; the presumption being, that he who is employed is alone responsible for his acts and contracts.

The burden is upon the libellants to show that Harnden's acts and contracts bind us, he doing business as a carrier, on his own account, in fact and appearance.

We are not bound, therefore, to bring home to the libellants knowledge of the terms of his contract with us; and his notices of these terms are not our notices, but his own; stipulated for, it is true, in our contract with him, *ex abundanti cautela*, but our exemption from responsibility coming from our relation to Harnden and our contract with him, and not from the fact that his notices were brought home to his employers.

But the Merchants' Bank actually knew that Harnden did business for himself, and was alone to be responsible. He distributed ten thousand notices to that effect, and especially sent them to the Boston banks. Harnden's deposition, 119, answers to fourth, fifth, sixth, seventh, eighth, and ninth interrogatories, *page 121, answer 121; answer to tenth cross-interrogatory. [*366

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He advertised to that effect in the Boston newspapers, some of which this bank took. Curtis's deposition, 153; Champney's, 153; Nichols's, 154; advertisement, 155; Conant's, 153-155.

Harnden was not the agent of the Merchants' Bank to ship their coin with us. He was their agent to collect their drafts in New York, but their carrier to transport the proceeds to them at Boston. He used our boats under general express arrangements, for the carrying on of his own business, made between him and ourselves, by which both are bound, and which necessarily excluded all tacit agreements between us and his customers.

We carried Harnden's crate for him,—not its contents for his employers. We are, therefore, no carriers for the Merchants' Bank; there is no contract—no privity of contract—between them and us.

Hence, we cannot be liable to the Merchants' Bank; but, if at all, only to Harnden, on our contract with him. *Reynolds v. Toppan*, 15 Mass., 370; *King v. Lenox*, 19 Johns. (N. Y.), 235, 236; *Walter v. Brewer*, 11 Mass., 99; *Ward v. Green*, 6 Cow. (N. Y.), 173; *Allen v. Sewall*, 2 Wend. (N. Y.), 327; S. C. in error, 6 Id., 335; *Halsey v. Brown*, 3 Day (Conn.), 346; *Portugal coin case*, Abb. Ship., 119; Cas. t. Hardw., 85, 194; *Butler v. Basing*, 2 Car. & P., 613; *Citizens' Bank v. Nantucket Steamboat Company*, 2 Story, 32-34, 46.

Again, in case of valuables, as jewels and precious stones, gold and silver coin, carried either by land or sea, it not being the custom of the carrier to carry such things without a special acceptance, he shall not be liable for their loss, unless he accepts them and is paid for them. *Kenrig v. Eggleston*, Aleyn, 93; commented on by Lord Mansfield, in *Gibbon v. Paynton*, 4 Burr., 2301. Cases of baggage decided by Lord Holt, and collected in 1 Vin. Abr., 220; and see 1 Wheat. Selwyn, 301, No. 1, and cases cited. *Orange County Bank v. Brown et al.*, 9 Wend. (N. Y.), 85; *Pardee v. Drew*, 25 Id., 459; *Citizens' Bank v. Nantucket Steamboat Company*, 2 Story, 32-34, 46; Statutes 11 Geo. 4, and 1 Wm. 4, ch. 38, 68, found in 2 Kent Com., 609, n. c.; 2 Steph. N. P., art. *Carrier*, in relation to land-carriers. Statutes 7 Geo. 2, ch. 15; 26 Id. 3, ch. 86; 53 Id. 3, ch. 159, found in 2 Kent Com., 606. Abb. Ship., part 3, ch. 4, sect. 8, 9, and in chap. 5, on Limitation of Responsibility of Ship-owners. See *Hinton v. Dibbin*, 2 Ad. & E. (N. S.), 646, reviewing *obiter dicta* in *Boys v. Pink*, *367] 8 Car. & P., 361, and in *Owen v. Burnett*, 2 Cramp. & M., 353; S. C., 4 Tyrw., 133, in construction of statutes 11 Geo. 4 and 1 Wm. 4, ch. 68.

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We neither received, were paid for, nor carried, with our knowledge, the gold and silver coin of the Merchants' Bank.

The warranty of sufficiency of boat, equipments, &c., is implied in the contract of carriage in favor of him whose goods are contracted to be carried. It follows, that, if we did not contract to carry for the Merchants' Bank, we did not warrant the sufficiency of our means of carriage to them.

Third point. That if in their own name, which we deny, the libellants could pursue the respondents, it could only be by virtue of and under the contract of Harnden and the respondents for the transportation on board of the boats of the respondents of Harnden's express crate; and that, by virtue of this contract, Harnden was the insurer of his own crate whilst on board the respondents' boats, using said boats as his own.

The contract between Harnden, by its terms, throws the whole risk of the carriage of his crate and contents exclusively on him,—in any event, at any time. No policy forbids such a contract.

In England it is well settled that a carrier may limit his responsibility by a special acceptance. *Kenrig v. Eggleston*, Ayleyn, 93; Rolles, Ch. J., *Southcote's case*, 4 Co., 84; Coke, Ch. J., *Slue v. Morse*, 1 Vent., 190, 288; Hale, Ch. J., *Lyon v. Mells*, 1 Smith, 484; S. C., 5 East, 428; Abb. Ship., part 3, ch. 4, sec. 8, p. 296, ed. 1822.

See old and new form of bill of lading. Abb. Ship., part 3, ch. 2, sec. 3, p. 216, ed. 1829; 1 Bell Com., 454, 471, 4th ed.; *Gibbon v. Paynton*, 4 Burr., 2301; see Yates, J., Peake, 150; 2 Taunt., 271; 1 Bell Com., 380, 384, 4th ed., book 1, part 1, ch. 4, sec. 3, *American Bills of Lading*; see *Gordon v. Buchanan*, 5 Yerg. (Tenn.), 71; *Johnson v. Friar*, 4 Id., 48; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.), 87; *Relf v. Rapp*, 3 Watts & S. (Pa.), 35.

It is well settled in England, that a common carrier may limit his responsibility by notices brought home to the knowledge of his customers. *Nicholson v. Willan*, 5 East, 513; *Gibbon v. Paynton*, 4 Burr., 2301; Yates, J., and Aston, J., *Evans v. Soule*, 2 Mau. & Sel., 1; *Latham v. Ratley*, 2 Bann. & C., 20; *Harry v. Packwood*, 2 Taunt., 264; *Leeson v. Holt*, 1 Stark., 186; *Mawing v. Todd*, Id., 72; *Lowe v. Booth*, 13 Price, 329; *Riley v. Horne*, 5 Bing., 217; *Brooke v. Pickwick*, 4 Id., 218.

The same doctrine prevails in America. *Gordon v. Little*, 8 Serg. & R. (Pa.), 533; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.), 87; *Orange County Bank v. Brown*, 9 Wend.

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(N. Y.), 115, Nelson, J.; *Phillips v. Earle*, 8 Pick. (Mass.), 182; *Bean v. Green*, 3 Fairf. (Me.), 422.

*368] *As to the extent of a carrier's liability under such notices. *Smith v. Horne*, 8 Taunt., 144; *Lowe v. Booth*, 12 Price, 329; *Brooke v. Pickwick*, 4 Bing., 218; *Owen v. Burnett*, 2 Crompt. & M., 360; *Wyld v. Pickford*, 8 Mees. & W., 443.

By special contract a carrier may dispense with all responsibility; and, in this respect, a special agreement differs from notice. 1 Bell Com., 380-384, 4th ed., book 1, part 1, ch. 4, sect. 2.

The cases of *Cole v. Goodwin*, 19 Wend. (N. Y.), 280; *Nowlin v. Hollister*, Id., 246, 247; *Clark v. Faxton*, 21 Id., 153, and *Gould v. Hill*, 2 Hill (N. Y.), 623, are cases of lost baggage of passengers or goods carried by land. See *Scheiffelin v. Harvey*, 6 Johns. (N. Y.), 180; *McArthur v. Sears*, 21 Wend. (N. Y.), 194; which show that, as common carriers by water, under a contract for the carriage of goods, and especially valuables, deliberately made, we should be entitled to the benefit of the terms of our special agreement with Harnden, under which the libellants must claim, if at all. See 2 Kent Com., 601, 608.

But we were not common carriers of this crate and its contents. A common carrier as to some things is not necessarily a common carrier as to others. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 33-34, 46, &c.

The agreement between us, as the owners of steamboats, and Harnden, a carrier, was a permanent arrangement, by virtue of which he was to have the privilege of sending his crate by our boats, and to carry on his business in our boats.

This he could not exact of us as a common carrier for him, and we did not perform as a common carrier. Story Bail., 512, § 508; Id., 483, § 476; *Jencks v. Coleman*, 2 Sumn., 224, 225; Story Bail., 581-583, § 591, a, 583, n. 1; 1 Vin. Abr., 220, and cases cited.

In New York it is perfectly well settled that any other bailees, except common carriers, may make what contracts, and provide for what limitations of responsibility, they will, and the courts will fairly carry out the contract. *Alexander v. Greene*, 3 Hill (N. Y.), 1; 2 Kent Com., 608, note a.

In New York a bailee, under such a contract as that between Harnden and ourselves, is liable only for fraud. Id.

It is like a case of charter-party, in which the charter-party settles the responsibilities of the parties to it. *Abbott Ship*, part 3, ch. 1, Contract of Affreightment.

Fourth point. That, although under these circumstances

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we cannot be liable for any degree of negligence, or for want of sufficiency in our boat and equipments, to the libellants, with whom we did not contract, and for whom we did not carry, nor to Harnden for any misconduct short of fraud or wilful *injury, yet we deny, as a matter of fact, the charge made against us in this respect, and contend that our boat was stanch and strong, and well equipped, and that her loss by fire was not occasioned by any deficiency in her equipments, or any unskilfulness or negligence in her conduct. [*369]

Admitting that we could be liable to them on this ground, the burden, as in case of every other breach of contract, is upon him who alleges and claims for a breach,—the libellants here. They must prove,—

1st. The insufficiency, &c.

2d. That their loss was caused by that insufficiency, and not merely its abstract existence. 1 Bell Com., 460, 4th ed., book 3, part 1, ch. 5, sec. 2, paragraph 499, L. B., 3; Pothier, *Chartre Partie*, vol. 1, p. 319; *Havelock v. Geddes*, 10 East, 555; *Sharp v. Grey*, 9 Bing., 459; Alderson, J., *Bremmer v. Williams*, 1 Car. & P., 414; Best, J., *Jones v. Boyce*, 1 Stark., 495; *Bell v. Reed*, 4 Binn. (Pa.), 127; *Hart v. Allen*, 2 Whart. (Pa.), 120; *Reed v. Dick*, 8 Watts (Pa.), 479; *Aimes v. Stevens*, 1 Str., 128.

The question has been, whether a carrier is ever liable for a *secret* defect. Pothier, *Chartre Partie*, vol. 1, p. 319; *Sharp v. Grey*, 9 Bing., 459; Alderson, J., *Christie v. Griggs*, 2 Campb., 81; *Bremmer v. Williams*, 1 Car. & P., 414; Story on Bailments, §§ 509, 562, 571, a, 592, and authorities cited.

However this may be, as a general question, we contend that, under a contract by which all risk was excluded from us, we are not to be liable for secret defects in our boats, machinery, &c.

Our boat, hull, engine, boiler, and general equipment were good, by the proof. (Here the counsel entered into a minute examination of the testimony.)

The act of 1838 is a penal act, imposing new duties upon carriers, and does not apply to a boat engaged in the waters in which the Lexington was employed, when lost, but only to boats voyaging "at sea," or in the specified larger lakes. See 8th and 9th sections of the act of 1838.

Compare the 8th and 9th sections of the act with the 3d, 4th, 5th, and 6th sections, and it will be seen that the word "sea," in the act, does not mean "bay, river, or other navigable waters of the United States," but "*altum mare*," "high or open sea," in the common sense of the term.

But, finally, the loss of the Lexington did not result from

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her not having "iron rods and chains," instead of "wheel or tiller ropes," required by the statute.

The boat, when found to be on fire, should have been *370] stopped; and this seems to have been the captain's attempt, at one *time. The parting of the wheel-ropes, if occasioned by the fire, did not contribute at all to her loss.

The want of the steering apparatus required by the statute, not being the cause of her loss, is no ground for damages, within the authorities above cited.

Mr. R. W. Greene, for the defendants in error, argued the question of jurisdiction first, and then the following points:—

1. That the respondents were common carriers.
2. That common carriers are liable for all losses, except those which arise from the act of God, the public enemies, or the fault of the owner of the goods.
3. That common carriers cannot limit their liabilities by notice.
4. That even a special agreement to exempt a common carrier from the legal liabilities of his employment would be void. One cannot be a common carrier, receiving the compensation of common carriers, and yet be exempted or excused from the proper responsibilities of his employment.
5. That if there be any doubt of the correctness of the foregoing propositions, according to the law of England or other countries, there is none according to the law of New York, where the shipment in this case was made.
6. But if the libellants be wrong on the general point (*viz.*, that common carriers cannot, in New York at least, limit their responsibility at all by notice), still the effect of notice, if any effect whatever be given to it, can only be to relieve the carrier from liability for *extraordinary* losses or occurrences. He is still liable for losses within his own warranty, express or implied, or occasioned by his own negligence or misconduct. The libellants contend, therefore,
7. That there is no sufficient proof of notice in this case; and,—
8. That if notice be proved, it does not relieve the respondents from their implied warranty with regard to the vessel, her seaworthiness, her equipment, the competency of her crew and commander, the mode of stowing cargo, and the navigation and general management of her as a carrying vessel.

And the libellants will maintain, as a rule of evidence fit to govern this case, that if a vessel be lost in fair weather, without the presence of any external cause or occurrence adequate

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to the production of the loss, the legal presumption is that she was either unseaworthy or was improperly navigated, conducted, or managed; and to discharge the respondents, this presumption must be met, answered, and overthrown, by clear and satisfactory proof.

*The libellants contend that there is in the case no such clear and satisfactory proof as is sufficient to overcome the legal presumption; and they insist, further, that there is proof that, in point of fact, the respondents' warranty was not complied with in various respects, and among others in these, viz. :—that the furnaces were unsafe and insufficient; that there was no proper casing to the steam-chimney, nor any safe lining of the deck where the chimney passed through; that dry pine wood was habitually kept in a very exposed situation; that, especially, there was a very improper stowage or disposition of the cargo on board, considering what that cargo was; that the boat had no tiller chain or rope, such as the act of Congress as well as common prudence required; that there were on board no fire-buckets, properly prepared and fitted with heaving-lines; that the fire-engine was in one part of the boat, while the hose belonging to it was kept or left in another, and where it was inaccessible when the fire broke out; and that in other respects the respondents were guilty of negligence, the more culpable, as the same boat had actually taken fire in her last preceding voyage, and no measure of caution had been taken to prevent a recurrence of the accident.

1st point. As to the question of jurisdiction.

The counsel upon the other side have argued this question as if it were the decision of the court which vested the jurisdiction in it, immediately under the Constitution, without the intervention of an act of Congress, and that if the court were to decide with us, the jurisdiction must remain in its full extent until an alteration of the Constitution. But the Constitution vests in Congress the power to distribute this jurisdiction amongst the courts of the United States, as the public good may require. The courts only take what Congress confers. Congress may confer a jurisdiction as large as the grant contained in the Constitution, as they have done in the Judiciary Act of 1789; or they may abridge and restrict the jurisdiction within such limits as they think proper. They may enact the statutes of Richard, with my Lord Coke's construction. They may even take away the jurisdiction over seamen's wages and bottomry bonds. Congress can also regulate the forms of process and the modes of proceeding in the

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courts of admiralty, and can provide for the trial by jury of all issues.

Upon such a construction of the grant, the people retain the whole subject under their own control, to be regulated as experience and the progress of events may render expedient. If they find it too large under the Judiciary Act of 1789, they can limit it; if they prefer that the remedy should be confined to cases *in rem*, they can so restrict it; if they wish a process *in personam* as well as *in rem*, they can leave the law as it is.

*Whereas, by the construction contended for by our *372] adversaries, the court are urged to disable Congress, and the people through Congress, from conferring such jurisdiction as their interests may require. The statutes of Richard, with my Lord Coke's construction of them, become a part of the Constitution of the United States, and impose upon the people and Congress a perpetual disability to enlarge the jurisdiction, however much their interests may require it, without an alteration of the Constitution. The members of the Convention were statesmen, civilians, and common lawyers; they were engaged in framing an instrument of government, which they hoped, and which we hope, will endure for ages. The great objects of the confederacy were commerce and union. Is it not absurd to suppose that men, engaged in such a work, would have incorporated into the compact of government such distinctions as to remedies *in rem* and *in personam* as are contended for by the counsel for the respondents? Would they not have conferred the larger power upon Congress, and thus left the subject to be regulated as experience should show was most expedient?

It is said, however, in answer to this, that, if the court should now decide that it does not possess the jurisdiction, Congress can hereafter enlarge the jurisdiction. But the present grant is coextensive with the grant of power to Congress itself in the Constitution. The words used are the same in both instruments. If, then, Congress have already exhausted their power by vesting the courts with the whole of it, how can any fund remain in reserve upon which Congress can draw for a fresh supply?

But it is contended, by the counsel upon the other side, that the English system of admiralty, as it existed in 1787, became bodily transferred, just as it then stood, into the Constitution of the United States. Without inquiring, for the present, into the absurd, contradictory, and inconsistent principles upon which the common lawyers of England had placed the system, let us examine how far it would be suitable and appro-

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priate to the United States,—how far it would be adapted to our condition, and adequate to carry out one of the great objects for which the people adopted the Constitution. This object was to promote commerce. The preamble indicates this. The United States was a maritime nation, with an immense extent of sea-coast, indented with bays, rivers, and harbors, the navigation of which was dangerous. A few considerations will serve to show that the limited construction contended for by the other side would eminently fail in promoting this essential object of the union.

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*As to pilotage.

The English admiralty had no jurisdiction over pilotage, except upon the high seas, where it was not needed.

(*Mr. Greene* here illustrated the necessity of the supervision of the federal government over the subject of pilotage, because of its importance, its peculiar applicability to admiralty jurisdiction, the meritorious character of the services rendered, &c., &c.; also over the subject of material men, inasmuch as the states were foreign to each other as to jurisdiction; also over the subject of salvage, inasmuch as the English admiralty had jurisdiction over salvage only where the property of the ship wrecked was not cast ashore; see 5 How., 452; also over the subject of collisions in bays, harbors, and navigable rivers, which are purely a maritime subject, and more apt to occur than collisions on the high seas.)

The subject of affreightment is not within the admiralty jurisdiction of England, although the subject of seamen's wages is so. But freight is the mother of wages. The whole subject of affreightment is purely maritime, and within the jurisdiction of all the Continental courts, and of Scotland, to this day. 1 Sumn., 555, 558, 559.

What are the history and principles of English admiralty jurisdiction, as settled by the common law courts? The principle is, that if a contract be made upon land, to be performed upon the sea, or made upon the sea, to be performed upon land, the courts of admiralty have no jurisdiction. But they can only interfere where contracts are made upon the sea, to be performed upon the sea,—such as a note of hand, given at sea, to be paid at sea, or an agreement to convey real estate, to be executed upon the voyage. Lord Kenyon admitted this to be absurd. In 3 T. R., 267, he says,—“If the admiralty have jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea, in order to execute the instrument, borders upon absurdity.” The common law, as to all other than maritime contracts, is, that the law of the place of performance is to govern; but this rule is set

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aside as to admiralty. The general rule which governs all courts, as to their jurisdiction, is the subject-matter. This is the rule in chancery, in the ecclesiastical courts, and the common law courts, upon every branch of jurisdiction except the admiralty; and in that case alone the inquiry is, not whether the contract be of a maritime nature, but whether it was made within the body of a county. The statutes of Richard are relied upon for this rule, and these statutes are declared by Lord Coke to be in affirmance of the common law. From *374] whatever source this rule of jurisdiction was derived,—whether from the statutes *of Richard or from the common law,—if it be an arbitrary rule, and not founded in any just principle, it is unreasonable to suppose that the people of the United States meant to make it a part of their federal compact. But neither the common law nor the statutes of Richard are justly chargeable with this absurd rule of jurisdiction. It rests entirely upon the authority of Lord Coke, who was a great common lawyer, but no civilian.

(*Mr. Greene* then cited the ancient commissions in admiralty, the ordinance of Edward I., confirmed by ordinance of Edward III., the statutes of Richard II. and Henry IV., to show that the object of all of them was to place the admiralty jurisdiction in the same position where Edward III. had placed it, which did not justify the rule in question.)

The history of Lord Coke's controversy with Lord Chancellor Ellesmere, shows the extent to which he desired to push the exclusive jurisdiction of the courts of common law. 3 Bl. Comm., 44. Lord Coke's enmity to the admiralty has been a subject of comment by the common law judges in later times, particularly by Mr. Justice Buller; but they were bound by the authority of his decisions, however much they may have condemned the principle on which they were founded. And now, at this late day, this court are called upon to incorporate these decisions into the American Constitution, and thus deprive the American people of the power, through their representatives in Congress, so to regulate this jurisdiction as their interests may require.

The preservation of the trial by jury is said to be the great object for which these decisions were made. It was alleged that the admiralty had no trial by jury, that the judge was the immediate representative of the crown, and that the subject had no participation in the proceedings of his court. This was very plausible in England, but it has no application to this country; and even in England itself, the reason is not sound. If the trial by jury be of such importance as to exclude the admiralty jurisdiction from certain classes of cases

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of a maritime character, why is the jurisdiction of the Lord Chancellor allowed in that country? His jurisdiction extends over the whole kingdom, and controls and annuls the judgments of the common law courts. He is the immediate adviser of the king, and keeper of his conscience. He is a member of the Privy Council, a politician, appointed and removed as his party succeeds or falls. There is no jury trial in his court, except at his discretion; and he never orders an issue to be tried before a jury, except when the evidence is so doubtful that he can come to no satisfactory conclusion, and he then *puts upon a jury the responsibility of guessing. The United States courts are invested by the [375 Constitution with this power, and they exercise it, sitting as circuit courts in the different states.

How have the common law courts of England extended their own jurisdiction, whilst so scrupulous respecting that of others? The venue was originally local in cases of contracts and personal torts, as well as in real actions. The jury must come from the vicinage; and therefore, where the transaction occurred at sea, no jury could try the case. But a *videlicet* gave to these courts jurisdiction over the ocean, and the defendant was not allowed to deny the fiction. This was, in fact, an encroachment upon the admiralty. The Court of King's Bench had originally no jurisdiction over contracts, but was confined to cases of trespass. But a fiction which was not permitted to be denied gave jurisdiction over matters of contract, and a similar fiction enlarged the jurisdiction of the Court of Exchequer also.

Two arguments are urged against the jurisdiction over the present case:—

1st. It takes away the trial by jury.

2d. It encroaches upon the jurisdiction of the state tribunals.

1st. It takes away the trial by jury.

Nothing can be clearer than that our ancestors attached a high value to the right of trial by jury. But there is a wide difference between an English admiralty judge and one appointed under the Constitution of the United States. The reasons for entertaining a jealousy against the former do not apply to the latter. In the United States, admiralty judges, as well as common law judges, are appointed by and responsible to the people, in some form or other. There is, therefore, no political reason for restraining the jurisdiction of a court of admiralty. If our American ancestors were jealous of the jurisdiction of the vice-admiralty courts of the colonies, the reason for that jealousy ceased when we became an independent people. A vice-admiralty judge of the colonies was the

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representative of the crown; the people of the colonies had no voice nor participation in his proceedings. It was a foreign tribunal, enforcing, amongst other things, the obnoxious laws of trade. But when the people of the United States came to frame a government for themselves, and to establish a judiciary which should be ultimately responsible to them, nothing can more clearly show how well the Convention and Congress understood their change of position, than the insertion into the Judiciary Act of 1789 of the clause which makes *376] seizures upon tide-water, *for breaches of the revenue laws, cognizable in the courts of the United States, as courts of admiralty. No trial by jury was provided. This branch of the vice-admiralty jurisdiction was most bitterly complained of by the colonies; and yet the first Congress which sat under the Constitution invested the courts of the United States with the same power. It was composed of many of the same men who, in the Convention, had framed the Constitution, and who had also been members of the Congress whose measures led to the Revolution. The jurisdiction thus given, for penalties and forfeitures upon tide-water, is in direct contradiction to the English system. But it was known to the members of the Convention that a jury trial could be prescribed by an act of Congress in the courts of admiralty. It was so in the colonial vice-admiralty of Virginia.

It may be mentioned, also, that chancery jurisdiction was given to the courts of the United States by the Constitution. There is here no trial by jury, and yet it controls and annuls the judgments of common law courts. Chancery courts existed in most of the colonies,—in New York, Virginia, &c.,—and their existence was never complained of, because they were established by the colonies themselves.

2d. It encroaches upon the jurisdiction of the state tribunals.

This argument begs the question. It assumes that such jurisdiction would be an encroachment. We deny it. The words of the grant in the Constitution are, "to all cases of admiralty and maritime jurisdiction." They are words of the most comprehensive import; and from the language used, as well as from the reasonableness of the thing, we say that the people must be presumed to have intended a jurisdiction which was needful and proper to carry out, or to aid in carrying out, the great commercial purposes of the Constitution. In adopting the Constitution, the people intended to confer upon the federal government all the powers needful to accomplish the purposes for which it was formed. State courts are governed by the common law, and not the law maritime.

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The decisions of one state, moreover, are not binding on another, and thus there would be no uniformity. Whilst the regulation of the commerce of the country was in the hands of the federal government, if its courts had no jurisdiction over commercial questions which might arise out of that commerce, there would be one law in New York, another in Massachusetts, and a third in some other state.

(*Mr. Greene* continued much further in his illustrations of this matter. But for them, or for his arguments upon the other points of the case, there is not room.)

**Mr. Webster*, upon the same side with *Mr. Greene*, [*377 laid down the following propositions, which he illustrated at considerable length.

This court has decided,—

First. That the admiralty jurisdiction of this government is not limited to the admiralty jurisdiction as it existed in England in 1789. The English rules, therefore, are not to be regarded. *Waring v. Clarke*, 5 How., 441.

Second. That a suit in admiralty lies for a tort committed on the high seas, or elsewhere within the ebb and flow of the tide. *Waring v. Clarke*, 5 How., 441.

Third. That in cases of tort, the proceeding may as well be *in personam* as *in rem*. *Manro v. The Almeida*, 10 Wheat., 473.

Fourth. That in case of contract where there is a lien, the admiralty jurisdiction arises, though the contract may be made on land. *Peyroux v. Howard*, 7 Pet., 324; *The General Smith*, 4 Wheat., 438.

Fifth. That the true question in cases of contract is this, to wit, whether the service agreed to be performed, and performed, be in its nature a maritime service. This excludes policies of insurance, but includes affreightment and all contracts to carry over and upon tide-waters. 7 Pet., 324; Lord Mansfield and other English judges; Hall's Admiralty, 1.

Sixth. In cases of contract, the proceeding may be *in personam* as well as *in rem*. There would be a great inconsistency if this were not so. In cases where nothing more is sought than damages for the non-fulfilment of a contract, there are two objects, and two only, in proceeding by way of seizure of the *rem*. One to compel an appearance in the litigation, the other to obtain security. Both these are identical with the proceeding by way of attaching the defendant's goods, as in the case in 10 Wheat. But it is important to remember, that, in cases of the seizure of the *rem*, the judgment or satisfaction is not limited to proceeds of the sale

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thereof. If a balance remain unsatisfied, execution process goes against the defendant *in personam*, if he has appeared and contested the suit. In this case, therefore, the plaintiff proceeds *in personam* with as much regularity as belongs to any proceeding *in rem*. Besides, as the *res* went to the bottom, how could there be any proceeding *in rem*. If there were another case exactly like this, except that in such case a spar, or a sail, or the caboose-house, having been found floating, should have been seized, would this court have taken jurisdiction in one case and not in the other? 10 Wheat., *ubi supra*.

*378] *Seventh. The court having decided that the constitutional grant of admiralty and maritime jurisdiction to the government of the United States is not to be limited by the rules which restrained the English admiralty in 1789, it follows of course, that the jurisdiction of the courts of the United States should naturally be coextensive with the granted power, unless Congress has otherwise declared; and as the Judiciary Act of 1789, section ninth, expressly vests in the District Courts of the United States original cognizance of all civil causes of admiralty and maritime jurisdiction, then whatever this court adjudges to be a case of admiralty and maritime jurisdiction belongs originally to the District Court, and invests that court necessarily with the power of all process and proceedings fit and proper for the exercise of its jurisdiction, subject to regulation by Congress.

Eighth. It is not, probably, doubted that the grant of admiralty and maritime jurisdiction to the government of the United States is exclusive, or that no state now retains any such power; and so absolutely indispensable has such a jurisdiction been found to be on the interior lakes and rivers, that Congress has been obliged to provide, and has provided, for its exercise on those waters. See Act of 1845.

The only objection to this necessary law seems to be, that Congress, in passing it, was shivering and trembling under the apprehension of what might be the ultimate consequence of the decision of this court in the case of the *Thomas Jefferson*. It pitched the power upon a wrong location.

Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, and it does extend, to all navigable waters, fresh or salt.

The Reporter understands that Mr. Chief Justice Taney.
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Mr. Justice McLean, and Mr. Justice Wayne, concurred in the following opinion.

Mr. Justice NELSON.

This is an appeal from the Circuit Court of the United States, held in and for the District of Rhode Island, in a suit originally commenced in the District Court in admiralty, and in which the Merchants' Bank of Boston were the libellants, and the New Jersey Steam Navigation Company the respondents.

The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents running *between New York and Providence, which [*379 took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about four miles off Huntington lighthouse, and between forty and fifty miles from the former city.

The District Court dismissed the libel *pro forma*, and entered a decree accordingly. An appeal was taken to the Circuit Court, where this decree of dismissal was reversed, and a decree entered for the libellants for the sum of \$22,224, with costs of suit.

The case is now before this court for review.

William F. Harnden, a resident of Boston, was engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose, he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of \$250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers between New York and Providence a wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st of December following, subject to these conditions:—

1. The crate with its contents to be at all times exclusively at the risk of the said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c., to be conveyed or transported by him in said crate, or otherwise in the boats of said company.

2. That he should annex to his advertisements published in

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the public prints the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading:—

“Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time.”

This arrangement expired on the 31st of December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question.

A few days previous to the loss of the *Lexington*, the libellants employed Harnden in Boston to collect from the banks in the city of New York checks and drafts to the amount of about \$46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect *380] and send home the same in the usual way. Eighteen thousand dollars of this sum *was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libellants, and was on board at the time she was lost, on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libellants to recover:—

1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made.

2. That if the suit can be maintained in the name of the libellants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and,

3. That the District Court had no jurisdiction, the contract of affreightment not being the subject of admiralty cognizance.

We shall examine these several objections in their order.

I. As to the right of the libellants to maintain the suit.

They had employed Harnden to collect checks and drafts on the banks in the city of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with the respondents for its conveyance, except what was derived from the possession in the execution of his agency. The general property remained in the libellants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them.

This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of

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this description of goods, the result would not be changed, so far as relates to the right of property.

The carrier has a lien on the goods for his freight, if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. (Story Bail., § 93, *g.*)

The carrier, says Buller, J., is considered in law the agent or servant of the owner, and the possession of the agent is the possession of the owner. (4 T. R., 490.)

Under these circumstances, the contract between Harnden and the respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libellants; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names.

It would be otherwise, in a court of law, if the contract was under seal. (Story Ag., § 160.)

It rested in parol, in this case, at the time of the loss.

*In *Sims v. Bond*, 5 Barn. & Ad., 393, the court [*381 observed that it was a well-established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.

The same doctrine is affirmed by Baron Parke, in delivering the judgment of the court in *Higgins v. Senior*, 8 Mees & W., 834, 844, in the Court of Exchequer. In that case, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing by the statute of frauds.

The rule is, also, equally well established in this country, as may be seen by a reference to the cases of *Beebe v. Robert*, 12 Wend. (N. Y.), 413; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72, and *Sanderson v. Lamberton*, 6 Binn. (Pa.), 129.

The last case is like the one before us. It was an action by the owners directly upon the sub-contract made by the first with the second carrier for the conveyance of the goods, in whose hands they were lost.

The cases are numerous in which the general owner has sustained an action of tort against the wrong-doer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a

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view to avoid circuitry of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent.

We think, therefore, that the action was properly brought in the name of the libellants.¹

II. The next question is as to the duties and liabilities of the respondents, as carriers, upon their contract with Harnden. As the libellants claim through it, they must affirm its provisions, so far as they may be consistent with law.

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.²

The question is, to what extent has this agreement qualified the common law liability?

*382] *We lay out of the case the notices published by the respondents, seeking to limit their responsibility, because,—

1. The carrier cannot in this way exonerate himself from duties which the law has annexed to his employment; and,

2. The special agreement with Harnden is quite as comprehensive in restricting their obligation as any of the published notices.

A question has been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of *Gould and others v. Hill and others*, 2 Hill (N. Y.), 623, and the conclusion arrived at that he could not. See also *Hollister v. Nowlen*, 19 Wend. (N. Y.), 240, and *Cole v. Goodwin*, Id., 272, 282.

As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property,—the safe custody and delivery of the goods,—we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

¹ APPLIED. *Nash v. Towne*, 5 Wall., 704. CITED. *Ford v. Williams*, 21 How., 290; *Baldwin v. Bank of New-*

bury, 1 Wall., 241; *Bank of Kentucky v. Adams Express Co.*, 3 Otto, 184.

² CITED. *Garrison v. Memphis Ins. Co.*, 19 How., 315.

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The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.¹

But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned.² And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an [*383 action in case of *refusal. And we agree with the court in the case of *Hollister v. Nowlen*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.³

The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be

¹CITED. *York Company v. Central R. R.*, 3 Wall., 112; *Denver &c. Co. v. Atchison &c. Co.*, 15 Fed. Rep., 652.

²CITED. *Munn v. Illinois*, 4 Otto, 130.

³CITED. *Railroad Co. v. Harris*, 12 Wall., 85.

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accountable to him or to his employers, in any event, for loss or damage.

The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands.

This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story Bail., § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. 13 Wend. (N. Y.), 611, 627, 628.

Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation.¹

This rule, we think, should govern the construction of the agreement in question.

*384] If it is competent at all for the carrier to stipulate or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties.²

The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case with a view to the question.

¹ APPROVED. *Railroad Co. v. Manuf. wood*, 17 Wall., 374; *Railroad Co. v. Co.*, 16 Wall., 328. *Pratt*, 22 Wall., 134.

² FOLLOWED. *Railroad Co. v. Lock-*

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There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along side of the boiler-deck, and around the steam-chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.

The fire broke out in the cotton next the steam-chimney, between the two decks, at about half past seven o'clock in the evening, and was discovered before it had made much progress. If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard a-port, for the purpose of heading her to the land. In this act, one of the wheel-ropes parted, being either burnt or broken, in consequence of which the hands had no longer any control of the boat.

Some of them then resorted to the fire-engine, but it was found to be stowed away in one place in the vessel, and the hose belonging to it, and without which it was useless, in another, and which was inaccessible in consequence of the fire.

They then sought the fire-buckets. Two or three only, in all, could be found, and but one of them properly prepared and fitted with heaving-lines; and, in the emergency, the specie-boxes were emptied, and used to carry water.

The act of Congress (5 Stat. at L., 306, § 9) made it the duty, at the time, of these respondents to provide, as a part of the necessary furniture of the vessel, a suction-hose and fire-engine, and hose suitable to be worked in case of fire, and to carry the same on every trip, in good order; and further provided, that iron rods or chains should be employed and used in the navigation of steamboats, instead of wheel or tiller ropes.

This latter provision was wholly disregarded on board the vessel during the trip in question; and the former also, as we have seen, for all practical or useful purposes.

*We think there was great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton; especially, regarding its exposure to fire from the condition of the covering of the boiler-deck, and the casing of the steam-chimney. The former had been on fire on the previous trip, and a box of goods partly consumed. Also, for the want of proper furniture and equipments of the vessel, as required by the act of Congress, as well as by the most prudential considerations.

It is, indeed, difficult, on studying the facts, to resist the

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conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested.

We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.

III. The remaining question is as to the jurisdiction of the court.

By the second section of the third article of the Constitution, it is declared that "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction."

The ground of objection to the jurisdiction, in this case, rests upon the assumption, that this provision had reference to the jurisdiction of the High Court of Admiralty in England, as restrained by the statutes of 13 and 15 Richard II., or as exercised in the colonies by the courts of vice-admiralty, which, as their decisions were subject to the appellate power of the High Court at home, with few exceptions, and those by act of Parliament, were confined within the same limits.

This is the foundation of the argument in support of the restricted jurisdiction, and which, it is claimed, excludes the contract in question.

Under the statutes of Richard, as expounded by the common law courts, in cases of prohibition against the admiralty, its jurisdiction over contracts was confined to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas.

If made on land, or within the body of an English county, though to be executed, or the service to be performed, upon the sea, or if made upon the sea, but to be executed upon the land, in either case it was held by the common law courts that the admiralty had no jurisdiction. In the first, because the place where the contract was made, and in the second, where *386] it was to be performed, was within the body of the *county, and, of course, within the cognizance of the common law courts, which excluded the admiralty.

It is not to be denied, therefore, if the grant of power in the Constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it, that the present suit cannot be maintained, as the District Court of Rhode Island had no jurisdiction.

But in answer to this view, and to the ground on which it rests, we have been referred to the practical construction that has been given to the Constitution by Congress in the Judi-

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ciary Act of 1789, which established the courts of admiralty, and assigned to them their jurisdiction; and also to the adjudications of this, and of the Circuit and District Courts, in admiralty cases, which not only reject the very limited jurisdiction in England, but assert and uphold a jurisdiction much more comprehensive, both in respect to contracts and torts, and which has been exercised ever since the establishment of these courts. And it is insisted, that, whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed.

We are inclined to concur in this view, and shall proceed to state some of the grounds in support of it.

By the ninth section of the Judiciary Act of 1789, which established the admiralty courts, it is declared that the District Courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

The High Court of Admiralty in England never had original jurisdiction of causes arising under the revenue laws, or laws concerning the navigation and trade of the kingdom. They belong, exclusively, to the jurisdiction of the Court of Exchequer, in which the proceedings are conducted as at common law.

That court exercises an appellate power over the decisions of the vice-admiralty courts in revenue cases in the colonies; even that power was doubted, till affirmed by the Court of Delegates, on an appeal from a decision of the vice-admiralty *court in South Carolina, in 1754. Since [387 then, it has been exercised; but this is the extent of its power over revenue cases, or arising under the navigation laws.

Thus it will be seen that a very wide departure from the English limit of admiralty jurisdiction took place within two years after the adoption of the Constitution; and that, too, by the Congress called upon to expound the grant with a view to the establishment of the proper tribunals to carry it into execution.

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The constitutionality of this act of Congress, and, of course, the true construction of the grant in the Constitution, became a subject of discussion before this court, at a very early day, on several occasions, and received its particular consideration.

The first case that involved the question was the case of *The Vengeance*, in 1796, nine years after the adoption of the Constitution. (3 Dall., 297.)

The vessel was seized by the marshal in the port of New York, as forfeited under an act of Congress, prohibiting the exportation of arms, and libelled and condemned in the District Court. On appeal, the Circuit Court reversed the decree and dismissed the proceedings; upon which an appeal was taken to this court.

On the argument, the Attorney-General took two grounds for reversing the decree. The second was, that, even if the proceeding could be considered a civil suit, it was not a suit of admiralty and maritime jurisdiction; and therefore the Circuit Court should have remanded it to the District Court, to be tried before a jury. He referred to the ninth section of the Judiciary Act, which declared, that "the trials of issues of fact in the District Courts, in all causes except *civil causes* of admiralty and maritime jurisdiction, shall be by jury," and insisted, that a libel for a violation of the navigation laws was not a civil suit of admiralty jurisdiction; that the principles regulating the admiralty jurisdiction in this country must be such as were consistent with the common law of England at the period of the Revolution; that there admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county; that the act of exporting arms must have commenced on land, and if done part on land and part on the sea, the authorities held that the admiralty had no jurisdiction.

The court took time to consider the question, and on a subsequent day gave judgment, holding that the suit was a civil cause of admiralty and maritime jurisdiction, and therefore rightfully tried by the District Court without a jury; that the case was one coming within the general admiralty powers of the court; and, for a like reason, it was held that the appeal to the Circuit Court was regular, and properly disposed of.

*388] *It will be observed that the seizure, in this case, was in the port of New York, and within the body of the county, which extends to Sandy Hook.

The next case that came before the court was the case of *The Schooner Sally*, in 1805, which arose in the Maryland district, and involved the same question as in the case of *The Vengeance*, and was decided in the same way.

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But the most important one, as it respects the question before us, was the case of *The Schooner Betsey*, in 1808 (4 Cranch, 443). This vessel was seized for a violation of the non-intercourse act between the United States and St. Domingo, in the port of Alexandria, in this District. She was condemned in the District Court; but on appeal the Circuit Court reversed the decree, from which an appeal was taken to this court.

Mr. Lee, who had argued the case of *The Vengeance*, appeared for the claimant, and requested permission to argue the point again more at large, namely, whether the case was one of admiralty and maritime jurisdiction; and in this argument will be found the ground and substance of all the arguments which have been since urged in favor of the limited construction of the admiralty power under the Constitution.

He referred to the terms of the grant in the Constitution, and denied that Congress could make cases of admiralty jurisdiction; nor could it confer on the federal courts jurisdiction of a case which was not of admiralty and maritime cognizance at the time of the adoption of the Constitution. That the seizure of a vessel within the body of a county, for a breach of a municipal law of trade, was not of admiralty cognizance,—that it was never so considered in England,—that all seizures in that country for a violation of the revenue and navigation acts were tried by a jury, in the Court of Exchequer, according to the course of the common law,—that the High Court of Admiralty in England exercised no jurisdiction in revenue cases,—and insisted, that if the ninth section of the Judiciary Act was to be construed as including revenue cases and seizures under the navigation acts as civil causes of admiralty and maritime jurisdiction, the act was repugnant to the Constitution, and void.

The court rejected the argument, and held that the case was not distinguishable from that of *The Vengeance*, and which they had already determined belonged properly to the jurisdiction of the admiralty. They observed, that it was the place of seizure, and not the place of committing the offence, that determined the jurisdiction, and regarded it as clear that Congress meant to discriminate between seizures on waters navigable *from the sea, and seizures on land or on [389] waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction.

Similar objections were taken to the jurisdiction of the court in the cases of *The Samuel* and *The Octavia* (1 Wheat., 9, 20), and received a similar answer from the court.

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We have been more particular in referring to these cases, and to the arguments of counsel, because they show,—

1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the Revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after full consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the Constitution; and,

2. They affirm the practical construction given to the Constitution by Congress in the act of 1789, which, we have seen, assigns to the District Courts, in terms, a vast field of admiralty jurisdiction unknown to that court in England.

The jurisdiction in all these cases is maintained on the broad ground, that the subject-matter was of admiralty cognizance, as the causes of action arose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide; expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and therefore out of the limits of the admiralty.¹

In answer to an argument that was pressed, that the offence must have been committed upon land, such as in case of an exportation of prohibited goods, the court say that it is the place of seizure, and not the place of committing the offence, that decides the jurisdiction,—a seizure upon the high seas or within tide-waters, although the tide-waters may be within the body of a county.

All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction within the words of the Constitution, and, as such, were properly assigned to the District Court, in the act of 1789, as part of its admiralty jurisdiction.

They were so regarded, as well in respect to the subject-matter as in respect to the place where the causes of action had arisen.

The clause in the act of 1789, “saving to suitors in all cases the right of a common law remedy where the common law is competent to give it,” was referred to on the argument in support of the restricted jurisdiction. And it was insisted *390] that the remedy is thus saved to both parties, plaintiff and defendant, *and is, in effect, an exception from the admiralty power conferred upon the District Courts of all causes in which a remedy might be had at common law.

¹ CITED. *Atkins v. Disintegrating Co.*, 18 Wall., 304, 305.
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The language is certainly peculiar, and unfortunate, if this was the object of the clause; and besides, the construction would exclude from the District Court cases which the sternest opponent of the admiralty will admit properly belonged to it.

The common law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or contract (with the exception of proceedings *in rem*), which, upon the construction contended for, would be transferred from the admiralty to the exclusive cognizance of these courts.

The meaning of the clause we think apparent.

By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The term "exclusive original cognizance" is used for this purpose, and is intended to be exclusive of the state, as well as of the other federal courts.¹

The saving clause was inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed.

This leaves the concurrent power where it stood at common law.

The clause has no application to seizures arising under the revenue laws, or laws of navigation, as these belong exclusively to the District Courts. (*Slocum v. Mayberry*, 2 Wheat., 1; *Gelston v. Hoyt*, 3 Id., 246.)

If the thing seized is acquitted, then the owner may prosecute the wrong-doer for the taking and detention, either in admiralty or at common law. The remedy is concurrent. *Id.*

2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship-carpenters and material men, for repairs and necessaries, made and furnished to ships, whether foreign or in the port of a state to which they do not belong, or in the home port, if the municipal laws of the state give a lien for the work and materials. (1 Pet. Adm., 227, 233, note; Bee, 106; 4 Wash. C. C., 453; 1 Paine, 620; Gilp., 203, 473; 1 Wheat., 96; 4 Id., 438; 9 Id., 409; 10 Id., 428; 7 Pet., 324; 11 Id., 175.)

The principle stated in the case of *The General Smith*, 4 Wheat., 438, and which has been repeated in all the subsequent *cases, is, that where repairs have been [*391

¹ FOLLOWED. *The Belfast*, 7 Wall., 638.

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made or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to enforce his right. But as to repairs or necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied unless recognized by that law. But if the local law gives the lien, it may be enforced in admiralty.

The jurisdiction in these cases, as will be seen from the authorities referred to, appears to have been exercised by the District Courts from the time of their earliest organization, and which was affirmed by this court the first time the question came before it.

The District Court of South Carolina, in 1796, in the case of *North and Vesey v. The Brig Eagle*, Bee, 79, maintained a libel for supplies furnished a foreign vessel, and considered the question as a very clear one at that day. See also *Pritchard v. The Lady Horatia*, p. 169, decided in 1800.

Judge Winchester, district judge of the Maryland district, maintained the jurisdiction, in a most able opinion, at a very early day. (1 Pet. Adm., 233, note.)

The same opinion was also entertained by Judge Peters, of the Pennsylvania district. (1 Pet., 227.)

Since then, the jurisdiction appears to have been undisputed.

We refer to these opinions, not so much for the authority they afford, though entitled to the highest respect as such, but as evidence of the line of jurisdiction exercised, at that early day, by learned admiralty lawyers, in direct contradiction to the theory, that the constitutional limit is to be determined by the jurisdiction in England. They are the opinions of men of the Revolution, engaged in administering admiralty law as understood in the country soon after the adoption of the Constitution, fresh from the discussions which every provision and grant of power in that instrument had undergone. The opinions may be well referred to as affording the highest evidence of the law on this subject in their day.

3. Another class of cases in which jurisdiction is entertained by the courts in this country on contracts, but which is denied in England, are suits for pilotage. (10 Pet., 108.) It is denied in England on the ground of locality, the contract having been made within the body of a county.

We shall pursue the examination no farther. The authorities, we think, are decisive against expounding the constitutional grant according to the jurisdiction of the English

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admiralty, and in favor of a line of jurisdiction which fully embraces the contract in question.

*Before jurisdiction can be withheld in the case, the court must not only retrace its steps, and take back [392 several of its decided cases, but must also disapprove of the ground which has heretofore been taken, and maintained in every case, as the proper test of admiralty jurisdiction.

Some question was made on the argument founded on the circumstance, that this was a suit *in personam*.

The answer is, if the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person, as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance.

On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract,—whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide.¹ And, again, whether the service was to be substantially performed upon the sea, or tide-waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract is to be performed beyond tide-waters, or if the contract relates exclusively to the interior navigation and trade of a state, jurisdiction is disclaimed. (10 Wheat., 428; 7 Pet., 324; 11 Id., 175; 12 Id., 72; 5 How., 463.)

The exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power.

It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries, and among the several states.

Contracts growing out of the purely internal commerce of the state, as well as commerce beyond tide-waters, are gene-

¹ QUOTED. *Insurance Co. v. Dunham*, 11 Wall., 27.

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rally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts.²

Upon the whole, without pursuing the examination farther, we are satisfied that the decision of the Circuit Court below was correct, and that its decree should be affirmed.

*393] *Mr. Justice CATRON.
 1. In my judgment, the New Jersey Steam Navigation Company were entitled to all the benefits of Harnden's contract with them, in regard to the property of others with which he (Harnden) was intrusted, for the purpose of transporting it in his crate. And though the company can rely on all the defences which they could have relied upon if Harnden had sued them, still I think the libellants can maintain this suit.

Had a trover and conversion been made of the money sued for, or an open trespass been committed on it by throwing it overboard, by the servants or agents of the company, then either Harnden, the bailee of the bank, might have sued the company, or the bank might have sued. As to the right to sue, in the case put, by the bank, there can be no doubt; as such acts were never contemplated by the contract, nor covered by it.

The Navigation Company were responsible to Harnden (and to those who employed him), notwithstanding the contract, for acts of gross negligence in transporting the property destroyed; as, for instance, if the servants of the company, in navigating the vessel, omitted to observe even slight diligence, and failed in the lowest degree of prudence, to guard against fire, then they must be deemed in a court of justice to have been guilty of gross negligence; by which expression I mean, that they acted reckless of consequences as respected the safety of the vessel and the lives and property on board and in their charge, that such conduct was contrary to common honesty, and that the master and owners were liable for loss by reason of such recklessness, as they would have been in case of an affirmative and meditated fraud that had occasioned the same loss, and that this burning was a tort.

Whether it is evidence of fraud in fact, as Sir William Jones intimates, or whether it is not, as other writers on bailments declare, is not worthy of discussion. The question is this: Is the measure of liability the same where a ship is burned because the master and crew did not observe the lowest degree

² QUOTED. *Allen v. Newberry*, 21 How., 246.

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of prudence to prevent it, and in a case where she is *wilfully* burned? This is the question for our consideration. In the civil law, I apprehend no distinction in the cases put exists; nor do I believe any exists at common law. But by the laws of the United States, such gross and reckless negligence as that proved in the case before us was a fraud and a tort on the shippers, and the fire that occurred, and consequent loss of life, a crime on the part of the master.

By the twelfth section of the act of 1838, chap. 191, every person employed on any steamboat or vessel, by whose negligence *to his respective duty the life of any person [^{*394} shall be destroyed, shall be deemed guilty of manslaughter, and subject to conviction and imprisonment at hard labor for a time not exceeding ten years. 5 Stat. at L., 306. Here the legislature have put gross negligence in the category of crimes of a high grade, and of frauds of course; nor can this court assume a less stringent principle, in a case of loss of property, than Congress has recognized as the true one, if life be destroyed by such negligence. From the facts before us, I feel warranted in saying, that, had the captain survived the destruction of the ship and the loss of many lives by the disaster, he would have been clearly guilty according to the twelfth section.

One single circumstance is decisive of the culpable negligence. By section ninth of the above act, it is made "the duty of the master and owner of every steam-vessel employed on the sea, to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order." This vessel had something of the kind; but it was in no order for use, and a mere delusion, and a sheer fraud on the law and the public. Had there been such an engine and hose, the fire could have been extinguished in all probability, as I apprehend.

2. There was only a single rigged bucket on board, and nothing else to reach the water with, and the money of libellants was thrown from the boxes, and they used to lift water.

3. The flue from the furnace ran through three decks, and was red-hot through the three decks, and the cotton was stowed within eighteen inches on all sides of this red-hot flue, and the bales pressed in, three tiers deep, from the boiler-deck to the next deck, so that it would have been with much difficulty that the cotton could have been removed should a fire occur; there the fire did occur, and the cotton was not removed,—wherefore the vessel was burnt. And from the

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mode of stowage a fire could hardly be avoided, and was to be expected and guarded against.

Then as to the jurisdiction. The fire occurred on the high sea. It was a tort there. The case depends not on any contract, but on mere tort standing beyond the contract. The locality of the tort is the *locus* of jurisdiction. Locality is the strict limit. 2 Bro. Adm. L., 110; 3 Bl. Com., 106. The conflict between the Luda and De Soto, in Louisiana, 1847, 5 How. But especially 2 Bro. Adm. L., 144, which lays down the true doctrine as follows:—

*395] “ We have now done with the effect of the master’s contracts *or violence, as to his owners, and proceed to consider how he and they are affected by his negligence. And, first, as soon as merchandises and other commodities be put on board a ship, whether she be riding in a port or haven, or upon the high sea, the master is chargeable therewith; and if the same be lost or purloined, or sustain any damage, hurt, or loss, whether in the haven or port before, or upon the seas after, she is upon her voyage, whether it be by mariners or by any other through their permission, the owner of the goods has his election to charge either master or owners, or both, at his pleasure,—though he can have but one satisfaction,—in a court of common law, if the fault be committed *infra corpus comitatus*; in the admiralty, if *super altum mare*; and if it be on a place where there is *divisum imperium*, then in one or the other, according to the flux or reflux of the sea.”

I think the libel in this case covers my view of it. It sets out the facts of how the money was shipped in general terms, but avers it was lost by fire, and by reason of an insufficient furnace, insufficient machinery, furniture, rigging, and equipments, and the careless, negligent, and improper management of said steamboat Lexington by the servants and agents of the Navigation Company.

If this technical objection had been addressed to the court below, it could have been easily remedied, and cannot be favorably heard here, now, no doubt, made for the first time.

I therefore think there was jurisdiction in the Circuit Court to try the libel; and, secondly, that the decree was proper, and ought to be affirmed, without alteration.

Mr. Justice DANIEL.¹

The inquiries presented for consideration in this cause resolve themselves into two obvious or natural divisions; the

¹ See *Newton v. Stebbins*, 10 How., 608; *Jackson v. Steamboat Magnolia*, 20 Id., 308.

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one involving the rights of the parties as growing out of their alleged undertakings; the other the right of the libellant to prosecute his claim in the mode adopted in the court below, and the power of the court to adjudicate it in that or in any other mode whatever. This latter inquiry, embracing as it does the nature and extent of the admiralty powers of the government of the United States, and by consequence the construction of that article of the Constitution by which alone those powers have been invested, challenges the most solemn, deliberate, and careful investigation. I approach that investigation with the diffidence which its wide-spread interest and importance, and a deep conviction of my own deficiencies, cannot but awaken.

The foundation, nay, the whole extent and fabric, of the admiralty *power of the government are to be found [*396 in that portion of the second section of the third article of the Constitution, which declares that the judicial power shall extend (amongst other subjects of cognizance there enumerated) "to all cases of admiralty and maritime jurisdiction."

The distribution of this admiralty power so created by the Constitution, with reference to the tribunals by which, and the modes in which, it shall be executed, is contained in the act to establish the judicial courts of the United States of 1789, section ninth, which constitutes the District Courts of the United States courts of exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of certain seizures under the laws of imposts, concluding or qualifying this investment of power with these plain and significant terms: "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

Looking now to the provisions of the third article of the Constitution, and to those of the ninth section of the Judiciary Act, we recur to the inquiry, What is this civil and maritime jurisdiction derived from the Constitution, and vested by the Judiciary Act in the District Courts,—what the standard by which its scope and power, its "space and verge," are to be measured,—what the rules to be observed in the modes of its execution? Although the Constitution and act of Congress do not precisely define nor enumerate the former, nor prescribe in forms and precedents the latter, yet it will hardly be pretended, that either the substance or the forms of admiralty jurisdiction were designed by the founders of our jurisprudence to be left without limit, to be dependent on surmise merely, or controlled by fashion or caprice. They were both ordained in reference to some known standard in

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the knowledge and contemplation of the statesman and legislator, and the ascertainment of that standard by history, by legislative and judicial records, must furnish the just response to the inquiry here propounded.

In tracing the origin, existence, and progress of the colonial institutions, or in seeking illustrations or analogies requisite for the comprehension of those institutions down to the period of separation from the mother country, it is to the laws and policy of the latter that we must chiefly look as guides to any thing like accurate results in our investigations. For the necessity here intimated, various and obvious causes will at once be perceived. As instances of these may be exemplified, —1st, similarity of education and opinion, strengthened by intercourse and habit; 2d, national pride, and the partiality which naturally creates in the offspring admiration and imitation of the parent; 3d, identity of civil and political *397] rights in the *people of both regions; 4thly, and chiefly, perhaps, the jealousy of the mother country with regard to her national unity, power, and greatness,—a principle which has ever prompted her to bind in the closest practicable system of efficient uniformity and conformity the various members of her extended empire. These causes have had their full effect in regulating the rights of person and of property amongst British subjects everywhere within the dominions of England. There is not, and never has been, a question connected with either, in which we do not find every Englishman appealing to the common law, or to the charters and statutes of England, as defining the nature and as furnishing the best protection of his rights. He uniformly clings to these as constituting at once his birthright, his pride, and his security. *Vide* 1 Bl. Com., 127, 128. Would it not be most strange, then, with this strong tenacity of adherence to their peculiar national polity and institutions, that we should suppose the government or the people of England disposed to yield their cherished laws and customs in matters which peculiarly affect them in a national point of view, to wit, the administration of their maritime and commercial rights and interests? It would seem to me equally reasonable to expect that the admiralty courts of England, or of any part of the dominions of England, in order to define or settle their jurisdiction, would as soon be permitted to adopt, as the source and foundation and measure of their power, the ordinances, if such there be, of China or Thibet, as those of France, Genoa, or Venice, or of any other portion of the continent of Europe, whether established by the several local governments on the continent, or based upon the authority of the civil law. With

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respect to the realm of England, the origin and powers of the court of admiralty are placed upon a footing which leaves them no longer subjects of speculation or uncertainty. Sir William Blackstone, in his Commentaries, Vol. III., chap. 5, p. 69, informs us,—upon the authority of Sir Henry Spelman, Glossary, 13, and of Lambard, Archeion, 41,—that the court of admiralty was first erected by King Edward III. Sir Matthew Hale, in his History of the Common Law, Vol. 1., p. 51 (London edition of 1794, by Runnington), speaking of the court of admiralty, says,—“This court is not bottomed or founded upon the authority of the civil law, but hath both its powers and jurisdiction by the law and custom of the realm in such matters as are proper for its cognizance.” And in a note (*m*) by the editor to the page just cited, it is said,—“The original jurisdiction of the admiralty is either by the connivance or permission of the common law courts. The statutes are only *in affirmance* of the common law, and to prevent *the great power which the admiralty had gotten [398 in consequence of the Laws of Oleron. That, generally speaking, the courts of admiralty have no jurisdiction in matters of contracts done or made on land; and the true reason for their jurisdiction in matters done at sea is, because no jury can come from thence; for if the matter arise in any place from which the *pais* can come, the common law will not suffer the subject to be drawn *ad aliud examen*.” And for this doctrine are cited 12 Co., 129; Roll. Abr., 531; Owen, 122; Brownl., 37 *a*; Roll., 413; 1 Wils., 101; Hob., 12; and Fortesc. De Laudibus, 103, edit. 1775. Again, Lord Hale, Vol. I., pp. 49–51, speaking of the jurisdiction of the admiralty, lays down the following limits to its power:—“The jurisdiction of the admiralty court, as to the matter of it, is confined by the laws of the realm to things done upon the high sea only; as depredations and piracies upon the high sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties or contracts made even upon the high sea,—touching things that are not in their own nature maritime, as a bond or contract for the payment of money,—so also of damages in navigable rivers, within the bodies of counties, things done upon the shore at low-water, wreck of the sea, &c.,—these things belong not to the admiral’s jurisdiction. And thus the common law and the statutes of 13 Richard II., cap. 15, and of 15 Richard II., cap. 3.

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confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea."

In this cursory view of Lord Hale of the admiralty jurisdiction, there is one feature which cannot escape the most superficial observation; and that is, the extraordinary care of this learned judge to avoid every implication from uncertainty or obscurity of terms, which might be wrested as a pretext for the assumption of power not clear, well founded, and legitimate. In the extract above given, it will be seen that the sea, as the theatre of the admiralty power, is mentioned in eight different instances, in every one of which it is accompanied with the adjunct *high*. *Altum mare* is given as the only legitimate province of the admiral's authority; and then, as if to exclude the possibility of improper implication, are placed in immediate and striking contrast the transactions and the situations as to which, by the common law and the statutes of *399] England, the interference of the admiralty was utterly inhibited. "But," *he proceeds to say, "touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charterparties or contracts made even upon the high sea,—touching things that are not in their own nature maritime, as a bond or contract for the payment of money,—so also of damages in navigable rivers, within the bodies of English counties, things done upon the shore at low-water, wreck of the sea, &c.,—these things belong not to the admiral's jurisdiction."

Sir William Blackstone, treating of the cognizance of private wrongs, Book 3, chap. 7, p. 106, speaks of injuries cognizable by the maritime or admiralty courts. "These courts," says this writer, "have jurisdiction and power to try and determine all maritime causes, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea." He then cites the statutes 13 and 15 Rich. II., Co. Litt., 260; Hob., 79; and 5 Co., 106, for the positions thus asserted. I shall, in the progress of this opinion, have occasion further to remark upon this language, "courts maritime or admiralty courts," here used by this learned commentator, when I come to speak of an interpretation placed upon the second section of the third article of the Constitution, as implying an enlargement of the powers conferred, from a connection of the terms *admiralty* and *maritime* in the section just mentioned. What I would

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principally advert to here is the description of the causes denominated *maritime*, and as falling solely and peculiarly within the admiralty jurisdiction, and to the reason why they are thus denominated *maritime*, and as such assigned to the admiralty. They are, says this learned commentator, "maritime, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea, and not within the precincts of any county." Here, then, is the explicit declaration, that it is the theatre, the place of their origin and performance, exclusively, not their relation to maritime subjects, which determines their forum; for they are causes, says he, which in their nature may be of common law cognizance. In this connection it seems not out of place to advert to the discrimination made by the same author between the pretensions to power *advanced by certain tribunals which subsisted [400 and grew up rather by toleration than as forming any fundamental and regular portions of the British constitution. Thus, in Book 3, chap. 7, pp. 86, 87, speaking of the ecclesiastical, military, and maritime courts, and the courts of common law, he says,—“And with regard to the three first, I must beg leave, not so much to consider what hath at any time been claimed or pretended to belong to their jurisdiction by the officers and judges of those respective courts, but what the common law allows and permits to be so. For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted to be informed how far their jurisdiction extends, or what causes are permitted and what forbidden to be discussed or drawn in question before them. It matters not what the Pandects of Justinian or the Decretals of Gregory have ordained; they are of no more intrinsic authority than the laws of Solon or Lycurgus; curious, perhaps, for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws, which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance which other

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nations have referred entirely to the temporal courts, as concerning wills and successions to intestates' chattels; and perhaps we may, in our turn, prohibit them from interfering in some controversies which, on the Continent, may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of our courts; and if any tribunals whatsoever attempt to exceed the limits so prescribed to them, the king's courts of common law may and do prohibit them, and in some cases punish their judges." So far, then, as the opinions of Hale and Blackstone are entitled to respect,—so far as the writings and decisions of the venerable expounders of the British constitution to which they refer may be regarded as authority,—the origin and powers of the admiralty in England, the subjects permitted to its peculiar cognizance, the control exerted to restrict it to that peculiar cognizance by the common law tribunals, would seem not to be matters of uncertainty. Sir William Blackstone, too, is a writer of modern date, and, as such, his opinions may claim exemption from the influence of conflict *401] *of bigotry or prejudice, which the advocates of the admiralty seem disposed to attribute to the opinions or the times of Spelman, of Fortescue, and Coke.

Passing from the testimony of the writers already mentioned, let us call in a witness as to the admiralty powers and jurisdiction, as existing in England for a century past, at least, whom no one will suspect of disaffection to that jurisdiction. I allude to Mr. Arthur Browne, Professor of Civil Law in the University of Dublin, in whose learned book scarcely any assertion of power ever made by the admiralty courts, however reprobated and denied by the common law tribunals, is not commended, if not justified, and scarcely one retrenchment or denial of power to the former is not as zealously disapproved. Let us hear what this witness is compelled, though *multo cum gemitu*, to admit, with respect to the jurisdiction of the instance court in cases civil and maritime,—cases identical in their character with that now under consideration. After dilating upon the resolutions of 1632, and upon what by him are designated as the irresistible arguments of Sir Leoline Jenkins in favor of the powers of his own court, Professor Browne is driven to the following concessions. Of the common law courts he says (Vol. II., p. 74),—"Adhering on their part to the strict letter of the rule, that the business of the admiralty was only with contracts made upon the sea, they here took locality as the only boundary, though in the instances before mentioned, of contracts made on sea, they refused this limit; and having insisted, as indeed Judge

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Blackstone has even of late done, that contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on land, were not cognizable by the admiralty, they left to it the idle power of trying contracts made upon the sea to be also executed upon the sea, of which one instance might not happen in ten years." Again (p. 85), speaking of what he characterizes as "the torrent of prohibitions which poured forth from the common law courts," he tells us, that "little was left for the authority of the admiral to operate upon, in the subject of contracts, amidst those curbs so eagerly and rapidly thrown upon him in the last century, save express hypothecations of ship or goods made at sea or in foreign ports, and suits for seamen's wages." At the close of this chapter on the jurisdiction of the instance courts, Mr. Browne presents his readers with the general conclusion to which his investigations on this head had conducted him, in the following words:—"The result of our inquiries in the present chapter, as to the extent of the jurisdiction of the instance court of admiralty which is at present seemingly allowed by the common law courts, is, that it is confined in matters of *contract to suits for seamen's wages (on all hands [^{*402} admitted to be an exception to the rule restricting the admiralty to the sea), or to those on hypothecations. In matters of tort, to actions for assault, collision, and spoil, and in quasi contracts, to actions by part-owners for security, and actions of salvage; but if a party," says he, "institute a suit in that court on a charter-party, for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to retain it." In this concluding passage from Mr. Browne's chapter on the jurisdiction of the instance courts, there are two circumstances which impress themselves upon our attention, as seemingly, indeed palpably, irreconcilable with the law or with each other. The first is the concession (a concession said to be made upon a general survey of the subject) as to the limit imposed by the common law tribunals upon the admiralty; the second, the opinion, in the very face of this concession, that the admiralty, if it should not be actually prohibited, if it could only escape the vigilance of the common law courts, might proceed, might make an incursion within this established, this prohibited, nay, conceded boundary. Opinions like these evince an adherence to the admiralty apparently extreme, and almost contumacious; and it may be owing to this devotion, that decisions have been pressed into its support, which, to my apprehension, do not come directly up to the point they are called to fortify, or, if

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they did, are too few in number and too feeble to remove the firmly planted landmarks of the law. Thus the case of *Menetone v. Gibbons*, 3 T. R., 267, is cited as authority that the admiralty has cognizance over contracts, though executed on land and under seal. This case, it is true, is somewhat anomalous in its features, but yet it is thought that no fair exposition of it can warrant the conclusions attempted to be deduced from it. Notwithstanding some expressions which may have fallen from some of the judges *arguendo*, it is certainly true, that every justice who decided that case put his opinion essentially upon these foundations:—that the case was one of a hypothecation of the ship, in the course of a foreign voyage, by the master, who had a right to hypothecate; that the contract provided for or gave no remedy except *in rem*, whereas the common law courts proceed against the parties only; that if the court should decide against the admiralty jurisdiction (and this, too, after a sentence of condemnation and sale of the ship), being unable to give any redress under the contract by proceeding *in rem*, the party making the advances would be irreparably injured. This case should be expounded, too, in connection with that of *Ladbroke v. *403] Crickett*, decided by the same judges twelve *months previously (2 T. R., 649), in which a natural distinction is taken between the extent of the right to prohibit the jurisdiction of the admiralty before sentence, and the right to impeach its proceedings after they are consummated and carried into execution without interference. In the latter case, Buller, whose remarks have been quoted from *Menetone v. Gibbons*, says (p. 654):—“There is a great difference between applications to this court for prohibitions to the admiralty pending the suit and after sentence; in the first case, this court will examine the whole case, and see the grounds of the proceedings in the admiralty; but the rule is quite the reverse after sentence is passed; in such a case, they will not look out of the proceedings; for the party who applies for a prohibition after sentence must show a nullity of jurisdiction on the face of the proceedings; therefore the plaintiff in this case could not go into evidence at the trial to impeach the decree of the court of admiralty. The case states, in general terms, that that court did pronounce a decree for the sale of the ship in question, and that a warrant issued out of that court for seizing and selling the ship. So that we must take it that they had jurisdiction, for nothing appears on the face of the decree to show that they had not.” Showing conclusively, that this case determined nothing as to the original legitimate powers either of the common law or admiralty tribunals, but

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positively refusing to institute a comparison between them. The next case adduced by Mr. Browne, and the last which I shall notice, is that of *Smart v. Wolff*, 3 T. R., 323. The first remark which is pertinent to this case is, that it was a case of prize, one of a class universally admitted to belong peculiarly and exclusively to a court of admiralty; and the question propounded in it, and the only question, was as to the proceeding practised by the court for carrying into effect this its undoubted jurisdiction. There the goods had been, by an interlocutory order, delivered to the captors, upon a stipulation to respond for freight, if allowed on the final decree; and the amount of freight ultimately allowed being greater than that covered by the stipulation, the court, by a proceeding substantially *in rem*, ordered the captors to bring in so much of the cargo as would be equal to the excess of the allowance beyond the amount of the stipulation. A rule for a prohibition obtained from the King's Bench was, upon full argument, discharged, and the grounds of the court's decision are fully disclosed in the opinion of all the judges, in accordance with the reasoning of Mr. Justice Buller, who is here particularly quoted because he has been referred to as favorable to the doctrines of Mr. Browne, and who thus expresses himself: [*404—“Every case that I know on the subject is a *clear authority to show that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction. After the cases of *Lindo v. Rodney*, *Le Caux v. Eden*, and *Livingston v. McKenzie*, it would only be a waste of time to enter into reasons to show that this court has no jurisdiction over those subjects. Still less reason is there for saying, that the admiralty shall be prevented from proceeding after it has made an interlocutory decree; because that would be to say, that the admiralty has jurisdiction at the beginning of the suit, and not at the end of it.” The case of *Smart v. Wolff*, then, is assuredly no direct authority, if authority at all, to sustain the theory or the partialities of Professor Browne. Indeed, the utmost that can be drawn from this case in favor of those theories is an expression of belief, by Justice Buller, that my Lord Coke entertained not only a jealousy of, but an enmity against, the admiralty; a belief which, whether well or ill founded, must be equally unimportant,—equally impotent to impugn an inveterate, a confirmed, nay, an admitted course and body of jurisprudence. Upon a review of all the authorities to which I have had access, the conclusion of my mind is certain and satisfactory, that, with some temporary deviations or irregularities, such as the resolutions of 1632, the jurisdiction of the instance court of the admiralty both

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by the common law and by the statutes of 13 and 15 Richard II., down to the period at which, during the reign of the present queen, that jurisdiction was enlarged, was, in matters of contract (with the known exception of seamen's wages), limited to marine contracts made and to be executed upon the high sea, and to cases of hypothecation of the ship upon her voyage; and in matters of civil tort, to cases also occurring upon the sea, without the body of the county. But this restriction upon the jurisdiction of the instance courts of England, so uniformly maintained by the common law courts of that country,—acknowledged, however condemned, by Mr. Browne, and admitted in argument in this case,—it is contended, does not apply to the powers and jurisdiction of the like courts in the United States, and did not apply at the period when the Federal Constitution was adopted, but that a jurisdiction more varied and enlarged, as practised in the British colonies in North America, and under the general confederation at the adoption of the Constitution, was in the contemplation of the framers of this Constitution, and must therefore be referred to as the measure of the powers conferred in the language of the second section of the third article,—“all cases of admiralty and maritime jurisdiction.” In testing the accuracy of these positions, it would be asking too

*405] much of this court to receive as binding authority the decisions of *tribunals inferior to itself, farther than they rest upon indisputable and clear historical truths in our colonial history; truths, too, which shall sustain a regular and recognized system of jurisdiction. It will not be sufficient to allege some obscure, eccentric, or occasional exertions of power, if they could be adduced, and upon these to attempt to build up an hypothesis or a system,—nay, more, to affirm them to be conclusive proofs of a system established, general, well known to and understood by the framers of the Constitution, and therefore entering necessarily into their acceptance of the terms “admiralty and maritime jurisdiction.” The danger of yielding to such scanty and inadequate testimony must be obvious to every mind. The still greater danger of theorizing upon words not of precise or definite import, freed from the restraints of settled acceptance, has been exemplified in our own time and country, in an able, learned, and ingenious effort to confer on the admiralty here powers not merely coextensive with the most ambitious pretensions of the English admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient or modern Europe, and covering, not only seas and navigable waters,

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but men and their transactions having no necessary connection with waters of any description, viz., shipwrights, material men, and insurers (*vide* 2 Gall., 397); and this upon the assumption that the term *maritime* implied more than the word *admiralty*, when unassociated with it, and that this was so understood by the framers of the Constitution, who designed it as an enlargement of the admiralty power. Yet if we turn to the language of Mr. Justice Blackstone, Vol. III., p. 106, he tells us that the courts maritime are the admiralty courts, using the terms *maritime* and *admiralty* as convertible; and that the injuries triable in the admiralty (or maritime causes) as such as are of common law cognizance, yet, being committed on the high seas, are therefore to be tried by a peculiar court. Again, p. 68, he says,—“The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty and its court of appeal.” So, likewise, Sir Matthew Hale, p. 50, in characterizing maritime contracts to be those made and to be executed upon the sea, certainly excludes any implication beyond these; and this must be taken as the English interpretation of the term *maritime*, by which it is understood as identical with *admiralty*.

And here it seems proper to remark, that I cannot subscribe to the opinion, either from the bench or the bar, that the decisions of inferior courts, which it is not merely the right, but *the duty of this tribunal to revise, should, by [*406 their intrinsic authority as decisions, be recognized as binding on the judgment of this court. They are entitled to that respect to which their accuracy, when examined, may give them just claims; but it is surely a perversion of our judicial system to press them as binding merely because they have been pronounced. If these decisions can be appealed to upon the mere force of their language, I would quote here the words of Judge Washington, in the case of the *United States v. Gill*, 4 Dall., 398, where he declares, that “the words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England, from whose code and practice we derive our systems of jurisprudence, and obtain the best glossary.” Nor am I disposed to consider the doctrine of the civil law which has been mentioned, to escape from the silence of our own code or that of England upon the subject.

I do not contest the position, that the established, well-defined, regular and known civil jurisdiction of the admiralty courts of England, or of the vice-admiralty courts of the

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American colonies, was in the contemplation of the men who achieved our independence, and was adopted by those who framed the Constitution. I willingly concede this position. That which I do resist is what seems to me an effort to assert, through the colonial vice-admiralty courts, powers which did not regularly inhere in their constitution; powers which, down to the date of the quarrel with the mother country, were never bestowed on them by statutory authority; powers which to their superior—from whom they emanated, and to whom they were inferior and subordinate, the High Court of Admiralty—had long been conclusively denied, as has been already abundantly shown. With respect to the establishment and powers of these courts, we are informed by Browne, 2 Civ. & Adm. Law, 490, that “all powers of the vice-admiralty courts within his Majesty’s dominions are derived from the high admiral, or the commissioners of the admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commission, the lords of the admiralty are authorized to erect vice-admiralty courts in North America, the West Indies, and the settlements of the East India Company;” “and in case any person be aggrieved by sentence or interlocutory decree having the force of a sentence, he may appeal to the High Court of Admiralty.” Blackstone, also, says (Vol. III., p. 68),—“Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the *407] admiral’s jurisdiction.” Stokes, in his View of *the Constitution of the British Colonies in North America, speaking of the vice-admiralty courts, says (chap. 13, p. 271),—“In the first place, as to the jurisdiction exercised in the courts of vice-admiralty in the colonies, in deciding all maritime causes, or causes arising on the high seas, I have only to observe that it proceeds in the same manner that the High Court of Admiralty in England does.” Again (p. 275), he says,—“From the courts of vice-admiralty in the colonies, an appeal lies to the High Court of Admiralty in England.” Mr. Browne, in his second volume of Civ. and Adm. Law, p. 491, accounts for the jurisdiction of the vice-admiralty courts in America, in revenue causes, by tracing it to the statute of 12 Charles II., commonly called the Navigation Act, and to statutes 7th and 8th of William III., c. 22, and designates this as totally foreign to the original jurisdiction of the admiralty, and unknown to it. With this view of the origin and powers of the vice-admiralty courts of the colonies, showing them to be mere branches, parts of the admiralty,

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and emanating from and subordinate to the latter, it would seem difficult to perceive on their part powers more comprehensive than those existing in their creator and superior, vested, too, with authority to supervise and control them. The existence of such powers certainly cannot rest upon correct logical induction, but would appear to be at war equally with common apprehension and practical execution. Power can never be delegated which the authority said to delegate itself never possessed, nor can such power be indirectly exercised under a pretext of controlling or supervising those to whom it could not be legitimately delegated. The colonial vice-admiralty courts, as regular parts of the English admiralty, created by its authority, could by their constitution, therefore, be invested only with the known and restricted jurisdiction of the former. If a more extended jurisdiction ever belonged to, or be claimed for, these colonial tribunals, it must rest on some peculiar and superadded ground, which it is incumbent on the advocates of this jurisdiction clearly to show. Has anything of the kind been adduced in the argument of this cause? Beyond the provisions of the statutes of Charles II. and William III., relative to cases of revenue, has there been shown any enlargement by statute of these vice-admiralty powers, any alteration by judicial decision in England of the constitution and powers of the vice-admiralty courts, as emanating from, and limited by, the jurisdiction of the admiralty in the mother country? Strongly as authority for the affirmative of these inquiries has been challenged, nothing satisfactory to my mind, nothing, indeed, having the appearance of authority has been adduced; because, I take it *for granted, from the distinguished ability of the counsel, such authority was not attainable. The learned and [408 elaborate investigations of the counsel for the appellants have brought to light a series of proofs upon the jurisdiction of the vice-admiralty courts, all in strict accordance with the positions laid down in Blackstone, Stokes, and Browne, and exemplifying beyond these the actual and practical extent and modes to which and in which that jurisdiction was permitted and carried into operation in the colonies. These developments are valuable as illustrations of our early history, but they are still more so to the jurist seeking to ascertain the boundaries of right amidst contested limits of power. A recapitulation of them here would require an inconvenient detail. They well deserve, nevertheless, to be preserved and remembered, as showing incontestably, with the exception of revenue cases arising under the statutes of Charles and of William, and designated on all hands as "totally foreign to the original juris-

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diction of the admiralty, and unknown to it," that the constitution and functions of the vice-admiralty courts, from the earliest notices of their existence, in the American colonies, were modelled upon and strictly limited to those of the mother country (of which they were branches or portions); that, so far from there having grown up a more enlarged and general jurisdiction in the colonial vice-admiralty courts,—a jurisdiction known and acquiesced in,—every effort on their part to transcend the boundary prescribed to their superior in the mother country was watched with jealousy by the common law tribunals, and by them uniformly suppressed. Coming down to the periods immediately preceding the Revolutionary conflict, and embraced by the war, and during the existence of the Confederation, the volumes of testimony poured forth in the forms of essays, speeches, and resolutions, proved that the pretensions then advanced by the British government, through the medium of the admiralty jurisdiction, extending that jurisdiction beyond its legitimate province as an emanation from the admiralty at home, so far from being regarded as pertaining to a known and established system, were received as novelties and oppressions,—as abhorrent to the genius of the people, to the British constitution itself, and worthy to be repelled even by an appeal to arms. It would seem, then, reconcilable neither with reason nor probability, that the men who made these solemn protests,—that a community still warm from the contest induced by them,—should, upon their emancipation from evils considered intolerable, immediately, by a species of political suicide, rivet those same evils indissolubly upon themselves. Much more

*409] reasonable does it appear to me, that the statesmen who framed *our national charter, when conferring the admiralty and maritime jurisdiction, had in their contemplation that jurisdiction only which was familiar to themselves and their fathers, was venerable from time, and in practice acceptable to all; they could not have intended to sanction that whose very existence they denied. This view of the question is further fortified by the opinion of two able American jurists, both of them contemporaneous with the birth of our government. I allude to the opinion of Chancellor Kent, expressed at page 377 of the first volume of his Commentaries, 5th edit., and to that of Mr. Dane, found in volume sixth of his Abridgment, p. 353. It is in close conformity to, and congenial with, the seventh amendment of the Constitution, and with the saving in the Judiciary Act of the right to a remedy at common law, wherever the common law should be competent to give it. An able illustration of the construction here contended for may also be seen in the elaborate opinion of the late Justice

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Baldwin in the case of *Bains v. The Schooner James and Catharine*, Baldwin, 544, where the learned judge, in support of his conclusions, with great strength of reasoning, and upon authority, expounds the term "suits at common law," in the seventh amendment of the Constitution, and the phrase, "the right to a common law remedy where the common law is competent to give it," contained in the saving in the ninth section of the Judiciary Act, showing their just operation in limiting the admiralty within proper bounds. I deem it wholly irregular to attempt to adduce general admiralty powers from the cognizance vested in the courts as to seizures; these are purely cases of revenue, are treated in England as anomalous, and as not investing general admiralty jurisdiction, but as unknown to it; or jurisdiction in cases of contract, as between private persons. This interpretation disposes at once of all the conclusions which it is attempted to draw from the several cases of seizure decided in this court. The *obiter dictum* in the case of the *General Smith* ought not to be regarded as authority at all, much less as laying the foundation of a system. From the best lights I have been able to bring to the inquiry before us, reflected either from the jurisprudence of the mother country, from the history of the colonial government, or the transactions of the general Confederation, I am satisfied that the civil, admiralty, and maritime jurisdiction conferred by the second section of the third article of the Constitution was the restricted jurisdiction known to be that of the English admiralty, insisted upon and contended for by the North American colonies, limited in matters of contract (seamen's wages excepted) to things agreed upon and to be performed upon the sea, and cases of hypothecation, *and in civil torts to [*410 injuries occurring on the same theatre, and excluded as to the one and the other from contracts made, or torts committed, within the body of a county.

It has been urged in argument, that the restriction here proposed is altogether unsuited to and unworthy the expanded territory and already great and increasing commerce of our country. To this may be replied the fact, that it was thought sufficiently broad for a nation admitted even at this day to be the most commercial on the globe. In the next place, I am by no means prepared to concede that the interests of commerce, and certainly other great interests in society, are to be benefited by incursions upon the common law jurisprudence of the country. Recurring, as a test, to the institutions and to the condition of various nations, a very different and even opposite conclusion would be impressed by it. But even if it be admitted that a power in the admiralty such as would

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permit encroachments upon the venerable precincts of the common law would be ever so beneficial, the reality of such advantage, and the right or power to authorize it, are essentially different concerns. An argument in favor of power founded upon calculations of advantage, in a government of strictly delegated powers, is scarcely legitimate when addressed to the legislature; addressed to the judiciary, it seems to be especially out of place. In my view, it is scarcely reconcilable with government in any form, so far as this term may signify regulated power, and ought to have influence nowhere. If a restricted admiralty jurisdiction, though ever so impotent for good or prolific of inconvenience, has been imposed by the Constitution, either or both those evils must be of far less magnitude than would be attempts to remedy them by means subversive of the Constitution itself, by unwarranted legislative assumption, or by violent judicial constructions. The pressure of any great national necessity for amendments of that instrument will always insure their adoption.

To meet the objection urged in this case to the jurisdiction deduced from the character of the contract sued on, it has been insisted that the foundation of this suit may be treated as a marine tort, which, having been committed on Long Island Sound, and therefore not within the body of any county, is exempt from objection on the score of locality. If the pleadings and proofs in this cause presented a case of simple or substantial tort, occurring without the body of a county, no just objection could be made to the jurisdiction. It is, therefore, proper to inquire whether a case of marine tort, in form or in substance, is presented upon this record.

*411] There is a class of cases known to the common law, in which a plaintiff having *a right of action arising upon contract may waive his remedy directly upon the contract in form, and allege his gravamen as originating in tort, produced by a violation or neglect of duty. The cases in which this alternative is permitted are, in the first place, those in which, independently of the rights of the plaintiff arising from express stipulations with the defendant, there are duties or obligations incumbent on the latter resulting from the peculiar position he occupies with respect to the public, giving the right to redress to all who may suffer from the violation or neglect of these public obligations. Such are the instances of attorneys, surgeons, common carriers, and other bailees. The wrong in these instances is rather the infringement of these public and general obligations, than the violation of the private direct agreement between the parties; and *agreement, contract*, is not the foundation of the demand, nor can it be

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properly taken as the measure of redress to be adjudged; for I presume it is undeniable, that, if the relations of the parties are the stipulations of their contract exclusively or essentially, their remedies must be upon such stipulations strictly. Secondly, they are cases in which a kind of *quasi* tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract. The contract, therefore, must be referred to, and substantially shown, to ascertain the rights of the parties, and to measure the character and extent of the redress to either of them. It can in no material feature be departed from. This I take to be the *rationale* of the practice, and the view here taken appears to be sustained by authority. Thus, in *Boorman v. Brown*, 3 Ad. & E., 525, N. S., Tindal, C. J., delivering the opinion of all the court, says,—“That there is a large class of cases in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently in *assumpsit*, or in case upon tort, is not disputed.” Again (p. 526), the same judge says,—“The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the non-performance, is a ground of action upon tort.” In the case of *Winterbottom v. Wright*, 10 Mees. & W., 114, Lord Abinger thus states the law:—“Where a party becomes responsible to the public by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent; so, in cases of public nuisances, whether the act was done by the party or a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. These, however, are *cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases, in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract; but there is no instance in which a party who was not a privy to the contract entered into with him can maintain any such action.” And Alderson, Baron, in the same case says,—“The only safe rule is, to confine the right to recover to those who enter into the contract. If we go one step beyond that, we may go fifty.” So, too, in *Tollit v. Sherstone*, 5 Mees. & W., 283, a case in tort, Maule, Baron, says,—“It is clear that an action of contract cannot be maintained by a person who is not a party to the contract;

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and the same principle extends to an action arising out of the contract." In farther proof that these actions in form *ex delicto*, founded on breach of contract, are essentially actions of contract, it is clear that, in such actions, an infant could not be debarred the privilege of his nonage, nor could the operation of the statute of limitations upon the true cause of the action be avoided; both these defences would apply, according to the real foundation of the action.

With respect to these cases *ex delicto quasi ex contractu*, as they have been called, it has been ruled, that if the plaintiff states the custom, and also relies on an undertaking general or special, the action is in reality founded on the contract, and will be treated as such. Vide *Orange County Bank v. Brown*, 3 Wend. (N. Y.), 158.

If the practice of the common law courts above considered be at all applicable to suits in the admiralty, how would it operate upon the case before us? Is this case, as presented on the face of the libel, or upon the proofs adduced in its support, either formally or substantially a case founded solely on public duty, or upon contract between the parties? It would seem to be difficult, in any form of words, to state a contract more express than is set out in the libel in this cause. It is true that in the first article there is a statement that the respondents were common carriers of merchandise between the city of New York and the town of Stonington in Connecticut, but it is nowhere alleged that the property of the complainants was delivered to the respondents as common carriers, or was received by them in that character, or under any custom or obligation binding them as carriers. So far from this, it is averred in the second article of the libel, that the com-
 *413] plainants contracted on a particular day, and at a particular place, and *that at that very place, and on that very day, the respondents contracted with the libellants, for a certain reward and hire to be paid, to transport the said merchandise, &c.,—mutual and express stipulations set forth. Is this the statement of a general custom, a responsibility accruing from implied public duties, or is this not rather the exclusion of every thing of the kind? Again, article third of the libel avers, that on the day and at the place mentioned in the second article, viz., on the 13th day of July, 1840, at the city of New York, the libellants delivered to the respondents their merchandise, and it was received by the latter, to be transported according to the agreement between them. If, then, the power of proceeding in tort for a breach of the contract, known to the common law courts, can be extended to the admiralty, it would still, as in the former tribunals according

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to the authorities, present every question for decision as a question of contract, between parties (and because they were so) to the contract, by the stipulations according to which alone the rights and wrongs of all must be adjusted. This election of the proceeding in tort arising *ex contractu*, if permitted to the admiralty, would leave the subject of jurisdiction just where it would stand independently of such election. In the exercise of such election, you are necessarily driven to the contract to ascertain the existence, the nature, and extent of the assumed tort, in other words, the infraction or fulfilment of the contract, and the investigation develops inevitably an agreement, of which, with respect to parties, to locality, or subject-matter, or to all these, the admiralty can have no cognizance.

But after all, I would inquire for the authority under which the admiralty has been allowed to assume, under an artificial rule of common law pleading, jurisdiction of matters not falling naturally, directly, and appropriately within its cognizance. Indeed, its admirers and advocates, from Sir Leoline Jenkins to Professor Browne, have zealously defended it against every imputation of attempts at assumption, insisting that the subjects claimed for its cognizance, and its modes of claiming them, were such only as naturally and appropriately belonged to it. They have as zealously complained of abstractions by the common law courts, by means of uncandid and unreasonable fictions, of matters naturally and familiarly belonging to the admiralty. If a single precedent exists showing that, by the artificial rules of pleading practised in the common law courts, partaking in some degree of fiction, the admiralty has ever obtained jurisdiction over matters which otherwise would not have fallen within its cognizance, that precedent is unknown to me; and it is equally certain that I am unwilling to *create one. And it is [414 remarkable, that, in direct opposition to this effort to give jurisdiction to the admiralty by borrowing a license from the common law courts, we have the explicit declaration of Professor Browne himself, amidst all his partiality, that in matters of tort the jurisdiction of the admiralty is limited to "actions for assault, collision, and spoil,"—instances of pure tort, excluding every idea of fiction, and equally excluding one single attribute of contract. *Vide* Vol. II., chap. 4, p. 122.

I am extremely diffident as to the wisdom and safety of enlarging a jurisdiction, (and especially by the force of implication,) which from the earliest traces of its existence (whatever has been said in this case about the power of reform in this respect) has always been exercised by rules and principles

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less congenial with our institutions than are the principles and proceedings of the common law; which, by the mere force of implication in the terms "admiralty and maritime," overrides the seventh amendment of the Constitution, and the important saving in the ninth section of the Judiciary Act; which by a like implication frees itself altogether from all restriction imposed, both by the second section of the third article of the Constitution, and by the eleventh section of the Judiciary Act, with respect to controversies between citizens of the same state. A jurisdiction substituting, too, for the invaluable safeguard to truth secured by confronting the witness with court and jury, a machinery by which the aspect and the force of testimony are graduated rather by the address and skill of the agents employed to fabricate it, than by its own intrinsic worth, and transferring the trial of facts resting upon credibility to a tribunal often remote and inconvenient, and constrained to decide on statements that may be merely colorable, often entirely untrue.

Again, to decide this case upon the ground of liability of the owners for a tort committed by the master, would present this strange incongruity. Although, by the common law, owners of vessels were responsible for losses occasioned by the misconduct of masters as their agents, to the full amount of such losses, yet as long since as the statute of 7 George II., passed in 1734, nearly forty years before our independence, this responsibility was expressly limited in extent to the value of the vessel and the freight. The laws of Oleron and Wisby, we are told by Lord Tenterden (*vide* Treatise on Shipping, p. 395,) contain no provision on this subject, though this writer informs us, upon the authority of Vinnius, that such a provision was contained in the laws of Holland, and that by the laws of Rotterdam, as early as 1721, the owners were ex-
 *415] empted from liability for the acts of the master done without their *order farther than their part of the ship amounted to. By the French Ordonnance of the Marine, Book 2, tit. 8, art. 2, the rule is thus given:—"Les propriétaires des navires seront responsable des faits du maitre; mais ils en demeureront déchargés en abandonnant leur bâtiment et le fret." So, too, Boulay-Paty, in his work entitled Cours de Droit Commercial Maritime, Vol. I., pp. 270 *et seq.*, after interpreting the word *fait* or act of the master as inclusive of *delicta quasi delicta*, acts of negligence or imprudence, as well as his contracts or *engagements*, upon a comparison of the opinions of various authors,—Valin, Emerigon, Pothier, &c.,—comes to the following conclusions:—"Maintenant, disons donc que le capitaine, soit par emprunt, soit par vente de mar

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chandises, soit par *délict* ou quasi-délict, n'a que le pouvoir d'engager le navire at le fret, sans qu'il lui soit *possible* de compromettre la fortune de terre de ses armateurs. Ceux-ci se dégagent de toutes les obligations contractées par le maître, en cours de voyage, par l'abandon du navire et du fret." This same writer, pages 275 and 276, lays down the following doctrines, which he quotes from Grotius, from Emerigon, from Pothier, and from the Consulat de la Mer:—"L'obligation où les propriétaires sont de garantir les *faits* de leur capitaine, est plus réelle que personnelle. * * * Pendant le cours du voyage, le capitaine pourra prendre deniers sur le corps, mettre des appareils en gage, ou vendre des marchandises de son chargement. Voilà tout. Son pouvoir legal ne s'étend pas au-delà des limites du navire dont il est maître, c'est-à-dire administrateur; il ne peut engager la fortune de terre de ses armateurs qu'autant que ceux-ci y ont consenti d'une manière spéciale. * * * De sorte que si le navire périt, ou qu'ils abdiquent leur intérêt, ils ne sont garans de rien. * * * En effet, le Consulat de la Mer, cap. 33, après avoir dit que l'intérêt que les armateurs ont sur le corps, est engagé au paiement des dettes contractées par le capitaine, en cours de voyage, ajoute que la personne ni les autres biens des copropriétaires ne sont obligés, à moins qu'ils ne lui eussent donné, à ce sujet, un pouvoir suffisant.

"Au ch. 236 il est dit que si le navire périt, c'est assez que cette perte soit pour le compte des quirataires."

From this view of the law as existing in England and on the European continent, it is manifest, that, in the former country, the responsibility of the owners, prior to the statute of 7 Geo. II., was a common law liability, and was acknowledged and allowed to the full extent that the demand could be proven, embracing both the persons and all the property of the owners; that since the statute of Geo. II., this liability is limited to the value of the ship and freight, but still [*416 to be enforced *in the courts of common law or equity; that, by the maritime law of the Continent, the liability of the owners was always limited to the ship and freight, and that, from this restricted liability, the owners were entirely released by an abandonment of ship and freight, or by a total loss of the former at sea, whether the claim was made on account of the contract, or tort, or *delictum* of the master. But in this case, the court have sanctioned a liability resting upon common law principles, irrespective of any limit imposed either by statute or by the rules of the maritime law, and this by means, too, of artificial or fictitious constructions, practised upon only in the courts of common law, relative to the forms

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of actions prosecuted in those courts; and, for the accomplishment of this object, have permitted the adoption of modes and proceedings peculiarly and solely appertaining to the maritime law,—a system of jurisprudence essentially dissimilar, a system which recognizes no such claim as the present, but under whose authority the owners would be wholly absolved by the total loss of the vessel, and under which they would be permitted to stipulate for their own exemption from liability on account of the barratry or dishonesty of their agents. *Vide* Abbott on Shipping, p. 294. The incongruity here pointed out might have been avoided, by confining the parties to their proper forum.

My conclusions, then, upon the question of jurisdiction, are these:—that the case presented by the libel is palpably a proceeding *in personam* upon an express contract, entered into between the parties in the city of New York; that it is therefore a case properly cognizable at a common law court, for any breach of that contract which may have been committed, and consequently is not a case over which the admiralty court can, under the Constitution and laws of the United States, have jurisdiction, either *in personam* or *in rem*.

Having felt myself bound to treat at some extent what seemed to me the decisive, and what may, too, be called the public or constitutional question involved in this cause,—the question of jurisdiction,—as to what may be the merits of this controversy, the obligations sustained by the parties to each other, and the extent to which these have been fulfilled or violated, I shall content myself with simply giving the conclusions to which my mind has been conducted, without pretending to reason them out fully upon the facts or the law of the case, because those conclusions would not be the grounds of a formal dissent, though disaffirmed by a majority of my brethren.

*417] Whilst I am impressed with the strong necessity that exists *for guarding against fraud or neglect in those who, by holding themselves forth as fitted to take charge of the lives, the health, or the property of the community, thereby invite the public trust and reliance, I am not prepared to say that there can be no limit or qualification to the responsibility of those who embark in these or similar undertakings,—limits which may be implied from the inherent nature of those undertakings themselves, or which may result from express stipulation. It seems to me undeniable, that a carrier may select the particular line or description of business in which he engages, and that, so long as he with good faith adheres to that description, he cannot be responsible for any thing beyond or incon-

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sistent with it. The rule which makes him an insurer against everything but the act of God or the public enemy makes him an insurer as to performances only which are consistent with his undertaking as carrier. A common carrier of travellers is bound to the preservation of the accustomed baggage of the traveller, because of the known custom that travellers carry with them articles for their comfort and accommodation, and the price for which the transportation is undertaken is graduated on that presumption; but the carrier would not therefore be responsible for other articles, of extraordinary value, secretly transported upon his vehicle, because by this secrecy he is defrauded of a compensation commensurate with the value of the subject transported, and with the increased hazards to which it is attempted to commit him without his knowledge or assent. But to render him liable, he must have received the article for transportation, and it must be a subject falling fairly within the scope of his engagement. Within this range he is an insurer, with the exceptions above stated. But a carrier may, in a given case, be exempted from liability for loss, without fraud, by express agreement with the person for whom he undertakes; for I cannot well imagine a principle creating a disability in a particular class of persons to enter into a contract fraught with no criminal or immoral element,—a disability, indeed, extending injuriously to others, who might find it materially beneficial to make a contract with them. A carrier may also be exempted from liability by the conduct of the owner of property, in keeping the exclusive possession and control of it, and thereby withholding it from the care and management of the carrier. Upon applying the principles here succinctly stated to the evidence in this cause, it is not made out in proof, to my mind, that the respondents ever received, as carriers, from the libellants, or indeed in any other capacity, property of any species or description, or ever knew that property of the libellants was, directly or indirectly, within the possession of the respondents, or on *board [*418 their vessel. It is not in proof that Harnden, in his contract with the respondents, acted as the agent of the libellants or for their benefit, or that, at the time of the agreement or of the shipment made by Harnden, the libellants and respondents were known to each other by transactions as shipper and carrier. It is established by proof, that Harnden contracted, in his own name and behalf alone, with the respondents for a separate compartment on board their vessel, to be, with its contents (the latter unknown to the respondent), at all times under his exclusive control; that the property alleged to have been lost was, if in this separate compartment, placed

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there without certain knowledge of its character or value on the part of the respondents, was under the exclusive direction of Harnden, who accompanied it, and who, up to the time of the conflagration of the vessel, held the property under lock and key, and could alone, without violence and a breach of the engagement, have had access to it. Were this controversy directly between Harnden and the respondents, from the peculiar nature of the contract between these parties, and from the possession of the subject reserved to and exercised by the former, any liability of the respondents, even then, might be a matter of doubt; but there should, I think, be no difficulty in concluding that no kind of liability could attach to the respondents in favor of persons for whom they had undertaken no duty, and who, in reference to the transaction in question, were strangers, entirely unknown to them. Upon the merits of this case, as well as upon the question of jurisdiction, I think the decree of the Circuit Court ought to be reversed, and the libel dismissed.

Mr. Justice GRIER concurred in opinion with Mr. Justice DANIEL.

Mr. Justice WOODBURY.

On most of the facts involved in this libel, little controversy exists. It is certain that the respondents took the property of the plaintiffs on board their steamboat, the *Lexington*, to carry it, on her last calamitous voyage, the 13th of January, 1840, from New York to Stonington. It is equally certain that it was lost on that voyage, in Long Island Sound, at a place where the tide ebbed and flowed strongly, and several miles from shore, and probably without the limits of any state or county. It is certain, likewise, that the property was lost in consequence of a fire, which broke out in the boat in the night, and consumed it, with most of the other property on board. The value of it is also sufficiently certain, and that it was put on board, not by an officer of the bank, but by Harnden, a forwarding agent for the community generally, and under a *419] special contract between Harnden and the respondents, that the *latter were not to run any risk, nor be responsible for any losses of property thus shipped by him.

But some other facts are not so certain. One of that character is, whether the fire occurred by accident, without any neglect whatever by the respondents and their agents, or in consequence of some gross neglect by one or both. It would not be very material to decide this last fact, controverted as it is, and in some degree doubtful, if I felt satisfied

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that the plaintiffs could recover anywhere, and more especially in admiralty, on the contract made by Harnden with the respondents, for the breach of the contract to carry and deliver this property.

The first objection to such a recovery on the contract anywhere is, that it was made with Harnden, and not with the bank. *Butler v. Basing*, 2 Car. & P., 613; 15 Mass., 370; 2 Story, 32. Next, that he was acting for himself, in this contract, on his own duties, liabilities, and undertakings, and not for them; and that the bank, so far as regards any contract, looked to him and his engagement with them, and not to the respondents or their engagement with him. 6 Bing., 131. Next, that the articles, while on board the boat, were to be in the care and control of Harnden, and not of the master or owners; and hence no liability exists on the contract even to him, much less the bank. Story Bail., p. 547, § 582. And this same conclusion is also urged, because Harnden, by his contract, made an express stipulation, that the property carried should be at his risk, as well as in his care. See 5 East, 428; 1 Vent., 190, 288. It is contended further, that, if the bank can sue on Harnden's contract made with the respondents, it must be on the principle of his acting in it as their agent, and not for himself alone; and if so, and they, by suing on it, adopt its provisions, they must be bound by the stipulation in it made by him, not to hold the respondents liable for any risk or loss.

It is, however, doubted, whether, with such a stipulation, the respondents are not, by public policy, to be still liable on a contract like this, in order to insure greater vigilance over all things intrusted to their care (*Gould v. Hill*, 2 Hill (N. Y.), 623), and on the ground, that the parties could not mean by the contract that the carriers were to be exonerated for actual misbehavior, but only for accidents otherwise chargeable on them as *quasi* insurers. *Atwood v. Reliance Ins. Co.*, 9 Watts (Pa.), 87; 2 Story, 32, 33.

It is insisted, next, that, as the unusual nature of the property carried, in this case, was not made known to the carriers, nor a proportionate price paid for its transportation, the owner *cannot recover beyond the usual value of com- [*420 mon merchandise of such a bulk. *Citizens' Bank v. Steamboat Nantucket*, 2 Story, 32; 25 Wend. (N. Y.), 459; *Gibbon v. Paynton*, 4 Burr., 2301.

But, giving no decisive opinion on the validity of any of these objections, as not necessary in the view hereafter taken, yet they are enumerated to show some of the difficulties in

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sustaining a recovery on this contract, notwithstanding their existence.

Another important objection remains to be considered. It is, that no jurisdiction exists over this contract in a court of admiralty where these proceedings originated. The contract was made on land, and of course within the body of the county of New York. It was also not a contract for a freight of goods abroad, or to a foreign country, the breach of which has been here sometimes prosecuted in courts of admiralty. *Drinkwater et al. v. The Spartan*, Ware, 149, by a proceeding *in rem* (155); *De Lovio v. Boit*, 2 Gall., 398; *The Volunteer*, 1 Sumn., 551; *Logs of Mahogany*, 2 Id., 589; 6 Dane Abr., 2, 1, *Charter-parties*. See a case *contra*, in the records of Rhode Island, A. D. 1742.

But the law of England is understood to be, even in foreign charter-parties, against sustaining such suits, *ex contractu*, in admiralty. 3 T. R., 323; 2 Ld. Raym., 904; 1 Hagg. Adm., 226, and cases cited in 12 Wheat., 622, 623.

By agreement of the judges in A. D. 1632, admiralty was not to try such cases, if the charter-party was contested. Dunlap's Adm., Pr., 14; 4 Inst., 135; Hob., 268.

It seems, however, to be doubted by Browne (2 Bro. Civ. & Adm. Law, 122, 535), whether the libellant may not proceed in admiralty, if he goes to recover freight only and not a penalty. It is also believed, that, in this country, contracts to carry freight between different states, or within the same state, if it be on tide-water, or at least on the high seas, have sometimes been made the subject-matter of libels in admiralty. Dunlap's Adm., 487; 1 Sumn., 551; 3 Am. Jur., 26; 6 Id., 4; *King et al. v. Shepherd*, 3 Story, 349, in point; Gilp., 524; Conkling, Pr., 150; *De Lovio v. Boit*, 2 Gall., 448. I am inclined to the opinion, too, that at the time the Constitution of the United States was adopted, and the words "cases of admiralty and maritime" were introduced into it, and jurisdiction over them was subsequently given in civil proceedings, in the act of 1789, to the District Courts, the law in England had in some degree become changed in its general principles in respect to jurisdiction in admiralty over contracts. Their courts had become inclined to hold, that the place of performance of a contract, if maritime in its subject, *421] rather *than the place of its execution, was the true test as to its construction and the right under it. This conformed, also, to the analogy as to contracts at common law. See cases in *Towne v. Smith*, 1 Woodb. & M., 135.

It is not unusual for the place to which the parties look for fulfilling their duties to be not only different from the place

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of making the contract, but for the parties to regard other laws and other courts, applying to the place of performance, as controlling and as having jurisdiction over it. *Bank of the United States v. Donnelly*, 8 Pet., 361; *Wilcox v. Hunt*, 13 Id., 378; *Bell at al. v. Bruen*, 1 How., 169.

Hence, for a century before 1789, Lord Kenyon says, admiralty courts had sustained jurisdiction on bottomry bonds, though executed upon the land; because, "if the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders on absurdity." See *Menetone v. Gibbons*, 3 T. R., 267-269; 2 Ld. Raym., 982; 2 H. Bl., 164; 4 Cranch, 328; Paine, 671. On this principle, the admiralty has gradually been assuming jurisdiction over claims for pilotage on the sea, both the place of performance and the subject-matter being there usually maritime. 10 Wheat., 428; 7 Pet., 324; 10 Id., 108; 11 Id., 175; 1 Mason, 508. Because, on the general principle just referred to, as to the object of the contract, if "it concerned the navigation of the sea," and hence was in its nature and character a maritime contract, it was deemed within admiralty jurisdiction, though made on land. *Zane v. The Brig President*, 4 Wash. C. C., 454; 4 Mason, 380; *The Jerusalem*, 2 Gall., 191, 448, 465; *The Sloop Mary*, Paine, 671; Gilp., 184, 429, 477; 2 Sumn., 1.

This is the principle, at the bottom, for recovering seamen's wages in admiralty. *Howe v. Nappier*, 4 Burr., 1944.

Not that the consideration merely was maritime, but that the contract must be to do something maritime as to place or subject. *Plummer v. Webb*, 4 Mason, 380; *Berni v. The Janus et al.*, 1 Baldw., 549, 552; "*A New Brig*," Gilp., 306. But we have already seen there are several direct precedents in England against sustaining these proceedings in admiralty on the contract, such as a charter-party or bill of lading, and strong doubts from some high authorities against it in this country. Chancellor Kent seems to think a proceeding in admiralty, on a charter-party like this, cannot be sustained, except by what he calls "the unsettled doctrine laid down in *De Lovio v. Boit*." 3 Kent. Com., 162. See likewise [*422] Justice Johnson's opinion to the like effect in *Ramsey v. Allegre*, 12 Wheat., 622.

Looking, then, to the law as held in England in 1789, and not considering it to be entirely clear in favor of sustaining a suit in admiralty on a charter-party like this, and that it is very doubtful whether any more settled or enlarged rule on this subject then prevailed in admiralty here, or has since been deliberately and generally adopted here, in respect to charter-

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parties or bills of lading, I do not feel satisfied in overruling the objection to our jurisdiction which has been made on this ground.

The further arguments and researches since *Waring v. Clarke* (5 How.), tend also, in my view, to repel still more strongly any idea that admiralty jurisdiction had become extended here, at the Revolution, in cases either of contracts or torts, more broadly than in England.

But it is not necessary now to go into the new illustrations of this cited in the elaborate remarks of the counsel for the respondents, or discovered by myself, in addition to those quoted in the opinion of the minority in *Waring et al. v. Clarke*, and in *The United States v. New Bedford Bridge*, 1 Woodb. & M. Among mine is the declaration by Lord Mansfield himself, December 20th, 1775, that the colonies wished "that the admiralty courts should never be made to extend there," instead of wishing their powers enlarged (6 American Archives, 234; Annual Register for 1776, pp. 99, 100); and there is likewise the protest of the friends of America, the same year, in the House of Lords, that the increase of admiralty power by some special acts of Parliament was a measure favored at home rather than here, and was not acceptable here, but denounced by them as an inroad on the highly prized trial by jury. 6 American Archives, 226. Among those cited is the conclusive evidence, that in some of the colonies here before the Revolution, the restraining statutes of Richard II., as to the admiralty, were *eo nomine* and expressly adopted, instead of not being in force here. See in South Carolina, 2 Stat. at L., 446, in 1712, and in Massachusetts, Dana's Defence of New England Charters, 49-54; in Virginia, "the English Statutes" passed before James I., 9 Henning's Statutes, 131, 203; *Commonwealth v. Gaines*, 2 Va. Cas., 179, 185; in Maryland, 1 Maryland Statutes, Kilty's Report, 223; and in Rhode Island, her records of a case in 1763, at Providence.

But I pass by all these, and much more, because, notwithstanding the course of practice here the last half-century in some districts, and the inattention and indifference exhibited *423] in many others as to the true line of discrimination between the jurisdiction *belonging to the common law courts and that in admiralty, enough appears to induce me, as at present advised, not to rest jurisdiction in admiralty over a transaction like this on contract alone. I shall not do it, the more especially when a ground less doubtful in my apprehension exists and can be relied on for recovering all the loss, if the damage was caused by a tort.

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I have turned my attention to ascertain whether the facts in this case exhibit any wrong committed by the respondents, of such a character as a tort, and in such a locality as may render our jurisdiction in admiralty clear over it, looking to the principles of admiralty law in England, and also in this country, so far as can now be discovered to have existed at the time of our Revolution.

First, as to this, it is argued, that, in point of fact, gross negligence existed in the transportation of this property. If so, this conduct by the respondents or their agents may be sufficient to justify a proceeding *ex delicto* for the nonfeasance or misfeasance constituting that neglect, and causing the loss of this property, entirely independent of the contract or its form, or the risks under it, or the want of notice of the great value of the property. Particularly might this be sufficient, if the injury was caused in a place, and under circumstances, to give a court of admiralty undoubted jurisdiction over it as a marine tort.

The question of fact, then, as to neglect here, and the extent of it, may properly be investigated next, as in one view of the subject it may become highly important and decisive of the right to recover, and as it is our duty to settle facts in an admiralty proceeding, when they are material to the merits.

As before intimated, it is here virtually conceded, that the property of the plaintiffs, while in charge of the respondents as common carriers on the sea, was entirely lost, by the burning of the boat in which it was transported.

The first inference from these naked facts would be, that the fire was produced by some cause for which the owners were responsible, being generally negligence, and that *primâ facie* they were chargeable. 6 Mart. (La.), 681; Story Bail., §§ 533, 538.

Indeed, the common carrier who receives property to transport, and does not deliver it, is always held *primâ facie* liable. Abb. Ship., ch. 3, § 3; 1 Vent., 190; 6 Johns. (N. Y.), 169; 8 Id., 213; 19 Wend. (N. Y.), 245; Story Bail., § 533; 3 Kent. Com., 207, 216; 3 Story, 349, 356; 5 Bing., 217, 220; 4 Id., 218.

If they would have this inference or presumption changed, so as to exonerate themselves, it must be done by themselves, *and not the plaintiffs, and by proof removing [*424 strong doubts; or, in other words, turning the scales of evidence in their favor in this attempt. This idea is fortified by the express provision establishing a presumption, by the

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act of Congress, in case of damages by explosions of steam. 5 Stat. at L., p. 305, § 13.

Independent of this presumption, when we proceed to examine the evidence on both sides as to the contested points of fact connected with the loss, it is found to be decidedly against the conduct of the respondents and their agents; and, so far from weakening the presumption against them from the actual loss, it tends with much strength to confirm it. There had, to be sure, been recent repairs, and certificates not long before obtained of the good condition of the boat. But on the proof, she does not seem to have been in a proper state to guard against accidents by fire when this loss occurred. Her machinery was designed at first to burn wood, and had not long before been changed to consume anthracite coal, which created a higher heat. And yet there was a neglect fully to secure the wooden portions of the boat, near and exposed to this higher heat, from the natural and dangerous consequences of it. So was there an omission to use fire-brick and new sheet-iron for guards, nigh the furnace. On one or two occasions, shortly before this accident, the pipe had become reddened by the intense heat so as to attract particular attention; and shortly before, the boat actually caught fire, it is probable, from some of those causes, and yet no new precautions had been adopted.

In the next place, the act of Congress (5 Stat. at L., pp. 304, 305) requires the owners of steamboats "to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose suitable to be worked in said boat, in case of fire, and carry the same upon each and every voyage in good order." (§ 9). And it imposes also a penalty of \$500 for not complying with any condition imposed by the act. (§ 2.)

The spirit of this requisition is as much violated by not having the hose and engine so situated as to be used promptly and efficiently, as by not having them at all, or not having them "in good order."

The hose and engine were not kept together, and hence could not be used on that fatal night. One was stowed away in one part of the boat, and the other elsewhere, so as not to be in a situation to be brought promptly into beneficial use.

Again, it was an imperative provision in the act of Congress before referred to (§ 9),—and the neglect of it was punished by a fine of \$300, on the owner as well as master,— "that iron rods or chains shall be employed and used in the *425] navigating of all steamboats, instead of wheel or tiller ropes." *Yet this was not complied with, and renders their conduct in this respect, not only negligent, but illegal.

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Though, in fact, this accident may not have proved more fatal than otherwise from this neglect, the non-compliance with the provision was culpable, and throws the burden of proof on the owners to show it did not contribute to the loss. *Waring et al. v. Clarke*, 5 How., 463. It is true, that Congress, some years after, March 30, 1845, dispensed with a part of this provision (5 Stat. at L., 626), under certain other guards. Yet in this case even those other guards were wholly omitted.

Nor does there appear to have been any drilling of the crew previously, how to use the engine in an emergency, or any discipline adopted, to operate as a watch to prevent fires from occurring, or, after breaking out, to extinguish them quickly. Indeed, the captain, on this occasion, checked the efforts of some to throw the ignited cotton overboard, so as to stop the flames from spreading, by peremptorily forbidding it to be done.

The respondents, to be sure, prove that several buckets were on board. But the buckets, except in a single instance, were not rigged with heaving-lines, so as to be able to draw up water, and help to check promptly any fire which might break out. And in consequence of their fewness or bad location, some of the very boxes containing the specie of the plaintiffs were broken open and emptied, in order to hold water. Lastly, when discovered, the officers and crew do not appear generally to have made either prompt or active exertions to extinguish the fire, or to turn the vessel nearer shore, where this property, and the passengers, would be much more likely to be preserved, eventually, than by remaining out in the deep parts of the Sound.

The extent and nature of the liability thus caused are well settled at law. The property of the plaintiffs was destroyed by fire, through great neglect by the defendants and their agents. Common carriers are liable for losses by fire, though guilty of no neglect, unless it happen by lightning. 1 T. R., 27; 4 Id., 581; 3 Kent Com., 217; 5 T. R., 389; *Gilmore v. Carman*, 1 Sm. & M. (Miss.), 279; *King et al. v. Shepherd*, 3 Story, 360; 2 Bro., Civ. and Adm. Law, 144; 2 Wend. (N. Y.), 327; 21 Id., 190. These respondents were common carriers, in the strictest and most proper sense of the law. *King et al. v. Shepherd*, 3 Story, 349. See other cases, *post*.

They would, therefore, be liable in the present case without such neglect, if this view of it applied to a recovery on the ground of a tort as well as of a contract. But as it may not, *the next inquiry is if the facts disclose a breach of duty, a culpable neglect, either by the officers or owners of

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the vessel, amounting to a tort, and for which the defendants are responsible.

It is well settled, that a captain is bound to exercise a careful supervision over fires and lights in his vessel, ordinarily. *Malynes*, 155; *The Patapsco Ins. Co. v. Coulter*, 3 Pet., 227, 228, 229; *Busk v. Royal Ex. Ass. Co.*, 2 Barn. & Ald., 82.

He is required in all things to employ due diligence and skill (9 Wend. (N. Y.), 1; Rice (S. C.), 162), to act "with most exact diligence" (1 Esp., 127), or with the *utmost care* (Story on Bailm., § 327). But how much more so in a steamboat, with fires so increased in number and strength, and especially when freighted with very combustible materials, like this, chiefly with cotton!

His failure to exert himself properly to extinguish any fire amounts to barratry. 3 Pet., 228, 234; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet., 213; 10 Id., 507. And if the property be insured against barratry, the owners may then recover.

To be sure, in one case the owners of a steamboat were exonerated from paying for a loss by fire. But it was only under the special provision of the local laws, rendering them exempt, if the fire occurred "by accidental or uncontrollable events." See Civil Code of Louisiana, 63d article; *Hunt v. Morris*, 6 Mart. (La.), 681.

So the written contract for freight, as well as that for insurance, sometimes does not cover fire, but specially exempts a loss by it. 3 Kent Com., 201-207.

In such case there may be no liability for it on the insurance, and doubtfully on the charter or bill of lading, unless it was caused by gross neglect, *crassa negligentia*. But in case of such neglect, liability exists even there. 3 Kent Com., 217; 3 Pet., 238; 1 Taunt., 227. In this view the owners seem liable for all damages which they or their servants could have prevented by care. 8 Serg. & R. (Pa.), 533. As an illustration of what are meant by such damages, they are those which happen, if on land, from unskilful drivers, "from vicious and unmanageable horses, or when occasioned by overloading the coaches, as these would imply negligence or want of care." *Beckman v. Shouse*, 5 Rawle (Pa.), 183.

From the above circumstance, the conclusion is almost irresistible, that what constitutes a gross neglect by the respondents and their agents, as to the condition of the boat and its *427] equipments, existed here, and by the deficiencies and imperfection *of them contributed much to the loss of this property; and beside this, that want of diligence and skill on board, after the fire broke out, as well as want of

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watchfulness and care to prevent its happening or making much progress, was manifest.

If any collateral circumstance can warrant the exaction of greater vigilance than usual, on occasions like these, or render neglects more culpable, it was, that the lives of so many passengers were here exposed by them, and became their victims. This last consideration is imperative, in cases of vessels devoted both to freight and passengers, to hold the owners and their servants responsible for the exercise of every kind of diligence, watchfulness, and skill which the principles of law may warrant. Beside the great amount of property on board on this occasion, they had in charge from one to two hundred passengers, including helpless children and females, confiding for safety entirely to their care and fidelity. All of these, except two or three, were launched into eternity, during that frightful night, by deaths the most painful and heart-rending. Had proper attention been devoted to the guards against fire, such as prudence and duty demanded, or due vigilance and energy been exercised to extinguish it early, not only would large amounts of property probably have been saved, but the tragic sufferings and loss of so many human beings averted.

In view of all this, to relax the legal obligations and duties of those who are amply paid for them, or to encourage careless breaches of trusts the most sacred, or to favor technical niceties likely to exonerate the authors of such a calamity, would be of most evil example over our whole seaboard, and hundreds of navigable rivers and vast lakes, where the safety of such immense property and life depends chiefly on the due attention of the owners and agents of steamboats, and is, unfortunately, so often sacrificed by the want of it. To relax, also, when Congress has made such neglect, when followed by death, a crime, and punishable at least as manslaughter, would be unfaithfulness to the whole spirit of their legislation, and to the loudest demands of public policy.

Their enactment on this subject is in these words (see statute before cited, sec. 12):—"That every captain," &c., "by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person on board said vessel may be destroyed, shall be deemed guilty of manslaughter," &c.

Showing, then, as the facts seem to do here, wrongs and gross neglect by both the owners and officers of the boat, the next step in our inquiries is, whether any principles or precedents exist against their being prosecuted in admiralty [*428 as a *tort, and by a proceeding which sounds *ex delicto*, and entirely independent of any contract.

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The recovery, in cases like this, on the tort, counting on the duty of the carrier and its breach by the negligent loss of the property, is common, both in this country and abroad, in the courts of common law.

Whether it be redressed there in trespass or case, when suing *ex delicto*, is immaterial, if, when case is brought, the facts, as here, show neglect or consequential damage, rather than those which are direct and with force. And if case lies at common law on such a state of facts, there seems to be no reason why a libel in admiralty may not lie for the wrong, whenever, as here, it was committed on the sea, and clearly within admiralty jurisdiction over torts. For the admiralty is governed by like principles and facts, as to what constitutes a tort, as prevail in an action at law for damages, and its ingredients are the same, whether happening on land or water. But case will lie at law, on facts like those here, for reasons obvious and important in the present inquiry. Indeed, on such facts the ancient action was generally in case, and counted on the duty of the carrier to transport safely the property received, and charged him with tortious negligence in not doing it. 1 Price, 27; 2 Kent. Com., 599; 3 Wend. (N. Y.), 158. In such proceedings at common law, the difference was in some respects, when *ex delicto*, more favorable to the owners, as then some neglect, or violence, or fraud, or guilt of some kind, must be shown, amounting to a breach of public duty by the carrier or his servants. *Hinter v. Dibdin et al.*, 2 Ad. & E., N. S., 646; 2 Bos. & P., N. R., 454; 2 Chit., 4. While in the action of assumpsit, more modern, but by no means exclusive, the promise or contract alone need be shown, and a breach of that, though without any direct proof of neglect, as carriers are, by their duties, in law, insurers against all losses except by the king's enemies and the act of God. 3 Brod. & B., 62, 63; 19 Wend. (N. Y.), 239; *Forward v. Pittard*, 1 T. R., 27; 1 Esp., 36; 2 Chit., 1; *Ashmole v. Wainwright*, 2 Ad. & E., N. S., 663.

So it is well settled that these rules of law, and all others as to common carriers by land, apply to those by water, and to those boats carrying freight, as this one did. 10 Johns. (N. Y.), 1; 1 Wils., 281; 3 Esp., 127; 2 Wend. (N. Y.), 327; 3 Story, 349.

What, then, in principle, operates against a recovery?

Some would seem to argue, that a proceeding *ex delicto* must be trespass, and that case is not one. But when it proceeds, as here, for consequential damages, and those caused by gross neglect, and not a mere breach of contract, it sounds *ex de-*

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licto as much as trespass itself. 1 Chit. Pl., 142; 3 East, 593; 2 Saund., 47, b.

*The misconduct complained of here amounted to a tort, as much as if it had been committed with force. [*429 A tort means only a wrong, independent of or as contradistinguished from a mere breach of a contract. The evidence here, in my apprehension, shows both misfeasance and nonfeasance, and a consequential loss from them, which it is customary to consider as tortious. It was here, to be sure, not a trespass *vi et armis*, and perhaps not a conversion of the property so as to justify trover, though all the grounds for the last exist in substance, as the plaintiffs have lost their property by means of the conduct of the defendants, into whose possession it came, and who have not restored it on demand, nor shown any good justification for not doing it.

It is altogether a mistake, as some seem to argue, that force and a direct injury are necessary to sustain proceedings in tort, either at law or in admiralty, for damages by common carriers. So little does the law regard, in some cases, the distinction between nonfeasance and misfeasance, in creating a tort and giving any peculiar form of action for it, that in some instances a nonfeasance is considered as becoming misfeasance; such as a master of a vessel leaving his register behind, or his compass, or anchor. 3 Pet., 235. And "torts of this nature," as in the present case, may be committed either by "nonfeasance, misfeasance, or malfeasance," and often without force. 4 T. R., 484; 1 Chit. Pl., 151; Bouvier's Dict., *Tort*. And even where *mala fides* is necessary to sustain the proceeding, gross negligence is evidence of it. 4 Ad. & E., 876; 1 How., 71; 1 Spence's Eq. Jur., 425; Jones Bail., 8; Story Bail., §§ 19, 20. The action in such case is described as "upon tort," and arises *ex delicto*. 2 Kent Com., 599. In most instances of gross negligence, misfeasance is involved (2 Crompt. & M., 360); as a delivery to a wrong person, or carrying to a wrong place, or carrying in a wrong mode, or leaving a carriage unwatched or unguarded. 2 Crompt. & M., 360; 8 Taunt., 144. Where case was brought for damage by overloading and sinking a boat, it was called an action "for a tort," and sustained, though the injury was wholly consequential. 1 Wils., 281.

Again, it has been argued, that if direct force be not a necessary ingredient to recover in this form of action, it must in some degree rest on the contract which existed here with Harnden, and be restrained by its limitations. But the books are full of actions on the case where contracts existed, which were brought and which count entirely

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independent of any contract, they being founded on some public duty neglected, to the injury of another, or on *430] some private wrong or *misfeasance, without reference to any promise or agreement broken. 12 East, 89; 4 How., 146; Chit. Pl., 156; *Forward v. Pittard*, 1 T. R., 27; 2 N. H., 291; 2 Kent Com., 599; 3 East, 62; 6 Barn. & C., 268; 5 Burr., 2825; 6 Moo., 141; 9 Price, 408; 5 Barn. & C., 605-609. Some of the cases cited of this character are precisely like this, being for losses by non-delivery of property by common carriers, and sued for as torts thus committed. 5 T. R., 389. They go without and beyond the contract entirely.

Nor is intent to do damage a necessary ingredient to sustain either case or trespass. 2 Bos. & P., N. R., 448. Though the wrong done is not committed by force or design, it is still treated as *ex delicto* and a tort, if it was done either by a clear neglect of duty, by an omission to provide safe and well-furnished carriages or vessels, by carelessness in guarding against fires and other accidents, by omitting preparations and precautions enjoined expressly by law, or by damages consequent on the negligent upsetting of carriages, or unsafe and unskillful navigation of vessels. See cases of negligent defects in carriages and vessels themselves, 2 Kent Com., 597, 607; 6 Jur., 4; *The Rebecca*, Ware, 188; 10 East, 555; 1 Johns. (N. Y.), Cas., 134; 5 East, 428. Or in machinery, *Camden and Amboy Railroad v. Burke*, 13 Wend. (N. Y.), 611, 627; 5 East, 428; 9 Bing., 457. Even if the defect be latent, 3 Kent Com., 205. See those of careless attention, *The Rebecca*, Ware, 188. See those of non-conformity to legal requisitions, as hose and engine here not in good order, *Waring et al. v. Clarke*, 5 How. See those consequent on negligent driving, 4 Barn. & C., 223; *Bretherton v. Wood*, 3 Brod. & B., 54. If damage or loss happen by neglect or wrong of a servant of a common carrier, the principal is still liable. 13 Wend. (N. Y.), 621; Story Part., § 489; *Dean et al. v. John Angus*, Bee, 369, 239; Story on Bailments, § 464; 2 Bro., Civ. & Adm. Law, 136. This is necessary to prevent fraud; if such neglect be not evidence of fraud or misfeasance. The owner should be liable for employing those negligent. Story Ag., § 318 and note.

There is another important consideration connected with this view of the subject, and relieving it entirely from several objections which exist to a proceeding founded wholly on a contract rather than a tort. It is this. Where the injury is caused by a tort or fraud, no question arises as to any special agreement or notice, as with Harnden here, not to assume any risk. In short, the agreement, of that kind here, does not

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exonerate, if "malfeasance, misfeasance, or gross negligence" happens by owners or their servants. 13 Wend. (N. Y.), 611; 19 Id., 234, 251, 261; 5 Rawle (Pa.), 179, 189; 2 Crompt. & M., *353; 2 Kent Com., § 40; *Brooke v. Pickwick*, 4 Bing., 218; 3 Brod. & B., 183. Because the wrong is then a distinct cause of action from the breach of the contract, and the exception in it as to the risk was intended to reach any loss not happening through tortious wrong. "Even with notice, stage-proprietors and carriers of goods would be liable for an injury or loss arising from the insufficiency of coaches, harness, or tackling, from the drunkenness, ignorance, or carelessness of drivers, from vicious and unmanageable horses, or when occasioned by overloading the coaches, as these would imply negligence or want of care." 3 Rawle (Pa.), 184. It is further settled, in this class of cases, that the principle of not being liable for jewels, money, and other articles of great value, unless notice was given of it and larger freight paid in consequence of it, does not apply. 4 Bing., 218; 5 Id., 223; 2 Crompt. & M., 353. Because here the liability is not that of an insurer against many accidents and many injuries by third persons of the property carried, and which it may be right to limit to such values as were known and acted upon in agreeing to carry. But it is for the wrong of the carrier himself, or his agents; their own misfeasance or non-feasance, and hence gross neglect, renders them responsible for the whole consequential damages, however valuable the property thus injured or lost. 2 Barn. & Ald., 356; 8 Taunt., 174; 4 Binn. (Pa.), 31; 2 Ad. & E., 659; 5 Barn. & Ald., 341, 350; 16 East, 244, 245.

Some think the neglect in such case, so as to be liable for valuables, must amount to misfeasance. 2 Adol. & E., 659; 2 Myl. & C., 358. It must be "misfeasance or gross negligence." 2 Kent Com., 607, note; 13 Price, 329; 12 B. Moo., 447; 5 Bing., 223-225; 8 Mees. & W., 443. By a recent statute in England, under William IV., though the carrier has been exonerated from the liability and care of valuables, without notice, yet he cannot be if gross neglect happens. 2 Adol. & E., 646.

All this being established at law, what is there to prevent this wrong from being deemed a tort, in connection with maritime matters,—or, in other words, "a marine tort,"—and subject to be prosecuted in admiralty? I am not aware that a marine tort differs from any other tort in its nature or incidents, except that it must be committed, as this was, on the high seas. See cases cited in *Waring et al. v. Clarke*, 5 How. There it was held sufficient to constitute a marine tort, and

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one actionable in admiralty, if the wrong was committed only on tide-water.

We have already suggested, also, as to the gist of the wrong, that gross neglect, the elements and definition of it, are the *432] same on the water as on land, and consequential or direct damages *by a wrong are regarded in the same light on both. The actions of case, as well as trespass, at common law, in illustration of this, are numerous, as to torts on the water. (See *ante*.)

Force, too, is no more necessary to constitute this kind of tort at sea than on land, or in admiralty than in a common law court. 3 Story, 349. That is the gist of this branch of the case. It is true, that most of the libels in admiralty for tort are for such as were caused by force, like assaults and batteries (4 Rob. Adm., 75); or for collision between ships on the sea, to the injury of person or property (2 Bro. Civ. and Adm. Law, 110; Dunlap's Adm., 31; Moo. 89); or for wrongful captures (10 Wheat., 486; Bee, 369; 1 Gall., 315; 3 Cranch, 408); or for carrying off a person *in invitum* (Dunlap's Adm., 53); or for any "violent dispossession of property on the ocean" (1 Wheat., 257; *L'Invincible*, 1 Id., 238; 3 Dall., 344). And though, where trespass is brought at common law, or a tort is sued for in admiralty, as "a marine trespass," there must usually have been force and an immediate injury (1 Chit. Pl., 128; 11 Mass., 137; 17 Id., 246; 1 Pick. (Mass.), 66; 8 Wend. (N. Y.), 274; 3 East, 293; 11 Wheat., 36, *argu.*; 4 Rob. Adm., 75), yet it need not be implied or proved in trespass on the case at law, or in a libel in admiralty for consequential damages to property. Such a libel lies as well for a tort to property as to the person, on the sea (2 Bro. Civ. & Adm. Law, 109, 202; Doug., 594, 613, note; 4 Rob. Adm., 73-76; *Martin v. Ballard et al.*, Bee, 50, 239); and for consequential injury by a tort there, as well as direct injury. *Sloop Cardolero*, Bee, 51, 60; 3 Mason, 242; 4 Id., 385-388; 2 Bro. Adm., 108; 2 Story, 188; 2 Sir Leo-line Jenkins, 777. It was even doubted once, whether, for such torts at sea, any remedy existed elsewhere than in admiralty. 2 Bro. Civ. & Adm. Law, 112. Indeed, 1 Bro. Civ. & Adm. Law, 397, shows, that, beside rights arising from contract, there were "obligations or rights arising to the injured party from the torts or wrongs done by another." And these were divided into those arising *ex delicto* and those *quasi ex delicto*; and the former included "damage" to property, as in this case. It meant injury to property by destroying, spoiling, or deteriorating it, and implied "faultiness or injustice" (401), but not necessarily force. Either trespass or

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case sometimes lies for a marine tort, even in the collision of vessels, where at times the only force is that of winds and tides, and the efforts of the master were to avoid, rather than commit, an injury. 1 Chit. Pl., 145; 2 Story, 188; 11 Price, 608; 3 Car. & P., 554. Damages by insufficient equipments, ropes, &c., must be paid by the owners of the vessel to the merchant, *even by the Laws of Oleron (art. 10). Sea [433 Laws, 136; Laws of Wisby, art. 49. And nothing is more consequential, or less with force, than that kind of injury.

Finally, the principles applicable to the definition of the wrong or tort being here in favor of a recovery in admiralty, and there being no precedents in opposition, but some in support of it, the inference is strong, that this destruction of the property of the plaintiffs may well be regarded and prosecuted in admiralty as a marine tort.

Though I admit there are no more cases in point abroad, in 1789, for sustaining a suit for a consequential injury by a carrier as a tort, than on the contract, in admiralty, yet the principles are most strongly in favor of relying on the tort, without any opposing decision, as there is a libel on the contract. Beside this, other difficulties are avoided, and more ample justice attained, by the libel here for the tort, than by one for the contract.

A moment to another objection,—that the libel in this case does not contain allegations in proper form to recover damages in admiralty, as if for a maritime tort.

This libel is in several separate articles, rather than in a single count. In none of them is any contract specifically set out, though in one of them something is referred to as “contracted.” The libel avers, that the respondents were common carriers; that a public duty thus devolved on them; that they received the property on board to transport it, and so negligently conducted, it was lost. The breach is described throughout, not of what had been “contracted” or promised, but as a wrong done, or tort, and specifies several misdoings. It is in these words:—

“Yet the respondents, their officers, servants, and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging, and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents, so carelessly, improperly, and negligently managed and conducted the said steamboat Lexington, during her said voyage, that by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments, and of such careless, improper,

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and negligent conduct, the said steamboat, together with the gold coin and silver coin to the libellants belonging, were destroyed by fire on the high seas, and wholly lost."

Where contract and tort, in the forms of declaration at common law in actions of the case, are with difficulty discriminated, the general test adopted is, if specific breaches *434] are assigned, *sounding *ex delicto*, it is case on the tort. Jeremy on Carriers, 117. Here this is done.

The same technical minuteness is not necessary in a libel as in a declaration at common law. 5 Rob. Adm., 322; Dunlap, Adm. Pr., 438, 439; Ware, 51. Only the essential facts need be alleged, without regard to particular forms, either in contract or tort. Hall Pr., 207, 138; Dunlap, Adm. Pr., 427.

And in the same libel between the same parties, unlike the rule at common law, it is held by some that both contract and tort may be joined, though it is proper to state them in separate articles in the libel, like separate counts. *Semble* in 3 Story, 349; Dunlap, Adm. Pr., 89. And in some cases it is clearly better not to unite them. Ware, 427. Here, if the libel is considered as but separate paragraphs of one article, it is a good one in tort. Dunlap, Adm. Pr., 114, 115; 4 Mason, 541. And if as separate articles, one of them is valid in tort.

The forms of libels for maritime torts include those which caused only consequential damages, as well as those which caused direct damages. Dunlap, Adm. Pr., 49; 3 Story, 349, one count seems to be for the wrong.

There are cases of this kind merely for improper usage to passengers, by bad words, and neglect; but no force existed, or was alleged. 3 Mason, 242.

Others are libels for seducing or carrying away a minor son of the plaintiff to his damage, like the actions on the case at common law. *Plummer v. Webb*, 4 Mason, 380. Yet they are called, as they are in law, "tortious abductions."

So a libel lies for loss of goods "carelessly and improperly stowed." Ware, 189.

But if the libel here was less formal in tort, the liberality practised in admiralty pleadings, regarding the substance chiefly, as in the civil law, would allow here any necessary amendments. Dunlap, Adm. Pr., 283; 4 Mason, 543; 3 Wash. C. C., 484. Or would allow them in the court below, by reversing the judgment, and sending the case back with directions to permit them there. 4 Wheat., 64, 63; 4 How., 154; 1 Wheat., 264, 13; 9 Pet., 483.

The amount of damages which can be awarded in admiralty in a case like this, has been agitated by some of the court, but was not argued at the bar. It is not without diffi-

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culty, but can in a minute or two be set right. By the ancient practice in admiralty, in case of contracts of freight made by the master, it is true that the owners were liable, whether *ex contractu* or *ex delicto*, and whether *in personam* or *in rem*, for only the value of the vessel or the capital used in that business. [*435 *Dunlap*, Adm. Pr., 31. And if the vessel was lost, the remedy against the owners was entirely lost in admiralty. *Ware*, 188. Yet it is a conclusive answer, that here, as well as abroad, the rule of the civil and common law is to give the whole loss. 2 Kent Com., 606; 3 Id., 217. And that this rule of full damage in a libel in admiralty has been adopted here after much consideration. *Livingston*, Justice, in *Paine*, 118, says, that "it had long been regarded as a general principle of maritime law" to make the owners liable for a tort by the master, and that now the whole injury was the measure of damage, without reference to the value of the vessel and freight. See also *Del Col v. Arnold*, 3 Dall., 333; *The Appollon*, 9 Wheat., 376; 3 Story, 347; 2 Id., 187.

This is modified by some state laws, under certain circumstances. See *The Rebecca* and *Phebe*, *Ware*. And in England, by 53 Geo. III. ch. 99.

But even there the owner is still liable beyond the value of the vessel and freight, if the damage or neglect was "committed or occasioned" with "the fault or privity of such owner." See Statutes at Large of that year; *Phebe*, *Ware*, 269. See for this and other statutes, 2 Bro. Civ. & Adm. Law, 45, excusing owners if the pilot alone is in fault. See 6 Geo. IV., ch. 125, § 55; 1 Wm. Rob., 46; 1 Dods. Adm. 467. So the whole injury must be paid now on the contract, and the owners cannot escape by abandoning the vessel that did the wrong. 2 Bro. Civ. & Adm. Law, 206, note.

On principle, also, this is the right rule in admiralty, clearly, where the owners themselves at home, and not the master abroad, made the contract, or where they were guilty of any neglect in properly furnishing the vessel, and not he. *Phebe*, *Ware*, 269, 203-206.

The principle of his binding them only to the extent of the property confided to him to act with, or administer on, does not apply to that state of facts (*Abb. Ship.*, 93), but only to his doings abroad.

The contracts made abroad are usually in his name, as well as by him, and not by the owners, and he only to sue or to be sued. *Abb. Ship.*, pt. 2, ch. 2, § 5.

In *Waring et al v. Clarke*, which was a tort by the master at home, in a collision of two boats, the whole amount of the injury was awarded. See also 1 How., 23; 3 Kent Com., 238.

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So principle, no less than precedent, requires it now, in admiralty as well as common law, when the master is usually not a part-owner, but a mere agent of the owners, and doing *436] damage, as here, by unskilfulness or neglect, and not by *wilful misconduct. Ware, 208; 1 East, 106. For this, surely, those should suffer who selected him *respondet superiori*. 1 East, 106; Abb. Ship., pt. 2, ch. 2, § 9; 2 Kent Com., 218.

It is a mistake, likewise, to suppose, as some have, that the rule of damage is thus higher in admiralty than at common law, or when counting on the tort rather than contract. The only difference is, that in admiralty, if counting on the contract, doubts exist whether a recovery can be had on the precedents, while, if counting on the tort, no doubt exists, the place of the tort being clearly on the sea, and within admiralty jurisdiction. Nor do I see any sound reason for not sustaining this case in admiralty, when jurisdiction exists there over the subject, because this proceeding is *in personam* and not *in rem*. 6 Am. Jur., 4; 2 Bro. Civ. & Adm. Law, 396; 2 Gall., 461, 462; Hard., 173.

The jurisdiction is one thing, the form of proceeding another; and it is only when the vessel itself is pledged, and no personal liability created, so as to lay a foundation for an action at law, that the form of proceeding seems to help to give jurisdiction in admiralty, where alone the libel *in rem* in such case can be followed. 3 T. R., 269.

But even then, I apprehend, the subject-matter must be proper for admiralty, or it could not be prosecuted there *in rem*, because, if the subject-matter is a carriage or horse, rather than a ship or its voyage, or something maritime, admiralty would get no jurisdiction by the thing itself being pledged, or to be proceeded against. *The Fair American*, 1 Pet. Adm., 87; Duponceau on Jurisdiction, 22, 23.

Indeed, the rule in England to this day seems to be adverse to proceeding in admiralty at all, even *in rem*, to recover freight. Abb. Ship., 170. *King et al. v. Shepherd et al.*, 3 Story, 319, was a libel, *in personam*, against a common carrier by water, and held that the liability was the same as on land, and an act of God to excuse must be immediate, and that the burden of the excuse rests on the respondents, and they are not discharged by a wreck, but must attend to the property till safe or restored.

So it has been adjudged by this court to be proper to prosecute in admiralty for marine torts, *in personam* as well as *in rem*. *Manro v. Almeida*, 10 Wheat., 473; *The Appollon*, 9 Id., 362; Bee, 141; *The Cassius*, 2 Story, 81; 14 Pet., 99.

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See also the rules of this court (1845), for admiralty practice, the 14th, 16th, and 17th (3 How., 7, Preface), and which expressly allow in libels for freight proceedings *in rem* or *in personam*, and in some trespasses to property either mode.

*I concur, therefore, in the judgment of the court, [^{*437} affirming the decree for full damages, but on the ground of a recovery for the wrong committed as a marine tort, rather than on any breach of contract which can be prosecuted by these plaintiffs, and in admiralty.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs, and damages at the rate of six per centum per annum.

PETER HOGG AND CORNELIUS H. DELAMATER, PLAINTIFFS
IN ERROR, v. JOHN B. EMERSON.¹

When a case is sent to this court under the discretion conferred upon the court below by the seventeenth section of the act of July 4, 1836 (Patent Law), 5 Stat. at L., 124, the whole case comes up, and not a few points only. The specification constitutes a part of a patent, and they must be construed together.²

Different patentable subjects united in one patent will not vitiate the patent, if they all relate to the same general matter, or are otherwise connected together. Applying this principle, Emerson's patent for "certain improvements in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land," decided not to cover more ground than one patent ought to cover, and to be sufficiently clear and certain.³

A patentee, whose patent-right has been violated, may recover damages for such infringement for the time which intervened between the destruction of the patent-office by fire, in 1836, and the restoration of the records under the act of March 3, 1837.

¹ S. C., 2 Blatchf., 1. AFFIRMED. S. C. 11 How., 587.

² FOLLOWED. *LeRoy v. Tatham*, 14 How., 179. CITED. *Tinker v. Wüber's, &c. Manuf. Co.*, 5 Bann. & A., 93; *Burke v. Partridge*, 58 N. H., 351. S. P. *Turrill v. Michigan Southern, &c. R. R. Co.* 1 Wall, 491.

³ See *Maxheimer v. Meyer*, 9 Fed. Rep., 462; *Wyeth v. Stone*, 1 Story, 274; *Root v. Ball*, 4 McLean, 177; *Morris v. Barrett*, 1 Fish. Pat. Cas., 461; *Lee v. Blansy*, 2 Id., 89.

See also *Burke v. Partridge*, 58 N. H., 351.

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THIS case was brought up, by writ of error, from the Circuit court of the United States for the Southern District of New York. It was a suit for the violation of a patent-right, and the writ of error was allowed under the seventeenth section of the act of 1836.

On the 8th of March, 1834, John B. Emerson, the defendant in error, obtained the following letters-patent, (which were recorded anew on the 5th of March, 1841), viz.:—

The United States of America, to all to whom these letters-patent shall come :

Whereas John B. Emerson, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the steam-engine, which improvement he states has *438] not been known or used before his application; hath made *oath that he doth verily believe that he is the true inventor or discoverer of the said improvement; hath paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are therefore to grant, according to law, to the said John B. Emerson, his heirs, administrators, or assigns, for the term of fourteen years from the eighth day of March, one thousand eight hundred and thirty-four, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, this eighth day of March, in the year of our Lord [L. s.] one thousand eight hundred and thirty-four, and of the independence of the United States of America the fifty-eighth.

ANDREW JACKSON.

By the President :

LOUIS McLANE, *Secretary of State.*

CITY OF WASHINGTON, *to wit :*

I do hereby certify, that the following letters-patent were delivered to me on the eighth day of March, in the year of our Lord one thousand eight hundred and thirty-four, to be

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examined; that I have examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on this eighth day of March, in the year aforesaid.

B. F. BUTLER,

Attorney-General of the United States.

The schedule referred to in these letters-patent, and making part of the same, containing a description in the words of the said John Brown Emerson himself, of his improvement in the steam-engine:—

To all whom it may concern:

Be it known, that I, John Brown Emerson, of the city of New York, have invented certain improvements in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, and that the following is a full and exact description thereof.

*One object of my improvement is to substitute for [*439 the crank motion a mode of converting the reciprocating motion of a piston into a continued rotary motion, by a new combination of machinery for that purpose.

This mode is applicable to an engine either with one or with two cylinders, and is carried into effect as follows: Alongside of the cylinder I place a shaft, the lower end of which may revolve in a step on the platform or foundation upon which the cylinder stands; in which case it must be somewhat longer than twice the length of the cylinder, as it must extend above it to a height somewhat greater than the length of the stroke of the piston. Sometimes, however, this shaft may have its lower gudgeon only a small distance below the upper end of the cylinders, whence it must extend above it as before. Its upper gudgeon must of course be sustained by a suitable frame. This shaft is to stand parallel to the piston-rod, from which it is to receive its revolving motion. Upon the upper end of the shaft, above the top of the cylinder, there is to be placed a solid cylinder of wood, or of any other convenient substance, of such diameter as shall cause its periphery to come nearly into contact with the piston-rod for its whole length, when the piston is raised. The solid cylinder above described is to be made to revolve in the following manner: I make a groove in it, which commences near its lower end, and, passing spirally, extends half-way round it by the time it reaches nearly to the upper end, or to a distance vertically equal to the stroke of the engine; from that point it passes

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down around the opposite half, and returns into itself at the point of beginning. Upon the upper end of the piston, against its side, I place a friction-roller, which is to work in the groove in the solid cylinder; the piston-rod rising between parallel guide-pieces, by which it is kept in its proper place, and its tendency to turn round by the action of the roller in the groove is checked. When the piston is down, this friction-roller will stand in the V formed by the junction of the grooves on the opposite sides, and as it is raised, it will in its passage to the upper junction give half a revolution to the solid cylinder, and in descending will complete the revolution by the action of the friction-roller on the other portion of the groove.

When two cylinders are used, they are to be placed parallel to each other, and at such a distance apart that the pistons of each may, in like manner, act upon the solid cylinder; the piston of one being up when the other is down. The boiler, the steam-pipe, the valves for the admission and discharge of steam, and other appendages, may be similar to some of those *440] already in use. From the revolving shaft, already described, *a rotary motion may be communicated to paddle-wheels, steam-carriages, or other objects. As it is my intention, in general, to place my cylinders and revolving shaft vertically, I communicate motion to the horizontal shaft of a paddle-wheel by means of bevel-gear wheels near the lower end, or at any convenient part of the shaft; and by similar gearing, carriages may be propelled upon rail or ordinary roads.

When used for steamboats, I employ an improved spiral paddle-wheel, differing essentially from those which have heretofore been essayed. This spiral I make by taking a piece of metal of such length as I intend the spiral propeller to be, and of a suitable width, say, for example, eighteen inches; this I bend along the centre so as to form two sides, say of nine inches in width, standing at right angles, or nearly so, to each other, and give to it, longitudinally, the spiral curvative which I wish. Of these pieces I prepare two or three, or more, and fix them on to the outer end of the paddle-shaft, by means of arms of a suitable length, say of two feet, more or less, in such a position that the trough-form given to them longitudinally shall be effective in acting upon the water. It must be entirely under water, and operate in the direction of the boat's way; instead of metal, the spiral propeller may be formed of wood, and worked into the proper form,—the shape, and not the material thereof, being the only point of importance.

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Where a capstan is required, as on board of a steamboat, I allow the upper end of the vertical shaft before described to pass through the deck of the vessel, and attach the capstan thereto, so that it may be made to revolve by the action of the shaft, using such ray-wheels and falls to connect the shaft and the capstan as will allow of their being conveniently engaged and disengaged.

What I claim as my invention, and for which I ask a patent, is the substituting for the crank in the reciprocating engine a grooved cylinder, operating in the manner hereinbefore described, by means of its connection with the piston-rod, together with all the variations of which this principle is susceptible; as, for example, a bar of metal may be bent in the form of a groove, and attached to the revolving shaft, and friction-wheels on the piston-rod may embrace this on each side, producing an effect similar to that produced by the groove. I also claim the spiral propelling-wheel, contracted and operating in the manner in which I have set forth; and likewise the application of the revolving vertical shaft to the turning of a capstan on the deck of a vessel. Not intending, in either of these parts, to confine myself to precise forms or dimensions, but to vary them in such manner as experience or convenience may dictate, whilst the principle of action remains unchanged, and similar results are produced by similar means.

JOHN BROWN EMERSON.

At April term, 1844, Emerson brought an action of trespass on the case in the Circuit Court of the United States for the Southern District of New York, against Hogg and Delamater, for an infringement on his patent-right. As one of the points decided by the court was whether or not the allegations of the declaration corresponded with the evidence of the patent, it is thought proper to insert the declaration. It was as follows, viz.:—

“John B. Emerson, a citizen of the State of New York, by Peter Clark, his attorney, complains of Peter Hogg and Cornelius Delamater, citizens of the same state, defendants, in custody, &c., of a plea of trespass on the case.

“For that, whereas the said plaintiff was the original inventor of a certain new and useful improvement, in the letters-patent hereinafter mentioned and fully described, the same being a certain improvement in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, which was not known or used before his said invention, and which was not, at the time of his application for a patent, as hereinafter mentioned, in public use with

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his consent or allowance. And the said plaintiff being so as aforesaid the inventor thereof, and being also a citizen of the United States, on the eighth day of March, one thousand eight hundred and thirty-four, upon due application therefor, did obtain certain letters-patent therefor, in due form of law, under the seal of the United States, signed by Andrew Jackson, then President, and countersigned by Louis McLane, then Secretary of State, bearing date the day and year aforesaid, whereby there was secured to him, the said plaintiff, his heirs, executors, administrators, or assigns, for the term of fourteen years from and after the date of the said patent, the exclusive right and liberty of making, using, and vending to others to be used, the said improvement, as by the said letters-patent in court to be produced will fully appear. And the said plaintiff further says, that the said defendants, well knowing the said several premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, and vending of the said invention or improvement, after the making and issuing of the said letters-patent, *442] and within the term of fourteen years in said letters-patent mentioned, to wit, on the * first day of January, eighteen hundred and forty, and on divers other days and times between that time and the commencement of this suit, at the city of New York, and within the southern district of New York, wrongfully and unjustly, without the leave or license, and against the will, of the plaintiff, made and sold divers, to wit, ten machines for propelling boats, in imitation of the said invention and improvement, or a part of the said invention or improvement, to the benefit, use, and enjoyment whereof the said plaintiff was and is entitled as aforesaid, in violation and infringement of the said letters-patent, and of the exclusive right and privilege to which the plaintiff was and is entitled as aforesaid, and contrary to the form of the statutes of the United States in such case made and provided.

“And the said plaintiff further says, that the said defendant, well knowing the said several premises, but further contriving and intending as aforesaid, after the obtaining of the said letters-patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit, on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, within the southern district of New York aforesaid, wrongfully and unjustly, without the leave or license, and against the will, of the plaintiff, did make and sell divers, to wit, ten

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improved machines for propelling boats or vessels upon the water, constructed in a similar form and acting upon the same principle as the said machine or improvement, to the benefit, use, and enjoyment whereof the said plaintiff was and is entitled by his said letters-patent, as aforesaid, in violation and infringement of the exclusive right so secured to the said plaintiff by the said letters-patent as aforesaid, and contrary to the form of the statute in such case made and provided.

“And the said plaintiff further says, that the said defendant, well knowing the said several premises, but contriving and intending as aforesaid, after the obtaining of the said letters-patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit, on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, in the southern district of New York aforesaid, wrongfully and unjustly, and without the consent or allowance, and against the will, of the plaintiff, did imitate in part and make a certain addition to the said invention or improvement, to the benefit, use, and enjoyment whereof the plaintiff was and is entitled as aforesaid, in breach of the said letters-patent, and in violation and infringement of the exclusive right and privilege so secured to the *said plaintiff as aforesaid, [*443 and contrary to the form of the statute in such case made and provided.

“By means of the committing of which said several grievances by the said defendants as aforesaid, the said plaintiff is greatly injured, and has lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and improvement in the said letters-patent described and set forth, and in respect whereof he was and is entitled to such privileges as aforesaid, and was and is otherwise damnified to the damage of the said plaintiff of ten thousand dollars, and therefore,” &c.

To this declaration, the defendants pleaded the general issue, and filed a copy of the special matters of defence to the action.

In May, 1847, the cause came on for trial. The patent was given in evidence, when the counsel for the defendants prayed the court to instruct the jury that the patent, thus produced in evidence by the said plaintiff, was void, for the reasons following:—

1. That the claim of the plaintiff, as set forth in his specification annexed to his letters-patent, embraces the entire spiral paddle-wheel; the claim is, therefore, too broad upon the face

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of it, and the letters-patent are void upon this ground, and the defendants are entitled to a verdict.

2. That the patent is void upon its face, for this,—that, purporting to be a patent for an improvement, and specifying that the invention is of “an improved spiral paddle-wheel, differing essentially from any which have heretofore been essayed,” without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from the previously essayed spiral paddle-wheels, it is wanting in an essential prerequisite to the validity of letters-patent for an improvement.

3. That the patent is void upon its face, for this,—that it embraces several distinct and separate inventions, as improvements in several distinct and independent machines susceptible of independent operation, not necessarily connected with each other in producing the result arrived at in the invention, and the subject-matter of separate and independent inventions.

4. It appears in evidence, that the drawing and model of the paddle-wheel of plaintiff, filed and deposited originally in the patent-office, had been lost by the destruction of that office in December, 1836, and that in restoring the record of the patent, under the act of March, 1837, the plaintiff sent from New Orleans to the office a new drawing, to be filed on the 5th of May, 1841, together with a court copy of the letters-patent *444] which were deposited in the office. The drawing was not *sworn to by the plaintiff, but remained in the office till January, 1844, when it was delivered to an agent of the plaintiff and sent to New Orleans, and sworn to by him, and filed in the department on the 12th of February, 1844. On an examination subsequently by the plaintiff, it was discovered that this drawing was imperfectly made, and thereupon a second drawing was procured by him, which he claimed and offered to prove to be an accurate one, and was sworn to, and filed on the 27th of March, 1844, an authenticated copy of which was offered in evidence on the trial by the plaintiff; which was objected to by the counsel for the defendants, but the objection was overruled and the evidence admitted, to which an exception was taken.

5. That if from the evidence the jury are satisfied that no propelling-wheels were made by the defendants between the 27th of March, 1844, the date of the alleged completion of the record of the plaintiff's patent, under the act of March 3d, 1837, and the commencement of this suit in April following, that, upon this ground, the defendants are entitled to a verdict.

The court charged, in respect to the instructions prayed for, that “the claim of the plaintiff was for an improvement on

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the spiral paddle-wheel or propeller; that, by a new arrangement of the parts of the wheel, he had been enabled to effect a new and improved application and use of the same in the propulsion of vessels; that the ground upon which the claim is grounded was this: it is the getting rid of nearly all the resisting surface of the wheels of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft. It is claimed that a great portion of the old blade not only did not aid in the propulsion, but actually impaired its efficiency, and also that the improved wheel is made stronger. It was made a question on the former trial, whether the plaintiff did not claim, or intend to claim, the entire wheel. But we understand it to be for an improvement upon the spiral paddle-wheel, claimed to be new and useful in the arrangement of its parts, and more effective, by fixing the spiral paddles upon the extremity of arms, at a distance from the shaft."

The court further instructed the jury, that "the description of the invention was sufficient, and that the objection, that the parts embraced several distinct discoveries, was untenable."

The court further charged, "that the damages were not necessarily confined to the making of the wheels between March, 1844, when the drawings were restored to the patent-office, and the bringing of the suit. Such a limitation [*445 assumes *that there can be no infringement of the patent after the destruction of the records, in 1836, until they are restored to the patent-office, and that, during the intermediate time the rights of patentees would be violated with impunity." We do not assent to this view.

In the first place, the act of Congress providing for the restoration was not passed till 3d March, 1837; and, in the second place, in addition to this, a considerable time must necessarily elapse before the act would be generally known, and then a still further period, before copies of the drawings and models could be procured. Patentees are not responsible for the fire, nor did it work a forfeiture of their rights.

The ground for the restriction claimed is, that the community have no means of ascertaining, but by a resort to the records of the patent-office, whether the construction of a particular machine or instrument would be a violation of the rights of others, and the infringement might be innocently committed.

But if the embarrassment happened without the fault of the patentee, he is not responsible for it; nor is the reason applicable to the case of a patent that has been published, and

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the invention known to the public. The specification in this case had been published. It is true, if it did not sufficiently describe the improvement without the aid of the drawing, this fact would not help the plaintiff. If there had been unreasonable delay and neglect in restoring the records, and in the mean time a defendant had innocently made the patented article, a fair ground would be laid for a mitigation of the rule of damages, if not for the withholding them altogether; and the court left the question of fact as to reasonable diligence of the patentee or not in this respect, and also all questions of fact involved in the points of the case for the defendants, to the jury.

The counsel for the defendants excepted to each and every part of the charge of the court, so far as said charge did not adopt the prayer on the part of the defendants.

The verdict of the jury was, that the said Peter Hogg and Cornelius Delamater, the defendants, are guilty of the premises within laid to their charge, in manner and form as the said John B. Emerson hath within complained against them, and they assess the damages of the said plaintiff, on occasion thereof, over and above his costs and charges by him about this suit in this behalf expended, at one thousand five hundred dollars, and for those costs and charges at six cents.

The judgment of the court was, that the said John B. Emerson do recover against the said Peter Hogg and Cornelius Delamater his damages, costs, and charges in form *446] aforesaid *by the jurors aforesaid assessed, and also three hundred and twenty-four dollars and fifteen cents, for his said costs and charges by the said court now here adjudged of increase to the said John B. Emerson, and with his assent; which said damages, costs, and charges, in the whole, amount to one thousand eight hundred and twenty-four dollars and fifteen cents.

The cause was argued in this court, in printed arguments, by *Mr. Upton* and *Mr. John O. Sargent*, for the plaintiffs in error, and *Mr. Morton* and *Mr. Cutting*, for the defendant in error. The arguments were too voluminous to be reported *in extenso*, and it is not possible, therefore, to give more than extracts from each.

The counsel for the plaintiffs in error assigned as errors the following points:

I. The defendant in error has no patent for an improved spiral paddle-wheel.

II. If the defendant's patent is for the combination of in-

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struments described in the specification, there is no pretence that the combination has been infringed; if for several separate improved machines, it cannot be supported in law.

III. Defendant's patent is void for too broad a claim, and for not distinguishing his alleged improvement from other inventions, nor particularly specifying, as the statute requires, the particular improvement which he claims as his own invention or discovery. The case exhibits an improvement as the invention, and the claim is for the whole machine.

IV. The drawing filed March 27th, 1844, was not legal evidence of defendant's patented invention, because there was a drawing filed by the patentee on the 12th of February previous, which was, by the second section of the act of 1837, with his letters-patent, the only legal evidence of his invention, as *patented*, that could be offered in any judicial court of the United States.

V.—1. The patentee, after an alleged correction of the record of his letters-patent, by filing the second drawing, could not, in law, avail himself of that alleged correction to cover by it alleged causes of action previously accruing; and in the absence of proof of any subsequent infringements, the plaintiffs here were entitled to a verdict below.

2. Nor was he entitled to recover damages for any alleged infringement prior to the alleged *completion* of his record by the filing of the corrected drawing of 27th March, 1844.

VI. What was reasonable time in this case for the restoration of defendant's patent to the office, if not expressly fixed *by statute (act of 1837, sec. 2), was [*447 exclusively a question of law.

Mr. Upton, for plaintiffs in error.

I. This action was brought to recover damages from the defendants below, for their asserted infringement of an alleged patent of the plaintiff for an "improved spiral paddle-wheel;" and the first question to which the attention of the court is requested is one which is presented upon the face of the letters-patent, which constitute the basis of the action, and which are incorporated into the bill of exceptions; it is this:—Has the defendant in error any such patent?

If it be manifest to this court, upon an inspection of the record and an examination of the letters-patent, that he has no grant, as patentee, of "an improved spiral paddle-wheel," then it is submitted, that there is no escape from the necessity of reversing the judgment which has been rendered, awarding him damages for the invasion of such a grant. This necessity is in no manner affected, though it appear that the

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objection was not taken in the court below, either at the trial or upon a motion in arrest of judgment. It is sufficient if the defect be manifest upon the record; for it would be monstrous to contend that this court is powerless, in any case, to reverse the judgment, when it appears upon the record before them that the very foundation of the judgment is so incurably and fatally defective as to have been completely beyond the remedy of the party, though the objection were taken at the earliest stage of the proceedings. Authority can scarcely be necessary to sustain this position. But this court has decided, in the case of *Slacum v. Pomeroy*, 6 Cranch, 221, that it is not too late to allege as error in the Supreme Court a defect which ought to have prevented the rendition of the judgment in the court below. "Had this error," say the court, "been moved in arrest of judgment, it is presumable that the judgment would have been arrested;" and "there can be no doubt, that any thing appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error." So also *Garland v. Davis*, 4 How., 131.

By the bill of exceptions it appears, that, upon the introduction in evidence of the letters-patent by the plaintiff, "the counsel for the defendants did insist before the said Circuit Court, on behalf of said defendants, that the said letters-patent so produced and given in evidence on the part of the said plaintiff, as aforesaid, were wholly insufficient as the basis of the aforesaid action and claim upon the said defendants." Now, by reference to the letters-patent (page 7 of the record), *448] the *court will perceive that the grant to the patentee, upon the face of the letters, is for "an improvement in the steam-engine," and for that alone; that it was for that alone that he solicited a patent by petition; that it was of that improvement only that he made oath that he was the original and first inventor. Such is the grant, and so it is recorded; and the public would seek in vain upon the records of the patent-office for a patent to the plaintiff below for "an improved spiral paddle-wheel."

It will not be contended that the letters, standing alone, confer any title to such an invention. But it may be said, that, inasmuch as the patentee has described a paddle-wheel, and also an improved method of causing a capstan to revolve upon the deck of a vessel, as well as his improvement in the steam-engine, and claimed these, as well as his steam-engine, in his schedule annexed to the letters-patent, the grant must be construed to cover the paddle-wheel and the capstan, as well as the steam-engine, though it be in express terms for

the steam-engine only, though it was for that alone that he solicited a patent, and it was that alone that he made oath he had invented. Were this doctrine maintainable, it is obvious that it would be wholly subversive of the policy of the law, which looks as well to the protection of the public as it does to the encouragement of inventors. That the schedule annexed to letters-patent forms a part of the patent, and that they are to be construed together, is undoubtedly well established. This is the English doctrine, as well as that of our own courts; and, by a careful investigation of the authorities, it will be perceived that Mr. Phillips, in his elementary work (pp. 224 *et seq.*), is mistaken in supposing that there is any conflict between them.

By these authorities it is decided, that the title of the invention, as contained in the patent, may be explained by its description in the specification, whenever such title is general, ambiguous, or uncertain; and the patent will be sustained in all cases, unless the patent indicate one invention, and the specification describe another and different invention. *American authorities.* Phill. Pat., 224, and cases cited; *Sullivan v. Redfield*, Paine, 442; *Shaw v. Cooper*, 7 Pet., 292, 315; *Evans v. Chambers*, 2 Wash. C. C., 125; *Barrett v. Hall*, 1 Mason, 476; *Whittemore v. Cutter*, 1 Gall., 437; *Evans v. Eaton*, Pet. C. C., 341. *English authorities.*—Gods. Pat., 108, 113, and cases; *Neilson v. Harford*, Webst. Pat. Cas., 312, and arg.; *Rex v. Wheeler*, 2 Barn. & Ald., 350; S. C., 3 Meriv., 629; *Glegg's Patent*, Webst. Pat. Cas., 117; *Russell v. Cowley*, Id., 470; *Househill v. Neilson*, Id., 679.

When Mr. Phillips says (Phillips on Patents, 225), that any defect in the title may be remedied by the specification, what *he means is apparent by reference to the cases [*449 which he cites. The description comes in aid of a defective title, but never can create a new title, by adding to the grant. There must be such a conformity between the title and the specification as that the former shall give some idea of the latter. It is the description of the thing patented "which is made part of these presents," not a description of something else, of which the title of the grant gives no idea.

Thus reads the patent itself. After reciting that John Brown Emerson had by petition solicited a patent for an improvement in the steam-engine, had made oath that he was the first and original inventor of said improvement, and paid the fee of thirty dollars into the treasury, it grants to him the exclusive right, &c., in the said improvement, "a description whereof is given in the words of the said John Brown Emerson himself, in the schedule hereunto annexed, and is made a part of these

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presents." Then follows the caption of the schedule, thus:—"The schedule referred to in these letters-patent, and making part of the same, containing a description in the words of the said John Brown Emerson himself of his improvement in the steam-engine."

No reported authority can be found in the remotest degree sustaining the proposition, that a description and claim of any thing contained in a specification are covered by the grant, though the grant make no reference to it, and the title is so entirely distinct from it as to suggest no idea of the thing described. Were this proposition tenable, then were we to strike out from this patentee's specification every word descriptive of his improvement in the steam-engine, leaving nothing but the comparatively few words descriptive of the spiral paddle-wheel and the improved capstan, the grant for the improvement in the steam-engine must be construed as a grant for an improved spiral paddle-wheel and an improved capstan. Now, would it not be monstrous to contend that an instrument of so solemn a character as a government grant of letters-patent is to be added to and enlarged by construction?

The doctrine as settled, upon every principle of construction, is the true doctrine;—that the description of the thing patented, contained in the schedule annexed to the patent, constitutes a part of the patent, and may be and should be resorted to, in construing the patent, to control the generality of the title and to explain or elucidate ambiguities or uncertainties; but that a description of a thing not indicated by the patent, not even remotely suggested by the grant or the title, can never be construed with the patent for the purpose of adding to or enlarging the terms of the grant.

*450] That this doctrine may be made more obvious and conclusive,—if it be possible or desirable,—the court is referred to the provisions of the statute under which the letters-patent in this case issued.

The inventor is required to present his petition soliciting the patent, and to make oath that he is the inventor. The statute further requires that the letters-patent shall recite the allegations and suggestions of the petition, and give a short description of the invention. This requisition was obviously for the twofold purpose, 1st, that it might appear that the proper preliminary steps had been taken by the applicant, of which the recital in the letters was proof; and, 2d, that it might, on their face, be seen what was the nature and character of the grant. (Act of 1793, §§ 1, 3.) Now, did this patentee present his petition, soliciting a patent for an improved spiral paddle-wheel, and make oath that he was the inventor of that

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improvement? If it be answered that he did, then the positive requisition of the statute is not complied with, for the patent recites the allegations and suggestions of no such petition, and gives a short description of no such invention; and for this reason the patent would be absolutely void.

This is well established in the following cases:—*Evans v. Eaton*, Pet. C. C., 340; *Kneiss v. Schuylkill Bank*, 4 Wash. C. C., 9; *Cutting et al. v. Myers*, Id., 220; *Evans v. Chambers*, 2 Id., 125.

If the letters-patent do recite the allegations and suggestions of the petition, then the patentee did not solicit a patent for “an improved spiral paddle-wheel” or an “improved capstan;” he did not make oath that he had invented these improvements, and hence the letters contain no description whatever of these improvements, and confer no grant of an exclusive right in them upon the patentee.

(The counsel then quoted largely from the opinion of Judge Washington in *Evans v. Eaton*, Pet. C. C., 340.)

II. At the trial, the defendants’ counsel requested the court to instruct the jury, “that the patent of the plaintiff was void upon its face, for this,—that it embraces several distinct and separate inventions, as improvements in several distinct and separate machines susceptible of independent operation, and not necessarily connected with each other in producing the result aimed at in the invention, and the subject-matter of separate and distinct patents.” The court charged the jury, that “the objection that the patent embraced several distinct discoveries is untenable.” In this it is respectfully submitted that the court below erred.

(The counsel here cited and commented on *Phill. Pat.* *451. “It is well settled, that two or more distinct machines, capable of independent operations, cannot be united in one patent.” 3 *Wheat.*, 454; 1 *Mason*, 447; 2 *Id.*, 112; 1 *Story*, 290.)

III. At the trial of this case, the counsel for the defendants requested the court to instruct the jury, “that the claim of the plaintiff, as set forth in his specification annexed to his letters-patent, embraces the entire spiral paddle-wheel; the claim is, therefore, too broad upon the face of it, and the letters-patent are void upon this ground.” Upon this point the court charged the jury as follows:—“It was made a question on the former trial, whether the plaintiff did not claim the entire wheel; but we understand it to be for an improvement upon the spiral paddle-wheel, claimed to be new and useful in the arrangement of its parts, and more effective, by

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fixing the spiral paddles upon the extremity of arms, at a distance from the shaft."

IV. At the trial, the counsel for the defendants also requested the court to instruct the jury, "that the patent is void upon its face for this,—that, purporting to be a patent for an improvement, and specifying that the invention is of an improved spiral paddle-wheel, 'differing essentially from any that have heretofore been essayed,' without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from the previously essayed spiral paddle-wheels, it is wanting in an essential prerequisite to the validity of letters-patent for an improvement." Upon this point the court charged the jury as follows:—that "the claim of the plaintiff was for an improvement on the spiral paddle-wheel or propeller,—that, by a new arrangement of the parts of the wheel, he has been enabled to effect a new and improvised application and use of the same in the propulsion of vessels. That the ground upon which the claim is founded is this: it is the getting rid of nearly all the resisting surface of the wheels of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft. It is claimed that a great portion of the old blade not only did not aid in the propulsion, but actually impaired its efficiency, and also that the improved wheel is much stronger." And the court further charged the jury, that "the description of the invention was sufficient."

Upon these two points, it is submitted that the court below erred. They are so connected, by reason of the peculiar circumstances of the case, that they will be presented and considered together, though they are distinct grounds of objection to the patent.

*452] *(The counsel then contended that the specification ought to be construed by itself, and be so clear as to be understood without resorting to evidence or any other source of information, and cited:—English authorities.—*McFarlane v. Price*, 1 Stark., 199; *In re Nickels*, Hindm. Pat., 186; *Hill v. Thompson*, 3 Meriv., 622; S. C., 8 Taunt., 325. American authorities.—*Dixon v. Moyer*, 4 Wash. C. C., 69; *Evans v. Hettick*, 3 Id., 425; *Lowell v. Lewis*, 1 Mason, 189; *Ames v. Howard*, 1 Sumn., 482).

This leads to the principle in the law of patents involved in the fourth point. It is the positive requisition of the statute, and has been repeatedly considered and passed upon by the federal judicial tribunals.

Before an inventor shall receive a patent, he is required, "in case of any machine, fully to explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions, and shall particularly specify and point out the particular improvement or combination which he claims as his own invention or discovery." The requisition of the English law is similar in this respect.

Now, before proceeding to consider whether the patentee, in this case, has complied with this positive and salutary requisition of the law, the attention of the court is requested to the reported cases in which the requisition has received judicial construction.

By a careful examination of these authorities, it will be found established, that, where a patent is taken out for an improvement, the specification must describe what the improvement is, and the patent be limited to such improvement; if the patent includes the whole machinery, it includes more than the patentee invented, and is therefore void;—that if the patent be for an improvement in an existing machine, the patentee must, in his specification, distinguish the new from the old, and confine his patent to such parts only as are new, and if both be mixed up together, and a patent is taken for the whole, it is void; that, however the authorities may apparently vary in pointing out the particular manner in which the patentee must specify his improvement, and distinguish what he claims as new and his invention from what was old and before known, yet that they are in perfect harmony in deciding that he must do this in some manner, and upon the face of the specification. American authorities.—*Evans v. Eaton*, 3 Wheat., 454; *Woodcock v. Parker*, 1 Gall., 438; *Whittemore v. Cutter*, 1 Id., 478; *Odiorne v. Winkley*, 2 Id., 51; *Lowell v. Lewis*, 1 Mason, 182; **Barrett v. Hall*, 1 Id., 447; *Sullivan v. Redfield*, Paine R., 441; *Evans v. Eaton*, 7 Wheat., 408; *Dixon v. Moyer*, 4 Wash. C. C., 69; *Isaacs v. Cooper*, 4 Id., 261; *Cross v. Huntly*, 13 Wend. (N. Y.), 385; *Head v. Stevens*, 19 Id., 411; *Ames v. Howard*, 1 Sumn., 482; *Kneiss v. Schuylkill Bank*, 4 Wash. C. C., 9; *Morris v. Jenkins et al.*, 3 McLean, 250; *Peterson v. Woodler*, Id., 248. English cases.—*McFarlane v. Price*, 1 Stark., 199; *Williams v. Brodie*, Dav. Pat. Cas., 96, 97; *Manton v. Manton*, Id., 349; *Hill v. Thompson*, 8 Taunt., 325; *Minter v. Wells*, 1 Webst. Pat. Cas., 130; *Rex v. Nickels*, Hindm. Pat., 186.

Now apply the rule of law, as prescribed by the statute and construed by these authorities, to the patent in this case. Admit that rule, as most liberally stated, in any reported de-

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cision, and the counsel respectfully asks, in what manner, upon the face of the patentee's specification, has he distinguished that which he claims as new, and his invention, from what was old and before known, or pointed out in what his improvement consists? It is most confidently answered, that he has done this in no manner whatever, neither expressly nor by implication, nor by any reference, and it is not in the wit of man to determine, upon the face of the specification, what the improvement is which the patentee claims or intended to claim. The court below, in their construction of the claim, in charging the jury, say, that the improvement consist "in a new arrangement of the parts." Does this appear, either in terms, or even impliedly, upon the face of the description? So far from this, the last words of the patentee, in his description, are, that the "shape" of the thing is the "only point of importance." The court further say, that this new arrangement of the parts consists in "getting rid of nearly all the resisting surface of the wheel of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the end of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft."

Where, upon the face of the description, is there any mention made of Stevens's, Smith's, or of any previously invented wheel, save in the general declaration by the patentee, that his improved wheel "differs essentially from any which have been heretofore essayed,"—a declaration which the court, in the case of *Barrett v. Hall*, above cited, declare to be "no specification at all?" And where, upon the face of the specification, is there the most remote allusion to the "getting rid of resisting surface?"

*454] V. At the trial of the case, "it appeared in evidence that the *drawing and model of the paddle-wheel of the plaintiff, filed and deposited originally in the patent-office, had been lost by the destruction of that office in December, 1836, and that, in restoring the record of the patent, under the act of March, 1837, the plaintiff sent from New Orleans to the office a new drawing, to be filed on the 5th of May, 1841, together with a court copy of the letters-patent, which were deposited in the office. The drawing was not sworn to by the plaintiff, but remained in the office until January, 1844, when it was delivered to an agent of the plaintiff, and sent to New Orleans, and sworn to by him, and filed in the department on the 12th day of February, 1844. On an examination, subsequently, by the plaintiff, it was discovered that this drawing was imperfectly made, and thereupon a second drawing was procured by him, which he claimed and

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offered to prove to be an accurate one, and was sworn to and filed on the 27th day of March, 1844, an authenticated copy of which was offered in evidence on the trial by the plaintiff, which was objected to by the counsel for the defendants; but the objection was overruled, and the evidence admitted, to which an exception was taken."

It is contended, that the Circuit Court erred in admitting in evidence the second drawing of March 27th, 1844, and in support of this position, the following considerations are respectfully submitted:

(The counsel then urged,—

That the patentee had exhausted his privilege, when he swore to the first drawing.

That if allowed to file more than one, he might continue to file them down to the day of trial.

That the first drawing became, by the statute, *primâ facie* evidence of the invention, and there could not be two such.

That if this patentee had procured a re-issue of his patent, under the third section of the act of 1837, he would not have been entitled to the privilege which he now claims, and it is unreasonable to suppose that Congress intended to give greater privileges under one section than another.)

VI. At the trial of this case, the counsel for the defendants requested the court to instruct the jury as follows,—“that if, from the evidence, the jury are satisfied that no propelling-wheels were made by the defendants between the 27th of March, 1844,—the date of the alleged completion of the record of the plaintiff's patent, under the act of March 3d, 1837,—and the commencement of this suit in April following, that, upon this ground, the defendants are entitled to a verdict.”

The court refused to grant this prayer, and left it, as a question of fact, for the jury to say, whether there had or had *not been unreasonable delay on the part of the [*455 patentee in restoring the record. Now, was this a question of fact? It is submitted, that it was not, but that, under the circumstances, it was a question of law, to be passed upon by the court.

The record shows, that, from the burning of the patent-office, in December, 1836, up to the month of May, 1841, no step whatever was taken by the patentee to restore the record of his patent, and that he then delayed to complete the record until the month of February, 1844. Of course, there could have been no dispute as to the fact in connection with the question of reasonable or unreasonable diligence. Now, the authorities are clear in establishing this doctrine,—that, when there is no dispute as to the facts, the questions of reasonable

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or unreasonable time, or delay, or diligence, are questions of law for the court, and not of fact for the jury. The following cases are referred to:—*Ellis v. Paige*, 1 Pick. (Mass.), 43; S. C., 2 Id., 71, 77, *n.*; *Gilbert v. Moody*, 17 Wend. (N. Y.), 354; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.), 191; *Livingston & Gilchrist v. Maryland Ins. Co.*, 7 Cranch, 506.

And now as to the charge of the court, that “the damages were not necessarily confined to the making of the wheels between March, 1844, when the drawings were restored to the patent-office, and the bringing of this suit. Is not this error? Why was the drawing of March 27th, 1844, filed in the patent-office? For the reason only, as avowed, that the drawing of February preceding was incorrect and defective. For the reason only, that the public had no notice, or, what is still worse, that the public had an imperfect and deceptive information, by the first drawing of the particulars of the patentee’s invention. Would it not be monstrous to allow a patentee to recover damages for an alleged infringement made at a time when, by his solemn oath, he declares that the defendant was not notified of the character of his invention?—nay, more, when he swears, that, at the time of the alleged infringement, the only recorded notice of his invention, sworn to by himself, was imperfect, incorrect, and insufficient?

But by an examination of the grounds upon which the court rest their decision upon this question, it will be seen in what manner the error has arisen. The court say, the limitation contended for by the defendants “assumes that there can be no infringement of the patent after the destruction of the records in 1836, until they are restored to the patent-office, and that, during the intermediate time, the rights of patentees would be violated with impunity.” With the greatest deference, it will appear, upon a consideration of the statute provisions, that the doctrine contended for involves no such assumption.

*456] *The second section of the act of 1837 provides for the very difficulty which is urged by the court as the sole objection to the limitation contended for. Foreseeing that some time must necessarily elapse before patentees could be informed of their rights and duties, and prepare copies of their patents and drawings and models, Congress has provided, in this section, that, from the 15th of December, 1836, when the patent-office was burned, to the 1st day of June, 1837, and not after, patentees and others may give in evidence their patents in any court, notwithstanding that they have not been recorded, and no verified drawing of the invention has been filed in the patent-office.

Is there not great danger, in the disposition to give the most liberal and enlarged interpretation to statute provisions for the protection and encouragement of inventors, that the rights of the public may be too much disregarded?

By the burning of the patent-office, something more was involved than the loss of the evidences of the rights of patentees. The public were thereby deprived of the only notice which the law recognizes of what they could and what they could not do, without being subjected to prosecutions for invasions of patent-rights. For the public, in the language of Judge Washington, in a case before cited, "can depend upon no other information, to enable them to avoid the consequences of litigation, than what the records may afford. No description of the discovery, secured by a patent, will fulfil the demands of justice and of the law, but such as is of record in the patent-office, and of which all the world may have the benefit."

Now Congress, in legislating to repair the loss of the patent-office, and to provide against its natural consequences, had in view the protection of the public, as well as patentees; and while, on the one hand, it was justly considered that patentees ought not to suffer by reason of a loss arising from no fault of theirs, on the other, it was as justly considered that the public ought not suffer by reason of a too long delay on the part of patentees to furnish to the public anew the recorded descriptions of their inventions. Thus the second section of the act of 1837, saving the rights of patentees, enables them to recover damages for infringements after the burning of the patent-office, and down to the month of June, 1837, notwithstanding the non-existence of any public record of their inventions; but, saving the rights of the public, the statute gives no further time.

Is not this clear? And being so, is it not manifest that the court below erred in the instructions given to the jury upon this point?

*The drawing of a patentee, annexed to his patent, [*457 or referred to in his specification, constitutes a part of the patent, and oftentimes, as in this case, is the most material portion of the description,—without which the invention would be virtually undescribed. Now, when a patentee alters or amends his patent, whether in the *written* description or the *delineated* description, there is nothing better established than that he cannot recover damages for an alleged infringement committed prior to such amendment. The authorities to this point are conclusive, and in perfect uniformity; some of them, and those the most recent, going so far as to main-

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tain that it makes no difference though the amendment be of a mere clerical error. *In re Nickels*, Turn. & P., 44; S. C., 1 Webst. Pat. Cas., 659; Hindm. on Pat. (Eng. ed.) 216 *et seq.*; *Wyeth v. Stone*, 1 Story, 290; *Woodworth v. Hall*, 1 Woodb. & M., 248, 389.

It is submitted, that a denial of the doctrine here urged on behalf of the plaintiffs in error would be equivalent to an abrogation of the provisions of the thirteenth section of the patent act of 1837, which declares that a patent can only be amended by a surrender and re-issue, and that the amended patent can only operate upon causes of action accruing subsequently to the amendment.

Construe the first section of the act of 1837 as the court below has construed it, and what is the consequence? A patentee, whose grant is dated on or before the 14th of December, 1836, may maintain actions for infringement of his rights from then to the present time, without any public record of his patent whatsoever being in existence during the entire period, provided he produces at the trial an authenticated copy of his patent and drawings from the patent-office, recorded there, perhaps, but the day before! From this consequence, it is submitted, there could be no escape, and small, indeed, would be the hope of escape for the innocent invader of the unrecorded right, with the question of reasonable diligence in the restoration of the record left to the decision of a jury.

Mr. Morton and *Mr. Cutting*, for the defendant in error.

I. The first point raised by the plaintiffs in error does not properly arise. The jury rendered a verdict for \$1,500 damages. The amount in controversy being less than \$2,000, the defendants below had no right to remove the cause to this court. They moved the Circuit Court for a new trial upon a case made, which motion was denied, and judgment was docketed upon the verdict. The defendants below then applied to the Circuit Court for the allowance of a writ of *458] error, under the 17th section of the act of Congress, approved July 4, 1836, *which authorizes writs of error in patent cases to the Supreme Court of the United States, in the same manner, and under the same circumstances, as was then provided by law in other judgments and decrees of Circuit Courts, "and in all other cases in which the court should deem it reasonable to allow the same."

Having no right to a writ of error, therefore, unless the judges of the Circuit Court "should deem it reasonable to allow the same," application for the writ was made to the dis-

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cretion of the court; and the application was granted so far as to allow the defendants to raise, for the consideration of the Supreme Court, five points specified by the court below, and which constitutes the 2d, 3d, 4th, 5th, and 6th points now presented by the plaintiffs in error.* The defendants availed themselves of the permission to issue a writ of error, restricted as above stated, and now, after the writ has been allowed, they seek to argue a question not embraced in those specified by the court.

It is respectfully submitted, that this course ought not to be encouraged, and that the grounds discussed in the first point taken by the plaintiffs in error need not be considered by the counsel for the patentee. It may be briefly remarked, however, that the point referred to was not raised at the trial, and does not appear upon the face of the record, or even upon the bill of exceptions. It was insisted below, that the patent was void for the reasons specified in the bill of exceptions. The court will search in vain for the question attempted to be discussed by the counsel for the plaintiffs in error in his first point.

Even if it were raised by the bill of exceptions, and were a point that could be argued here, it would be untenable. The argument appears to be, that the patentee has no patent for "an improved paddle-wheel," because the title of the grant is for an improvement in the steam-engine, and the counsel for the plaintiffs in error argues as if the letters and the schedule were not part of the same instrument. By taking the whole patent together, that is, the letters and the specification, [*459 there can be *no difficulty in ascertaining the extent of the patent. It grants to the patentee the right "of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said patentee himself in the schedule hereto annexed, and is made a part of these presents."

Thus the schedule is made a part of the patent, as much as if it were recited in the letters themselves. The grant is for

* Writ of error allowed in respect to the question:—

1. Whether the patent is void as embracing two or more distinct and independent inventions or improvements.
2. Whether the claim is for entire paddle-wheel, or only for an improvement.
3. Whether the new is sufficiently distinguished from the old.
4. Whether the corrected drawing was properly allowed and filed.
5. Whether the rule of damages was correct, on condition that case be submitted on written argument to Supreme Court at ensuing term, before 1st February, and judgment to be secured by filing the usual bond.

A copy of Judge Nelson's indorsement on petition for writ of error.

ALEX'R GARDINER, Clerk.

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the improvement described in the schedule,—and by referring to the schedule, the improved paddle-wheel is distinctly embraced as a part of the claim.

In the construction of patents, the schedule annexed must be always kept in view, and resorted to in order to ascertain what is the invention claimed and patented. If the claim or specification be more extensive than the actual invention, the patent may be void in part or in whole for that reason; but there can be no doubt that, *primâ facie*, the patentee has a grant for all that he claims in the schedule annexed to his patent. The description in the letters of the thing invented is always very brief, because it points to and incorporates the patentee's specification and description annexed, and which usually sets forth minutely the whole claim.

The argument on the other side, as to the effect of a variation between the title of the patent and the thing patented and described in the schedule, assumes that a good and perfect specification and description of the invention claimed by the patentee may be utterly defeated by a defect in the title, so that a specification and claim free from all ambiguity will be rendered utterly worthless by a defect in what the counsel terms "the title" of the patent. A rule of construction so harsh and unreasonable would be most destructive in its consequences. If applied to the interpretation of statutes, it would nullify many of them that are free from doubt; not many of the acts of Congress would stand, if defective titles were declared to be fatal to the laws themselves.

The patent act of 1793, section first, provides that the Secretary of State may cause letters-patent to be granted, "giving a short description of said invention or discovery." When the patentee presents his specification, it is referred to in, and made a part of, the patent, and it is from the patent, with schedules and drawings taken together, that it is to be determined what thing is intended to be patented. *Pitt v. Whitman*, 2 Story, 621. Any defect in the title is remedied by a proper description in the schedule. *Barrett v. Hall*, 1 Mason, 477; *Whittemore v. Cutter*, 1 Gall., 437; *Phill. Pat.*, 224, 225.

*460] *In England, the rule appears to be different. There the patent is distinct from the specification, and controls it in construction, so that the patentee cannot cover anything by the specification which is not embraced in the patent. *Campion v. Benyon*, 3 Brod. & B., 5; *The King v. Wheeler*, 2 Barn. & Ald., 345.

II. But the plaintiffs insist, that the patent "is void, for the reason that it embraces several distinct and separate in-

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ventions, as improvements in several distinct and independent machines susceptible of independent operation, not necessarily connected with each other in producing the result arrived at in the invention, and the subject-matter of separate and independent inventions."

It is clear from the specification, that the patentee claims to have discovered an improvement in the steam-engine, and with it, in the mode of propelling vessels. He substitutes for the crank motion a mode of converting the reciprocating motion of a piston into a continued rotary motion, by a new combination of machinery for that purpose. From the revolving shaft described by him, a rotary motion may be communicated to paddle-wheels or other objects. When used for steamboats, the patentee employs the improved paddle-wheel described by him, which is necessarily to be worked in connection with the other machinery. When a capstan is required, as on board of a steamboat, he describes the mode of connecting the shaft of the engine with the capstan, so that it may be made to revolve by the action of the shaft; and he claims as his invention the substituting for the crank, in the reciprocating engine, a grooved cylinder, operating as described; the paddle-wheel constructed and operating as set forth; and the application of the revolving vertical shaft to the turning of a capstan.

Now it is manifest that the invention is a mechanical unity. The improved engine and paddle-wheel are intended to act together, and if a capstan be used, the improved engine is made to connect with and turn the capstan, as it does the paddle-wheels. Although the engine may be applied to the old-fashioned wheel, and though it may or may not be attached to the capstan, yet it is manifest that the improved engine connected with the paddle-wheel, or with a capstan, may be used in connection to produce or aid the result designed by the patentee, viz., the propulsion or navigation of a vessel.

(The remainder of the argument upon this head is omitted.)

III. The defendants prayed the court to instruct the jury, "that the claim of the plaintiff, as set forth in his specification annexed to his letters-patent, embraced the entire spiral paddle-wheel; that the claim was, therefore, too broad upon the face of it, and the letters-patent were void upon that ground.

*The court charged the jury, that "it was made a [*461 question on the former trial, whether the plaintiff did not claim or intend to claim the entire wheel; but we understood it to be for an improvement upon the spiral paddle-wheel."

The counsel for the plaintiffs in error supposes that the court below arrived at this conclusion, not from the face of

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the patent, but from matters de hors the specification. This assertion is unfounded. The view of the court below is the result of a just construction of the patent itself.

It is difficult to perceive by what course of argument the patent can be shown to be too broad upon its face. By the expression "too broad," I presume, is intended that the patentee claims more than he has invented. This is usually a question of fact, dependent upon the proofs at the trial. The face of this patent certainly does not disclose the fact, that the patentee has a grant for any thing of which he does not claim to have been the inventor. The counsel for the plaintiffs has not discussed this point, except so far as his observations under his fourth point may be applicable to it; and it is therefore not deemed necessary here to enlarge further upon this branch of the case, except to observe that the patentee does not claim to be the inventor of "paddle-wheels," nor of "wheels acting on the spiral or screw principle;" on the contrary, he refers to wheels previously "essayed," upon which wheels the patentee claims to have improved. What he does claim, then, is an improved spiral propelling-wheel, constructed and operating under water in the manner described, which improvement, as described in the schedule, is new, and is the invention of the patentee.

IV. It is insisted, that the court below ought to have charged the jury as prayed for; namely, "that the patent is void upon its face for this,—that, purporting to be a patent for an improvement, and specifying that the invention is of an improved spiral paddle-wheel, differing from any which have heretofore been essayed, without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from previously essayed spiral paddle-wheels, it is wanting in an essential prerequisite to the validity of letters-patent for an improvement."

The court refused so to charge, and held that the description of the invention was in this respect sufficient.

The point now raised is one purely technical, because it must be assumed after verdict, and upon the bill of exceptions, that the patentee was the real inventor of what he claims; that *de facto* he has not claimed as new that which had been known before; that the improvement is useful, and that the *462] specification is so full and clear, and free from ambiguity, that *any mechanic skilled in the art of making propellers could, by following it, construct the thing patented.

But however meritorious the invention may be, yet it is contended that the patent ought to be adjudged void, because

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it does not point out the difference between the improved propeller and all other propelling-wheels previously essayed.

The object of pointing out the old from the new is, that the public may be informed what the party claims as his invention, and may ascertain if he claims any thing in common use.

The law does not require that he should describe the various paddle-wheels then known, or point out the differences between them and his improvement; such a rule even if practicable, would be too onerous to be endured. Take, for example, a patent for an improvement upon all stoves previously essayed; it would be unreasonable to prescribe that the specification should describe all the stoves in use, or that had ever been essayed, and that it should point out the difference between them and the particular improvement; such requirement would be impracticable. When Emerson applied for his patent, in 1834, there were a very great number of paddle-wheels and propellers known, or which had been essayed, many of which had been patented in this country and in England. Now, it was not necessary for him to have described all these various wheels and propellers. It is enough if he has specified his own improvement; and if he has done so in an intelligible form, his patent is good on its face, although, when tested by evidence dehors the patent, it might appear that he has claimed what was old, and thus his patent might be defeated.

In *Evans v. Eaton*, 7 Wheat., 435, the rule is thus expressed:—"We do not say that the party is bound to describe the old machine, but we are of opinion that he ought to describe what his own improvement is, and to limit the patent to such improvement. The law is sufficiently complied with by distinguishing in full, clear and exact terms the nature and extent of his improvement only."

Most of authorities cited by the counsel for the plaintiffs in error, under his fourth point are referred to by Phillips, in his work on Patents, and the rule that he deduces from them is thus stated, at page 269:—

"In specifying an improvement in a machine, it is often necessary to describe the whole machine as it operates with the improvement, in order to make the description intelligible, and enable an artist to construct the machine, as the inventor is bound to do in his description, and which if he fails to do, he falls into the fault of obscurity; on the other hand, [*463 if the whole *machine, as well the old as the new part, be thus described, it is requisite to distinguish what part the patentee claims, since, if this does not satisfactorily appear, the patent will, as we have seen, be void for ambiguity; or if

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the obvious construction is, that he claims the whole machine in its improved state, the patent will be void by reason of the patentees claiming too much. The mode of expression generally used in the books, in relation to this subject, is, that the specification must distinguish the old from the new. The only object of this distinction is, however, to specify what the patentee claims, and the mere discrimination of the new from the old would not necessarily show this, for perhaps he does not claim all that is new. When the cases say, therefore, that the specification must distinguish the new from the old, we must understand the meaning to be, that it must show distinctly what the patentee claims, the only object of this distinction being for this purpose. This doctrine is illustrated by some of the cases already stated, and it runs through them all wherein this question arises."

Most of the patents describe the improved machine only, as will be seen by referring to the specifications in the patent-office, and to the reports of patent cases.

It has been, of late years, the practice of the courts of this country to give effect to patents, if possible, rather than to destroy them; and to this end, mere technical objections are no longer encouraged. The rigorous rules of the English courts, and of some of our earlier cases, by which meritorious patents were frequently overturned, have given place to more liberal and enlightened principles.

[The remainder of the argument upon this head is omitted.)

V. The authenticated copy of the corrected drawing, filed in the patent-office on the 27th of March, 1844, was correctly admitted.

The original drawing, filed with the patent in 1844, had been destroyed by fire; the patentee could not of course produce the original, and he therefore resorted to the next best evidence that the nature of the case permitted; this consisted of a copy which the plaintiff below offered to prove to be an accurate copy of the original; and this copy so offered was duly authenticated in the manner provided by the first and second sections of the act of March 3, 1837.

Upon the strictest principles of the law of evidence, the plaintiff below was entitled to prove what the original drawing really was. The original being lost, the next best evidence of it was an exact copy, proved to be accurate.

*464] This proof would have been admissible and proper, irrespective *of the act of 1837, and whether the copy so offered was a record of the patent-office or not. Suppose the act of 1837 had never been passed, and the plaintiff had proved the destruction of the original drawing, he might have

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produced upon the trial a copy of it; and after proof that it was a true copy, he would have entitled himself to read it in evidence.

But there can be no reasonable doubt that the corrected drawing, filed on the 27th of March, 1844, was properly received by the patent-office, and that an authenticated copy thereof was admissible as evidence under the provisions of the act of 1837.

That act was remedial in its character; its object was to restore the records, and to repair the loss occasioned by the fire. To that end, it was of the highest public importance that the specifications and drawings should be correctly and accurately restored. To have received imperfect or inaccurate copies would have increased, and not have remedied, the mischief, and to assert that the patent-office had exhausted its power to restore models and drawings by the reception of what were not copies or true representations of the originals would be to give a construction to the statute that would defeat its object.

The first section declares, "that it shall be the duty of the commissioner to cause the copies offered by the patentee, or any authenticated copy of the original record, specification, or drawing, which he may obtain, to be transcribed," &c. It is not only within the powers of the department to receive corrected drawings or models, in place of those that prove to be inaccurate or imperfect, but it is the duty of the commissioner to obtain exact substitutes for the originals, if possible; and if those already filed are shown to be erroneous, imperfect, or untrue delineations of the originals, it is the duty of the commissioner to replace them with corrected copies. In this way only can the objects of the act be accomplished. To deny this power would be to perpetuate errors.

VI. The court below properly refused to charge the jury that the defendants were not entitled to a verdict, if they were satisfied that no propelling-wheels were made between the 27th of March, 1844, and the commencement of the suit.

The defendants excepted to the charge so far only as it did not adopt the prayer insisted on by them.

The prayer upon this point insists that the defendants were entitled to a verdict, if no wheels were made by them after the 27th of March, 1844, no matter how often they had infringed the plaintiff's patent prior to that date. It assumes that all persons may, with impunity, infringe upon all or any patents intermediate between the destruction by fire of [465 the records of the patent-office, *and the complete restoration of them under the act of 1837. If the principle con-

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tended for be sound, then the patentee has no remedy for wilful and deliberate violations of his patent committed intermediate the destruction of the records of the patent-office and the complete restoration of them, no matter how public and notorious the patent may have become, and no matter how extensively the patent may have been published and circulated in works of art or otherwise.

This principle cannot be sound; and the defendants' prayer and exception raise no other question. The prayer assumes the broad ground, that there is no liability for infringements committed prior to the restoration, not only of the patent itself, but of the drawings, and that the patentee is not entitled even to nominal damages.

The patent, in the present case, had been restored and recorded anew long before the 27th of March, 1844, namely, in the year 1841; the recorded copy of the specification and claim was correct, and disclosed the patentee's right; and yet the court was asked in effect to charge the jury, that infringements might be perpetrated with impunity at any time after the fire, and at any time after the recording anew of the letters and schedule, until the 27th of March, 1844. The letters-patent were published in the Franklin Journal in 1834, were filed anew in 1841, and of themselves were sufficient to protect the patentee, even if the restoration of the drawing had been imperfect.

The views of the learned judge in his charge need no illustration; he charged the jury as favorably for the defendants as they had a right to request.

The complaint of the counsel for the plaintiffs in error, that the court left the question of unreasonable delay, on the part of the patentee, in taking measures to restore his records to the jury, is not properly urged, upon the present writ of error, because,—

1. It is not one of the five points that the court below allowed to be raised.

2. That part of the charge was not excepted to at the trial, and, on the contrary, the exception was limited to the point taken in the defendant's prayers.

3. Even if this point were properly before the court, it is clear that the question whether the patentee had been guilty of unreasonable delay and neglect in restoring the records was a question of fact upon the evidence then before the court.

It was a question of fact, submitted to the jury for the benefit of the defendants below; for if there had been such
 *466] neglect or delay, the court instructed the jury, that, if the defendants *had innocently made the patented arti-

cle, it would be a fair ground for a mitigation of the rule of damages, if not for the withholding them altogether.

The charge was as favorable to the defendants as the law and the evidence would permit.

Mr. John O. Sargent, for the plaintiffs in error, in reply and conclusion.

It is objected to the first point raised by the counsel for the plaintiffs in error, that it is not properly presented to the court, though it is admitted to arise upon the record. The argument is, that the court below intended to restrict the plaintiffs to the consideration of certain specified questions. True it is, that the court struck out from the bill of exceptions several points on which the plaintiffs relied; but the object of the court in so doing is misapprehended. It was the purpose of the court merely to disembarass and relieve the record of objections which they considered ill-taken, and the discussion of which they deemed unnecessary. That, besides this limitation, of which the plaintiffs have not complained, it was the intention of the court to cut them off from their right of dealing with this record according to law, is not to be presumed or implied. No doubt whatever is entertained by the counsel for the plaintiffs, that the objection is well raised on the record, and that it is fatal to the defendant's claim.

I. The point made is, that the defendant in error has no patent for an improved spiral paddle-wheel.

The learned counsel for the defendant is mistaken in supposing that the argument of plaintiffs' counsel proceeds upon the idea, that the letters-patent and the specification are not parts of the same instrument. The specification forms a part of the patent, and they are to be construed together, but construed with reference to the fundamental principle of interpretation, *Quoties in verbis nulla ambiguitas, ibi nulla expositio contra verba fienda est*,—or, as it is sometimes laid down in the books, "No construction shall be made contrary to the very express words of a grant."

In construing this instrument, we must look to the situation of the parties, and the mode in which it was prepared. The formal letters-patent speak the language of both parties. In the instrument of grant, there is nothing equivocal or ambiguous. It is not capable of being misunderstood. No ingenuity can extort a double meaning from it. Mr. Emerson made oath that he was the inventor of an improvement in the steam-engine; solicited a patent for said improvement; received a patent reciting the exclusive privileges vested in him in said *improvement, and making the description of said

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improvement contained in the schedule annexed a part of his patent. All this must be taken as absolute truth. The patentee claiming under this instrument is bound by its recitals, and estopped from denying anything that it alleges. The letters-patent, in fact, are the joint production of the grantor and grantee. The Secretary of State adopted the description of his improvement which the grantee furnished in his petition. The entitling of the schedule is debatable ground. This may have been the work of the grantee alone, or of a clerk in the department. In either event, it indicates the intention of the parties, and, as if to exclude the possibility of the grantee's taking an exclusive privilege to any other thing than that contemplated and expressed in the patent, the heading or title of the schedule recites, in effect, that said schedule is made a part of the patent, so far as it contains a description of the improvement in the steam-engine, and no farther.

The language of the parties indicates plainly enough what was intended to be granted, and what was actually granted. Then comes the descriptive part of the schedule, or the specification, in the words of the grantee alone. This contains a particular description of the improvement in the steam-engine secured by the patent. It then describes an application of this improved engine to turn the capstan on the deck of a vessel; and an improved spiral paddle-wheel, alleged to differ materially from those previously essayed. Now, the ground taken by the counsel who opened this case is simply this,—that Mr. Emerson cannot, by the introduction of new matters in his specification, make his patent operate as a grant for the improvement mentioned in his petition, oath, and letters; and also as a patent for other things not mentioned in such petition, oath, and letters. It is respectfully submitted, that such is clearly the law.

It is presumed that there is no difficulty in the court's taking judicial notice of anything involved in the construction of a patent, which a judge at *nisi prius* would know without the aid of a jury. If this view is correct, the court will know that an improved steam-engine is not an improved paddle-wheel, and was not at the time this patent was issued. This being so, the improved spiral paddle-wheel is not only not in terms included in this patent, but is by legal implication as absolutely excluded from the patent as if it were excluded in express terms. In the fair, natural, obvious interpretation of this grant, collecting its meaning from the terms used in it, understood in their plain, ordinary, and popular sense, the

*468] improved steam-engine is the subject, and the sole subject of Mr. Emerson's *patent. Apply these princi-

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ples, which, in the language of a learned and eminent judge, furnish a "rule of construction which applies to all instruments," and they establish beyond a question that Mr. Emerson has no grant for an exclusive privilege in a spiral paddle-wheel.

And, first, because the force of the schedule is thus restrained in express terms by the patent, and these terms are the language of both parties. Again, because the language of the schedule is throughout the language of the grantee alone, and binds the grantor only so far as it has been expressly, or by necessary implication, adopted by him. Now the duty of the Secretary of State, under the act of 1793, was purely ministerial. He took no such judicial cognizance of specifications as is now rigidly exercised by the commissioner of patents. The grantee might have included many distinct machines in his schedule, and the Secretary of State was not called upon to notice the fact, did not notice it, and could not have prevented it. The patent was within his control, and the schedule so far as it was made a part of the patent, but not otherwise. He could so far restrict it as to limit its effect to the description of the thing patented, and to that extent he did in fact, in express terms, limit it. Beyond this he had no jurisdiction. The same is true of the Attorney-General. It was his duty merely to see that the patent purported to embrace but one improvement, and that the specification was signed by the patentee, and attested by two witnesses. His duty was then discharged, and he certified to the patent's being conformable to law. Now, is it not against reason, and therefore against law, to say that such a schedule, made by the grantee alone, and not examined by the grantor, is in any other respect, and to any greater extent, operative in conferring exclusive privileges, than it is made so by the mutual assent of the parties, expressed in their common and joint language in the patent itself? Can such recklessness and improvidence in the issue of its grants as a different construction would establish be attributed to any government? If the schedule had contained the specification of a spiral paddle-wheel alone, would it have been patented under the terms of this grant? Would the patentee in that case have complied with that provision of the statute of 1793, which required him to "recite" his invention in his petition? Would his oath to the invention of an improved steam-engine then have covered the invention of a spiral paddle-wheel? And if not in that case, why in this? Does the mere fact of describing the improved steam-engine in the schedule incorporate in this

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patent an improved paddle-wheel, which would not have been incorporated if the improved steam-engine had been *469] *omitted altogether? If such is the construction to be put upon these instruments, the Secretary might as well have issued his letters-patent in blank, and suffered individuals to fill them up at their pleasure. The petition, the oath, the description, the grant, the signing by the Secretary and President, the reference to the Attorney-General, were all superfluous. But, say the counsel for the defendant in error, the schedule is a part of the patent, and if the schedule contains a description and claim of a machine, that machine becomes the subject of the exclusive privileges granted by the patent, just as much as if the inventor had petitioned for, sworn to, paid for, and received a patent for the same. This understanding of the matter would have been a very convenient one for a patentee under the law of 1793, because it would have enabled him to include in his letters the inventions of others, without incurring the penalties of perjury; and as many of them as he pleased at the expense of a single fee. With all deference, but with all confidence, it is repeated, that the schedule is so far a part of the patent as it contains a description of the thing patented, and no farther. It is the description of the improvement patented contained in the schedule, which is the specification that forms a part of the patent. It is in this view that the language of the court is to be applied, when they say that the specification is a part of the patent, and that the whole is to be taken together, and construed as one instrument. As a general thing, under the law of 1793, the schedule contained only such a specification; in contemplation of law it never can contain any other; if it contains anything more, the excess is surplusage. If it does not vacate the patent, it is at least inoperative,—it cannot enlarge the grant.

On the English cases there would be no doubt on this point. For the non-conformity between the title in the patent and the description in the specification, the patent would be declared void on two grounds:—1st. For the false suggestion in the petition. 2d. For the claim in the specification of an improvement not within the true meaning and extent of the grant.

Either of these objections would render a patent in England absolutely void:—1st. Because the crown has been deceived. 2d. Because the inaccurate title is calculated to deceive the public.

These consequences flow, not from any special provision in the English patents or statutes, but from principles of the common law applicable to all public grants. These principles

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apply with equal force to public grants of the United States, unless there is some provision in our patents as issued, or in *our statutes on this subject, rendering them [*470 inapplicable. It is submitted, with all deference, that no such provision can be found, and that the reasons for sustaining them in their full effect are stronger under the system established by our act of 1793, than under the English system.

(The remainder of the argument upon this head is omitted.)

II. It is again objected by the counsel for the defendant in error, that there is nothing in the exception to the ruling of the court in regard to the insertion of several claims for distinct and separate machines in the specification.

The case of the defendant is obviously very much distressed by this point, and his counsel protest strongly that the inventions described exhibit a "mechanical unity," being all a means of propelling vessels. To maintain this proposition they resort to a very extraordinary mechanical discussion, to show that, by means of the capstan, without regard to the motive power of the engine, they could propel a vessel. If this be so, and the counsel should present their argument to the commissioner of patents in the shape of a specification, they might readily obtain a patent for it if a new and useful invention. They think, if a vessel with Mr. Emerson's machinery on board should be becalmed, without fuel, that, by applying "the motive power" by manning the capstan, motion would thereby be communicated to the propeller. The answer to this is, that no such application is contemplated by the patentee; and to arrive at it the learned counsel is compelled to sever and destroy his mechanical unity, by leaving the steam-engine useless for the want of fuel.

The question is now, for the first time, distinctly presented to this tribunal, and the doctrine on this subject is to be settled by the judgment of the court in this case. It is a question of no inconsiderable public importance, and it is desirable that it should be adjudicated on plain and substantial grounds. All inventions are supposed to conduce more or less to one common object, to wit, the benefit of the public. This common purpose is probably too remote to sustain the introduction of all manner of inventions into the same patent; but, for all practical purposes, it is precisely as proximate and tenable as the common purpose claimed for the patentee in this case.

It is most humbly submitted, that the doctrine of this court, as suggested in *Evans v. Eaton*, is the true doctrine on this subject:—"On the general patent law a doubt might well arise whether improvements on different machines could regu-

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larly be comprehended in the same patent, so as to give a right to the exclusive use of the several machines separately, *471] as well as a right to the exclusive use of those machines in combination." *This language obviously contemplates a case in which the machines patented might be used in combination; and the whole force of Mr. Justice Marshall's very sound and pregnant suggestion is destroyed the moment the converse of the proposition is established, namely, that when machines are capable of being used in combination, then any number of them may be united in the same patent. The language of the court in the case cited applies only to the case where the machines in question are capable of acting together; withdraw such cases from the operation of the principle propounded by the court, and there is an end of it. And yet this doctrine, as laid down by the court in that case, is daily acted upon by the patent-office, under the act of 1836; and if it is materially shaken or qualified, the revenues of the department will be very seriously diminished.

The suggestion in *Evans v. Eaton*, on this point, was much considered in *Barrett v. Hall*, and it may be said that no cases on record present more masterly expositions of the principles of patent law which they discuss. *Wyeth v. Stone* stands on the extreme verge of sound principle; but there the two instruments were in fact but part of one and the same machine. The instruments contemplated in that case formed a compound machine for cutting ice. They were, in fact, but parts of one and the same instrument. Two things cannot be readily imagined more absolutely distinct and separate instruments, than a steam-engine and a paddle-wheel. A steam-engine is employed to give motion to every manner of machinery. A paddle-wheel may be turned by horse-power, or man-power, or windmill-power, as well as by a steam-engine. Here the engine is the motive power; the wheel is the thing moved. The engine might be well employed to move any thing else; the wheel might well be put in action by any other motive power. They are as distinct and separate as cause and effect, and cannot be united in one patent, except upon principles that would entirely nullify the rule of law laid down in *Evans v. Eaton* and *Barrett v. Hall*, and admit of the introduction in the same patent of entirely distinct and separate machines.

It is suggested, that a different doctrine from that contended for by the plaintiffs prevails in England. We have cited no English authorities on this point. It arises on our own statutes, and is so rested by Mr. Justice Marshall.

There is no hardship in the rule contended for. In no other way can the subject-matter of an invention be distinctly

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brought out, so as to warn the public against undesigned infringements. If several machines can be mixed up in one specification, and several improvements on each, and then patented in the name *of one of those machines, [*472 it is respectfully, but earnestly, insisted, that the patent-office cannot fail to become the source of more oppression and outrage than will be long tolerated by a people who are masters of their own institutions. Under such an understanding of the law, letters-patent will be regarded by the public as mere charters of iniquity, and the whole system must be swept away. It must be as impracticable to sustain such an institution in the United States as it would be to establish the Inquisition here, or vest in the government those odious prerogatives the abuse of which led to the English statute of monopolies.

It is most humbly submitted, then, that, on the authorities and on the reason of the case, there was error in the charge of his honor, the circuit judge, that "the objection that the patent embraces several distinct discoveries is untenable."

III. Counsel for the defendant in error cannot perceive by what course of argument this "patent" can be shown to be too broad upon its face. We are embarrassed somewhat in reasoning upon this case, because it is an anomaly. This is the first attempt on record to sustain a grant of an exclusive privilege by virtue of letters-patent which contain no allusion whatever to the alleged subject-matter of the privilege which is set up under them. We repeat, and to this point pray the special attention of the court, that, among the many hundred patent cases that have been adjudicated in this country and in England, not one such case is reported. In discussing analogies, therefore, we must waive for the time the great difference between this and all other cases, arising from the fact that the patent before us contains no grant of an exclusive privilege in a spiral paddle-wheel.

Plaintiffs' counsel do not allege, therefore, that this patent is too broad upon its face. It is as broad upon its face as the law will allow. It is broad enough to cover an improved steam-engine, and no more broad. It is made void by attempting to include more in the specification than is included in the grant, and more in the claim than is shown to be of the patentee's invention. The objection of plaintiffs' counsel is, that the claim is broader than the invention.

The claim is for the entire spiral paddle-wheel, constructed and operating as set forth; and more than that, it is for such a machine "not confined to precise forms or dimensions, but varied as experience or convenience may dictate, whilst the

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principle of action remains unchanged, and similar results are produced by similar means."

Here is a claim for the entire wheel, to be varied as the *473] inventor may see fit to vary it, and for every other wheel operating *on the same principle, and producing similar results by similar means. It is a claim, as broad and distinct as language can make it, for the spiral propelling-wheel, and every part of it, and for liberty to vary it in form as the inventor pleases, as long as a similar result—to wit, the propulsion of vessels—is produced by similar means,—to wit, by a spiral wheel. The result contemplated is propulsion; the means or instrument is a spiral wheel, of such form as experience or convenience may induce the inventor to make, without changing the principle of action. Such is the claim; and if the claim is a valid one, no man can effect the propulsion of a vessel on the principle of action contemplated by a spiral wheel, without invading Mr. Emerson's claim.

But, while such is the claim with which Mr. Emerson arms himself, and goes out among men, as Lord Kenyon expressed himself in a similar case, "hanging terrors over the unlearned," when we come to examine the specification of his wheel, we find an implied acknowledgment that it is only an improvement, and merely an implied acknowledgment. He speaks of an "improved spiral paddle-wheel," leaving the unavoidable inference, that he has improved the ordinary paddle-wheel by making it spiral, and that the spiral feature—or, as he subsequently described it, his spiral trough—is the only material part of his improvement.

Here is the old defect, that has been decided over and over again to be fatal,—the invention of an improvement, and the claim of the whole machine. No ingenuity can withdraw this case from that large class of cases in which the rule we contend for has been laid down with a distinctness that cannot be mistaken, and applied with a wise, uniform, and unrelenting firmness. The courts say, that no man shall give that false color to his claim which may enable him to "hang terrors over the unlearned." The case before the court is *Jessop's case*, where the patent was for the whole watch, and the invention of a particular movement. It is the case presented in *Williams v. Brodie*, where the invention was an improvement on a stove, and the patent for the whole stove. It runs on all fours with *Cross v. Huntley*, where the invention was of an improvement in the washing-machine, and the claim was for the whole machine; where the court did not hesitate, in an action where the patent came up collaterally, to declare it void. It is *Bovile v. Moore*, where the patent for an improvement on a

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lace-machine was held void, because the claim was for the whole machine, though a considerable part of it had been long in use.

There is no matter of fact to be found, in order to bring out this defect, that the law may be applied to it. It lies on the *face of the specification. Jessop, Williams, [*474 Cross, and Bovile showed that they had invented improvements, and claimed the entire machines. Emerson suggests that he has invented an improvement, and claims the entire machine. Where is the difference? What subtilty can distinguish between these cases? And why should we seek to establish thin, fine, and subtle distinctions, in a case where the policy of the law is so plain, obvious, and honest, and where the great end to be attained is to prevent patentees from "hanging terrors over the unlearned?"

These cases, it may be said, are not binding authorities upon this court. They are not so cited. No weight is claimed for them beyond that which they derive from their intrinsic good sense and sound reason. Their authority, as well-considered decisions, has never been judicially disturbed or questioned. But there is a case of controlling authority,—that of *Evans v. Eaton*,—sustaining the doctrine for which we contend to its full extent. To this case I shall have occasion again to refer, in considering the fourth head of the argument of the learned counsel for the defendant, to which I now pass.

IV. The fourth point discussed by the learned counsel for the defendant touches the second prayer made to the court below.

Plaintiffs contend that Mr. Emerson's specification does not define with precision the nature and extent of the alleged improvement in the spiral paddle-wheel, but describes the whole machine, and claims the whole as improved, without distinguishing the new from the old. A patent with such a specification cannot be supported. This doctrine rests so firmly on the authoritative decision of this court, that it may well be left to authority. We shall, therefore, merely allude to the obvious reason for it, which is, to limit the exclusive privilege to the actual improvement, and disarm the patentee of the power of "hanging terrors over the unlearned," and practising upon the fears and credulity of the public, by "pretending that his invention is more than what it really is, or different from its ostensible objects." If a patentee can mix up a single undefined improvement in details of the construction and operation of an old machine, and then claim the whole machine constructed and operating in the manner set forth, then a patent, instead of being merely the reward of meri-

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torious invention, is a device to encourage litigation, extortion, and fraud. Such a patent shifts its grounds at every trial, changes its color according to the aspect in which it is presented or met, and adapts itself with a fatal elasticity to the length and breadth of the evidence which happens to be applied to it.

*475] *(The remainder of the argument upon this head is omitted.)

V. Now with regard to the drawings. It appears from the record (p. 10), that two drawings were filed by Mr. Emerson in the patent-office, under the act of 1837; one as early as 1841, which was re-filed, with the plaintiff's oath to its correctness, on the 12th of February, 1844, and the other, with the same oath, on the 27th of March, 1844. The second drawing was the one produced and relied on by the plaintiff below as constituting, with the letters-patent, that certified copy of the renewed record in the patent-office, which the second section of the act last cited makes the only proof of the alleged patent admissible in any judicial court of the United States.

The learned counsel for the defendant in error suggest, that, after the original drawing was destroyed by fire, the next best evidence of it was an accurate copy of it, offered to be proved such. It is submitted, with great deference, that a drawing of Mr. Emerson's paddle-wheel, filed in March to lay the foundation of a suit in April, was not the next best evidence of the alleged original, for the reason that there was another drawing, previously filed and sworn to, which was something more than next best evidence of the lost original, being made by statute absolutely the only evidence of it that could be received in any judicial court of the United States. It might, indeed, be well contended, that the first-filed drawing did not at all partake of the character of secondary evidence. It became, by force of the statute, to all legal intent, the original drawing. It filled the place of the original drawing on the record, being verified by the same oath, vesting the same rights, construed in the same way as part of the specification, and conclusive proof of all that it purported to prove, until it should be rebutted. The letters-patent and first drawing filed by Mr. Emerson, under the first section of the act of 1837, became, by virtue of the second section, as far as the patentee was concerned, primary evidence. It was open to observation and impeachment to all the rest of the world; but by operation of the statute, in connection with well-established principles of law, it was at all events conclusive upon the patentee. The drawing, therefore, filed on the 27th of March, 1844, was not in law the "next best" evidence of Mr. Emer-

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son's original drawing, because there was a prior drawing filed on the 12th of February, which the statute had expressly declared to be the legal original, at least for all purposes of litigation.

(The remainder of this argument upon this head is omitted.)

VI. On the question of damages, counsel for the defendant insists that there was no error in the charge of the learned judge, that "the damages were not necessarily confined to the *making of the wheels between March, 1844, [^{*476} when the drawings were restored to the patent-office, and the bringing of the suit." Such a limitation was prayed below, and, as it was supposed, on well-established principles of law and equity. It is again pressed, with all deference, but with perfect conviction, that the refusal of the prayer was error, for which the judgment under consideration ought to be reversed.

The patent act contemplates, that every thing to be done by an inventor, with respect to his specification and drawings, is to be done before the patent issues. There is no such thing as correcting the record of a specification or drawing by mere substitution of some other specification or drawing. After the patent issues, the patentee cannot, by merely depositing a new drawing, on any plea whatever, make it a part of his patent, or any evidence whatever of his invention, as originally patented, so as to cover cases of alleged infringement prior to such change in the record. There can be only one motive of desiring to add a new drawing, and that is, to remedy a defect or insufficiency in the original drawing or specification, or to correct the same. The object of such a change can never be merely to present a more tasteful drawing, or a drawing more agreeable to the eye, or more in conformity to pictorial rules. Other arts than the fine arts induce such an application. The offer to file a new drawing is an admission on the part of the patentee, that his new drawing covers something in which the original drawing is defective or insufficient. And, under these circumstances, what does the statute say? That the patentee must surrender his patent, and that a new patent may issue in conformity with his corrected specification, and thereafter operate, for the residue of the original term, on the trial of all actions thereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing out of the original patent. And in this case, the commissioner is not bound to grant such re-issue, nor can he grant it except in cases where the error has arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive

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intention. Similar proceedings may be had in regard to the addition of an improvement. (Act of 1836, § 13.)

(The remainder of the argument upon this head is omitted.)

It is respectfully submitted, then,—

1. Because the defendant in error has no grant of exclusive privilege in the machine, which is the subject-matter of the present controversy:

2. Because he could not in law receive a grant for it, as one of several distinct machines in the same patent:

*477] *3. Because, as the author of an improvement, he could not take out a valid patent for the whole machine:

4. Because he has not in his specification distinguished between the old and new parts of his alleged improved machine, but has claimed the whole machine as improved:

5. Because he did not produce in evidence the record of his patent which the law had made such, but another record; and,

6. Because he has recovered damages for causes of action accruing previously to the alleged correction of his record, and prior to the alleged renewal of it under the act of 1837:

For all these reasons, and for others raised upon the exceptions and record in this cause, presented perhaps too much at length, but not more at length, in the view of counsel, than their public importance may justify,—that the judgment of the Circuit Court in this case ought to be reversed.

Mr. Justice WOODBURY delivered the opinion of the court.

This is a writ of error brought under some peculiarities which are first to be noticed.

It comes here by virtue of the 17th section of the general patent law of July 4th, 1836. (5 Stat. L., 124.)

That section grants a writ of error from decisions in actions on patents, as in ordinary cases, and then adds the privilege of it “in all other cases in which the court shall deem it reasonable to allow the same.” This was doubtless intended to reach suits where the amount in dispute was less than \$2,000, on account of the importance of the points sometimes raised, and the convenience of having the decisions on patents uniform, by being finally settled, when doubtful, by one tribunal, such as the Supreme Court.

The judges below, in this case, deemed it reasonable, that only a certain portion of the questions raised at the trial, concerning the validity of the patent, should come here, and the record was made up accordingly.

But the appellants contend for their right to bring here all

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the questions which arose in the case, and this is a preliminary point to be settled before going into the merits. The present is believed to be the first writ of the kind, which has given occasion for settling the construction of any part of the above provision; and therefore, without the aid of precedent, after due consideration of the words and design of the statute, we have come to the conclusion, that the position of the plaintiffs in error, in this respect, is the correct one, and that when a court below deem it "reasonable" to allow a writ of error at all, under the discretion vested in them by this special provision, it must be on the whole case.

*The word "reasonable" applies to the "cases," rather than to any discrimination between the different points in the cases. [*478

It may be very proper for the court below to examine those points separately and with care, and if most of them present questions of common law only, and not of the construction of the patent acts, and others present questions under those acts which seem very clearly settled or trifling in their character, not to grant the writ of error at all. It might, then, well be regarded as not "reasonable" for such questions, in a controversy too small in amount to make the writ a matter of right to persons, if standing on an equal footing with other suitors. But we think, from the particular words used rather than otherwise, that the act intended, if the court allowed the writ as "reasonable" at all, it must be for the whole case, or, in other words, must bring up the whole for consideration.

We shall, therefore, proceed to examine all the questions made at the trial, which it is supposed are relied on, and are now before us on the original writ and a *certiorari* issued since.

Looking to the declaration, the action is for a violation of a patent for an "improvement in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land."

The evidence offered at the trial was a patent for "a new and useful improvement in the steam-engine," "a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents."

In the schedule annexed is described fully what he says he invented, viz.,—"certain improvements in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land."

The first question arising on this statement is, whether the evidence proves such a patent as is set out in the writ to have been violated by the respondents.

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If the patent is to be ascertained from the letters alone, or rather from what is sometimes called their title or heading, without reference to the schedule annexed, the evidence is undoubtedly defective, as the writ speaks of a patent for an "improvement in the steam-engine and in the mode of propelling" vessels, &c., therewith,—while the letters themselves, in their title or heading, speak only of a patent for "a new and useful improvement in the steam-engine." But the schedule annexed and referred to for further description, after "improvement in the steam-engine," adds, "and in the mode of propelling therewith" vessels, &c.

*479] It can hardly be doubted, therefore, that the improvement *referred to in the writ and in the letters-patent, with the schedule or specification annexed, was in truth one and the same.

Coupling the two last together, they constitute the very thing described in the writ. But whether they can properly be so united here, and the effect of it to remove the difficulty, have been questioned, and must therefore be further examined. We are apt to be misled, in this country, by the laws and forms bearing on this point in England being so different in some respects from what exist here.

There the patent is first issued, and contains no reference to the specification, except a stipulation that one shall, in the required time, be filed, giving a more minute description of the matter patented. (Webst. Pat., 5, 88; Gods. Pat., 6, App.) It need not be filed under two to four months, in the discretion of the proper officer.¹ (Gods. Pat., 176.)

Under these circumstances, it will be seen that the patent, going out alone there, must in its title or heading be fuller than here, where it goes out with the minute specification. But even there it may afterwards be aided, and its matter be made more clear, by what the specification contains. They are, says Gods. Pat., 108, "connected together," and "one may be looked at to understand the other." See also 2 H. Bl., 478; 1 Webst. Pat. Cas., 117; 8 T. R., 95.

There, however, it will not answer to allow the specification, filed separately and long after, to be resorted to for supplying any entire omission in the patent; else something may be thus inserted afterwards which had never been previously examined by the proper officers, and which, if it had been submitted to them in the patent and examined, might have prevented the allowance of it, and which the world is not aware

¹ CITED. *Amer. Diamond Rock Boring Co. v. Sheldon*, 4 Bann. & A., 605; S. C., 17 Blatchf., 324.

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of, seeing only the letters-patent without the specification, and without any reference whatever to its contents. 3 Brod. & B., 5.

The whole facts and law, however, are different here. This patent issued March 8th, 1834, and is therefore to be tested by the act of Congress then in force, which passed February 21st, 1793. (1 Stat. at L., 318.)

In the third section of that act it is expressly provided, "that every inventor, before he can receive a patent," "shall deliver a written description of his invention," &c.;—thus giving priority very properly to the specification rather than the patent.

This change from the English practice existed in the first patent law, passed April 10th, 1790 (1 Stat. at L., 109), and is retained in the last act of Congress on this subject, passed July 4th, 1836 (5 Stat. at L., 119).

It was wisely introduced, in order that the officers of the government might at the outset have before them full means to *examine and understand the claim to an invention better, and decide more judiciously whether to grant a patent or not, and might be able to give to the world fuller, more accurate, and early descriptions of it than would be possible under the laws and practice in England. [480

In this country, then, the specification being required to be prepared and filed before the patent issues, it can well be referred to therein *in extenso*, as containing the whole subject-matter of the claim or petition for a patent, and then not only be recorded for information, as the laws both in England and here require, but beyond what is practicable there, be united and go out with the letters-patent themselves, so as to be sure that these last thus contain the substance of what is designed to be regarded as a portion of the petition, and thus exhibit with accuracy all the claim by the inventor.

But before inquiring more particularly into the effect of this change, it may be useful to see if it is a compliance with the laws in respect to a petition which existed when this patent issued, but were altered in terms shortly after.

A petition always was, and still is, required to be presented by an inventor when he asks for a patent, and one is recited in this patent to have been presented here. It was also highly important in England, that the contents of the petition as to the description of the invention should be full, in order to include the material parts of them in the patent, no specification being so soon filed there, as here, to obtain such description from, or to be treated as a portion of the petition, and the whole of it sent out with the patent, and thus complying

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with the spirit of the law, and giving fuller and more accurate information as to the invention than any abstract of it could.

In this view, and under such laws and practice here, it will be seen that the contents of the petition, as well as the petition itself, became a very unimportant form, except as construed to adopt the specification, and the contents of the latter to be considered substantially as the contents of the former.

Accordingly, it is not a little curious, that, though the act of 1793, which is to govern this case, required, like that of 1790, a petition to be presented, and the patent when issued, as in the English form, to recite the "allegations and suggestions of the petition," (1 Stat. at L., p. 321, sec. 1, and p. 110, sec. 3,) yet, on careful inquiry at the proper office, so far as its records are restored, it appears that, after the first act of 1790 passed, the petitions standing alone seldom contained any thing as to the patent beyond a mere title; sometimes fuller, and again very imperfect and general, with no other allegations or suggestions, or descriptions whatever, except *481] those in the *schedule or specification. The only exception found is the case of *Evans v. Chambers*, 2 Wash. C. C., 125, in a petition filed December 18th, 1790.

Though the records of the patent-office before 1836 were consumed in that year, many have been restored, and one as far back as August 10th, 1791, where the petition standing alone speaks of having invented only "an easy method of propelling boats and other vessels through the water by the power of horses and cattle." All the rest is left to the schedule. Other petitions, standing alone, are still more meagre; one, for instance, in 1804, asks a patent only of a "new and useful improvement, being a composition or tablets to write or draw on;" another, only "a new and useful improvement in the foot-stove;" and another, only "a new and useful improvement for shoemaking;" and so through the great mass of them for nearly half a century. But the specification being filed at the same time, and often on the same paper, it seems to have been regarded, whether specially named in the petition or not, as a part of it, and as giving the particulars desired in it; and hence, to avoid mistakes as to the extent of the inventor's claim, and to comply with the law, by inserting in the patent at least the substance of the petition, the officers inserted, by express reference, the whole descriptive portion of it as contained in the schedule. This may have grown out of the decision of *Evans v. Chambers*, in order to remedy one difficulty there. Cases have been found as early as 1804, and with great uniformity since, ex-

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explicitly making the schedule annexed a part of the letters-patent. Proofs of this exist, also, in our reports, as early as 1821, in *Grant et al. v. Raymond*, 6 Pet., 222; and one, 1st Oct., 1825, in *Gray et al. v. James et al.*, Pet. C. C., 394; and 27 Dec., 1828, *Wilson v. Rousseau*, 4 How., 649.

Indeed, it is the only form of a patent here known at the patent-office, and the only one given in American treatises on patents. Phill. Pat., 523. Doubtless this use of the schedule was adopted, because it contained, according to common understanding and practice, matter accompanying the petition as a part of its substance, and all the description of the invention ever desired either in England or here in the petition. Hence it is apparent, if the schedule itself was made a part of the patent, and sent out to the world with it, all, and even more, was contained in it than could be in any abstract or digest of a petition, as in the English form.

We regard this mode and usage on this subject, adopted so early here and practised so long, as not proper to be overruled now, to the destruction of every patent, probably, from 1791 to *1836; and this, too, when the spirit of [*482 all our system was thus more fully carried out than it could have been in any other way.

As this course, however, sometimes was misunderstood and led to misconstructions, the revising act as to patents, in July 4th, 1836, changed the phraseology of the law in this respect, in order to conform to this long usage and construction under the act of 1793, and required not in terms any abstract of the petition in the patent, but rather "a short description" or title of the invention or discovery, "correctly indicating its nature and design," and "referring to the specification for the particulars thereof, a copy of which shall be annexed to the patent." And it is that—the specification or schedule—which is fully to specify "what the patentee claims as his invention or discovery." Sec. 5. (5 Stat. at L., 119.)

It was, therefore, from this long construction, in such various ways established or ratified, that, in the present patent, the schedule, or, in other words, the specification, was incorporated expressly and at length into the letters themselves,—not by merely annexing them with wafer or tape, as is argued, but describing the invention as an "improvement, a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents." Hence, too, wherever this form has been adopted, either before or since the act of 1836, it is as much to be considered with the letters,—*literæ patentēs*,—in construing them, as any paper referred to in a deed or other contract

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Most descriptions of lands are to be ascertained only by the other deeds and records expressly specified or referred to for guides; and so of schedules of personal property, annexed to bills of sale. *Foxcroft v. Mallett*, 4 How., 378; 21 Me., 69; 20 Pick. (Mass.), 122; Phil. on Pat., 228; *Earle v. Sawyer*, 4 Mason, 9; *Ex parte Fox*, 1 Ves. & B., 67. The schedule, therefore, is in such case to be regarded as a component part of the patent. Pet. C. C., 394, and *Davis v. Palmer et al.*, 2 Brock., 301. The oath of Emerson, too, that he was inventor of the improvement, must thus be considered as extending to all described in the schedule, no less than the title; and this is peculiarly proper, when the specification is his own account of the improvement, and the patent is usually only the account of it by another, an officer of the government. Taking, then, the specification and letters together, as the patent-office and the inventor have manifestly in this instance intended that they should be, and they include what has long been deemed a part and the substance of the petition; and the patent described in them is quite broad enough to embrace what *483] is alleged in the writ to have been taken out as a *patent by the plaintiff, and to have been violated by the defendants. They are almost *ipsisismis verbis*. And when we are called upon to decide the meaning of the patent included in these letters, it seems our duty not only to look for aid to the specification as a specification, which is customary, (1 Gall., 437; 2 Story, 621; 1 Mason, 477,) but as a schedule, made here an integral portion of the letters themselves, and going out with them to the world, at first, as a part and parcel of them, and for this purpose united together forever as identical.

It will thus be seen, that the effect of these changes in our patent laws and the long usage and construction under them is entirely to remove the objection, that the patent in this case was not as broad as the claim in the writ, and did not comply substantially with the requirements connected with the petition.

From want of full attention to the differences between the English laws and ours, on patents, the views thrown out in some of the early cases in this country do not entirely accord with those now offered. Paine, 441; *Pennock et al. v. Dialogue*, 2 Pet., 1. Some other diversity exists at times, in consequence of the act of 1793, and the usages under it in the patent-office, not being in all respects as the act of 1836. But it is not important, in this case, to go farther into these considerations.

The next objection is, that this description in the letters thus considered covers more than one patent, and is, therefore, void.

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There seems to have been no good reason at first, unless it be a fiscal one on the part of the government when issuing patents, why more than one in favor of the same inventor should not be embraced in one instrument, like more than one tract of land in one deed, or patent for land. *Phill. Pat.*, 217.

Each could be set out in separate articles or paragraphs, as different counts for different matters in libels in admiralty or declarations at common law, and the specifications could be made distinct for each, and equally clear.

But to obtain more revenue, the public officers have generally declined to issue letters for more than one patent described in them. *Renouard*, 293; *Phill. Pat.*, 218. The courts have been disposed to acquiesce in the practice, as conducive to clearness and certainty. And if letters issue otherwise inadvertently, to hold them, as a general rule, null. But it is a well-established exception, that patents may be united, if two or more, included in one set of letters, relate to a like subject, or are in their nature or operation connected together. *Phill. Pat.*, 218, 219; *Barrett v. Hall*, 1 *Mason*, 447; *Moody v. Fiske*, 2 *Id.*, 112; *Wyeth et al. v. Stone et al.*, 1 *Story*, 273.

*Those here are of that character, being all connected with the use of the improvements in the steam- [484 engine, as applied to propel carriages or vessels, and may therefore be united in one instrument.

Another objection is, that these letters, even when thus connected with the specification, are not sufficiently clear and certain in their description of the inventions.

This involves a question of law only in part, or so far as regards the construction of the written words used. *Reutgen v. Kanours et al.*, 1 *Wash. C. C.*, 168; *Davis v. Palmer et al.*, 2 *Brock.*, 303; *Wood v. Underhill*, 5 *How.*, 1. The degree of clearness and freedom from ambiguity required in such cases is, by the patent act itself of 1793, to be sufficient "to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same." 1 *Stat. at L.*, 321. See also on this, *Gods. Pat.*, 153, 154; 2 *H. Bl.*, 489; *Wood v. Underhill*, 5 *How.*, 1; *Davoll et al. v. Brown*, 1 *Woodb. & M.*, 57; *Pet. C. C.*, 301; *Sullivan v. Redfield*, *Paine*, 441.

There are some further and laudable objects in having exactness to this extent, so as, when the specification is presented, to enable the commissioner of patents to judge correctly whether the matter claimed is new or too broad. 3 *Wheat.*, 454; 3 *Brod. & B.*, 5; 1 *Stark.*, 192. So, also, to enable

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courts, when it is contested afterwards before them, to form a like judgment. 1 Stark., 192. And so that the public, while the term continues, may be able to understand what the patent is, and refrain from its use, unless licensed. Webst. Pat., 86; 11 East, 105; 3 Meriv., 161; *Evans v. Eaton*, 3 Wash. C. C., 453; 4 Id., 9; *Bovill v. Moore*, Davies, 361; *Lowell v. Lewis*, 1 Mason, 182-189.

In the present instance, yielding to the force of such reasons in favor of a due and rational degree of certainty in describing any improvements claimed as new, there still seems to us, though without the aid of experts and machinists, no difficulty in ascertaining, from the language used here, the new movement intended to be given to the steam-engine, by substituting a continued rotary motion for a crank motion, and the new form of the spiral wheel, when the engine is used in vessels, by changing the form of the paddles and placing them near the ends of the arms; and the new connection of the power with the capstan of such vessels, by inserting the upper end *485] of the shaft into the capstan. It is obvious, also, that the inventor *claims as his improvement, not the whole of the engine, nor the whole of the wheel, but both merely in the new and superior form which he particularly sets out. He, therefore, does not claim too much, which might be bad. *Hill v. Thompson et al.*, 2 J. J. Marsh. (Ky.), 435; 4 Wash. C. C., 68; Gods. Pat., 189; *Kay v. Marshall*, 1 Myl. & C., 373; 1 Story, 273; 2 Mason, 112; 4 Barn. & Ald., 541; *Bovill v. Moore*, 2 Marsh., 211.

The novelty in each he describes clearly, as he should; and it is not necessary he should go further. 1 Story, 286; Webst. Pat., 86, note. *McFarlane v. Price*, 1 Stark., 199; and *King v. Cutler*, Id., 354; 3 Car. & P., 611; 2 Mason, 112; *Kingsby & Pirss. Pat.*, 61; Gods. Pat., 154; *Isaacs v. Cooper et al.*, 4 Wash. C. C., 259.

He need not describe particularly, and disclaim all the old parts. 7 Wheat., 435; Phill. Pat., 270, and cases cited.

And the more especially is that unnecessary, when such disclaimer is manifestly, in substance, the result of his claiming as new only the portions which he does describe specially. All which is required on principle in order to be exact, and not ambiguous, thus becomes so.

It is to be recollected, likewise, that the models and drawings were a part of this case below, and are proper to be resorted to for clearer information. *Earle v. Sawyer*, 4 Mason, 9. With them and such explanatory testimony as experts and machinists could furnish, the court below were in a condition to understand better all the details, and to decide more cor-

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rectly on the clearness of the description; but from all we have seen on the record alone, we do not hesitate to concur in the views on this point as expressed in that court.

In conclusion, on the other objections to the proof, as to the drawings and to the charge below in relation to the effect of them and to the destruction of them by fire, we likewise approve the directions given to the jury.

The destruction by fire was no fault of the inventor; and his rights had all become previously perfected. This is too plain to need further illustration. We cannot consent to be over astute in sustaining objections to patents. 4 East, 135; *Crosley v. Beverly*, 3 Car. & P., 513, 514. The true rule of construction in respect to patents and specifications, and the doings generally of inventors, is to apply to them plain and ordinary principles, as we have endeavored to on this occasion, and not, in this most metaphysical branch of modern law, to yield to subtleties and technicalities, unsuited to the subject and not in keeping with the liberal spirit of the age, and likely to prove ruinous to a class of the community so inconsiderate *and unskilled in business as men of genius [486 and inventors usually are.

Indeed, the English letters-patent themselves now, however different may have been once their form or the practice under them, declare that "they are to be construed" "in the most favorable and beneficial sense, for the best advantage" of the patentee. Gods. Pat., 24, App., 7; *Kingsby & P. Pat.*, 35. See also, on this rule, *Grant v. Raymond*, 6 Pet., 218; *Ames v. Howard*, 1 Sumn., 482-485; *Wyeth v. Stone*, 1 Story, 273, 287; *Blanchard v. Sprague*, 2 Id., 164; 2 Brock., 303; 2 Barn. & Ald., 345, in *The King v. Wheeler*; 4 Howard, 708, in *Wilson v. Rousseau et al.*; 1 Crompton, M. & R., 864, 876, in *Russell v. Cowley*.

The judgment below is affirmed.

Mr. Chief Justice TANEY, Mr. Justice DANIEL, and Mr. Justice GRIER, dissented from the opinion of the court.

Note.—After the delivery of this opinion, the counsel for the plaintiffs in error suggested that other questions were made below, which they desired to be considered, and therefore moved for another *certiorari* to bring them up. This was allowed, and judgment suspended till the next term.

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WILLIAM HOUSTON AND OTHERS, AND FRANCIS FISK AND OTHERS, PLAINTIFFS IN ERROR, v. THE CITY BANK OF NEW ORLEANS.

The District Court of the United States, sitting in bankruptcy, had power to decree a sale of the mortgaged property of a bankrupt; and if there are more mortgages than one, and the proceeds of sale are insufficient to discharge the eldest mortgage, the purchaser will hold the property free and clear of all encumbrances arising from the junior mortgage.¹

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the state of Louisiana.

The facts in the case are fully set forth in the opinion of the court.

It was argued by *Mr. Johnson* and *Mr. Clay*, for the plaintiffs in error, and *Mr. Sergeant*, for the defendants in error.

Mr. Johnson stated the case on behalf of the plaintiffs in error, who were purchasers of certain property which was exposed to public sale by order of the District Court of the United States. The question was, whether a mortgage upon the property, held by the City Bank, was an existing lien at the time of filing the bill, or whether the lien had been destroyed by the proceedings in bankruptcy.

*487] *He then proceeded to lay down four propositions:—
 1. That the District Court had jurisdiction to decree a sale, with or without the assent of the mortgagee, and the purchaser gets an absolute title against all persons claiming by or through the bankrupt.

2. If wrong in this proposition, and the District Court had no authority to sell without the assent of the mortgagee, then it had power to sell with that assent; and as the property did not sell for enough to pay the first mortgagee, who assented to the sale, the title to the purchaser becomes absolute.

3. If wrong in this, then that the conduct of the City Bank, the junior mortgagee, furnishes presumptive evidence of its assent also to the sale.

4. That the cancellation of the mortgage of the bank under a mandamus, as between the mortgagee and those claiming under him, vested an absolute title in the purchaser.

(As the decision of the court turned entirely upon the first point, the argument of *Mr. Johnson*, and also those of the other counsel, upon the other points, are omitted.)

¹ CITED. *Ray v. Nourseworthy*, 23 Wall., 134.

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I. The District Court had power to decree a sale, with or without the assent of the mortgagee. This involves two branches:—

1st. Had Congress the constitutional power to pass such an act?

2d. Did they, by the act, vest the power in the District Court?

1st. The power of Congress was denied during the passage of the act, but this court have affirmed it by decreeing under it. It is only necessary to refer to the language of the Constitution, and it will be seen that the terms of the grant are of the broadest character. The power is to pass all laws; the only restriction is that they shall be uniform. But as the court has already decided the constitutionality of the law, by acting under it, the inquiry need not be pursued.

2d. Did Congress, by the act, vest the power in question in the District Court?

We have seen, that the power of Congress over the subject of bankruptcy is total and absolute, with the single limitation, that the laws must be uniform; and an examination of the law will show that Congress intended to exercise the whole of its power. This is a cardinal principle in the interpretation of the statute. If the legislative power was intended to be exhausted, we can judge how much was given to the courts. We say, that jurisdiction over the whole subject of bankruptcy was conferred.

The title of the act is coextensive with the power of Congress. *It is "to establish a uniform system," &c. [*488 The first section is so too. The second avoids certain deeds, &c., and the proviso says that liens or mortgages, &c., shall not be impaired. The only effect of this is to preserve the rights themselves; but it gives no direction how the rights are to be enforced. It means that the courts of the United States are to protect them, as well as the state courts; and the uniform rule by which this is to be done can only be found in the former, acting as they do from one common source of construction and authority, namely, this court. The exception itself in favor of these rights shows that Congress intended to occupy the whole ground. Everything which is not excepted passes under the act. The rights themselves, therefore, being the only matters which are excepted, the mode of enforcing those rights by an application to the state courts is not saved. Not being excepted, it is gone. If Congress had intended that the state courts should retain their jurisdiction over mortgages, and have the power of foreclosing them, the law would have said so. The argument upon the other side

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must be, that all these encumbrances were excluded from the operation of the law entirely. But the bankrupt is obliged to make a return of all his property of every kind, under the penalty of losing the benefit of the law. He must include his mortgaged property, and the whole must be adjudicated by one head. Other sections, in addition to the proviso, show a design of giving the control of the whole subject to the District Court. All property of the bankrupt, all his rights in every species of estate, real, personal, and mixed, all his debts, are portions of the matter which is thrown into this court. Debts are provable and proved there. If such a surrender be not made, the bankrupt is not to have the benefit of the act. This shows that all the debts are to be paid out of the property. The fifth, seventh, ninth, tenth, and fifteenth sections all tend to show the control of the District Court over the entire subject; the sixth and eighth, more especially. Let us revert to the question before the court, and see what it is. Had the District Court authority to decree a sale of mortgaged property, so as to give the purchaser a good title? This is the question. The language of the Constitution is very different as to the two subjects of naturalization and bankruptcy. Over the first the power of Congress is only to establish a uniform rule, leaving it to the state, as well as federal, courts to enforce the rule. The jurisdiction of state courts is not taken away. But over the subject of bankruptcy the power is to establish uniform laws. They must be the same everywhere. It would be strange, if the United States courts *489] *which may occur under these laws. The object was uniformity. In fact, this was the condition upon which the power was held by the federal government. The act of Congress says that the District Court shall have jurisdiction over all matters arising under the act, all "cases and controversies," all "acts, matters, and things," &c., until a final distribution. Is this a power merely to sell an estate subject to liens? If a clear title could not be obtained, the property would be sacrificed. The fact that claims may exist upon the property, and the legality of those claims, are wholly different things. A bankrupt may make fraudulent mortgages, or give illegal claims to his wife. Who is to decide the question of their legality, unless it be the District Court? Until the question was settled, the property would not sell. So much for the sixth section. But the eighth removes all doubt, for it allows the Circuit Court to entertain a bill in equity in all cases arising under laws, treaties, &c. The third section vests the rights of a bankrupt in the assignee. Could he not have filed

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a bill in the Circuit Court to have the mortgaged property sold? The mortgagee also might file a bill. If the assignee were to assert, and prove, that the mortgage was void, either in his bill or answer, would not the court set it aside? But the jurisdiction of the Circuit Court is concurrent with the District Court, not superior to it. The District Court has, therefore, the same power.

The decisions of this court in 3 How., 203 and 426, settle the question. But the opinion is said to be *obiter*. It is strange, that the highest court in the land, vested with power to decide constitutional questions, should listen for many hours to arguments, write out its opinion, and that such opinion should be disregarded as *obiter*. It was wise to settle the law then. As soon as the act of 1841 passed, numerous cases occurred under it. Doubts grew up. Judges decided differently. Property to the amount of thousands of dollars was distributed under the law. It was the duty of this court, as guardians of the commonwealth, to settle all these difficulties, and guard against conflicts between the authorities of the states and United States. But the doctrines asserted in *Ex parte Christy*, 3 How., 203, have ceased to be *obiter*. Even if we admit that the precise point now before us was not before the court in that case, yet it came up afterwards, in 3 How., 426. At page 434, the court say, that they concur in the principles and reasoning of *Ex parte Christy*. The dismissal of the bill depended upon the case coming within the preceding case of *Ex parte Christy*, and the decision was made upon this ground. This was not, therefore, an *obiter* opinion. [*490 At page 440, Mr. *Justice Catron never doubted the power of the District Court over mortgaged property, provided the jurisdiction of a state court had not first attached. As this did not occur in the present case, it appears to be free from all objection.

Mr. Sergeant, for defendants in error.

This case is brought to this court under the twenty-fifth section of the Judiciary Act, and the only point open is the one which arises under that section. It has been said by the counsel on the other side, that the whole case is before this court, and the authority of *Osborne v. Bank of United States* cited in support of the position. But that case was not brought here under the twenty-fifth section. This court cannot decide that the court below was right on the constitutional point, and then proceed to reverse the decision for other real sons. Only one of the points stated by the opposite counsel is before the court now. The other three are not. All ques-

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tions relating to the respective rights of different mortgagees is a Louisiana question, to be decided by the state courts. Whether or not the bank assented to the sale is not a point which this court is at liberty to examine under the record, nor whether the proceedings in the state courts, in order to obtain the cancellation of the mortgages, were regular or not. These are questions for the courts of the state exclusively. The only question now before us is the right of the District Court, under the act of Congress, to force to a conclusion all matters between a mortgagor and mortgagee. How has the exercise of this power worked in the present case? The bankrupt was worth \$350,000, and borrowed \$200,000 on mortgage. The property, under the forced sale, sold for \$120,000 only, not one third of what the assignee had valued it at. (*Mr. Sergeant* here recited the facts in the case.)

The question before us may be divided into two branches:—

1st. Had the District Court jurisdiction over mortgages?

2d. Had it jurisdiction in this case, and in the mode pursued?

1st. Before the case of *Ex parte Christy*, different constructions had been given to the act of Congress, and we are still in the midst of the conflict. Where was the necessity of deciding in advance? The act of Congress could as well be carried out in one way as in the other. If the settlement of questions relating to mortgages had been left to state courts, it would not have protracted the settlement of a bankrupt's estate. The necessity of the case does not demand that this *491] power should be vested in the District Courts. The existence *of different opinions shows a doubt of the existence of such a power; and a decision in favor of this ultra power will make a law odious which was not so before. It makes the law interfere with state jurisdiction. If this mortgage had been left to the ordinary course of proceeding in Louisiana, the case would have been settled long ago. But instead of that, we are here now, disputing about an act of Congress. What is it? The proviso in the second section controls and limits the whole act. It declares that nothing shall annul, destroy, or impair the rights of married women, or liens or mortgages. Without this proviso, the law could not have been passed. It was put in because the states required it to be so. The reservation is that liens shall not be impaired. Suppose a lien existed upon property, and the person who held the lien was put into possession, and an order of the District Court forces him to sell it when he does not wish to do so. Is not his lien impaired? The creditor is in possession of property, under a contract that he shall keep

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it until the debtor pays him what is due, and the court sends an officer to take it away. Has he not a less right than the contract gives him? So, also, the construction contended for on the other side requires the District Court to settle the rights of married women. What right has this court to meddle with the subject, whilst a woman is yet under coverture? Who is to represent her? The proviso saves equally rights under contracts and rights under the law. Your aid is not asked to protect them. All liens are preserved which are valid by the laws of the respective states. Who is to judge of their validity? The state courts, or the judges of this court in their circuits? Whichever tribunal decides, it must look only to state laws. Where, then, is the evil of allowing state courts to interpret state laws?

It is not correct to say, as the opposite counsel has done, that where Congress has plenary power, and passes an act, therefore the act must be construed to the full extent of the power which Congress possessed. This has not been the doctrine of Congress nor of the people. Half a century ago, this court decided that they would take jurisdiction only so far as Congress had delegated it. The Judiciary Act of 1789 limits the power of this court, which has never gone beyond it. Doubtful words must not be construed to enlarge jurisdiction until the people alter the Constitution of the United States. If there be a doubt, the test must then be applied, whether a necessary implication exists, or whether the laws of the United States can be enforced without the jurisdiction claimed. This is the rule in all cases of limited jurisdiction. Apply it to this case. Has Congress said clearly that this power is given to the District *Court? On the contrary, [*492 some of the judges of this court have denied the power, which shows that it is not clearly granted.

The second, third, and eleventh sections all have the same object in view, namely, the preservation of rights which exist under state laws; and the only inquiry is into the validity of these rights under those laws. The United States are jealous of their Constitution, and have courts of their own to protect it. Is it unreasonable to concede the same feeling to the states, and to allow their own courts to decide upon rights flowing from state laws? Nobody doubts the correctness of the course pursued by the United States. Why not grant the same to the states?

The third section gives to the assignee all the rights of the bankrupt. Take the case of property pledged for a debt due by a bankrupt, and in possession of the mortgagee. The bankrupt himself has no right to take it out of his possession,

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except by redeeming it. How, then, can the assignee do it, and exercise greater power than the bankrupt himself? All that the assignee can legally do is to redeem. But the claim here is, that the assignee can bring the unwilling creditor into the District Court, and compel him to sell the property. If there is a loss, on whom will it fall? The creditor must be the only sufferer. So it would be, if family rights were involved. The assignee would look only to the interest of the creditors of the bankrupt, and the rights of the family be wholly disregarded.

2d. Had the District Court jurisdiction in this case, and in the mode pursued?

(*Mr. Sergeant* here objected, that the requisitions of the act had not been complied with, as to the petition, notice, &c.)

In England, the courts order trustees to invest trust-funds in mortgages, and so they do in the United States. Such an investment is generally recognized as a safe place for money. What is a mortgage? It is an estate in land vested in the mortgagee. It may be called a security for a debt, but it is created by a conveyance of the estate. It is true that it is an estate on condition subsequent, but if the debt is not paid, the estate vests in the mortgagee. The relief sought here is to have property sold. I ask that the contract may be carried out. The nature of a mortgage is explained in 1 How., 318, and 9 Wheat., 489. It is there asserted, that the mortgagor has no right, at law or equity, but to redeem the property by paying the debt. Whilst the mortgagee has two remedies,—namely, by ejectment and bill,—the mortgagor has no right *493] except to redeem. Congress knew this, and vested his right *in the assignee. In Pennsylvania there is no foreclosure of a mortgage. The courts of law furnish the remedy. Our mortgagee can never be obliged to sell. Will you overturn our law of mortgage by ambiguous words? I adhere to the contract in this case. They go out of it. It is at the option of the mortgagee whether to sell or not; but they compel him to sell. The property was worth \$350,000. Suppose they had waited for a favorable time to sell, instead of putting it up at auction. What good has accrued to any one from so putting it up? None. But the opposite counsel say that this course is recommended by its simplicity. What has this simplicity produced? A long contest in Louisiana, and now here, at a grievous expense. Congress never intended this. Nor did they intend to place the courts of the United States in a position antagonistical to the state courts, and thereby compel the latter to surrender the whole control of subject. And for what purpose? To promote speedy set-

tlements? The cases under the bankrupt law of 1800 are not yet all disposed of. Now and then we find one walking the earth, like an unquiet ghost.

Mr. Clay, for the plaintiffs in error, in reply and conclusion.

Thomas Banks, a citizen of New Orleans, being the owner of a block of buildings in that city, a remarkable edifice, called Banks's Arcade, executed three several mortgages upon it, the first to the New Orleans Canal and Banking Company, the second to the Carrollton Railroad Company, and the third, and last in point of time, to the City Bank of New Orleans, the defendant in this writ of error. These mortgages were executed to secure payment of large sums of money which Banks owed to the respective mortgagees, as stated in the mortgages. On the 30th of July, 1842, Banks filed his petition, in the District Court of the United States, holden in New Orleans, to be declared a bankrupt, under the act of the Congress of the United States to establish a uniform system of bankruptcy. His petition was accompanied by a schedule, exhibiting the names of all his creditors, and a list of all his property; and among his creditors so enumerated is the defendant, for a loan on mortgage and on pledge of stock; and among the property described in the schedule, and surrendered to his creditors, is Banks's Arcade. On the 5th of September, 1842, after due publication and notice served on the creditors resident in the city of New Orleans, (the defendant being one of them,) according to the requisition of the bankrupt act, a decree of bankruptcy was pronounced by the District Court, and F. B. Conrad was appointed assignee of the bankrupt's estate, who qualified, and entered on the duties of his office according to law.

*On the 10th of October, 1842, the assignee presented a petition to the District Court, stating that a great [*494 portion of the bankrupt's property consisted of large masses, such as the City Hotel, Banks's Arcade, &c., which would sell to greater advantage if subdivided; that the leases granted by the bankrupt were about expiring; and that the interest of the estate would be promoted by leasing out the property for one year, as purchasers would prefer buying with tenants in occupation of the property. A day was fixed, by order of the court, for the hearing of the petition, which was advertised in the newspapers; and on the hearing, the prayer of the petition was granted, and the assignee took possession of Banks's Arcade and the other property of the bankrupt.

Subsequently, the assignee applied to the District Court for an order of sale of the property, exhibited plans for its subdivi-

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vision, and proposed terms of sale. The court fixed a day for the hearing of the petition, ordered it to be published in the newspapers, and personal notice of it to be served on the mortgagees. On the 6th of January, 1843, the court, after reciting that notices had been published according to the rules of court, and that personal notice had been served on the mortgage creditors, naming them, (and the defendant among them,) pronounced a judgment, that the sale of the property take place in the manner and on the terms proposed by the assignee, on the 15th of February, 1843; and that the mortgages be cancelled, so as to give purchasers unencumbered titles, reserving, however, to the mortgagees respectively, their rights upon the proceeds of sale.

The sale accordingly was effected, by the marshal of the United States, on the day appointed, when the plaintiffs, being the highest bidders, became respectively the purchasers of the several parcels adjudged to them by that officer. The sale was one of the most notorious and attractive that ever took place in the city of New Orleans, from the conspicuous position, great value, and well-known character of Banks's Arcade, &c. It was duly advertised in the newspapers of the city, placarded, and otherwise made public, and brought together a vast multitude. It was conducted with irreproachable fairness, which is not contested at all in the present suit. By the subdivision of the great block of buildings into smaller parcels, they were placed within the reach of a greater number of persons, and consequently excited more competition among persons disposed to purchase. By the large and liberal credits given to purchasers, (which there was no obligation to have done,) the property was also placed in the power of more *495] capitalists and purchasers. From these two causes, it is beyond a *doubt, that the property sold for much more than it would have commanded if it had been put up in block and sold for cash.

From the public advertisement and the great notoriety of this sale of Banks's Arcade, in the absence of all proof it would not have been doubted, but it is positively proven in the cause, that the defendant had full notice of the sale. Yet neither the defendant, nor any one of that vast multitude present at the sale, interposed, in any manner whatever, to forbid it, or uttered one word of warning or advice to persons bidding, to prevent their purchasing. And the plaintiffs, so far from supposing that they would be involved in a tedious and expensive lawsuit about the property they were purchasing, had every reason to conclude that they would acquire a clear, unencumbered, and indisputable title to it.

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Still, before they actually paid the consideration money, and received titles for the property purchased, they required of the assignee the production of the certificate of the register of mortgages, that there existed no mortgage or other encumbrance on the property, which certificate is held by the law and practice of Louisiana to be a perfect security to purchasers against preëxisting liens. The District Court, it has been seen, had ordered the mortgages (including the defendant's) to be cancelled, prior to the sale, so that purchasers might obtain unencumbered titles; and what the law, through the tribunals of justice, commands to be done, ought to be considered and taken as done. But to remove all scruples and quiet all apprehensions, on the 24th of February, 1843, the court passed an order, at the instance of the assignee, stating that, in pursuance of its order, a sale had taken place, for which sale the New Orleans Canal and Banking Company, which held the first and oldest mortgage on Banks's Arcade, had given to the assignee its written consent that its mortgage should be raised, in order that the assignee might pass clear titles to the purchasers; and ordering that the recorder of mortgages should erase from his records the mortgages of the defendant and others.

On the 6th of March, 1843, the assignee presented his petition to the Parish Court for the parish of New Orleans, reciting the proceedings in the District Court, and the refusal of the recorder of mortgages to comply with the order to erase the mortgages; and concluding by praying the court for a mandamus to compel the register to cancel the mortgages in conformity with the order of the District Court. The case was elaborately argued for three days, in the Parish Court, which finally ordered the mandamus to be granted. [*496 The recorder *appealed from this decision to the Supreme Court of Louisiana; and that court affirmed it. (See 5 Rob. (La.), 49.) Thereupon the recorder erased the mortgages, gave a certificate that no encumbrances existed on the property, and the assignee passed a clear title to the plaintiffs, and received the price from them at which the property had been stricken off, in money and notes, according to the terms of sale.

On the 23d of June, 1843, the New Orleans Canal and Banking Company presented a petition to the District Court, stating the sale of Banks's Arcade, and praying that, as the first mortgagee, the assignee be ordered to pay over to the petitioner the cash proceeds and the notes of the purchasers. The court ordered public notice to be given of this petition, which having been accordingly given, on the 6th of July,

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1843, the day fixed for its being heard, the court gave judgment that the assignee pay over to the Canal Bank, holding the oldest mortgage, the proceeds of the sale of Banks's Arcade. The aggregate amount fell far short of what was due to the bank.

On the 5th of January, 1844, the assignee having filed his account of his administration of the bankrupt's estate, so far as he had been able to make progress in it, his account was referred by the court to commissioners, for examination and report. The commissioners proceeded to the adjustment of the assignee's accounts, awarded or adjudged the proceeds of the sale of Banks's Arcade to the New Orleans Canal and Banking Company, as the first mortgage creditor on the property, and reported to the court.

Upon receiving their report, the hearing on it was fixed for the 18th of April, 1844, and notice was ordered to be given through the public papers, and personally, to the resident creditors of the bankrupt, to show cause why the report should not be homologated by the court. Among the creditors personally notified was the City Bank of New Orleans, the present defendant. On the day fixed, the report of the commissioners was homologated by the court.

Throughout the whole proceedings of the District Court, in the case of Thomas Banks's bankruptcy, that court appears to have acted with the greatest caution, and with the most conscientious regard to the rights of mortgagees and all creditors. In the commencement of Banks's action or suit against his creditors, to obtain his discharge, under the bankrupt act of Congress, they were notified by publication in the newspapers, and personally, as required by the act. On the occasion of every important step taken during the progress of the case, *497] the creditors were fully notified, either personally or by publication *in the newspapers, or in both forms, of what was proposed to be done. Thus, when the assignee proposed to have the property subdivided, and, as the leases upon it were about expiring, asked for authority to grant new leases, the court fixed a time for hearing his motion, and ordered public notice thereof to be given in the newspapers. So, when the assignee applied for an order of sale, accompanying his petition with a schedule of the property to be sold, and stating the proposed terms of sale, the court fixed a time for hearing the motion, and ordered that public notice thereof be given in the newspapers, and personally served on the mortgage creditors. So, also, when the New Orleans Canal and Banking Company, after the sale of Banks's Arcade, petitioned the court, as the oldest mortgagee, to have the proceeds

of the sale applied towards payment of its mortgage, a day was fixed for the trial of this petition, and the court ordered public notice to be given in the newspapers. And again, after the report was made of the commissioners appointed to settle the assignee's account of the administration of the bankrupt's estate, by which report the proceeds of Banks's Arcade were awarded to the first mortgagee, as they had been previously by the judgment of the court, notice was given to all creditors, through the public papers, and served personally on the defendant, to appear and show cause why the report should not be homologated by the court.

But if the District Court were signally assiduous and untiring in inviting, by repeated notifications, all persons, and the City Bank especially, to come forward and assert their rights, and oppose whatever might unjustly tend to their prejudice, that corporation appears to have firmly resolved to disregard all its friendly summonses. It maintained throughout an obstinate, if not sullen, silence. It determined upon a deliberate, if not masterly, inactivity. It never once, on any occasion, appeared in the District Court sitting in the bankruptcy of Thomas Banks. It did not object to, or contest, the sale of the Arcade, when about to be ordered. It did not forbid the sale, when about to be made. It did not oppose the appropriation of the proceeds of sale towards the payment of the first and prior mortgage. When the report of the commissioners, appointed to settle the accounts of the assignee, was about to be homologated by the court, the defendant did not oppose the slightest obstacle, although that report expressly assigned the proceeds of the Arcade away from his mortgage towards the satisfaction of the elder mortgage. He made no opposition, which is known, to the erasure of his mortgage, either before the Parish Court of New Orleans, or before the Supreme Court of Louisiana. If the defendant entertained any antipathy to *the federal tribunal, [*498 the state courts remained open to him; but neither there did he make his appearance, whilst any of the transactions which he now seeks to annul and set aside were in progress. He did not before any state court institute an hypothecary action, or apply for any order of seizure and sale to subject the Arcade to the payment of his mortgage. He applied for no injunction to restrain the proceedings before the District Court, nor to prevent the Parish Court from erasing his mortgage. The defendant was as silent as the grave until after the whole proceedings about the Arcade were closed in the bankrupt court, until after the plaintiffs had bought the property, without warning, paid the purchase-money, received a clear title, and

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taken a peaceable and quiet, and, as they had every right to suppose, an undisturbable possession, of what they had fairly bought and honestly paid for.

In this stage of the business, when all seemed perfectly settled, and when, according to the ordinary course of human affairs, and the wants of quiet and repose in society, there should be a termination of all controversy, the City Bank of New Orleans for the first time puts itself in motion, and, seeking to disregard, disturb, and set aside all that had been previously done in respect to the Arcade, commences in the Commercial Court of New Orleans its hypothecary action against the plaintiffs in this writ of error, as third parties in possession of the mortgaged property. It does not make defendants to the suit, either the New Orleans Canal and Banking Company, or the Carrollton Railroad Company, both of which, as has been before stated, held mortgages prior in time and dignity to that of the City Bank of New Orleans. It charges no irregularity, imputes no fraud, and does not impeach the fairness of the sale. It is founded exclusively upon the notion, that the highest judicial tribunals of the state and Union had perseveringly and deliberately misinterpreted the bankrupt act; and that, although that act is now dead, and years have elapsed and millions of property have changed hands under faith of the interpretation given to it, it is not now too late to go back and correct the error into which those tribunals have fallen. The court dismissed the action of the City Bank, and it appealed to the Supreme Court of Louisiana. That court, reversing the decision of the inferior tribunal, gave judgment for the City Bank, to reverse which this writ of error is now prosecuted.

I. The first ground on which the plaintiffs rely is, that the first mortgagee, being an acknowledged party to the cause, gave his previous consent and authority to the sale, and, after *499] it was made, petitioned the court to receive the proceeds, and *actually did receive them, towards the satisfaction of his mortgage, and so ratified and confirmed the previous sale.

(As the decision of the court did not turn upon this point, the argument is omitted.)

II. But it is contended that, without any assent of the first mortgagee to the proceedings of the court in bankruptcy, and even in opposition to the protest of that and every other encumbrancer, that court, under the act of Congress, had full and complete jurisdiction over the mortgaged property, had ample power to order its sale, and that the sale, in virtue of its authority, is valid and binding upon all parties whatever.

Nothing, it would seem, on principle, would be more proper and fitting, than that the assignee of the bankrupt should be invested with all the property, however encumbered, rights, and interests of the bankrupt; that he should have power to sell and dispose of it to the best advantage, making clear titles to the purchasers; and that he should be obliged, at the same time, to show proper regard and pay due respect to all liens and encumbrances existing on the property. In no other way can a unity in the administration of the bankrupts' estate be secured. In no other way can a speedy and definitive settlement of it be effected. If a part of his estate, the unencumbered part only, be subject to the authority of the assignee, and the residue of it, the encumbered part, be beyond his control, and liable to a different and conflicting administration, delay and confusion are inevitable.

What was so manifest and reasonable in itself was not likely to be overlooked by the wisdom of Congress. Accordingly, in the bankrupt act, the assignee is invested with the fullest right and power over the whole estate, rights, and interests of the bankrupt, of whatever kind or nature, to the same extent in which the bankrupt himself held them. (Third section of the act.) And Congress, looking to the interest of all parties to have a speedy settlement of the bankrupt's estate, has provided, (in the tenth section of the act), that it shall, if practicable, be accomplished within two years after the decree in bankruptcy.

By the second section of the act, it is provided, that nothing in the act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of the act.

Under this proviso the defendant contends, that, as mortgagee, he is exempted from the operation of the bankrupt act; that it does not touch or affect him; that [*500 the property which is mortgaged to him is beyond the reach or control of the bankrupt court, and that he may proceed when he pleases to enforce his mortgage rights, without regard to the interests of the other creditors of the bankrupt, and without respect to the requirement of the bankrupt act to insure a speedy settlement and close of the proceedings in each case in bankruptcy, within two years, if practicable, after the decree declaring the bankruptcy.

These are high pretensions, and ought to be fully and justly weighed. Undoubtedly, the rights of all mortgagees, in a due

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execution of the bankrupt act, are to be fully respected and enforced, and are not to be annulled, destroyed, or impaired. But, whilst the most liberal and full effect ought to be given to the part of the act which declares that they shall not be impaired, annulled, or destroyed, full operation should also be allowed to all other parts of the act.

If the act can receive a construction by which the mortgage creditor can be made safe in the receipt of the debt which the mortgage was intended to secure, and other creditors can be allowed to receive what remains of the mortgaged property, after that object is accomplished, that construction would be recommended by justice and equity.

The plaintiffs contend, that the mortgaged property should be fairly administered by the assignee, along with the other property of the bankrupt; that it should be fairly sold, in a manner likely to make it the most productive; and that out of the proceeds the mortgages should be first satisfied, and the residue, if any, be applied to the payment of the general creditors. And this, they contend, is necessary to comply with the provisions of the bankrupt act. Far from annulling, destroying, or impairing the lien, they contend that this course gives to it full and complete effect, securing the identical object for which the mortgage or lien was created.

But the defendant, in effect, contends that the whole property of the bankrupt, as was manifestly intended by the bankrupt act, is not vested in the assignee; that a part of that property, which happens to be mortgaged, is without the power or control of his assignee; that it can only be acted upon and disposed of when the mortgagee pleases; and, consequently, whatever may be its value or amount, whether it exceeds or not the debt which it was intended to secure, it must remain exempt from the power or management of the assignee.

This is not believed to be according to the design of the bankrupt act. That was to subject the whole property of the *501] bankrupt to the payment of all his debts, according to their *priority and privileges. And this design can be best effectuated by subjecting the property to a single and undivided management, under the superintendence of the assignee, acting in obedience to one judicial tribunal.

If the contrary be supposed,—if the mere fact of the existence of a mortgage withdraws the mortgaged property from the control of an assignee,—what might be the consequence? The mortgage may be illegal and invalid, or may be upon property amounting to a value greatly exceeding the debt intended to be secured by it. Is the property mortgaged

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under such circumstances to remain beyond the reach of the assignee? Does not every view which can be taken of the subject lead to the conclusion, that the entire property of a bankrupt, encumbered and unencumbered, should be under the control of the assignee, so as to be administered by him, with due respect to liens or not, as they may happen to exist?

It is further urged by the defendant, that, whilst his mortgage is to remain sacred and beyond the reach of the assignee, the equity of redemption may be sold; in other words, that the mortgage property must be sold, subject to the encumbrance. If the existence of a mortgage protects the property against the operation of the bankrupt act, all "lawful rights of married women or minors, or any liens or other securities on property, real or personal," are equally entitled to the protection claimed under the proviso of the second section of the bankrupt act. How would it be possible to make any rational sale of the estate of the bankrupt, subject to these unascertained encumbrances? Neither the seller could possibly know the actual value of what he was selling, nor the purchaser what he was buying. Both would be acting perfectly in the dark. Between the two modes of selling the encumbered property,—that of selling it although shingled over with unknown liens, or liens of unascertained amount or validity, subject to the whole of them, or that of fairly selling it upon ample notice, liberated from all encumbrances, good and bad, and applying the proceeds first to the satisfaction of all "lawful rights of married women or minors, or any liens, mortgages or other securities," and the surplus, if any, to other creditors,—there cannot for a moment be a doubt which is fraught with the most equity, justice and propriety. The error of the argument of the defendant, in opposition to the latter mode of sale, consists in considering it as annulling, destroying, or impairing the lien. So far from its having that effect, the precise object for which it was created is accomplished by applying the proceeds of the mortgaged property to the satisfaction of the lien. It no more annuls, destroys, or impairs the lien, than would be done by a *judicial [*502 sale of the property under a judgment or the decree of a state tribunal. A mortgage cannot be justly or truly said to be impaired or annulled when it has been fully satisfied, or satisfied to the extent of all the proceeds of the property mortgage.

If it had been the intention of Congress to do any thing more, in regard to mortgages and other liens, than to preserve them unimpaired,—if it had been intended to exclude them altogether from the operation of the bankrupt act,—different

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language from that which was actually used would have been employed. Thus in the third, the next section of the act to that which has been under consideration, the language of the proviso is, "that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture," &c., clearly manifesting, that, with that exception, it was the purpose of Congress to vest in the assignee the whole estate of the bankrupt, of every name and nature, encumbered or unencumbered, to be administered by him with due regard to the rights and privileges of all persons.

But it is useless to prolong the argument in support of the interpretation of the bankrupt law now contended for. Any necessity for it is wholly superseded by authoritative decisions of the highest tribunals, federal and state. The jurisdiction of the United States District Court, sitting in bankruptcy, over the property mortgaged by the bankrupt, is supported and maintained by this court in the case *Ex parte the City Bank of New Orleans* (the same bank which is defendant in this case) against *Christy, Assignee*, 3 How., 292. Nothing can be more full, clear, and satisfactory, than the reasoning employed by this court in that case, and the conclusions at which it arrives. It was objected against it, in the court below, that the decision was extra-judicial; that it was not necessary to determine the point as to the jurisdiction over mortgages; and that the cause went off by a refusal to grant the prohibition moved for. It is true, that, if the Supreme Court had chosen to shrink from any expression on that point of its opinion, and to stand non-committal, it might have limited itself to a simple denial of the prohibition. But it is respectfully conceived, that such a course of darkness would not have well corresponded with the duty and dignity of that high tribunal. The point fairly arose in the cause, was elaborately discussed in the argument, and was deliberately considered by the court. It arose under a new law, just going into full operation throughout the whole extent of the United States, and subject to exposition by a great variety of tribunals, federal and state. Conflicting, or apparently conflicting, *503] decisions were made, or in danger of *being made, by inferior courts. All eyes were anxiously turned to this court for light. The very party now objecting to the authority of the precedent brought the point before the court, and fully, ably, and confidently argued it. Under all these circumstances, and considering the great necessity for uniformity of practice and decision under this new law, could this court have justly and honorably avoided settling definitively the controverted point? The court thought it could not. The

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decision of such a question, which was attended with so much solemnity and consideration, cannot be regarded as *obiter dicta*, or loose expressions of judges, which accidentally fall from them, without deliberation, during the progress of a trial.

But, to put the matter forever at rest, this court subsequently reaffirmed all the doctrines and principles laid down previously in the preceding case, in *Norton's Assignee v. Boyd and others*, 3 How., 434.

I will not go into an examination of the decisions of particular judges of the federal courts, acting on the circuits or in the districts; for if they conflict with those already referred to, they must yield to the paramount authority of this court.

If this decision of the question, by the highest tribunal in the land, stood upon its own exalted authority and dignity alone, it ought to command the respect and obedience of all other tribunals, state and federal, within the United States. For if the Supreme Court of the United States cannot finally and definitively settle a controverted interpretation of a law of the United States, our admirable but complicated system of free government would be thrown, as to the administration of justice, into utter and hopeless disorder and confusion. But it does not rest upon the sole authority of this court. The Supreme Court of Louisiana, by repeated decisions, fully and deliberately considered, had decided the same question in the same way. *Conrad, Assignee, &c., v. Prieur, Recorder, &c.*, 5 Rob. (La.), 49; *Clarke, Assignee, v. Rosenda et al.*, Id., 27; *Benjamin, Assignee, v. Prieur*, Id., 59; *Lewis v. Fisk et al.*, 6 Id., 159.

It will be perceived, on an examination of these cases, that they cover the whole ground of the question of the jurisdiction of the bankrupt court; and that it was thoroughly considered and most ably argued. The Supreme Court of Louisiana declares, that, however the question may be settled in other states, the maintenance of the jurisdiction of the bankrupt court is essential to the purposes of justice in Louisiana; and that, if it be not maintained, "it would be destructive of most of the liens and securities intended to be protected by the last proviso of the second section of the act of Congress," [*504 owing *to the peculiar nature of the liens and mortgages as constituted by the laws of Louisiana.

Thus doubly fortified by the solemn and deliberate decisions of the highest judicial tribunal in the United States, and the highest judicial tribunal of the state of Louisiana, the plaintiffs had some right to suppose that they could not be disturbed in the possession of property fairly purchased, and held by them under the sanction of these high authorities.

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(*Mr. Clay* then replied to *Mr. Sergeant's* argument respecting the irregularity of the proceedings.)

III. That the cancelment and erasure of the defendant's mortgage create an absolute bar to any relief which he now seeks to subject the mortgage in the hands of third parties to his demand.

IV. That the defendant, by his culpable silence and non-intervention, during the whole proceedings, from beginning to end, and terminating in the consummation of the sale of the mortgaged property by the passing of titles, has deprived himself of all right to the aid and assistance of a court of justice to enforce his present claim.

(As the decision of the court did not turn upon either of these points, the argument is omitted.)

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by a writ of error directed to the Supreme Court of the state of Louisiana, under the twenty-fifth section of the act of 1789. The record is voluminous, and necessarily so from the nature of the controversy in the state courts. But the following summary statement contains all the facts material to the question now before this court upon the writ of error.

In 1842, Thomas Banks, a citizen of New Orleans, was declared a bankrupt under the act of Congress to establish a uniform system of bankruptcy, and F. B. Conrad appointed his assignee. At the time of his bankruptcy he was the owner of certain real property in New Orleans, called Banks's Arcade, upon which he had executed three several mortgages, all of them outstanding and unsatisfied at the time he became a bankrupt. The first was to the New Orleans Canal and Banking Company; the second to the Carrollton Railroad Company; and the third to the City Bank of New Orleans.

Upon the application of the assignee, the District Court of the United States ordered those mortgaged premises to be sold, and directed that the mortgages should be cancelled, and the property sold free from encumbrance, rendering to the *505] parties interested their respective priorities in the proceeds. It *was accordingly sold, and purchased by the appellants; and they having complied with the terms of sale, conveyances have been made to them by the assignee, and possession delivered.

Before the money was paid by the purchasers, there were some proceedings in the state courts in order to obtain the actual cancellation of these mortgages in the office in which

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they were recorded. But these proceedings are not material to the question before this court, and it is unnecessary to state them.

After the sale was made and reported by the assignee, the New Orleans Canal and Banking Company, which held the elder mortgage, filed a petition in the District Court, praying that the proceeds of the sale might be paid over to that bank; the whole amount for which the property was sold being insufficient to satisfy the debt due on that mortgage. The said bank had, it appears, before this application was made, consented to the sale by the assignee, and agreed that the mortgages in its favor should be cancelled for the purpose of giving titles to the purchasers, reserving its rights to be paid first out of the proceeds.

But neither the Carrollton Railroad Company nor the City Bank of New Orleans appeared in the District Court in any of the proceedings hereinbefore mentioned, although regularly notified. Nor did either of them exhibit or prove any claim against the bankrupt's estate, nor assent or object to the sale, or to any of the proceedings therein.

Subsequently, however, and after the proceedings upon this subject in the District Court had been completed, and the purchasers had complied with the terms of sale, and received their titles from the assignee, and been placed in possession of the premises, the City Bank of New Orleans, which held the third mortgage, instituted a suit in the Commercial Court of the state, for the purpose of charging the property in the hands of the purchasers with the money due on its mortgage. The purchasers resisted the claim, upon the ground that they were entitled to hold the property free and discharged from this encumbrance, under the sale made to them by the assignee, as hereinbefore stated. And the Commercial Court having decided in favor of the validity of this defence, the bank appealed to the Supreme Court of the state, where the question was raised and argued, whether, under the act of Congress establishing a uniform system of bankruptcy, the purchasers were entitled to hold the premises free and discharged from the mortgage to the City Bank.

Upon this question the Supreme Court reversed the judgment *of the Commercial Court, and adjudged that [*506 the property should be seized by the sheriff, and sold to satisfy the demand of the bank. And it is this judgment of the Supreme Court of Louisiana that is now before this court for revision.

The record manifestly presents a case within the twenty-fifth section of the act of Congress of 1789, and the jurisdic-

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tion of this court has not been disputed. The authority of the District Court of the United States to order the sale of the property free from and discharged of the encumbrances, as mentioned in the proceedings, was drawn in question, and the decision of the Supreme Court of the state was against the validity of the authority thus exercised by the District Court. And this is the only question upon which this court is authorized to pass judgment; for the same section of the act of 1879, which gives jurisdiction in the cases therein enumerated, forbids it to be exercised over any other question which may have arisen in the case, or been decided by the state court.

The question, then, to be decided by this court is simply this:—Are the purchasers under the sale made by the assignee of Thomas Banks, as hereinbefore stated, under the authority of the District Court, entitled to hold the property free and discharged from the mortgage and encumbrance of the City Bank?

With every respect for the learned state court which has decided against the right of the purchasers, we cannot persuade ourselves that it can be either necessary or proper, at this day, for this court, in deciding a case like this, to enter into an argument upon the construction of the bankrupt law, in order to vindicate its judgment. The power of the District Court over mortgages, in cases of bankruptcy, was fully argued and considered in the two cases reported in 3 How., 292, and 426, as appears by the opinions delivered by the court, and the opinions of the justices who dissented. But whatever difference of opinion existed as to some of the propositions maintained in these cases by the majority of the court, there has been no division of opinion upon a question like the one presented in this record. And the court are unanimously of opinion, that the sale made by the assignee of the property in question is valid, and that the purchasers are entitled to hold it free and discharged from the mortgage to the City Bank, and from all other encumbrances mentioned in the proceedings.

The judgment of the Supreme Court of Louisiana must therefore be reversed.

Order.

*507] This cause came on to be heard on the transcript of the *record from the Supreme Court of the state of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme 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 Supreme

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Court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

THE WEST RIVER BRIDGE COMPANY, PLAINTIFFS IN ERROR,
v. JOSEPH DIX AND THE TOWNS OF BRATTLEBORO' AND
DUMMERSTON, IN THE COUNTY OF WINDHAM, DEFEN-
DANTS IN ERROR.

THE WEST RIVER BRIDGE COMPANY, PLAINTIFFS IN ERROR,
v. THE TOWNS OF BRATTLEBORO' AND DUMMERSTON, IN
THE COUNTY OF WINDHAM, AND JOSEPH DIX, ASA
BOYDEN, AND PHINEAS UNDERWOOD, DEFENDANTS IN
ERROR.

A bridge, held by an incorporated company, under a charter from a state, may be condemned and taken as part of a public road, under the laws of that state.¹

This charter was a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state.²

The Constitution of the United States cannot be so construed as to take away this right from the states.³

Nor does the exercise of the right of eminent domain interfere with the inviolability of contracts. All property is held by tenure from the state, and all contracts are made subject to the right of eminent domain. The contract is, therefore, not violated by the exercise of the right.⁴

The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement.

Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property.⁵

¹ CITED. *East Hartford v. Hartford Bridge Co.*, 10 How., 536, 537; *People ex rel. v. Walsh*, 96 Ill., 252. S. P. *Re Towanda Bridge Co.*, 91 Pa. St., 216.

² CITED. *Richmond &c. R. R. Co. v. Louisa R. R. Co.*, 13 How., 83; *Greenwood v. Freight Co.*, 15 Otto, 22. S. P. *Mills v. St. Clair County*, 8 How., 569; *Milner v. New Jersey R. R. Co.*, 6 Am. L. Reg., 6.

³ CITED. *Withers v. Buckley*, 20 How., 89, 91. See *Boon Co. v. Patterson*, 8 Otto, 403.

⁴ CITED. *Planters' Bank v. Sharp*, ante, *331; *Dodge v. Woolsey*, 18 How., 379; *Matter of Meador*, 1 Abb. U. S., 327; *Ashuelot R. R. Co. v. Elliot*, 58 N. H., 456.

⁵ CITED. *Board of Liquidation v. City of New Orleans*, 32 La. Ann., 918; *B. & O. R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va., 853.

There is no principle which forbids

that property acquired by a corporation in virtue of the right of eminent domain should be taken from it by another exercise of the same right. *Chicago &c. R. R. Co. v. Town of Lake*, 71 Ill., 333; *Matter of N. Y. Central &c. R. R. Co.*, 63 N. Y., 326; *Sixth Ave. R. R. Co. v. Kerr*, 72 Id., 330. Compare *Chicago &c. R. R. Co. v. City of Joliet*, 71 Ill., 25; *Central City R'y Co. v. Fort Clark R'y Co.*, 81 Id., 523; *Matter of Rochester Water Comm'rs*, 66 N. Y., 413. But property condemned for one public use—e. g., a railroad, cannot be conveyed to another company, for another use exclusively, except by legislative act; and this, though the railroad be under state control. *West. Union Teleg. Co. v. Amer. Union Teleg. Co.*, 65 Ga., 160; s. c. 38 Am. Rep., 781. Compare *Matter of New York &c. R. R. Co.*, 20 Hun (N. Y.), 201, 205.

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THESE cases were brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Judicature of the state of Vermont.

In 1795, the legislature of Vermont passed an act, entitled, "An act granting to John W. Blake, Calvin Knowlton, and their associates, the privilege of building a toll-bridge over West River, in Brattleboro'."

The first section enacted that Blake, Knowlton, and their associates, should be and continue a body politic and corporate, by the name of the West River Bridge Company, for one hundred years; and that they should have the exclusive privilege of erecting and continuing a bridge over West River, within four miles from the place where said stream united

*508] with Connecticut River.

*The second section fixed the rate of tolls. The third section enacted, that, at the expiration of forty years from the first of December, 1796, the judges of the Supreme Court should appoint commissioners to examine the books and accounts of the company; and if it should appear that the net proceeds should have averaged a larger sum than twelve per cent. per annum, the judges should lessen the tolls, provided they did not reduce them so low as to prevent the proprietors from receiving twelve per cent.

The remaining sections provided for the government of the company, for their keeping the bridge in good repair, &c., &c.

During the years 1795, 1796, and 1797, the company built the bridge.

In 1799, Josiah Arms conveyed to the company a small piece of land, about two acres, lying on the south bank of West River.

In 1803, the legislature passed a supplement to the charter, which altered the rate of tolls, but left the remaining parts of it unaltered.

In November, 1839, the legislature passed an act entitled, "An act relating to highways," in and whereby it was enacted and provided, that "whenever there shall be occasion for any new highway in any town or towns in this state, the Supreme and County Courts shall have the same power to take any real estate, easement, or franchise of any turnpike, or other corporation, when, in their judgment, the public good requires a public highway, which such courts now have, by the laws of this state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons, whose estate, easement, franchise, or rights shall be taken, as are now granted and provided in other

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cases; provided, that no such real estate, easement, or franchise shall be taken in the manner and for the purposes aforesaid, unless the whole of such real estate, easement, or franchise belonging to said corporation shall be taken, and compensation made therefor."

On the 25th of August, 1842, Joseph Dix and fifty-four other persons presented the following petition to the County Court for the county of Windham:—

"That the public highway or stage-road, leading from the stage-house of Henry Smith, in Brattleboro', through the northerly part of said town, and through the town of Dummerston, to the south line of Putney, in said county, has for a long time been a subject of great complaint, both on account of the steep and dangerous hills, and the great difficulty of keeping the same in repair, as now travelled. That [*509 various and repeated *attempts have been made to improve the same, with little success. Your petitioners further represent, that, from actual survey and admeasurement, they are confident a highway may be laid between said termini, and made at a moderate expense, which will avoid most of the hills and be perfectly satisfactory to the public. Your petitioners are aware that some alterations have recently been made on said route by a committee of this court, upon the petition of Paul Chase and others, and that indictments are now pending against said towns for not making the same; but your petitioners believe that said committee, in ordering said alterations, are influenced by the solicitations of interested individuals, rather than the public good, and that if said alterations are worked, they would form but little improvements, and that the public will never be satisfied until said highway is laid on the best possible route; and further, that it will cost as much to make said alterations, (which we consider to be useless,) as it will to make a good travelling road on the route contemplated by the petition.

"And your petitioners further represent, that the toll-bridge across West River, on said route in Brattleboro', owned by the West River Bridge Corporation, is, and for a long time has been a sore grievance, both to the traveller and the inhabitants of the towns in the vicinity, who have occasion to pass and repass, travel and labor, on said highway; and however the legislature in the infancy of the state may have exercised a sound discretion in granting said toll-bridge, yet, in the present improved and thriving condition of the inhabitants, your petitioners are unable to discover any good reason why said grievance should longer be endured, or why the wealthy town of Brattleboro' should not, as well as other towns much

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less able, sustain a free bridge across West River. Your petitioners therefore pray the court, by an able, judicious, and disinterested committee, to cause said route to be surveyed, and such alterations and improvements to be made in the old road, or a new one to be laid, as the public good may require; and also to take the real estate, easement, or franchise of the 'West River Bridge Company,' a corporation owning the afore-said toll-bridge, for the purpose of making a free road and bridge across said river, agreeable to the statute in such case made and provided; and as in duty bound will ever pray."

In conformity with the above prayer, the court appointed three persons to examine the premises and make report.

In May, 1843, the commissioners reported that they had examined the premises, and were unanimously of opinion that a new road ought to be laid out over a considerable portion of *510] the distance between the termini mentioned in the petition, *which road, they said, they had caused to be surveyed and laid out. The report then proceeded as follows:

"The said commissioners also examined the toll-bridge across West River in Brattleboro', and have taken into consideration the propriety of laying a free road across said bridge, at the expense of said town of Brattleboro', as contemplated by said petition; and in this the said commissioners were unanimously of the opinion, that public good required that the real estate, easement, or franchise of the West River Bridge Corporation should be taken, and compensation made therefor, that said toll-bridge might thereafter become a free bridge. The said commissioners have therefore assessed to the said West River Bridge Corporation the sum of four thousand dollars, to be paid to the said West River Bridge Corporation out of the treasury of said town of Brattleboro', in full compensation for all real estate, easement, or franchise belonging to said corporation, which real estate, easement, or franchise is situate in said town of Brattleboro', near the mouth of West River, and is supposed to be more particularly described in a deed from Josiah Ames to the West River Bridge Company, dated on the first day of April, in the year seventeen hundred and ninety-nine, and recorded in Brattleboro' records of deeds, liber D, page 203, containing two acres of land, be the same more or less, with a covered bridge, gate, toll-house, barn, and other buildings thereon.

THOMAS F. HAMMOND,
JULIUS CONVERSE,
ISAAC N. CUSHMAN,
Commissioners."

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To this report, the West River Bridge Company, the town of Brattleboro', the town of Dummerston, and the persons who were entitled to damages for the loss of land, &c., all filed objections.

The town of Brattleboro' filed five objections, the last of which was as follows:—

“5. Because it does not appear from said report, and is not true in fact, that there was, or that said commissioners considered that there was any occasion for any new highway on said route within a great distance, to wit, within two miles of said bridge.”

The town of Dummerston filed ten objections, the first four of which are as follows:—

“1. Because said commissioners proceeded in said report to discontinue the Indicted Road, so-called; a road of which the petition of Joseph Dix and others did not ask the discontinuance; *a road which said town was then liable [*511 to make, and has since raised money to make.

“2. Because the acceptance of said report would render the maintenance of two roads necessary through a large part of the town, while the natural difficulties are so great, that, with only one, the burdens of said town, when compared with its means, are unusually onerous.

“3. That the surveyed route, or Nurse Swamp route, so called, is a longer, more wet, and more expensive route, between the termini in question.

“4. That the said commissioners were partial, prejudiced, and mistaken; and acted under the influence of misrepresentations made by interested persons.”

The persons to whom damages were awarded by the report were fifteen in number. Eleven of these filed six objections, the first of which was as follows:—

“1. Because the said commissioners were partial, prejudiced, and mistaken, and acted under the misrepresentations made by interested persons.”

The West River Bridge Company filed seven objections, the sixth of which stated the charter, their observance of it, and their desire for its continuance.

In November, 1843, the case was tried, and the report of the commissioners was accepted. The two towns were ordered to pay the damages awarded to the persons through whose lands the road was laid out, and “the town of Brattleboro' to pay to the West River Bridge Company the sum of damages, as assessed by said commissioners, by the 31st day of May, 1844; and that said bridge be opened for the free public travel by the 1st day of June, 1844.”

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In February, 1844, a writ of *certiorari* was sued out from the Supreme Court, whereby the whole proceedings of the County Court were brought up for review. Upon the argument, the West River Bridge Company, in addition to the exceptions which they had presented to the court below, filed the two following:—

“First. That the said statute of this state, having been enacted long after the said grant by the same state of the said franchise of toll to the said West River Bridge Corporation, and long after the said grant was accepted and acted on by the said corporation, is of no validity for the purpose of authorizing the taking of the said franchise against the consent of said corporation, or the laying out of a free public highway over and upon the said bridge, on the ground that the said statute, if it purports to authorize the proceedings aforesaid, *512] is a violation of the contract of this state with the said corporation, and is *therein repugnant to that clause of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contract.

“Secondly. That inasmuch as it is apparent upon the said record, and proofs filed in said cause, copies of which are hereto annexed, that there is no occasion for any new highway within the said town of Brattleboro’, near said bridge; and that no new highway is in fact laid out, or adjudged to be laid out, within the distance of two miles from either terminus of said bridge; and that the damages awarded to the said West River Bridge Company are grossly inadequate as a compensation for the value of the corporate franchise, and other property adjudged to be taken; the taking of the said franchise, and laying out of the said free public highway over and upon the said bridge, by the judgment of the said County Court, under such circumstances, a mere evasion, under color of law, of the said provision of the Constitution of the United States, and an exercise of authority under this state which is wholly invalid as against the said West River Bridge Company, on the ground of its being repugnant to the constitutional provisions aforesaid.”

The Supreme Court passed the following judgment:—

“And thereupon, after hearing the respective parties by their counsel, upon their respective allegations, and the said exceptions in said record contained, it is considered, ordered, and adjudged by the court here, that the statute aforesaid was and is valid for the purpose of taking the said franchise, and laying out the said free public highway over and upon the said bridge; and that the same was and is in no wise repugnant to the Constitution of the United States; and that the

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said proceedings of the said County Court were a lawful exercise of the authority of the state under the said statute, and neither repugnant to nor an evasion of the provisions of the said Constitution; and that there is no error in the record and proceedings aforesaid; and that the said defendant parties recover their costs."

To review this judgment, a writ of error brought the case up to this court.

It was argued by *Mr. Webster* and *Mr. Collamer*, on behalf of the plaintiffs in error, and *Mr. Phelps*, for the defendants in error. On both sides argumentative briefs were filed; and although all the counsel added many illustrations and arguments, orally, to their respective briefs, in the progress of discussion, yet the reporter thinks it the safer course to reprint the briefs themselves.

**Mr. Webster* and *Mr. Collamer*, for the plaintiffs in error. [*513

In the township of Brattleboro', in Vermont, A. D. 1795, there was a public highway along the west bank of Connecticut River, and passing across West River, a tributary of the Connecticut, which public highway was re-surveyed that year, and ever has, and still does, continue unaltered within said town. This re-survey was under an act of 1795. (*Whitney's affidavit, and copy of survey; Record, pp. 34, 35.*)

In 1795, by an act of the legislature of Vermont, the plaintiffs were created a corporation for one hundred years, with the exclusive privilege of erecting and continuing a toll-bridge over West River, within four miles of the place where that stream unites with Connecticut River, and the rate of toll was fixed by said act. The act provided that the bridge should be built where the road was to be surveyed, and within two years, and it was so done. (*Charter, Record, p. 26, § 4, and proviso to § 6, p. 28.*)

The act further provided, that, at the expiration of forty years, the outlay and income of the plaintiffs might be examined by commissioners, appointed by the Supreme Court; and, if the plaintiffs had realized more than twelve per cent. per annum, the court might reduce the tolls so as to yield only that amount. The plaintiffs, within the limited time, erected the bridge, and have ever since sustained it, having several times rebuilt it; and now, at great expense, have erected so large a part of it with stone, that to sustain it is much less expense than formerly, and the franchise and bridge are now of great value, to wit, of the value of ten thousand dollars. (*Record, p. 56.*)

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By the general law of Vermont relating to highways, the County Court, on petition, may appoint commissioners to lay out highways within the county, who survey the way and assess the damage to the landholders, and make report to the court, who thereupon make their orders accordingly; and the same power is given to the Supreme Court, in laying highways into two or more counties. (Rev. Stat. of Vermont, p. 553.)

In November, 1889, the legislature passed "an act relating to highways," which provided, "whenever there shall be occasion for any new highway in any town or towns within this state, the Supreme and County Courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the state, to lay out highways over individual or private property; and the same power is *514] granted, and *the same rules shall be observed, in making compensation to all such corporations and persons whose estate, easement, franchise, or right shall be taken, as are now granted and provided in other cases; provided that no such real estate, easement, or franchise shall be taken in the manner and for the purpose aforesaid, unless the whole of such real estate, easement, or franchise belonging to said corporation shall be taken, and compensation made therefor."

In 1842, a petition was presented to the County Court of the county of Windham, Vermont, praying for a re-survey and improvements in the highway, beginning in the village of Brattleboro', and leading north across this bridge, and thence north to and through the town of Dummerston; and in relation to this bridge, it is represented in the petition as a great "grievance, and should no longer be endured;" and praying that said road should be re-surveyed, and the real estate, easement, or franchise of the "West River Bridge Company," should be taken for the purpose of making a free road and bridge across said river. On that petition the court appointed commissioners, who proceeded to examine the road and decide in the premises.

They surveyed and laid out a road in this manner, (as appears, Record, p. 17,) beginning at Brattleboro' village, about one mile south of this bridge, and following the existing highway to and across the bridge, and thence north of the bridge two miles, without making any alteration whatever. (Record, p. 32, and Report, p. 17.) They then report changes in the highway, all but fifty rods of which is in Dummerston; and, as to this bridge, the commissioners report as follows:—

"The said commissioners also examined the toll-bridge

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across West River, in Brattleboro', and have taken into consideration the propriety of laying a free road across said bridge, at the expense of the town of Brattleboro', as contemplated by said petition; and in this the said commissioners were unanimously of opinion, that the public good required that the real estate, easement, or franchise of the West River Bridge Company should be taken, and compensation made therefor, that said toll-bridge might be made a free bridge. The commissioners have therefore assessed to the said West River Bridge Corporation, the sum of four thousand dollars, to be paid to the said West River Bridge Corporation out of the treasury of said town of Brattleboro', in full compensation for all real estate, easement, or franchise belonging to said corporation, which real estate, easement, or franchise is situate in said town of Brattleboro', near the mouth of West River." (Record, pp. 15, 16, and Ames's deed, p. 32.)

This report was returned into court, and though [*515 exceptions and objections were thereto made on the part of the present plaintiffs, as well as by said town of Brattleboro', yet the court, on the hearing, decided to accept and approve said report, and established the whole of said road, and ordered that Brattleboro' pay the present plaintiff the said sum of four thousand dollars, and "that said bridge be opened for the free public travel." (Record, pp. 25, 26.)

This decision and these proceedings were carried before the Supreme Court of the state by *certiorari*, and by that court affirmed; whereupon the plaintiff brings this writ of error.

By the twenty-fifth section of the Judiciary Act of the United States, it is provided, "That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision of the suit could be had, where is drawn in question the validity of a statute of, or authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." The plaintiff insists that this power and authority exercised under the state of Vermont, and the statute of that state, passed in 1839, under which the power was exercised in the manner it was done, are repugnant to the Constitution of the United States.

This court is never called on to decide a state law unconstitutional in the abstract. It must have a case before it, and the question is, Is it constitutional as construed and applied in the case by the state court? If it were not so, the state courts have but to take a state law, good on its face, and con-

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strue it to cover cases, however grossly unconstitutional, and there would be no redress, as it might be said, The law is good, but the decision is bad, but that is not within the jurisdiction of this court. The only way is to treat the state statute as the state court has treated and applied it in the case, and then to consider whether, for such a purpose, it is constitutional. Such has been the course in this court. A law may be constitutional for some purposes, and not for others. (*Golden v. Prince*, 3 Wash. C. C., 313.) The statute of Maryland, levying a tax on any bank put in operation in that state without consent of its legislature, was not decided as unconstitutional in the abstract. It was undoubtedly good as to private banks, or those of other states; but when it was applied by the state courts to a branch of the United States Bank, then this court decided that, for that purpose, it was bad, being unconstitutional. (*McCulloch v. Maryland*, 4 *516] Wheat., 235.) The statute of New York, granting the exclusive navigation of its *waters by steam vessels, was, by this court, holden as unconstitutional, as applied to vessels coming from without the state. (*Gibbons v. Ogden*, 9 Wheat., 209.) Indeed, the words of the United States statute are carefully adapted to such an object. It provides, not merely that this court is to pass on the constitutionality of the state law, but on any authority exercised under any state. If, then, it appears that, in this case, the plaintiffs' rights have been invaded by any authority under the state, or by any law of the state repugnant to the Constitution of the United States, the decision of the state court must be reversed.

I. It is insisted by the defendant, that this is a pretended exercise of the power of the eminent domain, as an incident of sovereignty,—the taking of private property for public use; when, in truth and reality, it is but an actual impairing and destroying the force and obligation of a contract, contrary to the provisions of the United States Constitution.

This is attempted to be effected under the disguise of calling this grant and franchise property. It is no such property as falls within, or can be the subject matter of the eminent domain. The original idea of the eminent domain was the right of sovereignty, or residuum of power over the land which remained in the sovereign or lord paramount after the fee granted to the feudatory, and was therefore confined to the realty. In the progress of arts and commerce, when personal property became worthy of legal consideration, this power of sovereignty was extended over that, and even included debts. But this grant to the plaintiffs can fall within no such category of property. It is a franchise, a pure

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franchise. It included the grant of no property, real or personal. It lay in grant, and not in livery. It was created by, and had its existence in, the grant in the contract; and it could cease only by impairing and destroying that contract. If a private debt or contract, as a chose in action, could be taken under the power of eminent domain, yet still the debt is kept on foot and in force. But this is an attempt, not to take and keep in force this contract, but actually to extinguish and destroy it. Even if it were true, as has been holden, that property which the corporation create or acquire, and the taking of which would not destroy the grant, might be taken in the proper exercise of this power of eminent domain, yet the grant itself, the franchise, is no property. A franchise is defined to be "a royal privilege or branch of the king's prerogative, subsisting in the hand of a subject."

The state alone possessed the power to erect and sustain toll-bridges across large streams in the public highway. This prerogative was duly granted to the plaintiffs as to a certain *stream; and in the plaintiffs' hands, within [*517 the limitations of the grant, it could not be overthrown by the exercise of another branch of the sovereignty of only equal and no greater force. It is true, that the shares in a corporation are property, but the franchise is not. It cannot be taken to respond to any liabilities of the corporation, and can only be extinguished by forfeiture. It is entirely unlike a grant of land, to which the state court compare it, in this,—this is a grant of royal prerogative, or branch of sovereignty; whereas, when land is granted, all the powers of sovereignty, to enforce the laws, levy taxes, and in all other respects, remain still in the state over the granted territory.

II. All the powers of the states, as sovereign states, must always be subject to the limitations expressed in the United States Constitution, nor can they any more be permitted to overstep such limitations of power by the exercise of one branch of sovereignty than another. What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretence, or oblique indirection. Among other matters limiting and restricting state sovereignty is this:—No state shall pass "any law impairing the obligation of contracts." The power of eminent domain, like every other sovereign power in the state, is subject to this limitation and prohibition. Laws creating corporations, with powers for the benefit of the individual corporators, even though for public purposes, like turnpikes, railroads, toll-bridges, &c., have always, and by almost every court in the Union, and by this court, been decided to be contracts between the government and the

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corporators. The plaintiffs' grant and franchise was a contract of the state for one hundred years, and by this act of 1839, and the proceedings under it, that contract is not only impaired, but utterly destroyed; and this a state can no more do under the power of eminent domain, than under the law-making power, or any other power of sovereignty. It is said, the citizen is safe, because, under the exercise of the eminent domain, he is to receive compensation for whatever is taken. That furnishes no security, for the mode and amount of compensation is fixed *ex parte* by the government and its agents; and, besides that, the prohibition of the Constitution is general, and contains no exception for this exercise of this power of eminent domain as to contracts.

If the provision of the Constitution, which forbids the impairing of contracts, does not extend to the contracts of the state governments, and they are left subject to be destroyed by the eminent domain, then there is an end of public faith. *518] It is said, by every writer, and by almost every court which has *passed on this subject, the eminent domain, that it must rest with "the legislative power to determine when public uses require the assumption of private property," and to regulate the mode of compensation. (2 Kent Com., 340.) If to this it be holden that this extends even to contracts of the government itself, then it follows, that the state of Mississippi, or any other state indebted, has but by law to declare, that the public good requires that the state debts, bonds, &c., shall be taken for the public use, and appoint commissioners to fix their present market value to the holders, and, on payment thereof, declare them extinguished. Such is the real character of this transaction.

III. The power or authority exercised under the state in this case was this: under the pretence of laying a new highway, where none was required, and none, in fact, laid, they have taken a franchise, and abolished the tolls of a chartered bridge. By the statute of 1839, under which this proceeding is attempted to be justified, it is provided, "whenever there shall be occasion for any new highway," &c., &c. In this case, it appears that there had been there a highway from 1796, and this bridge was built in that highway, and this public stage-road was followed by the commissioners who made this survey for more than a mile south of this bridge, across it, and two miles north of it, without variation; and this was approved by the court; thus conclusively deciding that no new highway was required there. All that was mere pretence and fiction, and shown by the record to be false. Let us now reduce to undisguised English that statute of the state, as it was

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construed and enforced by the authority exercised under the state in this case. Whenever any toll-bridge heretofore granted becomes of any value to the proprietors, and thereby obnoxious to the inhabitants of the vicinity, they may present a petition to their County Court, and therein falsely pretend that a new highway is there needed, and the court shall appoint commissioners, of their own selecting, who may pretend to lay out a new highway, but really only follow the old one across the bridge, and appraise the damage to the proprietors of the bridge; and the court may thereupon declare and adjudge, that all tolls at said bridge cease on said sum being paid, though the time of the grant has not expired, and though the sum does not equal half the value of the franchise. This would be, in substance, enacting that "hereafter no tolls shall be paid for passing West River Bridge, the same being hereby abolished, because they are offensive to the vicinity, and the proprietors shall receive such gross sum as persons selected *ex parte* by the vicinity or state shall decide." [*519 All this is but destroying* the contract by which the franchise was created, under the color and pretence of exercising the eminent domain. Chancellor Kent, in treating of this power of eminent domain, says:—"If they should vacate a grant of property or of a franchise, under a pretext of some public use or service, such cases would be abuses of their discretion, and fraudulent attacks on private rights, and the law be clearly unconstitutional and void." (2 Kent Com., 340.)

IV. It has been holden in every state, where the point has arisen, and before judges of this court, that every turnpike, railroad, or toll-bridge, though made by a corporation, still is a highway, and an erection for public use; and therefore a clause in such grant to take private property, making compensation therefor, without consent of the owner, for such highway, is a legitimate exercise of the power of eminent domain. When, therefore, this power has been exercised, or the delegation of its exercise has been granted to the corporation and been used, and the private property been taken and devoted to the public use, the power has exhausted itself on the subject. All that remains is the contract of the state with the corporation, that is, that the erection shall be sustained by the corporation for public use, and compensation received therefor by the receipt of certain tolls. Now, can the state impair and abolish this contract by again exercising the power of eminent domain on the subject? Can the state say to the corporation, We delegate to you, for good consideration, the power of eminent domain in taking property to make a road or bridge for public use; and when this is done, then say, We will again

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assume and exercise over you the very same power we delegated and sold to you?

V. It is not necessary now to inquire whether, for the purpose of making some new, extensive, and continuous highway, canal, or railroad, which the public good required, and which required the including within it some short turnpike, railroad, or toll-bridge previously granted, such turnpike, or bridge, or railroad might not be legitimately merged in the greater object. Nor is it necessary, in this case, to decide whether this bridge and franchise might not be taken and destroyed to prevent public invasion, or to convert into a fortification, or for any different public use from that to which it is already appropriated. This case is of a very distinct character, and cannot be properly confounded with such cases. This bridge was erected in a highway, constitutes a part of that highway, and is devoted exclusively to the public use as a highway; nor can the proprietors deprive any one of the right of so *520] using it. The attempted proceeding is, not to appropriate it to any new public *use, but to keep it devoted to precisely the same use, but only to abolish the tolls, which by contract belong to the plaintiff.

It is said by the state court, that this is the same as a grant of land. Let us, then, supposing this to be so, inquire whether a state, having, for good consideration, granted land in fee-simple for the grantee to use, occupy, improve, and to sell to others for the same purpose, can, under the power of eminent domain, in any form, take that land from the owner, and compel him to receive a sum which the state's commissioners shall state, for the purpose of using, by the state, the same for the same purposes it was used before by the owner; and to sell or grant to others, for the same purposes and uses. If this be so, there is no limitation to this power; for, as the legislature alone have the right to determine when and what private property shall be taken for the public use, if there be superadded, that they also shall determine what is public use, it must follow that what courts have often said, a state could not take one man's property and give it to another, is not true; for they have but to declare that they will take it for the use of the state, and then grant it to others for a greater price or better cultivation; or take the lands of all for an agrarian operation for the public benefit. If these tolls are abolished by this proceeding, what prevents the state from granting the same charter to some political favorite to-morrow?

It should be here observed, that the public can obtain no pecuniary benefit by this or any similar operation, nor be relieved of any burden thereby, except what is derived by

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fraudulently or coercively imposing on the other party an insufficient compensation, as in this case. What the plaintiff ought justly to receive was the value of the franchise, that is, that sum which the tolls would have yielded him beyond the expense of sustaining the bridge. If the public justly pay the plaintiff that sum, and then support the bridge, their outlay is precisely the same as if they left the plaintiff to sustain the bridge, and paid the tolls. Unjust oppression can be the only object of this proceeding.

This power, the eminent domain, which only within a few years was first recognized and naturalized in this country, is unknown to our Constitution or that of the states. It has been adopted from writers on other and arbitrary governments, and goes on the ground, that all the powers heretofore regarded as the incidents of sovereignty must be existing in some department of state authority, which is far from true. But being now recognized in court, our only security is to be found in this tribunal, to keep it within some safe and well-defined limits, or our state governments will be but unlimited despotisms *over the private citizens. They [*521 will soon resolve themselves into the existing will of the existing majority, as to what shall be taken, and what shall be left to any obnoxious natural or artificial person. It is easy to see, that, by a very slight improvement on the proceedings in this case, and in pursuance of the avowed principle, that, as to the exercise of this power of eminent domain, the legislature, or their agents, are to be the sole judges of what is to be taken, and to what public use it is to be appropriated, the most levelling ultraisms of Anti-rentism or Agrarianism or Abolitionism may be successfully advanced.

Mr. Phelps, for defendants in error.

In the year 1795, the plaintiffs in error were made a corporation by act of the legislature of the state of Vermont, and, by said act, had granted to them the exclusive privilege of erecting and maintaining a bridge over West River, within four miles of its mouth, with the right of taking certain tolls for passing the same. This franchise was to continue for the term of one hundred years, and has not yet expired. The company proceeded to erect their bridge, and have maintained it until the institution of the proceeding in question, and have, during all that time, been in the enjoyment of the franchise so granted. In 1842, a proceeding was instituted in the County Court for the county of Windham, within which said bridge was situated, under a general law of the state of Vermont for the laying out and opening highways, by which proceeding the

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bridge was made a public and free highway, and the right to take tolls extinguished. This was effected by the judicial determination of a court of competent jurisdiction. In conformity with the provisions of the statute, the whole property of the plaintiffs, both realty and franchise, was appraised, and due provision made for compensation to the plaintiffs to the full value of the same.

By a statute of that state, then and still in force (passed November, 1839), the Supreme and County Courts have the same power to take any real estate, easement, or franchise, of any turnpike or other corporation, when, in their judgment, the public good requires a public highway, which they have by law to lay out highways over individual or private property.

The plaintiffs in error now seek to reverse the proceedings and judgment of the state court, upon the ground that the above-mentioned statute, so far as it professes to authorize the extinguishment of their franchise, is unconstitutional and void.

*522] The Constitution of the United States and that of the state *of Vermont both recognize the right to take private property for public use. The latter declares:—

“That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”

This provision, as well as the similar one in the Constitution of the United States, does not confer the power, but merely limits its exercise.

The power itself is an essential and indispensable attribute of sovereignty, which can be neither alienated nor abridged by ordinary legislation.

Without the limitation imposed by the Constitution, it might be exercised without compensation. *Gov., &c., of Cast Plate Manuf. Co. v. Meredith*, 4 T. R., 794; *Stark v. McGowen*, 1 Nott & M. (S. C.), 387.

Full compensation to the plaintiffs having been provided in this case, the proceeding does not conflict with the constitution of Vermont.

Nor with that of the United States, as the provision in that instrument is not restrictive of the states, but of the general government only.

The proceeding, then, being a regular and legitimate exercise of power, warranted by the constitution of the state, the question arises, Does it conflict with that provision in the Constitution of the United States which prohibits a state from passing a law impairing the obligation of contracts?

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And this question resolves itself into another, namely, Does this provision of the Constitution override, annul, or abrogate the right of eminent domain, as it would otherwise exist in the sovereignty of the respective states?

For if this power is still supposed to exist, notwithstanding this clause of the Constitution, then its legitimate exercise cannot conflict with that provision.

All real estate is held, or supposed to be held, by grant from the state. If it cannot be taken for public use in a proper case, and in a proper way, under the restriction of the state constitution, then it cannot be taken at all, and the right of eminent domain is gone.

That this right still remains in the several states is not now to be questioned. *Rogers v. Bradshaw*, 20 Johns. (N. Y.), 742; *Beekman v. Sar. and Schen. Railroad Co.*, 3 Paige (N. Y.), 45; *Boston Water Power Co. v. Boston and Worcester Railroad Co.*, 23 Pick. (Mass.), 360; 15 Vt., 745; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.), 459; S. C., 11 Pet., 546.

But there is no need of authorities on this point. The *entire practice and universal opinion of the country, judicial and extra-judicial, from the adoption of the Constitution to this day, have settled the matter. [*523

It is not to be supposed, that the purpose of this restriction was to extinguish a power in the several state sovereignties so essential to the exercise of their functions.

If, then, this proceeding is obnoxious to the objection of violating the Constitution, it must be for some other reason than because private property, once granted by the state, has been resumed for public use in the manner pointed out by the constitution and laws of the state.

If this restriction does not forbid the exercise of the power, does it limit and control it?

Unquestionably it does. A grant is a contract, and any thing which defeats or impairs rights growing out of it, in a manner inconsistent with the constitution and laws of the state, may be said to impair its obligation. Thus, to take private property for public use without compensation, where the state constitution forbids such taking, is, doubtless, prohibited by that clause of the Constitution of the United States which provides that no law shall be passed impairing the obligation of contracts.

In order, then, to render the exercise of the right of eminent domain justifiable and consistent with the Constitution of the United States, it is admitted there should be, first, compensation to the owner, where the state constitution requires it;

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and, secondly, such necessity for the act as a rational exercise of the power, keeping in view its end and purpose, requires.

As to the compensation, it is in this instance fully provided for. So scrupulous is the law of the state on this point, that not only was the whole property of the plaintiffs compensated for at its appraised value, in this instance, but provision is made by the statute (see stat. of Vermont, p. 133), for a revision of the subject, in certain cases, by the judicial tribunals.

It was objected before the state court, that no notice was given to the plaintiffs by the commissioners, before proceeding to assess damages.

The state court, doubtless, found that notice was given, as the return of the commissioners so states. But if the fact were otherwise, the omission does not vitiate the proceeding, as the statute just alluded to provides a remedy in such a case.

The value of the plaintiff's property and the amount of compensation having been ascertained by judicial determination, this court will not inquire whether it was in fact reasonable or not. The adjudication of the state court is conclusive, and an error of judgment, in this particular, would not vitiate the proceeding.

*524] *The next inquiry is as to the necessity for the exercise of the power in this instance.

It is admitted that the right to take private property for public use depends upon necessity. Yet that need not be of the most stringent character,—an unavoidable, uncontrollable necessity. It is enough if the public interest or convenience require it; in short, if it be a measure of public expediency.

Upon this principle has the power been exercised in a vast majority of cases throughout the country. All modern improvements in the means of communication stand upon this footing. New roads are substituted for old ones for convenience alone. Canals and railroads are not indispensable; the country may subsist, as it has done, without them; yet they are so intimately connected with the great interests of the country, and have such important bearing upon its prosperity and welfare, that the propriety and legality of the exercise of this right of eminent domain for their establishment have never been doubted.

If the power exist in the state governments, the power of judging of the reasonableness of its exercise in a given case, and of the degree of necessity generally which justifies the appropriation of private property to public use, must exist there also.

This power is admitted to appertain to the state legislatures, and may, without question, be delegated by them to

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the judicial tribunals, as it is often delegated to private corporations and mere executive officers. When exercised by the latter, it is of course subject to judicial revision and control. Upon this ground stands the proceeding in chancery in the state court, which has been brought hither by writ of error.

This judicial function must be vested somewhere, and from the very nature of it, it having reference to a matter of mere internal and domestic policy, it must be in the state government.

The decision of the state court is therefore, upon this point, conclusive, and the necessity for the exercise of the power in this case is judicially established.

If, then, the power has been exercised agreeably to the provision of the state constitution, and upon sufficient necessity, for proper and rational objects, and in a proper and legal manner, the plaintiffs are driven to the alternative of either admitting the constitutionality and validity of the proceeding, or denying the power altogether. For, if such an exercise of it be forbidden by the prohibition in the Constitution of the United States, all and every exercise of it is equally so.

But that prohibition was not intended to override or abrogate *the right of eminent domain. The latter [*525 remains full, ample, and unimpaired, to be exerted in a sound legislative and judicial discretion, in proper cases and for proper ends.

The proceeding in question does not impair the obligation of the grant to the plaintiffs in 1795.

Every grant of this kind is made subject to the right of eminent domain, and of course upon the implied condition that the property may be resumed for public use whenever the public necessities require it. This is universally admitted in respect to land, and I shall endeavor to show that there is no difference in this respect between land and a franchise like the one in question. The resumption, therefore, whenever the public exigencies require it, is in harmony with the original intent and tenor of the grant.

It is not an attempt to repeal or annul the grant, but the proceeding recognizes its validity and the rights derived from it. It is on this ground that compensation is made.

It is a purchase by the state of the plaintiffs' franchise, and may be illustrated by its analogy to a purchase by a grantor of a title derived originally from his own conveyance.

It is, I am aware, a proceeding *in invitum*; but, being a purchase, it is no more in derogation of the grant, than the course of a creditor who, by virtue of legal process, seizes property of his debtor held by force of a conveyance from himself, is in derogation of that conveyance.

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Whether the right of a state to compel a sale from the plaintiffs to itself is derived from an implied condition in the grant, or from a power inherent in its sovereignty, is unimportant; if legally effected, it is a sale and purchase after all, and is no more inconsistent with the original grant than if made voluntarily by the plaintiffs.

It does not impair the obligation of the contract, because it leaves to the plaintiffs the full benefit of the grant; and if they cannot enjoy that benefit in the precise form originally specified, they take what, in the eye of the law, is the same thing, an equivalent. The franchise is extinguished but is extinguished by purchase; and if any injustice is done, it must consist rather in the arbitrary and unnecessary exercise of an acknowledged power, than in any denial or impeachment of the validity of the grant, or the rights derived from it. The proceeding, instead of questioning or impairing the obligation of the contract, recognizes and affirms it, and gives a compensation upon the simple and only ground, that the rights and property of the plaintiffs derived from the grant are not to be questioned.

*526] The general power of the state to reclaim, for public use, *lands which have been granted to individuals, will not be questioned; but the question has been agitated elsewhere, and may be started here, whether a franchise granted to private persons for their private emolument, and yet for a public use, is not beyond the reach of that power. These cases being of a mixed character, combining private right and emolument with public convenience, the question resolves itself into two others, viz. :—

1st. Are private rights thus conferred of any superior sanctity? And,

2d. Does the partial, qualified, and limited appropriation of the property to public use exclude the further exercise of the right of eminent domain?

It is impossible, we think, to make any distinction between franchises thus granted, and titles to land derived from letters-patent. The same sovereign power exists. The same great law of public necessity, demanding that private right should yield to public exigency, applies to both.

The distinction attempted to be drawn from the supposition, that the citizen takes his grant of land knowing and expecting that it may be resumed for public use, but receives his grant of a franchise with different expectations, is evidently a distinction without a difference, as it is based upon an assumption in every point of view erroneous.

The exercise of this right of eminent domain over franchises

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created by special grant is a common occurrence. Bridges are substituted for ferries; turnpikes are superseded by railroads and canals; yet, frequent as this occurrence is, it has rarely been contested.

The power of the legislature to take franchises, like other property, for public use, has never, to my knowledge, been judicially denied. On the contrary, it has often been judicially asserted. See *Armington v. Barnet*, 15 Vt., 745.

In *Rogers v. Bradshaw*, 20 Johns. (N. Y.), 742, the canal encroached upon and took a portion of the turnpike, and the latter encroached upon the adjoining land; yet the right of the state was sustained.

In the case of *Charles River Bridge v. Warren Bridge*, the ferry, which was the property of a private corporation, was superseded by the bridge.

In the case between the *Boston Water Power Company* and the *Worcester Railroad*, 23 Pick. (Mass.), 360, the power of the legislature over franchises is expressly asserted. In that case the franchise was not, indeed, annihilated, but was diminished in value, and impaired. If the legislature could take a portion of the franchise, they could doubtless take the whole, if the exigency required it.

**Mr. Phelps* here adverted to the case of *Charles River Bridge v. Warren Bridge*, 7 Pickering, to show [*527] the opinions entertained on this point at the bar and on the bench. See pp. 394, 399, 452, 453, 500, 513, 522, 523, 528. Also, to same case, 11 Pet., pp. 472, 490, 505, 569, 579, 580, 638, 641, 644, 645.

He also cited *Tuckahoe Canal Co. v. The James River Railroad Co.*, 11 Leigh (Va.), 42; *Enfield Bridge Co. v. Hartford and New Haven Railroad Co.*, 17 Conn., 40, 60; same case, pp. 457, 461; 8 N. H., 398.

It is to be borne in mind, that the real estate of the plaintiffs was not derived from the grant of 1795, nor was it acquired by the aid of the power of the state; no authority being conferred by that act to take private property without the owner's assent.

The taking the land, therefore, if it conflict with any grant, conflicts with the original grant from the British crown, made prior to the Revolution. If it come in collision with the grant of the franchise, it is only incidentally and consequentially.

Unless, then, the legislature, by the grant of the franchise in 1795, parted with the right of eminent domain over the place where the franchise was to be exercised, the taking the land for public use must be conceded to be lawful.

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If, then, the land can be taken, could not the same power take the franchise, which is merely incident to it?

If we advert to the act of 1795, we shall find that the franchise consists in the right to take toll upon a bridge, to be maintained by the plaintiffs, upon their own land, and at their own expense. Now, if the bridge itself passes from them in a legal way, and they cease to maintain it, the right to take toll ceases.

The case, then, is not one in which the grant of the franchise is revoked or annulled by the legislature in bad faith, but one in which, the public having acquired the rights of the plaintiffs, the further exercise of the franchise is neither reasonable nor just.

It was argued in the court below, that the franchise is not annexed to land, and therefore "could not be taken, but where the right is given to take land."

The franchise, by the grant, might be exercised at any place within four miles of the mouth of the river. The proceeding in question merely prohibits its exercise in this particular place, leaving it to be enjoyed elsewhere, if it be of any value to the plaintiffs. In this view, the case falls precisely within the decision in the *Boston Water Power Company v. Worcester Railroad*, 23 Pick. (Mass.), 360.

*528] The plaintiffs, however, had given a location to it, and its exercise elsewhere being probably of no value, the case was treated by the state court as a practical extinguishment of it, and compensation made accordingly.

In this view of the matter, the franchise still subsists, impaired only by the establishment of a public highway in this particular place.

Does the partial and qualified appropriation of the plaintiffs' property to public use exclude the exercise of the right of eminent domain by the state?

It is to be observed, that the land of the plaintiffs had never been taken by the sovereign power for public use until the proceeding now in question was instituted. It was voluntarily devoted to that use by the plaintiffs, with a view to the enjoyment of the franchise.

The property is still private, and the public use it only by paying an equivalent, in the form of toll.

Were it otherwise, it would be difficult to make out that a partial exercise of the right of eminent domain exhausts the power, or that, property being devoted to public use, the sovereign power cannot regulate, modify, or control that use. The fact of such devotion comes rather in aid, than otherwise, of the public right.

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Whether, therefore, we have regard to the fact that the property is private, or to the qualified public use, there is no impediment to taking it absolutely for a more enlarged and beneficial public use, on the one hand, and modifying or changing the use on the other.

There is no difficulty arising from the fact, that the property is already sequestered to public use; but the difficulty has arisen, as the reported cases show, from the employment of private corporations to exercise the power in question, and to carry out these great measures of internal improvement. The objection was first started, that, in the case of turnpike and railroad corporations, the property of the citizen has been taken, not for public use, but for the private use and benefit of the corporation. The proceeding has, however, been sustained, upon the ground, that, although the enterprise has been undertaken with a view to private emolument, yet the ultimate purpose is the public convenience; and if the legislative power can take private property for such purposes, it may be taken through the agency of a corporation, as well as that of a public executive officer. So, where a grant of a franchise comes in collision with a previous grant of a similar kind, it has been objected, that it was not competent for the legislature to take the property of one person for the use and benefit of another; yet such a proceeding has been [*529 sustained, where it is for public use, and the increased benefit to the public requires the sacrifice.

Our case, however, is free from this objection. The property has been taken, not for the benefit of another private corporation, but strictly and solely for public use.

The objection urged in the state court, that no new highway is laid out, is founded upon an erroneous assumption. The public and free highway is, in a legal sense, a different thing from a bridge, or way, which is private property, and which the citizens may use only for a toll, to be paid in each instance of using.

The highway was public only in a limited sense. That it was competent for the legislature or the courts, under the statute, to enlarge the public use, is, I think, clear.

If the objection is, that no new highway was necessary, inasmuch as the public had already a right of passage there, and could use the way as they had previously done, the answer is, that the power of the courts over this matter is not limited to cases of strict, absolute necessity, but they are at liberty to consult the public convenience, and to look to a more beneficial and enlarged public use. They are the constitutional judges on this point, and their decision upon it is conclusive.

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The statute of Vermont, under which the court proceeded, does not use the word *necessity*. Its language is, "Whenever there shall be occasion for a new highway," &c., and "when, in their [the court's] judgment, the public good requires a public highway."

There are several points made in the state courts, which are addressed rather to the discretion of those courts, and which have no bearing upon the constitutional question; it is not deemed necessary to notice them here.

Mr. Justice DANIEL delivered the opinion of the court.

The West River Bridge Company, Plaintiffs, v. Joseph Dix and the Towns of Brattleborough and Dummerston, Defendants, upon a writ of error to the Supreme Court of Judicature of the state of Vermont, sitting in certain proceedings as a court of law, and

The same Plaintiffs v. The Towns of Brattleborough and Dummerston, and Joseph Dix, Asa Boyden, and Phineas Underwood, upon a writ of error to the Supreme Court of Judicature, and to the Chancellor of the First Circuit of the state of Vermont.

*530] These two causes have been treated in the argument as one,—*and such they essentially are. Though prosecuted in different forms and in different forums below, they are merely various modes of endeavoring to attain the same end, and a decision in either of the only question they raise for the cognizance of this court disposes equally of that question in the other.

They are brought before us under the twenty-fifth section of the Judiciary Act, in order to test the conformity with the Constitution of the United States of certain statutes of Vermont; laws that have been sustained by the Supreme Court of Vermont, but which it is alleged are repugnant to the tenth section of the first article of the Constitution, prohibiting the passage of state laws impairing the obligation of contracts.

It appears from the records of these causes, that, in the year 1795, the plaintiffs in error were, by act of the legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and

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enjoyed the franchise granted to them by law, until the institution of the proceeding now under review.

By the general law of Vermont relating to roads, passed 19th November, 1839, (*vide* Revised Laws of Vermont, p. 553,) the County Courts are authorized, upon petition, to appoint commissioners to lay out highways within their respective counties, and to assess the damages which may accrue to landholders by the opening of roads, and these courts, upon the reports of the commissioners so appointed, are empowered to establish roads within the bounds of their local jurisdiction. A similar power is vested in the Supreme Court, to lay out and establish highways extending through several counties.

By an act of the legislature of Vermont, passed November 19th, 1839, it is declared, that, "whenever there shall be occasion for any new highway in any town or towns of this state, the Supreme and County Courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons whose estates, easement, franchise, or rights shall be taken, as are now granted and [*531 provided in other *cases." Under the authority of these statutes, and in the modes therein prescribed, a proceeding was instituted in the County Court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plaintiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property, and for the consequent extinguishment of their franchise. The judgment of the County Court, having been carried by certiorari before the Supreme Court of the state, was by the latter tribunal affirmed.

Pending the proceedings at law upon the petition of Dix and others, a bill was presented by the plaintiffs in error to the chancellor of the first judicial circuit of the state of Vermont, praying an injunction to those proceedings so far as they related to the plaintiffs or to the real estate, easement, or franchise belonging to them. This bill, having been demurred to, was dismissed by the chancellor, whose decree was affirmed on appeal to the Supreme Court, and a writ of error to the last decision brings up the case on the second record.

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In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the state of Vermont, which the latter, under the inhibition in the tenth section of the first article of the Constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the state legislation or to the Constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with *532] *reference to the advantage of the whole society. This power, denominated the *eminent domain* of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The Constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most sanctionious regard for the one is perfectly consistent with the possession and exercise of the other.

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power.

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of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of [*533 eminent *domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament de-

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nounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conceding the power to reside in the state government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary *534] foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction *has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, chap. 3, page 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. *Vide Bl. Com., Vol. III., ch. 16, p. 236, as to injuries*

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to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a state, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of the *Governor and Company of the Cast Plate Manufacturers v. Meredith*, 4 T. R., 794, and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

The several state decisions cited in the argument, from 3 Paige (N. Y.), 45, from 23 Pick. (Mass.), 361, from 17 Conn., 454, from 8 N. H., 398, from 10 Id., 371, and 11 Id., 20, are accordant with the decision above mentioned, from 4 T. R., and entirely *supported by it. One of these [*535 state decisions, namely, the case of the *Enfield Toll-Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn., places the principle asserted in an attitude so striking, as seems to render that case worthy of a separate notice. The legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted, in a charter subsequently granted by them to the Hartford and Springfield Railroad Company, a provision in these words,—“That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company.” This provision, comprehensive as its language may seem to be, was decided by the Supreme Court of the state as not embracing any exemption of the Bridge Company from the legislative power of eminent domain, with respect to its franchise, but to declare this, and this only,—that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the state. These decisions sustain clearly the

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following positions, comprised in this summary given by Chancellor Walworth, 3 Paige (N. Y.), 73, where he says, that, "notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency, of the state is concerned." In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognize the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power,—the only question properly presented upon these records,—we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise; nor do we inquire into the conformity between the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the state for the exercise of her legitimate authority, and as being without the province assigned to this court by the Judiciary Act.

*536] Upon the whole, we consider the authority claimed for the state of Vermont, and the exertion of that authority which has occurred under the provisions of the statutes above mentioned, by the extinguishment of the franchise previously granted the plaintiffs, as set forth upon the records before us, as presenting no instance of the impairing of a contract, within the meaning of the tenth section of the first article of the Constitution, and consequently no case which is proper for the interposition of this court. The decisions of the Supreme Court of Vermont are therefore affirmed.

Mr. Justice McLEAN.

As this is a constitutional question of considerable practical importance, I will state, succinctly, my general views on the subject.

The West River Bridge, under the statutes of Vermont, was appropriated to public purposes. And it is alleged that the charter under which the bridge was built and possessed by such appropriation was impaired. Our inquiry is limited to this point. For whatever injury the proceeding may have done

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to the interests of the corporation, unless its contract with the state was impaired, we have no jurisdiction of the case.

The power in a state to take private property for public use is undoubted. It is an incident to sovereignty, and its exercise is often essential to advance the public interests. This act is done under the regulations of the state. If those regulations have not been strictly observed, that is not a matter of inquiry for this court. The local tribunals have the exclusive power in such cases.

This act by a state has never been held to impair the obligations of the contract by which the property appropriated was held. The power acts upon the property, and not on the contract. A state cannot annul or modify a grant of land fairly made. But it may take the land for public use. This is done by making compensation for the property taken, as provided by law. But if it be an appropriation of property to public use, it cannot be held to impair the obligations of the contract.

It is insisted, that this was a pretended exercise of the power of the eminent domain, with the view of destroying the force and obligation of the plaintiffs' charter.

This whole proceeding was under a standing law of the state, and it was sanctioned, on an appeal, by the Supreme Court of the state. A procedure thus authorized by law, and sanctioned, cannot be lightly regarded. It has all the solemnities of a sovereign act.

*But it is said that the franchise of the plaintiff cannot be denominated property; that "it included the grant of no property real or personal; that it lay in grant, and not in livery." [*537]

If the action of the state had been upon the franchise only, this objection would be unanswerable. The state cannot modify or repeal a charter for a bridge, a turnpike-road, or a bank, or any other private charter, unless the power to do so has been reserved in the original grant. But no one doubts the power of the state to take a banking-house for public use, or any other real or personal property owned by the bank. In this respect, a corporation holds property subject to the eminent domain, the same as citizens. The great object of an act of incorporation is, to enable a body of men to exercise the faculties of an individual. Peculiar privileges are sometimes vested in the body politic, with the view of advancing the convenience and interests of the public.

The franchise no more than a grant for land can be annulled by the state. These muniments of right are alike protected. But the property held under both is held subject to a public

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necessity, to be determined by the state. In either case, the property being taken renders valueless the evidence of right. But this does not, in the sense of the Constitution, impair the contracts. The bridge and the ground connected with it, together with the right of exacting toll, are the elements which constitute the value of the bridge. The situation and productiveness of the soil constitutes the value of land. In both cases, an estimate is made of the value, under prescribed forms, and it is paid when the property is taken for public use. And in these cases the evidences of right are incidents to the property.

No state could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the state, and kept up by it, as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bonâ fide* by a state, but the property, not its product, must be applied to public use.

It is argued, that, if the state may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the state cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not *538] pretended. If in the course of time the property, by a change of *circumstances, should no longer be required for public use, it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway should be abandoned, it would revert to the original proprietor and owner of the fee.

It is objected that this bridge, being owned by a corporation and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private.

The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. But it was a toll-bridge, and by the act it is made free. The use, therefore, is not the same. The tax assessed on the citizens of the town, to keep up and

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pay for the bridge, may be impolitic or unjust; but that is not a matter for the consideration of this court.

It is supposed, if this power is sustained by the state of Vermont, it will be in the power of a state to seize the evidences of its indebtedness in the hands of its citizens, or within its jurisdiction, have their value assessed, and, by paying the amount, extinguish them. Such a case bears no analogy to the one before us. The contract only is acted upon in the case supposed. The obligation to pay the money by the state is materially impaired, which brings the case within the Constitution. But the appropriation of property affects the contract or title by which it is held only incidentally. This, it is said, is an extremely technical distinction, and is not sustainable, as it enables a state to do indirectly what the Constitution prohibits.

However nice the distinction may seem to be, when examined it will be found substantial.

The power of appropriation by a state has never been held by any judicial tribunal as impairing the obligation of a contract, in the sense of the Constitution. And this power has been frequently exercised by all the states, since the adoption of the Constitution. In the fifth article of the amendments to the Constitution it is declared, "Nor shall private property be taken for public use without just compensation." This refers to the action of the federal government, but a similar provision is contained in all the state constitutions. Now the Constitution does not prohibit a state from impairing the obligation of a contract unless compensation be made, but the inhibition is absolute. So that if such an act come within the prohibition, the act is unconstitutional. But this power has been exercised by the states, since the foundation of the government, [*539 and no one has supposed that it was prohibited by that clause in the Constitution which inhibits a state "from impairing the obligation of a contract."

The only reasonable result, therefore, to which we can come is, that the power in the state is an independent power, and does not come within the class of cases prohibited by the Constitution.

This view gives effect to the Constitution in imposing a salutary restraint upon legislation affecting contracts, but leaves the states free in their exercise of the eminent domain, which belongs to their sovereignties, is essential for the advancement of internal improvements, and acts only upon property within their respective jurisdictions. The powers do not belong to the same class. That which acts upon contracts and impairs their obligation only is prohibited.

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Mr. Justice WOODBURY.

In the decisions of this court on constitutional questions it has happened frequently, that, though its members were united in the judgment, great differences existed among them in the reasons for it, or in the limitations on some of the principles involved. Hence it has been customary in such cases to express their views separately. I conform to that usage in this case the more readily, as it is one of the first impression before this tribunal, very important in its consequences, as a great landmark for the states as well as the general government, and, from shades of difference and even conflicts in opinion, will be open to some misconstruction.

I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a state is derived from, or protected by, its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Vattel, B. 1, ch. 20, § 244; 2 Kent Com., 270; 37 Am. Jur., 121; 1 Bl. Com., 139; 3 Wils., 303; 3 Story Const., 661; 3 Dall., 95. Some ground this public right on sovereignty. 2 Kent Com., 339; Grotius, B. 1, ch. 1, § 6. Some on necessity. 2 Johns. (N. Y.), Ch., 162; 11 Wend. (N. Y.), 51; 14 Id., 56; 1 Rice (S. C.), 383; *Vanhorne's Lessee v. Dorrance*, 2 Dall., 310; *Dyer v. Tuscaloosa Bridge*, 2 Port. (Ala.), 303; *Harding v. Goodlett*, 3 Yerg. (Tenn.), 53. Some on implied compact. *Raleigh & Gaston Railroad Co. v. Davis*, 2 Dev. & B. (N. C.), 456; 2 Bay, 36, in S. Car.; 3 Yerg. (Tenn.), 53. When a charter is granted after laws exist to condemn property when needed for public purposes, others might well rest such a right *540] on the hypothesis, that such laws are virtually a part and condition of the grant itself, as much as *if inscribed in it, *todidem verbis*. *Towne v. Smith*, 1 Woodb. & M., 134; 2 How., 608, 617; 1 Id., 311; 3 Story Const., §§ 1377, 1378, *quære*.

But, however derived, this eminent domain exists in all governments, and is distinguished from the public domain, as that consists of public lands, buildings, &c., owned in trust exclusively and entirely by the government (3 Kent Com., 339; *Memphis v. Overton*, 3 Yerg. (Tenn.), 389); while this consists only in the right to use the property of others, when needed, for certain public purposes. Without now going further into the reasons or extent of it, and under whatever name it is most appropriately described, I concur in the views of the court, that it still remains in each state of the Union in a case like the present, having never been granted to the general government so far as respects the public high-

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ways of a state, and that it extends to the taking for public use for a road any property in the state, suitable and necessary for it. *Tuckahoe Canal case*, 11 Leigh (Va.), 75; 11 Pet., 560; 20 Johns. (N. Y.), 724; 3 Paige (N. Y.), 45; 7 Pick. (Mass.), 459. But whether it could be taken without compensation, where no provision exists like that in the fifth amendment of the Constitution of the United States, or that in the Vermont constitution, somewhat similar, is a more difficult question, and on which some have doubted. 4 T. R., 794; 1 Rice (S. C.), 383; 3 Leigh (Va.), 337. I do not mean to express any opinion on this, as it is not called for by the facts of this case. But compensation from the public in such cases prevails generally in modern times, and certainly seems to equalize better the burden. 2 Dall., 310; *Pisc. Bridge v. Old Bridge*, 7 N. H., 63; 4 T. R., 794; 1 Nott & M. (S. C.), 387; *Stokes et al. v. Sup. Ass. Co.*, 3 Leigh (Va.) 337; 11 Id., 76; *Hartford Bridge*, 17 Conn., 91; Vattel, B. 1, ch. 20, § 244; 3 Paige (N. Y.), 45; 2 Dev. & B. (N. C.), 451; 2 Kent Com., 339, note; *Lex. & Oh. Railroad case*, 8 Dana (Ky.), 289.

Nor shall I stop to discuss whether it is on this principle of the eminent domain alone, that private property has always been taken for highways in England, on making compensation, so as to be a precedent for us. This was done there formerly, not as here, but by a writ *ad quod damnum*, and it was for ages issued before the grant of any new franchise by the king, whether a road, ferry, or market; and the inquiry related to the damage by it, whether to the public or individuals. Fitz., N. B., 221; 3 Bac. Abr., *Highways*, A.

Nor were alterations in roads, or even the widening or discontinuing of them, allowed without it. *Thomas v. Sorrel*, Vaughan, 314, 348, 349; Cooke (Tenn.), 267; 6 Barn. & Ald., 566.

*But in modern times Parliament, by various laws, [*541 have authorized all these, after inquiry and compensation awarded by certain magistrates. 1 Burr., 263; Campb., 648; Cro. Car., 266, 267; 5 Taunt., 634; Domat, B. 1, t. 8, § 2; 7 Ad. & E., 124.

And thus, notwithstanding the theoretical omnipotence of Parliament, private rights and contracts have been in these particulars, about compensation and necessity for public use, as much respected in England as here.

So as to railroad companies, as well as turnpikes, under public trustees, and as to common highways; the former are often authorized there to erect bridges, and carry their roads over turnpikes and other highways; but it is on certain con-

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ditions, keeping them passable in that place or near, and on making compensation. *Kent v. L. & B. Railway Co.*, 1 R. Cas., 505, and *Attorney-General v. The L. & S. Railroad*, 1 Id., 302, 224; 2 Id., 711; 1 Gale & D., 324; 2 Id., 1; 4 Jur., 966; 5 Id., 652; 9 Dowl. P. C., 563; 7 Adol. & E., 124; 3 Mau. & Sel., 526; 11 Leigh (Va.), 42.

But I freely confess, that no case has been found there by me exactly in point for this, such as the taking of the road or bridge of one corporation for another, or of taking for the public a franchise of individuals connected with them. Though, at the same time, I have discovered no prohibition of it, either on principle or precedent, if making compensation and following the mode prescribed by statute.

The peculiarity in the present case consists in the facts, that a part of the property taken belonged to a corporation of the state, and not to an individual, and a part was the franchise itself of the act of incorporation.

I concur in the views, that a corporation created to build a bridge like that of the plaintiffs in error is itself, in one sense, a franchise. 2 Bl. Com., 37; *Bank of Augusta v. Earle*, 13 Pet., 596; 4 Wheat., 657; 7 Pick. (Mass.), 394; 11 Pet., 474, 454, 472, 490, 641, 645; 11 Leigh (Va.), 76; 3 Kent Com., 459. And, in another sense, that it possesses franchises incident to its existence and objects, such as powers to erect the bridge and to take tolls. See same cases.

I concur in the views, also, that such a franchise as the incorporation is a species of property. 7 N. H., 66; *Tuckahoe Canal Co. v. Tuckahoe & Camb. Railroad Co.*, 11 Leigh (Va.), 76. It is a legal estate vested in the corporation. 4 Wheat., 700; 11 Pet., 560. But it is often property distinct and independent of the other property in land, timber, goods, or choses in action, which a corporation, like a body not artificial, may own. 3 Bland. (Md.), 449; 11 Leigh (Va.), 76.

*542] It is also property subject to be sold, sometimes even on execution (*Semb.*, 4 Mass., 495; 11 Pet., 434), and may be devised or inherited. 17 Conn., 60. And while I accede to the principle urged by the counsel for the bridge, that the act of incorporation in this case was a contract, or in the nature of one between the state and its members (1 Myl. & C., 162; 4 Pet., 514, 560; *Lee v. Nailer*, 2 Younge & Coll., 618; *King v. Pasmoor*, 3 T. R., 246; *Woodward v. Dartmouth College*, 4 Wheat., 628; 7 Cranch, 164; *Terrett v. Taylor*, 9 Id., 43, 52; 9 Wend. (N. Y.), 351; 11 Pet., 257; *Canal Co. v. Railroad*, 4 Gill & J. (Md.), 146; 3 Kent. Com., 459; *Enfield Toll-bridge case*, 17 Conn., 40; 1 Greenl. (Me.), 79; 8 Wheat., 464; 10 Conn., 522; Peck (Tenn.), 269; 1 Ala.,

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23; 2 Stew. (Ala.) 30), I concur in the views of the court, that this or other property of corporations may be taken for the purpose of a highway, under the right of eminent domain, and that the laws of Vermont authorizing it are not in that respect and to that extent violations of the obligation of any contract made by it with the corporation. *Bradshaw v. Rodgers*, 20 Johns. (N. Y.), 103, 742; *The Trust. of Belf. Ac. v. Salmond*, 2 Fairf. (Me.), 113; *Enfield Bridge* case, 17 Conn., 40, 45, 61; 3 Paige (N. Y.), Ch., 45; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.), 394, 399; S. C., 11 Pet., 474; 1 Bland. (Md.), 449; *Bellona Co.* case, 3 Id., 449.

Because there was no covenant or condition in the charter or contract, that the property owned by it should not be liable to be taken, like all other property in the state, for public uses in highways. 7 N. H., 69; 4 Wheat., 196; *Jackson v. Lamphire*, 3 Pet., 289.

Because, without such covenant, all their property, as property, must be liable to proper public uses, either by necessity, or the sovereignty of the state over it, or by implied agreement.

And because, on a like principle, taxes may be imposed on such property, as well as all other property, though coming by grant from the state, and may be done without violating the obligation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled. 5 Barn. & Ald., 157; 2 Railway Cases, 17 arg. 23; 7 Cranch, 164; *New Jersey v. Wilson*, 4 Pet., 511; *Providence Bank v. Billings*, 11 Id., 567; Shaw, C. J., in *Charles River Bridge v. Warren Bridge*; *Gordon v. Appeal Tax Court*, 3 How., 146; 12 Mass., 252; 4 Wheat., 699; 4 Gill & J., (Md.), 132, 153; *Williams v. Pritchard*, 4 T. R., 2. The grantees are presumed to know all these legal incidents or liabilities, and they being implied in the grant or contract, their happening is no violation of it. 8 Pet., 281, 287; 11 Id., 641, 644; 3 Paige (N. Y.), 72.

*Vattel says,—“The property of certain things is given up to the individuals only with this reserve.” [*543 B. 1, ch. 20, § 244.

In England anciently, when titles of land became granted with immunities from numerous ancient services, it was still considered that such lands were subject by implication, under a certain *trinoda necessitas*, to the expenses of repair of bridges as well as forts, and of repelling invasion. Tomlins, Dict., *Trinoda Necessitas*; 3 Bac. Abr., *Highways*, A.

Even the right to a private way is sometimes implied in a grant, from necessity. Cro. Jac., 189; 8 T. R., 50; 4 Mau. & Sel., 387; 1 Saund., 322, n.

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It is laid down, also, by Justice Story, that "a grant of a franchise is not in point of principle distinguishable from a grant of any other property." *Dartmouth College v. Woodward*, 4 Wheat., 699, 701.

I concur, therefore, in the further views, that the corporation as a franchise, and all its powers as franchises, both being property, may for these and like reasons, in proper cases, be taken for public use for a highway. *Pierce v. Somersworth*, 10 N. H., 370; 11 Id., 20; *Piscat. Bridge v. N. H. Bridge*, 7 Id., 35, 66; 8 Id., 398, 143; 11 Pet., 645; Story, J., in *Warren Bridge v. Charles River Bridge*; 2 Kent Com., 340 n.; 2 Pet., 658; 5 Paige (N. Y.), 146; 1 Rice (S. C.), 383; 2 Port. (Ala.), 296; 7 Ad. & E., 124; 3 Yerg. (Tenn.), 41; 2 Fairf. (Me.), 222; 23 Pick. (Mass.), 360; *J. Bonaparte v. C. Railroad*, Baldw., 205; *Tuckahoe Canal Co. v. The T. & J. River Railroad Co.*, 11 Leigh (Va.), 42; *Enfield Bridge Co. v. Hartford & New Haven Railroad*, 17 Conn., 40; *Armington v. Barnet*, 15 Vt., 745, and 16 Id., 446, this case; 3 Cow. (N. Y.), 733, 754; 11 Wend. (N. Y.), 590; *Lex. & Oh. Railroad case*, 8 Dana (Ky.), 289; 18 Wend. (N. Y.), 14.

It must be confessed, that some surprise has been felt to find this doctrine so widely sustained, and in so many of the states, and yet no exact precedent existing in England.

But in relation to it here, I am constrained, in some respects, to differ from others, and, as at present advised, agree to the last proposition, concerning the taking of the franchise itself of a corporation, only when the further exercise of the franchise as a corporation is inconsistent or incompatible with the highway to be laid out.

It is only under this limitation as to the franchise itself, that there seems to be any of the necessity to take it which, it will be seen in the positions heretofore and hereafter explained, should exist. Nor do I agree to it with that limitation, without another,—that it must be in cases where a clear *544] intent is manifested in the laws, that one corporation and its uses shall *yield to another, or another public use, under the supposed superiority of the latter and the necessity of the case.¹ 4 Gill & J. (Md.), 108, 150; *Barbour v. Andover*, 8 N. H., 398.

Within these limitations, however, the acts of incorporation and all corporate franchises appear to me to possess no more immunity from reasonable public demands for roads and taxes, than the soil and freehold of individuals.

The land may come by grant or patent from the state, as

¹See *United States v. Chicago*, 7 How., 195.

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well as the corporation, and both the grant and corporation may be contracts. But they are contracts giving rights of property, held, and of course understood to be held, subject to those necessary burdens and services and easements to which all other property is liable. And it is neither inconsistent with the grant of them, nor a violation of the contract contained in them, to impose those burdens and easements, unless an express agreement has been made to the contrary by the state in the act of incorporation or grant, as is sometimes done in respect to taxation. But where the corporation, as a franchise, or its powers as franchises, can still be exercised usefully or profitably, and the highway be laid out as authorized, I see no reasons why these franchises should then be condemned or taken. The property owned by a banking or manufacturing corporation may, for instance, be condemned for highways, necessarily, where situated on a great line of travel; but why should their franchises be, if their continued existence and use may be feasible and profitable, and one not inconsistent with the taking and employment of their other property for a public highway?

In this instance, however, as a fact, the franchise was established and seems to be useful only in one locality. The continuance of it elsewhere than at this spot would be of no benefit to individual members or the public. If the bridge itself and land of the corporation at that place were taken, it was better for the latter that the franchise should be taken with them, if enhancing the damages any, because, unlike a bank or manufacturing company, the corporation could not do business to advantage elsewhere, even within the limited four miles, as there was no road elsewhere within their grant. The law of Vermont, too, was clear, that the toll-bridge might be made to give way for a free highway. It is, therefore, only under the particular circumstances and nature of this case, that, in my apprehension, the taking of the franchise itself was not a violation of the contract. For, under different circumstances, if a franchise be taken and condemned for a highway, when not connected locally with other property wanted, when it can be exercised on ordinary principles [*545 elsewhere, when not *in some respects incident to, or tied up with, the particular property and place needed, I am not now prepared to uphold it. I am even disposed to go further, and say, that if any property of any kind is not so situated as to be either in the direct path for a public highway, or be really needed to build it, the inclination of my mind is, that it cannot be taken against the consent of the owner. Because, though the right of eminent domain exists

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in some cases, it does not exist in all, nor as to all property, but probably as to such property only as, from its locality and fitness, is necessary to the public use. *Semb.*, 4 Myl. & C., 116; *Webb v. Manchester, &c., Railway Co.*, 1 R. Cas., 576.

It may be such, not only for the bed of the road, but perhaps for materials in gravel, stone, and timber, to build it with. Yet even then it must be necessary and appropriate as incidents. 2 Dev. & B. (N. C.), 462; 13 East, 200.

And also, for aught I now see, circumstances must, from its locality and the public wants, raise an urgent necessity for it. "The public necessities" are spoken of usually as the fit occasion to exercise the power, if it be not derived from them in a great degree, and the reason of the case is confined to them. (See cases before.)

The ancient *trinoda necessitas* extended to nothing beyond such necessity.

Indeed, without further examination, I fear that even these limitations may not be found sufficient in some kinds of public highways,—such as railroads, for instance. And I must hear more in support of this last position before acquiescing in their right to take, *in invitum*, all the materials necessary to build such roads,—as the timbers on which their rails are laid, or the iron for the rails themselves.

Nor do I agree that, in all cases of a public use, property which is suitable or appropriate can be condemned. The public use here is for a road, and the reasoning and cases are confined chiefly to bridges and roads, and the incidents to war. But the doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse. Where the public use is one general and pressing, like that often in war for sites of batteries, or for provisions, little doubt would exist as to the right. *Salus populi suprema est lex*. So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age,—such *546] as its pressing demands for easier social intercourse, *quicker political communication, or better internal trade,—and advancing with the public necessities from blazed trees to bridle-paths, and thence to wheel-roads, turnpikes, and railroads.

But when we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain

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strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison?

So a custom-house is a public use for the general government, and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence; while as to a light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents, also, for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have been advanced in this country. 3 Paige (N. Y.), 45. Again, many things belonging to bridges, turnpikes, and railroads, where public corporations for some purposes, are not, like the land on which they rest, local and peculiar and public, in the necessity to obtain them by the power of the eminent domain. Such seem to be cars, engines, &c., if not the timber for rails, and the rails themselves. *Gordon v. C. & J. Railway Co.*, 2 R'y Cas., 809.

Such things do not seem to come within the public exigency connected with the roads which justifies the application of the principle of the eminent domain. Nor does even the path for the road, the easement itself, if the use of it be not public, but merely for particular individuals, and merely in some degree beneficial to the public. On the contrary, the user must be for the people at large,—for travellers,—for all,—must also be compulsory by them, and not optional with the owners,—must be a right by the people, not a favor,—must be under public regulations as to tolls, or owned, or subject to be owned, by the state, in order to make the corporation and object public, for a purpose like this. 3 Kent Com., 270; *Railroad Co. v. Chappell*, 1 Rice (S. C.), 383; *Memphis v. Overton*, 3 Yerg. (Tenn.), 53; *King v. Russell*, 6 Barn. & C., 566; *King v. Ward*, 4 Ad. & E., 384.

*It is not enough that there is an act of incorporation for a bridge, or turnpike, or railroad, to make them [*547 public, so as to be able to take private property constitutionally, without the owner's consent; but their uses, and object, or interests, must be what has just been indicated,—must in their essence, and character, and liabilities, be public within the meaning of the term "public use." There may be

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a private bridge, as well as private road, or private railroad, and this with or without an act of incorporation.

In the present instance, however, the use was to be for the whole community, and not a corporation of any kind. The property was taken to make a free road for the people of the state to use, and was thus eminently for a public use, and where there had before been tolls imposed for private profit and by a private corporation so far as regards the interest in its tolls and property.

And the only ground on which that corporation, private in interest, was entitled in any view originally to condemn land or collect tolls was, that the use of its bridge was public,—was open to all and at rates of fare fixed by the legislature and not by itself, and subjected to the revision and reduction of the public authorities.

It may be, and truly is, that individuals and the public are often extensively benefited by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights. 1 Rice (S. C.), 388. And in point of law it seems very questionable as to the power to call such a corporation a public one, and arm it with authority to seize on private property without the consent of its owners.

I exclude, therefore, all conclusions as to my opinions here being otherwise than in conformity to these suggestions; though when, as in the present case, a free public use in a highway and bridge is substituted for a toll-bridge, and on a long or great and increasing line of public travel, and thus vests both a new benefit and use, and a more enlarged one, in the public, and not in any few stockholders, I have no doubt that these entitle that public for such a use to condemn private property, whether owned by an individual or a corporation. *Boston W. P. Co. v. B. & W. Railroad Corp.*, 23 Pick. (Mass.), 360. And it is manifest that unless such a course can be pursued, the means of social and commercial intercourse might be petrified, and remain for ages, like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement. 2 Dev. & B. (N. C.), 456; 1 Rice (S. C.), 395; 8 Dana (Ky.), 309.

*548] I exclude, also, any inference, that, in assenting to the doctrine, that an act of incorporation for a toll-bridge is a contract, giving private interests and rights as well as public ones, and thereby not allowing a state to take the private ones or alter them, unless for some legitimate public use, or by consent, as laid down in 4 Wheat., 628, I can or do

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assent to the doctrine of some of the judges there in respect to public offices being such contracts as not to be changed or abolished by a state on public considerations, without incurring a violation of the contract.

I should be very reluctant to hold, till further advised, that public offices are not, like public towns, counties, &c., mere political establishments, to be abolished or changed for political considerations connected with the public welfare. 9 Cranch, 43. The salaries, duration, and existence of the offices themselves seem to be exclusively public matters, open to any modification which the representatives of the public may decide to be necessary, whenever no express restriction on the subject has been imposed in the constitution or laws. *Quære. Hoke v. Henderson*, 4 Dev. (N. C.), 1.

This would seem the implied condition of the office or contract, as much as that it may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it. See, as to the last, *McCulloch v. Maryland*, 4 Wheat., 316; *Weston v. The C. C. of Charleston*, 2 Pet., 449; *Dobbins v. Comm. of Erie City*, 16 Id., 435.

Finally, I do not agree that even this franchise, as property, can be taken from this corporation without violating the contract with it, unless the measure was honest, *bonâ fide*, and really required for what it professed to be, beside being, as before remarked, proper, on account of the locality and nature of this property, to be condemned for this purpose.¹

And though I agree, that, for most cases and purposes, the public authorities in a state are the suitable judges as to this point, and that the judiciary only decide if their laws are constitutional (2 Kent Com., 340; 1 Rice (S. C.), 383); that the legislature generally acts for the public in this (2 Port. (Ala.), 303; 3 Bl. Com., 139, note; 4 T. R., 794, 797); that road agents are their agents, under this limitation (1 Rice (S. C.), 383); yet I am not prepared to agree, that if, on the face of the whole proceedings,—the law, the report of commissioners, and the doings of the courts,—it is manifest that the object was not legitimate, or that illegal intentions were covered up in forms, or the whole proceedings a mere “pretext,” our duty would require us to uphold them. *Id.*; Rice (S. C.), 391. In England, though *this power exists, yet if used maliciously or wantonly, it is held to be void. *Boydfield v. Porter et al.*, 13 East, 200.

In this case, however, while the fairness of it is impeached by the plaintiffs in error, yet on the record the object avowed

¹ CITED. *The Passenger Cases*, 7 How. 571.

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is legal. It was to make travel free where it was before taxed, and the bridge, though remote from the changes desired in the old road, was still situated on the great line of travel over it, and not merely by color and finesse connected, and, from increases in population and business, seemed proper to be made free at the expense of the town or county.

Nor on the face of the record do the proceedings seem void, because the assessment may have been without a jury, when it was made by the legal officers, appointed for that purpose. 3 Pet., 280; 2 Dev. & B. (N. C.), 451, 460; *Beekman v. Sar. Railroad*, 3 Paige (N. Y.), 45. Nor void as made by the commissioners without notice, when the return states notice, and when there was a full hearing enjoyed by all before the court on the report.

Nor void because the compensation was too small to the corporation,—as it was assessed in conformity to law,—or too burdensome to the town alone to discharge, though the last might well have been flung on a larger number, like a county. 10 N. H., 370; Tomlins Dict., *Ways*, 2; 1 Rice (S. C.), 392. Nor because the commissioners take a fee instead of an easement, when the legislature provide for a fee as more expedient. 2 Dev. & B. (N. C.), 451, 467. Nor because some of the property condemned was personal, when it was mixed with the real, and when real or personal, if needed and appropriate, may at times be liable. 1 Rice (S. C.), 383.

With these explanations, I would express my concurrence in the judgment of the court.

Mr. Justice WAYNE delivered a dissenting opinion.

Order.

The West River Bridge Company, Plaintiffs in error, v. Joseph Dix, and the Towns of Brattleboro' and Dummerston in the County of Windham.

This cause came on to be heard on the transcript of the record from the Supreme Court of Judicature of the state of Vermont, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

The West River Bridge Company, Plaintiffs in error, v. The Towns of Brattleboro' and Dummerston, in the County of Windham, and Joseph Dix, Asa Boyden, and Phineas Underwood.

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*This cause came on to be heard on the transcript of the record from the Supreme Court of Judicature of the state of Vermont, and the Chancellor of the first Judicial Circuit of the said state of Vermont, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Judicature and Chancellor of the first Judicial Circuit of the state of Vermont in this cause be and the same is hereby affirmed, with costs.

CHARLES PATTERSON, APPELLANT, v. EDMUND P. GAINES AND WIFE.*

The opinion of this court in the case of *Gaines v. Relf and Chew*, (2 How., 619,) reviewed.

A court of equity can decide the question whether or not a party is the heir of a deceased person. It is not necessary to send the issue of fact to be tried by a court of law.

Where a marriage took place in Pennsylvania, it must be proved by the laws of Pennsylvania. In that state it is a civil contract, to be completed by any words in the present tense, without regard to form, and every intendment is made in favor of legitimacy.

Where the complainant in a bill offers to receive an answer without oath, and the defendant accordingly filed the answer without oath, denying the allegations of the bill, the complainant is not put to the necessity, according to the general rule, of contradicting the answer by the evidence of two witnesses or of one witness with corroborating circumstances. The answer, being without oath, is not evidence, and the usual rule does not apply.

In this case, however, even if the answer had been under oath and had denied the allegations of the bill, yet there is sufficient matter in the evidence of one witness, sustained by corroborating circumstances, to support the bill.

A marriage may be proved by any one who was present and can identify the parties. If the ceremony be performed by a person habited as a priest, and *per verba de presenti*, the person performing the ceremony must be presumed to have been a clergyman.

If the fact of marriage be proved, nothing can impugn the legitimacy of the issue, short of the proof of facts showing it to be impossible that the husband could be the father.¹

By the laws of Louisiana and Pennsylvania, a marriage between a woman and a man who had then another wife living was void, and the woman could marry again without waiting for a judicial sentence to be pronounced declaring the marriage to be void.²

If she does so marry again, and the validity of her second marriage be contested, upon the ground that she was unable to contract it because the first marriage was legal, it is not necessary for her to produce the record of the

*Mr. Chief Justice Taney did not sit in this cause, a near family relative being interested in the event.

Mr. Justice McLean did not sit in this cause.

Mr. Justice Catron did not sit in this cause, by reason of indisposition.

¹ CITED. *Egbert v. Greenwalt*, 44 Mich., 250. ² FOLLOWED. *Finn v. Finn*, 62 How. (N. Y.), Pr., 85.

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conviction of *her first husband for bigamy. The burden of proof lies upon those who make these objections to the second marriage, and the declarations of the bigamist, that he had a first wife living when he married the second, are evidence.

When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is that a child born after the marriage is legitimate, and it will be incumbent on him who denies it to disprove it, although in so doing he may have to prove a negative.

Although the general rule is that a person cannot be affected, much less convicted, by any evidence, decree, or judgment to which he was not actually or in consideration of law privy, yet it has been so far departed from as that wherever reputation would be admissible evidence, there a verdict between strangers in a former action is evidence also.

Although by the code of Louisiana a person holding property by sale from a donee of an excessive donation is liable to the forced heir only after an execution first had against the property of the donee, yet this rule does not apply to cases where the sale was made without any authority, judicial or otherwise.¹

Where sales are made without this authority, the purchaser is presumed to have notice of it. It is his duty to inquire whether or not the requisitions of law were complied with.

The statute of limitations which was in force when the suit was brought is that which determines the right of a party to sue.

By the Louisiana code of 1808, a deceased person could not, in 1811, dispose of more than one fifth of his property, when he had a child. The child is the forced heir for the remaining four fifths.²

THIS was an appeal from the Circuit Court of the United States for East Louisiana.

It was a branch of the case of *Gaines and Wife v. Chew and others*, which is reported in 2 How., 619.

In the history of that case it is said (2 How., 627), that in 1836, Myra (then Myra Whitney, and now Myra Gaines) "filed a joint bill with her husband, in the Circuit Court of the United States for the District of Louisiana, against Relf and Chew, the executors in the will of 1811, the heirs of Mary Clark, and all the purchasers and occupants of the estate of which Clark died in possession, claiming to be the heir and devisee of Clark, and calling upon them all to account for the rents and profits of the several portions of the estate."

The joint bill, thus filed against a number of persons, was treated differently by the respondents. Some pursued one course and some another. Relf and Chew, the executors, demurred generally, and upon the argument of the demurrers, some questions arose upon which the judges differed in opinion. These questions were consequently certified to the Supreme Court, and the answers to them constitute the case reported in 2 How., 619. Patterson was one of the occupants and purchasers of a part of the property of which Clark died

¹ FOLLOWED. *Gaines v. New Orleans*, 6 Wall., 712. preme Court comprised in the *Gaines* litigation, see *Gaines v. Chew*, 2

² For a list of the cases in the Su- How., 619, n.

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seized, and he chose to answer the bill. The proceedings of the court under this answer are now under consideration.

The history of Zuline Carriere, the mother of Mrs. Gaines, is briefly given in 2 How., 620, and need not be repeated. The facts are there stated, of her marriage with a man by the *name of De Grange; of her afterwards learning that De Grange had a former wife living; of her separation from him and journey to New York to obtain proofs of this first marriage of De Grange; of De Grange's first wife arriving in New Orleans from France; of De Grange being committed to prison on a charge of bigamy, and subsequent escape from the country; of Clark's marriage with Zuline in Philadelphia; of the birth of Myra, the complainant in the present suit; of Clark's placing her in the family of Mr. and Mrs. Davis; of the circumstances attending the making of the will of 1811; and some of the testimony relating to a subsequent will made in 1813, leaving all his property to his daughter Myra. The statement of these things in 2 Howard is referred to, as being a more particular narrative than the mere outline which is here given. We propose to take up the case where that report left it.

The record in the present case was in a very confused condition. Papers were misplaced, and the entire record of proceedings in the Court of Probates, from 1834 to June 8, 1836, was introduced as evidence by the defendant, Patterson, in the Circuit Court; and also the proceedings of that court at a much earlier date. From them the following facts appear.

Clark died on the 16th of August, 1813. On the 18th of August, two days afterwards, the following petition was presented to the Court of Probates.

To the Honorable the Judge of the Court of Probates of the Parish of New Orleans.

The petition of Francisco Dusuau de la Croix, of this parish, planter, respectfully shows:

That your petitioner has strong reasons to believe, and does verily believe, that the late Daniel Clark has made a testament or codicil, posterior to that which has been opened before your honorable court, and in the dispositions whereof he thinks to be interested. And whereas it is to be presumed that the double of this last will, whose existence was known by several persons, might have been deposited with any notary public of this city.

Your petitioner, therefore, prays that it may please your Honor to order, as it is the usual practice in such cases, that every notary public in this city appear before your honorable

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court within the delay of twenty-four hours, in order to certify on oath if there does or does not exist, in his office, any testament or codicil, or any sealed packet, deposited by the said late Daniel Clark.

And your petitioner, as in duty bound, will ever pray, &c.
(Signed,) D. SEGHERS,

Of Counsel for the Petitioner.

*553] *Francisco Dusau de la Croix, the above petitioner, maketh oath that the material facts in the above petition set forth are true, to the best of his knowledge and belief.
(Signed,) DUSUAU DE LA CROIX.

Sworn to before me, August 18th, 1813.

THOS. BEAL, *Reg. Wills.*

The court ordered the notaries of the city to appear before it on the next day, when seven appeared and deposed that no testament nor codicil, nor sealed packet, had been deposited in their office by the late Daniel Clark, nor had any deposition, *mortis causa*, been made by him.

The will of 1811 was then admitted to probate. It was as follows:—

Daniel Clark. In the name of God: I, Daniel Clark, of New Orleans, do make this my last will and testament.

Imprimis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the state of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate my friends, Richard Relf and Beverly Chew, my executors, with power to settle every thing relating to my estate.

(Signed,)

DANIEL CLARK.

Ne varietur. New Orleans, 20th May, 1811.

J. PITOT, *Judge.*

Letters testamentary were granted to Relf on the 27th of August, 1813, and to Chew on the 21st of January, 1814, the latter being absent from New Orleans at the time of Clark's death.

Davis had removed to the North, with his family, in 1812, carrying with him Myra, who passed for his daughter and bore his name.

Things remained in this condition until 1832, when Myra married William Wallace Whitney, and about the time of her marriage became acquainted with her true name and parentage.

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In 1834, Whitney and wife commenced a series of proceedings in the Court of Probates, which continued until the 8th of June, 1836, when the court dismissed their petition. It has been already stated, that this entire record was introduced into the case now under consideration by the defendant, Patterson, on the 13th of August, 1840. Many depositions were taken, which constitute a part of the mass of evidence in the case, although some of the witnesses were reexamined under the authority of a commission issuing from the Circuit Court *of the United States, after the filing of [*554 the bill. They who were thus reexamined were Harriet Smith, *alias* Harper, Madame Caillaret, the sister of Zuline, Belle Chasse, and De la Croix. They whose depositions were not taken over again were Bois Fontaine, Mr. and Mrs. Davis, Pitot, Derbigny, Madame Benguerel, and Preval. The evidence of Madame Despau, another sister of Zuline, was only taken once, and then under a commission issuing from the Circuit Court.

It is not necessary to give a particular narrative of the proceedings before the Court of Probates, from 1834 to June, 1836. They were commenced in March, 1834, by a petition filed by Charles W. Shaumburg for letters of administration upon the estate of Clark, on the ground that the succession was in an unclaimed and abandoned condition, and that he had an interest in the settlement of the same. This petition was opposed by Relf and Chew. On the 18th of June, 1834, Whitney and wife became parties, by filing a petition praying that the will of 1811 might be annulled and set aside, that Myra Clark Whitney might be declared to be the heir of Clark, and that Relf and Chew might be ordered to deliver over the estate to her, &c.

On the 14th of January, 1835, Relf and Chew filed an answer to this petition, denying that Myra had any claim; that Clark was ever legally married, or that he ever had any legitimate offspring; and denying all the other allegations generally.

In the course of this controversy many depositions were taken.

On the 8th of June, 1836, the Court of Probates pronounced its judgment, nonsuiting the plaintiffs.

On the 28th of July, 1836, Whitney and wife filed a bill on the equity side of the Circuit Court of the United States, against Relf and Chew, the executors under the will of 1811, against the heirs of Mary Clark, and all the occupants and purchasers of the estate of which Clark died in possession. The bill charged that the will of 1813 was fraudulently sup-

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pressed, that its existence and suppression were notorious, and that all the purchasers did, in their consciences, believe that the will of 1811 had been fraudulently admitted to probate. It moreover stated the whole case, of which an outline has been given, alleging, also, that the sales made by Relf and Chew were illegally made.

Relf and Chew demurred generally, and also pleaded to the jurisdiction of the court. The proceedings in that branch of the case are set forth in 2 How., 619. Other defendants pursued other measures of defence, which it is not now necessary to mention.

*555] *On the 12th of December, 1837, Whitney's death was suggested, and the suit continued in the name of Myra alone.

On the 24th of May, 1839, Edmund P. Gaines and Myra, his wife, filed a supplemental bill, stating their intermarriage, and praying that the suit might be continued in their joint names as complainants.

On the 18th of April, 1840, the complainants filed an amended bill, praying that Caroline de Grange, and her husband, John Barnes, might be made defendants to the original bill.

On the 21st of April, 1840, Patterson filed his answer, which was not under oath, but signed by his counsel, in conformity with the waiver of the complainants. The answer denied all right and title of the complainants, in and to the following described piece or lot of ground situated on Philippa Street, between Perdido and Poydras Streets, having front, on Philippa Street, one hundred and twenty-five feet French measure, by seventy feet in depth, the same being in a square of ground situated in Suburb St. Mary, of this city, now the second municipality of New Orleans, and bounded by Philippa, Circus, Perdido, and Poydras Streets.

It alleged that the property belonged to Clark in his lifetime, and was legally sold by Relf and Chew, his executors, and denied all the allegations of the bill.

On the 25th of April, 1840, Patterson filed the following supplemental answer:—

“The supplemental answer of Charles Patterson, one of the defendants in the above-entitled suit, most respectfully represents:—

“That the property described in his original answer is ninety feet in depth, instead of seventy-five, French measure, as therein stated, and further represents that your respondents

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purchased a part of of said property from Gabriel Correjollas, and the remainder from Etienne Meunier, and that the said Meunier purchased from the said Correjollas, and the said Correjollas purchased all the said property at an auction sale made in the year 1820 by the testamentary executors of the late Daniel Clark, all of which facts will more fully appear from the four several copies of the authentic deed of sale hereunto annexed as a part of this supplemental answer. And this respondent prays that this supplement be made a part of his original answer."

To this answer the deeds referred to were attached as exhibits.

*As the claim of Mrs. Gaines in the present case was made, not as devisee under the will of 1813, but as [*556 forced heir under the Civil Code of 1808, ch. 3, § 1, art. 19, which prohibits a testator from willing away more than one fifth of his property if there is a legitimate child living at the time of his death, it is only necessary to insert in this statement such of the depositions as have a bearing upon the marriage of Clark, and the consequent legitimacy of his daughter Myra.

Madame Despau and Madame Caillaret were sisters of Zuline, and examined under a commission issuing from the United States court.

Their evidence was as follows :

Interrogatories to be propounded, on behalf of Complainants, to John Sibley, Madame Caillaret, Madame Despau, and Mrs. Eliza Clark.

1st. Were you, or not, acquainted with the late Daniel Clark of New Orleans?

2d. Was the said Daniel Clark ever married? if so, when and to whom, and was there any issue of said marriage? State all you may know or have heard of said Clark upon this subject.

3d. Were you acquainted with a man in New Orleans by the name of De Grange? if so, when and where have you known him? Was he, or not, married when he first came to New Orleans, and did he, or not, so continue until after he finally left it? State all you may know or have heard touching this subject.

4th. If you know any thing further material to the complainants in the controversy, state it.

Cross-interrogatories.

1. Will you and each of you answering any interrogatories

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of the complainants state your age, employment, and present residence, and if a married woman state your maiden name; and if married more than once state the names of your husbands, and by whom and when and where you resided during each year from 1810 to 1814?

2. If you answer the first interrogatory in chief affirmatively, state how that acquaintance originated. When and where did you first see Mr. Daniel Clark? Was your acquaintance with him intimate or not? Was it ever interrupted, and if so, for what reason? Did it continue uninterrupted until the death of Mr. Clark, and if so, how long a period did it embrace? Do you say that your intimacy with Mr. Clark was *557] of such a nature as to enable you to become acquainted with *events in his life which were not disclosed to the entire circle of his acquaintance? and if so, have you a distinct recollection of any such event or events? and state the circumstances which strengthen your memory on this point.

3. Will you state where Mr. Clark resided when in New Orleans? Do you recollect the street and the house? Did he board or keep house? If he boarded, did he also lodge at the same house, and if so, who was the keeper of this house, and what was his or her general character? If he had a house, did he have a housekeeper, and if so, what was his or her general character? Did he reside in New Orleans during the summer months, and if not, where did he go? At whose house did he stop, or whom did he visit? and state what you know of the people whom he visited, and his own standing in society.

4. If, in answering the second interrogatory, you say that Mr. Daniel Clark was ever married, state when, where, and to whom. By what priest, clergyman, or magistrate, and who were the witnesses present? Were you among the witnesses? What other witnesses were present with you? Did you ever see the lady whom you say Mr. Clark married, and if so, what was her personal appearance, her age, and name, and family? Where did she reside before the time you say she was married to Mr. Clark? How long did you know her before that time? Or were you acquainted with her until then? Did not Mr. Clark introduce her to you? State particularly every thing you know in regard to the connection of Mr. Clark with the lady whom you call his wife, and state if she was ever married before or after the time you say she was married to Mr. Clark; if so, when, where, and to whom?

5. Did you ever know that there was any issue of said supposed marriage? if so, who told you? State your means of knowing any thing about this circumstance. What was the name, age, sex, and the time of the birth of the child whose

father you say was Mr. Clark? Do you know who nursed and reared this child, and if so, who was the nurse? State, if you please, if you saw the mother shortly after this child was born, and if so, where was she? Did she reside then at the house of Mr. Clark, and if not, why not, and where did she reside? Did Mr. Clark live with her at this time, and were they known generally to the neighbors as man and wife?

6. Was this supposed marriage of Mr. Clark's (if you say he ever was married) public or private? If public, did Mr. Clark introduce his wife to his friends and acquaintances in New Orleans? And if she was not introduced, state why she was not. Or was his marriage private? If so, why was it private? And what circumstances could, or did, probably *induce him to keep that marriage secret from [*558 his friends and the public?

7. Do you know Myra C. Whitney, one of the complainants in this controversy? If so, how long have you been acquainted with her? Did either of the complainants inform you, by letter or otherwise, that your testimony would be important to them in this suit? and if so, on what points did they wish you to be prepared?

8. If, in answering the third interrogatory, you say that you were acquainted with a man in New Orleans by the name of De Grange, state, if you please, where and when you first became acquainted with him, in what year. Were you intimate with him, and if so, did this intimacy continue without interruption? Was he born in the city of New Orleans? and if not, where was he born, and how long did he remain in said city? What was his employment? Was he married in New Orleans, or where was he married? Were you present at his marriage? and if so, state when and by whom he was married. Have you ever seen his wife, and if so, what was her personal appearance and age, and what was her name prior to her marriage with De Grange? Did you ever see De Grange's wife and the lady whom you say Mr. Clark married in company together? if so, when and where, and how often? State particularly every thing you know touching said De Grange, his wife, and their connection or relation with Mr. Clark.

9. Did you ever, or not, hear Mr. Clark acknowledge that he had any natural children in New Orleans? and particularly, did you ever, or not, hear him acknowledge two female children,—the one named Caroline and the other named Myra? And is, or not, that Myra one of the complainants in this case? Did you ever hear him say that he intended to leave by will money or property enough to Myra to take the stain off her birth? If you heard him use such expressions, or those of a

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similar character, state what you suppose he meant by taking off the stain from the birth of his own legitimate daughter.

10. Will you state who was the mother of the complainant, Myra? And did the mother nurse Myra? if not, why not? Who did nurse her? Did her mother die, and leave her an infant, or was she too sick and too feeble to nurse that child? Did the mother of Myra, the complainant, nurse and raise her, or not? If not, who did? Mention particularly any and all the circumstances on which you found your opinion.

11. If you know when the complainant Myra was born, state the precise date and place, and state if you know by whom and where she was raised, and whose name she bore, and why she bore that name.

*559] *12. State, if you please, what are your feelings and affections towards the complainants; whether you are related to or connected with either of them; and if you are, how and in what degree or way, and whether you have any interest in the event of this suit.

13. Will each one of you, answering any of these direct or cross interrogatories, state whether you have seen or examined, read or heard read, any one of them, or copies of them, at any time or place, before you were called upon by the commissioner to answer them? If ay, state when, where, and by whom they were thus so shown or read to or by you, and for what purpose. State, also, each one of you, whether you have had any conversation or correspondence, within the last three or four years, with the complainants, or with either of them, respecting their supposed claims against the estate of Daniel Clark, and if you answer affirmatively, state why, when, and where such conversation or correspondence occurred, and the nature and amount of them so far as your memory will serve you; and who was present at such conversations. If you have any letters from the complainants, or from either of them, on the matters referred to in these direct and cross interrogatories, annex them to your answers if possible; and if not possible, state why. If you have preserved and cannot annex them, give true extracts from them, and if that be not possible, state your recollections.

14. What is your maternal language? If not English, do you understand that language perfectly? And if you do not understand English, how have you contrived to answer the foregoing chief and cross interrogatories? Who has translated them to you?

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Answers of Madame Despau.

Answers to the first interrogatory.

I was well acquainted with the late Daniel Clark of New Orleans.

Answer to the second interrogatory.

Daniel Clark was married in Philadelphia, in 1803, by a Catholic priest. I was present at this marriage. One child was born of that marriage, to wit, Myra Clark, who married William Wallace Whitney, son of General T. Whitney of the state of New York. I was present at her birth, and knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew, nor had any reason to believe, any other child besides Myra was born of that marriage. The circumstances of her marriage with Daniel Clark *were these. Several years after her marriage with Mr. De Grange she heard that he had a living wife. Our family charged him with the crime of bigamy in marrying the said Zuline; he at first denied it, but afterwards admitted it, and fled from the country; these circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential, first, to obtain record proof of De Grange having a living wife at the time he married my sister, to obtain which from the records of the Catholic church in New York (where Mr. De Grange's prior marriage was celebrated) we sailed for that city. On our arrival there, we found that the registry of marriages had been destroyed. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. De Grange's prior marriage. We proceeded to that city, and found Mr. Gardette; he answered, that he was present at said prior marriage of De Grange, and that he afterwards knew De Grange and his wife by this marriage,—that this wife had sailed for France. Mr. Clark then said, "You have no reason longer to refuse being married to me. It will, however, be necessary to keep our marriage secret till I have obtained judicial proof of the nullity of your and De Grange's marriage." They, the said Clark and the said Zuline, were then married. Soon afterwards, our sister, Madame Caillaret, wrote to us from New Orleans that De Grange's wife whom he had married prior to marrying the said Zuline, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy,—Father Antoine of the Catholic church in New Orleans taking

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part in the proceedings against De Grange. Mr. De Grange was condemned for bigamy in marrying the said Zuline, and was cast into prison, from which he secretly escaped by connivance, and was taken down the Mississippi River by Mr. Le Briten d'Orgenois, where he got to a vessel, escaped from the country, and according to the best of my knowledge and belief, never afterwards returned to Louisiana; this happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that, before he could promulgate his marriage with my sister, it would be necessary that there should be brought by her an action against the name of De Grange. The anticipated change of government created delay, but at length, in 1806, Messrs. James Brown and Eligeas Fromentin, as the counsel of my sister, brought suit against the name of Jerome de Grange in the city court, I think, of New Orleans. The grounds of said suit were, that said De Grange had imposed himself in marriage upon her at a time when he had living a lawful *561] wife. *Judgment in said suit was rendered against said De Grange. Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. Mr. Clark became a member of the United States Congress in 1806. While he was in Congress, my sister heard that he was courting Miss —* of Baltimore. She was distressed, though she could not believe the report, knowing herself to be his wife; still, his strange conduct in deferring to promulgate his marriage with her had alarmed her; she and I sailed for Philadelphia, to get the proof of his marriage with my sister. We could find no record, and were told that the priest who married her and Mr. Clark was gone to Ireland. My sister then sent for Mr. Daniel W. Coxe, and mentioned to him the rumor. He answered, that he knew it to be true that he (Clark) was engaged to her. My sister replied, it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark, if he were disposed to contest it. He advised her to take counsel, and said he would send one; a Mr. Smythe came, and told my sister that she could not legally establish her marriage with Mr. Clark, and pretended to read to her a letter in English (a language then unknown to my sister) from Mr. Clark to Mr. Coxe, stating that he was about to marry Miss —. In consequence of this information, my sister Zuline came to the resolution of having no

 * The name is omitted by the Reporter.

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further communication or intercourse with Mr. Clark, and soon afterwards married Mr. Gardette of Philadelphia.

Answer to the third interrogatory.

I became acquainted with Mr. Jerome de Grange in 1793, when, as I understood, he first came to New Orleans. He was a nobleman by birth, and passed for a single or unmarried man; and courted and married Zuline, née De Carriere, at the age of thirteen, the same who is the mother of Myra Clark Whitney. Zuline had two children by him, a boy and a girl; the boy died; the girl is still living, her name is Caroline; she is married to a physician by the name of Barnes. I was present at the birth of these children.

Answer to the fourth interrogatory.

I am not aware of knowing other important matter to the complainants in this cause.

Answer to the first cross-interrogatory.

My name is Sophie Veuve Despau, née De Carriere. My deceased husband was a planter. I was born in Louisiana. My *age is sixty-two. I now reside in Beloxi; [*562 from 1800 to 1814, I resided in Louisiana, in Philadelphia, and in Cuba.

Answer to the second cross-interrogatory.

I first knew Daniel Clark in New Orleans; his being the husband of my sister, Zuline de Carriere, placed me on a footing of intimacy with him during the time of their intercourse; that intimacy was afterwards interrupted by their separation.

Answer to the third cross-interrogatory.

I had reason to know that Mr. Clark, at different times, lived in different houses in New Orleans. I have before said that he did not give publicity to his marriage with said Zuline. He kept a very handsome establishment for her in New Orleans, and was in the habit of visiting her.

Answer to the fourth cross-interrogatory.

I have already stated that Mr. Clark was married to my sister, Zuline de Carriere, that I was present at her marriage (a private one), in Philadelphia. Besides myself, Mr. Dornier of New Orleans, and an Irish gentleman, a friend of Mr. Clark's, from New York, were present at his marriage. A Catholic priest performed the marriage ceremony. I have

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already before stated, that Zuline was married to Mr. Jerome de Grange before her marriage with Mr. Clark, and that thereafter she was married to Mr. Gardette of Philadelphia.

Answer to the fifth cross-interrogatory.

I have already stated that I knew Myra Clark to be the issue, and the only issue, of the marriage of Zuline de Carriere and Daniel Clark. A few days after the birth of Myra Clark, she was placed by her father under the care of Mrs. Davis, the wife of Colonel S. B. Davis, with whom she lived until her marriage with Mr. Whitney. I have heard that Colonel Davis concealed from the said Myra her true history, and that she bore his name after her father's death. Zuline and Mr. Clark occupied different houses in New Orleans, but he always visited her, as heretofore mentioned, at her own house; their marriage was known only to a few friends; Mr. Clark told me that he had informed Colonel S. B. Davis, Mr. Daniel W. Coxe, and Mr. Richard Relf, of his marriage with my sister Zuline.

Answer to the sixth cross-interrogatory.

I always understood and believed, at least for the first years of his marriage, that Mr. Clark was prevented from making it public on account of her unfortunate marriage with Mr. De *563] Grange. His pride was great, and his standing was of the *highest order in society, and that pride might have suggested his opposition to the promulgation of his marriage. He, however, always manifested by his conversations, which I frequently heard, the greatest affection for his daughter Myra.

Answer to the seventh cross-interrogatory.

I have already stated my knowledge of Myra Clark Whitney from her birth. As I never made any secret of my knowledge of her being the daughter of Daniel Clark, nothing was more likely than she and her late husband should hear of my acquaintance with her parentage, and many circumstances connected with it, as already related. And on this it was, I presume, that I have been called upon to give testimony in this affair. But neither of them, nor any body else, ever dared to ask of me any declarations in the least inconsistent with truth and justice.

Answer to the eighth cross-interrogatory.

I have already in my former answers stated, particularly the third and fourth, my knowledge of Jerome de Grange, and of

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his first and second marriages. Before the detection of his bigamy, said Zuline had a son who died, and a daughter called Caroline, which bore his name. Since the death of Mr. Daniel Clark, Mr. Daniel W. Coxe and Mr. Hulings of Philadelphia gave her the name of Caroline Clark, and took her to Mr. Clark's mother, and introduced her as the daughter of her son. She of course believed their story, which induced her, in her will, to leave a portion of her property to Caroline. Caroline was born in 1801. I was present at her birth, as well as that of her brother.

Answer to the ninth cross-interrogatory.

I never heard Mr. Clark acknowledge his having any natural children, but have only heard him acknowledge one child, and that a lawful one, to wit, said Myra.

Answer to the tenth cross-interrogatory.

I have already given a full account of the mother of Myra, and of Myra herself, and her being with Mrs. Davis. I have stated all that I know of these matters, as called for by this interrogatory.

Answer to the eleventh cross-interrogatory.

The information called for by this interrogatory has already been given.

*Answer to the twelfth cross-interrogatory. [*564

I have already before stated myself to be the sister of Myra's mother. My feelings towards Myra are those of friendship and all becoming regard. I wish, however, that justice only be done towards her, but in or by the issue of the suit I have nothing to gain or lose.

Answer to the thirteenth cross-interrogatory.

I have never seen or heard read the interrogatories or cross-interrogatories referred to, before called upon to answer them. Any conversations that I have had about this affair I have already given an account of.

Answer to the fourteenth cross-interrogatory.

My natural language is French; but my nephew is well acquainted with the English language, and when in need of a translator, I apply to him.

(Signed,) SOPHIE VE. DESPAU, NÉE DE CARRIÈRE.

Which answers, being reduced to writing, have been signed

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and sworn to in my presence, this twenty-eighth day of June, A. D., 1839. In testimony whereof, I have hereunto set my hand and seal, this the day and year above written.

(Signed,)

HOLMES P. WENTZELL.

J. P. H. C. [L. s.]

One word erased on third page, also one word on fourth page; two words interlined on fourth page; twenty-five words erased on fifth page; one word interlined on sixth page, before signing.

(Signed,)

H. P. WENTZELL.

J. P. H. C. [L. s.]

W. W. WHITNEY and MYRA C. WHITNEY }

vs.

RICHARD RELF, BEVERLY CHEW, and others. }

In pursuance of the annexed commission, issued from the United States Circuit Court of the Eastern District of Louisiana, I, the undersigned, justice of the peace in Hancock county, state of Mississippi, have caused to come before me Madame Rose Vve. Caillaret, née De Carriere, who being duly sworn to declare the truth on the questions put to her in this cause, in answer to the interrogatories annexed to said commission, says:—

Answer to the first interrogatory.

I was well acquainted with the late Daniel Clark, of New Orleans.

*565] *Answer to the second interrogatory.

I was not present at the marriage of Zuline, née De Carriere, who is my sister, with Daniel Clark, but I do know that said Clark made proposals of marriage for my sister, and subsequently said Zuline wrote to me that she and said Clark were married. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. De Grange was void, from the fact of his having then, and at the time of his marrying her, a living wife; these proposals were deferred being accepted till the record proof of De Grange's said previous marriage could be obtained, and said Zuline, with her sister, Madame Despau, sailed for the North of the United States, to obtain the record proof.

Answer to the third interrogatory.

I was acquainted with Mr. De Grange in New Orleans. He was considered an unmarried man on coming to New Orleans,

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and as such imposed on my sister Zuline to marry him; but it was afterwards proved he had a lawful wife still living. After this imposition of said De Grange, his said lawful wife came to New Orleans, and detected and exposed his bigamy in marrying the said Zuline, when he had a living and lawful wife at and before the time of his marrying Zuline. He was prosecuted, condemned, and cast into prison, and escaped privately from prison. He escaped from Louisiana, as it was reported, by the Spanish governor's connivance. Le Breton d'Orgenois was said to aid De Grange, in getting him off. This happened some time before the Americans took possession of New Orleans. Mr. Clark's marriage with my sister Zuline was after the detection of De Grange's bigamy. The birth of their daughter, Myra Clark, was some years after the marriage.

Answer to the fourth interrogatory.

I am not aware of knowing any thing more of importance in this suit, except the marriage of said Zuline with Mr. Gardette, of Philadelphia, before the death of Mr. Clark.

Answer to the first cross-interrogatory.

My name is Rose Veuve Caillaret, née De Carriere. My age is sixty-eight years. I was born in Louisiana, and resided some time in France after this marriage of Zuline and Mr. Clark, and after that resided in the state of Mississippi.

Answer to the second cross-interrogatory.

I became acquainted with Mr. Clark in New Orleans. In consequence of his attachment and marriage to my sister Zuline, *an intimacy subsisted between him and myself. Our friendly intercourse continued during my residence in New Orleans.

Answer to the third cross-interrogatory.

When I resided in New Orleans, Mr. Clark lived in his own houses, with his own slaves to wait upon him. He had the reputation of being a man of immense wealth. He stood at the head of society, was considered a man of very great talents, and much beloved for his benevolence.

Answer to the fourth cross-interrogatory.

I have already stated all I knew about Mr. Clark's marriage with Zuline, and of her marriage with De Grange. By this marriage she had two children, a boy and a girl. The boy is dead, the girl is still living; her name is Caroline and she is

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married to Dr. Barnes. I have already stated that said Zuline also married Mr. Gardette.

Answer to the fifth cross-interrogatory.

It is to my knowledge, that Myra Clark, who married Mr. Whitney, is the child, and only child, of Mr. Clark by Zuline de Carriere. It is to my knowledge, that Mr. Clark put his daughter Myra under the charge of Mrs. Davis. Mr. Clark acknowledged to me that Myra was his lawful and only child. Mrs. William Harper nursed her for some time from kindness. Mr. Clark's gratitude towards this lady, for nursing his child, lasted with his life. Said Myra was brought up and educated in the family of Colonel Davis, and supposed herself their child until within a few months of her marriage with Mr. Whitney.

Answer to the sixth cross-interrogatory.

I always heard that Mr. Clark's marriage with Zuline was private, and that he did not promulgate it, unless he did so in his last will, made a little before his death, and lost or purloined after his death. He never explained to me his reasons for not publishing his marriage in his lifetime.

Answer to the seventh cross-interrogatory.

I have known Myra Clark Whitney for some years, making no secret about my knowledge I possessed of the matters of which I have herein spoken, and it being known that I was an elder sister of Zuline de Carriere. Therefore it was, I suppose, that I have been called on to testify in this cause; but no one has ever taken the liberty to intimate a wish for me to declare any thing but the truth.

*567] *Answer to the eighth cross-interrogatory.

I have already said all I know about Mr. De Grange.

Answer to the ninth cross-interrogatory.

I never heard Mr. Clark make any acknowledgment of his having any natural children; and I never heard of his having another child than Myra Clark Whitney, and which Mr. Clark informed me was his lawful child.

Answer to the tenth cross-interrogatory.

I have already stated all I know as to the parentage and nursing and education of Myra Clark.

Answer to the eleventh cross-interrogatory.

I have already stated all I know about the parentage and

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name of Myra Clark, except that I have heard that after her father's death she was called Myra Davis.

Answer to the twelfth cross-interrogatory.

My feelings are friendly and kind towards Myra Clark Whitney, and I wish her such success only in her suit as is compatible with justice. I have no interest in the issue of it.

Answer to the thirteenth cross-interrogatory.

I have never seen the interrogatories put to me until called upon to answer them. I have already stated all I have to say about my conversations. I am not aware of ever having any correspondence with either of them on this subject.

Answer to the fourteenth cross-interrogatory.

French is my mother tongue, but my son is well acquainted with the English language, and when in need of a translator, I apply to him.

(Signed,) VEUVE CAILLARET NÉE ROSE CARRIERE.

As the opinion of the court refers also to the evidence of Bois Fontaine, it is deemed proper to insert it.

Interrogatories and Answers of Pierre Baron Bois Fontaine.

WM. WALLACE WHITNEY and MYRA C., his wife,	} Court of } Probates.
<i>vs.</i> P. O'BEARN and others.	

Interrogatories to be propounded to Witnesses on Behalf of the Plaintiffs.

1st. Were you acquainted with the late Daniel Clark, deceased, of New Orleans? If so, were you at any time on terms of intimacy with him?

*2d. Did the said Daniel Clark leave at his death any child acknowledged by him as his own? If so, [*568 state the name of such child, whether such child is still living, and if living, what name it now bears; as also state when and where, and in what times, said acknowledgment of said child was made.

3d. Have you any knowledge of a will, said to have been executed by said Clark shortly before his decease? Did you ever read or see the said will, or did Daniel Clark ever tell you that he was making said will, or had made said will? If so, at what time and place, and if more than once, state how often, and when and where.

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4th. If you answer the last question affirmatively, state whether the said Daniel Clark ever declared to you, or to any one in your presence, the contents of said will. And if so, state the whole of said declarations, and the time, place, and manner in which they were made, before whom, and all the circumstances which occurred when such declaration was made.

5th. State how long before his death you saw the said Daniel Clark, for the last time, how long before his death he spoke of his last will, and what he said in relation to his aforesaid child.

6th. State whether you ever heard any one say he had read the said will. If so, state whom, what was said, and whether the said person is now living, or not.

(Signed,)

WM. M. WORTHINGTON,
For Plaintiff.

Cross-examined.

1st. Each witness examined, and answering any one of the foregoing interrogatories, is desired to state his name, age, residence, and employment; and whether he is in any manner connected with, or related to, any of the parties to the suit, or has any interest in the event of the same.

2d. How long did you know Daniel Clark, and under what circumstances? And if you presume to state that Daniel Clark left any child at his decease, state who was the mother of said child, and who was the husband of that mother. State all the circumstances fully and in detail, and whether said Clark was ever married, and if so, to whom, when and where.

3d. If said Clark ever acknowledged to you, that he supposed himself to be the father of a child, state when and where he made such an acknowledgment, and all the circumstances of the recognition of such a child or children, and whether the act was public or private.

*569] 4th. Did said Clark consider you as an intimate friend, to *whom he might confide communications so confidential as those relating to his will? If ay, state what you know, of your own personal knowledge, of the contents of said will, and be careful to distinguish between what you state of your own knowledge, and what from hearsay.

The defendants propound the foregoing interrogatories, with a full reservation of all legal exceptions to the interrogatories in chief, the same not being pertinent to the issue, and the last of said interrogatories being calculated merely to draw from the witness hearsay declarations.

(Signed,)

L. C. DUNCAN,
For Defendants.

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In pursuance of the annexed commission, directed to me, the undersigned, justice of the peace, personally appeared Pierre Baron Bois Fontaine, who being duly sworn to declare the truth on the questions put to him in this cause, in answer to the foregoing interrogatories, says:—

1st. In reply to the first interrogatory he answers,—I was acquainted with the late Daniel Clark of New Orleans, and was many years intimate with him.

2d. In reply to the second interrogatory he answers,—Mr. Clark left at his death a daughter named Myra, whom he acknowledged as his own, before and after her birth, and as long as he lived. In my presence he spoke of the necessary preparation for her birth, in my presence asked my brother's wife to be present at her birth, and in my presence he proposed to my sister and brother-in-law, Mr. S. B. Davis, that they should take the care of her after her birth. After her birth he acknowledged her to me as his own, constantly, and at various places. He was very fond of her, and seemed to take pleasure in talking to me about her.

When he communicated to me that he was making his last will, he told me he should acknowledge her in it as his legitimate daughter. The day before he died, he spoke of her with great affection, and as being left his estate in his last will. The day he died, he spoke of her with the interest of a dying parent, as heir of his estate in his last will. She is still living, and is now the wife of William Wallace Whitney.

3d. In reply to the third interrogatory he answers,—About fifteen days before Mr. Clark's death I was present at his house, when he handed to Chevalier de la Croix a sealed packet, and told him that his last will was finished, and was in that sealed packet. About ten days before this, he had told me that it was done. Previous to this, commencing about four months before his death, he had often told me that he was making his last *will. He said this in [570] conversation with me on the plantation, and at his house; and I heard him mention this subject at Judge Pitot's. I frequently dined at Judge Pitot's with Mr. Clark on Sundays. The day before he died, he told me that his last will was below, in his office-room, in his little black case. The day he died, he mentioned his last will to me.

4th. In reply to the fourth interrogatory, he answers,—I was present at Mr. Clark's house about fifteen days before his death, when he took from a small black case a sealed packet, handed it to Chevalier de la Croix, and said, "My last will is finished; it is in this sealed packet, with valuable papers; as

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you consented, I have made you in it tutor to my daughter. If any misfortune happens to me, will you do for her all you promised me? Will you take her at once from Mr. Davis? I have given her all my estate in my will, an annuity to my mother, and some legacies to friends. You, Pitot and Belle Chasse, are the executors." About ten days before this, Mr. Clark, talking of Myra, said that his will was done.

Previous to this he often told me, commencing about four months before his death, that he was making his last will. In these conversations he told me that in his will he should acknowledge his daughter Myra as his legitimate daughter, and give her all his property. He told me that Chevalier de la Croix had consented to be her tutor in his will, and had promised, if he died before doing it, to go at once to the North, and take her from Mr. Davis. That she was to be educated in Europe. He told me that Chevalier de la Croix, Judge Pitot, and Colonel Belle Chasse were to be executors in his will. Two or three days before his death, I came to see Mr. Clark on plantation business; he told me he felt quite ill. I asked him if I should remain with him. He answered that he wished me to. I went to the plantation to set things in order, that I might stay with Mr. Clark, and returned the same day to Mr. Clark, and stayed with him constantly till he died. The day before he died, Mr. Clark, speaking of his daughter Myra, told me that his last will was in his office-room below, in the little black case; that he could die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his mother comfortable by an annuity in it, and remembered some friends by legacies.

He told me how well-satisfied he was that Chevalier de la Croix, Judge Pitot, and Belle Chasse were executors in it, and Chevalier de la Croix Myra's tutor. About two hours before his death, Mr. Clark showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier *571] de la Croix, as he was her tutor, as well as one of the executors *in it; and just afterwards Mr. Clark told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier de la Croix.

After this, and a very short time before Mr. Clark died, I saw Mr. Relf take a bundle of keys from Mr. Clark's *armoire*, one of which, I believe, opened the little black case. I had seen Mr. Clark open it very often.

After taking these keys from the *armoire*, Mr. Relf went below. When I went below, I did not see Mr. Relf, and the office-room door was shut. Lubin told me that when Mr. Relf went down with the keys from the *armoire*, he followed, saw

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him there on getting down go into the office-room, and that Mr. Relf on going into the office-room locked the office-room door. Almost Mr. Clark's last words were, that his last will must be taken care of on said Myra's account.

5th. In reply to the fifth interrogatory, he answers,—I was with Mr. Clark when he died; I was by him constantly for the last two days of his life. About two hours before he died, he spoke of his last will and his daughter Myra in connection, and almost his last words were about her, and that this will must be taken care of on her account.

6th. In reply to the sixth interrogatory, he answers,—When, after Mr. Clark's death, the disappearance of his last will was the subject of conversation, I related what Mr. Clark told me about his last will in his last sickness. Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read it, it was finished, was dated, and signed by Mr. Clark; was an olographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her, gave an annuity to his mother, and legacies to some friends. The Chevalier de la Croix was tutor of said Myra, his daughter; Chevalier de la Croix, Colonel Belle Chasse, Judge Pitot, were executors; Judge Pitot and John Lynd are dead. The wife of William Harper told me she read it; Colonel Belle Chasse told me that Mr. Clark showed it to him not many days before his last sickness; that it was then finished. Colonel Belle Chasse and the lady, who was Madame Harper, are living.

In reply to the first cross-interrogatory, he answers,—My name is Pierre Baron Bois Fontaine, my age about fifty-eight. I have been some time in Madisonville; the place of my family abode is near New Orleans, opposite side of the river. I was eight years in the British army. I was several years agent for Mr. Clark's plantations; since his death, I have been engaged *in various objects. I now possess [*572 a house and lots, and derive my revenue from my slaves, cows, &c. I am in no manner connected with, or related to, any of the parties of this suit; I have no interest in this suit.

In reply to the second cross-interrogatory, he answers,—I knew Daniel Clark between nine and ten years; I knew him as the father of Myra Clark; she was born in my house, and was put by Mr. Clark, when a few days old, with my sister and brother-in-law, Samuel B. Davis. I was Mr. Clark's agent for his various plantations,—first, the Sligo and the Desert, then the Houmas, the Havana Point, and when he died, of

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the one he purchased of Stephen Henderson. He respected our misfortunes, knowing that our family was rich and of the highest standing in St. Domingo before the Revolution. The mother of Myra Clark was a lady of the Carriere family. Not being present at any marriage, I can only declare it as my belief, Mr. Clark was her husband. To answer this question in detail, as is demanded, it is necessary that I state what was communicated to me. It was represented to me that this lady married Mr. De Grange in good faith, but it was found out some time afterwards that he already had a living wife, when the lady née Carriere separated from him. Mr. Clark some time after this married her at the North. When the time arrived for it to be made public, interested persons had produced a false state of things between them, and this lady being in Philadelphia, and Mr. Clark not there, was persuaded by a lawyer employed, that her marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette. Some time afterwards, Mr. Clark lamented to me that this barrier to making his marriage public had been created. He spoke to me of his daughter Myra Clark from the first as legitimate, and when he made known to me he was making his last will, he said to me that he should declare her in it as his legitimate daughter. From the above I believe there was a marriage.

In reply to the third cross-interrogatory, he answers,—Mr. Clark made no question on this subject before and after her birth, and as long as he lived he exercised the authority of a parent over her destiny. He was a very fond parent; he sustained the house of Mr. Davis and Mr. Harper, because my sister had her in care, and Mrs. Harper suckled her. He sustained Harper as long as he lived, and conferred great benefits on my brother-in-law. He spoke of her mother with great respect, and frequently told me after her marriage with Mr. Gardette, that he would have made his marriage with her *573] public, if that barrier had not been made, and frequently lamented *to me that this barrier had been made, but that she was blameless. He said he would never give Myra a step-mother. When, in 1813, he communicated to me that he was making his last will for her, he showed great sensibility as to her being declared legitimate in it. While I was with him at his death-sickness, and even at the moment he expired, he was in perfect possession of his senses, and no parent could have manifested greater affection than he did for her in that period. Nearly his last words were about her, and that his will must be taken care of on her account.

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She, the said Myra, is the only child Mr. Clark ever acknowledged to me to be his. She was born in July, 1805.

In reply to the fourth cross-interrogatory, he answers,—I was a friend of that confidential character from the time of said Myra's birth. Mr. Clark treated me as a confidential friend in matters relating to her and to his affairs generally. In reply to the fourth interrogatory, I have stated what I know concerning Mr. Clark's last will; my recollection of these facts is distinct. The circumstances connected with them were of such a character, that my recollection of them could not be easily impaired.

(Signed,)

PIERRE BARON BOIS FONTAINE.

And on the 25th day of April, A. D. 1840, the following decree was entered of record in the words and figures following, to wit:—

EDMUND P. GAINES and wife	}	No. 122.
v.		
CHEW & RELF et als.		

This cause having come for final hearing, by consent of the complainants and the defendant Patterson, upon the bill, answer, replication, exhibits, depositions, and documents on file herein, and on the admission of the parties, that the estate in controversy in this case exceeds in value the sum of two thousand dollars, and the said complainants and the defendant Patterson expressly waiving and dispensing with the necessity of any other parties to the hearing or decision of this cause than themselves, and agreeing that the cause shall be determined alone upon its merits, and the court, being now sufficiently advised of and concerning the premises, does finally decree and order that the defendant Patterson do, on or before the first day of the next term of this court, convey and surrender possession to the complainant, Myra Clark Gaines, of all those lots or parcels of land lying and being in the city of New Orleans, and particularly described in this [*574 answer and *exhibits, and to which he claims title under the said will of (1811) eighteen hundred and eleven; said conveyance shall contain stipulations of warranty against himself only, and those claiming under him. It is further decreed and ordered, that the defendant pay the complainants so much of their costs expended herein as has been incurred by reason of his being made a defendant in this cause.

From which decree the defendant prayed an appeal to the Supreme Court of the United States, which is granted.

And by consent of the complainants, bond and security is

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dispensed with. By consent, the copy of records of the Probate Court, with a full and complete transcript of the proceedings had in relation to the estate of the late Daniel Clark on file in said court, (hereafter to be filed,) to constitute a part of the record herein.

Decree rendered April 25th, 1840.

Decree signed April 25th, 1840.

(Signed,)

J. MCKINLEY, *Presiding Judge.*

The cause having come up to this court by this appeal, was argued by *Mr. Brent* and *Mr. May*, for the appellant, Patterson, and by *Mr. Johnson* and *Mr. Jones*, for Gaines and wife.

The counsel for the appellant contended that the decree of the court below was erroneous, for the following reasons, viz:

1. Because the bill shows no case for equitable relief.
2. Because there is no sufficient evidence of the alleged title in the complainant, as devisee of Daniel Clark.
3. That she is not the heir at law of Daniel Clark.
4. That she was the adulterine child of said Clark, by illicit commerce between said Clark and the mother of complainant, then the lawful wife of Jerome de Grange, and as such child incapable by law of inheriting or receiving by gift or will the property of said Clark.
5. That if not the adulterine child, she was Clark's illegitimate offspring, incapable of receiving from him more than one third of his estate.
6. That the appellant is a purchaser of a legal title to the property in suit, under a will legally admitted to probate, and under the authority of the executors therein named.
7. That the decree is otherwise erroneous and wrongful.
8. That she is not the child of Clark.

The argument of *Mr. Brent* and *Mr. May* was as follows:

The bill of complaint was filed in the Circuit Court of the United States for the District of Louisiana, against *575] the appellant *and numerous other defendants. The answers (original and supplemental) of Patterson disclose the nature of his title as *bonâ fide* purchaser under the will of Daniel Clark dated in 1811, and duly admitted to probate in the proper court.

Various depositions and documentary evidence were filed by the complainants and the appellant, and the case being set for hearing as between themselves, a final decree was rendered against Patterson for all the property held by him as purchaser under the will of 1811.

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We allege error in that decree.

1st Question. Is the appeal of Patterson properly and fairly before this court? True, there was no order of severance to justify the separate decree against one co-defendant, but we contend, that, under the circumstances of this case, it was competent for the appellant and appellees to set the case for final decree upon all the evidence taken, and the result of such action cannot be to prejudice the other parties in any respect; for if they can materially change the aspect of the case by additional evidence, the judgment of this court on our case will not conclude them. We refer in support of this position to the following authorities. 2 Dana (Ky.), 422; 2 Bibb (Ky.), 167; Pract. Reg., 16; 1 Pet., 306; 3 Munf., (Va.), 368, 374, 397; 6 Har. & J. (Md.), 10; 3 Dall., 401.

The course pursued by Mr. Patterson in separating himself from his co-defendants is not the result of collusion with the appellees. If it were, it would be impotent. But it is the fruit of an anxious desire on his part to meet the claims of this claimant fully and fairly on the merits, without delay or resort to any of those dilatory proceedings which have thrice been overruled in this court.

Mr. Patterson wishes to know as speedily as possible whether he is the owner of this property; and he has introduced, as he believes, matter enough in this record to destroy this claim,—at least he has introduced all the evidence known to him.

We are thus attentive to such an imputation of collusion, because, at the argument of a motion to dismiss this appeal made some years ago by the counsel of Caroline Barnes, one of the present counsel understood such an imputation to be made or insinuated in this court by the counsel of Caroline Barnes.

We will, in repudiating this charge, as we do indignantly, by the authority of Mr. Patterson, add to the denial, in his behalf, our own declaration, as officers of this high court, that our instructions have been to defeat the claim of Mrs. Gaines, if possible, by every fair and honorable argument; and in behalf of Mr. McHenry, of New Orleans, we state that [*576 a correspondence *between him and the gentleman who was understood to make the charge has resulted in acquitting him, as counsel of Mr. Patterson, from every imputation.

2d Question. Has Mrs. Gaines any title to the property in dispute, as alleged devisee under the will of 1813?

We meet this question by showing from the record that, although there is evidence to prove that Clark had made a will some weeks before his death, declaring Myra his legiti

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mate child and sole heir, yet that will is not proved to have been in existence at his death, save by his dying declarations, which are no evidence whatever of the will being then in existence. *Jackson v. Betts*, 6 Cow. (N. Y.), 382.

These dying declarations were the delirious ravings of a man *in extremis*, oblivious of the fact that he had himself destroyed a will made to practise a pious but posthumous fraud, for the purpose of gratifying an inordinate love for Myra, but a fraud which it is fair to presume, upon this evidence, his sober after-reflections induced him to shrink from, and with his own hands to destroy that will which, if he died without cancelling, would, to his conscience and his God present him as dying with a falsehood on his lips.

But if the will were existent at his death, it was olographic, and there are not as many competent witnesses to the will as the law required, for the laws then in force exclude women as incompetent. 2 Partidas, 964, Law 9; 1 Id., 23; Laws of Orleans, 230, art. 105.

But this court, in 2 How., 646, have settled that this will of 1813 cannot confer title until duly admitted to probate. Therefore, Mrs. Gaines's title, as devisee, cannot be relied on to sustain the decree against Patterson.

3d Question. Is Mrs. Gaines the child and forced heir of Daniel Clark?

Her bill of complaint alleges her birth in July, 1806, and that up to Clark's death, in 1813, she was called Myra Clark, but after his death, and up to her marriage in 1832, she was called Myra Davis, and was kept in ignorance of her true name and parentage, that is, from 1813 to 1832, a period of nineteen years, and until she was twenty-six years of age, and that in 1832 she learned her rights by accident.

Such is her own showing, and as part of her evidence she brings forward Davis, the very man who had been intrusted by Clark with the sacred deposit of his child. See Davis's own deposition, Record, 181, 5th, 6th, and 7th answers. And see Clark's solemn appeal to him in his Philadelphia letter, Record, 183.

Davis says that Clark told him Myra would be his heir. Record, 183, 184.

*577] *Now if Davis had not known and ascertained that Myra was an adulterous offspring, incapable by the laws of Louisiana of receiving the munificent but insane bequest of Clark, and that her claims founded on Clark's latter conduct were untenable, how can his treatment of Myra be viewed in any other light than as a shameless abandonment of his solemn trust?

If Davis suppressed the true history of Myra with a conviction that its knowledge would be her triumph, words could not be found adequate to the denunciation of his conduct. But we think the explanation of this conduct is to be found in the fact, that Davis knew this unfortunate offspring of guilty parents to be banned and barred by the policy of the laws of Louisiana, and that to acquaint her with the intentions of Clark towards her would be to lead her into endless and idle litigation. Neither Davis nor his wife attempts to explain their conduct in keeping Myra ignorant of her rights, if they believed she had any. And if her claims are just, the conduct of Davis is directly impeached by the evidence of her own witness, Belle Chasse. General repute called her the child of Davis. See the evidence of Madam Despau, Record, 165; Caillaret, Record, 169; Thiling, Record, 334; Coxe, Record, 337; Bois Fontaine, Record, 356; Mrs. Smith, Record, 136.

If, as we hereafter propose to establish, the intercourse between Clark and her mother was illicit at all times, then his belief as to his paternity amounts to nothing, especially when it is proved that she does not resemble Clark, as did Caroline Barnes, the elder child. See Coxe's deposition, Record, 336.

Clark's acknowledgments should have been before a notary and two witnesses. Code of 1808, p. 48, art. 24-26.

If alimony alone is sued for, such informal acknowledgments might be sufficient. Code of 1808, p. 50, art. 31; Id., p. 154, art. 45; Id., p. 156, art. 45.

If Myra was the illegitimate offspring of Clark, alimony is all she can claim. Code of 1808, p. 156, art. 46; Id., p. 48, art. 28; Id., p. 154, art. 45.

But going beyond the character of natural child, Mrs. Gaines claims to be the child of Clark by a lawful marriage of her mother with him. And in considering this claim, we first examine the nature and effect of Clark's declarations, which are said to prove the fact.

Conceding, *ex gratia*, that in 1813, by the pretended will of that year, Clark attempted formally to declare her legitimate, yet how can his genuine and undoubted will of 1811 be reconciled with such latter attempt?

In 1811, Myra was five years old, and living in New Orleans, as Clark well knew, and yet at the time of his undertaking a *sea-voyage he executes that will, wholly [*578 premitting any notice of Myra, and willing all his estate to his mother.

Why did he overlook Myra? Was he the unprincipled father, who would disinherit his young and innocent offspring?

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No, he was not unmindful of her claims, and he sought to provide for her in the only secret and stealthy mode permitted by the penal laws of Louisiana.

He executes various deeds to Belle Chasse, De la Croix, and Davis, on blind trust, for Myra's benefit, thus creating no legal right for Myra, but an honorable claim on the consciences of these friends for a handsome property. See their depositions.

Who can believe that an anxious father would thus hazard the whole property designed for his helpless and lawful child, by blind confidence in the honor of human beings, when by will or deed he could guard her rights effectually and beyond contingency?

We defy and challenge any satisfactory explanation of these acts, consistent with the claim of Mrs. Gaines. But if, as we allege, Clark knew her to be the adulterine offspring of Madame de Grange by him, then his conduct can well be understood. For, by the laws of Louisiana, an adulterous offspring can receive from its parent nothing but alimony, either in the shape of donations *inter vivos* or *causa mortis*. Code of 1808, p. 212, art. 17.

This statutory interdict, then, was the cause of Clark's making his will of 1811, and creating blind trusts for the benefit of Myra.

But there are other acts of Clark which go to destroy his later attempt to efface the stain on Myra's birth, such as the secrecy with which her birth was guarded, and the haste with which he tore the tender infant from her mother's breast; his never suffering this child to dwell under his roof; and, lastly, his attempt, after his pretended marriage with the mother of Myra, to marry Miss ——. See deposition of Madame Despau.

These acts of Clark, when arrayed against the will of 1813, if it were here in court, subscribed by his hand, would speak the truth with a power and eloquence which no after conduct of his could resist.

The truth is, that the inconsistent will of 1813 arose from the increase of affection for his natural child, who daily fastened on his heart, as proved by her own witnesses, and in the infatuation of his love he madly conceived the purpose of making a will declaring her his lawful child and universal legatee.

This pious fraud was frankly avowed to his bosom friend, Chevalier de la Croix. See his deposition.

*579] *But, doubtless, as he dwelt more upon the moral crime of perpetrating this fraud on society, and on the truth, he tore that will with his own hands, and hence its non-

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appearance, though, in the delirium of fever, he murmured of it as still existing.

Then we assert that Clark's acts and conduct are the strongest witnesses against the claim of Mrs. Gaines as his heir at law.

Let us see if the mother of Mrs. Gaines has not also testified against this pretended marriage.

If she was Clark's wife, as pretended, she afterwards committed rank bigamy in marrying Gardette, living Clark. See Coxe's evidence, and the marriage certificate.

Nay, she told Coxe, that, so far from being married to Clark, she had only his promise to marry.

Then both Clark and his pretended wife have testified against their intermarriage, and if they so testify, who is the witness to outweigh them? Madame Despau is the solitary witness to the marriage,—a sister of Myra's mother.

Madame Despau impeaches herself by showing her privity with the marriages of her sister to both Clark and Gardette, and her reasons are flimsy for a justification. Record, p. 164. It was rash enough for her to stand by, in the lifetime of Jerome de Grange, the first husband of her sister, and see that sister marry Clark, with nothing to shield her from bigamy but the statement of Gardette, that, to his knowledge, De Grange had a prior living wife.

All this, as stated by her, is bad enough; but her inconsistency about De Grange twice flying, her attempt to palm off Caroline Barnes as the child of De Grange, her statement that the visit of herself and sister in 1803 was to hunt up the records at the North of De Grange's prior marriage, when Coxe proves that their visit was in 1802, and that in that year her sister, in Philadelphia, gave birth to Caroline, at which time De Grange was absent in Europe,—all these things taint and condemn this witness, and her unsupported testimony to this *factum* of marriage must fall.

No one can doubt, on these facts, that, so far from Madame de Grange and Clark going to Philadelphia to hunt up records and have a marriage, they went there to shroud from the eye of observation the birth of Caroline, the first fruit of an adulterous intercourse between Clark and the mother of Myra.

If Madame Despau be "falsa in uno, falsa est in omnibus." See *The Santissima Trinidad*, 7 Wheat., 283. Madame Despau is the universal marriage witness of her sister, who, on her own evidence, had three husbands, all living at *the same time; first, De Grange, then Clark, and then Gardette. She says that while in Philadelphia, on the occasion of a visit, some years after the marriage of Clark, her

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sister married Mr. Gardette, because she was told, in the presence of Madame Despau, by Coxe and Smythe, a lawyer, that her sister could not prove her marriage to Clark. Record, 164.

Where, we ask, was her own proof? Where Mr. Dorvior, the other witness stated by her to Clark's marriage? But where was her sense of virtue, that would suffer her to stand by and see her sister marry Gardette, living Clark? And this bigamy with Gardette is perpetrated and connived at by two sisters who had warred against the bigamy of De Grange, as the complainant alleges.

If we believe Madame Despau, she and her sister, Madame de Grange, had, in 1808, to abandon all hope of proving a splendid marriage with Clark, which the child of that pretended marriage expects now to prove, after the lapse of thirty-nine years. Madame Despau says that her sister Zuline had two children by De Grange. Record, 164 and 166. Yet another sister, Caillaret, says no child was born of that union. Record, 293. And afterwards Madame Despau, in a subsequent deposition, shifts her evidence on this point and conforms it to Madame Caillaret's statement. But establish the *factum* of an intermarriage between Clark and the mother of Myra, which cannot be, yet that mother was already the lawful wife of Jerome de Grange, who was then and afterwards alive. This prior marriage of Zuline to De Grange is proved by Mrs. Gaines's own witnesses, Madame Despau and Madame Caillaret, in 1796. How then could Madame de Grange contract marriage with Clark in 1803, unless De Grange was dead, which is not pretended? Because it is said De Grange's marriage with Zuline was null, by reason of his having a prior wife alive in 1796. Where is the proof of this allegation?

There are but three attempts to prove this allegation in the record, viz.:—First, the hearsay of Gardette, that he knew De Grange had a prior living wife. This hearsay is no evidence against us, as we have no claims under Gardette.

Secondly, that a report was current in New Orleans that a woman came there claiming to be the wife of De Grange. But where she came from, or where she went, no one knows, and common report is no evidence of such a fact. *Mima Queen's case*, 7 Cranch, 290.

Thirdly, the confessions of De Grange that his marriage with Zuline was void by reason of his prior marriage.

To this we answer, that these confessions are as much *581] hearsay when brought against us, as Gardette's statements were; for *we do not claim under De Grange,

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and to let his unsworn statements go in evidence against us would be to make our rights depend upon his *ex parte* statements, without any means or opportunity to us of testing their truth or falsehood. *Morgan v. Yarborough*, 11 La., 76.

We have spoken of but three attempts to prove De Grange a bigamist, for we will not even call the failure to prove him so by record proof an attempt.

On the face of complainants' bill, it appears that the defendant, Patterson, claims under the will duly probated, and dated 1811. And Patterson, being a third possessor, cannot be ousted until she has discussed, that is impeached, the will of 1811, by proceeding against the legatees therein. *Hodder v. Shepherd*, 1 La., 507; Code of 1808, p. 214, art. 26; *Id.*, p. 216, art. 37-39. She ought to have sued to discuss that will in four years after her majority, or eight years at farthest. 2 Partidas, 1046; 1 *Id.*, 384; Constitution of 1812, art. 4, § 11.

By these laws she was barred in July, 1831, or July, 1835, at farthest, which is before the bill was filed, and the benefit of this prescription appears on the face of her bill, and need not be pleaded.

We insist that the title of Patterson was legally derived under the will of 1811, and that the sales were all regular and valid in every respect.

And in conclusion, if there be a doubt on this whole case, it should inure to the benefit of *bonâ fide* purchasers, whose titles ought not to be overturned in a case like this.

For Mrs. Gaines, personally, we feel every sympathy; but how often is it that the innocent offspring is made to suffer for the acts of the parent! And if ever parents deserved condemnation here or elsewhere, these parents have deserved it. A mother who, for the world's false esteem, would discard from her maternal breast two helpless infants, and never again look upon her own offspring,—a mother who, upon the case made by her own daughter, stands convicted of adultery before her pretended marriage with Clark, and with bigamy afterwards,—such a mother is above the judgment of human tribunals. And what shall we say of the conduct of Daniel Clark, if Myra be his lawful child, and Madame de Grange was his lawful wife? Courting another woman while his wife was living, and at his death forgetting that she had been his wife, although he had, as pretended, pronounced her blameless, participating in the crime of separating two infants from their mother to save the paltry pride of that mother,—such a man, if the claims of this lady be just, should be consigned to infamy in all human estimation. Even now, [*582
“the web of destiny hangs around this unfortunate

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but innocent offspring, and the dreadful past cannot be recalled. After the lapse of forty years, the sun of truth shines upon this dark and adulterous intrigue, revealing all its deformity on the highest judicial records, and showing the vanity of Clark's latter attempts to efface the stain, if it could be called a stain, which his own wild passions had placed upon his child at her birth.

The Reporter is compelled to omit the arguments of *Mr. Johnson* and *Mr. Jones*, the counsel for Gaines and wife, as their insertion would make the report of this case too long.

Mr. Justice WAYNE delivered the opinion of the court.

The history of this case will be found in the report of the case of *Gaines v. Relf and Chew*, in 2 How., 619.

This is the fourth time that the cause has been before this court. Its decision, in each instance hitherto, has been in favor of the complainants.

The third time, it was brought here upon points upon which the judges in the Circuit Court were divided in their opinions. They arose upon the argument of demurrers, filed by several of the defendants.

It was said there was a want of equity in the bill; that there was a complete remedy at law; that the bill was multifarious, and that there was a misjoinder of parties; that the will of 1813, upon which the complainants relied for a recovery, had not been admitted to probate; and that if the complainants relied upon Mrs. Gaines being the forced heir of Daniel Clark, whatever that right might be, it was recoverable at law.

Upon the argument of the demurrers, three points were made upon which the judges could not agree, and they were certified to this court for its decision.

Those points were,—

1st. Was the bill multifarious, and have the complainants a right to sue the defendants jointly in this case?

2d. Whether the court could entertain jurisdiction of the cause, without probate of the will set up by the complainants, which they charge to have been destroyed and suppressed?

3d. Has the court jurisdiction of this cause, or does it belong exclusively to a court of law?

Upon the first point, this court, for reasons which are as satisfactory to us as they were to the judges who then heard the argument, decided that the bill was not multifarious; that there was no misjoinder, excepting that the purchasers of the

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property of Daniel Clark had no interest in the rendition of the accounts by the executors, under the will of 1811, nor any with what *might be the interest of Caroline [583 Barnes in the will of 1813; that those particulars ought not to be connected with the general object of the bill, but that it could be so amended, in both respects, in the Circuit Court, as to avoid the exceptions.

Upon the second point, this court, upon a full review of the authorities, came to this conclusion,—that both the general and local law require the will of 1813 to be proved in the Court of Probates before any title can be set up under it; but that this result did not authorize a negative answer to the second point.

The court said, that, under the circumstances of the case, the complainants were entitled to full and explicit answers from the defendants in regard to the wills of 1813 and 1811, and that such answers, being obtained, might be used as evidence before the Court of Probates to establish the will of 1813, and to revoke that of 1811. The answer was pertinent to the inquiry, and nothing beyond it. We have adverted to it to show that the decree of the Circuit Court now under consideration has no connection with the will of 1813, and that it was made by that court under the answer given by the court to the third point.

The third point was, Has the court jurisdiction of the cause, or does it belong exclusively to a court of law?

This point involved the jurisdiction of the court in every aspect in which the bill could be viewed. So the court considered it. The claim made in the bill for Mrs. Gaines did not rest alone upon the alleged will of 1813, but also upon the allegation that she was the legitimate child of Daniel Clark, and, under the law of Louisiana, was his forced heir. The court said, “The complainants, in prosecuting their rights upon the ground of Mrs. Gaines being the heir at law, no probate of the will of 1813 will be required. They must rest upon the heirship of Mrs. Gaines, the fraud charged upon the executors to the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give proper relief without decreeing the revocation of the will of 1811.”

Such were the answers given by this court to the points which had been certified to it.

The Circuit Court, in the subsequent trial of the cause between the complainants and the appellant, Mr. Patterson,

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has decreed that Mrs. Gaines is the forced heir of Daniel Clark, or in other words, that, being his legitimate child, she was entitled, under the laws of Louisiana, to her *legitime* in his estate at the time of his death.

*584] This decree was made upon the pleadings and proofs in the cause, put in by the complainants and the appellant, Charles Patterson. He was one of the defendants who had not demurred to the bill. Before those demurrers had been filed, Mr. Patterson had filed his answer, by his counsel, but not under oath, having availed himself of the waiver in this respect tendered to the defendants by the complainants. To that answer there was a general replication. The parties having introduced their proofs, the case was regularly in order for a hearing. It was heard at the earnest desire of both parties. No suggestion was made in the Circuit Court below, that it would direct an issue to be made for the trial of the legitimacy of Mrs. Gaines by a jury. No such desire has been expressed by the counsel of the appellant in this court, though it was intimated that it ought to have been done. We do not think it an occasion for such a course to be pursued.

The practice of granting issues is limited to cases in which the court, in the fair exercise of its discretion, considers that justice will best be obtained by that course. Discretion, we mean, as it is guided by what has been the practice of courts of chancery. *Gardner v. Gardner*, 22 Wend. (N. Y.), 526; *Drayton v. Logan*, Harp. (S. C.), Eq., 67; 3 Paige (N. Y.), 457, 601.

In the English chancery, except in the case of an heir at law or of a rector or vicar, it is not a matter of right. In the American courts of equity we know of no practice establishing an issue as a matter of right. In Virginia and others of our states, the heir's right to an issue is given by statute. As the English chancery, in the exceptions mentioned as a matter of right, has allowed them, upon the ground that the common law "invests a party filling a particular situation with certain rights, of which it is the object of the suit to divest him, we presume that where, by operation of the law, in either of the states, particular persons have an interest in the property of an ancestor, whatever might be the evidence in favor of the authenticity and genuineness of the will, if the heirs at law object to its being done, the court will not establish the will, without the opinion of a jury upon a *devisavit vel non*."

We have recurred to what has been hitherto decided in this cause concerning jurisdiction, to prevent hereafter, in the further progress of it against any of the defendants, any doubt

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about it; and that the principles upon which this court has asserted it might be better understood than they seem to have been at the bar. The Circuit Court, in rendering its decree, understood it perfectly. We have been particular, too, in repeating what was decided by this court in 2 How., 619, because it comprehends the subject-matter upon which the jurisdiction *of the court was affirmed, and covered [*585 all who were parties, with the exceptions mentioned, and their obligations to answer, either jointly or separately, the bill as they pleased; though the whole of them, or any lesser number, might have a common defence. The object being that a final decree might be made between the complainants and each defendant, provided the interest or property upon which the decree is to attach was a part of the property of Daniel Clark and now separate in each defendant who might answer separately, or in any two or more of them who might do so jointly. Or if the defendants, as they had a right to do,—except such of them as have already chosen not to answer conjointly, and have answered separately,—should make a common answer, that the decree between the parties might be common to all, and attach upon the property of Daniel Clark in their hands, if the complainants make out the right of Mrs. Gaines, as forced heir of Daniel Clark. This disposes of the question of jurisdiction, and of the suggestion made in the course of the argument of the cause here, though not strongly insisted upon, that the jurisdiction or practice of the court did not permit a separate decree against Mr. Patterson, or any other defendant in the cause. If the decree against any of the defendants determines the character of the subject-matter or property for which he is sued, making it a part of what shall be the aggregate from which the complainants' interest is to be calculated, it is a final decree, and perfect against the defendant, though it may require the confirmation of a further order of the court before it can be acted upon; as in cases of foreclosure, or where a fund may be distributable among a particular class of individuals, or where, in the distribution of an estate, it becomes necessary to direct a master to report upon its kind or value, &c., &c., of which there is a full illustration in the decree given by this court in the case of *Michoud v. Girod*, 4 How., 543.

The cause is now before this court upon the appeal of Mr. Patterson.

The argument of the learned counsel, Messrs. Brent and May, in favor of the reversal of the decree may be condensed as follows:—

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1. There is no circumstantial evidence in favor of the marriage between the mother of Mrs. Gaines and Daniel Clark.

2. The testimony of Madame Despau, who declares that she was present at the marriage, is not entitled to belief on many accounts.

3. Mr. Clark's acknowledgments that Myra, Mrs. Gaines, was his legitimate child, even if admissible, are contradictory, *586] if De la Croix has spoken the truth, as he spoke differently *of her to that witness. And they are intrinsically overruled by his most solemn acts, in stealthily providing for her by blind trusts, and more especially by the will of 1811.

4. Conceding, *exempli gratia*, that there was a *factum* of the alleged marriage, still there is proof of the marriage of the mother of Mrs. Gaines with De Grange, and no legal or satisfactory proof of the nullity of that marriage; because De Grange's confessions that he had a wife alive at the time he married the mother of Mrs. Gaines are not evidence,—particularly not so in this case, as the appellant does not claim the property for which he is sued under De Grange. The argument of counsel upon the point of a previous and subsisting marriage was this:—There is direct proof of a marriage between Zuline Carriere, the mother of Mrs. Gaines, and De Grange. To annul it, there is no other testimony than the hearsay of De Grange's confessions, and Gardette's declarations, that, when De Grange married Zuline, he was then a married man,—that it was a common rumor in New Orleans, that such was the fact,—that a woman calling herself Mrs. De Grange, and claiming to be the wife of De Grange, came to New Orleans in pursuit of him, as her husband. It is said, if she did, her assertions were equally hearsay. Reputation in New Orleans that the marriage with Zuline was null would be no evidence of the fact. Further, it is said the attempt to prove De Grange's conviction for bigamy is a failure. But even if the record of his conviction had been produced, which was not done, it is *res inter alios acta*, and could not be admitted against the appellant, who does not claim under De Grange, but under conveyances from the executors to the will of 1811.

The counsel also contend, whether they are right or wrong in the foregoing positions is a matter of no consequence, except as showing the history of the case, and tending to prevent further litigation, because, by the code of Louisiana of 1808, re-enacted in this particular in the code of 1825, it is declared that a person holding property by sale from a donee of an excessive donation is only liable to the forced heir, after

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an execution first had against the property of the donee. Under both codes, too, the third possessors are only liable in the order of their purchases. That the *légitime* of the forced heir is not to be recovered in the specific property, but in the value of the *légitime*, as it may be ascertained under the Louisiana codes. For these last positions, counsel rely upon the language of the codes, and upon the case of *Hodder v. Shepherd et al.*, 1 La., 505. That was a case which arose under the code of 1808, but is cited in the new code as [*587 a *judicial exposition of both the old and new code, in this respect. It is said that this case is within the provisions of the code under the decision just cited, as Mary Clark, the mother of Daniel Clark and grandmother of Mrs. Gaines, as universal legatee of her son by the will of 1811, accepted the succession of his estate as the law of Louisiana required it to be done. That her power of attorney to the executors, Chew and Relf, authorized them to make sales of the property of Daniel Clark as they were made, and gave to the purchasers valid titles, without any order of the Probate Court, or any judicial sale, being necessary. That the purchasers are not liable to be sued at all, until the forced heir exhausts the property, or, in other words, discusses the rights or property of the grandmother in her son's estate.

The statute of limitations, it was also said, barred a recovery by the complainants.

We have stated more particularly than we would otherwise have done the arguments urged by the counsel of the appellant, and in the strongest way in which they were presented. It was due to the importance of the case, to the interest of all concerned in this controversy, and because the arguments of both of the counsel command our respect. Parts of some of these objections have our acquiescence, others have not.

Our conclusions relating to the marriage of the mother of Mrs. Gaines to her father, the lawfulness of the marriage, and that she is the legitimate offspring of that marriage, differ from all that has been urged against them.

The marriage, the legitimacy of Mrs. Gaines, and the validity of the sales made by the executors, make the substance of this case put in issue by the pleadings. Were those pleadings different from what they are, there would be enough to prove the marriage and the legitimacy of Mrs. Gaines. But as the pleadings are, we cannot, upon the evidence, exclude such conclusions.

The marriage must be proved, according to what would be proof of it where it took place. This marriage took place in Pennsylvania, at Philadelphia, in the presence of a witness

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who says she was present, and that the ceremony was performed by a Catholic priest. "Marriage is a civil contract in Pennsylvania, to be completed by any words in the present tense, without regard to form." *Hantz v. Sealy*, 6 Binn. (Pa.), 405. "Marriage is to be decided by the laws of the place where celebrated." *Phillips v. Gregg*, 10 Watts, (Pa.), 168. Every intendment is to be made in favor of legitimacy. *Senser v. Bower*, 1 Pa., 453.

*588] The bill asserts the marriage, its lawfulness, and that Mrs. *Gaines is the issue of the marriage; the answer is a denial of these allegations. The plaintiffs file a general replication. But as the appellant accepted the waiver offered in the bill, that their answers might be put in without being sworn to, and did not swear to his answer, he is not entitled to have the benefit of his answer as a denial of the plaintiff's case, unless the denial is contradicted by the evidence of two witnesses, or by one and corroborating circumstances.

In the case of the *Union Bank v. Geary*, 5 Pet., 99, this court said,—“Indeed, we are inclined to adopt it as a general rule, that an answer not under oath is to be considered merely as a denial of the allegations of the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations.” In *Bartlett v. Gale*, 4 Paige (N. Y.), 503, the Chancellor says,—“But where an answer on oath is waived, although, as a pleading, the complainant may avail himself of admissions and allegations in the answer which go to establish the case made by the bill, such answer is not evidence in favor of the defendant for any purpose.” An answer is always under oath, unless the plaintiff chooses to dispense with it, and then the court will order the answer of the defendant to be taken without oath. But whether the answer is not sworn to by the order of the court when the plaintiff waives it, or the waiver has been voluntarily accepted by the defendant, it is not evidence in his favor for any purpose. As this court said in 5 Peters, just cited, it is analogous to the general issue at law, and a single undiscredited witness will be sufficient to prove the allegations in the bill which the answer denies. There is such a witness in this case. We do not intend, however, to put the conclusion to which we have come respecting the marriage solely upon her testimony. It is so strongly corroborated by other proofs, that the answer would be disproved if it had been sworn to.

Madame Despau says,—“Daniel Clark was married in Philadelphia, in 1803, by a Catholic priest. I was present at the marriage. One child was born of this marriage, to wit, Myra Clark (now Mrs. Gaines), who married William Wallace

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Whitney, son of General T. Whitney of the state of New York. I was present at her birth, and knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew, nor had any reason to believe any other child besides Myra was born of that marriage." The witness then proceeds to relate what she terms the circumstances of the marriage, including the previous marriage of Zuline Carriere with De Grange, his subsisting marriage when he married Zuline, and the result of it, when that fact had been discovered *by Zuline and her family. This witness is not discredited in any of the ways or for any of the causes which can allowably be used for such a purpose. She is not contradicted by any witness.

Marriage may be proved by any person who was present, and can identify the parties. *St. Devereux v. M. Dew Church*, Burr, 506; 1 W. Bl., 145.

If the marriage were in a foreign country, proof that it was solemnized in the manner usual in that country will be good presumptive proof that it was a valid marriage. *Lacon v. Higgins*, 3 Stark., 178.

Marriage by a person habited as a priest and being *per verba de presenti*, the person performing the ceremony must be presumed to have been a clergyman. *Rex v. Brampton*, 10 East, 282.

In what way is the attempt made to lessen the force of her testimony? In no other than by negative declarations of other persons who knew Clark, that they do not believe he was ever married, and by the witness De la Croix, who says,—and he is the only witness who says so,—that Clark spoke to him of Myra as his natural child. A hundred such witnesses would not be sufficient to impeach the testimony of one witness swearing positively to the fact of the marriage. And allowing that Clark did so speak to De la Croix, a husband's declarations of the illegitimacy of a child when the marriage has been so proved is not sufficient to rebut the presumption of its having been lawfully begotten, until the presumption is disproved by evidence showing the want of access between the husband and wife. *Bury v. Phillipot*, 2 Myl. & K., 349.

Once the marriage is proved, nothing shall be allowed to impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father. See opinion of the Judges in *Banbury Peerage case* by Le Merchant. Access is presumed, unless the contrary be plainly proved.

But all the other witnesses, some of whom were more in

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Clark's confidence than De la Croix was, say that he spoke to them of Myra as his legitimate child, calling her such.

Pierre Baron Bois Fontaine declares, that Clark treated him as a confidential friend in matters relating to Myra and to his affairs generally; that he was with Clark when he died. He says Clark repeatedly spoke to him of Myra as his legitimate child. Nearly his last words were about her. And further, he spoke of her mother with great respect, and frequently told *590] him, after her marriage with Gardette, that he would have made his *marriage with her public if that barrier had not been made; but that she was blameless.

Mrs. Harriet Smith says,—“Mr. Clark and my late husband, Mr. Harper, were intimate friends, &c. I suckled in her infancy Mr. Clark's daughter Myra. I did it voluntarily, in consequence of her having suffered from the hired nurses. Mr. Clark considered that this constituted a powerful claim on his gratitude and friendship, and he afterwards gave me his confidence respecting her.” The interesting and truthful narrative of this witness of the relations between the father and the child, from her birth to the time of his death, and his frequent declarations that he would acknowledge her as his legitimate child, must make strong impressions upon any reader of it that she was such. Belle Chasse, the intimate and confidential friend of Clark for many years, and who proved himself, as the facts in the case show, worthy of that relation, says,—“With much reflection and deliberation, Clark spoke of his being occupied in preparing his last will. On these occasions, in the most impressive and emphatic manner, he spoke of Myra as the object of his last will, and that he should in it declare her to be his *legitimate child* and heiress of all his estate.”

Madame Caillaret, the sister of Zuline, says she was not present at the marriage of her sister with Mr. Clark, “but I do know that Clark made proposals of marriage with my sister. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. De Grange was void, from the fact of his having then, and at the time of his marrying her, a living wife. These proposals were deferred being accepted until the record proof of De Grange's previous marriage could be obtained, and Zuline, with her sister, Madame Despau, sailed for the *North of the United States*, to obtain the record proof.” Thus confirming what Madame Despau likewise says of Clark's proposals of marriage:—“Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential first to obtain record proof of De Grange having a living wife at the time he married my sister,

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to obtain which from the records of the Catholic church in New York, (where Mr. De Grange's prior marriage was celebrated,) we sailed for that city. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. De Grange's prior marriage. We proceeded to that city, and found Mr. Gardette. He answered, that he had been present at the prior marriage of De Grange, and that he afterwards knew De Grange and his wife by this marriage,—that this wife had sailed for France. Mr. Clark then said, 'You have no reason any longer to refuse [*591 being *married to me. It will, however, be necessary to keep our marriage secret till I have obtained judicial proof of the nullity of your and De Grange's marriage.' Clark and Zuline were then married." Madame Despau then relates their return to New Orleans, the prosecution of De Grange for bigamy, his imprisonment, escape, and flight from the country, without his having ever returned to Louisiana again. "All this happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that, before he could promulgate his marriage with my sister, it would be necessary for her to bring an action against the name of De Grange. The anticipated change of government caused delay; but at length, in 1806, Messrs. James Brown and Eligeas Fromentin, as the counsel of my sister, brought suit against the name of Jerome de Grange, in the City Court of New Orleans.

Now, rejecting all that Gardette is said to have said, all that Madame Despau says of the prosecution of De Grange for bigamy, and of the appearance of a female in New Orleans claiming De Grange for her husband, as not being within the allowable limits of hearsay testimony in a question of pedigree, the concurring testimony of two witnesses in the family as to Mr. Clark's proposals of marriage is such a corroboration of the declaration of one of them, that the marriage took place in her presence, as to make a basis broad enough to receive the declarations of the father, and his affectionate treatment of his child from her birth to his death, as conclusive of his marriage with her mother, and of her legitimacy. Such declarations, where there are probable grounds of a marriage, are the best proof in a question of pedigree. Just such—though they are within what is termed hearsay—as experience has shown to be necessary, in cases of doubt, to establish conjugal relations and the legitimacy of children. Such declarations, unlike those which De la Croix says Mr. Clark made to him, have always been received to establish the legitimacy of a child, with or without proof of marriage; and when there is

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in a case the positive testimony of one witness to a marriage, they are conclusive proof of legitimacy.

What is urged against such a conclusion in this case?

The conduct of the parties in not promulgating their marriage, and not occupying the same house upon their return to New Orleans. In connection with that conduct, the testimony of De la Croix, that Colonel and Mrs. Davis, who reared Mrs. Gaines at the request of her father, knew nothing of his marriage; that the witnesses, Mr. Coxe and Mr. Hulings, who were for a long time the intimates of Mr. Clark,—
 *592] the former his partner in business,—swear, to the best of their belief, *that he never married. And the subsequent connection with Gardette, without a dissolution of the marriage with Mr. Clark.

The first is a good objection, until it has been reasonably accounted for. We do not mean so accounted for as to make it proper, but enough so to separate such conduct from the suspicion of an illicit connection.

Madame Despau declares, when the marriage was contracted in Philadelphia, and afterwards upon their arrival in New Orleans, that Clark said the marriage could not be disclosed on account of Zuline's previous marriage with De Grange; that legal proof must be obtained of the previous marriage of De Grange, and that an action would have to be brought by Zuline "against his name." This is substantially confirmed by Madame Caillaret, in her statement of the proposals for a marriage by Mr. Clark, and it having been deferred for the reason given by Madame Despau for its concealment. It is confirmed by what other witnesses say, as well as Madame Despau, of the arrest and imprisonment of De Grange for bigamy, to which they all swear as within their own knowledge, and by the subsequent proceedings in the City Court against De Grange. (Record, 206.) Connect the preceding with the mode of proceeding in Louisiana to impeach a marriage with one unable to contract marriage, its existing application to De Grange, and what might then have been its application to Mrs. Clark if her marriage in Philadelphia had been disclosed before a sentence of the nullity of her marriage with De Grange had been obtained, and we shall have facts from which motives for concealment of it may be inferred diverse from and stronger than the usual suspicion of its having been caused by an illicit intercourse. It was not necessary to the validity of the marriage in Philadelphia, that a sentence of dissolution should have been first pronounced in Louisiana against De Grange. By the law of the latter, as well as by the law of Pennsylvania, the marriage with De Grange was void from the beginning. A

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void marriage imposes no legal restraint upon the party imposed upon from contracting another, though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding, wherever that may be done. Mr. Clark probably knew what we have just stated concerning the validity of his marriage; but from his pride and temper, as his character has been disclosed in this record, was it not probable, not to say natural, that such a man, anticipating his return to Louisiana, would resort to the course which was pursued, to keep his feelings from being wounded, until a judicial sentence [*593 had restored *his wife to the unequivocal condition [enjoyed by her before the imposition of De Grange? We speak of the fact, and not of its propriety. The latter has not our approbation, but we recognize what all of us know to be true, that concealment is as frequently the refuge of error as it is of crime, and that men of the world shun more than any thing else the exposure of their follies, more especially such as the world may think to be so, and bearing upon the honor of the most delicate relation which a man can form in life. It is not a fiction, that men have been situated as Mr. Clark was, who have died without disclosing, as he did, even in behalf of their unoffending children, such a relation, and that women have been found to bear it. Such reflections would have no weight with us, unconnected with the proof that there is in this case of the marriage. But we think, with such proof, that they are appropriate to repel any presumption of illegitimacy in this instance, arising from the concealment of the marriage, or from the parties to it not having occupied the same house. The events which followed embittered the rest of this father's life, and until now, have deprived his child of that legitimate standing which he was most anxious to give her, and which seems to have pressed most heavily upon him at the hour of his death. Bois Fontaine says, in reply to the third cross-interrogatory,—“He spoke of her mother with great respect, and frequently told me, after her marriage with Gardette, that he would have made his marriage with her public if that barrier had not been made, and frequently lamented to me that it had been made; but that she was blameless. He said he would never give Myra a step-mother. When, in 1813, he communicated to me that he was making his last will, he showed great sensibility as to her being declared legitimate in it. While I was with him in his death-sickness, and even at the moment he expired, he was in perfect possession of his senses, and no parent could have

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manifested greater affection than he did for her. Nearly his last words were about her," &c.

"Time with him was near its end, and the truth was told.

De la Croix's testimony, in the particular in which it is relied upon, differs from that of all the other witnesses, who have deposed to what Mr. Clark said to them, repeatedly, of the legitimacy of his child.

We regard it the less, for notwithstanding his intimacy with Mr. Clark, and the confidence which he had in De la Croix's suitableness to be the guardian of Myra, he says Mr. Clark never spoke to him about her, except on the occasion when he was asked to become his executor and her tutor. Record, *594] 233, 234. This declaration to De la Croix, supposing it to *have been made in connection with the occasion when he says that it was made by Mr. Clark, is the testimony in the record most relied upon to disprove the legitimacy of Mrs. Gaines. But it cannot be allowed to exceed in weight the testimony of several other witnesses who were more intimate with Mr. Clark than De la Croix was, who—from facts in the cause independently of any declarations of theirs—seem to have had more of his confidence, and to whom Mr. Clark spoke very differently of the same fact. A single declaration, directly the reverse of many to the same fact, may be made in such a manner, by the same person, as to disable us from coming to a conclusion coincident with that which the many assert. But if the latter are associated with other proofs bearing upon the point derived from other persons, stronger than any proofs which can be connected with the contradiction of them, we have a rule to guide us in our estimate of both, making the many prevail over the one, though it might, independently of all other proof connected with either, bring us to an opposite conclusion. The testimony of De la Croix cannot stand the test of this rule. Setting aside all that the other witnesses say contrary to it, there is the oath of one witness who swears to the marriage, which raises an intendment of legitimacy in the offspring conclusive until it has been disproved. Against such a rule, suspicions or doubts not resting upon proofs as strong as the proofs of the marriage, must not be indulged. But for a brief illustration of the rule, let us take the case. De la Croix says Mr. Clark told him, upon the only occasion he ever spoke to him of Myra, that she was his natural child. Madame Despau says she was present at the marriage of Mr. Clark to the mother of Myra. Bois Fontaine says Mr. Clark said to him, speaking of the mother of Mrs. Gaines, that he would have made his marriage with her public, but for her subsequent connec-

tion with Gardette. Now where is the weight of proof? Does De la Croix's testimony exceed that of the witness who swears to the marriage, and also Clark's declaration to Bois Fontaine admitting it? The contrary declarations may neutralize each other, in this aspect of the case, without lessening the positive.

In such a case, we have not a choice of conclusions, but must take that which the positive proves.

Hitherto, the testimony of De la Croix has been treated as if it was altogether unexceptionable. It is not so. There is in it that cold hardness of a man of the world, unmindful of the relations of former friendship whilst professing to regard them, but little in unison with kindness, and not at all so with the seriousness of exact truth. Such men will not swear to *what is false, but they may speak what is [*595 not true, by an indifference to exactness in what they do say. De la Croix's testimony is twice in the record, taken at different times, and we have it both in French and English. No injustice is done him by translation. They are not so contradictory of each other as to justify of themselves any charge against his intentional veracity; but they differ in particulars about Myra, as well as of other persons, so as to make it right that it should, as a whole, be received with great caution. Besides, for there must be no disguise of the facts which bring us to our conclusion concerning his testimony, there is upon the record a pecuniary relation between himself and the estate of Daniel Clark, which, unexplained, does not leave a favorable impression of his impartiality in this affair.

Again, suppose the fact of legitimacy in this case had been placed altogether upon the evidence of Belle Chasse and De la Croix, that of the former would not have been proof of it. But if Belle Chasse's testimony is fortified by that of others, speaking as strongly as he does of Clark's declarations of his daughter's legitimacy, it would not be reasonable to discard it for the testimony of De la Croix, which is unsupported by any other witness. Is the conclusion one less of proof, because Colonel and Mrs. Davis, who reared the child at the request of her father, were ignorant of his marriage? because Mr. Coxe and Mr. Hulings, who knew him well, say that they knew nothing of Mr. Clark's marriage, the two last declaring so to the best of their belief? All of this is negative testimony, implying ignorance of the fact of which they speak, and not knowledge of it,—a fact susceptible of positive proof, or of proof by facts from which marriage may be inferred. The rest of the testimony of Mr. Coxe, Mr. Hulings, and De la Croix, in respect to the marriage, is excluded from our consideration, from not being within the rules by

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which hearsay is admissible in cases of pedigree. Neither of them relate anything as coming from the parents of Myra, or the relations on either side of the marriage. The only point in which the testimony of Mr. Coxe differs from that of Madame Despau is in his narrative of the arrangement made by him, at the request of Mr. Clark, for the birth of Caroline, now Mrs. Barnes. Madame Despau says she was the child of De Grange; Mr. Coxe, that Clark told him that she was his child. These declarations are at variance with each other as to the fact, but not contradictory. The fact may be as one or the other witness has related it. The difference, therefore, does not at all discredit Madame Despau. But the ignorance *596] of Colonel and Mrs. Davis of the marriage, in connection with the arrangements *which were made by them, at the request of its father, for the birth of the child, and the father's great confidence in them, it is said, is extraordinary and unaccountable. But is it not equally so, that, under such circumstances, he should not have communicated to them the reverse? The latter is ordinarily the usual confidence between the parties upon such occasions, and when it is not made, an inquiry suggests itself at once why it was not done. Its not having been done, though extraordinary, proves nothing either one way or the other; the mind is left to connect other facts with it, for the purpose of enabling us to conclude what inference can justly be made from such an incident, so much out of the way of the confidence between parties upon such occasions. There are no such facts in this case to aid such an objection. There are facts independent of it, which happened afterwards, which repel it.

The witnesses speak of the extraordinary affection manifested by Mr. Clark for this child,—his daily visits, parental and endearing fondness,—his costly presents and manifested pride in her, as time developed her mind and appearance,—and that he always called her Myra Clark. All of this is not inconsistent with what men of generous temper will and should do to repair as much as they can, in such cases, their indiscretion as to the birth of a child. But when a parent does it, with subsequent declarations, made over and over again, to several persons, of a child's legitimacy, they may well be united with the latter to remove the objection, that Mr. Clark had not mentioned his marriage to Colonel and Mrs. Davis. Besides, let it be remembered that the evidence shows, up to that time, he had mentioned his marriage to no one Madame Despau, his wife, and himself only knew the secret, and his influence over them made it his own, until they could speak free from the apprehensions excited in them by his dec-

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laration, that the marriage was not to be disclosed until the marriage with De Grange had been judicially annulled. He was a man of no ordinary character or influence upon those who were about him. His natural fitness to control became habitual, as his wealth and standing increased, and it was exercised and involuntarily yielded to by all who associated or who were in business with him. He was a man of high qualities, but of no rigor of virtue or self-control;—energetic, enterprising, courageous, affectionate, and generous, but with a pride which had yielded to no mortification until his affection subdued it to a sense of justice in behalf of his child. As to Mrs. Clark's subsequent connection with Gardette whilst she was the wife of Mr. Clark, considering it alone or [*597 with those reasons which *have been urged against the fact of that marriage, our conclusion is, that, inexcusable as her conduct was, there is not enough to make the fact of the marriage with Mr. Clark doubtful. Discarding from our consideration altogether the irritation and impositions to which this female had been subjected from her girlhood, and her well-founded fears of the fidelity of Mr. Clark, and admitting she was very deficient in her apprehension of the sacredness of marriage, however much it may expose her virtue and her affection for her lawful husband to conclusions against both, we do not deem it to be a fact strong enough to set aside the testimony of one witness who swears positively to her marriage with Mr. Clark, and all the corroborating proof of that fact in the case. It will raise a suspicion against the marriage, in this most curious and original chapter of domestic life, not easily removed from the minds of those who indulge it. But we cannot permit it to prevail over the legitimacy of her child, established, as we think ourselves obliged to say it has been, in conformity with those rules of evidence which long experience and the wisdom of those who have gone before us in courts of equity have deemed the best to ascertain, in cases of doubt, the affinity and blood-relationship of social life.

But it is still said, admitting the marriage with Clark to have taken place in Philadelphia, that Mrs. Gaines cannot inherit from her father, his marriage with her mother being void, on account of her previous marriage with De Grange.

This will depend upon the marriage with De Grange having been a valid marriage. Or upon its being void for one of those causes which disable persons from contracting marriage. The burden of proof in such a case is not upon the party asserting the validity of the second marriage, but on the other, who asserts its invalidity on account of the validity of the first. Both are affirmative declarations. *Ei incumbit probatio*

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qui dicit, non qui negat. The argument is, the marriage with De Grange stands in the way of any right of Mrs. Gaines to inherit from her father, until the record of the conviction of De Grange for bigamy has been produced. We do not understand the law to be so. A bigamist may be proved so, in a civil suit, by any of those facts from which marriage may be inferred. Reputation of marriage is not enough, but facts from which it may be inferred are so. In a prosecution for the offence, there must be proof of an actual marriage. The confession of the bigamist will be sufficient in a civil suit, when made under circumstances which imply no objection to it as a confession. De Grange did make such a confession. Madame *598] Benguerel says, in answer to the seventh interrogatory put to her,—“My *husband and myself were very intimate with De Grange, and when we reproached him for his baseness in imposing upon Zuline, he endeavored to excuse himself by saying, that, at the time of his marrying her, he had abandoned his lawful wife, and never intended to see her again.” Record, 212. And her answer to the cross-interrogatory is,—“I am not related to nor connected with the defendants, nor with either of them, nor with the mother of the said Myra, nor am I interested at all in this suit. It was in New Orleans where I obtained my information. It will be seen by my answers how I knew the facts. I was well acquainted with De Grange and the said Zuline, and I knew the lawful wife of the said De Grange, whom he had married previous to his imposing himself in marriage upon Zuline.” The credit of this witness is unassailed. Here, then, is proof enough of a subsisting marriage between De Grange and another female, when he married Mrs. Gaines’s mother, to invalidate the latter.

But suppose Madam Benguerel had not given such testimony, or that her credit had been successfully assailed; what would then be the state of the objection? Just this: as all the other witnesses who speak of the prosecution of De Grange for bigamy speak of his conviction only as hearsay or common report, the defendant cannot call upon the plaintiff for record proof of it, without placing himself in the inconsistent attitude of rejecting the hearsay to be proof of its existence, but giving to him the right to call for its production. The testimony of Madame Benguerel was introduced by the plaintiffs without any obligation upon them to have done so. It establishes the fact of De Grange’s previous marriage, for all the purposes of this controversy. The denial, in the answer of the defendant, that Mr. Clark was ever married, is the assertion of a fact, of which the defendant cannot, in the nature of things, have positive knowledge, and is therefore no more than a declara-

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tion of his belief. One witness, therefore, overrules the denial. But there is no force in this objection for another reason. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is, that a child of the marriage is legitimate, and it will be incumbent upon him who denies it to disprove it, though in doing so he may have to prove a negative.

Further upon this point, the record of De Grange's conviction cannot be called for, as there is proof that it could not be found in the proper office in New Orleans, where it should be. The complainants do not rely upon such proof to establish the fact that De Grange was a married man when he married Zuline. *His declaration to Madame Benguerel, [*599 associated with other facts, sufficiently proves it.

Before leaving this point, however, we will make a single remark upon what was said in the argument, that, if the record of De Grange's conviction had been produced, it would not have been competent testimony, from its being *res inter alios acta*.

The general rule certainly is, that a person cannot be affected much less concluded, by any evidence, decree, or judgment, to which he was not actually, or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees. *Duchess of Kingston's case*, 11 How. St. Tr., 261; *Davies, Demand.*, Lowndes, Tenant, 7 Scott, N. R., 141; *Doe d. Bacon v. Brydges*, Id., 333; *Read v. Jackson*, per Lawrence, J., 1 East., 355; *Brisco v. Lomax*, 8 Ad. & E., 198; *Evans v. Rees*, 10 Id., 151; *Biddulph v. Ather*, 2 Welsb., 23; *Tooker v. Duke of Beauford*, 1 Burr., 146, as to manorial rights; *Brisco v. Lomax*, 8 Ad. & E., 198, as to disputed boundary; *Laybourn v. Crisp*, 4 Mees. & W., 320, as to questions of immemorial custom; *Travers v. Challoner*, Gwill, 1237, as to disputed modus and pedigree; *Carr v. Heaton*, Gwill, 1261. In *Neal & Duke of Athol v. Wilding*, Str., 1157, the court rejected a special verdict in a former suit, the defendants not having been parties to that suit, which was offered to prove three of the descents which were necessary to make out the Duke's pedigree. Mr. Justice Wright differed from the majority of the judges on that occasion, and in Buller's N. P., 4th ed., p. 233, it is said that the opinion of that learned judge was generally approved, though the determination by the rest of the court was contrary. Ar d

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the point has been since repeatedly ruled in conformity with the opinion of Mr. Justice Wright.

But it may be said that the real fact was not what our conclusion is upon this point. Let it be remembered by those who may say so, that possibilities are the enemies of truth, indicating more frequently than otherwise the unpreparedness of a mind to receive it, rather than its uncertainty. They have no standing in the law against a violent presumption, which is *plena probatio*, or full proof.

Having disposed of all the objections which were urged, or which can be raised upon this record, against the most interesting and essential fact in the case of the complainants, *600] we *proceed to give our conclusions upon the legal points made for the reversal of the decree of the Circuit Court.

They were, that a suit at the instance of a forced heir cannot be maintained against a purchaser, until the donee's property has been discussed.

It was said the decree was not final.

That the statute of limitations barred a recovery.

And last, that the decree directs the property for which the defendant is sued to be conveyed and surrendered to Mrs. Gaines, instead of making it liable as a portion of Daniel Clark's estate, out of which the forced heir's *légitime* is to be calculated.

The first objection would prevail against the decree, if Mr. Patterson's was such a purchase. It is not so.

The defendant is the alienee of the purchasers who bought the property at auction, in the year 1820, from the executors of Mr. Clark under the will of 1811. It is admitted that the property was a part of Mr. Clark's estate when he died.

These sales were made without any authority, judicial or otherwise. They were made after the time when, by the law of Louisiana, the relation of the sellers as executors had expired. Nor can it be said they were legal on account of the power of attorney given to Mr. Relf and Mr. Chew by Mrs. Clark, the mother and universal legatee of the testator. She could give no power to the executors to dispense with the law prescribing the manner for making the sale of a succession. Her power of attorney was not of itself, nor was it treated by the executors, to make for her a legal acceptance of the succession. It was neither an express nor a tacit acceptance of the succession, casting upon her the responsibilities resulting to a donee of a succession by its acceptance. It might have been used as an act done by her from which her intention to accept the succession might have been inferred, which would have been a legal acceptance. But it was not so treated.

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Until the acceptance was made as the law required it to be, every act performed under it by the attorneys was void.

The power was also given when the possession of the estate was lawfully in the executors, for the purpose of enabling them to discharge their functions according to law. It could not invest them with any power, either when their connection with the estate as executors existed, or afterwards, to sell any part of it in a way not permitted by the law.

One of the executors, Mr. Relf, received letters testamentary on the 27th August, 1813. The other, Mr. Chew, on the 21st January, 1814. Without delay, on the same day that he received letters, Mr. Relf applied for leave to sell the [*601 movable *and immovable property of his testator. It was granted. For reasons stated in a subsequent application, he applied for an extension of the order as to the time for making a sale. It was allowed, without any alteration of the time for advertising the property he wished to sell, as fixed in the first order. The movable effects were to be advertised ten days. The slaves and other immovable effects thirty days. The defendant depends upon these orders for the regularity of the sales and the validity of the purchase made by his alienor, Correjollas, the original purchaser. The sale of the property bought by Correjollas was made in 1820. The time for making the sales, according to the order of the court, had passed more than six years. The time within which the executors could act as such by the law of Louisiana had expired. They had neither legal nor delegated authority from the donee of the estate, recognized as such by the law of Louisiana, to make the sale. It was a sale without judicial order,—a sale in disregard of, and in violation of, the law,—one which the law of Louisiana makes absolutely void. If considered as having been made under the orders for sale given by the court, it is also absolutely void. It is necessary to show, in all cases of forced sales, meaning such as are done by judicial order,—particularly of the property of a succession, or estate of a deceased person,—that all the formalities of the law have been strictly complied with, or the sale will be annulled. *Delogny v. Smith*, 3 La., 421; *Donaldson v. Hull*, 7 Mart. (La.), N. S., 113; *Marsfield v. Comeaux*, Id., 185; 8 Id., 246; 4 La., 204; 11 Mart. (La.), 610, 675; 2 La., 328.

Under these decisions, and the view which we have taken of this point of the case, the fact of notice by the purchasers, and by the defendant from them, of the illegal and fraudulent sale, cannot be denied. The defendant knew, from the titles which he received from the purchaser, Correjollas, and from that bought by him from the other alienee of Correjollas, that

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the sales had been made by Mr. Relf and Mr. Chew in a representative character, and it was his duty to inquire if they legally filled it. Not having done so, he has bought in his own wrong, and the title by which he claims the property must be annulled. We have confined our remarks strictly to the objection, that these sales were made by the donee, or universal heir of the will, without adducing other causes found in the proceedings of the executors, of which this record is but too fruitful, to show that the objection has no foundation in fact.

Of the statute of limitations we will only say, that the *602] statute in force at the time the suit is brought determines the *right of the party to sue for a claim, and that the time under that in force when this suit was commenced had not expired. We ought, though, to say, to prevent future misapprehension, that it is not regularly in the pleading of this cause.

It is also said that the decree of the Circuit Court is not final, in the sense contemplated by the law, to give to this court appellate jurisdiction. Indeed, we do not see how a decree could be more so. Nothing is left open between the parties; it embraces the pleadings as well as the proofs in the cause, and directs the property held by the defendant, as it is set forth in the pleadings, to be conveyed and surrendered to Mrs. Gaines. And it is only because the decree is subject to the objection, that the *légitime* of Mrs. Gaines in her father's estate is to be calculated out of the whole of it, so as to ascertain and preserve distinct from the controversy the disposable *quantum* to which the donee is entitled under the will of 1811, that we shall direct it to be reversed.

Mrs. Gaines, as the forced heir of her father, is entitled to such a portion of his estate as he could not deprive her of, either by donations *inter vivos* or *mortis causa*. The will of 1811 is not null on account of its being a donation exceeding the *quantum* which the father could legally dispose of, but is only reducible to that *quantum*.

To determine the reduction to which the donation in the will of 1811 is liable, the 29th article of title 2d of donations *inter vivos* and *mortis causa*, ch. 3, § 2, of the code of 1808, gives the rule. The disposable *quantum* in this instance would be one fifth of the aggregate of the property of the decedent in Louisiana; the *légitime* four fifths. Code of 1808, 212, tit. 22.

We shall direct the decree of the court below to be reversed, and adjudge that a decree shall be made in the said court, in this suit, declaring that a lawful marriage was contracted in

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Philadelphia, Pennsylvania, between Daniel Clark and Zuline Carriere, and that Myra Clark, now Myra Gaines, is the lawful and only child of that marriage. That the said Myra is the forced heir of her father, and is entitled to four fifths of his estate, after the excessive donation in the will of 1811 is reduced to the disposable *quantum* which the father could legally give to others.¹

That the property described in the answer of the defendant, Mr. Patterson, is a part of the estate of Daniel Clark at the time of his death, that it was illegally sold by those who had no right or authority to make a sale of it, that the titles given by them to the purchaser and by the purchaser to the defendant, Mr. Patterson, including those given by the [*603] buyer *from the first purchaser to Mr. Patterson, are null and void, and that the same is liable, as a part of the estate of Daniel Clark, to the *légitime* of the forced heir, and that the defendant, Charles Patterson, shall surrender the same as shall be directed among other things to be done in the premises, as will appear in the decree and mandate of this court to the Circuit Court in Louisiana.

Order.

This appeal having been heard by this court, upon the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and upon the arguments of counsel, as well for the appellant as for the appellees, this court, upon consideration of the premises, doth now here adjudge, order, and decree, that the decree of the said Circuit Court be and the same is hereby reversed, with costs, and that such other decree in the premises be passed as is hereinafter ordered and decreed.

And this Court, thereupon proceeding to pass such decree in this cause as the said Circuit Court ought to have passed, doth now here adjudge, order, and decree, that it be adjudged and declared, and is hereby adjudged and declared, upon the evidence in this cause, that a lawful marriage was contracted and solemnized at Philadelphia, in the state of Pennsylvania, between the same Daniel Clark, in the bill and proceedings mentioned, and the same Zuline or Zuliene Carriere, in the bill and proceedings mentioned; and that Myra Clark, now Myra Clark Gaines, and one of the complainants in this cause, is the lawful and only issue of the said marriage, and was at the death of her said father, Daniel Clark, his only

¹ CITED. *Gaines v. Hennen*, 24 How., 572; but see *Id.*, 628.

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legitimate child and heir at law, and as such was exclusively invested with the character of his forced heir, and entitled to all the rights of such forced heir.

And this court doth further adjudge, order, and decree, that all the property described and claimed by the defendant Patterson in his answer and supplemental answer, and in the exhibits thereto annexed, is part and parcel of the property composing the succession of said Daniel Clark; that the defendants Richard Relf and Beverly Chew, at the time and times when, under the pretended authority of the testamentary executors of the said Daniel Clark, and the attorneys in fact of the said Mary Clark in the will and proceedings mentioned, they caused the property so described and claimed by the defendant Patterson to be set up and sold at public auction, in December, 1820, and when they executed their act of *604] sale, dated on the 18th February, 1821, to Gabriel Correjollas* for the two lots therein described, (which two lots constitute the same property described and claimed by the defendant Patterson as aforesaid.) had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction and the said act of sale to Correjollas in confirmation of the previous sale at auction, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant Patterson, at the time and times when he purchased the property so described and claimed by him as aforesaid, (part from the said Correjollas, the vendee of the defendants Relf and Chew, and the residue from Etienne Meunier, the vendee of said Correjollas, himself the vendee of the same defendants), was bound to take notice of the circumstances which rendered the actings and doings of the said defendants in the premises illegal, null, and void; and that he ought to be deemed and held, and hereby is deemed and held, to have purchased the property in question with full notice that the said sale at auction under the pretended authority of the said defendants and their said act of sale to Correjollas were illegal, null, and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And the said court doth further adjudge, order, and decree, that all the property claimed and held by the defendant Patterson as aforesaid now remains, unalienated and undisposed of, as part and parcel of the succession of the said Daniel Clark, notwithstanding such sales at auction and act of sale in the pretended right or under the pretended authority of the defendants Relf and Chew.

And the court doth further adjudge, order, and decree, that

the complainant, Myra Clark Gaines, is justly and lawfully entitled, as the only forced heir of said Daniel Clark, to her *legitimate portion* of four fifths of the said succession, and to have four fifths of the property so claimed and held by the defendant Patterson, as aforesaid, duly partitioned, apportioned, and delivered or paid over to her, together with four fifths of the yearly rents and profits accruing from the same, since the same came into the said defendant's possession; and for which the said defendant is hereby adjudged, ordered, and decreed to account to the said complainant.

And the court doth now here remand this cause to the said Circuit Court for such further proceedings as may be proper and necessary to carry into effect the following directions; that is to say,—

1. To cause the said defendant Patterson forthwith to surrender all the property so claimed and held by him as aforesaid *into the hands of such curator, commissioner, [*605 or trustee as the said court may appoint for the purpose; whose duty it shall be, under the directions of the court, to manage the said property to the best advantage, till the whole matter and apportionment of the said two portions (being the said four fifths and one fifth) of the said property shall have been completed and finally liquidated, as a part of the succession of the said Daniel Clark, and in the meantime to collect and receive all the rents, issues, and profits of the same, and to account and bring the same into court, to be there apportioned and paid over, or in part retained for further directions.

2. To cause four fifths of the property so claimed and held by the defendant Patterson as aforesaid to be duly partitioned, appropriated, and delivered or paid over to the said complainant; and to retain the residue subject to further directions for the appropriation of the same; which either party shall be at liberty to move for; and if the same be proved and found indivisible by its nature, or cannot be conveniently divided, to cause it to be sold by public auction, after the time of notice and advertisements, and as near as may be in the manner prescribed by law in the judicial sale of the property of successions; and, in case of such sale by auction, to apportion and pay over four fifths of the net proceeds of such sale to the said complainant, and to retain the residue subject to further directions, as aforesaid.

3. To cause an account to be taken by the proper officer of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since it came into the possession of the defendant Patterson; and four fifths of the same to be accounted

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and paid to the said complainant, and the residue to be retained subject to such further directions as aforesaid.

4. To give such directions and make such orders, from time to time, as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by the parties and the officers of the court.

*606] *THE UNITED STATES, APPELLANTS, v. HENRY
YATES AND ARCHIBALD MCINTYRE.

Under the peculiar circumstances of this case, the counsel for the appellees was permitted to strike out his appearance, but such withdrawal must not authorize a motion to dismiss for want of a citation.¹

The appearance of counsel does not preclude a motion to dismiss for the want of jurisdiction, or any other sufficient ground, except the want of a citation. It is the practice of the court to receive such motions after an appearance has been entered.²

Under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. If the appeal has been regularly prosecuted, he is as much entitled to judgment in the one case as in the other.³

THIS was an appeal from the District Court of the United States for Louisiana, under the act of Congress passed on the 17th of June, 1844, providing for the adjustment of land claims within the states of Louisiana, Arkansas, &c.

A motion was made by *Mr. Baldwin*, whose name appeared as counsel for the appellees, to strike out his appearance, and in support of the motion he filed the following affidavit and letter.

“Harvey Baldwin, of the city of Syracuse in the state of New York, being duly sworn, saith,—That he is the attorney and counsel of the above-named appellees, and as such brought and assisted in the trial of the above-entitled suit in the District Court of Louisiana.

“That this deponent set out from his residence aforesaid for Europe, on the 10th day of July last, and returned therefrom on the 28th or 29th of December last.

“That while in Europe, this deponent, by a letter from his clerk, was informed, that, owing to some irregularities touching

¹ See *Graham v. Spencer*, 14 Fed. Rep., 606. How., 207. CITED. *Creighton v. Kerr*, 20 Wall., 12.

² APPLIED. *Carroll v. Dorsey*, 20

³ CITED. *Habich v. Folger*, 29 Wall., 7.

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the appeal, said cause was at an end and would not be further prosecuted, or language to that effect. But this deponent was subsequently informed, by a letter from his wife, that the appeal taken therein was not abandoned, and that the return thereto would soon be filed, or words to that effect. Whereupon this deponent wrote to Major Hobbie, Deputy Postmaster-General of this city, and requested him to call on Mr. Carroll, the clerk of this court, and take such measures in the name of this deponent as might be necessary to save default, and protect the rights of this deponent's clients therein; which letter this deponent has since his arrival in this city obtained from said Hobbie, and, together with the envelop thereof, is hereunto annexed.

"And this deponent further saith, that since his arrival in this city, he has been informed by the clerk of this court that said Hobbie called on him, on or about the 29th day of December last, with the letter from this deponent, and ordered the appearance of this deponent entered for the appellees in said suit, and that said appearance was thereupon entered, pursuant to such direction and request.

"And this deponent further saith, that, having been apprised that there were some irregularities in regard to said appeal, *he did not intend to have his appearance entered in said cause if by so doing it would prevent said appellees from taking advantage of such irregularity. [*607

"And this deponent further saith, that, having since his arrival in this city seen the return to said appeal, he is satisfied that irregularities touching the appeal in said cause do exist, and as the counsel for said appellees deems it his duty, as at present advised, to present them to the consideration of this honorable court. And further saith not.

HARVEY BALDWIN.

"Sworn to in open court, 15th February, 1848.

WILLIAM THOMAS CARROLL,
Clerk of Supreme Court, U. S."

"Frankfort on the Maine, November 15th, 1847.

"My dear Sir,—I wrote you a hasty note this morning, via Liverpool, requesting your kind attention to a suit I have in the United States Court,—*Yates and McIntyre v. The United States*, appeal from District Court of Louisiana by United States, under the act of Congress of 1844.

"Since I arrived in this country, I have been informed that the appeal was abandoned, or, owing to some irregularity in appellants' proceedings, the appeal was at an end.

"This may or may not be so. If return has been made, my

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appearance for appellees ought, I suppose, to be entered; but I do not wish, by entering an appearance, to waive any irregularity or advantage which the appellees may have, without their consent. Will you do me the favor to call on Mr. Carroll, the clerk, and take such measures, in my name, as may be necessary to save default and protect the rights of my clients.

"I ought in justice to myself and them to say, that, under ordinary circumstances, they would not regard mere technicalities; but the lands in question have cost them more than they can ever hope to realize with the titles confirmed. For twenty years they have been struggling to get the government to do that which, by the terms of the treaty of 1803, it solemnly promised to do, and the doing of which formed, *stricti juris*, a condition precedent to the perfection of its own title. Until this is or shall be done, our property remains unavailable. If, therefore, the government has by laches lost the right to prosecute the appeal, I see no reason, under the circumstances, why we should restore it to them.

"When you look into the matter, do whatever may be necessary to protect our interest, and hold me accountable at our first meeting, which I now hope will be some time in the month of December next.

"H. BALDWIN."

*608] *Mr. Chief Justice TANEY delivered the opinion of the court.

Upon the affidavits filed, the court will permit the attorney who has appeared for the appellees to withdraw his appearance. But this leave will not authorize a motion to dismiss for want of a citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he cannot afterwards withdraw it.

But the appearance does not preclude the party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for the one above mentioned. And a motion of that kind is, in the practice of this court, usually and most properly made by the attorney after his appearance is entered on the docket. And if such a motion is intended to be made in this case, the withdrawal of the appearance is not necessary to give the appellee a right to make it.

The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in a court exercising original jurisdiction, do not apply in an appel-

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late court. And under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. For if he is entitled to his appeal, and has prosecuted it to this court according to law, the refusal or omission of the appellee to appear will not delay the trial, and a judgment against him will be as conclusive as if an appearance for him had been entered on the docket, and the case argued by his counsel.

Mr. Justice DANIEL and Mr. Justice WOODBURY dissented from the opinion of the court.

Order.

On consideration of the motion by *Mr. Baldwin*, for leave to strike out his appearance, which had been improvidently entered (by an agent of his) for the appellees in this cause, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is now here ordered by the court, that the leave prayed for be and the same is hereby granted.*

*The case was afterwards dismissed, upon the same grounds as in the preceding case of *The United States v. Curry and Garland*.

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TO THE

MATTERS CONTAINED IN THIS VOLUME.

The references are to the STAR (*) pages.

ABATEMENT.

1. An action on the case will not lie against the executors of a deceased marshal, where executions had been placed in the hands of the marshal, and false returns made on some of them, and imperfect and insufficient entries on others. *United States v. Daniel*, 11.
2. The rule respecting abatement is this:—If the person charged has received no benefit to himself at the expense of the sufferer, the cause of action does not survive. But where, by means of the offence, property is acquired which benefits the testator, there an action for the value of the property survives against the executor. *Ib.*
3. If a plea to the jurisdiction and a plea of *non assumpsit* be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived. *Bailey v. Dozier*, 23.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

APPEAL.

1. By the act of May 23d, 1828 (4 Stat. at L., 284), relating to private land claims in Florida, appeals from the Superior Court of the Territory of Florida are governed by the laws of 1789 and 1803. *Villabulos v. United States*, 81.
2. Therefore, where an appeal was not made in open court, and at the term at which the final decree was passed, a citation was necessary, which must be signed by a judge, and not by the clerk. See *United States v. Hodge*, 3 How., 534. *Ib.*
3. The act of 1828, above mentioned, allowed appeals to be prosecuted within four months, and placed them, in other respects, upon the same footing with writs of error under the act of 1803. Writs of error and citations are returnable to the term of the appellate court next following; and unless the writ and citation are both served before the term, the case is not removed to the appellate court. *Ib.*
4. Consequently, where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion. *Ib.*
5. An order of the District Court, sustaining a demurrer to a petition because it is multifarious, and because the names of the persons claiming or in possession of the land which the petitioners allege to belong to them are not set forth, is not a final judgment or decree from which an appeal lies to this court. *Heirs of De Armas v. United States*, 103.
6. Under the peculiar circumstances of this case, the counsel for the appellees was permitted to strike out his appearance, but such withdrawal must not authorize a motion to dismiss for want of a citation. *United States v. Yates*, 606.
7. The appearance of counsel does not preclude a motion to dismiss for the want of jurisdiction, or any other sufficient ground, except the want of a citation. It is the practice of the court to receive such motions after an appearance has been entered. *Ib.*

APPEAL—(Continued.)

8. Under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. If the appeal has been regularly prosecuted, he is as much entitled to judgment in the one case as in the other. *Ib.*

ATTORNEY.

1. Where a citizen of Virginia sued, in the Circuit Court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity. *Shelton v. Tiffin*, 164.

BANKRUPTCY.

1. A decree of the Circuit Court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree,—is not such a final decree as can be appealed from to this court. *Pulliam v. Christian*, 209.
2. The District Court of the United States, sitting in bankruptcy, had power to decree a sale of the mortgaged property of a bankrupt; and if there are more mortgages than one, and the proceeds of sale are insufficient to discharge the eldest mortgage, the purchaser will hold the property free and clear of all encumbrances arising from the junior mortgage. *Houston v. City Bank of New Orleans*, 486.

BILLS AND NOTES.

1. Under the statutes of Mississippi, a protest of promissory notes, and statement of notices given to the parties, being certified under the notarial seal and verified by the affidavit of the notary, may be read in evidence. It is not necessary to introduce the notary, personally, to testify. *Sims v. Hundley*, 1.
2. Where a bill of exchange is presented for acceptance or payment, which is refused, it is sufficient if the officer who presents it makes a note at the time of the facts which occurred on presenting the bill. The formal protest may be drawn up afterwards, at the convenience of the notary. *Bailey v. Dozier*, 23.
3. Under the laws of Mississippi, a protest is not essential to enable the indorsee of an inland bill of exchange to recover the amount of it. The statute of Mississippi is similar to the English statutes of 9th and 10th of William III., and 3d and 4th of Anne, and must receive the same construction with them. *Ib.*
4. Before those statutes, the indorsee of an inland bill had a right to recover the amount of it from the drawer. This right was not taken away by them; but they gave an additional right to interest and damages. The common law right remains. *Ib.*
5. Although the declaration began with an averment that the drawer and indorser were citizens of the same state (which, of course, would oust the jurisdiction of the Circuit Court), yet, as it afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction. *Ib.*
6. Where the holder of a protested note and the party entitled to notice reside in the same city or town, notice should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business. *Bowling v. Harrison*, 248.
7. The term "holder" includes the bank at which the note is payable, and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest. *Ib.*
8. A memorandum upon the note, that the "third indorser, J. P. Harrison, lives at Vicksburg," was not sufficient to go to the jury as evidence of an agreement upon his part to receive notice through the post-office. *Ib.*
9. Where a promissory note, payable to a firm, was signed by one of the partners in the firm together with two other persons, and suit was brought upon it against these two other persons in the name of the

BILLS AND NOTES—(Continued.)

- payee partner, upon the ground, that the note was intended for his individual benefit, and that the insertion of the name of the firm as payees was an error, it was clearly his duty to prove such error upon the trial. *McMicken v. Webb*, 292.
10. If these two other persons were merely sureties (a fact for the jury), proof of such error would not make them liable beyond the terms of their contract, unless they were privy to and agreed to the same. Neither a court of law nor equity will lend its aid to affect sureties beyond the plain and necessary import of their undertaking. This is the doctrine of this court, of the state courts, and of England. *Ib.*
 11. The payee partner having brought into the evidence the terms upon which the partnership was dissolved, by which it appeared to be his duty to collect the assets, pay the debts, and settle the concerns of the partnership, it was competent for the jury to judge whether the note was given provisionally and designed to abide the settlement of the affairs of the firm, and if so, then it became necessary for the payee partner to prove the fulfilment of these duties before any right of action upon the note accrued to him. *Ib.*
 12. The note being drawn by one of the partners payable to his own firm, this drawer partner was entitled to one half of it, and the obligation of the sureties was diminished *pro tanto*. *Ib.*

CARRIERS.

1. A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound. *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 344.
2. Admiralty has jurisdiction *in personam* as well as *in rem*, over controversies arising out of contracts of affreightment between New York and Providence. *Ib.*
3. The rights of the shipper of the specie may be controlled by a valid contract between the express carrier and steamboat company. *Ib.*

CERTIFICATE OF DIVISION.

1. Where it is evident, from the record, that the whole case has been sent up to this court, upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction. *Nesmith v. Sheldon*, 41.

CHANCERY.

1. Where a husband and wife, in order to carry out an ante-nuptial agreement, conveyed personal property to a trustee, with directions to hold a part of it for the sole and separate use of the wife, with a power to the wife to alien or devise it, such part goes, if she dies intestate, to her next of kin, free of all claim on the part of the husband. *Marshall v. Beal*, 70.
2. But where a legacy was left to a trustee for the benefit of the wife, and the trustee was directed "to let the wife have some part or parcel of the money, occasionally, as she may stand in need, to be paid out to her at the discretion of the trustee," this fund goes to the husband at the wife's death, by the laws of Maryland. *Ib.*
3. Where a bill in equity sought to enjoin a judgment, and charged that the complainant had a good defence which he did not know of at the time when judgment at law was rendered against him, and charged also that he was entitled to pay the debt in the depreciated notes of a particular bank, of which advantage it was attempted to deprive him by fraud and collusion, and this bill was demurred to, it was error in the court below to sustain the demurrer. *Davis v. Tileston*, 114.
4. Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits. *Mathewson v. Clarke*, 122.
5. Where there was a sale of wild lands in Florida, occupied by Indians, and the purchasers gave a mortgage to secure the payment of some outstanding instalments of the purchase-money, the fact that the purchasers had not complete possession of the lands is not a sufficient objection to their being charged with interest from the time when the money was due. *Curtis v. Innerarity*, 146.

CHANCERY—(Continued.)

6. They had paid a large part of the purchase-money before the execution of the mortgage, without raising this objection, and the parties to the contract of sale knew that the Indians had possession of the lands as hunting-grounds. *Ib.*
7. The purchasers in a former suit averred that they had peaceable possession, and the vendors cannot be held responsible for a subsequent disturbance. *Ib.*
8. The doctrine of the civil law, viz., "that the vendee is not liable for interest where he received no profits from the thing purchased," applies only to executory contracts where the price is contracted to be paid at some future day, and the contract is silent as to interest. *Ib.*
9. Nor is it an objection to the allowance of interest, that the purchaser was put to much trouble and expense to obtain a recognition of his title. *Ib.*
10. The claim to be released from interest, upon the ground that there was no person legally authorized to receive it, is not supported by the facts in this case. *Ib.*
11. Where the vendor gave a power of attorney to an agent to receive a payment from the purchasers on account, and the agent gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved of the acts of the agent, the payment is not good, even on account, against the vendor. *Ib.*
12. The purchasers, by making a payment in this way, upon certain terms which were not within the power of attorney, constituted the agent their agent. For two years afterwards, they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was then too late. *Ib.*
13. Where fraud is alleged in a bill, and relief is prayed against a judgment and a judicial sale of property, a demurrer to the bill, that relief can be had at law, is not sustainable. *Shelton v. Tiffin*, 164.
14. Where a worthless promissory note is imposed upon the vendor as part of the cash payment, it would seem that, if any fraud has been practised upon the vendor by the vendee, the amount of the note still remains an equitable lien upon the land. *Ib.*
15. The Civil Code of Louisiana (article 2412) enacts, that "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." *Bein v. Heath*, 228.
16. Where a wife mortgaged her property to raise money, and the question did not turn upon her doing so as the surety of her husband, it was not necessary for the lender to prove that the proceeds of the loan inured to her separate use. *Ib.*
17. The fact of the application of the money may be proved to show the character of the transaction, with a view of establishing collusion or fraud. *Ib.*
18. The decisions of the state courts of Louisiana upon this subject examined. *Ib.*
19. Where a wife mortgaged her property, and then sought relief in chancery upon the ground that the contract was void in consequence of her disability to contract, and it was shown that the lender acted in good faith; proceeded cautiously under legal advice, under assurances that the loan was for the exclusive use of the wife, to whom the money was actually paid; the interest upon the loan paid for several years; the mortgaged property insured by her, and the policy assigned to the mortgagee;—a bill to relieve her from the contract cannot receive the sanction of a court of equity. *Ib.*
20. But it is no objection to such a bill, as a rule of pleading, that the husband is made a party to it with the wife. He acts only as her *prochein ami*. *Ib.*
21. A decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an

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- account of the profits of the lands and slaves, and also an account of certain money and notes, and then said decree concluding as follows, viz.: "and so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises, and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs,"—was a final decree within the meaning of the acts of Congress, and an appeal from it will lie to this court. *Forgay v. Conrad*, 201.
22. But a decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court, is interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be finally adjudicated. From such a decree no appeal lies. *Ib.*
 23. The attention of the Circuit Courts is called to the propriety of merely announcing their opinion in an interlocutory order, and withholding a decree setting aside titles and conveyances until the case is ready for a final decree. *Ib.*
 24. The difference between the English and American practice upon this subject explained. *Ib.*
 25. Where the defendants claimed separate pieces of property, conveyed at different times by separate conveyances, and the decree against them was several, it was not necessary for all to join in an appeal. *Ib.*
 26. Where a mortgage was given by a postmaster to secure the post-office department, and the Circuit Court was asked to instruct the jury, that, according to the true interpretation of the mortgage, there was contained therein no stipulation or agreement to extend the time, or preclude the government from suing the principal and sureties upon the postmaster's bond, and the court refused, upon the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage; this was error in the court. It is the duty of the court to construe all written instruments given in evidence, as a question of law. *United States v. Hodge*, 279.
 27. Payment under this mortgage could not be enforced until after the lapse of six months from its date. But its acceptance by the government did not release the sureties upon the bond, because, in order to discharge the surety by giving time, the time which is given must operate upon the instrument which the surety has signed. The mortgage here was only a collateral security, which was beneficial to the surety. *Ib.*
 28. Where the holder of a preëmption right to lots in the town of Dubuque sold them to another person, the facts, that the vendor had received certificates of his right, although the land-officers were not satisfied with their sufficiency, and that the vendor acted as the undisputed owner, were sufficient to negative the charge of fraud in his representing his title to be good. *Bush v. Marshall*, 284.
 29. The relinquishment, by the vendor, of his title to the United States, with a view to a public sale and completion of his title, was not fraudulent towards the vendee, if it was the purpose of the vendor to enable himself to convey a perfect title to his vendee. *Ib.*
 30. If, at the public sale, the vendee himself became the purchaser, he became a trustee for his original vendor; and if, at the public sale, the original vendor became the purchaser, the title inured to the benefit of his vendee. *Ib.*
 31. A court of equity can decide the question whether or not a party is the heir of a deceased person. It is not necessary to send the issue of fact to be tried by a court of law. *Patterson v. Gaines*, 550.
 32. Where the complainant in a bill offers to receive an answer without oath, and the defendant accordingly filed the answer without oath, denying the allegations of the bill, the complainant is not put to the necessity, according to the general rule, of contradicting the answer by the evidence of two witnesses or of one witness with corroborating circum-

CHANCERY—(*Continued.*)

stances. The answer, being without oath, is not evidence, and the usual rule does not apply. *Ib.*

33. In this case, however, even if the answer had been under oath and had denied the allegations of the bill, yet there is sufficient matter in the evidence of one witness, sustained by corroborating circumstances, to support the bill. *Ib.*

COMMERCIAL LAW. See BILLS AND NOTES.

1. Under the statutes of Mississippi, a protest of promissory notes, and statement of notices given to the parties, being certified under the notarial seal and verified by the affidavit of the notary, may be read in evidence. It is not necessary to introduce the notary, personally, to testify. *Sims v. Hundley*, 1.
2. Where a bill of exchange is presented for acceptance or payment, which is refused, it is sufficient if the officer who presents it makes a note at the time of the facts which occurred on presenting the bill. The formal protest may be drawn up afterwards, at the convenience of the notary. *Bailey v. Dozier*, 23.
3. Under the laws of Mississippi, a protest is not essential to enable the indorsee of an inland bill of exchange to recover the amount of it. The statute of Mississippi is similar to the English statutes of 9th and 10th of William III., and 3d and 4th of Anne, and must receive the same construction with them. *Ib.*
4. Before those statutes, the indorsee of an inland bill had a right to recover the amount of it from the drawer. This right was not taken away by them; but they gave an additional right to interest and damages. The common law right remains. *Ib.*
5. Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits. *Mathewson v. Clark*, 122.
6. The language of the complainant in his bill, "that he became interested in a ship and cargo at and from Gibraltar," is decisive of the question of time when his interest commenced, and shows that he had no interest until she arrived at Gibraltar. *Ib.*
7. Where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent., and also one-tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo had no right to traffic upon his own account, for his own benefit. *Ib.*
8. If the master and supercargo, after the loss of his first vessel, charters another and uses the capital of his partners in prosecuting his trade, informing his owners thereof and expressing his willingness to continue the business upon the same terms as before, to which they did not object, such continuance of the business must be governed by the same rules which regulated the transactions in the first ship. *Ib.*
9. Where a promissory note was payable to the order of several persons, the name of one of whom was inserted by mistake, or inadvertently left on when the note was indorsed and delivered by the real payees, one of whom was also the maker of the note, the indorsee had a right to recover upon the note, although the names of all the payees were not upon the indorsement, and had a right, also, to prove the facts by evidence. *Pease v. Dwight*, 190.
10. Referring to the case of the Bank of the Metropolis against the New England Bank, reported in 1 Howard, 234, the following instructions to the jury upon the second trial would have carried out the opinion of this court, viz. :—
 - 1st. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills or notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.
 - 2d. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the

CHANCERY—(Continued.)

owner of the paper transmitted, yet the Bank of the Metropolis is not entitled against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

- 3d. But if the jury found, that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were, from time to time, suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis is entitled to retain against the New England Bank for the balance of account due from the Commonwealth Bank. *Bank of Metropolis v. New England Bank*, 212.

CONSTITUTIONAL LAW.

1. The decisions of this court in *Groves v. Slaughter*, 15 Pet., 449, and *Rowan v. Runnels*, 5 How., 134, again affirmed. *Sims v. Hundley*, 1.
2. Under the joint resolutions of Congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The transfer of the navy of Texas related exclusively to the ships of war and their armaments. *Brashear v. Mason*, 92.
3. A mandamus against the Secretary of the Navy will not lie at the instance of an officer, to enforce the payment of his pay. *Ib.*
4. Where a bank was chartered with power to "have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind soever, nature, and quality, and the same to grant, demise, alien, or dispose of for the good of the bank," and also "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," &c., and, in the course of business under this charter, the bank discounted and held promissory notes, and then the legislature of the state passed a law declaring that "it shall not be lawful for any bank in the state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant,"—this statute conflicts with the Constitution of the United States, and is void. *Planters' Bank v. Sharp*, 301.
5. A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound. *New Jersey Steam Navigation Company v. Merchants' Bank*, 344.
6. A bridge, held by an incorporated company, under a charter from a state, may be condemned and taken as part of a public road, under the laws of that state. *West River Bridge Company v. Dix et al*, 507.
7. This charter was a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state. *Ib.*
8. The Constitution of the United States cannot be so construed as to take away this right from the states. *Ib.*
9. Nor does the exercise of the right of eminent domain interfere with the inviolability of contracts. All property is held by tenure from the state, and all contracts are made subject to the right of eminent domain. The contract is, therefore, not violated by the exercise of the right. *Ib.*
10. The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement. *Ib.*
11. Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property. *Ib.*

CUSTOM.

1. A usage, to be binding, should be definite, uniform and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. *Bowling v. Harrison*, 248.

EMINENT DOMAIN.

1. A bridge, held by an incorporated company, under a charter from a state, may be condemned and taken as part of a public road, under the laws of that state. *West River Bridge Co. v. Dix*, 507.
2. This charter was a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state. *Ib.*
3. The Constitution of the United States cannot be so construed as to take away this right from the states. *Ib.*
4. Nor does the exercise of the right of eminent domain interfere with the inviolability of contracts. All property is held by tenure from the state, and all contracts are made subject to the right of eminent domain. The contract is, therefore, not violated by the exercise of the right. *Ib.*
5. The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement. *Ib.*
6. Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property. *Ib.*

EQUITY.

1. Where a bill in equity sought to enjoin a judgment, and charged that the complainant had a good defence which he did not know of at the time when judgment at law was rendered against him, and charged also that he was entitled to pay the debt in the depreciated notes of a particular bank, of which advantage it was attempted to deprive him by fraud and collusion, and this bill was demurred to, it was error in the court below to sustain the demurrer. *Davis v. Tileston*, 114.
2. A court of equity can decide the question whether or not a party is the heir of a deceased person. It is not necessary to send the issue of fact to be tried by a court of law. *Patterson v. Gaines*, 550.
3. Where the complainant in a bill offers to receive an answer without oath, and the defendant accordingly filed the answer without oath, denying the allegations of the bill, the complainant is not put to the necessity, according to the general rule, of contradicting the answer by the evidence of two witnesses or of one witness with corroborating circumstances. The answer, being without oath, is not evidence, and the usual rule does not apply. *Ib.*
4. In this case, however, even if the answer had been under oath and had denied the allegations of the bill, yet there is sufficient matter in the evidence of one witness, sustained by corroborating circumstances, to support the bill. *Ib.*

ERROR, (WRIT OF).

1. The continuance of a cause, or the refusal to continue it, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. This, also, has been long settled. *Sims v. Hundley*, 1.
2. Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial. *Bank of United States v. Moss*, 31.
3. Judgment having been rendered for the plaintiffs, it was not competent for the court below to strike out the judgment at the next term, on the ground of supposed want of jurisdiction. *Ib.*
4. The power of a court over its records and judgments examined and stated. *Ib.*
5. Where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record. *United States v. Hodge*, 279.

ERROR, (WRIT OF)—(*Continued.*)

6. Where the plaintiff excepted to the opinion of the court, which opinion was more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although there may have been error in the instructions, provided that error consisted in giving the plaintiff too much. *McMicken v. Webb*, 292.

EVIDENCE.

1. Under a plea of *non assumpsit*, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court. *Sims v. Hundley*, 1.
2. For the rules of evidence respecting marriage, see MARRIAGE.

EXECUTORS AND ADMINISTRATORS.

1. The rule respecting abatement is this. If the person charged has received no benefit to himself at the expense of the sufferer, the cause of action does not survive. But where, by means of the offence, property is acquired which benefits the testator, there an action for the property survives against the executor. *United States v. Daniel*, 11.
2. As to the form of action, none will lie at common law, against an executor, where the general issue plea is "not guilty." *Ib.*
3. An action of debt will not lie against an administrator, in one of these United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. *Stacy v. Thrasher*, 44.
4. The doctrine of privity examined. *Ib.*

HUSBAND AND WIFE.

1. By the laws of Louisiana and Pennsylvania, a marriage between a woman and a man who had then another wife living was void, and the woman could marry again without waiting for a judicial sentence to be pronounced declaring the marriage to be void. *Patterson v. Gaines*, 550.
2. If she does so marry again, and the validity of her second marriage be contested, upon the ground that she was unable to contract it because the first marriage was legal, it is not necessary for her to produce the record of the conviction of her first husband for bigamy. The burden of proof lies upon those who make these objections to the second marriage, and the declarations of the bigamist, that he had a first wife living when he married the second, are evidence. *Ib.*

JURISDICTION.

1. Under a plea of *non assumpsit*, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court. *Sims v. Hundley*, 1.
2. If a plea to the jurisdiction and a plea of *non assumpsit* be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived. *Bailey v. Dozier*, 23.
3. Although the declaration began with an averment that the drawer and indorser were citizens of the same state (which, of course, would oust the jurisdiction of the Circuit Court), yet as it afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction. *Ib.*
4. Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial. *Bank of United States v. Moss*, 31.
5. Judgment having been rendered for the plaintiffs, it was not competent for the court below to strike out the judgment at the next term, on the ground of supposed want of jurisdiction. *Ib.*
6. The power of a court over its records and judgments examined and stated. *Ib.*
7. Where it is evident, from the record, that the whole case has been sent up to this court, upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction. *Nesmith v. Sheldon*, 41.
8. An action of debt will not lie against an administrator, in one of these

JURISDICTION—(Continued.)

- United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. *Stacy v. Thrasher*, 44.
9. The doctrine of privity examined. *Ib.*
 10. The act of Congress, passed on the 27th of February, 1801 (2 Stat. at L., 103), authorizes a writ of error from this court to the Circuit Court for the District of Columbia in those cases only where there has been a final judgment, order, or decree in that court. *Van Ness v. Van Ness*, 62.
 11. Where the Orphans' Court directed an issue to be sent for trial in the Circuit Court, which issue was, "whether the petitioner was the widow of the deceased or not," and the Circuit Court proceeded to try the issue, and the jury, under the instructions of the court, found that the petitioner was not the widow, exceptions to these instructions cannot be reviewed by this court on a writ of error. *Ib.*
 12. The certificate of the finding of the jury, transmitted by the Circuit Court to the Orphans' Court, was not such a final judgment, order, or decree as is included within the statute. After the reception of the certificate, the Orphans' Court had still to pass a decree in order to settle the rights of the parties. *Ib.*
 13. An order of the District Court, sustaining a demurrer to a petition because it was multifarious, and because the names of the persons claiming or in possession of the land which the petitioners alleged to belong to them were not set forth, was not a final judgment or decree from which an appeal lies to this court. *Heirs of De Armas v. United States*, 103.
 14. Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state unless the contrary appear. And this principle is strengthened when the individual lives on a plantation and cultivates it with a large force, claiming and improving the property as his own. *Shelton v. Tiffin*, 164.
 15. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive upon the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. *Ib.*
 16. The facts, that the party and his wife were residents of Louisiana for more than two years before the commencement of the suit; that he was absent only once, on a visit to a watering-place; that he resided the greater part of the time on a plantation which he claimed as his own; that he constructed upon it a more secure and comfortable dwelling-house; that he observed to a witness that he considered himself a resident,—are sufficient to justify the Circuit Court of Louisiana in exercising jurisdiction in a suit brought against that party by a citizen of Missouri. *Ib.*
 17. A judgment of a state court, that the debt had been extinguished, given in an action which was not brought for the recovery of the debt, and which action, moreover, had been discontinued by the plaintiff, cannot be set up in bar of proceedings in the Circuit Court for the recovery of the debt, which proceedings had been commenced when the judgment of the state court was given. *Ib.*
 18. What are final decrees from which an appeal will lie, and what are not. *Forgay v. Conrad*, 201.
 19. Where the Circuit Court decreed that the complainants were entitled to two sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to this court. *Perkins v. Fourniquet*, 206.
 20. A decree of the Circuit Court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously

JURISDICTION—(Continued.)

made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree,—is not such a final decree as can be appealed from to this court. *Pulliam v. Christian*, 209.

JURY.

1. It was error to leave the construction of a mortgage to the jury. It is the duty of the court to construe all written instruments given in evidence, as a question of law. *United States v. Hodge*, 279.
2. The question whether or not a signer of a promissory note was a surety is a fact for the jury. *McMicken v. Webb*, 292.
3. Also, whether it was given provisionally to abide the settlement of a partnership. *Ib.*

LANDS, PUBLIC.

1. Where the holder of a preëmption right to lots in the town of Dubuque sold them to another person, the facts, that the vendor had received certificates of his right, although the land-officers were not satisfied with their sufficiency, and that the vendor acted as the undisputed owner, were sufficient to negative the charge of fraud in his representing his title to be good. *Bush v. Marshall*, 284.
2. The relinquishment, by the vendor, of his title to the United States, with a view to a public sale and completion of his title, was not fraudulent towards the vendee, if it was the purpose of the vendor to enable himself to convey a perfect title to his vendee. *Ib.*
3. If, at the public sale, the vendee himself became the purchaser, he became a trustee for his original vendor; and if, at the public sale, the original vendor became the purchaser, the title inured to the benefit of his vendee. *Ib.*

LEGACY.

See CHANCERY.

LOUISIANA.

See MARSHALS, CHANCERY, MARRIAGE.

1. Although by the code of Louisiana a person holding property by sale from a donee of an excessive donation is liable to the forced heir only after an execution first had against the property of the donee, yet this rule does not apply to cases where the sale was made without any authority, judicial or otherwise. *Patterson v. Gaines*, 550.
2. Where sales are made without this authority, the purchaser is presumed to have notice of it. It is his duty to inquire whether or not the requisitions of law were complied with. *Ib.*
3. The statute of limitations which was in force when the suit was brought is that which determines the right of a party to sue. *Ib.*
4. By the Louisiana code of 1808, a deceased person could not, in 1811, dispose of more than one fifth of his property, when he had a child. The child is the forced heir for the remaining four fifths. *Ib.*

MANDAMUS.

1. A mandamus against the Secretary of the Navy will not lie at the instance of an officer to enforce the payment of his pay. *Brashear v. Mason*, 93.

MARRIAGE.

1. Where a marriage took place in Pennsylvania, it must be proved by the laws of Pennsylvania. In that state it is a civil contract, to be completed by any words in the present tense, without regard to form, and every intendment is made in favor of legitimacy. *Patterson v. Gaines*, 550.
2. A marriage may be proved by any one who was present and can identify the parties. If the ceremony be performed by a person habited as a priest, and *per verba de presenti*, the person performing the ceremony must be presumed to have been a clergyman. *Ib.*
3. If the fact of marriage be proved, nothing can impugn the legitimacy of the issue, short of the proof of facts showing it to be impossible that the husband could be the father. *Ib.*
4. By the laws of Louisiana and Pennsylvania, a marriage between a woman and a man who had then another wife living was void, and the woman could marry again without waiting for a judicial sentence to be pronounced declaring the marriage to be void. *Ib.*

MARRIAGE—(Continued.)

5. If she does so marry again, and the validity of her second marriage be contested, upon the ground that she was unable to contract it because the first marriage was legal, it is not necessary for her to produce the record of the conviction of her first husband for bigamy. The burden of proof lies upon those who make these objections to the second marriage, and the declarations of the bigamist, that he had a first wife living when he married the second, are evidence. *Ib.*
6. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is that a child born after the marriage is legitimate, and it will be incumbent on him who denies it to disprove it, although in so doing he may have to prove a negative. *Ib.*
7. Although the general rule is that a person cannot be affected, much less convicted, by any evidence, decree, or judgment to which he was not actually or in consideration of law privy, yet it has been so far departed from as that wherever reputation would be admissible evidence, there a verdict between strangers in a former action is evidence also. *Ib.*

MARSHALS.

1. The decision of this court in the case of *Gwin v. Breedlove*, 2 How., 29, reviewed and confirmed, viz.:
That under a statute of Mississippi, relating to sheriffs, a summary process against a marshal might be resorted to, in order to enforce the payment of a debt, interest, and costs, for which he was liable by reason of his default; that the courts of the United States could not enforce the payment of a penalty imposed by the state laws in addition to the money due on the execution; that a marshal and his sureties could not be proceeded against, jointly, in this summary way, but they must be sued as directed by the act of Congress. *Gwin v. Barton*, 7.
2. Any excess of interest awarded over and above the legal rate is a penalty, and comes within the above rule. *Ib.*
3. An action on the case will not lie against the executors of a deceased marshal, where executions had been placed in the hands of the marshal, and false returns made on some of them, and imperfect and insufficient entries on others. *United States v. Daniel*, 11.
4. By the laws of Louisiana, debts which are due to a defendant, against whom an execution has issued, may be seized and sold. But they must first be appraised at their cash value, and if two thirds of such appraised value is not bid, the sheriff must adjourn the sale and again advertise the property. *Collier v. Stanbrough*, 14.
5. This mode of proceeding was adopted by a rule of the Circuit Court of the United States, and was therefore obligatory upon the marshal. *Ib.*
6. Where the marshal made a sale of some promissory notes secured by mortgage, without an appraisal, and sold them for less than one third of their amount, the sale was void. *Ib.*

MARYLAND.

See CHANCERY.

MISSISSIPPI.

See CONSTITUTIONAL LAW; COMMERCIAL LAW.

PATENT.

1. When a case is sent to this court under the discretion conferred upon the court below by the seventeenth section of the act of July 4, 1836 (Patent Law), 5 Statutes at Large, 124, the whole case comes up, and not a few points only. *Hogg v. Emerson*, 437.
2. The specification constitutes a part of a patent, and they must be construed together. *Ib.*
3. Emerson's patent for "certain improvements in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land," decided not to cover more ground than one patent ought to cover, and to be sufficiently clear and certain. *Ib.*
4. A patentee, whose patent-right has been violated, may recover damages for such infringement for the time which intervened between the destruction of the patent-office by fire, in 1836, and the restoration of the records under the act of March 3, 1837. *Ib.*

PLEAS AND PLEADING.

1. Under a plea of *non assumpsit*, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court. *Sims v. Hundley*, 1.
2. No action will lie, at common law, against an executor, where the general issue plea is "not guilty." *United States v. Daniel*, 11.
3. If a plea to the jurisdiction and a plea of *non assumpsit* be put in, and the issue be made upon the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived. *Bailey v. Dozier* 23.
4. Although the declaration began with an averment that the drawer and indorser were citizens of the same state (which, of course, would oust the jurisdiction of the Circuit Court), yet as it afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction. *Ib.*
5. Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial. *Bank of United States v. Moss*, 31.
6. Where a wife sought relief by a bill in chancery from a mortgage of her separate property, it was no objection to the bill, as a rule of pleading, that the husband was made a party to it with the wife. He acts only as her *prochein ami*. *Bein v. Heath*, 228.
7. The statutes of Iowa provide a mode for taking bills of exceptions, by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception, *nunc pro tunc*, after the trial. *Sheppard v. Wilson*, 260.
8. Such is also the English practice under the Statute of Westminster 2, and such is the practice recognized by this court. *Ib.*
9. Therefore, where a bill of exceptions was signed two years after the trial, the Supreme Court of Iowa were right in striking it out of the record. *Ib.*
10. Where, after verdict, a motion was made for a new trial, which was held under a continuance, and an entry was afterwards made that the motion was overruled, and judgment entered on the verdict, but, at the time of such entry and judgment, the court was not legally in session, it was no error in the court, at a subsequent and regular term, to treat the entry thus irregularly made as a nullity, to decide the motion, and enter up judgment according to the verdict. *Ib.*
11. The difference between this case and that of the *Bank of the United States v. Moss* (6 Howard, 31) pointed out. *Ib.*
12. A continuance, relating back, may be entered at any time to effect the purposes of justice. *Ib.*
13. Where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record. *United States v. Hodge*, 279.
14. A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits the right should be waived upon the record, before the motion for a new trial is heard. *Ib.*
15. The practice in Louisiana allows the sureties to be sued without joining the principal. *Ib.*
16. Where the plaintiff excepted to the opinion of the court, which opinion was more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although there may have been error in the instructions, provided that error consisted in giving the plaintiff too much. *McMicken v. Webb*, 292.

PRACTICE.

See MARSHALS; PLEAS AND PLEADING.

1. The continuance of a cause, or the refusal to continue it, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. *Sims v. Hundley*, 1.

PRACTICE—(*Continued.*)

2. No action will lie, at common law, against an executor, where the general issue plea is "not guilty." *United States v. Daniel*, 11.
3. By the act of May 23d, 1828 (4 Statutes at Large, 284), relating to private land claims in Florida, appeals from the Superior Court of the Territory of Florida are governed by the laws of 1789 and 1803. *Villabolos v. United States*, 81.
4. Therefore, where an appeal was not made in open court, and at the term at which the final decree was passed, a citation was necessary, which must be signed by a judge, and not by the clerk. See *United States v. Hodge*, 3 How., 534. *Ib.*
5. The act of 1828, above mentioned, allowed appeals to be prosecuted within four months, and placed them, in other respects, upon the same footing with writs of error under the act of 1803. Writs of error and citations are returnable to the term of the appellate court next following; and unless the writ and citation are both served before the term, the case is not removed to the appellate court. *Ib.*
6. Consequently, where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion. *Ib.*
7. The 9th section of the act of 26th May, 1824, relative to the action of the Attorney-General in cases of appeal, is only directory, and its non-observance does not vitiate an appeal, provided it be taken by the district attorney and sanctioned in this court by the Attorney General. *United States v. Curry*, 106.
8. An attorney or solicitor cannot withdraw his name, after it has been entered upon the record, without the leave of the court, and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself. *Ib.*
9. The opinion of the court in the case of *Villabolos v. The United States*, (*ante*, p. 81) again asserted; viz: that the appellant must prosecute his appeal to the next succeeding term of this court, and whenever the appeal is taken by entering it in the clerk's office, the adverse party must be cited to appear at that time. *Ib.*
10. Therefore, where an appeal was filed in the clerk's office in November, 1846, and there was no citation to the adverse party to appear on the 7th of December, 1846 (the commencement of the succeeding term of this court), the case was not removed upon that appeal. *Ib.*
11. A party may take a second appeal where the first has not been legally prosecuted. But in the present case, the order of the court cannot be construed as a grant of a second appeal. *Ib.*
12. The appeal must therefore be dismissed, on motion. *Ib.*
13. The attention of the Circuit Courts called to the propriety of merely announcing their opinion in an interlocutory order, and withholding a decree setting aside titles and conveyances until the case is ready for a final decree. *Forgay v. Conrad*, 201.
14. The difference between English and American practice upon this subject explained. *Ib.*
15. Where the defendants claimed separate pieces of property, conveyed at different times by separate conveyances, and the decree against them was several, it was not necessary for all to join in an appeal. *Ib.*
16. Where the Circuit Court decreed that the complainants were entitled to two sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to this court. *Perkins v. Fourniquet*, 206.
17. A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits the right should be waived upon the record, before the motion for a new trial is heard. *United States v. Hodge*, 279.
18. The practice in Louisiana allows the sureties to be sued without joining the principal. *Ib.*
19. Where the plaintiff excepted to the opinion of the court, which opinion was more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although

there may have been error in the instructions, provided that error consisted in giving the plaintiff too much. *McMicken v. Webb*, 292.

20. Under the peculiar circumstances of this case, the counsel for the appellees was permitted to strike out his appearance, but such withdrawal must not authorize a motion to dismiss for want of a citation. *United States v. Yates*, 606.
21. The appearance of counsel does not preclude a motion to dismiss for the want of jurisdiction, or any other sufficient ground, except the want of a citation. It is the practice of the court to receive such motions after an appearance has been entered. *Ib.*
22. Under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. If the appeal has been regularly prosecuted, he is as much entitled to judgment in the one case as in the other. *Ib.*

SURVIVAL OF CAUSE OF ACTION.

See ABATEMENT, 2.

TEXAS.

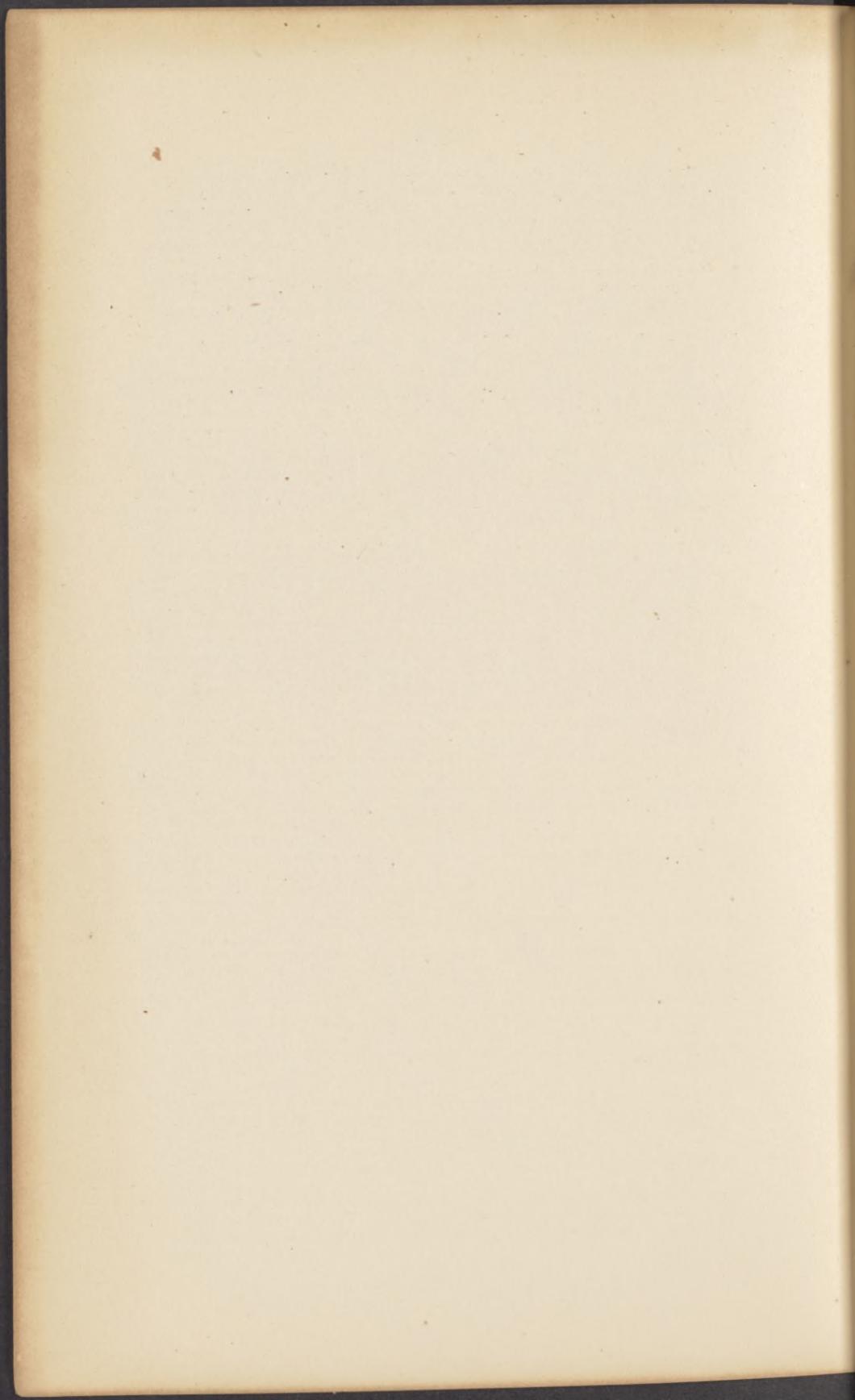
1. Under the joint resolutions of Congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The transfer of the navy of Texas related exclusively to the ships of war and their armaments. *Brashear v. Mason*, 93.

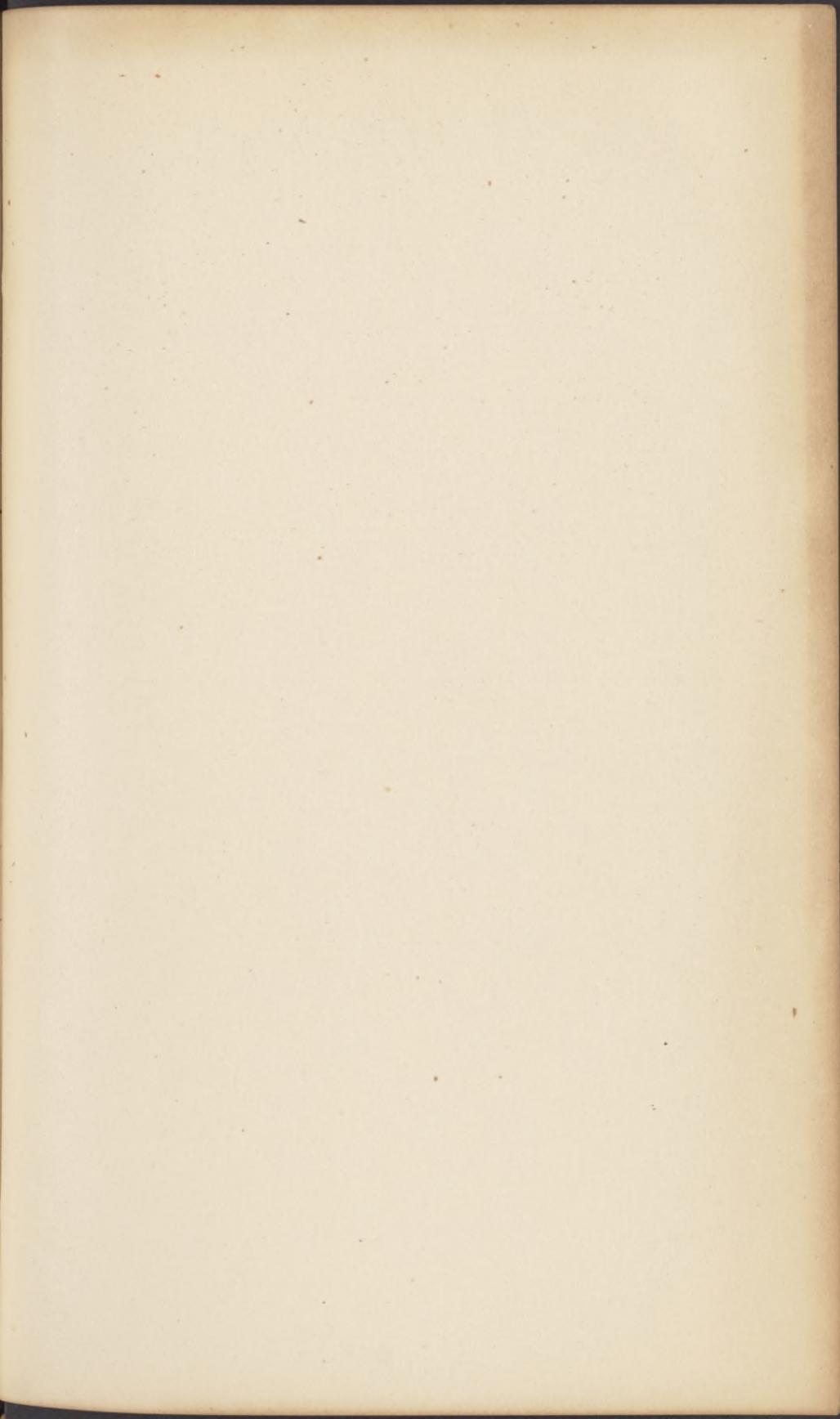
TRIAL.

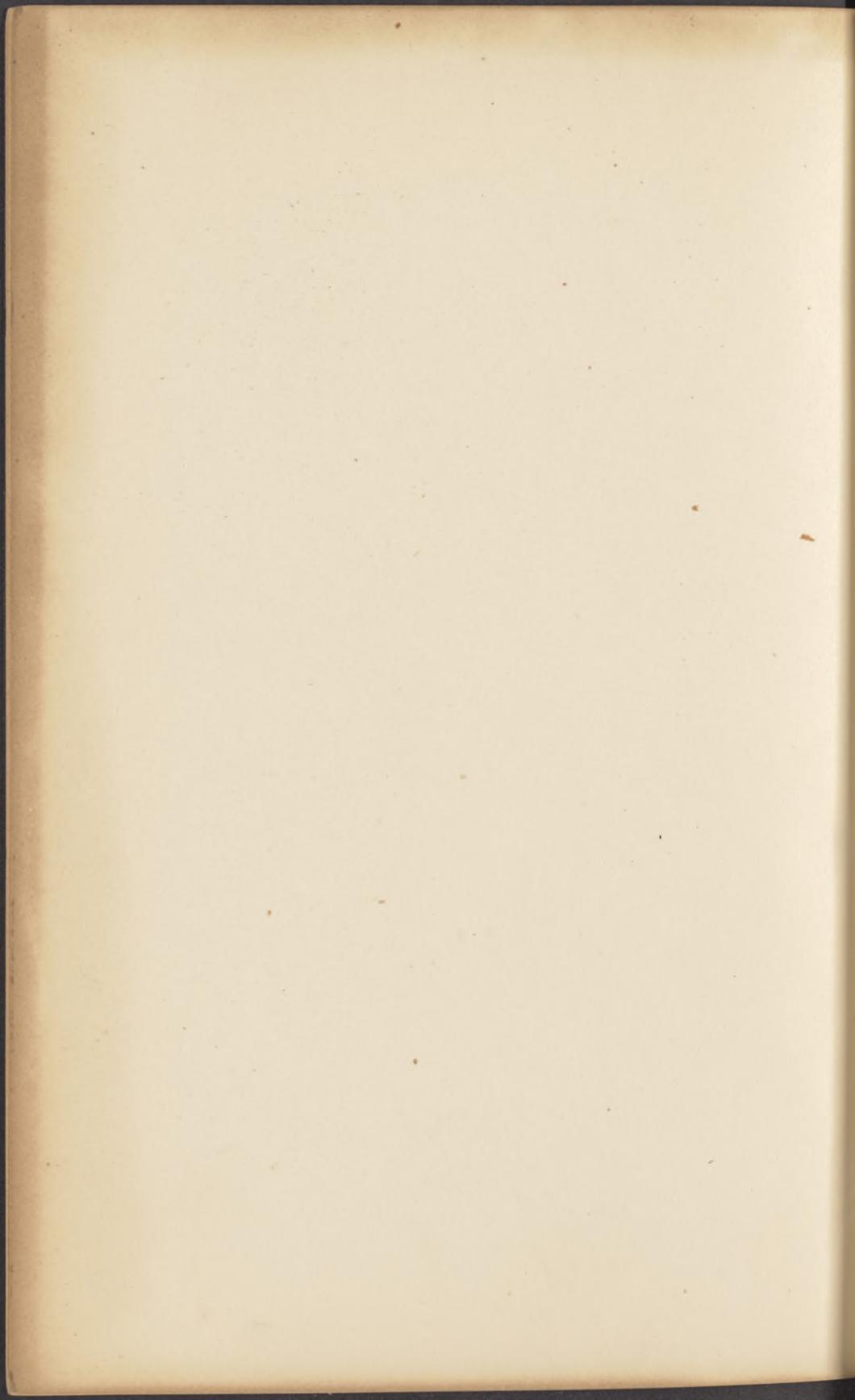
1. Where a mortgage was given by a postmaster to secure the post-office department, and the Circuit Court was asked to instruct the jury, that, according to the true interpretation of the mortgage, there was contained therein no stipulation or agreement to extend the time, or preclude the government from suing the principal and sureties upon the postmaster's bond, and the court refused, upon the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage; this was error in the court. It is the duty of the court to construe all written instruments given in evidence, as a question of law. *United States v. Hodge*, 279.

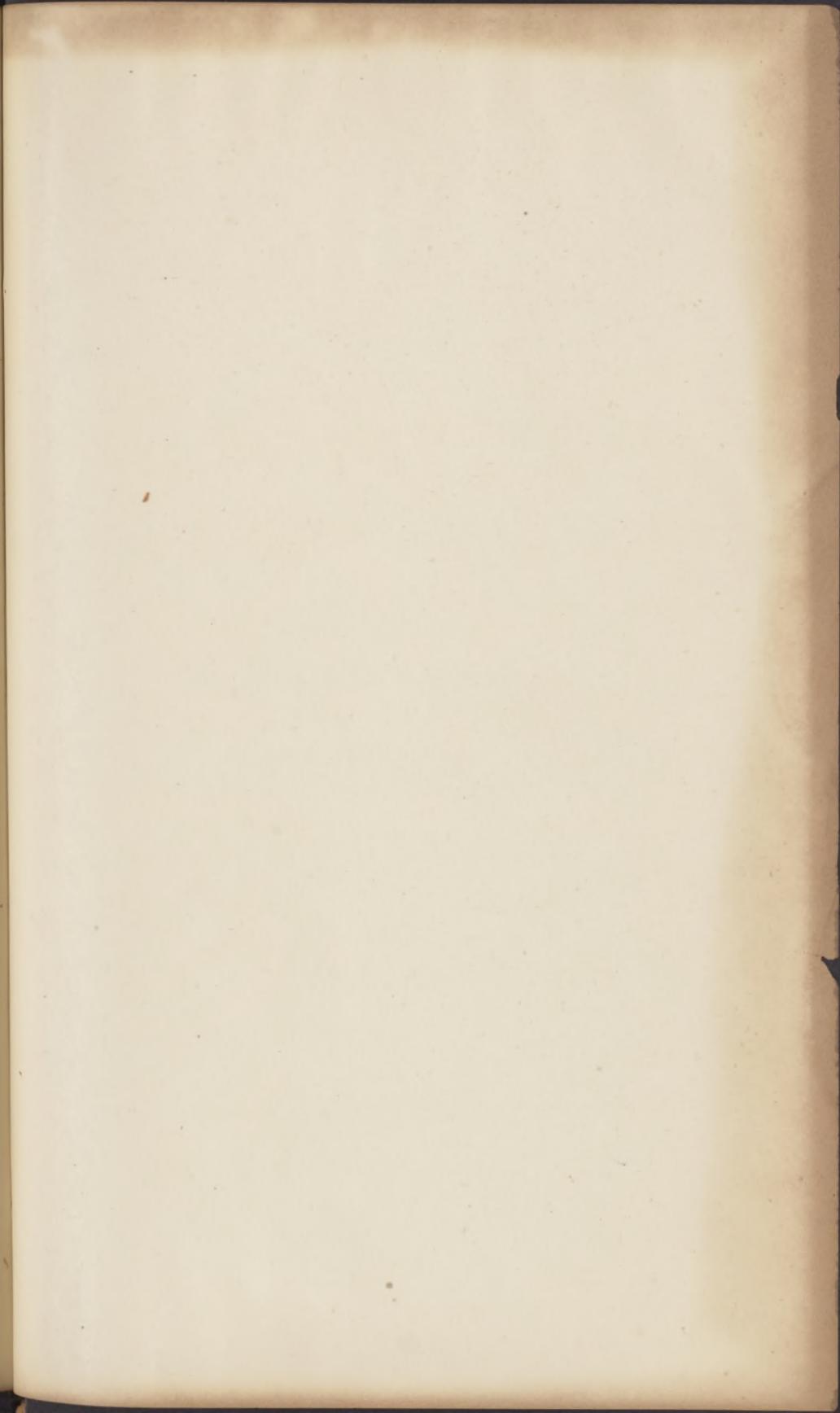
WRIT OF ERROR.

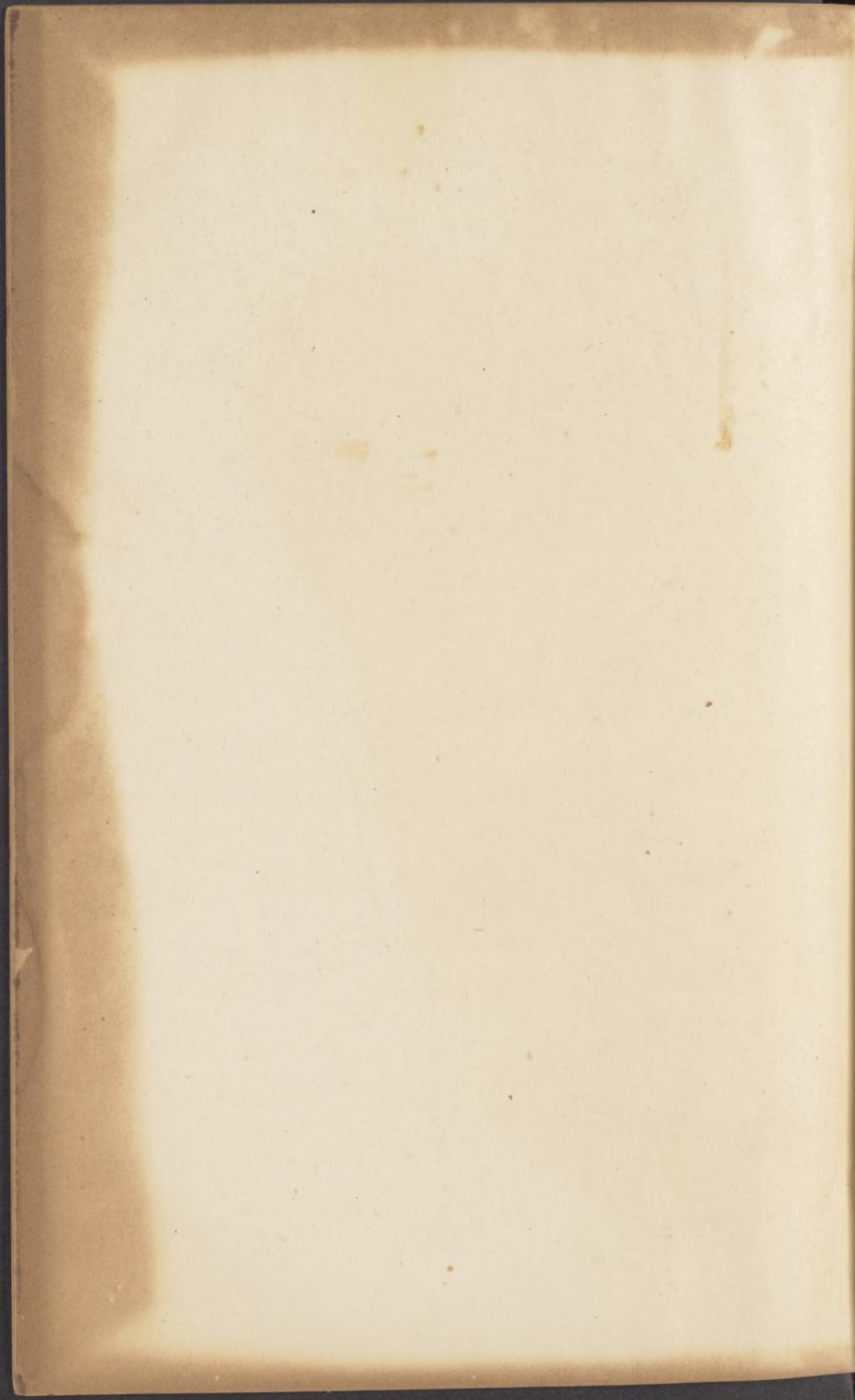
See ERROR.

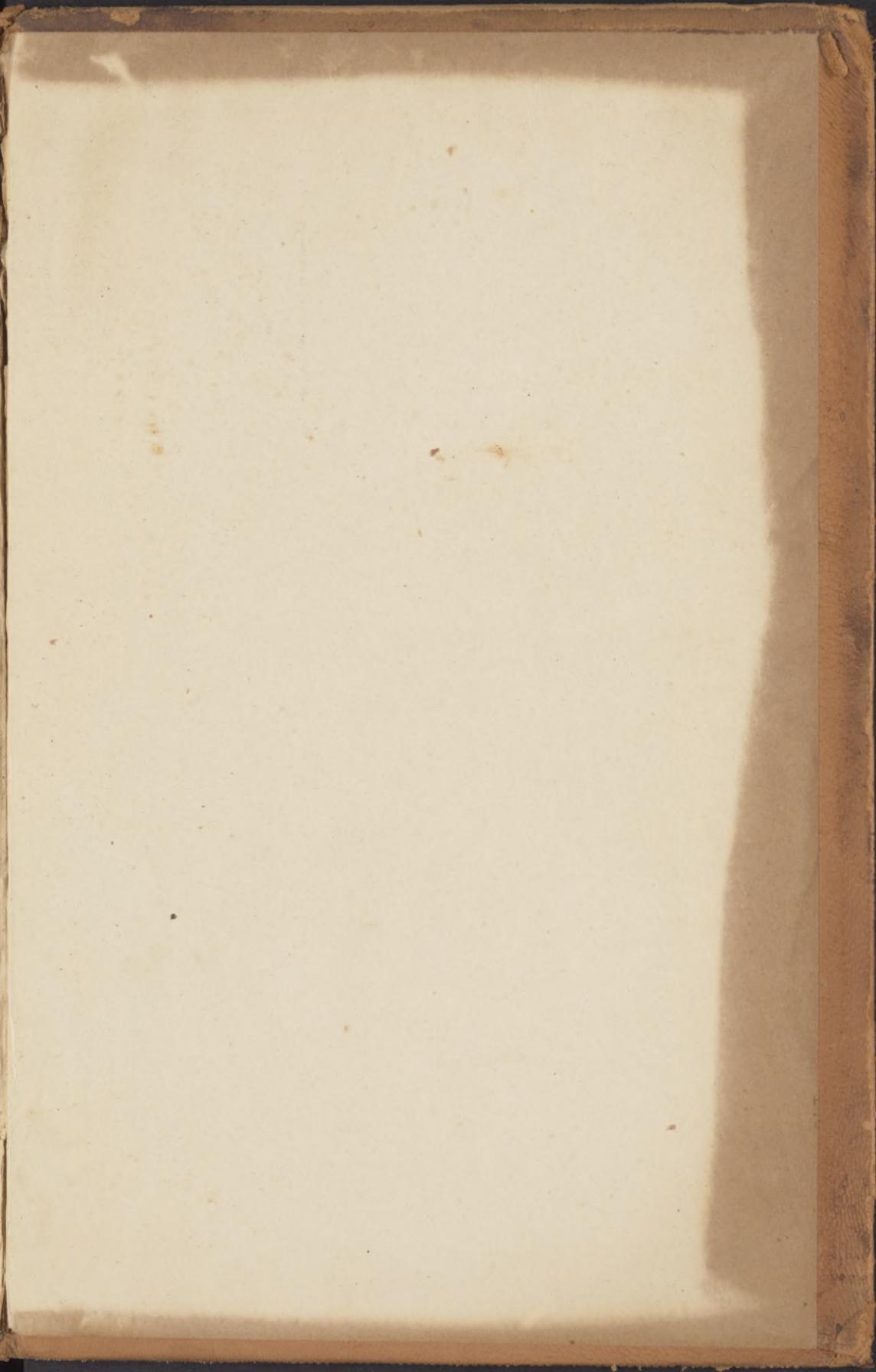












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