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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

DECEMBER TERM, 1851.

By BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. XII.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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PROCEEDINGS

IN RELATION TO THE

DEATH OF JUDGE WOODBURY.

At the opening of the Court, the Honorable J. J. Crittenden, Attorney-General of the United States, rose and remarked substantially as follows:—

As an officer of this Court, and at the request of its bar, it becomes my duty to submit a brief and imperfect expression of our common regret for the loss of the distinguished member of this Court, whose death this nation has recently been called upon to deplore.

Judge Woodbury was a man who for a long series of years occupied a most conspicuous position. The continued confidence reposed in him by his country, and the numerous honors which he shared, all testify to his greatness, and will be his noblest monument.

It has rarely happened that any citizen has enjoyed such a succession of exalted public honors as were shared by Judge Woodbury. Governor, Secretary of the Treasury, Senator, and, his last and greatest distinction, Judge of the Supreme Court of the United States, whose jurisdiction is more extended than any other upon the continent, and whose mandate is obeyed from Boston to San Francisco—all these honors, one after the other, were worn by him, but neither they nor any other human distinction could save him to us any longer. He has fallen in the midst of his earthly honors; he has fallen as all of us must fall, and left with us only his fame, which is immortal.

Judge Woodbury was a man who wore his honors, great as they were, meekly; and it was his distinguishing merit, that he thought much less of them than of the duties they entailed.

The bar of this Court deeply deplore the loss which they have sustained; and, not doubting the fervent sympathy of this Court

with them, I feel that my duty will be discharged by offering the resolutions which embody the sentiments of this bar, and by requesting, at their instance, that they may be placed on the records of this Court, where they will remain as imperishable as his fame.

The resolutions are as follows:—

At a meeting of the members of the bar and officers of the Court, held in the Supreme Court Room, on Monday, the 1st of December, 1851, Jonathan Meredith, Esquire, of Maryland, was called to the chair, and Alexander H. Lawrence, Esquire, of Washington, appointed Secretary.

On motion of Richard S. Coxe, Esquire, it was resolved that a committee of three gentlemen be appointed by the chair to prepare and report to this meeting appropriate resolutions on the occasion of the lamented death of the late Honorable Levi Woodbury, one of the Associate Justices of the Supreme Court of the United States.

Whereupon the chair appointed the Honorable Reverdy Johnson, of Maryland, Richard S. Coxe, Esquire, of Washington, and R. H. Gillet, Esquire, of New York, to constitute said committee.

Mr. Johnson, on behalf of the committee, reported the following resolutions, which were unanimously adopted:—

Resolved, That the Supreme Court, the Bar, and the nation, have sustained, in the death of the Honorable Levi Woodbury, a loss of extensive learning, indefatigable industry, unsuspected integrity, and high abilities. After filling, with great reputation, some of the most important offices under the National and State Governments, his elevation to the Bench was received with general satisfaction, and his premature and unexpected death with universal regret.

Resolved, That this meeting lament the death of Judge Woodbury, in the prime of life and usefulness, and that we will wear the usual badge of mourning during the residue of the term.

Resolved, That the Chairman and Secretary transmit a copy of these resolutions to the family of the deceased, and assure them of our sincere condolence on account of the bereavement they have experienced.

Resolved, That the Attorney-General be requested to move the court that these resolutions be entered on the minutes of their proceedings.

JONATHAN MEREDITH, *Chairman.*

A. H. LAWRENCE, *Secretary.*

Whereupon Mr. Chief Justice Taney replied:—

The Court is very sensible of the loss it has sustained in the death of Judge Woodbury.

He had been a member of the Court but a few years; yet he was long enough on the bench to leave behind him, in the reports of the decisions of the Court, the proofs of his great learning and industry, and of his eminent qualifications for the high office he filled.

His life had been passed mainly in the public service before he became a member of this Court. And in the various and important offices, judicial and political, to which he had been appointed, he was always found equal to the duties imposed upon him, and never failed to distinguish himself by the extent and accuracy of his information, upon every subject connected with his official duties, or upon which he was at any time called upon to act. The same learning and the same untiring industry marked his brief course on this bench. We all feel that we have lost in him an able, upright, and learned associate, and most truly and sincerely deplore his death; and we cordially unite with the bar in the resolutions they have presented, and shall order them to be entered on the records of the Court.

Ordered, that the proceedings of the City Council of the City of Portsmouth, upon the death of the late Mr. Justice Woodbury, be entered on the minutes of the Court, which are as follows:

City of Portsmouth, September 5th, 1851.

At a meeting of the City Council, held this day, the following preamble and resolutions were adopted:—

Whereas, by the decree of Divine Providence, our eminently distinguished and highly esteemed fellow-citizen, the Honorable Levi Woodbury, Associate Justice of the Supreme Court of the United States, has been suddenly summoned from our midst, in the full vigor of his manhood and of his usefulness,

Therefore, *Resolved*, by the City Council of the City of Portsmouth, that we deeply deplore the loss of the illustrious deceased —a loss to his family, his fellow-citizens, and the nation.

Resolved, That a retrospect of the past causes us more vividly to realize the extent of the calamity that has befallen us by the removal of one whose worth as a statesman, a public officer, a citizen, and a *man*, was acknowledged wherever his fame had extended, or his acquaintance had been enjoyed.

Resolved, That we respectfully tender our heartfelt sympathies to his distressed family in their overwhelming bereavement.

Resolved, That, as a deserved tribute to the merit of the deceased, as well as to testify more publicly our sense of this sad dispensation, the members of the City Council will, at an early day, join with their fellow-citizens in such obsequies as are due to the public services and private worth of the honored dead.

Resolved, That his Honor, the Mayor, be requested to communicate copies of these resolutions to the bereaved family of the deceased, the President of the United States, and the United States Supreme Court.

Extract from the records.

A true copy. Attest. JOHN BENNETT, *City Clerk.*

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. ROBERT C. GRIER, Associate Justice.
HON. BENJAMIN R. CURTIS, Associate Justice.

JOHN J. CRITTENDEN, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

RICHARD WALLACH, Esq., Marshal.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1851.

George T. Davis,	*Massachusetts.*
William H. Macfarland,	*Virginia.*
Miron Leslie,	*Missouri.*
Samuel T. Glover,	*Missouri.*
Ferdinand Moulton,	*District of Columbia.*
Nelson Barrere,	*Ohio.*
Hiram Bell,	*Ohio.*
Miles Taylor,	*Louisiana.*
William A. Sackett,	*New York.*
Charles M. Keller,	*New York.*
Joseph B. Stewart,	*Kentucky.*
H. H. Miller,	*Mississippi.*
William Whaley,	*South Carolina.*
George Harding,	*Pennsylvania.*
Frederic W. Seward,	*New York.*
John D. Freeman,	*Mississippi.*
Charles Sexton,	*Wisconsin.*
Andrew G. Chatfield,	*Wisconsin.*
Algernon S. Sullivan,	*Ohio.*
James W. Bryan,	*North Carolina.*
Samuel Chilton,	*District of Columbia.*
Asahel Peck,	*Vermont.*
J. M. Vancott,	*New York.*
Kiah B. Sewall,	*Alabama.*
Israel Washburn, Jr.,	*Maine.*
Samuel M. Parsons,	*New York.*
A. Judson Crane,	*Virginia.*
Joseph Annin,	*New Jersey.*
Thomas J. McKaig,	*Maryland.*
Stephen D. Dillage,	*New York.*
John W. Maynard,	*Pennsylvania.*
William F. Frick,	*Maryland.*
Charles Ballance,	*Illinois.*

Amory Holbrook,	*Oregon.*
John Sherman,	*Ohio.*
Anson Wolcott,	*New York.*
Edward Shippen.	*Pennsylvania.*
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Antonio Artells,	*New York.*
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James O. Stevenson,	*New York.*
H. Z. Hayner,	*New York.*
John J. Latting,	*New York.*
Edward Wells,	*New York.*
Peleg W. Chandler,	*Massachusetts.*
Richard Stockton Field,	*New Jersey.*
George Ticknor Curtis,	*Massachusetts.*
Augustus P. Hascall,	*New York.*
Marius Schoonmaker,	*New York.*
Rensselaer R. Nelson,	*Minnesota Territory.*
John Romeyn Brodhead,	*New York.*
Daniel E. Sickles,	*New York.*
Wm. Washburton Scrugham,	*New York.*
Albert Angelo Nunes,	*Florida.*
A. M. Mitchell,	*Ohio.*
George L. Becker,	*Minnesota Territory.*
David Reynolds,	*Indiana.*

A TABLE OF THE CASES REPORTED

IN THIS VOLUME.

[The references are to the STAR (*) pages.]

	Page
Achison *v.* Huddleson	293
Almy, Wilbur *v.*	180
Bank of the United States, Lyman et al. *v.*	225
Barnwell et al., Clark et al. *v.*	272
Bein et al. *v.* Heath	168
Bennett et al. *v.* Butterworth	367
Binns et al. *v.* Lawrence	9
Board of Wardens of the Port of Philadelphia, Cooley *v.*	299
Bond *v.* Brown	254
Brown, Bond *v.*	254
Bromley, United States *v.*	88
Butterworth, Bennett et al. *v.*	367
Castant et al., United States *v.*	437
Clark et al. *v.* Barnwell et al.	272
Clark et al., Smith *v.*	21
Cooley *v.* Board of Wardens of the Port of Philadelphia	299
Dinsman *v.* Wilkes	390
Dorsey *v.* Packwood	126
Dundas et al. *v.* Hitchcock	256
Erwin *v.* Parham	197
Farmers' Bank of Virginia *v.* Groves	51
Felton, Teal *v.*	284
Fitzhugh et al. Propeller Genesee Chief *v.*	443
Gaines *v.* Relf et al.	472
Groves, Farmers' Bank of Virginia *v.*	51
Grand Gulf Railroad and Banking Co. *v.* Marshall	165

Page

Harris *v.* Runnels 79
Heath, Bein et al. *v.* 168
Hitchcock, Dundas et al. *v.* 256
Huddleson, Achison *v.* 293

Iowa, State of, Miners' Bank *v.* 1
Ives *v.* Merchants' Bank of Boston 159

Lagow et al., Neilson *v.* 98
Lambert et al., Rich et al. *v.* 347
Lawrence, Binns et al. *v.* 9
Le Blanc et al., The United States *v.* 435
Lessieur et al. *v.* Price 59
Linton et al. *v.* Stanton 423
Lyman et al. *v.* Bank of United States 225

Marshall, Grand Gulf Banking and Railroad Co. *v.* . . . 165
McCoull et al., Snead *v.* 407
Merchants Bank of Boston, Ives *v.* 159
Miners Bank *v.* State of Iowa 1
Montault et al. *v.* United States 47
Moore, United States *v.* 209

Neilson *v.* Lagow 98
New Orleans Canal and Banking Co. *v.* Stafford . . . 343

Oliver et al., Williams, Trustee, *v.* 111
Same Same *v* 125

Packwood, Dorsey *v.* 126
Parham et al., Erwin *v.* 197
Parks *v.* Turner et al. 39
Pintard, Thredgill, Administrator of Goodloe *v.* . . . 24
Porche, United States *v.* 426
Price, Lessieur et al. *v.* 59
Propeller Gennesee Chief *v.* Fitzhugh et al. 443

Reid et al., United States *v.* 361
Relf et al., Gaines *v.* 472
Rich et al. *v.* Lambert et al. 347
Runnels, Harris *v.* 79
Russell *v.* Southard et al. 139

Page

Saltmarsh *v.* Tuthill 387
Sargeant et al. *v.* State Bank of Indiana 371
Simon, United States *v.* 433
Smith *v.* Clark et al. 21
Smyth *v.* Strader, Perrine & Co. 327
Snead *v.* McCoull et al. 407
Southard et al., Russell *v.* 139
Strader, Perrine & Co., Smyth *v.* 327
Stafford et al., Union Bank of La. *v.* 327
Stafford et al., New Orleans Canal and Banking Co. *v.* . 343
Stanton, Linton et al. *v.* 423
State Bank of Indiana, Sargeant et al. *v.* 371

Teal *v.* Felton 284
Thredgill, Administrator of Goodloe *v.* Pintard, . . 24
Turner et al., Parks *v.* 39
Tuthill, Saltmarsh *v.* 387

Union Bank of La. *v.* Stafford et al. 327
United States *v.* Bromley 88
United States *v.* Castant 437
United States *v.* LeBlanc et al. 435
United States, Montault et al. *v.* 47
United States *v.* Moore 209
United States *v.* Porche 426
United States *v.* Reid et al. 361
United States *v.* Simon 433
United States *v.* Wilkinson et al. 246

Wilbur *v.* Almy 180
Wilkes, Dinsman *v.* 390
Wilkinson et al., United States *v.* 246
Williams's Trustee *v.* Oliver et al. 111
Same Same *v.* 125

RULE No. 59.

Ordered, that, when a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff, and the 54th rule, adopted at December Term, 1849, be, and the same is hereby, rescinded.

RULE No. 60.

Ordered, that, whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

[The references are to the STAR (*) pages.]

A.

		Page
Abbotsford, The	8 Otto, 442	254*n*
Acherly *v.* Roe	5 Ves., 565	156
Alford *v.* Baker	53 Ind., 279	225*n*
Allen *v.* King	4 McLean, 128	225*n*
Allen *v.* Lenoir	53 Miss., 321	256*n*
Allen *v.* Newberry	21 How., 246	443*n*
American Fur Co. *v.* United States	2 Pet., 358	79*n*
American Ins. Co. *v.* Johnson	1 Blatchf. & H., 9	466*n*
Ames Packing &c. Co. *v.* Tucker	8 Mo. App., 95	225*n*
Amos *v.* Bennett	125 Mass., 120	225*n*
Ancaster *v.* Mayer	1 Bro. C. C., 164	152
Ancon, The	6 Sawy., 123	443*n*
Anderson *v.* Bewley	11 Heisk. (Tenn.), 29	256*n*
Andrews *v.* United States	2 Story, 203	79*n*
Anonymous	1 Hill (S. C.), 258	555
Anschicks *v.* State	6 Tex. App., 524	361*n*
Anstice *v.* Brown	6 Paige (N. Y.), 448	107
Ant, The	10 Fed. Rep., 297	443*n*
Archibald *v.* Argall	53 Ill., 307	225*n*
Ariadne, The	13 Wall., 479	443*n*
Armstrong *v.* Treas. of Athens Co	16 Pet., 285	109, 167
Athlone Peerage Case	8 Cl. & F., 262	570
Atkins *v.* The Disintegrating Co	18 Wall., 304	443*n*

B.

Babcock *v.* Wyman	19 How., 299	139*n*
Bacon, The	Newb., 274	443*n*
Bagnell *v.* Broderick	13 Pet., 436	75
Baird *v.* Bank of Washington	11 Serg. & R. (Pa.), 411	109
Baldwin *v.* Payne	6 How., 332	167
Baltimore &c. R. R. Co., *Ex parte*	16 Otto, 5	347*n*
Bank of Louisiana *v.* Farrar	1 La. Ann., 49	338
Bank of Mount Pleasant *v.* Sprigg	1 McLean, 178	159*n*
Bank of United States *v.* Beverly	1 How., 134	225*n*
Bank of United States *v.* Daniel	12 Pet., 33	225*n*
Bank of United States *v.* Owens	2 Pet., 527	79*n*
Barker *v.* Connellin	2 Mart. (La.), 177, 180	122*n*
Barney *v.* Keokuk	4 Otto, 324	443*n*
Barry *v.* Gamble	3 How., 51	75
Basset *v.* United States	9 Wall., 38	254*n*
Bateman, Petition of	11 R. I., 585	256*n*

		Page
Bayou *v.* Mollere	2 Mart. (La.), 66, 68	218
Bearse *v.* Ropes	1 Sprague, 331	272*n*
Belfast, The	7 Wall., 639	443*n*
Bernstein, *Re*	3 Redf. (N. Y.), 20	180*n*
Blackburn *v.* Stupart	2 East, 243	416
Board of Education *v.* Fonda	77 N. Y., 350	225*n*
Boone *v.* Missouri Iron Co	17 How., 340	126*n*
Booth *v.* Robinson	55 Md., 451	139*n*
Bowes *v.* East London W. W. Co	3 Madd., 384	156
Boyle *v.* McLaughlin	4 Har. & J. (Md.), 291	283
Boyle *v.* Zacharie	6 Pet., 658	148
Boynton *v.* Kellogg	3 Mass., 192	555
Bradstreet *v.* Heron	2 Blatchf., 116	272*n*
Brainerd *v.* Brainerd	15 Conn., 575	147
Brennan *v.* Willson	71 N. Y., 502, 507; 4 Abb. N. C., 279	180*n*
Brick *v.* Brick	8 Otto, 516	139*n*
Brigham *v.* Lally	130 Mass., 485	225*n*
Bronson *v.* Cahill	4 McLean, 19	126*n*
Brown *v.* Dunckel	46 Mich., 29	225*n*
Brown *v.* Dewey	1 Sandf. (N. Y.) Ch., 37	152
Brown *v.* Duncan	10 Barn. & C., 98	84
Brown *v.* Evans	8 Sawy., 504	387*n*
Browning *v.* Porter	2 McCrary, 582; 12 Fed. Rep., 460	168*n*
Brownsword *v.* Edwards	2 Ves. Sr., 246	575
Brugman *v.* McGuire	32 Ark., 733	225*n*
Bullock *v.* Irvine	4 Munf. (Va.), 450	418
Burnett *v.* Lynch	5 Barn. & C., 589	152
Burr *v.* Des Moines Co	1 Wall., 103	254*n*
Burswell, The	13 Fed. Rep., 907	272*n*

C.

Cake *v.* Lebanon Bank	86 Pa. St., 303	225*n*
Caroline, The	9 Ben., 11	272*n*
Carpenter *v.* Wall	11 Ad. & E., 803	555
Carpenter *v.* Providence &c. Ins. Co	16 Pet., 495	157
Casey *v.* State	37 Ark., 67	361*n*
Caune *v.* Sagory	2 Mart. (La.), 81	218
Chapman *v.* Blissett	Cas. *t.* Talb., 145	107
Chatfield *v.* Boyle	15 Otto, 233	347*n*
Cherry *v.* Sweeny	1 Cranch C. C., 530	361*n*
Chicago &c. R. R. Co. *v.* Fuller	17 Wall., 569	299*n*
Citizens' Bank *v.* Board of Liquidation	8 Otto, 141	125*n*
City of Richmond *v.* Smith	15 Wall., 438	254*n*
Claflin *v.* Houseman	3 Otto, 142	292*n*
Clapp *Re*	2 Low, 226	225*n*
Clark *v.* Barnwell	*post* *272	347*n*
Clearwater *v.* Meredith	21 How., 489	327*n*
Clements *v.* Warner	24 How., 394	24*n*
Clymere, The	9 Fed. Rep., 166	299*n*
Cohens *v.* Commonwealth of Virginia	6 Wheat., 264	315
Collins *v.* People	98 Ill., 584	361*n*
Colson *v.* Thompson	2 Wheat., 336	126*n*
Columbo, The	3 Blatchf., 521	272*n*
Commander-in-Chief, The	1 Wall., 51	272*n*, 466*n*
Commerce, The	1 Black, 579	443*n*
Commercial Bank of Cincinnati *v.* Buckingham	5 How., 317	111*n*, 124
Commonwealth *ex rel.* Reed *v.* The Sheriff	13 Phil. (Pa.), 447	299*n*
Congdon *v.* Goodman	2 Black, 574	111*n*
Conway *v.* Alexander	7 Cranch, 218	139*n*, 148, 151

		Page
Conway *v.* Taylor	1 Black, 635	299*n*
Connemara, The	13 Otto, 755; 1 Morr. Tr., 461	347*n*
Cope *v.* Rowland	2 Cromp. M. & R., 157	84
Copelin *v.* Insurance Co	9 Wall., 461	254*n*
County of Mobile *v.* Kimball	12 Otto, 698, 701; 1 Morr. Tr., 465, 468	299*n*
Cox *v.* Raband's Syndics	2 Mart. (La.), 11, 13	218
Coxe *v.* Chamberlain	4 Ves., 637	272
Craig *v.* Leslie	3 Wheat., 50	107
Craig *v.* Missouri	4 Pet., 411	79*n*
Crandall *v.* State of Nevada	6 Wall., 42	299*n*
Crane *v.* Bonnell	1 Gr. (N. J.) Ch., 264	152
Crane *v.* Decker	22 Hun (N. Y.), 452	180*n*
Cresse *v.* Marigny	2 Mart. (La.), 50, 54	220
Crowell *v.* Randall	10 Pet., 392	124
Cunningham *v.* Ashley	14 How., 377	24*n*
Curren *v.* Crawford	4 Serg. & R. (Pa.), 3	572
Currie *v.* Kennedy	78 N. C., 91	225*n*

D.

Daniel Ball, The	10 Wall., 563	443*n*
Davenport *v.* Fletcher	16 How., 144	327*n*
Davidson *v.* Gwynne	12 East, 381	282
Davies *v.* Lloyd	1 Cl. & F., 295	570
Davis *v.* Gaines	14 Otto, 406	472*n*
Davis *v.* McDonald	42 Ga., 205	256*n*
Deakin *v.* Lea	11 Biss., 32, 36, 39, 42	168*n*
Dean *v.* Nelson	10 Wall., 170	126*n*
Deans *v.* McLendon	30 Miss., 343, 360	79*n*
Delaigle *v.* Denham	65 Ga., 491	139*n*
Delaware, The	14 Wall., 597	272*n*
DeLizardi *v.* Hardaway	8 Rob. (La.), 20	178
Deneale *v.* Stump	8 Pet., 526	22
Denniston *v.* Coquillard	5 McLean, 253	126*n*
Dinsman *v.* Wilkes	7 How., 89	390, 401
Dixon *v.* Parker	2 Ves. Sr., 225	147
Doe *v.* Bray	8 Barn. & C., 813	572
Doe *v.* Willan	2 Barn. & A., 84	107
Doe *d.* Ellerbrock *v.* Flynn	1 Cromp. M. & R., 137, 139	575
Doe, lessor of Poor *v.* Considine	6 Wall., 471	98*n*
Doremus *v.* Bennett	4 McLean, 224	327*n*
Douglas *v.* Toucey	2 Wend. (N. Y.), 352	555
Dowell *v.* Applegate	7 Fed. Rep., 883; 7 Sawy., 235.	79*n*
Downer *v.* Fortescue	3 Atk., 130	156
Downey *v.* Hicks	14 How., 240	39*n*, 225*n*
Dred Scott *v.* Sandford	19 How., 501	1*n*
Drummond *v.* Duke of St. Albans	5 Ves., 433	156
Dugan *v.* United States	3 Wheat., 172	107
Duncan *v.* United States	7 Pet., 448	390*n*
Dunlap *v.* Sims	2 La. Ann., 239	339

E.

Eagle, The	8 Wall., 20	443*n*
Easton, *Ex parte*	5 Otto, 72	443*n*
Eden *v.* Earl Bute	1 Bro. P. C., 465	159
Edmonson *v.* Harris	2 Tenn. Ch., 427	256*n*
Edrington *v.* Harper	3 J. J. Marsh. (Ky.), 355.. 148,	152
Elder *v.* Rouse	15 Wend. (N. Y.), 218	152
Elliot *v.* Van Voorst	18 Leg. Int., 396	98*n*
Elmendorf *v.* Taylor	10 Wheat., 152	327*n*
Elmira Shepherd, The	8 Blatchf., 341	443*n*
Emerine *v.* O'Brien	36 Ohio St., 491	225*n*

		Page
Emma Johnson, The	1 Sprague, 527	272*n*
Enterprise, The	1 Paine, 32	79*n*
Erie R'y Co. *v.* Pennsylvania	21 Wall., 498	293*n*
Erwin *v.* Lowry	7 How., 172	111*n*
Excelsior, The	12 Fed. Rep., 200	443*n*

F.

Fairbanks, The	9 Wall., 422	443*n*
Farrar *v.* United States	5 Pet., 385	164
Farwell *v.* Salpaugh	32 Iowa, 582	225*n*
Fauconberge *v.* Fitzgerald	3 Bro. P. C., 546	159
Faurie *v.* Morin	2 Mart. (La.), 39	218, 220
Feamster *v.* Withrow	12 W. Va., 611	225*n*
Ferrett *v.* Atwill	1 Blatchf., 151	79*n*
Finn *v.* Finn	62 How. (N. Y.) Pr., 85	472*n*
Fisher *v.* Fields	10 Johns. (N. Y.), 505	111
Flagg *v.* Mann	2 Sumn., 486	139*n*, 147, 152
Floyer *v.* Lavington	1 P. Wms., 268	152
Foley *v.* Harrison	15 How., 447	59*n*
Foreman *v.* Loyd	2 Leigh (Va.), 284	419
Forsythe *v.* Norcross	5 Watts (Pa.), 432	572
Foster *v.* Jackson	Hob., 52	416
Foxcroft *v.* Mallett	4 How., 379	148
Franconet *v.* The Backus	Newb., 1	443*n*
Franklin G. Fowler, The	8 Fed. Rep., 364	466*n*
Fremont *v.* United States	17 How., 542	59*n*, 124*n*
French *v.* Shoemaker	12 Wall., 100	387*n*
Fretz *v.* Bull	*post* *468	443*n*

G.

Gaines *v.* Hennen	24 How., 628	472*n*
Gaines *v.* New Orleans	6 Wall., 711	472*n*
Gelpcke *v.* Dubuque	1 Wall., 220	79*n*
Gibson *v.* Chouteau	8 Wall., 650	111*n*
Gibson *v.* Chouteau	13 Wall., 101	59*n*
Gibson *v.* McCarthy	Cas. *t.* Hardw., 311	575
Gill *v.* Oliver	11 How., 529	119, 125
Gillet *v.* Pierce	1 Brown Adm., 553, 555	443*n*
Gilman *v.* Philadelphia	3 Wall., 727	299*n*
Glenearne, The	7 Fed. Rep., 607	299*n*
Gold Mining Co. *v.* National Bank	6 Otto, 641	79*n*
Golden Grove, The	13 Fed. Rep., 688	443*n*
Goldhawk *v.* Duane	2 Wash. C. C., 323	159*n*
Goodyear *v.* Bourne	3 Blatchf., 266	407*n*
Goodyear *v.* Providence Rubber Co.	2 Fish Pat. Cas., 499; 2 Cliff., 351	168*n*
Gordon *v.* Caldeleugh	3 Cranch, 268	423*n*
Gorman *v.* Stanton	5 Mo. App., 585	256*n*
Gould *v.* Lamb	11 Metc. (Mass.), 84	111
Grace Girdler, The	7 Wall., 201	443*n*
Grand Gulf R. R. &c. Co. *v.* Marshall	*post* *165	111*n*
Grand Republic, The	10 Fed. Rep., 400	466*n*
Graves *v.* Shulman	59 Ala., 406	225*n*
Green *v.* Biddle	8 Wheat., 78	156
Grignon *v.* Astor	2 How., 319	385
Guion *v.* Doherty	43 Miss., 538	225*n*

H.

Hack *v.* Norris	46 Mich., 594	139*n*
Hale *v.* Gaines	22 How., 159	59*n*
Hall *v.* De Cuir	5 Otto, 488	299*n*
Hall *v.* Russell	11 Otto, 509	59*n*

		Page
Haney *v.* Baltimore Steam Packet Co..	23 How., 295	443*n*
Happy *v.* Mosher	48 N. Y., 313	225*n*
Harkness *v.* Underhill	1 Black, 325	24*n*, 126*n*
Harmar *v.* McLeland	16 La., 28	534
Harriet, The	1 Story, 251	79*n*
Harris *v.* Dennie	3 Pet., 292	124
Hartman *v.* Greenhow	12 Otto, 676; 1 Morr. Tr., 553	59*n*
Hathaway *v.* Barrow	1 Campb., 151	575
Hayden *v.* Davis	3 McLean, 276	79*n*
Hayden *v.* Oriental Mills	15 Fed. Rep., 606	361*n*
Henderson *v.* Mayor &c. of New York.	2 Otto, 272	299*n*
Henderson *v.* State	1 Ala. L. J., 52	361*n*
Hennen *v.* Munro	4 Mart. (La.), N. S., 449	576
Hicks *v.* Cook	4 Dow, P. C., 6	154
Hicks *v.* Hicks	2 Gill & J. (Md.), 85	154
Hill *v.* Sleeper	58 Ind., 221	225*n*
Hillyard *v.* Grantham	*Cited in* 2 Ves. Sr., 246	575
Hine, The *v.* Trevor	4 Wall., 563	443*n*, 466*n*
Hinson *v.* Lott	8 Wall., 152	299*n*
Hodges *v.* State	3 Tex. L. J., 7	361*n*
Hodgson *v.* Temple	5 Taunt., 181	84
Hœflinger *v.* Wells	47 Wis., 628	225*n*
Hogan *v.* Ross	11 How., 297	389
Holdridge *v.* Gillespie	2 Johns. (N. Y.) Ch., 34	154
Holmead *v.* Corcoran	2 Cranch C. C., 119	361*n*
Holmes *v.* Oregon &c. R'y Co	6 Sawy., 266	443*n*
Holt *v.* Rogers	8 Pet., 420	126*n*
Holyday *v.* Batson	4 How., 645	22
Hosea *v.* Miles	13 La., 107	43
Hot Springs Cases	2 Otto, 713	59*n*
Howard, The, *v.* Wissman	18 How., 231	272*n*
Howland *v.* Blake	7 Otto, 627	139*n*
Hubbard *v.* Turner	2 McLean, 519	168*n*
Hudson *v.* Bradley	2 Cliff., 130	225*n*
Huet *v.* Le Messurier	1 Cox, 275	570
Hughes *v.* Edwards	9 Wheat., 489	108
Hughes *v.* United States	4 Wall., 232	24*n*
Hume *v.* Scott	3 A. K. Marsh. (Ky.), 261	555
Hunter *v.* State	8 Tex. App., 75	361*n*
Hurst, *Re*	1 Flipp., 462	225*n*
Huse *v.* Glover	15 Fed. Rep., 295; 11 Biss. 554	299*n*
Hussey *v.* Sibley	66 Me., 192	225*n*
Hussey *v.* Smith	9 Otto, 22	24*n*

I.

Ingraham *v.* Bockins	9 Serg. & R. (Pa.), 285	572
Insurance Co. *v.* Dunham	11 Wall., 26	443*n*
Insurance Co. *v.* Tweed	7 Wall., 44	254*n*

J.

Jackson *v.* Hall	84 N. C., 492	367*n*
Jackson *v.* Heiskill	1 Leigh (Va.), 257	419, 420
Jackson *v.* Steamboat Magnolia	20 How., 305	443*n*
Jamieson *v.* Leitch	Miln. Ecc. Tr. *t.* Radc., 690	575
Jaques *v.* Withy	1 T. R., 557	416
Jecker *v.* Montgomery	18 How., 123	390*n*, 466*n*
Jenkins *v.* Greenwald	2 Fish Pat. Cas., 37	168*n*
Jenny Lind, The	Newb., 443	443*n*
Johnson *v.* Hudson	11 East, 180	84
Johnston *v.* Sutton	1 T. R., 524	402
Jones *v.* White	1 Str., 68	575

K.

		Page
Kane *v.* Bloodgood	7 Johns. (N. Y.) Ch., 111	155
Kendall *v.* Almy	2 Sumn., 278	126*n*
Kendall *v.* Stokes	3 How., 97	291
Kimball *v.* The Anna Kimball	2 Cliff., 4; 3 Wall., 37	225*n*
Kimmel *v.* Kimmel	3 Serg. & R. (Pa.), 337	555
Kirby *v.* Turner	1 Hopk. (N. Y.), 309	191
Klinger *v.* State of Missouri	13 Wall., 263	98*n*, 111*n*
Knownell, *Ex parte*	13 Ves., 193	416

L.

Ladd *v.* Wilson	1 Cranch C. C., 305	361*n*
Lamb *v.* Davenport	18 Wall., 314	24*n*
Lawler *v.* Walker	14 How., 149	111*n*
Lawley *v.* Hooper	3 Atk., 278	152
Lawrence *v.* United States	2 McLean, 581	159*n*
Lea *v.* Deakin	13 Fed. Rep., 515	168*n*
Leader *v.* Barry	1 Esp., 353	570
League *v.* Waring	85 Pa. St., 244	225*n*
Leake *v.* Ferguson	2 Gratt. (Va.), 419	420
Lean *v.* Friedlander	45 Miss., 559	225*n*
Lee *v.* Lee	8 Pet., 44	390*n*
Learned *v.* Welton	40 Cal., 349	180*n*
Le Breton *v.* Nouges	3 Mart. (La.), 60	596
Leonard *v.* Sussex	2 Vern., 526	107
Leonard *v.* The Volunteer	1 Chic. L. N., 185	443*n*
Linnell *v.* Lyford	72 Me., 284	139*n*
Little *v.* Ames Button Hole &c. Co.	67 Ind., 67	225*n*
Little *v.* Dodge	32 Ark., 453	256*n*
Little Rock &c. R'y Co. *v.* Talbot	39 Ark., 530	272*n*
Lord Audley's Case	1 St. Tr., 393; 3 How. St. Tr., 413	578
Lord Stafford's Case	7 How. St. Tr., 1459	555
Lord *v.* Bigelow	124 Mass., 185	225*n*
Lottawanna, The	21 Wall., 582	299*n*
Louisville &c. R. R. Co. *v.* Letson	2 How., 497	327*n*
Lowell *v.* Williams	125 Mass., 439	225*n*

M.

McBlair & Gibbes	17 How., 232	111*n*
McGill *v.* Bank of United States	12 Wheat., 514	164
McGinnis *v.* The Pontiac	5 McLean, 359; Newb., 130	443*n*
McIntyre *v.* Humphreys	1 Hoffm. (N. Y.), 331	147
Mackay *v.* Easton	19 Wall., 633	59*n*
McNeil, *Ex parte*	13 Wall., 242	299*n*
McNeil *v.* Magee	5 Mason, 244	126*n*
Maggie Hammond, The	9 Wall., 459	272*n*, 347*n*
Magniac *v.* Thomson	15 How., 300	407*n*
Maguire *v.* Tyler	8 Wall., 665	98*n*
Mallow *v.* Hinde	7 Pet., 252	327*n*
Marks *v.* Dickson	20 How., 501	24*n*
Marshall *v.* Baltimore &c. R. R. Co.	16 How., 334	79*n*
Marshall *v.* Marshall	42 Ala., 149	225*n*
Martha, The	Olc., 140	272*n*
Martin *v.* Bartow Iron Works	35 Ga., 320	79*n*
Martin *v.* Hunter	1 Wheat., 305	124, 315
Mason *v.* Gamble	21 How., 390	88*n*
Mason *v.* Newell	2 Chic. L. N., 1	126*n*
Mason *v.* Wallace	4 McLean, 77	126*n*
Matheson *v.* Branch Bank of Mobile	7 How., 260	165*n*
Mawson *v.* Hartsink	4 Esp., 103	554, 555
Maxwell *v.* Montacute	Pr. in Ch., 526	147

		Page
Mayer *v.* White	24 How., 320	111*n*
Mayor *v.* Magnon	2 Mart. (La.), 2	220
Mehan *v.* Thompson	71 Me., 492	225*n*
Mehlberg *v.* Fisher	24 Wis., 607	225*n*
Mercantile Mut. Ins. Co	18 Wall., 249	254*n*
Mercier *v.* Packwood	2 Mart. (La.), 33, 34	220
Merrill *v.* Petty	16 Wall., 345	347*n*
Meyers *v.* State	8 Tex. App., 321	361*n*
Michigan Cent. R. R. Co. *v.* Michigan Southern R. R. Co	19 How., 378	111*n*
Middlesex *v.* Thomas	5 C. E. Gr. (N. J.), 39	225*n*
Miller *v.* Hannibal &c. R. R. Co	24 Hun (N. Y.), 610; 90 (N. Y.), 435	272*n*
Miller *v.* Nichols	4 Wheat., 311	109
Millingar *v.* Hartupee	6 Wall., 262	111*n*
Milne *v.* Huber	3 McLean, 212	79*n*
Mirick *v.* Humphill	Hempst., 179	361*n*
Mobile Building Assoc. *v.* Robertson	65 Ala., 387, 389	139*n*
Monitor, The	9 Ben., 78	443*n*
Moore *v.* Clapton	22 Ark., 125, 128	79*n*
Moore *v.* Houston	5 Wheat., 1	319
Moore *v.* Mississippi	21 Wall., 639	165*n*
Morewood *v.* Enequist	23 How., 494	347*n*
Morgan *v.* Shinn	15 Wall., 110	139*n*
Morris *v.* Harvey	75 Va., 726	225*n*
Morris *v.* Nixon	1 How., 118 139*n*, 147,	148
Morsell *v.* Hall	13 How., 215	39*n*
Mott *v.* Buxton	7 Ves., 201	107
Motte *v.* Bennett	2 Fish. Pat. Cas., 642	168*n*
Muddle *v.* Stride	9 Car. & P., 380	280
Murdock *v.* City of Memphis	20 Wall., 633	165*n*

N.

National Bank *v.* Matthews	8 Otto, 627	79*n*
National Bank *v.* Wells	79 N. Y., 498	225*n*
Neal *v.* State of Ohio	3 How., 720 293*n*,	296
Neale *v.* Neale	9 Wall., 1	126*n*
Nelson *v.* Woodruff	1 Black, 160 272*n*,	347*n*
Neptune, The	6 Blatchf., 193	272*n*
Neves *v.* Scott	13 How., 272	139*n*
New Jersey Steam Nav. Co. *v.* Merchants' Bank	6 How., 344	464
New Orleans Canal &c. Co. *v.* Stafford	*post* *343	327*n*
New York, The *v.* Rea	18 How., 225	443*n*
New York &c. Steamship Co. *v.* Rumball	21 How., 385	461*n*
New York &c. Transp. Co. *v.* Philadelphia &c. Steam Nav. Co	22 How., 472	443*n*
Newhall *v.* Wheeler	7 Mass., 189	111
Newton *v.* Stebbins	10 How., 586 464,	296
Niagara, The *v.* Cordes	21 How., 29 272*n*,	347*n*
Nidig *v.* Nat. City Bank	59 How. (N. Y.) Pr., 10	225*n*
Nightingale *v.* Chaffee	11 R. I., 609	225*n*
Norris *v.* Jackson	9 Wall., 125	254*n*
Norris *v.* Mumford	2 Mart. (La.), 20	220
Northern Pac. R. Co. *v.* Kindred	14 Fed. Rep., 80; 3 McCrary, 631.	51*n*

O.

O'Brien *v.* Perry	1 Black, 132	24*n*
Offut *v.* Hundsley	9 La., 1	339
Ohler, The	2 Hughes, 12	443

		Page
Oldham *v.* Halley	2 J. J. Marsh. (Ky.), 114..147,	148
Oliver *v.* Alexander	6 Pet., 143	353
Orleans, The *v.* Phœbus	11 Pet., 175	456
Osborne *v.* Mobile	16 Wall., 482	299*n*
Ottawa, The	3 Wall, 273	443*n*
Overton *v.* Bigelow	3 Yerg. (Tenn.), 513	147

P.

Packet Co. *v.* Catlettsburg	15 Otto, 563	299*n*
Packet Co. *v.* Keokuk	5 Otto, 88	299*n*
Pana *v.* Bowler	17 Otto, 541	139*n*
Pana *v.* Bowler	17 Otto, 702	299*n*
Paving Co. *v.* Mulford	10 Otto, 148	347*n*
People *v.* Gray	9 Pac. C. L. J., 778	361*n*
People *v.* Hunt	8 Pac. C. L. J., 590	361*n*
People *v.* Mather	4 Wend. (N. Y.), 257	555
People *v.* Sprague	53 Cal., 491	361*n*
Peter *v.* Beverly	10 Pet., 532	225*n*
Petrel, The *v.* Dumont	28 Ohio St., 602	443*n*
Pettiward *v.* Prescott	7 Ves., 541	156
Peugh *v.* Davis	6 Otto, 337	139*n*
Phillips *v.* Bullard	58 Ga., 256	225*n*
Planters' Bank of Mississippi *v.* Sharp	6 How., 301	167
Poindexter *v.* McCannon	1 Dev. (N. C.) Eq., 373	152
Police Jury of Concordia *v.* Davis	9 How., 280	51
Pomeroy *v.* Manin	2 Paine, 476	168*n*
Poteete *v.* State	9 Baxt. (Tenn.), 261	361*n*
Poteete *v.* State	2 Leg. Rep., N. S., 151	361*n*
Potomac, The	15 Otto, 634	466*n*
Pound *v.* Turck	5 Otto, 463	299*n*
Presser *v.* State	77 Ind., 274	361*n*
Price *v.* Torrington	1 Salk., 285	572
Prigg *v.* Commonwealth of Pennsylvania	16 Pet., 621	315
Prince *v.* Bearden	1 A. K. Marsh. (Ky.), 170	147
Proctor *v.* Baldwin	82 Ind., 374	225*n*
Protector, The	11 Wall., 87	21*n*, 327*n*

R.

Rader *v.* State	5 Lea (Tenn.), 610	361*n*
Railroad Co. *v.* Lindsay	4 Wall., 650	39*n*
Raynsford *v.* Phelps	43 Mich., 344	284*n*
Reboul *v.* Behren	9 La., 90	339
Rector *v.* Ashley	6 Wall., 142	59*n*, 111*n*
Reddall *v.* Bryan	24 How., 420	423*n*
Reeside, The	2 Sumn., 567	272*n*
Renthorp *v.* Bourg	2 Mart. (La.), 97, 158	219, 220
Rex *v.* Delamotte	21 How. St. Tr., 811	554
Rex *v.* Layer	16 How. St. Tr., 285	554
Rex *v.* Lockwood	13 How. St. Tr., 285	554, 555
Rex *v.* Watson	32 How. St. Tr., 495	554
Rice *v.* Minnesota &c. R. R. Co	1 Black, 381	59*n*
Rich *v.* Lambert	*post* *347	272*n*
Richardson *v.* City of Boston	19 How., 263	165*n*
Richardson *v.* Mellish	3 Bing., 334	45
Riglay, *Ex parte*	19 Ves., 463	191
Roach *v.* Hulings	16 Pet., 319	39*n*, 46
Robertson *v.* Campbell	2 Call (Va.), 421	152
Robertson *v.* Coulter	16 How., 106	111*n*
Robinson *v.* Campbell	3 Wheat., 212	147
Robinson *v.* Nat. Bank of Newberne	81 N. Y., 391	284*n*
Rockhill *v.* Hanna	15 How., 196	407*n*
Rogers *v.* Marshall	4 Leigh (Va.), 425	420

		Page
Roosevelt *v.* Meyer	1 Wall., 517	423*n*
Roosevelt *v.* Post	1 Edw. (N. Y.), 579	156
Russell *v.* Farley	15 Otto, 444	168*n*
Russell *v.* Stansell	15 Otto, 304	347*n*
Rutherford *v.* Green	2 Wheat., 196	77
Ryan *v.* Thomas	4 Wall., 603	423*n*

S.

St. John *v.* Paine	10 How., 557	443*n*
St. John *v.* Turner	2 Vern., 418	154
St. Paul &c. R. R. Co. *v.* Schurmeir	7 Wall., 288	443*n*
Sanger *v.* Sargent	8 Sawy., 94	59*n*
Sarah Jane, The	1 Low., 203	443*n*
Saulet *v.* Shepherd	4 Wall., 502	254*n*
Schulenberg *v.* Harriman	21 Wall., 61	59*n*
Scott *v.* Fields	7 Watts (Pa.), 360	152
Scott *v.* Jones	5 How., 343	7
Scudder *v.* Andrews	2 McLean, 464	79*n*
Searight *v.* Stokes	3 How., 151 293*n*,	296
Seaver *v.* Bigelows	5 Wall., 210	347*n*
Secrest *v.* Turner	2 J. J. Marsh. (Ky.), 471	152
Seller *v.* The Pacific	1 Oreg., 409	272*n*
Seymour *v.* Delancey	6 Cow. (N. Y.), 445	207
Seymour *v.* Delancey	6 Johns. (N. Y.) Ch., 222	207
Shand, The	10 Ben., 311	272*n*
Sharp *v.* Scoging	Holt. N. P., 2; Id., 541	555
Shear *v.* Robinson	18 Fla., 451	139*n*
Sheels *v.* Davies	4 Campb., 119	282
Sherman *v.* Inman Steamship Co	26 Hun (N. Y.), 110, 111	272*n*
Shields *v.* Barrow	17 How., 130	407*n*
Shields *v.* Davis	6 Taunt., 65	282
Shields *v.* Thomas	17 How., 5	347*n*
Shriver *v.* Linn	2 How., 43	197*n*
Shulte *v.* Thompson	15 Wall., 161	347*n*
Siebold, *Ex parte*	10 Otto, 385	299*n*
Silver Lake Bank *v.* North	4 Johns. (N. Y.) Ch., 370	109
Simpson *v.* Greeley	20 Wall., 158	327*n*
Sinclair *v.* Jackson	8 Cow. (N. Y.), 543	191
Slaughter House Cases	10 Wall., 292	387*n*
Sloga, The	10 Ben., 320	272*n*
Smith, *In re*	13 Fed. Rep., 27	361*n*
Smith *v.* Bettger	68 Ind., 254	225*n*
Smith *v.* Burnham	2 Sumn., 612	168*n*
Smith *v.* Hunter	7 How., 738 109,	165*n*
Smith *v.* Rummens	1 Campb., 9	575
Smith *v.* State of Maryland	6 Cranch, 281	124
Smith *v.* The Creole	2 Wash. Jr., 485	299*n*
Sortwell *v.* Hughes	1 Curt., 244	79*n*
Southard *v.* Russell	16 How., 547	139*n*
Spear *v.* Place	11 How., 552 347*n*,	353
State Freight Tax Case	15 Wall., 280	299*n*
State Tonnage Tax Case	12 Wall., 219	299*n*
State *v.* Boswell	2 Dev. (N. C.) L., 209	555
State *v.* McConkey	49 Iowa, 499	361*n*
State *v.* Martin	74 Mo., 547	361*n*
State *v.* Mims	26 Mo., 183; 2 N. W. Rep., 683	361*n*
State *v.* Robinson	20 W. Va., 757	361*n*
State *v.* Shock	68 Mo., 552	361*n*
State *v.* Smith	86 N. C., 705	361*n*
State *v.* State Bank	6 Blackf. (Ind.), 349	106
State *v.* Stewart	51 Iowa, 312	361*n*
State *ex rel.* Mullen *v.* Drew	32 La. Ann., 1044 111*n*,	327*n*

		Page
Steamboat Co. *v.* Chase	16 Wall., 531	443*n*
Steamship Co. *v.* Joliffe	2 Wall., 468	299*n*
Stearns *v.* Palmer	10 Metc. (Mass.), 32	111
Stewart *v.* Potomac Ferry Co	5 Hughes, 382; 12 Fed. Rep., 304.	443*n*
Stimpson *v.* Pond	2 Curt., 502	79*n*
Stockton *v.* Bishop	2 How., 74	387*n*
Stockton *v.* Bishop	4 How., 155	39*n*
Strader *v.* Baldwin	9 How., 261	423*n*
Stratton *v.* Jarvis	8 Pet., 11	353
Strother *v.* Lucas	12 Pet., 411	371*n*
Stuart *v.* Laird	1 Cranch, 299	315
Studwell *v.* Palmer	5 Paige (N. Y.), 166	159
Sturges *v.* Crowninshield	4 Wheat., 193	319
Surget *v.* Byers	Hempst., 715	126*n*
Suydam *v.* Williamson	20 How., 428	246*n*
Swain *v.* Frazier	8 Stew. (N. J.), 326	225*n*
Sweet *v.* Southworth	125 Mass., 417	225*n*
Swift *v.* Tyson	16 Pet., 1	148

T.

T. A. Goddard, The	12 Fed. Rep., 177	272*n*
Taylor *v.* Luther	2 Sumn., 232	147
Teal *v.* Spangler	72 Ind., 380	225*n*
Tennessee *v.* Davis	10 Otto, 298	361*n*
Texas &c. R'y Co. *v.* White	57 Tex., 134	168*n*
Thomas *v.* McCormack	9 Dana (Ky.), 109	148
Thomas Jefferson, The	10 Wheat., 428	455
Thompson *v.* Hickey	8 Abb. (N. Y.), N. C. 163*n*,	139*n*
Thweatt *v.* State	66 Ga., 673	225*n*
Tilson *v.* Warwick Gas-Light Co	4 Barn. & C., 968	152
Tinken *v.* Stillwagon	1 City Ct. (N. Y.), 393	299*n*
Tod *v.* Wick	36 Ohio St., 389	79*n*
Tominy, The	16 Fed. Rep., 603	272*n*
Tracy *v.* Swartwout	10 Pet., 80	292
Transportation Co. *v.* Downer	11 Wall., 134	272*n*
Trent *v.* Henning	7 East, 99	107
Turner *v.* Maryland	17 Otto, 56	299*n*
Turner *v.* The Black Warrior	McAll., 181	272*n*
Tyler *v.* Magwire	17 Wall., 280	98*n*

U.

United States *v.* Adams	1 West. L. J., 315	88*n*
United States *v.* Alden	1 Sprague, 95	390*n*
United States *v.* Arnold	1 Gall., 348	159*n*
United States *v.* Athens Armory	35 Ga., 344	79*n*
United States *v.* Babbit	1 Black, 61	79*n*
United States *v.* Baugh	4 Hughes, 511	361*n*
United States *v.* Boisdore	11 How., 77; 8 Id., 119. 224, 432,	434
United States *v.* Bradley	10 Pet., 343	107
United States *v.* Cameron	15 Fed. Rep., 796	361*n*
United States *v.* Carr	8 How., 1	88*n*
United States *v.* Chaloner	1 Ware, 214	88*n*
United States *v.* Clements	3 Hughes, 509	361*n*
United States *v.* Curry	6 How., 113	389
United States v. Davenport	15 How., 9	209*n*
United States *v.* Davis	2 N. Y. Leg. Obs., 35	361*n*
United States *v.* D'Auterive	10 How., 609. 51, 209*n*, 440, 441,	437*n*
United States *v.* DeRodriguez	7 Sawy., 637	209*n*
United States *v.* Ducros	15 How., 38. 47*n*,	437*n*
United States *v.* Gibert	2 Sumn., 21	361*n*
United States *v.* Hall	9 Am. L. Reg. (O. S.), 232	88*n*
United States *v.* Hartwell	6 Wall., 396	79*n*

		Page
United States *v.* Hodge	6 How., 279	108
United States *v.* Howland	4 Wheat., 108	148
United States *v.* Hudson	3 McLean, 156	98*n*
United States *v.* Hughes	13 How., 1, 4, 7	209*n*
United States *v.* Hughes	3 Hughes, 509	361*n*
United States *v.* Kimball	7 Law Rep., 32	88*n*
United States *v.* Knight	14 Pet., 316	410
United States *v.* Knight	1 Black, 489	139*n*
United States *v.* Land	3 McLean, 365	98*n*
United States *v.* Lent	1 Paine, 417	246*n*
United States *v.* Linn	15 Pet., 290	107
United States *v.* Lynde	11 Wall., 643	47*n*, 437*n*
United States *v.* McCullagh	13 How., 216	437*n*
United States *v.* Moore	*post* *209	433*n*
United States *v.* Morris	14 Pet., 464	79*n*
United States *v.* Norton	1 Otto, 569	88*n*
United States *v.* Pillerin	13 How., 9	47*n*, 437*n*
United States *v.* Pomeroy	3 N. Y. Leg. Obs., 143	88*n*
United States *v.* Quincy	6 Pet., 460	390*n*
United States *v.* Reynes	9 How., 127	51, 440, 441
United States *v.* Ricketts	2 Cranch C. C., 553	159*n*
United States *v.* Rillieux	14 How., 189	47*n*, 435*n*
United States *v.* Roselius	15 How., 36	209*n*, 437*n*
United States *v.* Rosenburgh	7 Wall., 582	361*n*
United States *v.* Simon	*post* *433	209*n*
United States *v.* Starr	Hempst., 469	79*n*
United States *v.* Stone	8 Fed. Rep., 259	361*n*
United States *v.* Thompson	9 Law Rep., 451	88*n*
United States *v.* Tilden	21 Law Rep., 598	88*n*
United States *v.* Tingey	5 Pet., 117	107
United States *v.* Vanzandt	2 Cranch C. C., 338	246*n*
United States *v.* Wiltberger	5 Wheat., 76	79*n*
United States *v.* Winn	3 Sumn., 209	79*n*

V.

Van Hook *v.* Pendleton	2 Blatchf., 85	168*n*
Vance *v.* Fairis	2 Dall., 217	572
Vattier *v.* Hinde	12 Wheat., 193	327*n*
Vernon *v.* Bethell	2 Eden, 110	148, 152
Vigers *v.* Aldrich	4 Burr., 2482	416
Villa *v.* Rodriguez	12 Wall., 339	139*n*
Vincenzo T., The	10 Ben., 229	272*n*
Virden's Appeal	13 Phil. (Pa.), 152	299*n*
Vorhees *v.* Bank of United States	10 Pet., 473	386, 564

W.

Wadlington *v.* Covert	51 Miss., 631	225*n*
Wakefield's Case	4 How. St. Tr., 575	578
Walden *v.* Bodley	14 Pet., 156	407*n*, 425
Waldorf *v.* Prop. New York	1 Flipp., 56	443*n*
Walker *v.* Walker	8 Wall., 744	256*n*
Wall *v.* Andrews	3 How., 568	466*n*
Wallace *v.* Wilder	13 Fed. Rep., 716	159*n*
Waller *v.* Bowman	8 Watts (Pa.), 544	572
Walter *v.* Wingfield	18 Ves., 443	572
Wanata, The	5 Otto, 617	159*n*
Ward *v.* Bourne	56 Me., 161	225*n*
Waring *v.* Clarke	5 How., 441	456, 464
Warner *v.* Norton	20 How., 448	390*n*
Webb *v.* Dunn	18 Fla., 728	299*n*
Webb *v.* Rorke	2 Sch. & L., 673	154
Webster *v.* Cooper	14 How., 499	111*n*

		Page
Weed *v.* Snow	3 McLean, 265	225*n*
Welch *v.* Allen,	21 Wend. (N. Y.), 147	111
Wertheimer *v.* Pennsylvania R. R. Co.	17 Blatchf., 422	272*n*
Weston *v.* Wiley	78 Ind., 54	225*n*
Wheeler *v.* Nesbitt	24 How., 545	390*n*
White *v.* Nicholls	3 How., 267	390*n*
Whitlock *v.* Willard	18 Fla., 158	327*n*
Whittick *v.* Kane	1 Paige (N. Y.), 202	147
Wiggins Ferry Co. *v.* East St. Louis	102 Ill., 574	299*n*
Wike *v.* Lightner	11 Serg. & R. (Pa.), 198	555
Wilbur *v.* Jernegan	11 R. I., 113	225*n*
Wilhelm *v.* Schmidt	84 Ill., 183	225*n*
Wilkinson *v.* Gordon	2 Addams, 152	575
Williams *v.* Critteris	Cro. Jac., 136	416
Williams *v.* Gibbes	17 How., 239	111*n*
Williams *v.* Gibbes	20 How., 536	111*n*
Williams *v.* Oliver	*post* *111	165*n*
Williams *v.* United States	1 How., 290	371*n*
Wilson *v.* Blackbird Creek Co	2 Pet., 251	319, 324
Wilson *v.* McNamee	12 Otto, 575; 1 Morr. Tr., 574	299*n*
Wolverton *v.* Lacey	18 Law. Rep., 672	443*n*
Woolman *v.* The Richard Doane	7 Int. Rev. Rec., 77	466*n*
Wright *v.* Bates	13 Vt., 341	147
Wright *v.* Lawton	37 Conn., 167	225*n*
Wrixon *v.* Colter	1 Ridgw., 295	154

Y.

Yates *v.* Aston	4 Ad. & E., N. S., 182	152
Young America, The	Newb., 101	443*n*

Z.

Zerega *v.* Poppe	1 Abb., 397	272*n*
Zone, The	2 Sprague, 19	272

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1851.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MINERS' BANK OF DUBUQUE, PLAINTIFFS IN ERROR, *v.* THE STATE OF IOWA, ON THE RELATION OF THE DISTRICT PROSECUTING ATTORNEY.

Where a bank was chartered and its charter repealed by the legislature of a territory, the question of the validity of the repealing act cannot be brought before this court under the twenty-fifth section of the Judiciary Act.

The power of review is confined by that section to certain laws passed by states, and does not extend to those passed by territorial Legislatures.[1]

THIS case was brought up, by writ of error, from the Supreme Court for the Second Judicial District of the state of Iowa. Proceedings were commenced when Iowa was a Territory, but in the progress of the cause she was admitted as a state. The pleadings set forth the facts of the case.

At the November term, 1845, of the District Court of Dubuque county, in the Territory of Iowa, the District Attorney of the United States filed the following information:

James Grant, district prosecutor of the third Judicial District, who prosecutes for the United States, on leave granted, comes into said District Court of Dubuque county, at the court-house in Dubuque county, on the first Monday in November, in the year of our Lord one thousand eight hundred and forty-five, and for said United States gives the court to be informed and understand, that John Wharton, Patrick Quigley, Robert Waller, John Thompson, Peter Waples, Jesse P. Farley, and Timothy Davis, for the space of two months last past, and since, have had and still use, without any legal

[1] See *Dred Scott* v. *Sandford*, 19 How., 501.

authority the liabilities and franchises of President, Directors, and Company of the Miners' Bank of Dubuque, and discount bills, loan money, buy and sell bills of exchange, and do all such other acts and things as bodies corporate for banking usually do.

All which privileges, liabilities, and franchises, the said *2] defendants *have usurped, and still do usurp, upon said United States, to the great damage and prejudice thereof.

Whereupon the said attorney prays the aid of this court in the premises, and due process of law against said defendants, to answer to said United States by what warrants they claim to have and enjoy the liabilities, privileges, and franchises aforesaid.

JAMES GRANT, *Dist. Pros.*

Whereupon the attorney for the Bank filed the following plea, viz.:

And the said John Wharton, Patrick Quigley, Robert Waller, John Thompson, Peter Waples, Jesse P. Farley, and Timothy Davis, President, Directors, and Co., &c.

As to the said liabilities, franchises, and privileges, of the said President, Directors, and Company, of the Miners' Bank of Dubuque, say that, by an act of the Legislature of Wisconsin, approved on the thirtieth day of November, in the year of our Lord one thousand eight hundred and thirty-six, which act, with alterations, was approved by Congress on the third day of March, in the year of our Lord one thousand eight hundred and thirty-seven, said President, Directors, and Company were duly incorporated as a company or body politic and corporate, with the privileges, liabilities, and franchises aforesaid; that by an act of Congress in session on the 12th day of June, in the year of our Lord one thousand eight hundred and thirty-eight, the Territory of Wisconsin was divided, and the Territory of Iowa formed therefrom; and by this warrant the said defendants have, and during the time in said information mentioned, and still use the liabilities, privileges, and franchises, as they well might, and still may; without this, that said defendants have usurped, or do now usurp, said liabilities, franchises, and privileges, in manner and form as by said information is supposed; all which the said defendants are ready to verify; and wherefore they pray judgment, and that said liberties, franchises, and privileges, above by them claimed, may be allowed and adjudged them, and that they may be herein dismissed, &c.

DAVIS, *Att'y for Bank.*

The replication of the plaintiff was as follows:—

And the said plaintiffs, for replication to said plea of said defendants, say, that the act of the Legislature of Wisconsin, by which said defendants claim the liberties, franchises, and privileges aforesaid, by an act of the Legislature of Iowa Territory, within whose jurisdiction the said corporate body existed, after the division of the Territory of Wisconsin, in force the twenty-first day of May, in the year of our Lord one thousand eight hundred and forty-five, the said liabilities, privileges, and franchises, was repealed, *disallowed, and declared for naught; and this he is ready to verify; wherefore he prays judgment, &c. [*3

JAMES GRANT, *Dist. Pros.*

The defendants rejoined, but afterwards had leave to file the following amended rejoinder:—

The said defendants, as to the said replication of the said plaintiffs to the plea of defendants, say, that they ought not to be barred of the franchises, liberties, and privileges secured to them by their aforesaid charter, because they say that the act of the said Legislature of Iowa aforesaid, whereby it is supposed the said charter was repealed, was passed without the said corporation (defendants) having first failed to go into operation, and without having abused or misused its privileges; and this they are ready to verify.

DAVIS & SMITH, *Atty's for Defendants.*

To this rejoinder the plaintiff demurred, and the defendants joined in demurrer.

At December term, 1847, the District Court gave the following judgment:—

Thereupon the demurrer is sustained by the court, with leave to the said defendants to answer over, but said defendants elect to abide by their aforesaid amended rejoinder; and it being adjudged by the court now here, that the information filed in this case, and the matters and things therein charged are true, it is therefore ordered, adjudged, and decreed, that the said defendants, and all others acting by, through, or under them, be ousted, and altogether and forever excluded from all such corporate rights, privileges, and franchises of the President, Directors, and Company of the Miners' Bank of Dubuque; that the corporation of said President, Directors, and Company be dissolved, and that the plaintiffs have and recover of and from the said defendants their costs about their suit in this behalf expended, and that they have execution therefor.

The Bank appealed to the Supreme Court of Iowa, which affirmed the judgment of the District Court; and a writ of error brought the case up to this court.

It was argued by *Mr. Lawrence*, for the plaintiff in error, who said that the principal question in the case was whether the legislature could repeal the charter of the Bank without evidence of misuse or abuse of its corporate privileges. His argument on this point need not be stated, as the case went off upon a question of jurisdiction.

*4] *Mr. Justice DANIEL delivered the opinion of the court.

By a statute approved on the 20th of April, 1836, Congress, within the boundaries designated by that statute, established the territorial government of Wisconsin, (*vid.* 5 Stat. at L., 10 to 16); and by a subsequent law, approved June the 12th, 1838, Congress divided the Territory of Wisconsin, and established over what had formed a portion of that territory, the territorial government of Iowa, (*vid.* 5 Stat. at L., 235 to 241.) On the 3d of March, 1845, the Territory of Iowa was admitted into the Union, as one of the States of this confederacy, (*vid.* 5 Stat. at L., 742), and on the 3d day of March, 1847, the like admission was extended to the Territory of Wisconsin. *Vid.* 9 Stat. at L., 478. By what may be termed the organic laws creating the governments of both the territories above-mentioned, it will be seen, that those governments were vested with general legislative power; and were subjected to no enumerated or specific limitations of that general power, save in certain exceptions applicable to the lands or other property of the United States, and to the right on the part of those governments, in exercising the power of taxation, to discriminate between the property of residents and non-residents. The language of the provisions here referred to is identical in the laws establishing each of these territories, and is in the following words: "That the legislative power of the Territory shall extend to all rightful subjects of legislation, but no laws shall be passed interfering with the *primary* disposal of the soil, no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands of residents." Each of those provisions contains the following declaration: All laws of the governor and legislative assembly shall be submitted *to, and if disapproved by* the Congress of the United States, the same shall be null and of no effect." *Vid.* 5 Stat. at L., p. 13 and Id. p. 237, § 6.

By a law of the territorial Legislature of Wisconsin, approved on the 30th of November, 1836, the plaintiffs in error were created a corporation by the style of the Miners' Bank of Dubuque, to continue until the 1st day of May, 1851. *Vid.* acts of Legislature of Wisconsin of 1836, p. 18, No. 7. By an act of Congress, approved on the 3d of March, 1837, (5 Stat. at L., 198,) the charter granted by the Legislature of Wisconsin was disapproved and annulled in certain particulars; but allowed and left in force as to the provisions not thus vacated, and contained, amongst other provisions, (section 23,) the following: "That this act be and the same is hereby declared to be a public act, and that the same be for the time before limited, construed in all courts and places benignly, and favorably, for every *beneficial purpose [*5 therein mentioned. Provided, that if such corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the legislative assembly of this Territory at any time to annul, vacate, and make void this charter." After the separation of Iowa from Wisconsin, the Legislature of the former Territory, (the Bank of Dubuque being situated within the government thereof,) by an act of the 21st of May, 1845, repealed the act of incorporation of the Miners' Bank; directed, under the supervision of the court of the District, the settlement by trustees of the affairs of that corporation, and the distribution of its assets amongst the creditors and stockholders thereof. *Vid.* Laws of Iowa Ter., c. 31. In pursuance of this law, the prosecuting attorney for the Territory, on the 10th of August, 1845, filed an information in the nature of a writ of *quo warranto* against the President, Directors, and Company of the Bank of Dubuque, as usurpers, upon the authority of the United States, of the privileges and franchises of a banking corporation. To this information the plaintiffs pleaded the act of incorporation by the Legislature of Wisconsin, as altered by the act of Congress, and the division of the Territory of Wisconsin, and the creation of the government of Iowa, in justification of their corporate rights. To this plea, it is replied for the United States, that the Act of the Legislature of Wisconsin, by which the defendants were incorporated, had, after the separation of the territories, been repealed by an act of the Legislature of Iowa, within whose jurisdiction the corporation existed. The plaintiffs in error (the defendants below) rejoined, that the repealing act of the Legislature of Iowa had been passed without the said corporation having failed to go into operation, and without having misused or abused its privileges. On behalf of the United States there

was a demurrer to this rejoinder, and in the mean time the Territory of Iowa having become a State, this case was tried before the Supreme Court for the Second Judicial District of the state, by which tribunal the demurrer was sustained, and judgment of ouster pronounced against the Bank.

By the plaintiffs in error it is insisted, that the averments in their rejoinder being admitted by the demurrer, it follows *ex consequenti*, that the repealing law of the Territory of Iowa was unconstitutional, as a law arbitrarily abrogating the charter of the Bank, and therefore a law *impairing the obligation of a contract*. In reviewing this case thus made, this court do not consider themselves called upon to test either the power of the government of Iowa for the enactment of the statute complained of, the coincidence or incompatibility of that statute with the 10th section of the first article of the Constitution, or *regularity of the proceedings in the court below. At the threshold of their examination of this case, they are met by an inquiry far more important and controlling than either of these, viz., an inquiry into their own authority to effect, under any aspect under which this case is presented to them, the result which is sought at their hands. Whatever authority there exists in this court to reëxamine and reverse the judgments or decrees of the courts, not those regularly appertaining to the organized judicial system of the United States, such authority must be traced to the 25th section of the law establishing the "Judicial Courts of the United States," by which section alone the power of this court for the purposes above stated was created and is clearly defined. By recurrence to that section it will be perceived, in order to give the corrective power to this tribunal, that, by the decision of the *state court*, there must have been "drawn in question, the validity of a statute or an authority exercised under the United States, and the decision be against their validity;" or it must be "where is drawn in question the validity or statute of, or an 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; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed under such clause of the Constitution, treaty, statute, or commission." By a comparison of the record before us with the section of the Judiciary Act above quoted, we think it nowhere apparent, that there has been, by the decision of the Court of Iowa, drawn in question the

*6]

validity of a treaty or statute of, or an authority exercised under the United States, much less that there has been a decision against the validity of either; or that there has been drawn in question the validity of a statute of, or an authority exercised under *any state*, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or the construction of any clause of the Constitution, or of any treaty or statute or of commission held under the United States, and a decision adverse to the validity of the latter. And it may be observed, that every requisite to form a ground of jurisdiction enumerated in each of the predicaments comprised in the statute, must combine in order to give to this court the power invoked by the plaintiffs in error. The alleged wrong which the court are called on to redress, is not an act of *state power* at all; it is an act of the *territorial* government of Iowa, by which was repealed an act of the preceding *territorial* government *of Wisconsin; consequently the decision of the court below asserted no *state* act or [*7 power in opposition to the Constitution, treaties, or laws, or to a commission or authority of, or under the United States, and presents therefore no ground of jurisdiction here, either as derived from the language of the statute, or from any construction heretofore given of it. If the question whether a writ of error would lie from this court to review the acts of the territorial governments could ever have been regarded as in any sense equivocal upon the language of the 25th section of the Judiciary Act, such a question could not now be considered as open, under the express adjudications previously ruled by this court. Thus in the case of *Scott* v. *Jones*, 5 How., p. 343, it was expressly declared,—"That an objection to the validity of a statute on the ground that the legislature which passed it were not competent or duly organized, under the acts of Congress and the Constitution, so as to pass valid statutes, is not within the cases enumerated in the 25th section of the Judiciary Act, and therefore this court has no jurisdiction over the subject. That in order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a *state* a member of the Union, and a public body owing obedience and conformity to its Constitution and laws. That if public bodies, not duly admitted into the Union, undertake as states, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the states or territories within which these bodies are situated and acting: but their measures are not examinable by this court

upon a writ of error. They are not *states*, and cannot pass statutes within the meaning of the Judiciary acts." Other cases cited by the court, in the opinion just quoted, might be adduced to show the difference ever taken by the court in reference to its relation to the states as states, and as contradistinguished from the territories of the United States. It seems to us, that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, viz.: the Congress of the United States. That control certainly has not been vested in this court, either in mode or in substance, by the 25th section of the Judiciary Act.

It has been argued in this case, that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of *8] *the Bank of Dubuque, enacted by the Legislature of Wisconsin, assenting to the residue; that therefore the charter of this Bank should be regarded as an act of Congress, rather than of the territorial government; and consequently the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy, till Congress, if not in session, could be convened, or when in session, must have awaited its possibly procrastinated aid.

The argument would render also the acts of the territorial governments, even the most wholesome and necessary, and though indispensably carried to the extreme of authority,

obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior. The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it, (and according to which it was in fact organized,) by the Legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the argument for the plaintiff in error, would constitute it rather a Bank of the United States, situated *without* the United States, and operating within the territory of Wisconsin, now the state of Iowa, independently of the power or local policy of that state, and beyond the reach of its faculties or obligations to be exerted for its own citizens. We think that the positions, urged for the plaintiff in error, leave the objections to the jurisdiction as above stated, in their full force. We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, *alike as acts of the territorial authorities, and not as the acts of any state of this Union; and that as such, this [*9 court has no power, by writ of error, to take cognizance of them in virtue of, and for the objects designated by, the 25th section of the Judiciary Act.

We therefore adjudge that the writ of error in this case be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court for the Second Judicial District of the state of Iowa, 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 the want of jurisdiction.

WILLIAM BINNS AND C. STOCKTON HALSTEAD, PLAINTIFFS, *v.* CORNELIUS W. LAWRENCE.

The Tariff Act, passed in 1846, (9 Stat. at L., p. 44,) enacted duties on glass, as follows, viz.:

"Schedule B. Forty per centum ad valorem, Glass cut.

"Schedule C. Thirty per centum ad valorem, Glass tumblers, plain, moulded, or pressed; not cut or punted."

The following classes of tumblers fall within Schedule B, and are chargeable with a duty of forty per centum, viz.:

1. Glass tumblers, the entire surface of the bottom of which had been smoothed by the glasscutter or grinder, previous to their importation into the United States.
2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glasscutter or engraver, previous to their importation into the United States.

THIS cause was brought up from the Circuit Court of the United States for the Southern District of New York, on a certificate of division in opinion between the judges thereof.

It was an action brought up by the plaintiffs against the Collector of New York for the return of certain duties, paid under protest, and charged to have been illegally exacted upon the importation of glass tumblers.

The tariff of 3d August, 1846, (9 Stat. at L., pp. 44, 45, ch. 74,) enacted duties on glass, as follows, viz.:

"Schedule B. Forty per centum ad valorem.

"Glass cut.

"Schedule C. Thirty per centum ad valorem.

*10] * "Glass tumblers, plain, moulded, or pressed; not cut or punted."

The demand of the plaintiffs, Binns & Halstead, for alleged overcharge of duties paid to the collector, was founded on the importations of glass tumblers of two kinds:

1. Glass tumblers, the entire surface of the bottom of which had been smoothed by the glasscutter, or grinder, previous to their importation into the United States.

2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glasscutter, or engraver, previous to their importation into the United States.

Upon these tumblers the collector charged a duty of forty per cent. classing them under schedule B. In ten importations this duty of forty per cent. amounted to $6,695.70, whereas the plaintiffs alleged that it was $730.20 too much, averring that the tumblers properly belong to Schedule C, and to recover this excess the present action was brought.

Upon the trial the jury found a verdict for the defendant. But upon the trial the counsel for the plaintiffs excepted to the charge of the court, which exception was reserved for argument.

Upon which said argument it occurred as a question whether, according to the true construction of the act of Congress of 30th July, 1846, entitled, "An act reducing the duty on imports, and for other purposes," glass tumblers, the bottoms of which have been smoothed or flattened by the process of cutting or grinding, and glass tumblers which have been

engraved on the sides by a similar process, should be charged with the duty of 40 per centum ad valorem, under schedule B of said act, as glass cut," or with the duty of 30 per centum ad valorem, under schedule C of said act, as "glass tumblers, plain, moulded or pressed, not cut or punted."

On which question the opinions of the judges of the court were opposed.

Whereupon, on motion of the said plaintiffs, by their counsel, that the point upon which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of this court to the Supreme Court to be finally decided:

It is ordered, that the following statement of facts, which is made under the direction of the judges, be certified according to the request of the said plaintiffs, and the statute in such case made and provided.

Statement of Facts.

That the tumblers in question consisted of two kinds, as follows:

*1. Glass tumblers, the entire surface of the bottoms of which had been smoothed by the glasscutter, or grinder, previous to their importation by the plaintiffs. [*11

2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glasscutter or engraver previous to such importation.

That the tumblers in question, of the first class, are only known in trade and commerce in the city of New York as "plain tumblers," or as "plain smooth-bottomed tumblers," or as "plain tumblers with flattened bottoms."

That the tumblers in question of the second class are only known in trade and commerce in said city as "engraved tumblers."

That the tumblers in question (of both classes) are not known in trade and commerce in said city as "cut glass."

That all the material witnesses for the plaintiffs were merchants, importing and dealing in glassware.

That all the material witnesses for the defendant were manufacturers of glassware, or glasscutters and grinders.

That the designation "cut glass," as used in trade and commerce in said city, applies only to tumblers, the sides of which have been cut or ground, and that the importers of glassware and dealers in glassware in said city, do not consider tumblers of the description in question in this suit as coming within the designation, and if they received an order from a customer

for "cut glass tumblers," would not regard it as including either smooth-bottomed or engraved tumblers.

That by the testimony of the manufacturers and operatives, glass tumblers are manufactured entirely by the glassblower, or in part by the glassblower and in part by the glasscutter or grinder, and that glass-blowing and glass-cutting are distinct and separate trades, and processes of manufacture.

By the same witnesses. That the bottoms of glass tumblers, manufactured entirely by the glassblower are rough, particularly in the centre, being there broken off from the punt or stick on which made; and that when sold in this condition such tumblers are known in trade and commerce in the city of New York as "plain" or "plain rough-bottomed tumblers."

By the same witnesses. That, after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter, or grinder, by whom the centre of the bottoms of tumblers is cut or smoothed, for the purpose of removing the particular roughness of that part of the tumbler, and that the process of thus cutting or smoothing the centre of the bottoms of such tumblers is called punting; and that tumblers manufactured by the glassblower, but the
*12] centre part of *the bottoms of which have been so cut or smoothed by the glasscutter, are known in trade and commerce as "punted" tumblers.

By the same witnesses. That, after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter or grinder, by whom the entire surface of the bottoms of such tumblers is cut or smoothed, and that tumblers manufactered by the glassblower, but the entire bottoms of which have been cut or smoothed by the glasscutter or grinder, are known in trade and commerce as "plain tumblers," or as "plain smooth-bottomed tumblers," or as "plain tumblers with flattened bottoms, and are similar to the tumblers in question of the first class.

By the same witnesses. That tumblers known in trade and commerce, and amongst manufacturers, as "moulded tumblers," or "pressed tumblers," are also made entirely by the glassblower, and are also rough-bottomed until subjected to the process of punting, or smoothing and cutting above described.

By the same witnesses. That all cutting of glass is done by means of grinding upon wheels, and that there is no such thing as the cutting of glass in the manufacture of "cut-glass" in any other way.

By the same witnesses. That the cutting or smoothing of

the bottoms of the tumblers in question, (of the first class,) is done by the glasscutter, and that the process of cutting and smoothing is identical with that of punting, except that it extends to the entire surface of the bottom of the tumblers, whereas the "punting" is limited, as above stated, to the centre of the bottom merely.

By the same witnesses. That the process of "punting," and the process of "cutting or smoothing" the bottoms of the tumblers in question, are identical in their operation with that of cutting the sides of tumblers, known in trade and commerce as "cut glass."

It is proved that the time required to cut or smooth the bottom of the tumblers in question, (of the first class,) is four or five times as long as that required for "punting" the bottoms of punted tumblers; and that tumblers with the bottoms cut or smoothed cost from 18 to 22 cents per dozen more than punted tumblers.

It is proved that the "punted" tumblers are charged with the duty of 40 per centum ad valorem under the Tariff Act of 1846.

It was proved by the manufacturers and operatives that the process of engraving the tumblers of the second class is similar to that of cutting the tumblers of the first class, but is a finer species of work, requiring more experienced and skilful workmen, and the use of copper wheels instead of wood and stone wheels, and oil and emery, instead of sand.

*All which we have caused by these presents to be exemplified, and the seal of the said Circuit Court to be hereunto affixed. [*13

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of New York, this first day of December, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-fourth.

ALEXANDER GARDINER, *Clerk.*

I, Samuel R. Betts, one of the judges of the Circuit Court of the United States, for the Southern District of New York, in the second circuit, do hereby certify, that the foregoing exemplification is in due form of law.

SAMUEL R. BETTS.

It was argued by *Mr. Patten* for the plaintiff, and *Mr. Crittenden* (Attorney-General,) for the defendant.

The points for the plaintiffs were as follows:—

1. That the tariff laws are to be construed according to the commercial sense of the terms used in them. *Lee* v. *Lincoln*, 1 Story, 610; *U. S.* v. 112 *Casks Sugar*, 8 Pet., 277; *Bacon* v. *Bancroft*, 1 Story, 341; *U. S.* v. *Wigglesworth*, 2 Id., 369; *Henry W. Sill et al.* v. *Cornelius W. Lawrence*, Collector, MS., before Justice Nelson, U. S. C., New York.

2. That statutes laying restrictions upon trade, or which lay an excise or tax upon it, are to be construed strictly. *Sewall* v. *Jones*, 9 Pick. (Mass.), 412; and that the court cannot, therefore, look for the intent of the framers beyond the ordinary and natural import of the language used.

3. That the words "plain tumblers," in the second clause upon this subject, in schedule C, are to be taken as used in commerce. Tariff Laws of July, 1846, p. 42; schedule B, "glass cut," p. 44; schedule C, p. 45, Boston edition; Tariff, 1842, p. 552, sec. 5.

4. That in commerce the tumblers in question are known as "plain tumblers."

5. that no *other* tumblers, either in commerce or manufacture, are known simply as *plain* tumblers. *U. S.* v. *Wigglesworth*, 2 Story, 369.

Mr. Crittenden, for the defendant, contended,—

1. That whether the tumblers in question were or were not of "glass cut," was a question of fact. Upon that question the evidence is clear in favor of the verdict.

That tumblers of glass punted are "glass cut" is undeniable upon the evidence of the manufacturers; and upon the same evidence it is equally clear that tumblers of glass with ornamental *figures engraved on them are "glass cut," and so both descriptions of the tumblers, about which the suit was brought, are within schedule B, and subject to a duty of forty per cent. ad valorem.

*14]

The descriptions, in schedule B, of "glass cut," and in schedule C, of "glass tumblers, plain, moulded, or pressed, not cut or punted," do not leave room for argument.

Both classes of the imported tumblers in question had been cut, punted, smoothed, and ground by the glasscutter; none of them were plain and uncut, as they were from the hands of the glassblower, and therefore cannot be brought to the lower duty of thirty per cent. ad valorem according to schedule C.

The maxim, "*Cuique in sua arte credendum est*," applies to the evidence of the manufacturers of glass introduced by the collector.

2. Upon the statements appearing upon the record, there is no ground for a new trial.

It is not possible to mystify and make intricate the matters of fact. That the tumblers of glass in question were "glass cut," tumblers of glass punted, tumblers with ornamental figures cut upon them, and not "glass tumblers, plain, moulded, or pressed, not cut or punted," cannot be made more lucid by argument than by the testimony given. Importing merchants cannot demolish facts, change the qualities and substance of things, alter the descriptions and meaning of schedules B and C, in the tariff of 1846, nor evade their effect by arbitrary names, which they may think fit to give to things imported by them.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action brought by the plaintiffs, importers of glassware, against the defendant as collector of the port of New York, to recover a certain amount of money paid under protest to the defendant as collector, for duties exacted by him upon glass tumblers imported by the plaintiffs at the period set forth in an exhibit filed in the cause, by which are also shown, the duties charged by and paid to the defendant, and the amount claimed by the plaintiffs, as having been improperly exacted; this last amount, consisting in each instance of the difference between the duty of 40 per centum *ad valorem*, charged under schedule B of the Tariff Act of July 30th, 1846, as on importations of "glass cut," and the duty of 30 per centum *ad valorem*, at which rate the plaintiffs claimed to enter their importations of glass above-mentioned, under schedule C of the same act of Congress, as "glass tumblers plain, moulded, or pressed, *not cut or punted*."

The question of law upon the construction of the Statute *of 1846, upon which the judges differed in opinion, and the facts of the case out of which that question has [*15 grown, cannot be stated with greater clearness or with more succinctness of form, than they have been in the certificate from the Circuit Court.

This cause having been tried before his honor Justice Nelson, on the 3d of November, 1848, the jury impanelled returned a verdict for the defendant. The counsel for the plaintiff having excepted to the charge of the presiding judge on the trial, the cause was heard upon the exceptions reserved for the plaintiff, involving the question whether, according to the true construction of the Act of Congress of 30th of July, 1846, entitled "An act reducing the duty on imports and for other purposes," glass tumblers, the bottoms of which have

been smoothed or flattened by the process of cutting or grinding, and glass tumblers which have been engraved on the sides by a similar process, should be charged with the duty of 40 per centum ad valorem, under schedule B of said act, as "glass cut," or with the duty of 30 per centum ad valorem, under schedule C of said act, as "glass tumblers plain, moulded, or pressed, not cut or punted."

On which question the opinion of the judges of the court were opposed.

Whereupon, on motion of the said plaintiffs by their counsel, that the point upon which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of this court to the Supreme Court to be finally decided.

It is ordered, that the following statement of facts, which is made under the direction of the judges, be certified according to the request of the said plaintiffs, and the statute in such case made and provided.

Statement of Facts.

That the tumblers in question consisted of two kinds, as follows:

1. Glass tumblers, the entire surface of the bottoms of which had been smoothed by the glasscutter or grinder, previous to their importation by the plaintiffs.

2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glasscutter or engraver, previous to such importation.

That the tumblers in question of the first class, are only known in trade and commerce in the city of New York as "plain tumblers," or as "plain smooth-bottomed tumblers," or as "plain tumblers with flattened bottoms."

That the tumblers in question of the second class, are only
*16] *known in trade and commerce in said city as "engraved tumblers."

That the tumblers in question (of both classes) are not known in trade and commerce in said city as "cut glass."

That all the material witnesses for the plaintiffs were merchants, importing and dealing in glassware.

That all the material witnesses for the defendant were manufacturers of glassware, or glasscutters and grinders.

That the designation "cut glass," as used in trade and commerce in said city, applies only to tumblers the sides of which have been cut or ground, and that the importers of glassware and dealers in glassware in said city, do not consider tumblers of the description in question in this suit, as coming within

the designation, and if they received an order from a customer for "cut glass tumblers," would not regard it as including either smooth-bottomed or engraved tumblers.

That by the testimony of the manufacturers and operatives, glass tumblers are manufactured entirely by the glassblower, or in part by the glassblower and in part by the glass-cutter or grinder, and that glass-blowing and glass-cutting are distinct and separate trades, and processes of manufacture.

By the same witnesses. That the bottoms of glass tumblers manufactured entirely by the glassblower, are rough, particularly in the centre, being there broken off from the punt or stick on which made; and that when sold in this condition, such tumblers are known in trade and commerce in the city of New York as "plain" or "plain rough-bottomed tumblers."

By the same witnesses. That after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter, or grinder, by whom the centre of the bottoms of such tumblers is cut or smoothed, for the purpose of removing the particular roughness of that part of the tumblers, and that the process of thus cutting or smoothing the centre of the bottoms of such tumblers is called punting; and that tumblers manufactured by the glassblower, but the centre part of the bottoms of which have been so cut or smoothed by the glasscutter, are known in trade and commerce as "punted" tumblers.

By the same witnesses. That, after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter or grinder, by whom the entire surface of the bottoms of such tumblers is cut or smoothed, and that tumblers manufactured by the glassblower, but the entire bottoms of which have been cut or smoothed by the glasscutter or grinder, are known in trade and commerce as "plain tumblers," or as "plain smoothed-bottomed tumblers," or as "plain *tumblers with flattened bottoms," and are similar to the tumblers in question of the first class. [*17

By the same witnesses. That tumblers known in trade and commerce, and amongst manufacturers as "moulded tumblers," or "pressed tumblers," are also made entirely by the glassblower; and are also rough-bottomed until subjected to the process of punting, or smoothing and cutting above described.

By the same witnesses. That all cutting of glass is done by means of grinding upon wheels, and that there is no such thing as the cutting of glass in the manufacture of "cut glass" in any other way.

By the same witnesses. That the cutting or smoothing of the bottoms of the tumblers in question, (of the first class,) is done by the glasscutter, and that the process of cutting and smoothing is identical with that of punting, except that it extends to the entire surface of the bottom of the tumblers, whereas the "punting" is limited, as above stated, to the centre of the bottom merely.

By the same witnesses. That the process of "punting," and the process of "cutting or smoothing" the bottoms of the tumblers in question, are identical in their operation with that of cutting the sides of tumblers, known in trade and commerce as "cut glass."

It was proved that the time required to cut or smooth the bottoms of the tumblers in question, (of the first class,) is four or five times as long as that required for "punting" the bottoms of punted tumblers; and that tumblers with the bottoms cut or smoothed cost from 18 to 22 cents per dozen more than punted tumblers.

It was proved that the "punted" tumblers are charged with the duty of 40 per centum ad valorem under the Tariff Act of 1846.

It was proved by the manufacturers and operatives, that the process of engraving the tumblers of the second class is similar to that of cutting the tumblers of the first class, but is a finer species of work, requiring more experienced and skilful workmen, and the use of copper wheels instead of wood and stone wheels, and oil and emery instead of sand.

The question referred to this court by the aforegoing certificate, and the solution of that question, are supposed to lie within a comparatively narrow compass. In the construction of the Act of Congress of July 30th, 1846, as in that of every other statute, one cardinal rule must govern, and it is this; that wherever the will or intention of the lawmaking power is declared in plain and unequivocal terms, that will or intention must be followed—absolutely followed. It would not be *18] admissible *under such circumstances, to attempt a control or modification of that will, by speculations of policy or by facts or opinions derived *aliunde*, as such a proceeding would in effect operate a repeal of the positive law, or the abrogation of a superior power, by what were the just and regular subjects of its operation. Where a statute may be ambiguous in its language, or may have reference to facts or conclusions dependent on usage, the influence of opinion or the proof of established usage may be proper or even indispensable, in fixing the just interpretation of the law, but it is

only in instances like these last mentioned, that such a rule of interpretation can be tolerated.

The question presented upon the certificate from the Circuit Court will be considered, 1st, with reference to the language of the Tariff Act of July 30th, 1846; and next upon the import of the facts proved in the case, upon the hypothesis that those facts could at all affect the rule of interpretation.

In schedule B, part of the act above-mentioned, laying an impost of 40 per centum on all articles embraced within it, the only description of glass mentioned, is that designated as "*glass cut.*" Its distinguishing characteristic, that brings the article within the purview of that schedule is, that it be *cut;* the figure, or the extent in which the process of cutting should have been applied, was nowhere defined by the statute; and it must be obvious, that any attempt to define or describe that which may, and must indeed be as diverse as the skill, the taste, or the prospect of profit on the part of the manufacturer, would have been utterly nugatory. But it could be easily understood, both by the law-maker and by others, that the beauty, the quality, and the price of glass are heightened by the process of cutting, and it was equally notorious or susceptible of proof, that the process of cutting is accomplished by but one species of operation, viz.: the operation of grinding. It would appear plain then, that all glass subjected to this one known process, as being enhanced in value, was designed to fall within the description in the statute of "*glass cut.*"

The articles of glassware enumerated in schedule C, as being subject to an impost of 30 per centum, are thus described, viz.: glass tumblers plain, moulded, or pressed, "*not cut or punted.*" Upon the language of the description just quoted it would seem too clear for cavil, that *cut* or *punted* tumblers, cannot be placed in the same class with those that are enumerated as "*plain*, *moulded* or *pressed*," but are carefully contradistinguished from these last denominations. *Cut* or *punted* tumblers, therefore, even if these two terms could be understood as having different significations and were not applicable merely to different degrees of cutting or grinding, do not fall under the lower rate of duty—but all **cut* tumblers, no matter in what part, in what figures or to what extent they are cut, and all *punted* tumblers were by the act of Congress of July 30th, 1846, subject to a duty of 40 per cent upon the proper construction of the language of the statute. An effort has been made to control this language, by introducing the opinions of certain dealers in glass, and of other persons in the city of New York, to show that tumblers, the entire bottom of which are ground or smoothed by the glass-

[*19

cutter, and tumblers the sides of which are wrought and ornamented by the same means, are not considered as *cut* but are held to be the first *plain*, and the second *engraved* tumblers. The sum of the argument thus attempted, when tested by common sense, amounts to this: That the process of grinding or cutting, when applied to the entire surface of the bottom of tumblers, or to the ornamenting of their sides, although it be the identical process and the only one by which cut glass is manufactured, is not cutting, but something less; and that the manufacturing of cut glass means something else or beyond the only process by which cut glass is ever made. The integrity or indeed the intelligibility of this argument, this court are unable to perceive. It cannot be sustained in opposition to the language of the statute, in violation of consistency, and against the weight of the testimony in the cause, upon mere arbitrary and unfounded assumption, or upon opinion entertained within a limited theatre, and this by persons whose interests are involved in and would be advanced by that assumption. The weakness of this assumption is further exposed by recurrence to facts stated by manufacturers and found in the record, in strict conformity with which, the distinction made in the statute appears to have been taken.

Thus it is proved, that tumblers are manufactured either entirely by the glassblower, or in part by the glassblower, and in part by the cutter or grinder; and *that glass-blowing and glass-cutting are distinct and separate trades and processes of manufacture.* It is further shown, in proof, that the bottoms of tumblers manufactured entirely by the glassblower, are rough in the centre, being there broken off from the *punt* or stick in which they are made; that after their completion as far as can be by the glassblower, they pass into the hands of the cutter or grinder, by whom the centre of the bottom is cut or smoothed, and that the process of thus cutting or smoothing the centre of the bottoms of these tumblers, is called *punting.* Again it is in proof, that the tumblers, as made by the glassblower, are frequently passed to the cutter or grinder, by whom the *entire surface* of the bottom is cut or smoothed; and it is the tumbler, thus cut and finished by the glasscutter,

*20] that is said to be known in the trade in *New York as "the plain tumbler," or as the "plain, smoothed-bottomed tumbler." It is also proved, that the cutting and smoothing the bottom of the tumbler is effected by the identical process which is applied in *punting*, the only difference consisting in the fact, that in the former operation it extends to the *entire surface*, instead of being limited to the point at which the tumbler was separated from the punt or stick.

20

"Cut or punted tumblers are expressly distinguished in the statute from glass tumblers, *plain, moulded, or pressed.*" Punted tumblers, it is clearly shown by the facts certified, are made by the operation of cutting or grinding the centre of the bottom; the smoothing of the entire bottoms of tumblers is merely the application of the same process to a greater extent; how this extended application can cause those tumblers subjected to it to be considered less as *cut glass*, than if they were merely punted, or cut at a small point of the bottom, presents a problem not easy of solution. Could these tumblers, with the entire bottom or sides cut or ground, be, with any propriety of language, denominated "plain tumblers," or "plain, smoothed-bottomed tumblers," they still are not the less "plain tumblers," or "plain, smoothed-bottomed tumblers," or "plain tumblers with flattened bottoms," or "engraved tumblers" so constituted by the operation of *cutting or grinding*. In this view of the question certified, it is the opinion of this court, that glass tumblers, having the entire surface or bottom smoothed or polished, or their sides figured or ornamented by cutting or grinding, come regularly within the operation of schedule B of the Tariff Act of July 30th, 1846, and are, within the intent and meaning of that schedule, subject to a duty of 40 per centum *ad valorem*, as *glass cut;* and we order it to be so certified to the Circuit Court of the United States, for the Southern District of New York.

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 New York, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that, according to the true construction of the act of Congress of 30th July, 1846, entitled "An Act reducing the duty on imports, and for other purposes," glass tumblers, the bottoms of which have been smoothed or flattened by the process of cutting or grinding, and glass tumblers which have been *engraved on the sides by a similar process, should be charged with the [*21 duty of 40 per centum *ad valorem*, under schedule B of said act, as cut glass. Whereupon, it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

FRANCIS O. J. SMITH, APPELLANT, *v.* JOSEPH W. CLARK, ET AL.

Where a motion is made to docket and dismiss a case under the 43d rule of this court, the certificate of the clerk of the court below, upon which the motion is founded, must state the names of the parties to the suit. It is not enough to say, Joseph W. Clark and others. The names of the "others" ought to be set forth.[1]

A MOTION was made by Mr. Woodbury to docket and dismiss this case under the 43d rule of this court. The case purported to be an appeal from the Circuit Court of the United States for the District of Massachusetts. The certificate of the clerk of the Circuit Court is set forth in the order passed by this court, and to be found at the end of this report. It is, therefore, unnecessary to repeat it.

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

A motion has been made to docket and dismiss this case, under the 43d rule of this court.

The certificate of the clerk states, that, in the Circuit Court of Massachusetts, in a cause depending in that court, in which Francis O. J. Smith was complainant in equity, and Joseph W. Clark and others were respondents, a final decree in that court was made on the 17th of October, 1850, in favor of the said Joseph W. Clark and others, respondents, from which the said Francis O. J. Smith appealed on the same day; and on the 30th of October filed his appeal-bond with sureties, whereby execution on the decree was suspended.

The certificate conforms to the rule in all respects but one, and that is in the statement of the parties. The respondents are stated to be Joseph W. Clark *and others*, from which, as well as from the statement in the motion, it appears that there were other respondents parties to the suit, who are not named in the certificate.

The 43d rule provides, that where the party against whom a judgment or decree is rendered, fails to file the record and docket the case within the time limited by the rule, the
*22] other party may *docket the case and file a copy of the record with the clerk, in which case it shall stand for argument at the term; or he may, at his election, have the case docketed and dismissed upon producing a certificate from

[1] See *The Protector*, 11 Wall., 87.

the clerk stating the cause, and certifying that such a writ of error or appeal had been duly sued out and allowed.

Now, where the unsuccessful party brings a writ of error, all the parties to it must be named in the writ; and the name of one or more of them "*and others*" is not a sufficient description to bring those not named before the court. It was so decided in *Deneale & others* v. *Stump's Executors*, 8 Pet., 526. And the same principle was applied to a writ of error docketed under the 43d rule, in the case of *Holyday et al.* v. *Batson et al.*, 4 How., 645. And the reason for requiring all the parties, whose interests are to be affected by the judgment, to be named in the writ of error, applies with equal force to the case of an appeal from a decree.

Where the party, in proceeding under the 43d rule, elects to file the record and try the cause, the record must certainly be as full and complete as the one which would be required from the opposing party. It must name all the persons which the writ of error or appeal is intended to bring before the court; otherwise there could be no judgment or decree for or against them.

And upon the same ground, the same thing must be done when the case is docketed in order to obtain a judgment of dismissal. The proceeding is in the nature of a writ of error or appeal, in which the party, in whose favor the judgment or decree was rendered, is allowed to bring the case before this court, in order to prevent unnecessary delay. And all the parties to the judgment or decree, whose interests are to be affected by docketing and dismissing the suit, are regarded as in court, for the purpose of being parties to the judgment of dismissal. Nor could the Circuit Court regularly issue an execution for or against a person not named; as it would not appear that he had been a party to the proceeding here, or that there had been a judgment of dismissal for or against him.

The rule of which we are speaking, was framed upon this principle: It requires that the certificate of the clerk should "state the cause," and this is not done unless the parties to it are named.

A departure from the rule might lead to very loose practice, and perhaps to abuses. We think it more safe to adhere to the established practice in this respect; and have used this occasion to state it the more fully, in order that the members of the bar and the clerks of the courts may in future avoid mistake.

The motion to docket and dismiss in this case is overruled.

* *Order.*

Francis O. J. Smith, Appellant, v. *Joseph W. Clark et al.*

Mr. Woodbury, having filed and read the following certificate, viz.:—

"United States of America, } ss
Massachusetts District, }

"I, Isaac O. Barnes, Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, do hereby certify, that in a certain cause pending in said court, wherein Francis O. J. Smith was complainant, in equity, and Joseph W. Clark et al., were respondents, a final decree in said cause was made by the court on the seventeenth day of October, A. D. 1850, in favor of the said Joseph W. Clark et al., respondents, as aforesaid,—whereupon an appeal was prayed by the said Francis O. J. Smith, complainant, as aforesaid, on the said seventeenth day of October, A. D. 1850, and, on the thirtieth day of said October, A. D. 1850, the said Francis O. J. Smith, complainant, as aforesaid, filed a bond with sureties in the sum of one thousand dollars. And thereupon the execution of the said final decree was suspended, and the said appeal has operated as a *supersedeas* in said cause.

"In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit [Seal.] Court, at Boston, this thirtieth day of December, A. D. 1851, and the independence of the United States of America the seventy-sixth.

"ISAAC O. BARNES, *Clerk.*"

now here moved the court to docket and dismiss this appeal under the 43d rule of this court. On consideration whereof, it is the opinion of this court that the titling of the case in the certificate is too vague and uncertain: Whereupon it is now here ordered by the court that the said motion be, and the same is hereby overruled.

*JOSEPH P. THREDGILL, ADMINISTRATOR OF ARCHIBALD GOODLOE, DECEASED, APPELLANT, *v.* JOHN M. PINTARD.

Where a settler upon the public lands had a pre-emption right to them and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase-money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law.[1]

THIS was an appeal from the Circuit Court of the United States for the District of Arkansas, sitting as a court of equity.

On the 12th of April, 1814, Congress passed an act, (3 Stat. at L., p. 122, § 5,) giving a right of pre-emption to settlers upon certain portions of the public lands, under certain conditions, one of which was, that the Indian title should have been extinguished.

A person by the name of Jane Matthers, claimed a right of pre-emption, under this act, to the southeast quarter of section one, township eighteen south, range one west, containing $168\frac{96}{100}$ acres, lying south of the Arkansas River.

On the 24th of August, 1818, the Indian title to this country became extinguished by the ratification of a treaty concluded with the Quapaw Indians.

Jane Matthers assigned her pre-emption right to Thomas T. Tunstall, but at what time the record did not show.

In 1833, an agreement was made for the sale of this land, between Tunstall and J. M. Pintard, which was not formally concluded until the ensuing year; but Pintard, with his family, moved upon the land in the autumn of 1833, and had several slaves engaged in clearing the land, making fences, &c.

On the 1st of April, 1834, Tunstall executed a deed for the land to Pintard, for the consideration of one thousand five hundred dollars, cash, and covenanted to convey the legal title as soon as a patent should issue for it.

[1] DISTINGUISHED. *Harkness* v. *Underhill*, 1 Black, 325. See also *Lamb* v. *Davenport*, 18 Wall., 314; *Hussey* v. *Smith*, 9 Otto, 22; *Cunningham* v. *Ashley*, 14 How., 377; *Clements* v. *Warner*, 24 Id., 394; *Marks v. Dickson*, 20 Id., 501; *O'Brien* v. *Perry*, 1 Black, 132.

The equity of a pre-emption claimant of land, under the laws of the United States, who has complied with the conditions imposed by those laws, obtained his certificate by the payment of the purchase-money, and retained uninterrupted possession of the property, cannot be defeated by one whose entry was subsequent, although he has fortified his title with a patent; such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the pre-emption claimant. *Hughes* v. *United States*, 4 Wall., 232.

On the 19th of June, 1834, Congress passed an act (4 Stat. at L., 678,) declaring, "That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession and cultivated any part thereof, in the year 1833," was entitled to a pre-emption.

On the 24th of July, 1834, a pre-emption right, and certificate of purchase was granted and issued to Tunstall, for the quarter section which he claimed under Jane Matthers, under the pre-emption act of 1814, by the land-officers at Little Rock.

On the 23d of March, 1835, Pintard sold the quarter section which he had purchased from Tunstall, together with part of an adjacent quarter section, which he had acquired in another way *making two hundred acres in all, to Wil- *25] liam Rhodes, for the price of forty dollars per acre; binding himself to convey the same by a general warranty deed as soon as the patents could be procured. Rhodes executed two promissory notes for $4000 each, the first due and payable on the 1st of March, 1836, and the second due on 1st of March, 1837. Pintard then delivered possession of the land and improvements, to Rhodes.

On the 13th of March, 1837, Rhodes sold the land which he had obtained from Pintard, together with some other land to Archibald Goodloe, the appellant in the present case, for sixty-five dollars per acre, being estimated to contain four hundred and fifty acres, when accurately surveyed. Five thousand seven hundred dollars was to be paid in hand, and the balance was to be paid in sixty days, except the amount yet remaining unpaid by Rhodes for the purchase of said land, which was to be paid as soon as the title with general warranty should be regularly made to said Goodloe.

On the 24th of February, 1838, the Commissioner of the Land-Office annulled the entry by Tunstall, as assignee of Jane Matthers, "inasmuch as the tract entered was not the property of the United States at the passage of the act under which the claim was made," viz., the act of 12th of April, 1814. He therefore cancelled the certificate, and directed the Register and Receiver at Little Rock, to refund the money to whoever might be entitled to receive the same.

On the 28th of March, 1838, Goodloe paid to Pintard, the sum of $600, which was credited on the back of the note, which had become due on the first of March, 1836, given by Rhodes to Pintard.

On the 22d of June, 1838, Congress passed another pre-emption law, (5 Stat. at L., 251,) by which every settler of

the public lands, being the head of a family, or over twenty-five years of age, should be entitled to a pre-emption.

On the 15th of February, 1839, Goodloe proved his pre-emption right under the above law entirely for his own benefit.

On the 31st of May, 1839, Goodloe paid to Pintard the sum of $1,363.82, which was credited upon the same note given by Rhodes, upon which the preceding payment was credited.

On the 9th of April, 1840, Goodloe obtained his pre-emption right, and on the 3d of March, 1841, a patent was issued to him by the United States.

On the 3d of March, 1843, Congress passed an act, (5 Stat. at L., 603,) extending to the settlers on the lands south of the Arkansas, the same privileges which were granted by the act of 1814.

In March, 1842, Pintard, a resident of the state of Mississippi, *filed his bill in the Circuit Court of the United States, for the District of Arkansas, against Goodloe [*26 and Tunstall, praying for a decree against Goodloe for the remainder of the purchase-money due to him upon the purchase of the tracts of land, and claiming a lien thereon, to have them subjected to sale for the payment of said money. It is not necessary to notice any other of the proceedings in the case than Goodloe's answer, which was filed in December, 1842. In it he resisted the claim against him principally on the ground, that Pintard never had any good and valuable claim or title to the land, either in law or equity; and, therefore, Pintard was not entitled to demand and receive the consideration agreed to be paid. Goodloe claimed that he himself held the legal title derived directly from the United States.

In April, 1845, the cause came on for hearing upon bill, exhibits, answers, issues, and evidence, and was argued; and in April, 1847, a decree was passed, that Goodloe should pay to Pintard the sum of ten thousand five hundred and fifty-two dollars, together with ten per cent. interest from the rendition of the decree till paid; that the two pieces of land mentioned in the proceedings should be charged with the payment; and that in default of payment by the 1st of November, ensuing, the land should be sold, &c., &c.

From this decree Goodloe appealed to this court.

It was argued by *Mr. Lawrence*, and there was also a brief filed by *Mr. Moorehead*, for the appellant, and by *Mr. Crittenden*, for the appellee, on whose side a brief was also filed by *Mr. H. S. Foote* and *Mr. Sebastian*.

The counsel for the appellant contended that the decree is erroneous, and ought to be reversed. It is admitted, in the opinion rendered, that the title of Pintard was invalid, and that Goodloe might have obtained a rescission of his contract on this ground; but as he perfected his title by obtaining a pre-emption in his own name, his act, while he continued in possession, enured to the benefit of Pintard, who should only be compelled to account for the amount paid for the better title. Ordinarily a vendor and a vendee, and those claiming under a vendee, stand in the relation of landlord and tenant, and all acts of the vendee in perfecting his title, enure to the benefit of the vendor. But this, from the nature of the case, must be confined to such acts as the vendor might himself have performed. Tunstall was a trespasser upon the public lands, going on Indian territory in express violation of law, and had no right which could be transmitted by him. Equity cannot enforce a contract founded on a violation of law. It is true he had an improvement, but it was one made in the teeth of a law of Congress; and if it was unlawful for him to
*27] make the improvement, it was but a continued *violation of law to place another man upon it. Congress afterwards, it is true, granted pre-emptions, which, if he had continued on the land, would have embraced his case. But can this give him any equity? It is well settled, by the practice of the department, under the sanction of the opinion of the Attorney-General, that if a man trespasses by settling on the public land, and afterwards places a tenant on the land, that the tenant is entitled to a pre-emption in his own name, and not the landlord. That is where there is an express and not a mere *quasi* tenancy, as in this case.

Neither Tunstall, or Pintard, or Rhodes, could have obtained a pre-emption. Goodloe alone was entitled, in his own right, by virtue of his own cultivation and settlement, and Pintard can derive no benefit from a contract illegal in its inception, and which could have been perfected by no act of his.

But if this view of the subject is wrong, the decree is radically erroneous in several particulars. Goodloe's obligation to Rhodes was not to pay to Pintard, as seems to have been assumed. He did not agree to stand in the shoes of Rhodes. Rhodes promised to pay in one and two years, with ten per cent. interest. Goodloe bound himself to pay to Rhodes the amount due to Pintard, when the legal title should be obtained. The giving a gross sum of $10,552, including the ten per cent. up to the rendition of the decree, with an accruing interest of ten per cent. upon the whole amount, makes the accruing interest about twenty per cent., upon the principal due. This

can hardly be fairly construed as the true meaning of the contract between Goodloe and Rhodes, and is such a compounding of interest as cannot be tolerated by a court of equity.

The amount, however, decreed upon the principles established by the Circuit Court, is for too much by at least one thousand dollars. The number of acres for which Goodloe obtained a pre-emption was 168, and the court settled the quantity in fractional section six, at 11 acres, making 179, instead of 200, which they were estimated to contain. This, at $40 per acre, would make $7,160; adding ten per cent. interest upon the two instalments into which this sum was to be divided, and the aggregate sum, at the rendition of the decree, would be $14,736.

The credits allowed by the court are as follows:

March, 1838,	$600.00
Interest at 10 per cent. to date of decree,	543.50
	1,143 50
May, 1839,	1,163.00
Interest at 10 per cent. to decree,	943.00
	2,306 00
January, 1840,	200.00
Interest at 10 per cent,	145.00
	345.00
April, 1840—expenses of procuring pre-emption,	900.00
Interest at 10 per cent. to date of decree,	630.00
	1,530 00

Making the aggregate amount of credits, including interest at 10 per cent. $5,324. This sum, deducted from $14,736, would leave $9,412, instead of $10,552 decreed by the court; so that, admitting that it was correct to aggregate principal and interest, and to give accruing interest upon the whole sum, the decree is for too much by more than $1000.

It is also respectfully contended, that it was erroneous to decree a sale of the fractional quarter, in section six, without obtaining the legal title, or having the holder of it before the court, so that the purchaser could obtain it by decretal order. Pintard alleges, in his bill, p. 9, "That Ben Taylor, of Chicot county, Arkansas, holds the legal title to said part of section six, and has held the same for some years." It is hardly

necessary to urge, that it was erroneous to decree a sale of this land, without first obtaining the legal title from Taylor.

The form of the decree is also erroneous, and in violation of the established principles of equity jurisprudence. The defendant, Goodloe, was ordered to pay a gross sum of money, by a named day; and if not paid, the commissioner named in the decree was directed to sell the land, make a conveyance, deliver possession, &c.; leaving it to the commissioner to ascertain whether the money was paid or tendered, and to decide accordingly. Whether the tender was or was not a good one, or whether the payment was or was not made, was left to the adjudication of the commissioner, when it was the province of the court to decide such matters. The proper chancery practice on this subject is given with great clearness and precision in the case of *Downing* v. *Palmateer*, 1 Mon. (Ky.), 66.

The counsel for the appellee contended that the agreement on the part of Goodloe to pay the purchase-money to Pintard, was founded upon a valuable consideration, and necessarily enured to the benefit of the latter, and upon which he might seek a remedy, although the contract was between Rhodes and Goodloe alone. *Piggott* v. *Thompson*, 3 Bos. & P., 149; Chit. on Contr. (5 ed.), 53; *Marchington* v. *Vernon*, 1 Bos. & P., 101 *in notes; Martyn* v. *Hinde*, Cowp., 437; *Dutton* v. *Poole*, 2 Lev., 210; 1 Ventr., 318.

*29] *A pre-emption right is property, so regarded by the government and the community at large. In Arkansas, "all improvements on the public lands of the United States are subject to execution." Rev. Stat., p. 377.

To call a settler upon the public lands a "trespasser," is an outrage upon a policy of the government which has been steadily pursued for more than twenty-five years.

The great point, to which the others are subordinate is, that Goodloe obtained the possession of both parcels of land through Pintard, and by a recognition of his title. By means of that possession, Goodloe was enabled to obtain a pre-emption to the principal tract, and which he could not have obtained if Pintard had not sold to Rhodes, and Rhodes to Goodloe. The fact is admitted in his answer; and indeed it is perfectly manifest that, if Pintard had remained in possession, he could and would have obviated any defect in his title, by availing himself of some confirmatory act of Congress, or of the later pre-emption acts, that is, of 1834 or 1838.

It was not competent, therefore, for Goodloe to disavow the title of Pintard, because they stood in the relation of landlord and tenant. The purchase of Goodloe from Rhodes was made on the 13th of March, 1837. The pre-emption of 1814 was

ordered to be cancelled on the 28th February, 1838, while Goodloe was in possession; and it is worth while to observe that one of the reasons for allowing him to enter the tract he did, under the act of 1838, was, that he alleged "*himself to be the purchaser from the individual who made the first-mentioned entry.*"

It is not pretended that Pintard was guilty of any fraud, or that Rhodes was guilty of any; and, if there was fraudulent conduct, this court will be obliged to attribute it to Goodloe. Of that I say nothing, because the case, as I view it, does not demand it.

The principle stated by this court, in *Galloway* v. *Finley*, (12 Pet., 295,) most strongly and pointedly applies: "That if the 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." *Searcy* v. *Kirkpatrick*, Cook (Tenn.), 211; *Mitchell* v. *Barry*, 4 Hayw. (Tenn.), 136. See *Morgan's Heirs* v. *Boone's Heirs*, 4 Mon. (Ky.), 297. Both the cases of *Galloway* and *Searcy*, above cited, must, I think, be regarded as conclusive upon the present. There is, indeed, a strong analogy between the three—a similarity not often found to exist, with this difference, as it appears to me,—that in the one at bar there are more equitable circumstances in favor of the vender, and demanding *the interposition of a court of equity, than in the others. [*30

In the case in 12 Pet., this court further declare, that, "in reforming the contract, equity treats the purchaser as a trustee for the vendor, because he holds under the latter; and acts done to perfect the title by the former, when in possession of the land, enure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed, was derived. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." *Willison* v. *Watkins*, 3 Pet., 45; *Connelly's Heirs* v. *Chiles*, 2 A. K. Marsh. (Ky.) Rep., 242; *Wilson* v. *Smith*, 5 Yerg. (Tenn.), 398; *Blight's Lessee* v. *Rochester*, 7 Wheat., 547. The vendor will be obliged to make an abatement in the purchase-money equal to what it cost to clear the title. *Officer* v. *Murphy*, 8 Yerg. (Tenn.), 502; *Meadows* v. *Hopkins*, 1 Meigs (Tenn.), 181; *Marshall* v. *Craig*, 1 Bibb (Ky.), 396. No court will allow a vendee to pry into and discover defects in his own title, with a view to purchase an outstanding claim, to the prejudice of the vendor. He may perfect his title, it is true, but then it must enure to the benefit of the vendor; and all the vendee

can conscientiously demand is the cost and expense of procuring the better title. In this case it is allowed to Goodloe—nine hundred dollars, all he asks; and which is certainly a very liberal allowance, but of which Pintard does not complain.

This very case furnishes a striking and forcible illustration of the soundness and justice of the doctrine thus laid down by this court. Goodloe, through Pintard, obtained a title to a tract of land by an expenditure of nine hundred dollars, which was worth sixty-five dollars per acre, *or more than ten thousand dollars;* and if he can escape the payment of the purchase money due from Rhodes to Pintard, and which was assumed by Goodloe, he will pocket the last-mentioned sum, and obtain the rich fruits of Pintard's two years' labor on the land for nothing! Can this be tolerated? Can it be thought of? In *Winlock* v. *Hardy*, 4 Litt. (Ky.), 274, it was said, "that a tenant cannot deny the title of his landlord; nor can a person who enters upon land, in virtue of an *executory* contract of purchase, deny the right of him under whom he enters; for he is *quasi* a tenant, holding only in virtue of his vendor's title, and by his permission.

See *Turly* v. *Rodgers*, 1 Marsh. (Ky.), 245; *Logan* v. *Steele's Heirs*, 7 Mon. (Ky.), 104; *Tevis's Rep's* v. *Richardson's Heirs*, Id., 659; *Fowler* v. *Cravens*, 3 J. J. Marsh. (Ky.), 430.

Goodloe never placed himself in a situation to contest the *31] *title of Pintard. If, upon the discovery of the defect in the title of the latter; if, upon the cancellation of the pre-emption certificate under the act of 1814, Goodloe had surrendered the land to Pintard, *bonâ fide*, he might, perhaps, have purchased a better title, and arrayed it in hostility to that of Pintard, and resisted the relief prayed for in the bill. This he did not do. He continued in possession; bought up a better title while in possession; nor is there any proof that he ever disavowed the title of Pintard, until the filing of his answer. 3 Marsh. (Ky.), 287.

The case of *Wilson* v. *Wetherby*, 1 Nott & M. (S. C.) 373, fully sustains this doctrine, and with regard to which this court, in *Willison* v. *Watkins*, 7 Wheat., 53, said: "In the case of *Nott & McCord*, 374, the court decide, that where a defendant enters under a plaintiff he shall not dispute his title while he remains in possession, and that he must first give up his possession, and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of common law

applicable to the cases of fiduciary possession before notice." Id., 54, 55, 56.

Goodloe, by holding the possession, and proving up a preemption in his own name, prevented Pintard from complying with his covenant as to making title; and, such being the fact, the familiar and well-settled principle applies, that if the obligee shall do any act to obstruct or prevent the obligor from performing his part of the contract, the obligor is thereby discharged from its performance; or, to speak more properly, the contract, as far as he is concerned, is in legal contemplation actually performed, and authorizes him to demand performance at the hands of the other party. (Bac. Abr., tit. "Conditions," Q, 3.); 3 Com. Dig., tit. "Condition," L. 6; Co. Lit., 207; Powell on Contr., 417, 418, 419; Pothier on Oblig., 127. In the case of *Marshall* v. *Craig*, 1 Bibb (Ky.), 395, which in many of its features was analogous to the present, it was laid down as a correct principle, abundantly established by authority, "that wherever a man by doing a previous act would acquire a right, if, owing to the conduct of the other party, he is prevented from doing it, he acquires the right as completely as if it had been actually done." See the case, from page 379 to 396, and authorities cited.

In the cases of *Majors* v. *Hickman*, 3 Bibb (Ky.), 217, and *Carrell* v. *Collins*, Id., 429, it is decided that he who prevents the performance of a condition cannot avail himself of the non-performance. 3 Com. Dig., Condition, L. 7; *Borden* v. *Borden*, 5 Mass., 67; *Clendennen* v. *Paulsel*, 3 Mo., 230; *Crump* v. *Mead*, Id., 233.

*"If a purchaser," says Sugden, "takes possession [*32
under a contract, and he afterwards rejects the title, he must relinquish the possession." 2 Sugd. on Vend., 23.

The same principle as to obstructing or preventing the performance of a covenant is applicable to the portion of the southwest fractional quarter of section 6, T. 18 south, range 1 east, because Goodloe, by obtaining the bond of Ben. Taylor from Tunstall, prevented Pintard from getting title to the part embraced in the bond, and which Goodloe says has been found to contain only eleven acres. For this, however, he acknowledges himself liable, and expresses his willingness to pay, and says he "*never did refuse to pay.*" As to title to said eleven acres of this section, as to his liability to Pintard therefor, Goodloe makes no contest; does not resist performance; but, on the contrary, recognizes Pintard's right to relief to that extent.

Indeed, from the proof, we are warranted in believing and assuming it as true, when taken in connection with his an-

swer, that Goodloe has obtained the legal title. In his letter to Peter O'Flynn, employed by him as an agent to procure from Tunstall the bond of Ben. Taylor, dated June 1st, 1840, he says: "I have purchased a tract of land of John M. Pintard, the same he purchased of Thomas T. Tunstall; the title is all perfect except about 20 acres of the southwest fractional quarter of section 6, township 18, range 1 east. Tunstall holds Ben. Taylor's obligation to convey to a particular line known to the seller. Taylor is willing to convey, if Tunstall will send me the obligation. * * * I have the original contract between Pintard and Tunstall, handed to me by Pintard, as an order for the obligation on Taylor. Col. Taylor's wife resides in Kentucky. If you will see Tunstall and forward me the obligation, directed to Richmond, Ky., I can have a deed acknowledged to bring down with me in September." *Vide* copy of letter attached to the deposition of O'Flynn.

Now, O'Flynn testifies, that the obligation was procured by him from Tunstall, and sent to Goodloe, and that Goodloe acknowledged the receipt thereof, and paid him for his services. (See O'Flynn's deposition.) The same fact is acknowledged in a letter from Goodloe to Pintard, dated Nov. 10, 1840. (See exhibit G, letter No. 4.) As Taylor who held the legal title, was willing to convey to Goodloe, provided Goodloe could obtain this bond from Tunstall; as Goodloe did obtain the bond in 1840; and as at the time of filing his amended answer, near five years afterwards, he acknowledged his liability to this extent, and did not even hint at any inability to obtain title, nor declare that he had not obtained it, I think we are bound to conclude that the deed which he said he could procure from Taylor, had been procured, or that he had derived a title to this part satisfactory *to himself, and thus entitling Pintard to compensation and relief. If he could not, or had not, obtained title, with the means in his hands to do so, he would most undoubtedly have insisted on it by way of defense in his answer. Under all the circumstances, silence is conclusive against him; but we have something more than that, namely, a distinct admission of liability, contained in his answer.

*33]

It may perhaps be said, that Taylor ought to have been made a party to the bill. In the first place, I beg leave to remark, that he was not materially interested in the suit; if he had any interest at all it was only nominal, and no beneficial purpose could have been effected by making him a party. He was ready and willing, as Goodloe informs us, to convey; and in fact no decree could have been taken against him; he would have been at best but a passive party; and as he could

do nothing necessary to the perfection of the decree, the court was fully warranted in proceeding without him. *Joy* v. *Wirtz et al.*, 1 Wash. C. C., 417; *Van Reimsdyk* v. *Kane*, 1 Gall., 371; *Mallow* v. *Hinde*, 12 Wheat., 193; *Hoxie* v. *Carr*, 1 Sumn., 173; *Wormley* v. *Wormley*, 8 Wheat., 451.

But, in the second place, it is too late to make the objection, in this court, on appeal. It was an objection not taken in the Circuit Court, either by demurrer, plea, or answer; and surely the appellant cannot be allowed to surprise the appellee with it now. Want of proper parties must be objected to by demurrer, or plea, or answer, and cannot be urged at the hearing. Mitf. Eq. Pl., 146; *Milligan* v. *Milledge*, 3 Cranch, 320.

The next inquiry is as to the lien of Pintard for the unpaid purchase-money. The lien of a vendor of land against it is peculiar to a court of equity, and can be enforced only in that court. It exists as a charge or incumbrance on the land against the vendee and his heirs, and other privies in estate, and also against all subsequent purchasers with notice of the non-payment of the purchase-money. It is wholly independent of possession on the part of the vendor, and attaches to the estate as a trust equally, whether it be actually conveyed or only contracted to be conveyed. 2 Story Eq., 462–467.

"Where a vendor," says Sugden, (Vendors, vol. 3, c. 18, p. 182, 183,) "delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be or be not conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, gives the vendor a lien *on the land* for the money." And he cites, as sustaining these positions, *Chapman* v. *Tanner*, 1 Vern., 267; *Pollixfen* v. *Moore*, 3 Atk., 272; 1 Bro. Ch. Cas., 302, 424; 6 Ves., 483; *Mackreth* v. *Symmons*, 15 Id., 329; **Smith* v. *Hibbard*, 2 Dick, 730; *Charles* v. *Andrews*, 9 Mod., 152; *Topham* v. *Constantine*, Toml., 135; *Evans* v. *Tweedy*, 1 Beav., 55; *Winter* v. *Lord Anson*, 3 Russ., 488. [*34

"So, on the other hand," says he, "if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate." 3 Atk., 1; 2 Younge & J., 493; 3 Id., 262. Thus proving that the lien does not arise nor depend upon perfect title. The term "estate" is used, which "imports," says Coke, "the interest which a man has in lands." Co. Lit., 345, *a;* 4 Com. Dig. Estates, A. 1.

According to the late Judge Story, "the principle upon which courts of equity have proceeded in establishing the lien

in the nature of a trust is, that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not to pay the consideration-money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches to him also, as matter of conscience and duty." 2 Story Eq., 465.

Did not Goodloe get the land through Pintard, and with full notice that the purchase-money was unpaid? Nay, did he not engage to pay that purchase-money himself? As long as he held the possession of the land thus acquired, could he resist this lien? It must certainly be manifest that he could not. The proposition is clear, that Pintard has a lien upon the land derived by Goodloe, through him, which the Circuit Court properly recognized and enforced.

These are the principal points in this case, and upon a careful investigation of them, I think it is obvious that the decree must be affirmed: first, on the law of the case; and, second, upon the principles of common honesty, which exist among men, and which courts of equity will always enforce. I beg the indulgence of the court to allude to a few matters of minor importance.

1. It is insisted in the answer, that the dwelling-house of Pintard was upon section six, and that he was not entitled to a pre-emption under the act of 1834. To this I reply, that whether he was or was not entitled to a pre-emption under that act, is not material to the support of his right to relief. But in fact, he was so entitled. The dwelling-house which was there when Pintard purchased of Tunstall, in the spring of 1833, was probably situated on or near the meridian line which divides section six and section one; but the proof is clear, that all the other buildings, improvements, and cultivation, were upon the southeast quarter of section one, or the large tract, and to which Goodloe subsequently proved up a pre-emption and obtained *the legal title in his own name. Pintard was a settler, or occupant of that tract within the meaning of the act of 1834, (*vide* Instructions and Opinions, 2d vol., p. 589, No. 535; p. 597, No. 543,) and as such most unquestionably entitled to a pre-emption.

*35]

2. Goodloe insists that of section six, sold to Rhodes by Pintard, and by Rhodes to himself, there was not enough embraced in the bond of Benjamin Taylor to make, with the other tract, two hundred acres; and that, upon ascertaining the boundaries and lines specified in said bond, it was found that it did not contain more than eleven acres. How it was ascertained he does not state; and we only have his own

assertion, without proof, that there was but eleven acres. From the proof, (see deposition of Booth,) it appears that the portion of land, thus described by boundaries in said bond, must have amounted to more than eleven acres. The court, however, in the decree, assume that to be the quantity; and of this Pintard does not complain, and surely Goodloe cannot be permitted to do so. That there were not two hundred acres in the whole, could be no ground for a rescision of the contract, if Goodloe were complainant, nor can it furnish any defense to a specific performance when he is defendant. He obtained what he principally desired—obtained the dwelling-house and all the other buildings, all the cleared lands, and all the improvements; he obtained the principal object of his purchase; and, as there was no fraudulent misrepresentation or concealment on the part of Pintard, the case is a proper one for abatement in the amount of the purchase-money to the extent of the small deficiency. This is well settled by authority. Newland on Contr., ch. 12, p. 251, 252; 2 Atk., 371; 4 Bro. C. C., 494; *Drewe* v. *Crop*, 9 Ves., 368; 7 Id., 270; 6 Id., 678; *Calcraft* v. *Roebuck*, 1 Id., 221; *Dyer* v. *Hargrave*, 10 Id., 505; 2 Story Eq., 88; 1 Sugd. on Vend., 506, 507, 508, 525, 526.

If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey. 1 Sugd. on Vend., ch. 7, § 3, p. 525 to 535, and notes and cases therein cited, 6th Am. edit.

Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contains the words more or less, or by estimation. Id., 526; *Hill* v. *Buckley*, 17 Ves., 394; 1 Call. (Va.), 313; 4 Mason, 419.

The utmost that Goodloe could claim, would be an abatement for the deficiency. This the court allowed him; or what *amounts to the same thing, charged him with the $168\frac{96}{100}$ acres, and the eleven acres at the contract price. [*36 Surely he will be obliged to resort to some other ground upon which to assail the present decree.

3. Goodloe has waived his right, if any he ever had, to object to Pintard's title. His letters, after having proved up a pre-emption in his own name, and especially the payment made by him to Pintard on the 31st May, 1839, of $\$1{,}363\frac{82}{100}$, amount to a waiver. The pre-emption having been proved up on the 15th February, 1839, this payment was made more than three months afterwards. The letters alluded to, begin-

ning in January, 1840, and ending in October, 1841, embrace a period of near two years; and when that payment and these provisions to pay are taken into consideration, there could hardly be more conclusive evidence of such waiver. 2 Sugd. on Vend., 10–14; *Margravine of Anspach* v. *Noel*, 1 Madd., 310; 2 Swanst., 172; 3 Younge & Coll., 291.

I beg leave to invite attention to the very able opinion of the Circuit Court, delivered by the district judge, the Hon. Benjamin Johnson. Viewing the whole record, it appears to me that Goodloe has no reasonable ground on which to assail this decree. All the payments made by him have been credited; the expense of procuring the better title, nine hundred dollars, has been abated from the purchase-money; and an abatement, at the rate of forty dollars per acre, has also been made for deficiency in quantity in section six. Surely he cannot conscientiously deny that justice has been done him; and, when his conduct in this transaction is scrutinized by a just and enlightened court, he can hardly expect to succeed in his appeal—hardly expect to escape that responsibility which the enlarged principles of a court of equity fix upon him.

The case of *Bush* v. *Marshall*, 6 How., 291, is referred to as being precisely in point.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court, for the District of Arkansas.

Under the act of the 12th of April, 1814, Jane Mathers claimed a right of pre-emption, by virtue of occupancy and cultivation, to the southeast quarter of section one, township eighteen south, range one west, containing one hundred and sixty-eight acres and ninety-six hundredths, lying south of the Arkansas River. She assigned her right to Thomas T. Tunstall, who entered and paid for the land at the Land-Office at Little Rock, the 24th of July, 1834, and obtained a patent certificate. On the 24th of February, 1838, this purchase was annulled by the Commissioner of *the Land-Office, on the ground that the Indian title to the land had not been extinguished when the settlement was made. The Indian title was relinquished to the United States by the Quapaw treaty, the 24th of August, 1818.

*37]

This tract was purchased of Tunstall by Pintard, in the spring of 1833, who took immediate possession, and made improvements on it. In the autumn of the same year he removed his family to the land, constructed cabins, stables, and other fixtures, and in the spring of 1834 he cultivated seventy-five or eighty acres in corn and cotton.

On the 23d of March, 1835, Pintard sold the above quarter section, and a part of the southwest quarter of section six, so as to make a tract of two hundred acres, at forty dollars per acre, to William Rhodes, who gave two notes of four thousand dollars each, payable in one and two years, with interest at ten per cent. per annum. The two hundred acres were sold by Rhodes to Goodloe on the 3d of March, 1837, for sixty-five dollars per acre. As a part of the consideration for this purchase, Goodloe agreed to pay Pintard the amount of his claim as soon as a regular title for the premises should be obtained.

Goodloe, on the 15th of February, 1839, proved a pre-emption in his own name, under the act of June 22d, 1838, to the quarter section, and paying the purchase-money into the Land-Office, he obtained a patent in his own name. Prior to this, on his contract with Rhodes, he paid to Pintard nineteen hundred sixty-three dollars and eighty-two cents. But having obtained the title to the land in his own name, he refused to make any further payments to Pintard on the ground that his claim was void. To enforce the payment of the sum due him on the sale to Rhodes, Pintard filed the bill now before us, with a prayer that the land might be sold, or so much of it as should be necessary to discharge the balance due to him.

It must be conceded that the first settler upon this land, the Indian title to it not having been extinguished, could claim under the act of 1814, no pre-emptive right. No laws giving to settlers a right of pre-emption, can be so construed as to embrace Indian lands. Such lands have always been protected from settlement and survey by penal enactments. But, it appears that the Indian claim to this land was relinquished to the United States by treaty, in 1818; after which it was embraced by all general acts giving to settlers a right of pre-emption.

By the act of the 26th of May, 1824, pre-emption rights were given north of the Arkansas River, to all who were entitled to such rights, under the act of 1814, and by the third section of the act of the 1st of March, 1843, every settler on the public lands south of the Arkansas River was entitled to the same benefits *under the provisions of the act of 1814, as though he had resided north of said river. By these acts a right of pre-emption was given in virtue of the first settlement upon the land. [*38

But there was another and prior act which gave to the occupant of this tract a right of pre-emption. By the act of the 19th of June, 1834, every settler upon the public lands prior to the passage of that act, who was in possession of a quarter section and cultivated a part of it in 1833, was entitled

39

to a pre-emption. In 1833, Pintard was in possession of the quarter section and cultivated a part of it, and he continued to occupy and improve it, until the spring of 1835, when he sold his right to Rhodes.

By his purchase Goodloe entered into the possession of a valuable property, and if he desired to rescind the contract it was incumbent on him to relinquish the possession of the quarter section, and claim the cancelment of the contract. He cannot avail himself of the benefit of the contract and resist a performance of it on his part.

But Pintard, when he sold to Rhodes, was entitled to the pre-emption of the quarter section. His claim was not only a valid one, but it was sold on reasonable terms, as Rhodes in two years sold the same to Goodloe at an advance of twenty-five dollars per acre. The attempt, under such circumstances, of Goodloe to avoid the payment of the consideration, by procuring the title in his own name, is fraudulent. A title thus procured would have enured to the benefit of the vendor, even if the pre-emptive right had not been vested in him.

A doubt is suggested in the argument whether Goodloe, having purchased from Rhodes, can be made responsible to Pintard. In his contract of purchase, as a part of the consideration, Goodloe bound himself to pay the amount due to Pintard from Rhodes on the previous purchase. It has been held that, under such circumstances, an action at law may be maintained in the name of the person to whom payment is to be made. But this is a case in chancery, and no one has doubted, that in equity, such a contract may be enforced.

Has Pintard a lien upon the land for the balance of the purchase-money? We think he has. Goodloe not only had notice of this claim, but he bound himself to pay it.

It is alleged that there is a mistake in the computation of the amount due, as decreed in the Circuit Court. If there be an error in the calculation, it is in favor of Goodloe, and of which he has no right to complain.

In their decree the Circuit Court gave the defendant a credit for the money paid to Pintard, and also a loan to him of two hundred dollars, and a liberal allowance for the expense of procuring the title. A proper deduction was also made for the deficiency in the number of acres sold.

*39] *There appears to be no error in the decree; it is therefore affirmed, with costs.

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 Arkansas, 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.

GEORGE W. PARKS, PLAINTIFF IN ERROR, *v.* SUMPTER TURNER AND HENRY RENSHAW, TRADING UNDER THE COMMERCIAL FIRM OF TURNER & RENSHAW.

In Louisiana, the Supreme Court of the State reviews the questions of fact as well as of law which are brought up from the courts below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given.

But when a case is brought before this court by a writ of error, it can only review questions of law; and, therefore, where the validity of a verdict of a jury is brought into question, the practice which prevails in the state courts of Louisiana is inapplicable in the courts of the United States.

Hence, where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and, the court then gave judgment for the amount of the note, this would have been adjudged to be a cause of reversal of the judgment by the Supreme Court of the state, but cannot be so held by this court.

The sufficiency of the verdict must be judged by the rules of the common law and the statutes of the United States, and not by the laws and practice of Louisiana. The act of 1824 (4 Stat. at L., 62) does not include such a case.

By the common law, although a judgment in such a case might not have been strictly proper, yet under a power of amending the verdict, the judgment can stand, because the plea having been that no consideration was given for the note and the verdict being for the plaintiff, it necessarily found that the whole amount was due.[1]

The 32d section of the Judiciary Act provides for this case by enjoining upon this court to disregard niceties of form, and so it was decided in 16 Pet., 321.[2]

The Constitution of Louisiana requires the state judges to give reasons for their decisions; but this is not operative upon the judges of the Circuit Court of the United States. On the contrary, their reasons form no part of the record when the case is brought up to this court.

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

The plaintiffs, Turner & Renshaw, sued the defendant, Parks, in the Circuit Court of the United States for the East-

[1] The statute of jeofails embraces verdicts defective in form, but substantially sufficient to enable the court to perceive the right of the case. *Roach* v. *Hulings*, 16 Pet., 319; *Downey* v. *Hicks*, 14 How., 240; *Railroad Co.* v. *Lindsay*, 4 Wall., 650. And see note to *Stockton* v. *Bishop*, 4 How., 155.

[2] APPLIED. *Morsell* v. *Hall*, 13 How., 215.

ern District, at New Orleans, to recover $5,969.22, due by promissory note executed by Parks to the plaintiffs. After
*40] exceptions overruled, *the case was submitted to a jury, who returned the following verdict:—

"We, the jury, find for the plaintiff.

"New Orleans, May 14th, 1849.

"H. R. WOOD, *Foreman;*"

which, on motion, was set aside, and the case submitted to another jury, who returned the following verdict:

"We, the jury, find for the plaintiff.

"GEO. M. PINCKARD, *Foreman;*

"New Orleans, 15th May, 1849.

On which verdict the following judgment was entered:

"In conformity with the prayer of the petition and the verdict of the jury, it is ordered, adjudged, and decreed, that the plaintiffs, Turner & Renshaw, recover from the defendant, George W. Parks, the sum of five thousand nine hundred and sixty-nine dollars and twenty-two cents, with interest thereon, at the rate of six per cent. per annum, from the first day of January, A. D., 1848, until final payment, and costs of every nature."

"Judgment signed 19th May, 1848.

(Signed,) THEO. H. MCCALEB,
U. S. Judge."

Parks sued out a writ of error and brought the case up to this court.

It was argued by *Mr. Henderson*, for the plaintiff in error, and *Mr. Mayer*, with whom was *Mr. Strawbridge*, for the defendants in error.

Mr. Henderson, for plaintiff in error.

There are two most manifest errors in this case. First, in the verdict of the jury, which is found thus: "We, the jury, find for the plaintiff."

But the verdict specifies *nothing* which the jury find for the plaintiff, and is in direct opposition to Art. 522, Code of Practice; and is adjudged error by the Supreme Court of Louisiana. 13 La., 109; 14 Id., 344.

The second error is, that the court gave *no reason* for its judgment. This is fatal. It was the requirement of the Constitution of Louisiana of 1811, and is readopted in the new Constitution of 1845, wherein article 70 provides: "The judges of *all the courts* within this state shall, as often as it

may be possible so to do, in every definite judgment, refer to the particular law in virtue of which such judgment may be rendered; and in *all cases*, adduce the reasons on which their judgment is founded."

*The cases in 4 Mart. (La.), 453, 4, 5, and in 12 La., 143, pronounce the judgment *unconstitutional* which furnishes no reasons for its decree. And the cases are numerous where this omission is adjudged error. 4 Mart. (La.), 463; 12 La., 143; 2d La. Ann., 59; 10 Mart. (La.), 56; 5 Id., 687–689; 11 La., 162; 13 Id., 13 and 108. [*41

This court will of course take no notice that the rules of practice in the state courts furnish the rules of practice on the *law side* of the Circuit Court of the United States for the District of Louisiana. And we admit, that were these exceptions before the Supreme Court of Louisiana, that the court, after reversing the judgment, would substitute themselves for the jury, and give a new and correct judgment, *without a verdict.*

But this court has repeatedly decided that it cannot, in a *law case*, *re-try the facts*, as the Supreme Court in Louisiana may do. Therefore, on reversal for the errors above shown, this court will award a *venire de novo.*

The counsel for the defendants in error contended that there certainly was a verdict—and a legal and valid one—rendered by the jury, fully authorizing the judgment pronounced. If it be meant that the verdict is for no particular sum, we answer, simply, that this does not vitiate either verdict or judgment; although, in strictness of form, the sum should perhaps be specified. But "the finding of a jury must be construed with reference to the pleadings. *Trepagnier* v. *Durnford*, 5 Mart. (La.), 452; *Harrison* v. *Faulk*, 3 La., 70. Thus, where a defendant, assuming the attitude of plaintiff in reconvention, had pleaded that the plaintiff owed him a larger specific sum than he owed plaintiff, and the jury found for defendant generally, without stating any amount, the court gave judgment in his favor for the difference or surplus. *Orleans Nav. Co.* v. *Bingey*, 6 Mart. (La.), N. S., 689; *Irwin* v. *Ware*, 1 Id., 645. So, in case of a judgment by the court for no specific amount, it must be construed with reference to the pleadings. *Melancon's Heirs* v. *Duhamel*, 3 Mart. (La.), N. S., 7; *Rochelle's Heirs* v. *Cox*, 5 La., 287.

In the present case, the prayer of the petition distinctly claims a specific amount, with interest and costs; and the verdict and judgment must of course be construed with reference thereto.

As to the last cause of error assigned—"That the judgment

contains no reasons," it is enough to reply, that the court could not decide otherwise than the jury found; and all reasons for judgment were therefore superfluous. Parks, although under section 23 of the State Act of 1839, p. 172, not really entitled to a trial by jury, had made them his judges, and they decided against him. The power of the court became thus
*42] limited to *sanctioning their verdict. "A judgment, which gives as the only reason why it was rendered—that the jury has found a verdict for plaintiff—will be held valid and sufficient." *McDonough* v. *Thompson*, 11 La., 565.

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

The material facts in this case may be stated in a few words. Turner and Renshaw, the defendants in error, filed their petition in the Circuit Court of the United States for the Eastern District of Louisiana, alleging that Parks, the plaintiff in error, was indebted to them in the sum of fifty-nine hundred and sixty-nine dollars and twenty cents, upon a promissory note for that sum, drawn by Parks, payable to his own order, and by him indorsed to the plaintiffs. A copy of the note is exhibited with the petition.

Parks in his answer states, that he denies all and singular the allegations in the petition except as therein afterwards admitted:—and says that the said note was given without any consideration whatever, and is therefore a *nudum pactum*, and void.

Upon this issue the case was tried by a jury, who returned a verdict in the following words: "We the jury find for the Plaintiff."

And upon this verdict the court gave judgment in favor of Turner and Renshaw for the sum due upon the note; and the present writ of error is brought by Parks to reverse that judgment.

Two objections are taken by the plaintiffs in error.

1st. That the verdict merely finds for the plaintiffs, in the Circuit Court, but does not find how much was due to them; and that no judgment therefore could be lawfully entered on that verdict.

2d. That the Circuit Court gave no reason for its judgment.

These objections have been argued altogether upon the laws of Louisiana regulating the proceedings in its courts of justice; and which, under the act of Congress of 1824, are supposed to be obligatory upon the Circuit Court of the United States.

Article 522 of the Code of Practice declares, "that the form of a general verdict consists in the foreman indorsing on the

back of the petition those words: 'verdict for the plaintiff for so much, with interest,' if it has been prayed for; or verdict for defendant, according as the verdict is for plaintiff or defendant."

And the 70th article in the new Constitution of Louisiana, adopted in 1845, provides that "the judges of all the courts within the state, shall, as often as it may be possible so to do, in every definitive judgment, refer to the particular law in virtue of which such judgment may be rendered; and in all cases adduce the reasons on which their judgment is founded."

*It is evident, therefore, that if this case depended upon the laws and practice of Louisiana, the judgment of the Circuit Court could not be maintained. Either of the objections would be fatal. And the case of *Hosea's Widow and Heirs* v. *Miles*, 13 La., 107, is directly in point upon both grounds. [*43

But it is difficult to apply the rules of Louisiana practice in a case where the validity of a verdict is in question. The appellate court of that state has jurisdiction of the fact as well as of the law; and in deciding upon the fact the court is not bound by the finding of the jury in the inferior court, but may decide in opposition to the verdict, if they think it was not warranted by the testimony in the record. And when they reverse the judgment of the court below, for error in fact or in law, they at the same time give the judgment which the inferior court ought to have given.

Upon an appeal, therefore, to the Supreme Court of the state, for errors like those now alleged to have been committed by the Circuit Court of the United States, although the judgment would have been reversed, yet the state court would at the same time have given judgment in favor of the defendants in error for the full amount of their debt. They would not have been delayed in the recovery of their money by mere technical objections to the proceedings in the inferior court, nor subjected to the expense of another trial, and perhaps another appeal. The case of *Hosea's Widow and Heirs* v. *Miles*, shows the course of proceeding in the state courts. For precisely the same errors now alleged in the case before us, were committed in that case by the court below; and although the Supreme Court reversed the judgment, on both grounds, they at the same time gave judgment in favor of the appellee for the amount due upon the note.

Now as to the first objection, we certainly cannot adopt in this court the practice and mode of proceeding in the appellate court of Louisiana. For a writ of error can bring up to this court nothing but questions of law. And as the whole

practice of Louisiana cannot be adopted in a case of this description, is the Circuit Court bound to follow it? and must the validity of this verdict depend upon the rules of the common law, and the acts of Congress, or upon the formula prescribed by the Louisiana code of practice? Unquestionably the force and operation of the verdict when the case is brought here, depends upon the rules of the common law. It is conclusive upon this court as to the fact found, while in Louisiana it is open to revision and reversal in the appellate court. And if the conclusive force and effect of a verdict depends upon the rules of the common law, it would seem to follow, that what is a sufficient finding by the jury to *constitute a legal verdict upon the issues joined, and to make it operate as such, must also depend upon the rules of the common law, except in so far as they may be modified by acts of Congress. And while this court is bound to give effect to the verdict according to the rules of the common law, it can hardly be required to look elsewhere, in order to ascertain what finding of the jury is a verdict, and entitled to the conclusive effect which the common law gives it. And if in this case it had appeared that the verdict had been delivered orally by the foreman and recorded by the court, and not indorsed on the back of the petition, this court could not on that account have treated the finding as a nullity, and refused to it the authority and force of a verdict.

*44]

Besides, the enforcement of the Louisiana practice in the Circuit Court of the United States, would place the suitors in that court in a worse condition than the suitors in the state courts, and an accidental departure from the prescribed form would be much more injurious in its consequences. We think the sufficiency of the verdict, in its form, as well as the question of its force and effect must depend upon the rules of the common law and the statutes of the United States. And that the qualified adoption of the practice of Louisiana by the act of 1824 was not intended to carry it to the extent now contended for by the plaintiff in error.

We proceed, therefore, to consider the case upon the principles of the common law and statutes of the United States.

The answer of the plaintiff in error, by necessary implication, admits that he executed and indorsed the note. For the only defense he takes in his answer is that it was given without consideration, and was *nudum pactum*. The issue was joined upon this point only. The answer contains no other objection to the validity of the note, nor does it allege that any part of the note had been paid, nor that he had any set-off against it, and upon these pleadings and issue the jury say

they find for the plaintiff. Now this verdict undoubtedly finds that the note was given upon a good consideration, although the jury do not say so in so many words; and it is equally clear, that in finding that it was given upon a valid consideration, they must necessarily have found also that the full amount specified in the note was due to the defendants in error. For there was no allegation and no evidence that any part had been paid. No one, we think, can read the pleadings and the verdict without being satisfied that this is the true meaning of the jury. There is no ambiguity or uncertainty in it. And the judgment in the Circuit Court is evidently according to this finding, and is therefore correct, unless there is some rule of law which renders the verdict inoperative and void.

*It is certainly the province of the jury, in a case of [*45
this kind, not only to determine whether the plaintiff is entitled to recover, but to find also and at the same time the amount due. And, in a court acting strictly upon common law forms and modes of proceeding, no judgment could have been legally entered, because the verdict omits to specify, in express terms and in the established form, the amount which the defendants in error were entitled to recover. How far the verdict might even yet be amended in the Circuit Court, is another question. For although the rule was anciently very strict in not permitting amendments to verdicts, yet, in later cases, this strictness has been relaxed in order to prevent a failure of justice; and while the English courts adhered to the established forms they often prevented them from working injustice to the parties by a liberal use of the power of amendment.

Thus in the case of *Richardson* v. *Mellish*, 3 Bing., 334, 346, a general verdict had been rendered and damages assessed upon a declaration in which one count was good and the others bad. A judgment upon this verdict was rendered in the Court of Common Pleas without adverting to the insufficiency of some of the courts, and the case was afterwards removed to the King's Bench by writ of error. As the record stood, the judgment of the Court of Common Pleas must undoubtedly have been reversed. But while the case was pending in the King's Bench, and had been argued there, and this error insisted upon as a ground for reversal, the Court of Common Pleas amended the verdict by entering it for the plaintiffs on the good count, and for the defendant in those counts which did not show a cause of action. The court was convinced, by the notes of the judge who tried the case, that the evidence offered at the trial applied to the good count,

and that there would be a failure of justice if the judgment was reversed upon this technical objection, which could and would have been readily removed if made at the trial.

We refer to this case to show that the English courts when acting altogether upon the principles of the common law, will amend a verdict actually rendered by the jury and recorded, if the court is satisfied, from the evidence and the pleadings, that in the form in which it was given by the jury it does not accomplish what they intended, and would, on that account, fail to do justice to the party in whose favor they found.

But it is not necessary to examine further into the practice of courts acting upon the rules of the common law; nor to inquire whether the verdict in this case, if defective in form, might not yet be amended in the Circuit Court. For we are satisfied that the thirty-second section of the act of Congress *46] of *1789, ch., 20, removes all difficulty in the case, and makes it the duty of this court to affirm the judgment rendered on this verdict.

The section of the law referred to directs the courts of the United States to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring shall specially sit down and express together with his demurrer as the cause thereof. This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them. And although verdicts are not specially mentioned in this provision, yet the words "or course of proceeding whatever," are evidently broad enough to include them; and, as they are within the evil, they cannot, upon a fair interpretation of the statute, be excluded from the remedy.

The question, however, has been already decided in this court in the case of *Roach* v. *Hulings*, 16 Pet., 321, 322. In that case, as in the one now before the court, the verdict was defective according to strict technical rules, and no judgment could legally be entered upon it. But this court held that the act of Congress above mentioned was intended to remove objections of that description where they impeded the administration of justice, and that it extended to imperfections and want of form in the findings of juries, as well as to the other

proceedings in the suit. And although, according to the strictness required by common law rules, the judgment must have been reversed, the court sustained it upon the ground that the substantial meaning of the verdict was manifest, and the defects objected to cured by this act of Congress. The intention of the jury in the case before us is equally clear upon the record; and upon the principles decided in the case of *Roach* v. *Hulings*, equally within the protection of the act of Congress. The right of the cause, and the legal obligation of the plaintiff in error to pay this money, is sufficiently apparent upon this record.

The second objection, taken by the plaintiff in error, is obviously untenable. The provision in the Constitution of Louisiana requiring the judges in the different courts to adduce the reasons upon which their judgment is founded can, of course, have no authority in the courts of the United States unless adopted by an act of Congress. And the act of 1824, adopting, to a certain *extent, the practice of the state courts, has no reference to a provision of this description. Indeed, such a provision is inconsistent with the practice and modes of proceeding in the courts of the United States. For the reasons upon which the opinion of the inferior court is founded form no part of a record when a case is brought here by writ of error. They cannot properly be inserted in a bill of exceptions. The point or principle of law, as applied to the case before the court, is all that is certified, and not the reasons upon which the court decided. [*47

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 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 and damages, at the rate of six per centum per annum.

AUGUSTE DE MONTAULT, AUGUSTINE RENE THERESE MONTAULT BY HER NEXT FRIEND LOUIS MONTAULT AND WILLIAM ROGER DE LA CHOUQUAIS, HUSBAND OF THE SAID AUGUSTINE, LOUIS MONTAULT, BERNARD DAUTIERRE, VALERIE DAUTIERRE, ELEANOR DAUTIERRE BY HER NEXT FRIEND LOUIS MONTAULT AND HER HUSBAND AUGUSTIN RICHARD, ADELINE DAUTIERRE, VIRGINIE DAUTIERRE, BY HER NEXT FRIEND LOUIS MONTAULT AND HER HUSBAND LOUIS BOULIGNY, FANNY DAUTIERRE, THEODORE DAUTIERRE, PAULINE DAUTIERRE BY HER NEXT FRIEND LOUIS MONTAULT AND HER HUSBAND SAMUEL LOGAN, APPELLANTS, *v.* THE UNITED STATES.

This court again decides, as in 9 How., 127, 280, and 10 How., 609, that, with respect to the tract of country between the Mississippi and Perdido rivers, south of the thirty-first degree of north latitude, the authorities of Louisiana had no right to make grants of land after the time of signing the treaty, by which it was ceded to Great Britain.

That treaty having been signed on the 10th of February, 1763, a grant of land in the above tract of country, issued by the French Governor of Louisiana, on the 11th March, 1763, was void.[1]

THIS was an appeal from the District Court of the United States for the Southern District of Alabama. It was a petition presented under the act of 1824, relating to land titles in Missouri, *as revised and made applicable by the act of 1844, to that part of the state of Alabama, below the thirty-first degree of north latitude.

*48]

The petition sets forth: "That your petitioners are the only heirs of the Chevalier Montault de Monterault, who, many years since, departed this life intestate, in the then province, now state, of Louisiana. Your petitioners further allege, that heretofore, to wit, on the third day of January, in the year seventeen hundred and sixty-three, the said Chevalier Montault de Monterault petitioned the then governor of the Colony of Louisiana for the grant of a tract of land lying south of the thirty-first degree of north latitude, and between the rivers Mississippi and Perdido, and within the state of Alabama, bounded by the rivers La Batture, now known as bayou Battre, the Gulf of Mexico, and Fowl River, extending into the interior to the sources of those rivers, and especially that branch of Fowl River, known as the Elwer or Leslay,

[1] See also *United States* v. *Pillerin*, 13 How., 9; *United States* v. *Rillieux's heirs*, 14 Id., 189; *United States* v. *Ducros*, 15 Id., 38; *United States* v. *Lynde*, 11 Wall., 643.

which, approaching each other, form a tract of land or cul-de-sac.

"Your petitioners further allege that, heretofore, to wit, on the eleventh day of March, in the year seventeen hundred and sixty-three, Louis de Kerlerac, then governor of the Colony of Louisiana, and Dennis Nicholas Faucault, performing the functions of commissary ordonnateur of said province, holding their appointments under the King of France, executed and delivered to the said Chevalier Montault de Monterault, a grant to said tract of land, by virtue of which he possessed it for many years, and used it for the purpose of cultivation, raising horses and cattle, and making tar; and the said Montault de Monterault was, at the time of making said grant, a resident of Louisiana; and said grant is protected by the treaty between the United States and France for the cession of Louisiana. Your petitioners allege that he never aliened the said land, that it belonged to him at the time of his death, and that it has descended to your petitioners as his legal heirs, and that it contains about forty-five thousand superficial acres.

"Your petitioners allege, that their claim aforesaid has not been submitted to the examination of any of the tribunals which have been constituted by law for the adjustment of land-titles, nor reported on by such tribunal. Wherefore, your petitioners pray that the validity of their claim aforesaid may be inquired into and decided by the said court; and reserving the right of amending their petition, and of making other persons parties to this proceeding if necessary, they pray that a copy of this their petition be served on the District Attorney of the United States for the Southern District of Alabama. And they further pray, that, after proper proceedings, it may be decreed by this court *that the title held by your petitioners to the above-described tract of [*49
land is good as against the United States and all persons claiming under them, and that they may be permitted to locate elsewhere a quantity of land equal to what the government of the United States may have sold or granted within the limits of the grant aforesaid to the Chevalier Montault de Monterault; and your petitioners pray for other and further relief, such as the nature of their case may require."

To this petition the District Attorney filed a general demurrer.

The District Judge sustained the demurrer, and the petitioners brought the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Badger*, for the

appellants, and by *Mr. Crittenden*, Attorney-General, for the United States.

The counsel for the appellants rested the case upon the following point:

The grant in this case was complete, and the grantee was in possession of the land and cultivated it.

It is true, the grant bears date about one month after the treaty of Paris, of the 10th of February, 1763.

But by the treaty of San Ildefonso, of October 1, 1800, the province of Louisiana was retroceded to France.

The permission of undisturbed possession under the grant by France, after her re-acquisition of the province, amounts to a confirmation.

Mr. Crittenden, made three points:

1. That on the 11th day of March, 1763, the date of the alleged grant, as stated in the petition, the French authorities, by whom it is alleged to have been made, had no power to make such a grant, the country within which the land is situated having been previously ceded by France to Great Britain, to wit, on the 10th February preceding. The tract of land embraced within the grant, lies on the shore of the Gulf of Mexico, a short distance to the west of the entrance of Mobile Bay.

The preliminary articles of peace between Great Britain, France, and Spain, were signed at Fontainebleau, the 3d November, 1762, and the definitive treaty at Paris, on the 10th February, 1763. Marten's Treaties, 17, 33. By the sixth article of the preliminary articles, and the seventh article of the definitive treaty, it was agreed between France and Great Britain, "that, for the future, the confines between the dominions of his Britannic Majesty and those of his Most Christian Majesty, in that part of the world, shall be fixed irrevocably, *50] by a line drawn *along the middle of the Mississippi, from its source to the River Iberville, and from thence, by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain, to the sea; and for this purpose the Most Christian King cedes in full right, and guarantees to his Britannic Majesty, the river and port of Mobile, and every thing which he possesses, or ought to possess, on the left side of the River Mississippi, with the exception of the town of New Orleans, and of the island in which it is situated, which shall remain to France. Translation in 2 White's Recop., 291.

By the twentieth article of the definitive treaty, Spain ceded Florida to Great Britain, "as well as all that Spain possesses,

on the Continent of North America, to the east or the south-east of the River Mississippi." The authorities to sustain the proposition are, *United States* v. *Reynes*, 9 How., 127; *Police Jury of Concordia* v. *Davis*, Id., 280.

2. That the description of the lands, alleged in the petition to have been granted, is so vague, indefinite, and uncertain, that they could not be identified, and the alleged grant is therefore void. *United States* v. *Miranda*, 16 Pet., 156; 15 Id., 184, 215, 275, 319; 10 Id., 331; 3 How., 787; 5 Id., 26; and the case of *United States* v. *Villalobos*, decided the present term.

3. That the petitioners should have made other persons, claiming the lands, or any portion of them, under a different title, or holding possession otherwise than under them, parties to this suit.

The court is respectfully referred to the argument, on this point, on behalf of the United States, in the case against Boisdore's heirs, at the present term. The district judge in Louisiana, held that it was necessary to make such parties, and the district judge of Mississippi, that it was not necessary.

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

The appeal in this case was taken from the decision of the District Court for the Southern District of Alabama.

The appellants filed a petition in that court to establish their title to a tract of land situated south of the 31st degree of north latitude, and between the Rivers Mississippi and Perdido, in the state of Alabama, the boundaries of which are set out in the petition. They state that the land in question was granted to the Chevalier Montault de Monterault on the 11th of March, 1763, by Louis Kerlerac, then Governor of the Colony of Louisiana, and Louis Nicholas Faucault, performing the functions of commissary ordonnateur, both of them holding their appointments under the King of France, and the petitioners claim title as the descendants and legal heirs of the grantor.

The only question which arises on this record is upon the *validity of this grant. It is objected to on account of the vagueness and uncertainty of the boundaries as set forth in the petition. But it is not necessary to express our opinion upon this point, because the other objection taken on behalf of the United States is conclusive, and it is very clear that the French authorities had no right to make this grant, and that it conveyed no title to the ancestor of the petitioners. For the definitive treaty of peace between Great Britain, [*51

France, and Spain, by which the territory in which this land is situated was ceded to Great Britain, was signed on the 10th of February, 1763, and consequently the French authorities could not, after that day, grant a title to lands lying in the ceded territory. This point was decided in the cases of the *United States* v. *Reynes*, 9 How., 127; *The Police Jury of Concordia* v. *Davis*, Id., 280; and the *United States* v. *Dauterieve*, 10 Id., 609. And as the grant in question was not made until the 11th of March next following the date of the treaty, it was at that time the exercise of a power by the French authorities which they no longer possessed, and could convey no title to the grantee.

The decree of the District Court dismissing the petition was therefore correct, and must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE FARMERS' BANK OF VIRGINIA, APPELLANTS, *v.* HORACE H. GROVES, ADMINISTRATOR OF MOSES GROVES, DECEASED.

The principles of law decided in this case are so dependent upon the facts that a succinct statement of the latter becomes necessary.

Collier was in possession of two drafts drawn by King upon Groves and accepted by him for the accommodation of King. Collier pledged these drafts to the Farmers' Bank of Virginia, as collateral security for a debt which he owed the bank.

The drafts not being paid at maturity, the bank sued both Groves and King, and recovered judgments against them, which were liens upon their property.

Collier and King then agreed, that if Collier were to purchase King's property at a certain sum, he would return his drafts to him and free him from the bank. To this agreement Groves was a witness, and the purchase was accordingly made.

Collier and the bank then agreed that the bank should give him time and he
*52] should *give additional collateral security to the bank and mortgage his property; first reducing the liens of prior mortgages down to a certain sum. The bank was moreover to surrender the collateral securities previously received. The mortgage was made by Collier and the collateral security surrendered to him by the bank.

After this, the bank had no right to prosecute the judgment which it had obtained against Groves.

The Farmers' Bank of Virginia *v.* Groves.

By the first agreement made between King and Collier, to which Groves was privy, Collier exonerated Groves, as far as it was in his power; and in consequence of the second agreement between Collier and the bank, Collier became re-invested with the whole control of the matter and his previous exoneration of Groves became immediately operative. Groves was, therefore, entirely discharged from all responsibility.

The failure of Collier to comply with his contract with the bank, did not prevent this exoneration of Groves from being effectual.[1]

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana, sitting as a court of equity.

The facts in the case are set forth in the opinion of the court, to which the reader is referred.

It was argued by *Mr. M'Farland*, for the appellants, and *Mr. Johnson*, for the appellee.

The grounds upon which a reversal of the decree was claimed, were the following:

It ought to be remarked, in the first place, that the only contract to which the bank admits itself to have been a party, after the rendition of their judgment against Groves, was a new mortgage given by Collier to Pegram, their agent, about the month of December, 1841, and of that contract there is no copy in the record, and it was not in evidence in the court below. Now, it is in reference to that contract that the bank, while admitting that it was understood at first, that the collateral security was to be surrendered to Collier, yet, he neither paid the notes secured by the new mortgage, nor did he insist on the surrender of the collaterals, but expressly waived the assignment of the judgment and consented that it should stand as additional security for Collier's debt, inasmuch as it turned out that the property was subject to heavy previous incumbrances. Is there any thing in the record in reference to that contract from which this court can infer an intention on the part of the bank to operate a novation unconditionally of the judgment against Groves, which is not even alleged in the bill, and to substitute in its place a new mortgage on the property of Collier, and his promissory notes? Such a security will be regarded by the law of Louisiana, where the contract was entered into, as cumulative, unless the previous debt was released in express terms. It is of the essence of a novation that the first debt be extinguished, and a new one substituted in its place; a novation is never presumed.

[1] See *Northern Pac. R. Co.* v. *Kindred*, 14 Fed. Rep., 80; s. c. 3 McCrary, 631.

See Louisiana Code, art. 2181, *et seq.*; 2 La. Ann., 188; *Parker* v. *Alexander*.

It is an ominous circumstance in reference to this new con-
*53] tract *or mortgage, that it was not produced in evidence by the party claiming the benefit of its stipulations. If it had contained an absolute release of the judgment against Groves, the sagacious and able counsel of the estate would not have failed to introduce it in support of the allegations in their bill. As it was in their power and was withheld, we have a right to infer that its production would have made against them.

But there is another view of this matter which, it appears, was absolutely insuperable.

Moses Groves was not a party to the new contract in 1841, and he now seeks to avail himself of a stipulation in his favor contained in it. This is what, in the technical language of the civil law, is called a *stipulation pour autrui*, or a stipulation in favor of a third person. The doctrine is well settled, that third persons may accept such stipulation in their favor, and enforce them either by action or exception. But before such acceptance and its notification to the parties, it may be retracted and desisted from, and the third person has no right to complain. Now in this case, it appears that Collier waived the release of the collateral security previously given, and agreed that the new mortgage should stand as additional security for the debt due to the bank, long before Groves sought to rely upon it as a discharge of the judgment against him.

See *Flower v. Lane et al.* 6 Mart. (La.), N. S., 152; *Pemberton* v. *Zacharie et al.*, 5 La., 316; *Mayor et al.* v. *Bailey*, 5 Mart. (La.), 322; *Marigny* v. *Remy*, 3 Id., N. S., 607.

We come now to examine the contract between Collier and King, on which the complainants rely in their bill as evidence of a discharge or payment of the judgment against Groves. It is remarkable that neither the bank nor Moses Groves was a party to that agreement. Collier did not even assume to act as the agent of the bank, much less is there any proof that he was so, or that his agreement with King was ever known to the bank. The whole purport of that agreement was, that Collier was to be permitted to purchase certain property of King's at sheriff's sale, at a certain price, and if he did so, Collier would grant full acquittance of certain debts, and particularly to Moses Groves, a full acquittance of all demands against said Groves, for and on account of said judgment obtained by the Farmers' Bank of Virginia.

The property which Collier was authorized to purchase on these conditions, is enumerated in the contract, consisting of

sundry tracts of land, and a large number of slaves. Now, the only evidence that he purchased any part of the property in pursuance of the agreement, is found in a sheriff's deed, and a *simple comparison between the agreement and the sheriff's deed will show that a large part of the property [*54 of King never was sold according to that agreement. The condition, therefore, upon which Collier was himself bound to procure a release of the judgment in favor of the bank, has not been complied with, and even between him and King no such obligation has resulted from the sale, much less is there anything in the whole transaction which is binding on the bank. It was as to the bank, *res inter alios acta.*

There is not the least pretext for saying, that the bank ever ratified and approved this agreement, or that they ever had any knowledge of it.

Mr. Justice NELSON delivered the opinion of the court.

This case comes up on an appeal from a decree of the Circuit Court of the United States for the District of Louisiana.

The case is somewhat complicated and confused, and it will be necessary to state the material facts to be found in it in order to present clearly the legal questions involved, and upon which the decision must depend.

On the 13th March, 1837, Thompson L. King drew two drafts, amounting in the aggregate, to fifteen thousand four hundred and ninety-seven dollars, in favor of John E. Hunter, upon Moses Groves, who duly accepted the same. The liability of Groves upon these drafts to the bank constitutes the main point in the controversy. The drafts were subsequently, but before maturity, indorsed by Hunter to Lewis A. Collier, and by him passed to the Farmers' Bank of Virginia, the appellants, as collateral security for an indebtedness to the Bank. Groves was an accommodation acceptor for the benefit of King, the drawer.

The bank recovered judgment against Groves for the amount of the drafts in the Madison District Court of Louisiana, December 1, 1840, and which was recorded in the office of the parish judge on the same day, in the parish of Madison, where the defendant resided, so as to operate as a judicial mortgage on his real estate and slaves. The bank recovered judgment also against King, the drawer, on one of the drafts; and, at the same time, held other judgments and demands against him, in which Collier was interested, to the amount of some fifteen thousand dollars. These judgments and demands had been pledged to the bank by Collier as collateral security for his indebtedness.

On the 26th February, 1841, a written agreement was entered into between Collier and King, in which, after reciting the several judgments and demands above stated, and held by the bank against King, in which Collier was interested; and
*55] also *reciting and describing certain plantations and lands, belonging to the said King, containing in all about twenty-two hundred acres, and a large number of slaves on the same, it was agreed, among other things, that if the said Collier should be permitted to purchase the said property at sheriff's sale on any of the aforementioned judgments for his own account, or for the account of the bank, at a sum not exceeding the whole amount of the several judgments and demands, or for a less sum, that then, and in that case, the said property should be received by him in satisfaction and discharge of the same; and the evidences of the several debts and demands thus held by him and the bank should be delivered up to the persons entitled to the same; and full discharges given; and especially to Moses Groves for and on account of the judgment obtained by the Farmers' Bank of Virginia against him.

There are several other provisions and stipulations in said agreement; but as they have no necessary bearing upon the material questions in the case, it is unimportant to notice them. Groves was a witness to this agreement.

In pursuance of this arrangement Collier became the purchaser of the property on the 13th of March, 1841, for the sum of $32,515, and received a deed of the same from the sheriff on the sixteenth of the month thereafter.

On the 1st of December, 1841, the Farmers' Bank of Virginia proposed to Collier, through their authorized agent, an arrangement of his indebtedness to them, as follows:

1. The bank to give him a credit on the same of one, two and three years. 2. And surrender all the collateral securities which they had received from him. And Collier, on his part, 1. To pay all the expenses of prosecuting the collateral securities to the attorneys in whose hands they are. 2. To give a mortgage, which was to operate as a judicial mortgage in favor of the bank, on all the property which he held in Concordia parish. 3. To assign to the bank certain notes, as collateral security, which he held against Dix & Glascock, amounting to $9000. 4. To have all the mortgages that appear as incumbrances upon the property reduced by a discharge of record to an amount not exceeding thirty-five thousand dollars, besides those in favor of the Bank of Virginia, and Lancaster, Denby & Company. And 5. To give three notes to the bank, one for $11,764.68, payable in twelve

months after date, one for $12,470.57, payable two years after date, and one for $13,218.80, payable three years after date, amounting in the aggregate, to thirty-seven thousand four hundred and fifty-four dollars, five cents.

This is the substance of the proposition made by the agent, and which was intended as instructions to F. H. Farrar, his *attorney, under whose direction the mortgage was to be prepared and executed. [*56

On the 3d of December, 1841, the mortgage was duly executed by Collier, and delivered to Farrar, and accepted by him on behalf of the bank.

It was recorded in the proper office, and a copy with the three notes transmitted by mail to the bank agreeably to the instructions.

On the 20th of April, 1843, the Farmers' Bank of Virginia applied to the judge of the Circuit Court of the United States, in the District of Louisiana, for an executor's process against the estate of Groves, he having died in December, 1841, praying that so much of his estate might be seized and sold as should be necessary to satisfy the judgment, which had been obtained by the bank against him December 1st, 1840, and which we have already referred to; and an order was granted accordingly; whereupon, Horace H. Groves, the son of the deceased, and administrator of the estate, filed the bill in this case in the Circuit Court of the United States, setting out, substantially, the facts already recited, and praying that the bank may be enjoined from proceeding to seize and sell any part of the estate, that the executory process may be set aside, and the bank decreed to enter satisfaction of the judgment of record.

The answer of the bank denies the authority of Collier to act for them in any settlement or discharge of the judgment, or for any purpose in connection therewith. They also deny that they ever gave their assent to the alleged discharge of the debt for which the judgment was rendered, or ever ratified or confirmed the acts and doings of Collier in relation thereto.

They further allege, that Collier was indebted to them in the year 1837, in a large amount, and that he transferred to them the acceptances of Groves, mentioned in the bill, as far back as 1837 and before they reached maturity, as collateral security for his indebtedness. That they never intended to place the bills under the control of Collier, but held them as their own, and prosecuted them to judgment. Nor did they ever allow him to take the charge and management of the judgment as their agent after it was recovered.

They further allege, that being delayed in the collection of the collateral securities, and receiving no payments from Collier, they employed James W. Pegram, in November, 1841, as their agent, to call upon Collier, at his home, with instructions to obtain a more satisfactory arrangement of the debt against him. That it resulted in the extension of the time of payment on his giving the mortgage and notes referred to in the bill. They admit it was understood between their agent
*57] and Collier, that *the negotiable paper which had been transferred as collateral security was to be surrendered up to him, the security furnished by the mortgage being, as represented by him, sufficient to secure his indebtedness, and relying on his punctuality in the payment of the notes as they became due. That two of the notes provided for by the mortgage are already past due, and nothing paid by the said Collier; that the property covered by the mortgage is discovered to be liable under previous incumbrances to a large amount, which may render it insufficient for the payment of their debt. That said Collier has long since waived the assignment of the said judgment, and consented that the bank might retain it as additional security.

The court below granted a preliminary injunction, and afterwards at the hearing on the pleadings and proofs, confirmed the same, and decreed, that satisfaction of the judgment against Groves should be entered of record.

Upon full consideration we are of opinion this decree is right, and should be affirmed.

King, the drawer of the bills, was the principal debtor, as the acceptance by Groves was for his accommodation. He was therefore bound to provide for them and keep Groves harmless; and this he did, so far as the interest of Collier was concerned, by the agreement of 26th February, 1841, and subsequent purchase by Collier of the plantation and slaves in pursuance of its stipulations. The purchase and title of the property under the sheriff's sale, it was agreed, should be made, and taken in satisfaction of this among other demands against King; and in order to complete the satisfaction, Collier bound himself to procure a discharge of the judgment which the bank had recovered upon the drafts, and then held. Groves was privy, and consenting to this arrangement between King and Collier, and, as between the latter and him, when consummated, it constituted a valid defense to the drafts or judgment either in law or equity.

It is true, as the bank was not privy and consenting to the arrangement, their interest in the drafts was unaffected by it, and they were still at liberty to enforce their judgment against

Groves, if necessary to the payment of the debt for which the drafts had been pledged as security.

But, on the 3d of December following, they entered into an arrangement with Collier by which it was agreed that, on the execution and delivery to them of three notes, payable in one, two, and three years, covering the whole amount of his indebtedness to the bank, together with a mortgage upon a large plantation and slaves, besides other real estate, as security for the payment, all the collateral securities previously held for the indebtedness should be given up to him. The notes and mortgage *were executed and delivered accordingly, and the collateral securities surrendered, [*58 and the interest in them again exclusively vested in Collier; and in this way becoming the owner of the drafts and judgment against Groves, for which he had already received satisfaction, and bound himself to procure a discharge from the bank, the agreement with King, the principal debtor, operated instantly as an extinguishment of the demand: and placed it beyond the power of either Collier or the bank, or both of them together, to revive it by any subsequent arrangement. The defense of Groves, arising out of the agreement of King with Collier, attached immediately on the bank reinvesting Collier with their interest in the drafts, and would adhere to them into whosesoever hands they might pass. They were not only bills over due, but had become merged in judgment against Groves.

It has been argued, on behalf of the bank, that Collier failed to comply with all the conditions upon which they stipulated to accept the mortgage and surrender the previous collateral securities; and especially in one important particular, namely, the discharge of record of existing incumbrances upon the property so as to reduce them to an amount not exceeding $35,000.

But there are several answers to this objection.

In the first place, the weight of the proof is, that the agent, after an investigation and examination of these incumbrances, waived the discharge of record, being satisfied that they had been paid from the representation of Collier.

And in the second, no such ground of defense is set up in the answer, nor is there any allegation of imposition or fraud by Collier in the transaction. And, in the third, assuming that there was, the bank could not avail themselves of it for the purpose of avoiding their part of the arrangement, and, at the same time, hold on to the mortgage as a security for Collier's indebtedness. There has been no surrender of the mort-

gage, on the part of the bank, or offer to surrender and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier.

It may be, that if a fraud had been committed upon the bank, in the negotiation to substitute this mortgage for other collateral securities, upon a surrender of the mortgage and notes accompanying it to Collier, on a discovery of the fraud, claiming to vacate the arrangement on this ground, their right to and interest in the securities surrendered, in the absence of any prejudice to the rights of third persons acquired, in the mean time, might revive; and, in this way, the defense of Groves be overreached, the bank being thus remitted to their original rights. But, be this as it may, as no such step has been taken, nor even claim of fraud set up in the pleadings,

*59] we are bound to regard the arrangement *as valid and binding upon both parties; and if any fraud or imposition has been committed to the prejudice of the bank, they must look to him personally for compensation and redress. The rights acquired by each party to the securities exchanged, must be taken to be such as were intended by the terms of agreement; and, regarding the transaction in this light, it is clear, even conceding, as is alleged, that Collier has since waived the surrender of the collateral securities for which he had stipulated, or has since reassigned them to the bank, the defense of Groves is still complete. These drafts, and judgment upon them, became extinguished the moment the agreement between the bank and Collier was carried into execution. They then became the exclusive property of the latter, in which event his agreement with King, the principal debtor, worked an immediate satisfaction.

It has, also, been argued, that King has failed to fulfil all the stipulations in his agreement with Collier, and hence that it is not available to Groves. But this is a question exclusively between him and Collier, who, for aught that appears, is content with the agreement in the way it has been carried into execution. He purchased the property and took the sheriff's deed as is alleged, and not denied, went into the possession and enjoyment of the estate, and still holds it. And, if he has not acquired all the property stipulated for in his agreement, he must look to King, personally, for compensation and redress. He has chosen to accept the execution of the agreement, and must be deemed bound by its stipulations.

In every view we have been able to take of the case, we are of opinion the decree of the court below is right, and 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 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.

GODFREY LESSIEUR, ABRAM AUGUSTINE AND MARY W. HIS WIFE, THOMAS H. DAWSON, RICHARD J. WATSON AND SARAH HIS WIFE, AND PALMELIA E. DAWSON, LAURA A. DAWSON AND GEORGE W. DAWSON, INFANTS, BY THOMAS H. DAWSON THEIR GUARDIAN, PLAINTIFFS IN ERROR, *v.* THOMAS PRICE.

Where the highest court of a state affirmed the judgment of the court below, in consequence of an equal division between the judges thereof, such judgment of affirmance is considered, when the case is brought here under the twenty-fifth section of the Judiciary Act, as an affirmance of the rulings of the court below.

Under the act of 17th February, 1815, (3 Stat. at L., 211,) for the relief of the inhabitants of New Madrid County, who suffered by earthquakes, a notice of location given to the Surveyor-General was not sufficient to vest the title in the applicant; the title was not complete until the plat and certificate of survey were filed and recorded in the Recorder's office. An exchange of titles then at once took place. The applicant became entitled to his new location, and the land which he abandoned reverted to the United States.[1]

But if the claim, under a New Madrid certificate, be prosecuted by an agent without the knowledge of the principal, the title to the new land cannot vest in the principal until he assents to and adopts the proceedings of his agent; because, by such assent, he relinquishes the title to the land which he first owned.

In 1820, Congress granted to the state of Missouri, (3 Stat. at L., 547,) four sections of land, which should, "under the direction of the legislature, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature may select, on any of the public lands of the United States: Provided, that such locations shall be made prior to the public sale of the lands of the United States surrounding such location."

This grant did not need an application to an officer of the United States for permission to locate it. When the legislature selected the land, and gave notice thereof to the Surveyor-General and Recorder of the Land-District, the land became identified and the title complete.

In making the selection, the legislature had a right to include fractional parts of sections, until the entire amount of four sections was made up.

The time at which the title of the state became complete, was the day on

[1] DISTINGUISHED. *MacKay* v. *Easton*, 19 Wall., 633. CITED. *Hale* v. *Gaines*, 22 How., 159; *Hot Springs Cases*, 2 Otto, 713.

which the Governor notified the Surveyor-General of the selection of the land by commissioners who had been appointed for that purpose.[2]

THIS case was brought up from the Supreme Court of the state of Missouri by a writ of error, issued under the 25th section of the Judiciary Act.

It was an ejectment brought by the plaintiffs in error, in the Circuit Court of Cole County, (State Court of Missouri,) to recover lot No. 455, as known and described upon the plat of the city of Jefferson, lying and being at a corner formed by the intersection of Washington and High Streets. Both parties claimed to derive title from the United States. The cause was submitted to the Circuit Court of Cole County, as a jury, and the judgment being for the defendant, the plaintiffs carried it to the Supreme Court of Missouri, where the judgment of the court below was affirmed by a divided court; one judge not sitting, one being for affirming the judgment, and one dissenting. The plaintiffs then brought the case to this court by writ of error.

The bill of exceptions, which was taken to the rulings of the court upon the trial of the cause in Cole County, sets forth, *in extenso*, sundry papers, the insertion of which does not appear necessary in this report. A summary of the evidence offered, together with the prayers to the court, seems to be all that is required.

Upon the trial in the Circuit Court, the plaintiffs gave in evidence the following chain of title, to wit:

1. A confirmation made by the Board of Commissioners, on
*61] *the 8th January, 1811, of two hundred arpens of land, in the county of New Madrid, to Baptiste Delisle, as described in a plat of survey certified the 27th of February, 1806.

2. The commissioners' or New Madrid certificate, issued 20 of November, 1817, to Baptiste Delisle, for two hundred arpens, in lieu of his land, injured by earthquakes, lying in the county of New Madrid.

3. A notice of location given by the Surveyor-General, by Thomas Hempstead, and A. L. Langham, as the legal representatives of Baptiste Delisle, dated 2d June, 1821, that they had located two hundred arpens under the foregoing certificate, "so as to include fractional section number six, the

[2] See also *Foley* v. *Harrison*, 15 How., 447; *Fremont* v. *United States*, 17 Id., 542; *Rice* v. *Minnesota, &c., R. R. Co.*, 1 Black, 381; *Rector* v. *Ashley*, 6 Wall., 150, 151; *Gibson* v. *Chouteau*, 13 Id., 101; *Schulenburg* v. *Harriman*, 21 Id., 61; *Hall* v. *Russell*, 11 Otto, 509; *Hartman* v. *Greenhow*, 12 Id., 676; s. c., 1 Morr. Tr., 553; *Sanger* v. *Sargent*, 8 Sawy., 94.

northeast fractional quarter of fractional section number seven, and as much off the north part of the west fractional half of fractional section number eight, as will make the quantity of two hundred arpens, all in township number forty-four, north of the base line of range number eleven, west of the fifth principal meridian, south of the Missouri River."

4. A survey made by the Deputy-Surveyor of the above location, dated 5th of August, 1821, and filed 11th of February, 1822.

5. Patent certificate, dated 25th of February, 1822, and delivered to Charles L. Hempstead.

6. Patent from the United States to Baptiste Delisle, dated the 13th of November, 1822.

7. Deed from Delisle and wife to Robert D. Dawson and Godfrey Lessieur, for the land patented to him, dated 13th of September, 1842.

8. It was admitted that the parties suing as the heirs of R. D. Dawson, were his heirs, and their names were correctly set out.

9. It was further admitted, that the defendant was in possession of the land in controversy, at the commencement of this suit.

10. The monthly and yearly value of the premises was agreed upon between the parties.

The defendant, to show title in himself, relied upon the following facts:

1. An act of Congress, approved 6th March, 1820, the fourth paragraph of the sixth section of which provides as follows: "Four entire sections of land be, and the same are hereby granted to said state, (the state of Missouri,) for the purpose of fixing their seat of government thereon, which said sections shall, under the direction of the legislature of said state, be located, as near as may be, in one body at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States, provided that *such locations shall be made prior to the public sale of the lands of the United States surrounding such location." 3 Stat. at L., 547. [*62

2. An ordinance, adopted by the Convention of the state of Missouri, on the 19th July, 1820, accepting the said grant of land. R. C., 1845, p. 22.

3. An Act of the legislature of the state of Missouri, entitled "An act providing for the location of the permanent seat of government for the state of Missouri," approved 16th November, 1820. 1 Terr. Laws, 649. This act appoints commissioners to select a site for the permanent seat of government,

and requires them to make their report to the next session of the General Assembly of said state.

4. An act, supplementary to the foregoing act, approved 28th June, 1821. 1 Terr. Laws, 773. This act provides for filling vacancies that may happen in the Board of Commissioners, and extends the time of making their report until the next session of the General Assembly.

5. A joint resolution of the General Assembly, approved 28th June, 1821, (1 Terr. Laws, 780) requiring the Governor of the state to notify the Surveyor-General for the state of Illinois and Missouri, and also the Register of the Land-Office in which the lands are selected, that commissioners appointed for that purpose "have selected the fractional sections six, seven, and eight, the entire sections seventeen and eighteen, and so much of the north part of sections nineteen and twenty as will make four sections, in fractional township forty-four, south of the Missouri River, in range number eleven, to fifth principal meridian; and that he request the said surveyor and register to withhold the same from sale or location, until the general assembly determine whether said selection be accepted by the state."

6. An act of the General Assembly, entitled "An act fixing the permanent seat of government," approved 31st December, 1821. 1 Terr. Laws, 825. The first section of which accepts the land above described for the use and benefit of said state. The second section provides for the laying out of a town thereon; and the third section requires the Governor to notify the Surveyor-General of the acceptance of said land by the General Assembly, for the permanent seat of government, by transmitting to him an authenticated copy of said act.

7. Also, an act of the General Assembly, entitled "An act supplementary to the act fixing the permanent seat of government," approved 11th January, 1822. 1 Terr. Laws, 859. This act further provides for the laying out of a town on the land selected, authorizes the sale of the lots in said town, and prescribes the terms of said sale, and requires the commis-
*63] sioners to make a *report of their acts to the next General Assembly. It further provides, that "any proposals made by any person or persons having claim to any part of the said lands selected for the permanent seat of government, in order that any claim or claims may be adjusted, *provided* nothing herein contained shall in anywise be construed to legalize or acknowledge such claim as valid in law," shall, by said commissioners, be communicated to the General Assembly.

8. A proclamation by the President of the United States,

dated 13th June, 1823, bringing into market by public sale, in the ordinary way, townships No. 40, 41, 42, 43, and 44, in range 11 west, and townships No. 40, 41, 42, and 43, in ranges 12, 13, and 14, of the fifth principal meridian. Sales to take place on the first Monday of October, 1823.

9. It was admitted that the premises in dispute are a part of the lands described in the foregoing resolutions; and the acts of the legislature given in evidence by the defendant subsequent thereto; and that the defendant holds whatever title the state had to the said claim.

To rebut the defendant's title, the plaintiff gave the following evidence:

1. A copy of a letter from the Governor of the state of Missouri, addressed to the Surveyor-General of Illinois and Missouri, dated 3d July, 1821, informing him of the selection made by the commissioners, for locating the permanent seat of government, and requesting him to withhold the lands thus designated, from sale or location, until the General Assembly shall determine whether they will accept the same. This letter is indorsed as having been received 8th July, 1821.

2. A letter from same to same, dated 1st January, 1822, transmitting an authenticated copy of the act of 31st December, 1821, entitled "An act fixing the permanent seat of government." This letter, by the indorsement thereon, appears to have been received on the day of its date.

3. A letter from the Surveyor-General to Governor McNair, in answer to the above letter, dated 2d of January, 1822. After acknowledging the receipt of the letter of the 1st January, 1822, and the copy of the act of the General Assembly of 31st December, 1821, the letter proceeds as follows: "I conceive it proper for me to inform you, for the information of the General Assembly, that a part of this land, (referring to the land selected by the commissioners, and accepted by the act of 31st December, 1821,) was located in virtue of a New Madrid certificate, on the 2d June, 1821, as represented on the sketch, and described in the entry made thereof, which you will find herewith inclosed. You will also receive a copy of a paper purporting to be a copy of *an entry, or location of fractional section No. 7, township No. 44, north [*64 of the base line of range No 11, west of the fifth principal meridian; this day filed in this office by Major Taylor Berry. For the character of this last-mentioned paper, as I view it, see my remarks on the back thereof."

4. It was admitted that the journal of the Senate of Missouri, of the 23d November, 1821, shows that a committee of the senate, to which had been referred the report of the com

missioners, for the location of the seat of government of the state, reported to the senate that the propositions made by Angers L. Langham ought to be accepted; and that the seat of government should be permanently located on the eight hundred and ninety-two acres of land situated at Cote Sans Dessein. That one half of which Langham proposed to donate to the state, which was concurred in. On motion, the report was laid on the table until next day, and afterwards, on the 25th November, 1821, the same was indefinitely postponed.

5. That the journal of the house of representatives shows that, on the 28th November, 1821, the house had under consideration the location of the permanent seat of government.

On the 15th of December next, following, the committee of the judiciary of the house reported to the house the state of the title at Cote Sans Dessein. On the 28th of same month, the house had the same subject under consideration.

6. It was further admitted that the journal of the house of representatives shows that, on the 3d January, 1822, Governor McNair laid before the General Assembly the communication received by him from the Surveyor-General, of date 2d January, 1822.

7. A joint resolution of the two houses of the General Assembly, requesting the Governor to notify the President of the United States of the selection made for the seat of government, approved 14th December, 1822. 1 Terr. Laws, 984.

8. An act of the General Assembly of the state of Missouri, approved 19th December, 1822, (1 Terr. Laws, 1018,) authorizing the trustees appointed by the act to contract with the claimant for the removal of the New Madrid location from the lands selected for the seat of government on certain conditions; if an adjustment be not obtained, then the trustees are required to select eight squares for public purposes, and the land so selected, together with the streets and alleys laid out, are condemned for public use, &c.

9. The survey of the lands selected by the state of Missouri, made in August, 1824, and approved by the Surveyor-General, on the 25th September, 1847.

Thereupon the defendant offered the following additional evidence, to wit:

*65] *1. A copy from the books of the Recorder of Land Titles of the relinquishment of lands in New Madrid, by which it appears that the land in lieu of which the certificate in favor of Baptiste Delisle was issued, and which the plaintiff had given in evidence, was made by Carter Beamon.

2. A copy of a deed from Delisle, for the land in New Mad-

rid, to Carter Beamon, dated 4th August, 1817, acknowledged on same day, and recorded on the 17th September, 1817. It was certified by the Recorder of land titles as being a true copy of the original on file in his office, and was also a sworn copy. Having first proved by a witness that he had applied to said recorder for the original which he had seen in his office and had compared with the copy, stating to him that he wished to use it on the trial of this case. But the recorder refused to let it go out of his office, saying that it was one of the files of his office, and that he was not authorized to let it go out of his office.

3. A certified copy of a deed from Delisle to Alexander Conia, dated 17th October, 1810, proved on the 20th January, 1823, before the judge of the County Court of St. Louis County, and recorded on the 6th May, 1823, in Cole County. This deed conveys the same land in New Madrid County.

The plaintiffs objected to the introduction of both deeds as evidence in the cause, and their objections were sustained, and said deeds rejected.

4. The defendant then read in evidence the deposition of John Baptiste Delisle, which shows that, until the year 1842, he never knew that the certificate issued in his favor, by virtue of which the location on the land in question was made, had been issued, nor of the location, nor survey thereof, nor of the issuing or existence of a patent to him of said land, nor even that Congress had passed a law for the relief of the sufferers by earthquakes in New Madrid County. And that, consequently, until said last-mentioned date, he never had given any assent to any of the proceedings touching the New Madrid location in his name.

On the close of the evidence the counsel for the plaintiff prayed the court to declare the following, in the nature of instructions, to be the law of this case:—

1st. The patent from the United States to John Baptiste Delisle, if the same be true and genuine, is sufficient in law to vest the legal title [to] the land therein mentioned in the said Delisle, if he were living at its date. [Given.]

2d. The deed from Delisle and wife to Robert D. Dawson and Godfrey Lessieur, if true and genuine, is sufficient in law to vest said title in said Dawson and Lessieur. [Given.]

4th. That if the New Madrid certificate, granted to said Delisle, was, on the 2d June, 1821, located on the land in controversy, *and was afterwards surveyed by a United States surveyor, according to law, and was appraised [*66 by the Surveyor-General; and said land was finally patented to Delisle, according to said location and survey, then the

effect of said patent is to vest said legal title in said Delisle, (as against any other title derived from the United States,) from said 2d June, 1821, the date of said location. [Refused.]

5th. That to vest the legal title to the four *entire* sections of land granted to the state for a seat of government by the act of the 6th March, 1820, it was necessary that said location should have been made of four whole and entire sections; and that a location thereof, on two whole sections and five parts of other sections, was not in conformity with said act, and therefore void, unless subsequently ratified by the Government of the United States, or some department or office thereof, authorized so to do. [Refused.]

6th. That a location of said land by the state should have been made in the office of some officer of the Land-Office Department of the United States, and that a record of said location should have been made in such office. [Refused.]

7th. To give validity to such location, it should have been sanctioned by some officer of the United States having authority in disposing of the public lands. [Refused.]

8th. That such location could not lawfully be made in the office of the Surveyor of public Lands in Illinois and Missouri. [Refused.]

9th. There is no evidence before the court, sitting as a jury, that any location of said four entire sections ever was in fact made. [Refused.]

10th. That if the New Madrid certificate, granted to John B. Delisle, was, on the 2d of June, 1821, located on the lands in controversy; and that said location was, on the 5th of August, 1821, surveyed by the proper officer of the United States, and afterwards patented to said Delisle, in conformity to said survey, the effect of said patent is to vest said title in said Delisle, or his legal representatives, from the said 5th of August, 1821, as against any person deriving title from the United States, after said location, and before said patent. [Refused.]

11th. That the notice of location, survey, patent, and other documents and acts shown in evidence by the plaintiffs, touching the location of the New Madrid certificate, No. 347, issued to John B. Delisle, &c., if true and genuine documents, show a better title than any which has been shown by the defendants. [Refused.]

12th. The neglect of the Surveyor-General, or the Recorder of Land-Titles, to perform any act of mere duty on their part,

*67] *towards the consummation of a title on said location, could not affect the rights of the party interested. [Refused.]

The defendants then prayed the following instructions:

1st. The title of the United States to the land described in the copy of the patent given in evidence by the plaintiffs was not divested out of the United States until the plat and survey, given in evidence by the plaintiffs, was returned to the office of the Recorder of Land Titles; and the title of the United States to the land located under the directions of the Legislature of the state of Missouri, in pursuance of the 4th proposition of the 6th section of the act of Congress of the 6th of March, 1820, was vested in the state as early as the acceptance by said state of the selection of land made by her commissioners. If, therefore, said acceptance was made prior, in point of time, to the returning of said survey and plat to the office of the Recorder of Land Titles; and if the land so selected and located embraces the same land mentioned in said copy of patent given in evidence by the plaintiff, then the said plaintiffs are not entitled to recover in this action. [Refused.]

2d. If the John B. Delisle, who was the owner of the land in the county of New Madrid, in lieu of which the certificate No. 347 was issued, until the year 1842, knew nothing of the issuing or existence of said certificate, nor of the notice, survey, or patent, given in evidence by the plaintiffs, and never assented to the same prior to said date, and if, prior to said date, the former sections of land mentioned in the 4th proposition of the 6th section of the act of Congress, approved March the 6th, 1820, had been located under the direction of the Legislature of this state, upon the premises in question, then no title passed to said Delisle, in or to said premises, as against the state of Missouri. [Given.]

3d. If Langham and Hempstead obtained the certificate No. 347, given in evidence by the plaintiffs claiming to be the legal representatives of John B. Delisle, and in that character made the location, when in fact they were not the legal representatives of said Delisle, nor in any manner entitled to said certificate, nor to the land located by virtue thereof, such location is void, as against this defendant. [Refused.]

The first and third of which were refused, and the second given, to the giving of which the plaintiffs also excepted.

The court thereupon gave a verdict for the defendant.

The plaintiffs then moved for a new trial, which was refused, and a bill of exceptions was taken to the several rulings of the court.

It has been before mentioned, that the Supreme Court of Missouri affirmed the judgment of the court below by a divided

*court; and that the plaintiffs sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Glover*, for the plaintiffs in error, and *Mr. Leslie*, for the defendant.

Mr. Glover made the following points:

1. The plaintiffs in error exhibited a title good in itself. The New Madrid certificate to John Baptiste Delisle, or his legal representatives, dated November 20, 1817, the entry therewith of June 2, 1821, the survey of August 5th, 1821, issued to the recorder February 11, 1822, patent certificate February 25, 1822, and patent in conformity with the said preliminary steps, dated November 13, 1822, constitute a title which would hold the land if no other title had emanated from the United States.

2. The defendant in error also claims that he holds a title valid in itself. This proposition the plaintiffs controvert entirely. They believe that the defendant has no title whatever; and in due time will endeavor to demonstrate that all the steps taken by the state of Missouri, in order to perfect a title under the grant contained in the act of Congress, approved March 6, 1820, were null and void, not being in conformity to the terms of the grant, or the laws of the land.

3. They will concede, however, for the present, and merely for the sake of the argument, that such a title exists in the defendant as he claimed for himself, and proceed to examine, with this view of the subject, what is the relative value of that title when compared with the plaintiffs'.

4. Whenever two titles have emanated from government, it becomes necessary to inquire which is the elder title, as that one must prevail. 1 Pet., 668; 13 Id., 436.

5. The plaintiffs insist that their title began to exist at the date of the entry, or notice of location, June 2, 1821; and that the patent thereon, issued to Delisle, or his legal representatives, relates back to the said entry, and overreaches any other title, taking its inception in the mean time from the government of the United States.

6. A contrary position has been taken just here by the defendant. It is this: that the right of Delisle, or any one claiming under him, incepted only at the moment of the return of the plat of his survey into the office of the Recorder of Land Titles. That in a case of conflicting titles, the priority of right can only be determined with reference to the date of this event; and that after the title is consummated by the

emanation of a patent, it has relation only to this point of time. Two decisions of this *court are relied on as establishing this doctrine. *Bagnell* v. *Broderick*, 13 Pet., 436; and *Barry* v. *Gamble*, 3 How., 32. [*69

(The counsel then examined these and other decisions of this court to show that the question did not arise, when an inchoate right springs up in the progress of acquiring a title under a New Madrid certificate, as against a conflicting grant.)

7. That the notice, survey, and patent vested a title in John Baptiste Delisle, or his legal representatives, notwithstanding the said Delisle was ignorant of the fact of their emancipation. The delivery of the said documents to Langham and Hempstead, as the acts of the United States, for the use of said Delisle, being beneficial to him, *his land in New Madrid having been destroyed*, vested a perfect title in him. 4 Kent Com., 454 and notes; 2 Salk., 168; 1 Touch., 236; 15 Wend. (N. Y.), 660; 6 Cow. (N. Y.), 620; 8 Barn. & C., 448; 5 Mo., 147; 4 Day (Conn.), 66; 12 Johns. (N. Y.), 82.

8. But delivery is not a requisite formality to the validity of a patent. It takes effect on passing the seal of the office, without the act of delivery, and without any affirmative assent of the patentee. 2 Co., 276 and note; 17 Cr. Eliz., 167; 5 Cow. (N. Y.), 458; 1 Cranch, 160; 1 Cov. & Hughes, Dig., 738, ch. 7, No. 8.

9. It would, therefore, seem to be unnecessary to look further into the case, supposing that a valid title, standing by itself, has been shown in the state of Missouri. The inception of the same could not be earlier than the selection of the land in question, December 31, 1821, by the legislative act. The title of Delisle, beginning on the 2d June, 1821, was earlier in time, and must prevail over the supposed state title.

10. If, however, the right of Delisle did not begin to exist till there was proof of his affirmative assent to the entry, location and patent in his name, as shown by his deed to Lessieur and Dawson, in 1842, still the plaintiffs were entitled to recover, because there was no title whatever in the state, as will now be shown.

11. The act of Congress, March 6, 1820, gave the grant therein contained, on the express condition—"provided" is the word—that the location should be made prior to the public sale of lands surrounding such location. This word makes a precedent condition. This was an emergency the defendant saw the necessity of meeting. He, therefore, introduced proof that, on one side of the location the lands were not offered at public sale prior to October, 1823, while he introduced no evidence as to the public sale of the lands on the other side of

the location, they having been offered to public sale prior to the location. The location was, therefore, in violation of this condition of the grant, and void. 4 Pick. (Mass.), 45, 7; Id., 156; 6 T. R., 320; 2 Pa. St., 219.

12. The act of the Legislature of Missouri, approved December 31, *1821, was merely an expression of intention to locate, not a location of their grant. To have constituted a location, application ought to have been made at the proper land-office, and an entry allowed according to the laws of the United States. But there never was any communication made by any person for the state of Missouri to any officer of the United States, having power to grant an application for, or allow any location of, the said lands. [See Land Laws Instructions and op. part 2, No. 304. 474, 394, showing that such a location should be entered in the Register's office.] The state location was, therefore, void for want of a proper record thereof in the proper office of the government of the United States.

*70]

13. But the steps taken by the state of Missouri, with reference to their grant, were otherwise in violation of the terms of the grant, and contrary to the laws of the United States. In this, the lands claimed to have been located, are not the lands granted. In contemplation of the laws of the United States, the terms "section," "half section," "quarter section," designate certain specific tracts marked and designated on the map of public surveys, indicate not a quantity of acres, but tracts inclosed in certain metes and bounds, and no other idea can be substituted as the meaning of the grant. Thus a section is not 640 acres at the will of the grantee; but is a known and fixed subdivision of the public land, marked and bounded as such. And so with "a half section," "a quarter section." That this position is well taken, observe the distinctive phraseology of the following acts of Congress: An Act granting lands to Mississippi, Public Land Laws, Instructions, and Opinions, part 1, p. 308. Id., 267, an Act granting lands to Indiana. Id., 312, an Act granting lands to Illinois. Id., 305, an Act granting lands to Alabama. Id., 578, an Act granting to Cherokee County, Alabama, 150 acres land in lieu of the "quarter section" allowed by law. Id., 377, an Act granting lands to Florida. Id., 315, an Act granting lands to Illinois. Id., 484, an Act granting lands to Arkansas. Id., 568, an Act granting lands to Arkansas, and confirming certain illegal selections made by Governor Pope, Id., p. 325.

The counsel then argued that the location by the state was irregular and void, for the following reasons:

1. Because "entire sections" were not taken throughout.

2. Because "fractions" were taken in part.

3. Because a slip, two miles in length, was taken off of two entire sections," thus making them fractional, and breaking up the legal subdivisions.

4. By substituting *quantity* for *metes and bounds*, when by the laws of the land the metes and bounds of four entire "*sections*" were all the state was entitled to receive, whether they contained *2,566 acres or not. If this grant had been of "*sections*" the purpose would be manifest; but [*71 a grant of "*four entire sections*" was enough to preclude the possibility of doubt as to the legislative intention. See 3 How., 660, where a survey made in violation of a rule laid down for securing the proper subdivision of the public lands was pronounced void, as was also the *patent on said survey*. See 7 Port. (Ala.), 432; 6 Cow. (N. Y.), 722.

14. Should the defendant, however, succeed in establishing the legality and necessity of a survey of the grant to the state, he will still not be relieved of difficulty. The doctrine for which he has contended—of appropriation of the land by survey—will then be brought home to his own door. His survey not being made till August, 1824, could not appropriate the land prior to that time; and, not being approved till 1847, had no existence as an official act till after the institution of his suit. The approval of said survey was the first entry on the books of any officer of the land department, in relation to the state grant or selections. The defendant has assumed the ground that the state grant was to be located by a new survey, in like manner as a New Madrid certificate; and that the plat of the survey was the location. If he is right in this position, then two conclusions follow. 1. That the state location was not made till after the public sale of all the lands surrounding it had taken place, and was, of course, void by the terms of the grant. 2. That when it was located, the land had been appropriated to Delisle, and the location void for want of title in the United States.

15. If it shall be considered by the court that, although the lands of Delisle, in lieu of which his New Madrid certificate was issued, were destroyed, and the grant was consequently pure donation to him, that, nevertheless, no title vested in him till his deed to Dawson and Lessieur, in 1824, still the plaintiffs were entitled to recover, the defendant not having shown any title in himself. A title springing up in Delisle in 1842, was in time to appropriate the land.

16. The act of the legislature of Missouri, approved December 19, 1822, [1 Terr. Laws, p. 1018,] by which the tract patented to Delisle was condemned to the public use, was not

relied on heretofore by the defendant as helping his case, and, I suppose, will not be here.

Mr. Leslie, for the defendant in error, contended that, under the several acts, viz., of Congress, approved 6th March, 1820; an ordinance of the Convention of Missouri, passed on 19th July, 1820, accepting the grant; an act of the General Assembly of Missouri, approved November 16, 1820; an act of the General Assembly of Missouri, approved June 28, 1821;

*72] nothing more *was necessary than the mere passage of the acts to vest a title in the state of Missouri.

The counsel then contended that Hempstead and Langham, in their proceedings in making the location and obtaining the certificate, were guilty of fraud on Delisle and on the government. On Delisle, because he was alive and had no knowledge of their doings and gave no assent thereto; on the government, because they sought to appropriate the public lands contrary to the terms and meaning of the act of Congress for the benefit of New Madrid sufferers.

The counsel then contended that the court erred in refusing the first instruction asked by the defendant's counsel; that the point contained therein was directly involved in the cases of *Basnell et al.* v. *Broderick*, 13 Pet., 436; and *Barry* v. *Gamble*, 3 How., 51, and was decided by this court.

The counsel then contended that the court was correct in granting the second instruction asked for by the defendant's counsel; that the act of Congress for the relief of the New Madrid sufferers was not a mere donation of land, to which the assent of Delisle might be implied; but that it was an exchange which could not be effectual until Delisle surrendered his injured tract to the United States. Consequently an affirmative act on his part was necessary before a title to the new location could vest; and, therefore, no title vested in him until 1842, when he assented to what had been done in his name. But before 1842, the title of the state of Missouri had become complete.

Mr. Justice CATRON delivered the opinion of the court.

The first consideration arising in this case involves a matter of practice. The suit was brought in a state Circuit Court of Missouri, and tried by the court without the intervention of a jury; when the judge ruled questions of law propounded to him unfavorable to the plaintiffs, and gave judgment for the defendant, to reverse which, a writ of error was prosecuted, and the cause removed to the Supreme Court of that state. On a rehearing there, only two of the judges were competent

to preside; they disagreed in opinion, and a judgment of affirmance was entered because of that division. And the question here is, how we are to treat the points ruled in the Circuit Court.

Our conclusion is, that the rulings of the circuit judge were adopted and affirmed by the judgment rendered in the Supreme Court, in like manner that they would have been had both judges concurred in affirming the judgment on all the grounds assumed by the court below: to hold otherwise, would be declaring that nothing had been decided in the state court of last resort, and thereby a second writ of error to this court would be defeated.

*Both sides claim title under acts of Congress; on a construction of these, and the facts calling for construction, the controversy throughout depends, and therefore, this court has unrestricted power to adjudge and conclude the controversy. [*73

Plaintiffs claim title under a New Madrid certificate; and the defendant under an act of Congress, granting to the state of Missouri a tract of four sections, to the end of locating the seat of government on it; and the principal question presented by the record is, which party first acquired such an interest in the land as will, by the laws of Missouri, support an action of ejectment. The state law provides, that those claiming lands by "New Madrid locations," may maintain actions of ejectment therefor. The location must, of course, be an appropriation of the land, and its acquisition by the locator, with the corresponding right to possess and enjoy it, as against the United States; and the inquiry arises, what acts were required on the part of the locator to divest the United States of title? This depends on a true construction of the act of February 17, 1815, for the relief of the inhabitants of New Madrid county, who suffered by earthquakes. John Baptiste Delisle was one of the sufferers, and on November 20th, 1817, a location certificate for two hundred arpens was obtained from the Recorder of Land-Titles, authorizing Delisle to locate that quantity on any of the public lands within Missouri Territory, the sale of which was authorized by law.

The act declares, that such certificate having issued, the location shall be made on application of the claimant by the principal deputy-surveyor for said Territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and return a plat of the survey to the Recorder of Land-Titles, together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on

whose behalf the same shall be made, which notice and plat, said recorder shall cause to be recorded in his office. That it shall be the duty of the recorder to transmit a report of claims allowed, and locations made, under this act, to the Commissioner of the General Land-Office; and he shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent, and on which a patent shall issue, &c.

The surveyor was required to make the location, and survey, "on application of the claimant." On this requirement a practice naturally sprung up, of filing with the surveyor a notice of location, describing the land that the claimant desired should be surveyed for him, and with which request the surveyor complied, unless some valid objection stood in the way, and rendered a compliance improper.

*74] *The notice of location, in this instance, was delivered to the Surveyor-General June 2d, 1821, for the land in dispute, and is claimed as the inception of title and location in fact, within the meaning of the state law, authorizing ejectments on New Madrid locations. That it was the mere act of the party, not having the assent of government, must be admitted. The act of Congress provides, "that, in every case where such location shall be made, according to the provisions of this act, the title of the person or persons to the land injured as aforesaid shall revert to, and become absolutely vested in the United States. A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the same time that title was taken by the new location. It was intended to be an exchange between the parties, and the inquiry arises, When did the United States take title? Was it when application in writing was made by the claimant to the surveyor to have his land located and surveyed at a particular place? The warrant, or location certificate, issued from the Recorder's office, and there it was returnable; there the plat and certificate were returned and recorded; that officer issued the patent certificate; in that office the law required all official business to be transacted, and not in the Surveyor's office. That the notice of location, and plat, and certificate were recorded in the Surveyor's office is true, and it was proper. It was not done, however, to the end of furnishing evidence of title to the claimant, but to have evidence there to show that the land was appropriated according to the New Madrid act, and for the convenience of the Surveyor's department. The plain meaning of the law is as above stated, nor can its import be changed by the practice pursued in the Surveyor's office:

there the claimant could not go for record evidence of his location, binding the United States to an exchange of lands. He could only refer to the Recorder's office. And what was the character of the evidence he had to rely on there? His entry was to be made by the principal Surveyor, or under his direction. It was to consist of a plat of survey, and a certificate describing the land, with the name of the claimant for whom the location by survey was made. This return the Recorder had to examine, pass upon, and record; if the location and survey had been properly made, then the United States assented to the exchange, and not until then.

The danger of allowing a claimant to locate a floating warrant at his own discretion, threatened the country with evils that had afflicted some of the elder states. It would have been certain to produce conflict of claims for the same land, to a material extent, and been contrary to a settled policy of the United States in disposing of the public lands, which was to avoid such conflict; *and, therefore, the act of 1815 [*75
vested the power of locating the claim in the principal Surveyor of the Territory.

We expressed our opinion as to what was a location of a New Madrid claim in the case of *Bagnell* v. *Broderick*, (13 Pet., 436,) thirteen years ago; and did so again in *Barry* v. *Gamble*, (3 How., 51,) in 1845, nor would we have said any thing further on the subject but for the division of opinion in the Supreme Court of Missouri, which seems to call in question the opinion expressed in the cases referred to, as we understand the proceeding there, on the ground that such expression of opinion was not necessary to arrive at the decisions then made.

A second question on the merits arises on the defendant's title, and is so connected with the one just discussed, that the principles governing it must be settled before a legal conclusion can be arrived at which will govern the controversy.

On the 6th of March, 1820, Congress provided by law for the admission of the then Missouri Territory as a state of the Union, and among numerous other regulations to aid the new state on coming in, it was enacted, "that four entire sections of land be, and the same are hereby granted to the said state, for the purpose of fixing the seat of government thereon; which said section shall, under the direction of the legislature of said state, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States: Provided, that such locations shall be made prior to

the public sale of the lands of the United States surrounding such location.

To secure the benefits of this donation the following steps were taken by the state of Missouri:

1. An ordinance adopted by the convention convened to form a constitution on the 19th of July, accepting the grant of land.

2. An act of the Legislature of the state providing for the location of the permanent seat of government, approved 16th November, 1820. This act appoints commissioners to settle a site for the permanent seat of government, and requires them to make their report at the next session of the General Assembly of said state.

3. An act supplementary to the foregoing act, approved 28th June, 1821. This act further extends the time of making their report until the next session.

4. A joint resolution, also approved 28th June, 1821, requiring the Governor of the state to notify the Surveyor-General for the states of Illinois and Missouri, and also the Register of the Land Office in which the lands are selected, that the commissioners appointed for that purpose "have selected the fractional sections six, seven, and eight, the entire sections seventeen and eighteen, *and so much of the north part of sections nineteen and twenty as will make four sections in fractional township forty-four south of the Missouri River, in range No. 11 west, fifth principal meridian; and that he request the said Surveyor and Register to withhold the same from sale or location, until the General Assembly determine whether said selection be accepted by said state."

*76]

5. An act of the General Assembly, entitled "An act fixing the permanent seat of government," approved 31st December, 1821, the first section of which accepts the land above described for the use and benefit of said state. The second section provides for the laying out of a town thereon, and the third section requires the Governor to notify the Surveyor-General of the acceptance of said land by the General Assembly, for the permanent seat of government, by transmitting to him an authenticated copy of said act.

6. Also an act of the General Assembly, entitled "An act supplementary to the act fixing the permanent seat of government," approved 11th January, 1822. This act provides for the laying out of a town on the land selected, authorizes the sale of the lots in said town, and prescribes the terms of said sale, and requires the commissioners to make a report of their acts in this respect to the next General Assembly. It further provides that "any proposals made by any person or per-

sons having claim to any part of the said land, selected for the permanent seat of government, in order that any claim or claims may be adjusted, shall by said commissioners be communicated to the General Assembly."

These proceedings took place before the surrounding lands were offered at public sale.

First, it is insisted "that the location was void because there never was any communication made by any person for the state of Missouri to any officer of the United States having power to grant an application for, or allow any location of, said lands; and that such location should have been entered and recorded in the Register's office of the local land district."

The land was granted, by the act of 1820; it was a *present grant*, wanting identity to make it perfect; and the legislature was vested with full power to select, and locate the land; and we need only here say, what was substantially said, by this court, in the case of *Rutherford* v. *Green's Heirs*, (2 Wheat., 196,) that the act of 1820 vested a title in the state of Missouri, of four sections; and that the selection made by the state legislature pursuant to the act of Congress, and the notice given of such location to the Surveyor-General, and the Register of the local district where the land lay, gave precision to the title, and *attached to it the land selected. [*77
The United States assented to this mode of proceeding; nor can an individual call it in question.

It is insisted, in the next place, that the location was void, because fractional sections were selected, to make the quantity of 2560 acres, embraced by the grant; that the law granted entire sections, in a square form, and intended to exclude fractional parts of sections; and as this controversy involved a fraction, no title was taken by the state of Missouri.

This objection is plausible, but we think unsound. The whole quantity was to be selected in one body as near as might be; the object of the grant was a city site for a great political purpose; that the seat of government would be established on the Missouri River was almost certain, a fact that could not have been overlooked by Congress. To a metropolis, the river front was absolutely necessary. If the land was selected adjoining the river, fractions must of necessity be taken; and therefore, the act of Congress cannot be construed in the restricted sense contended for without violating a leading object of grantor and grantee; nor does it seem to have entered the mind of either, that a selection of fractions violated the terms of the grant. From first to last, for nearly thirty years, has the grantor acquiesced; nor do we think that

the validity of the selection can be called in question by an objection never set up by the United States.

The next inquiry is, as to the date when the land selected attached to the grant. June 28, 1821, the Governor of Missouri notified the Surveyor-General of the fact, that the land had been located by the commissioners, and awaited the action of the Legislature; and on the 31st day of December, 1821, the land was accepted by the Legislature; the same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanctioned, our opinion is that the acts were concurrent, and that the title refers to the first act; and, therefore, that the state took title from the 28th of June, 1821, when the Surveyor-General was notified that the location had been made. We state this as matter of principle, held in the case of *Landes* v. *Brant*, decided at last term. It is not material, however, whether the date be the 28th of June, or 31st of December, 1821, when the Legislature acted. Delisle's location by survey, was filed and recorded, in the Recorder's office, February 11, 1822; this is the first evidence of its legal existence appearing of record, and on that day it took date. It follows, that the legal title of Missouri, is elder than the equitable title set up under Delisle's claim. This was in effect the opinion of the court below, as appears
*78] by a refusal to give the 4th, 5th, 6th, 7th, 8th, *9th, 10th, 11th, and 12th exposition of the law demanded by the plaintiffs; and with which opinion we concur.

The next question raised and decided by the state courts appears by the following exposition of the law, pronounced at the request of the defendant, and on which the judgment also proceeded:

"If John B. Delisle, who was the owner of the land in the County of New Madrid, in lieu of which the certificate No. 347 was issued, until the year 1842, knew nothing of the issuing or existence of said certificate, nor of notice, survey, or patent given in evidence by the plaintiffs, *and never assented to the same prior to that date;* and if, prior to that date, the four sections of land mentioned in the fourth proposition of the sixth section of the act of Congress, approved March 6th, 1820, had been located under the direction of the Legislature of this state upon the premises in question, then no title passed to the said Delisle, in or to said premises, as against the state of Missouri."

The evidence shows, that all the steps taken for the purpose of obtaining a grant of land from the United States, in

lieu of land owned by John B. Delisle, lying in New Madrid county, and which had been injured by earthquakes, were taken by Langham and Hempstead, or at their instance, they representing themselves to be the legal representatives of Delisle, and without the consent, knowledge, or authority of Delisle, and that what was done by them in his name did not receive his sanction or assent until the year 1842. But it is insisted that the law will imply his assent, as the grant was beneficial to him. This might be a safe implication if the grant had been a pure donation unaccompanied with any condition; but such is not the fact. The act of Congress for the relief of the inhabitants of New Madrid county, whose lands had been materially injured by earthquakes, provides that, where locations are made under the act, the title of the individual to the land injured shall revert to, and become absolutely vested in, the United States. Instead, therefore, of its being a pure donation on the part of the government, it was a proffered barter or exchange of lands by legislative enactment. Where the value of the land in New Madrid had been entirely destroyed, it might be regarded as a donation of other land to the individual owner; but where that was not the case, it could not be so considered. Now, it is a well known fact, that much of the land exchanged with the government under this law is this day of more intrinsic value than the land located in lieu thereof. Where this is the case, the government, instead of making a donation, has driven a profitable bargain. But the government is not chargeable with any *wrong in this transaction, because the owners of land in New Madrid were not compelled to accept the provisions of the act; if they did so, it was a voluntary act on their part, and their assent should be evidenced by some affirmative act done by them. [*79

There is, however, in this case, no ground for implication. All presumption of assent is utterly excluded by the evidence of Delisle himself, who states that he was wholly ignorant of the existence of the act of Congress on that subject until the year 1842. He could not be divested of his land in New Madrid until he assented to the exchange, and he could give no assent until he was informed of the act of Congress making provision for those whose land had been injured. The title, then, to the land in New Madrid remained in Delisle up to the year 1842, when he assented to what had been done by Langham and Hempstead in his name; and, as Congress only intended to grant other land on condition that the title to the land injured should revert to, and vest in the government, no

title could pass to Delisle until 1842, prior to which time the state of Missouri had acquired title to the land in controversy.

It is proper to remark that, on the last ground of defense, we have adopted the views, in part, expressed by one of the judges of the Supreme Court of Missouri, whose opinion is found in the record.

Our conclusion is that, on both grounds of defense, the state courts expounded the law applicable to the facts correctly, and that therefore the judgment should be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Missouri, 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.

JOHN L. HARRIS, SURVIVING PARTNER OF ROWAN AND HARRIS, *v.* HIRAM G. RUNNELS.

Where a defendant, when sued upon a note, set up, as a defense, that the note was given for an illegal consideration, the whole statute must be examined in order to discover whether or not the legislature intended to prevent courts of justice from enforcing contracts relating to the act prohibited.

*80] *Where a statute prohibits an act or annexes a penalty to its commission, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it.[1]

Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain any thing "from which the contrary can be properly inferred."[2]

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[1] While it is true that penal laws must be construed strictly, and never extended by implication, *Ferrett* v. *Atwill*, 1 Blatchf., 151; *Stimpson* v. *Pond*, 2 Curt., 502; *United States* v. *Starr*, Hempst., 469; *Andrews* v. *United States*, 2 Story, 203; yet they are not to be so strictly construed as to defeat the obvious intention of the legislature. *The Enterprise*, 1 Paine, 32; *United States* v. *Wiltberger*, 5 Wheat., 76; *American Fur Co.* v. *United States*, 2 Pet.. 358; *United States* v. *Morris*, 14 Id., 464; *United States* v. *Winn*, 3 Sumn., 209; *United States* v. *Athens Armory*, 35 Ga., 344. This intention should be searched out and followed. *The Enterprise*, *supra*; *United States* v. *Winn*, *supra*. All the provisions should be construed together, *The Harriet*, 1 Story, 251; and in cases of doubt the penalty will not be inflicted, *The Enterprise*, *supra*.

[2] A promise to do what the law forbids, is void, whether the act proposed to be done be *malum in se* or *malum prohibitum*. *Bank of the United States* v. *Owens*, 2 Pet., 527; *Marshall* v. *Baltimore &c. R. R. Co.*, 16 How., 334; *Milne* v. *Huber*, 3 McLean, 212; *Scudder* v. *Andrews*, 2 Id., 464; *Craig* v. *Missouri*, 4 Pet.

Thus, where a statute of Mississippi declared that slaves should not be brought into the state without a previous certificate signed by two freeholders, with a certificate of the clerk of the county from which they came, certifying that the signers were respectable freeholders; and slaves were brought in without such certificate and sold, the contract is not void, but the purchaser must pay his note given for the purchase-money.

Other parts of the statute indicate that the legislature did not intend to declare the contract void; as, for example, a part in which a fine is imposed upon the buyer and also upon the seller.[3]

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

The action was originally brought by Rowan & Harris upon the following note. Rowan having died during the suit, it was prosecuted by Harris, the surviving partner. It will be perceived that the action was by the indorsees against the indorser.

Dollars 8,671.33⅓.

On or before the first day of March, eighteen hundred and forty, I promise to pay H. G. Runnels, or order, eighty-six hundred and seventy-one 33⅓ dollars, negotiable and payable at the Planters' Bank, Natchez, Miss., value received, this 7th December, 1837.

G. W. ADAMS.

(*Indorsed.*)

For value received, I transfer and assign over to Rowan & Harris the within note of $8,671.33⅓; said note is secured by

411; *Martin* v. *Barlow Iron Works*, 35 Ga., 320. If the statute simply prohibits an act without inflicting a penalty for the doing of it, a contract in contravention of the statute is void. *Sortwell* v. *Hughes*, 1 Curt., 244; *Hayden* v. *Davis*, 3 McLean, 276. What is implied in a statute, is as much a part of it, as what is expressed. *United States v. Babbit*, 1 Black, 61; *Gelpcke* v. *Dubuque*, 1 Wall., 220.

[3] The rule that penal statutes must be construed strictly "does not exclude the application of common sense to the terms made use of in the act in order to avoid any absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." *United States* v. *Hartwell*, 6 Wall., 396. See also *Gold Mining Co.* v. *National Bank*, 6 Otto, 641; *National Bank* v. *Matthews*, 8 Id., 627; *Dowell* v. *Applegate*, 7 Fed. Rep., 883; s. c. 7 Sawy., 235; *Moore* v. *Clopton*, 22 Ark., 128; *Deans* v. *McLendon*, 30 Miss., 360; *Tod* v. *Wick*, 36 Ohio St., 389.

mortgage on lands, of record in Bolivar county, Miss., and I vest in said Rowan & Harris the right to control said mortgage.

Given under my hand this 22d July, 1838.

H. G. RUNNELS.

Rowan & Harris.

Before stating the pleas of the defendant, it is proper to refer to a statute of Mississippi, passed in 1852. (Howard & Hutch. Dig., 155.)

Sec. 1, Describes who are slaves; such as are brought in pursuant to law, &c.

Sec. 2. Slaves may be brought in, except convicts.

Sec. 3. No person shall bring in or hold convicts.

*81] *Sec. 4. Slaves not to be brought in without a previous certificate, signed by two respectable freeholders in the county and state from which the slaves were brought, and signed and acknowledged before the clerk of said county, and certified by the clerk that the persons whose signatures were affixed thereto were respectable freeholders of the county and neighborhood where they resided, containing a particular description of the stature and complexion of such slaves, together with the names, ages, and sex of the same; and furthermore, that the slaves therein mentioned and described had not been guilty or convicted of murder, burglary, or arson, or felony, within the knowledge or belief of such freeholders.

Sec. 5. The seller shall register the certificate in the Orphans' Court, and swear that he believes it to be true.

Sec. 6. Seller or purchaser, contrary to this act, shall pay one hundred dollars for every slave so sold or purchased.

To the declaration of the plaintiff, Runnels plead three pleas, viz., the general issue of *non assumpsit* and two special pleas. The conclusion of one of these pleas will show the nature of both. "And the defendant avers, that the said plaintiffs had not, previously to the importation of the slaves, sold as aforesaid to the said defendant, and had not previously to, nor at the time when the said slaves were sold to this defendant, obtained a certificate signed by two respectable freeholders in the county of the state of Virginia, from which said slaves were brought, and signed or acknowledged before the clerk of said county, in the state of Virginia, and certified by said clerk, that the persons whose signatures were affixed thereto were respectable freeholders of the county and neighborhood where they resided, containing a particular description of the stature and complexion of such slaves, together with the names, ages, and sex of the same; and furthermore,

that the slaves therein mentioned and described had not been guilty or convicted of murder, burglary, or arson, or felony, within the knowledge or belief of such freeholders, in the said state of Virginia; and so this defendant says, that the sale of said slaves to him was illegal and void, and the transfer and indorsement made by him of the note in the declaration was also illegal and void, and this he is ready to verify; wherefore, &c."

The plaintiff joined issue upon the first plea, and demurred to the two special pleas. Upon the trial, the court below overruled the demurrers, and gave judgment for the defendant. Whereupon, the plaintiff brought the case up to this court by writ of error.

It was argued by *Mr. Nelson*, for the plaintiff in error, and by *Mr. Howard* for the defendant.

Mr. Nelson contended that the Statute of Mississippi [*82 was a mere police regulation, the non-observance of which did not avoid the contract, and cited the following cases: *Faikney* v. *Reynous*, 4 Burr., 2069; *Petrie* v. *Hannay*, 3 T. R., 418; *Farmer* v. *Russell and another*, 1 Bos. & P., 296; *Simpson* v. *Bloss*, 7 Taunt., 246; *Johnson and others* v. *Hudson*, 11 East, 180; *Armstrong* v. *Toler*, 11 Wheat., 259; *Graves* v. *Slaughter*, 15 Pet., 449; and Story Confl. of Laws, pp. 205–209. The act of Mississippi of the 18th June, 1822, How. & Hutch. Dig., 156; Hutch. Miss. Code, 513.

Mr. Howard contended, that contracts contrary to laws or public policy are void and will not be enforced.

Craig v. *State of Missouri*, 4 Pet., 426; *Hunt* v. *Knickerbacker*, 5 Johns. (N. Y.), 327; *Sharp* v. *Teese*, 4 Halst. (N. J.), 352; *Marchant* v. *Evans*, 8 Taunt. 142; *Stephens* v. *Robinson*, 2 Cromp. & J., 209; *Spurgeen* v. *McElwain*, 6 Ohio, 442; *Belding* v. *Pitkin*, 2 Cai. (N. Y.), 147; *Fales* v. *Mayberry*, 2 Gall.,, 560; *Griswold* v. *Waddington*, 15 Johns. (N. Y.), 37; 16 Id., 438.

They are void whether so declared by the statute or not. It is sufficient that they are forbidden, or contrary to law or public policy. *Yates* v. *Williams*, 5 Ark., 684; *Eberman* v. *Reitzel*, 1 Watts & S. (Pa.), 181.

Where a thing is not absolutely prohibited, but permitted to be done in a particular manner, and prohibited in any other, contracts are not valid made in violation of the prescribed method. This was settled in the celebrated case of *Law* v. *Hodson*, 11 East, 300, which was an action to recover

the price of brick which did not conform to the size prescribed by the statute. Like the Mississippi law of 1822, it did not declare contracts void, but contained a prohibition under penalty. To the same effect is *Little* v. *Poole*, 9 Barn. & C., 192; *Forster* v. *Taylor*, 5 Barn. & Ad., 887; *Tyson* v. *Thomas*, 1 McCl. & Y., 119; *Langton* v. *Hughes*, 1 Mau. & Sel., 593; *Bank U. S.* v. *Owens*, 2 Pet., 537.

It was decided in Massachusetts, that "no action lies on a promissory note, the consideration whereof was the sale of shingles, not of the size prescribed by the statute." *Wheeler* v. *Russell*, 17 Mass., 258.

No action can be maintained for leather not stamped as required by law; *Elkins* v. *Parkhurst*, 17 Vt., 105; *DeBegnis* v. *Armistead*, 10 Bing., 107; *Cope* v. *Rowland*, 2 Mees. & W., 149. The last case decides, that business by a broker without license is illegal, and that he cannot recover for his services.

*83] *Mr. Justice WAYNE delivered the opinion of the court.

It is said that the note sued upon in this case, was given for an illegal consideration.

The illegality alleged is, that the plaintiff brought slaves into the state of Mississippi as merchandise, in contravention of the statute regulating the importation of them, and sold them to the defendant, for which the note was given in payment. It is admitted by the plaintiff's demurrer to the defendant's special plea, that they were so brought and sold. The court overruled the demurrer and gave judgment for the defendant. The cause is before this court upon a writ of error sued out by the plaintiff. The law making contracts, in contravention of statutes, irrecoverable by suit, will be first stated and afterwards applied to this case.

There is no doubt that *assumpsit* cannot be sustained upon a contract which has not a sufficient consideration. It must not be illegal, of an immoral tendency, or contrary to sound policy. The common law maxims are *ex turpi causâ, non oritur actio—ex dolo malo non oritur actio.* It prohibits every thing which is unjust or *contra bonos mores.* The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void; and they are so whether the consideration to be performed or the act to be done be a violation of the statute.

A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it, by affixing a penalty to

the performance or omission thereof. It makes no difference whether the prohibition be expressed or implied. In either case, a contract in violation of its provisions is void. The rule is certain and plain. The practice under it has been otherwise. The decisions in the English courts have been fluctuating and counteracting. Those in the courts of our states have followed them without much discrimination. No one can read any one of the recent elementary treatises upon contracts without noticing the differences of opinion among judges as to the operation of the rule. Showing, however, as they do, the history of these differences, they may lead to more conformity of judicial opinion hereafter in this respect.

The character of these differences will be seen by noticing one of them. Others might easily be made.

Within a few years we were told, in the English Reports and seemingly to us with a good reason, that the rule which avoids a contract made in contravention of a statute, did not apply to statutes made for the protection of the revenue only. That the non-observance of excise regulations will not avoid a contract *in respect of their subject-matter, if it be not accompanied with fraud, although a penalty attaches. *Johnson* v. *Hudson*, 11 East, 180; *Brown* v. *Duncan*, 10 Barn. & C., 98; *Hodgson* v. *Temple*, 5 Taunt., 181. And that it was always to be applied, when the statute was made for the protection of the public from moral evils, or from those which we know from experience that society must be guarded from by preventive legislation. Such was received as the law by the courts in England and in our states, and cases were ruled in both accordingly; but afterwards, with only a few years intervening, Baron Parke, a distinguished judge, truly said, in *Cope* v. *Rowland*, (2 Cromp. M. & R., 157,) "Notwithstanding some dicta apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which has made it so has in view the protection of the revenue or any other object." Such we believe to be now the rule in England, but with many exceptions, made upon distinctions very difficult to be understood consistently with the rule; so much so, that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be [*84

taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes *unlawful*, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy it should always be applied, is very certain. For, in some statutes, it is said in terms that such *85] contracts are void; in *others, that they are not so. In one statute, there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practises a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them.

We now turn to the case on hand, to apply to it our version of the rule and the manner of its application.

The statute relied upon by the defendant, to avoid the payment of his note, is that of June, 1822, (Hutch. Dig., 512). He relies upon the fourth section, substantially recited in his special pleas, and says the plaintiffs cannot recover upon the note, as it was given for an illegal consideration, from the plaintiff's having failed, before he sold the negroes, to comply with the directions in the fourth section. The sixth section declares that both the seller and the buyer of such slaves shall pay one hundred dollars for every slave so sold or purchased.

The two sections, considered conjunctively, seem to us to imply that the penalty only, without any other loss to either the seller or the buyer, was to be inflicted. The subject-matter and the sufficiency of the penalty relatively to the value of a slave, to prevent the mischief against which the legislature meant to guard, imply that the legislature did not mean that such a contract should not be enforced in a court of justice. Besides, as the act was meant to prevent convict negroes from being brought into the state for sale, and another penalty for that offence is to be inflicted, severer than that of the sixth section, without a forfeiture of the slave or any provision for his removal from the state, it cannot have been intended that the disregard of precautionary directions, for the importation of slaves for sale was to be visited with its penalty, and the indirect forfeiture by the seller of the price of them, by denying to him the aid of courts to enforce a contract of sale for negroes who were not convicts. This statute must be interpreted as all other statutes are liable to be. The state's policy was to exclude all negroes tainted with crime. For aught that appears in the pleadings, the defendant bargained for the negroes, knowing that they were brought into the state as he says they were. If, then, there was a violation of the law by his purchase, he stands in *pari delicto* with the seller, with this difference between *them, that he is now seeking to add to his breach of the law the injustice of retaining [*86 the negroes without paying for them. And he might do so if the statute was such as it is represented to be in his pleas. The law will not aid either of two parties who are in *pari delicto* in the violation of a statute. Whatever may be stated in a contract for an illegal purpose, a defendant, against whom it is sought to be enforced, may, to prevent it, show both the turpitude of himself and the plaintiff. Lord Mansfield said, with a very proper sensibility of the injustice of such a plea and of the policy which permits it to be insisted upon, "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff." Such is the law, and the defendant would have the advantage if he had not mistaken the statute under which it is claimed.

It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, or substantially avoiding the inflic-

tion of a penalty upon the transgressor, that such an interpretation must he rejected. In this case, the interpretation contended for in behalf of the defendant does both. One of them has already been stated. It is, that it would lead to the infliction of a severer penalty for the disregard of the directions for buying slaves for sale who are not convicts, than the statute imposes upon those who shall bring convict slaves into the state.

Further, the penalty in the sixth section, upon such as do not comply with the directions in the fourth, is to be equally inflicted upon the buyer and the seller.

Make, then, this contract void, by the application of the rule *pari delicto potior conditio est defendentis et possidentis*, and the defendant, in the event of his conviction for transgressing the statute, would be substantially released from the penalty as to all the objects for which punishment is ever inflicted; because, having the power to retain the negroes, he would pay the fine from their labor, or would get them for only so much less than he bargained to give for them. In other words, the seller, if convicted too, would pay his own and the buyer's fine. Again, as the rule is not allowed for the benefit of either party to an illegal contract, but altogether upon grounds of public policy, we do not think that public policy calls for the application of it in this case, as the defendant might keep the slaves which he bought from the plaintiff within the state of Mississippi, contrary to the law which forbade the sale of them.

*87] *Such decided advantages, to one of two who have violated a statute by a contract, could not have been meant by the legislature of Mississippi.

It is gratifying to us, that the conclusion at which we have arrived is sustained by the subsequent legislation of Mississippi. In 1837, (Hutch. Dig., 535,) an act was passed repealing the act permitting slaves to be brought into the state for sale. In addition to the penalty, it is declared in terms that all contracts in contravention of it shall be void. There could not be, from statutes in *pari materiâ*, especially in one repealing another and substituting new conditions and penalties upon the same subject-matter of both, a stronger circumstance to show, that under the first statute in order, contracts in violation of it were not meant to be irrecoverable by suit. Our judgment in this case is, that the contract is not void, and that the defendant can take nothing by his pleas.

We are aware, that decisions have been made in the courts of Mississippi seemingly in conflict with this; but they are only so in appearance. None of them were made until after

the constitution of Mississippi of 1817 had been superseded by that of 1832. We have said, more than once, and now say again, that the clause in the constitution of 1832, prohibiting the introduction of slaves into the state as merchandise, was inoperative to prevent it until the legislature acted upon it. We have read all that has been officially written in opposition to that conclusion without having our confidence in its correctness at all shaken.

We shall direct the reversal of the judgment in this case.

Mr. Justice McLEAN and Mr. Justice CURTIS dissented.

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 for further proceedings to be had therein, in conformity to the opinion of this court.

The United States, Plaintiffs in error, *v.* Daniel H. Bromley.

The act of Congress passed on the 3d of March, 1845, (5 Stat. at L., 736,) forbids the transportation of letters, packages, or other mailable matter, except such as may have relation to some part of the cargo or some article at the same time conveyed in a stage or other vehicle, when such transportation is over a mail route.

A letter or order, although unsealed, directing tobacco to be sent by the return boat as a commercial transaction, was within the prohibition of the statute.[1]

Under the act of Congress passed on the 31st of May, 1844, (5 Stat. at L., 658,) directing that final judgments in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws may be reviewed in this court without regard to the sum or value in controversy, this court can exercise jurisdiction. The revenue of the Post-Office Department is a part of the revenue of the government.[2]

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[1] See also *United States* v. *Hall*, 9 Am. L. Reg. (O. S.), 232; *Same* v. *Kimball*, 7 Law. Rep., 32; *Same* v. *Thompson*, 9 Id., 451; *Same* v. *Tilden*, 21 Id., 598; *Same* v. *Pomeroy*, 3 N. Y. Leg. Obs., 143; *Same* v. *Chaloner*, 1 Ware, 214; *Same* v. *Adams*, 1 West. L. J., 315.

[2] The act of 1844 gives jurisdiction to the appellate court, without regard to the amount in controversy, only where the judgment is rendered in a circuit court. *United States* v. *Carr*, 8 How., 1. It does not include an action against a collector to recover back duties paid under protest. *Mason* v. *Gamble*, 21 How., 390. See *United States* v. *Norton*, 1 Otto, 569.

THIS case was brought up by writ of error, from the Circuit Court of the United States for the Northern District of New York.

It was an action of debt on statute, commenced in the District Court of Northern New York, founded on the *tenth* section of the act of 3d March, 1845: "An act to reduce the rates of postage; to limit the use, and correct the abuse, of the franking privilege; and for the prevention of frauds on the revenue of the Post-Office Department."

The section is as follows: "That it shall not be lawful for any stage-coach, railroad car, steamboat, packet-boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly performs trips at stated periods on a post-route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the Post-Office Department, to transport or convey, otherwise than in the mail, any letter or letters, packet or packages of letters, or other mailable matter whatsoever, except such as may have relation to some part of the cargo of such steamboat, packet-boat, or other vessel, or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle; and excepting also newspapers, pamphlets, magazines, and periodicals; and for every such offence, the owner or owners of the stage-coach, railroad car, steamboat, packet-boat, or other vehicle or vessel, shall forfeit and pay the sum of one hundred dollars; and the driver, captain, conductor, or person having charge of any such stage-coach, railroad car, steamboat, packet-boat, or other vehicle or vessel at the time of the commission of any such offence, and who shall not at that time be the owner thereof, in whole or in part, shall in like manner forfeit and pay, in every such case of offence, the sum of fifty dollars." 5 Stat at L., 736.

*89] *What constitutes mailable matter, is defined in the fifteenth section. Id., 737.

The declaration contains ten counts, and in substance, they all and each of them charge, that Bromley, the defendant, was the captain of the packet-boat Empire, which regularly performed trips, at stated periods, between two places, from one to the other of which places the United States mail was regularly conveyed, under the authority of the Post-Office Department, to wit, between Albion and Rochester; and that the said packet-boat, and the said defendant so being such captain, and the managers, servants, and crews of the said packet-boat, did, while the said defendant was such captain thereof, and while the said packet-boat did regularly perform trips, at

stated periods, between the said places, the said United States mail being regularly conveyed, under the authority of the Post-Office Department, from one to the other of the said places, transport and convey, otherwise than in the mail, divers letters, packets, and packages of letters, to wit, ten letters, ten packets, and ten packages of letters, then and there being mailable matter, other than newspapers, &c.; and which said letters, packets, and packages of letters, did not, nor did any or either of them, have relation to any part of the cargo of the said packet-boat, from one to the other of the said places, from one to the other of which said places the United States mail was then and there regularly conveyed as aforesaid, under the authority of the Post-Office Department, contrary to the intent of the act; whereby the defendant did then and there forfeit, and became liable to pay the plaintiffs the sum of fifty dollars; by means whereof, an action hath accrued to the plaintiffs to demand and have of and from the defendant the sum of fifty dollars.

To this declaration the defendant pleaded *nil debet*, to which the plaintiffs joined issue.

The cause coming on to be tried, the plaintiffs offered certain evidence set forth in the bill of exceptions, as follows:

Wallace Sherman, to whom it was objected on behalf of the defendant, that he was informer in the case, but the court overruled the objection.

The said witness was therefore examined in chief by the said United States Attorney, and testified, that he was clerk in the post-office at Albion, from about the middle of August, 1846, during all which time the mail was regularly carried under the authority of the Post-Office Department, between Albion and Rochester, New York, daily. H. I. Sickles was postmaster at Albion; that he had seen the defendant, and knew him by sight; that he believed he was captain of the packet-boat Empire, on the Erie Canal, in 1845, and part of 1846; that the packet-boat Empire, *during the season of navigation, performed regular trips between Rochester and Buffalo; that Albion was on the canal between Rochester and Buffalo; that he had seen Kelsey, the steward of the boat; that he was steward of the boat while the defendant was captain; that he saw a letter or letters given to Kelsey in 1846, he thought in May; that it was while the defendant was captain, and while the boat was at Albion; Kelsey was the steward of the boat, which was going from Buffalo to Rochester; that he thought two letters were given to him, one by Brainard and one by Parmlee; that he did not know as anything else was given to the steward; that he the wit-

[*90

ness, was not far off; that he did not know whether both the letters were given to the steward at the same instant of time.

On cross examination by the counsel for the defendant, this witness testified that this was between 10 and 11 o'clock at night; the boat did not stop at Albion over fifteen minutes; that on the occasion spoken of he and one White got on the boat; that he had seen the defendant on the boat Empire since that time; that he did not abandon the boat very early in 1846; that after the defendant quit, Kelsey run the boat as captain; that he, the witness, was not acquainted with Brainard, who was a tobacco peddler; Parmlee attended the bar at the Mansion House in Albion; the papers handed to the steward were folded in the shape and size of letters; he, the witness, did not know whether they were sealed or not; Kelsey got on the boat after he took the letters; they did not contain over one sheet of paper each.

On a re-examination by the said United States Attorney, the witness testified, that he saw the report of the case by the postmaster to the United States Attorney. It is shown to and identified by the witness, who stated the report to be dated May 7, 1846.

William V. White was then called as a witness for the said United States, and testified that he resided at Brockport, and was at Albion in the spring of 1846, he thought in May, and stayed at Albion from dark until 10 or 11 o'clock the same night; and then went from Albion to Rochester in the packet-boat Empire, of which the defendant was the captain.

That the last witness, Sherman, came down to the wharf to see the witness off. That he, the witness, did not see any thing handed to the steward, or any hand on the boat. That he arrived at Rochester about 7 o'clock the next morning, and saw Kelsey, the steward, have something of paper, which he handed to a boy. That he did not see the size of the paper, or whether sealed or open. That he did not see from what part of his person the steward took the paper. That the boy
*91] to whom the *paper was delivered belonged to the boat; he thought there was no more than one paper, and that he should think they were folded. That he did not notice any writing on the papers. That this was almost half an hour after the boat arrived at Rochester. The said United States Attorney thereupon asked the said witness whether the said steward, when he gave the said papers to the boy, gave any directions to the boy in respect to said papers. And the said counsel for the said defendant did then and there object, and insist that the said question was improper, and that the said witness ought not to answer the same. And the said court

did thereupon then and there decide, that the said question was incompetent, and that the same should not be answered by the witness; to which opinion and decision the said United States Attorney did then and there except.

On cross-examination, the said witness testified that he was with Sherman most of the time after nine o'clock of the evening of the transaction spoken of, until the packet-boat left Albion. That it was between the 1st and 15th of May, 1846. That the defendant was on the boat as captain that night.

James Brainard was then called and sworn as a witness on behalf of the United States, and testified that in May, 1846, he was at work peddling tobacco for Mr. Palmer; that he was at Albion every two weeks, and thought he was there in May; that he was there the fore part of the week, but did not recollect the time of the month; that he recollected offering Kelsey a letter at Albion to carry to Mr. Palmer, his employer, at Rochester, and Kelsey would not carry it, and said he was not permitted to carry letters. That this was in front of the hotel at Albion, at 10 or 11 o'clock at night; that he (the witness) kept the letter, and wrote an order on his employer for some tobacco, and gave it to Kelsey to carry; that he wrote it on a half sheet of paper, and wrote it half over and tore off the residue. That he folded it over the width of the sheet, and then once at right angles with the first fold, and directed it on the outside to Mr. Palmer, at Rochester. That the order to Mr. Palmer was a request to send some tobacco to him (the witness) at Albion, by the boat Empire, or by the first boat; and the witness thinks the request was to send it by the first boat; and this was the substance of the paper. That he did not give the steward anything for carrying the letter. That he received the tobacco the next day. He found it at the hotel at Albion, when he came back from Berne Centre.

On cross-examination, this witness testified, that he supposed, when he wrote, that the Empire would be the first boat out of Rochester, after the receipt of the order by Palmer. That he told Palmer to send the tobacco by the first boat; that he paid nothing for bringing the tobacco.

*James H. Palmer was then called and sworn, as a witness on behalf of the United States, and testified [*92 that he was the person of that name referred to in the testimony of the last witness, and had charge of the business of the firm at Rochester, for whom Brainard was peddling tobacco in May, 1846. That he frequently received orders from Brainard by mail and otherwise; that the orders were all destroyed; that he never sent tobacco to peddlers except upon orders, unless they requested it before they left Rochester.

On cross-examination, he testified that he recollected sending tobacco by the defendant's boat, in May, 1846, to Brainard.

William Parmlee was then sworn, and called as a witness on behalf of the United States, and testified that, in May, 1846, he attended bar for Mr. Hopkins, at Albion. That he did not recollect handing any paper or letter to Kelsey, to be carried by him, or for any other purpose; that he had offered letters to Kelsey to carry, and he refused to carry them; that he recollected seeing Brainard giving a note to Kelsey, written on two thirds of a sheet of foolscap paper, and folded in about the size of an ordinary letter, to be carried to Rochester.

On cross-examination, the witness testified that the boat Empire brought the tobacco from Rochester for Brainard; and he (the witness) paid the steward (Kelsey) half a dollar for bringing it, which Brainard afterwards repaid him.

Said Kelsey was then called as a witness for the said United States, and testified that in May, 1846, he was steward of the Empire. The defendant was captain of the said boat; that he recollected the circumstances spoken of by Brainard and Sherman, that Brainard came with a letter, and he (the witness) refused to take it; and that he soon afterwards brought the order spoken of, which he (the witness) took, and, when he arrived at Rochester, sent to Mr. Palmer, and received the tobacco and carried it to Albion, for which he received a half dollar, which was a perquisite of his own.

The said United States Attorney thereupon rested the said cause, and the counsel for the defendant did then and there ask the said judge to direct the said jury that the said evidence did not establish a cause of action against the said defendant; and that the said defendant, upon the said evidence, was entitled to a verdict; and the said judge did thereupon, then and there declare and decide, that the said evidence, so as aforesaid given, did not establish a cause of action against the said defendant; and that the said paper, carried and conveyed by the steward of the said boat, from Albion to Rochester, as aforesaid described by the witnesses, was not a letter or mailable matter within the meaning of the act of Congress,

*93] but was a paper having a different *and distinct character of its own, and could be lawfully carried by the said steward of the packet-boat aforesaid; and did then and there, for the reason aforesaid, direct the said jury to find a verdict for the said defendant. To which said opinion and decision the said United States Attorney did then and there except; and the said jury did thereupon, in pursuance of the said opinion and decision, without leaving the box, find a verdict for the defendant.

The cause was afterwards removed by writ of error into the Circuit Court, when the judgment of the District Court was affirmed.

The United States then sued out writ of error and brought the case up to this court.

It was argued by *Mr. Crittenden*, Attorney-General, for the United States, and by *Mr. Sackett*, for the defendant in error.

Mr. Crittenden contended:

1. That, although the amount in controversy is under the sum of two thousand dollars, yet this court has jurisdiction, under the act of 31st May, 1844: "An act to amend the Judiciary act, passed the 24th September, 1789," whereby it is enacted, "that final judgments in any Circuit Court of the United States, in any civil action, brought by the United States, for the enforcement of the revenue laws of the United States, or for the collection of the duties due, or alleged to be due, on merchandise imported therein, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, without regard to the sum or value in controversy in such action, at the instance of either party." 5 Stat. at L., 658. And that the laws relating to the revenue of the Post-Office Department are revenue laws, within the meaning of the above act. The act under which the suit is brought is entitled "An act to reduce the rates of postage, &c., and for the prevention of frauds on the revenue of the Post-Office Department." 5 Stat. at L., 736. See also act of 3d March, 1845: "An act to change the organization of the Post-Office Department, and to provide more effectually for the settlement of the accounts thereof," particularly the first, third, twelfth, and forty-fifth sections. 5 Stat. at L., *et seq.*

2. That the paper conveyed by the steward of the packet-boat Empire was a letter within the meaning of the statute. See testimony of Parmlee and Brainard.

1st. The law under which the suit was brought is a revenue law, and is to be liberally construed, so as to effect the intention of Congress, *Taylor* v. *United States*, 3 How., 197.

2d. A letter is a written communication from one person to *another; neither external direction, nor sealing, nor envelope, are essential to a letter. [*94

3d. The paper in question being directed externally, was mailable matter; that is, had every requisite to enable it to be effectively transmitted by post.

4th. That here was an attempt to evade the statute. The steward rejected what he describes as a letter, but conveyed a

paper with the same contents and direction. See Kelsey's testimony.

Mr. Sackett contended:

1. This Court has no jurisdiction, less than $2000 being in controversy.

The act of 31st of May, 1844, (5 Stat. at L., 658,) giving to this court the right of review, on error, to a circuit court, in all "civil actions for the enforcement of the revenue laws of the United States," does not apply to the act under which this suit is brought. That act is a law to carry out the power vested in Congress in relation to post-offices and post-roads, and not a revenue act. Art. 1, sec. 8, of the Constitution.

The system of postages, established by that act, is not a system of revenue. It is a plan of compensation for the services of government in carrying the mails.

Revenue laws must be uniform. Sec. 8, Constitution. This law is but a graduated scale of rates charged for labor performed. Indeed, there is no power in Congress to convert its power "to establish post-offices and post-roads" into a revenue power. And though postages, however unequally levied, may incidentally produce revenue, they are not levied as revenue. Official fees of marshals, attorneys, &c., that go into the Treasury, may as well be claimed to arise from the taxing or revenue power.

But if this be held to be a revenue law, query, does the act of 31st of May reach suits for penalties for its violation? Such suits are not suits to enforce the law, but to punish for a breach of it.

2. The paper carried by Kelsey was not "mailable matter." It was not a letter, and there is no other specification of "mailable matter," except letters, by which this case is even supposed to be embraced. The parties acted sincerely, and, as they believed, lawfully. It is said, on the other side, that the same thing was contained in the order, that was in the destroyed letter. There is no proof of this; but if true it is of no legal consequence. The same word might have been sent verbally, and it would have been as much an evasion in one case as the other, so far as payment was concerned.

This paper was not a letter, a packet, or package; it was an
*95] *open request, a memorandum. To compel such papers to pass through the mails would be a most useless clog to business, and utterly derange the customs and conveniences of society. It is not intended by the post-office act to compel business into the mails, but only to prevent what naturally

belongs to them from being drawn out by private hands. 5 Stat. at L., 737, sec. 15.

3. If the paper carried was "mailable matter," standing alone, it was not so in its connection with the "cargo" of the boat. The act clearly contemplates that boats and vessels may do their own business in relation to their own cargo, whether on board or to be procured. This will be seen from the language of the act. The 10th section, in stating the exceptions, says, "except such as may have relation to some part of the cargo of such steamboat, packet-boat, or vessel, or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle."

In fact, if vessels on lakes, rivers, and canals, are not to be permitted to carry memorandums or orders, in relation to their cargo, either on board or to be procured, they will suffer endless inconvenience. For instance, a boat is passing, and a shipper wishes "cargo" put on board a few miles ahead; the mail may not pass in three days; he wants to send by the boat an order to his agent to ship; under the rule contended for he cannot do it.

4. The act is a penal one, and must be construed strictly. Its penal character is very extraordinary. It makes the innocent pay the penalty for the guilty. So in this case.

Mr. Justice McLEAN delivered the opinion of the court.

This is a case on error, from the Circuit Court of the Northern District of New York.

An action of debt was brought in the District Court, under the tenth section of the act of the 3d of March, 1825, entitled "An act to reduce the rates of postage, &c., and for the prevention of frauds on the revenue of the Post-Office Department." It prohibits, under the penalties provided, any stage-coach, railroad car, steamboat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips on a post-route, on which the mail is carried, from transporting letters, packages, or other mailable matter, except such as may have relation to some part of the cargo, or to some article at the same time conveyed in a stage or other vehicle.

The declaration charged the defendant Bromley, as the captain of the packet-boat Empire, which regularly performed trips *on the canal between Albion and Rochester, in the state of New York, on which line the mail was transported, under the authority of the Post-Office Department, with transporting, otherwise than in the mail, divers letters, packets, and packages of letters, then and there being mailable [*96

matter, other than newspapers, &c., not having relation to the cargo.

The defendant pleaded *nil debet*, and the plaintiffs joined issue.

Evidence was given to show that the defendant was captain of the boat Empire, which performed trips between the places stated, and that the mail was regularly conveyed on the same route in 1845 and 1846. That Brainard, one of the witnesses, gave a note to Kelsey, the steward of the boat, written on two thirds of a sheet of foolscap paper, and folded the size of an ordinary letter, with a direction upon it, to be carried to Rochester. That the letter was an order to Mr. Palmer for tobacco, which was sent by the return boat, and for which Kelsey, the bearer, received fifty cents.

The testimony being closed, the defendant prayed the judge to instruct the jury that it did not establish a cause of action against the defendant; and the judge instructed the jury that the paper conveyed by the steward of the boat, Kelsey, from Albion to Rochester, as sworn to by the witnesses was not a letter or mailable matter, within the meaning of the act of Congress; but was a paper having a different and distinct character of its own, and could be lawfully carried by the said steward of the packet-boat aforesaid, and did therefore direct the jury to find for the defendant, which they did, and to which instruction the plaintiff excepted.

The cause was afterwards removed to the Circuit Court by writ of error, and by which court the judgment of the District Court was affirmed. This judgment of affirmance is now before us for revision.

This writ of error was issued under the act of the 31st of May, 1844, entitled "An act to amend the Judiciary Act passed the 24th September, 1789, which provides that final judgments in any Circuit Court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of the duties due on merchandise imported therein, may be examined, and reversed or affirmed in the Supreme Court of the United States, without regard to the sum or value in controversy in such action, at the instance of either party."

That the act which prescribes the offence charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for the "prevention of frauds on the revenue of the Post-Office Department." *In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudu-

*97]

lent acts which lessen it. Under the act of 1836, the revenue of the Post-Office Department is paid into the treasury. Revenue is the income of a state, and the revenue of the Post-Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports.

We think the instruction of the court was erroneous. The letter or order, as it is called by some of the witnesses, was folded in the form of a letter and directed as such, though it was not sealed. A seal was not necessary to constitute it a letter or to make it chargeable with postage. The letter was not within the exception of the statute, as it did not relate to the cargo or to any article on board of the boat. It was an order for tobacco on Mr. Palmer, of Rochester, who was a dealer in that article. Among merchants, an order to the wholesale dealer for merchandise is a common subject of correspondence. And it may be doubted whether any other subject can be named on which more letters are written and forwarded in the mail. Two thirds of the half sheet which composed the letter was covered with writing, from which an inference may be drawn that something more than a mere order for goods was requested by the writer. But an order for goods, folded and directed as a letter, is clearly mailable matter, and a conveyance of it, as charged, is a violation of the law.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings, according to law.

Order.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the Northern District of New York, 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 for further proceedings to be had therein, according to law.

*HALL NEILSON, (UNITED STATES) PLAINTIFF IN ERROR, *v.* CLARK B. LAGOW, DAVID H. LAGOW, AND ELIZABETH S. LAGOW, CHILDREN AND DEVISEES OF WILSON LAGOW, DECEASED.

The act of Congress, passed on 1st May, 1820, (3 Stat. at L., 568,) enacts, "That no land shall be purchased on account of the United States, except under a law authorizing such purchase."

Where land was conveyed to trustees, for the purpose of paying a debt due to the United States, and the highest court of a state decided against a title set up under that deed, upon the ground that the deed was in violation of the act of Congress, this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review that decision.

The deed to the trustees being an authority to sell so much of the land as might be necessary to pay the debt, this was not such a purchase as is forbidden by the statute. Nor does the act of Congress prohibit the acquisition, directly, by the United States, of the legal title to land, when it is taken by way of security for a debt.[1]

Where the trustees purchased, and paid for out of money belonging to the United States, the equitable title, where the legal title to the land had been previously conveyed to them, the acquisition of this equitable title was nothing more than relieving the land of an incumbrance, and was not such a purchase as was forbidden by the statute.

Where the grounds of the decision of the Supreme Court of the state are not stated in the record, this court will look into the bill of exceptions taken in the court of original jurisdiction, to see what points were carried up to the Supreme Court, and whether they were necessarily involved in the judgment of the Supreme Court.

A deed to trustees and their successors in trust to sell and convey a fee-simple absolute, vested such an estate in them without the insertion of the word "heirs" in the deed.[2]

THIS case was brought up from the Supreme Court of Indiana, by a writ of error issued under the 25th section of the Judiciary Act. It originally stood in the name of Wilson Lagow, the ancestor of the present defendants in error.

The point involved was the construction of the act of Congress, passed on the 1st May, 1820, (3 Stat. at L., 568,) which forbids land from being purchased on account of the United States except under a law authorizing such purchase.

At a preceding term of this court a motion was made to dismiss the case for want of jurisdiction, which is reported in 7 How., 772. A brief history of the case is there given; and a more particular one is given in the present opinion of the

[1] S. P. *United States* v. *Hudson*, 3 McLean, 156; *United States* v. *Land*, Id., 365. And the government holds land so taken as security, as any other corporation would hold it under similar circumstances, and cannot claim the immunities of a sovereign in respect thereto. *Elliot* v. *Van Voorst*, 18 Leg. Int., 396.

[2] See also *Doe, lessor of Poor*, v. *Considine*, 6 Wall., 471; *Magwire* v. *Tyler*, 8 Id., 665; *Klinger* v. *State of Missouri*, 13 Id., 263; *Tyler* v. *Magwire*, 18 Id., 280.

court, which renders any further statement by the Reporter unnecessary.

It was argued by *Mr. Gillet* and *Mr. Crittenden*, (Attorney-General,) for the plaintiff in error, and *Mr. Judah* for the defendant in error.

The counsel for the plaintiff in error contended, that the exposition of the statute, given by the court, if true, renders null the security given by the bank for the debt of $120,308, and interest due to the United States; renders null *all other securities taken for the benefit of the United States upon lands, in any form or manner, from their debtors for thirty years last past; and until after that statute of May 1st, 1820, shall be modified or repealed, it annuls the titles of all purchasers of lands under securities given to the United States within that period by their debtors; for the instruction, says the act of Congress, "means any and every mode of acquiring an interest in real estate other than by inheritance;" "and the interest which the bank then had in the land remained in the bank." [*99

This construction, applied to the facts of the case, has extended a disabling effect of the act of Congress to the uttermost; has strained the disability to a mischievous end, not within the reason, meaning, and intent of the act; has misconceived the purpose of the statute; has overlooked the settled distinctions between legal titles and requisites, between titles to lands and securities for money, or for the performance of an act deemed valuable in law; it has overturned the established principles respecting deeds of trust executed to assure the payment of money; in fine, it has perverted a statute made to prevent the Secretaries of the Treasury, War, and Navy Departments, from diverting the moneys appropriated from the objects of appropriation, from spending the public money, and running the government in debt on account of purchase of lands, into a statute to inhibit them from securing and collecting debts due to the United States.

By the deed of trust the trustees had a discretion to demise and lease the whole or any part of the said lands, lots, and houses, until such time or times as a sale or sales thereof could be made, and receive and take the rents and profits; "also to foreclose the said mortgage and collect the said notes," (to wit, the notes of Willis Fellows, of $7000, for the purchase of the square lot surrounded by streets, and the mortgage on the square lot to secure the purchase-money, which notes and mortgage were assigned by the deed of trust to the trustees,

and the subject of the decree of sale, and sale and deed to the trustees, given in evidence by Neilson;) they had a discretion vested in them, or a majority of them, as to the sales to be made, "for cash, or on credit," "on such terms, and in such parts and parcels, as to them shall seem most advantageous," "retaining thereout, however, their, the said trustees', expenditures, and a reasonable compensation for their trouble and services," and, after paying the debt and interest due by the bank to the United States, to return the surplus to the bank, and also all such parts of the said lands and premises, either in fee or in mortgage, as shall remain unsold," &c., pp. 10, 11, 12. Such being the terms of the deed, the land must remain
*100] in the trustees to enable *them to perform the trust. Therefore, the statute of uses, or statute for transferring uses into possession, did not operate so as to transfer the land, or the title, or the possession, to the *cestui que use*, or *cestui que trust*, the United States. 2 Bl. Com., ch. 20, p. 336.

Upon the deed of trust it is palpable that the United States are not the purchasers of the land, the title is not in them, nor the possession; all that they have a right to is the money arising out of the rents, issues, and profits, and sales, when made by the trustees; the money, to the sum of the debt and interest due from the bank, as mentioned in the deed of trust, was all that the United States had a right to demand and have from the trustees; all that the United States could rightfully demand and enforce in a court of equity, with costs of suit. The land itself the United States could not rightfully demand and have, either by a suit at law or in equity, nor the possession of the land. The deed of trust was but a security for money, not a sale and purchase of the land between the bank and the United States.

That the defendant, Neilson, was subjected to the action of Lagow, and to judgment of eviction from the land, and mulcted in costs, was induced solely by the erroneous construction of the statute given by the court. From such a suit, such a judgment, and such costs, the defendant, Neilson, had the right and privilege to be exempted; he claimed his right, privilege, and exemption, but was deprived of them by the erroneous construction of the statute as contained in the bill of exceptions taken in the Circuit Court. The errors assigned in the Supreme Court of Indiana brought up for review the construction of the statute as contained in the bill of exceptions. The Supreme Court of Indiana affirmed the judgment of the Knox Circuit Court in all things.

Upon the jurisdiction of this court to revise the decision of the Supreme Court of Indiana, as being a case properly within

the 25th section of the Judiciary Act, it is sufficient to cite the cases of Crowell *v.* Randell, and Shoemaker *v.* Randell, 10 Pet. 391 to 399, in which fourteen previous cases upon this 25th section are noticed, and the doctrine is reaffirmed: "That it is not necessary that the question should appear on the record to have been raised in direct and positive terms *ipsissimis verbis*, but it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment."

No such verdict and judgment could have been rendered against the defendant, Neilson, in the Knox Circuit Court, if it had not been induced by the erroneous exposition of the statute of May 1, 1820, given by the Circuit Court; and the affirmance *in the Supreme Court of Indiana clearly and necessarily decides that question raised by the [*101 assignment of errors, and affirms that erroneous exposition of the statute of the United States.

Mr. Judah, for the defendants in error. The question is,

Had the bank any interest in the premises after executing the deed of the 1st July, 1822, to the trustees?

And this question resolves itself into these:

1. Was that deed valid?

2. If that deed was valid, did it convey the whole interest of the bank?

1. We assert that the deed was void by virtue of the seventh section of the act of Congress of the 1st May, 1820, in relation to the Treasury, War, and Navy Departments. That section is as follows: "That no land shall be purchased on account of the United States, except under a law authorizing such purchase."

That this law was understood by the proper officers at Washington to be in force in 1822, and so late as 1824, is proven by a letter of Mr. Pleasanton, then Agent of the Treasury, to the House of Representatives, 8th March, 1824, and printed in the American State Papers. Public Lands, vol. 3, 563. And this, too, is shown by the act of May 26th, 1824, which gives to the officers of the Treasury a limited power to purchase on execution. It is decided that the United States may "enter into contracts not prohibited by law." *United States* v. *Tingey*, 5 Pet. 115, 128; *United States* v. *Bradley*, 10 Id., 343, 359. But where, in the bond or deed, there is a condition or grant which is prohibited, that is illegal and void. *United States* v. *Bradley*, 10 Pet., 363.

If it is said that the interposition of trustees will take this case out of the statute, we reply,

1. That such a contrivance would be a fraud on the statute. Coke's rule is as follows:— *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.* Co. Lit. 223, b; and see 2 T. R., 251–2, quotations from Lord Northington; and *Doe* v. *Carter*, 8 T. R., 300.

2. We assert that, by the deed from the bank, only a life estate was conveyed to Badollett, Harrison, and Buntin.

Indiana is a common law state. In its courts the distinction between the jurisdiction at law and that in equity is strictly preserved. The present is a common law action, and the question is as to the legal title. The words in the deed, "and their successors," are mere surplusage, not sufficient to pass a fee-simple. *Clearwater* v. *Rose*, 1 Blackf. (Ind.), 137; *Roberts* v. *Forsythe*, 3 Dev. (N. C.), 26; 4 Cruise, Dig., 335, 336.

*102] *A grant to a natural person and his successors, passes only an estate for life. Co. Lit., 9, v. And hence, if the deed is void, the title remained in the bank, and, on its forfeiture, reverted to the Steam-Mill Company, and passed to Lagow. If the deed is valid, but only passed a life estate, the reversion in fee remained in the bank, reverted to the Steam-Mill Company, and passed to Lagow, and, on the determination of the life estate by the deaths of the grantees, took effect in possession. In either case Lagow has the legal estate, and is entitled to recover at law. If the law, on either of the above positions, is with the defendants in error, we presume this court will decide in their favor. But there is another view of the case which the counsel for the defendant in error is unwilling to abandon.

The Supreme Court of Indiana were required to determine whether a new trial should have been granted, and that depended on the question whether, on the whole case, the verdict was right. This required the solution of one, or of two questions. If the deed only conveyed a life estate, and the grantees were dead, it was not material whether the deed was valid or invalid. We deny that there is anything in this record to show that the court did determine the validity of the deed. It is true that there are instructions on the record in which this question is made, but it is as true that there are on the record the facts from which the other question does necessarily arise. Both questions might have been determined; but it is usual for appellate courts to pass over questions not necessary for the determination of the case before them. And hence we ask, Is it a "necessary intendment" that the Su-

preme Court of Indiana did decide both the questions in this case? For we understand that it must appear to this court, if not expressly, by "necessary intendment," that some question within the jurisdiction of this court did arise and was decided; that it is not enough that such question might have arisen and might have been decided. *Smith* v. *Hunter*, 7 How., 738, 742; 16 Pet., 281, 285; 10 Id., 368, 391.

Mr. Justice CURTIS delivered the opinion of the court.

This case comes here by a writ of error to the Supreme Court of the state of Indiana. The record shows that Lagow, the defendant in error, instituted an action of disseisin in a Circuit Court of the state of Indiana, whereby he sought to recover of Neilson, the plaintiff in error, a tract of land described in the counts. The tenant having pleaded the general issue, the case was committed to a jury. At the trial, it appeared that Lagow, together with Nathaniel Ewing, John D. Hay, and Caroline Smith, whose title, if any, Lagow is alleged to have afterwards acquired, were in possession of the demanded premises in the *year 1820, claiming to own the same, and upon this evidence of title he rested his [*103 case. The defendant then introduced a deed, bearing date September 19th, 1821, from Lagow, Ewing, Hay, and Smith, conveying to the Bank of Vincennes, the State Bank of Indiana, the lands in controversy, excepting a certain square therein described. He also put in evidence another deed from the bank to Badollett, Harrison, and Buntin, conveying the same lands acquired by the bank under the deed last mentioned, and also transferring to the grantees some equitable title to the square excepted out of that deed. This conveyance is made to the grantees and their successors in the trusts declared by the deed, which are: "until the sale hereinafter authorized shall be made, the trustees, or a majority of them, or their successor or successors herein appointed, or who may hereafter be appointed agreeably to the mode hereinafter directed, shall and may demise or lease the whole or any part of the said lands, lots, and houses, until such time or times as a sale or sales thereof can be made, and receive and take the rents and profits thereof, also foreclose the said mortgages and collect the said notes; in trust nevertheless, for the use of the Secretary of the Treasury of the United States in extinguishment of the debt due by the said Bank of Vincennes to the United States; and upon this further trust and confidence that the said trustees, or a majority of them, and their survivor or survivors herein appointed, or which shall hereafter be appointed, agreeably to the mode hereinafter directed,

shall and do, whenever thereto requested by the Secretary of the Treasury of the United States, for the best price that can be got, sell and dispose of, for cash or on credit, on such terms, and in such parts or parcels, as to them shall seem most advantageous, all or any part of the above-described and conveyed lands, tenements, and hereditaments, to any person or persons who may be inclined to purchase the same; and to execute and to acknowledge, in due form of law, deed or deeds of conveyance, unto the purchaser or purchasers, his heir or their heirs and assigns in fee-simple absolute and upon the further trust that they, the said trustees, or a majority of them, or the survivors of them herein appointed, or hereafter to be appointed agreeably to the mode hereinafter directed, shall and do pay and apply, of and every the sum and sums of money or other proceeds to be raised or paid by the rents or sales of the said lands and collections of the said notes, or any part or parts thereof, to the proper use of the United States, until the sum of one hundred and twenty thousand three hundred and eight dollars, which is now agreed upon by the said parties of the first part, of the one part; and the Honorable Jesse B. Thomas, as the legally authorized agent of the United States, of the other part, as the sum now due, together with
*104] interest *on the said sum of money, at the rate of six per centum per annum until paid; retaining thereout, however, their, the said trustees', expenditures, and a reasonable compensation for their trouble and services, returning and paying the overplus, if any, to the said President, Directors, and Company of the said Bank of Vincennes, their successors or assignees; and also upon this further trust, as to all such parts of the said lands and premises, either in fee or under mortgage, as shall remain unsold, that they, the said trustees, and their successors, shall stand seized thereof to the use of the United States, until the debt aforesaid shall be fully paid and discharged, and there afterwards to the use of the said President, Directors, and Company, their successors and assigns forever, provided always, and it is hereby expressly agreed and declared by and between the parties of these presents, that in case of the death of either or any one or more of the said trustees hereinbefore named, or of any trustees hereafter to be appointed, it shall and may be lawful, to and for the said Secretary of the Treasury of the United States for the time being, at any time or times thereafter, by deed duly executed, to fill up such vacancies; and the said trustees, when so appointed by the Secretary of the Treasury as aforesaid, shall all of them have the like power and authority to act in the several trusts according to the true intent and

meaning of these presents, as fully and amply, to all intents and purposes, as if such new or other trustee or trustees had been actually named herein by the said President, Directors, and Company of the said Bank of Vincennes; and provided, also, that no trustee now appointed, or to be hereafter named and appointed as above directed, shall in any event be liable for any more than he shall receive, nor for any loss or damage not occasioned wilfully and designedly by such trustee, or through his gross and wilful negligence."

Neither the *habendum* nor the grant in this deed contains the word heirs.

The tenant further offered in evidence, proceedings under a judicial sale of the title to the excepted square above mentioned, by which Badollett, Harrison, and Buntin, the trustees under the deed of the bank, became the purchasers of the legal title to that square, which was conveyed to them in fee-simple in 1827, and also introduced evidence to show that he was in possession under the trustees with a contract to purchase of them the entire tract of land demanded.

The plaintiff then put in evidence the record of a *quo warranto* against the bank, by which it appeared that in July, 1822, a judgment of forfeiture was rendered against that corporation, and all its franchises and property seized into the possession of the state; and he offered proof that Badollett, Harrison and *Buntin purchased the legal title to the reserved square as trustees, and that the money paid [*105 by them was from the funds of the United States, supplied by the order of the Secretary of the Treasury, and that all the trustees were deceased when the action was brought.

At the request of the plaintiff the court gave the following instructions:

1. That on the proof of possession as owners by the Steam-Mill Company in 1820, and of the conveyance by the company to Lagow, of June, 1827, Lagow, the plaintiff, is entitled to recover, unless the defendant has shown a better title.

2. That the 7th section of the act of Congress of 1st of May, 1820, forbids "the purchase of any land on account of the United States," unless authorized by act of Congress.

3. That the term "purchase of land" in law, and in the act of Congress, means any and every mode of acquiring an interest in real estate other than by inheritance.

4. That if the government is prohibited from purchasing land directly in its own name, it is also prohibited from purchasing indirectly in the name of an agent or trustee.

5. That if there is any act of Congress or law authorizing the conveyance from the bank to the trustees, it is incumbent

on the defendant to show it; and from the fact that the defendant does not set up any such act or law, the jury may infer there is none.

6. That all acts, deeds, and agreements, contrary to the plain language, or even to the policy, of an act of Congress, are void.

7. That if the deed of trust from the bank is contrary to the letter or to the spirit and meaning, or to the policy of the act of the 1st May, 1820, it is void; and the interest which the bank then had in the land remained in the bank.

The court refused to give the following instruction requested by the defendant:

"That it was competent for the Bank of Vincennes to make a deed to trustees for the benefit of the United States, and such a deed is valid and lawful for the purpose for which it was made. To which refusal of the court the defendant at the time excepted."

A verdict having been rendered in favor of the plaintiff, a motion for a new trial was made and refused, and in conformity with the practice of that court, exceptions were taken to such refusal, and having been allowed, the case went by appeal to the Supreme Court of Indiana, which is the highest court of that state. So that the record, presented to the Supreme Court an assignment of three alleged errors, being the same relied on as causes for a new trial in the court below, viz.:

1. For the error of the court in misdirecting the jury.

*106] *2. For the refusal of the court to give the instructions to the jury asked by the defendant.

3. Because the verdict is contrary to the law and evidence.

The Supreme Court affirmed the judgment of the Circuit Court, and under the 25th section of the Judiciary Act, (1 Stat. at L., 117,) the defendant has brought the record to this court, by a writ of error.

To present intelligibly, the legal merits of the case at one view, and to show what question is here for decision, it should be stated, that by the law of Indiana, as expounded by the Supreme Court of that state, (*State* v. *The State Bank*, 6 Blackf. (Ind.), 349,) whatever real property was held by the bank, when its charter was annulled, went to the grantors thereof; that as Lagow and others, whose rights he is alleged to have acquired, were the grantors of this land to the bank, it became material to ascertain, whether the bank had any and what title to the land, when its franchises were seized; that the bank having conveyed by deed to Badollett and others as trustees, before the forfeiture took effect, the validity of that deed was necessarily drawn in question; that the

court did in effect decide, that according to the true construction of section 7th of the act of Congress of May 1st, 1820, (3 Stat. at L., 568,) the defendant could take no title under, or through that deed, the same being void by force of that act; and consequently the title remained in the bank and passed to Lagow when the charter of the bank was vacated.

The question, therefore, which arises upon this writ of error is, whether the Supreme Court of Indiana rightly construed the act of Congress, which is in these words: "That no land shall be purchased on account of the United States, except under a law authorizing such purchase."

The deed in question conveyed the land to Badollett and others, in trust to sell so much thereof as might be necessary to raise sufficient money to pay a debt due from the bank to the United States. It is clear this was not in any sense a purchase of land on account of the United States. In the land itself, the United States acquired by the deed, no interest. They were not even clothed with an equitable right to acquire such an interest through the aid of a court of equity; for their title was not to the whole proceeds of the lands, whatever they might be, but only to so much of them as might be necessary to pay the debt of the bank. To this extent both the creditor and the debtor had the right to insist on a sale, and whatever residue of land should remain, was by force of the deed, operating by means of a shifting, or secondary use, to go to the bank upon payment in full of the debt due to the United States. It is true, the deed *con- [*107
tains some language, which, taken by itself, might raise a use, executed in the United States; but it is well settled that such language is controlled, by an intent, manifested in the instrument, to have the legal estate remain in trustees, to enable them to execute a trust which the deed declares; and where, as in this case, the trust is to sell and convey in fee simple absolute, a legal estate is vested in the trustees commensurate with the interest which they must convey in execution of the trust. *Mott* v. *Buxton*, 7 Ves., 201; *Leonard* v. *Sussex*, 2 Vern., 526; and the cases in note (*f*) to *Chapman* v. *Blissett*, Cas. Talbot, 145–156; *Trent* v. *Hanning*, 7 East, 99; *Doe* v. *Willan*, 2 Barn. & A., 84.

It is clear, therefore, that these trustees, and not the United States, took the land under this deed, and that the latter acquired no interest in the land as such. This court has applied the same principles to the case of an alien, in *Craig* v. *Leslie*, 3 Wheat., 50, which settles that a devise of land to a citizen as a trustee, upon a trust to sell the land and pay over the proceeds to an alien, is a valid trust, and the interest of

the alien is not subject to forfeiture. See also *Anstice* v. *Brown*, 6 Paige (N. Y.), 448. If it were necessary, therefore, we should hold that the act of Congress was not applicable to this conveyance, because by it no title to land was purchased on account of the United States.

But we do not think it necessary to rest the decision of the case exclusively on this ground; for in our judgment the act of Congress does not prohibit the acquisition by the United States of the legal title to land, without express legislative authority, when it is taken by way of security for a debt. It is the duty of the Secretary of the Treasury to superintend the collection of the revenue, and of the Comptroller of the Treasury to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for all debts which may be due to the United States. 1 Stat. at L., 65, 66. To deny to them the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, we consider settled by the cases of *Dugan's Ex'rs* v. *United States*, 3 Wheat., 172; *United States* v. *Tingey*, 5 Pet.. 117; *United States* v. *Bradley*, 10 Id., 343; *United States* v. *Linn*, 15 Id., 290.

These cases decide, that the United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts and take bonds by way of *108] *security, in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department, when not prohibited by law, although not required to do so by any legislative act; and we think this same power extends to and includes taking security upon property for a debt already due. The assumption, that Congress intended by the act in question to prohibit the just exercise of this useful power, is wholly inadmissible. In *United States* v. *Hodge, et al.*, 6 How., 279, a postmaster had made a mortgage of property, real and personal, to secure to the Post Office Department the sum of sixty-five thousand dollars, or such other sum as might be found due on a settlement six months after the mortgage. This mortgage embraced debts already due, and gave time to the debtor. The sureties on his official bond relied on its giving time as discharging them from their obligation. It is manifest that if the mort-

gage were void there was an end of the case, yet it is nowhere suggested that it was invalid, and it is treated by the court as an operative and effectual instrument. The object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein, but simply to obtain payment of the debt secured. This is the principal thing to which all others are incidental. It may happen that, by the foreclosure of a mortgage containing no power of sale, the mortgagee may become the owner of the land under the mortgage; but this is not the object which the parties have in view when the mortgage is made, and takes place only because their main end is not attained, and by force of proceedings which ensue afterwards because their main end is not attained. Such a transaction is essentially different from a purchase of land in which the parties have nothing in view but to exchange for the present dominion and title of the land acquired by the purchaser, the money, or other price paid to the seller, and in analogous cases the distinction between these transactions has been recognized. An alien cannot have an action to enforce the title to land which he has taken by way of purchase; but this court has decided, in *Hughes et al.* v. *Edwards et ux.*, 9 Wheat., 489, that an alien mortgagee may have the aid of a court of equity to foreclose a mortgage by a sale, because the debt is the principal thing and the land only an incident. So, though a corporation was by its charter authorized to take mortgages for debts previously contracted, it has been held that a mortgage to secure a debt contracted at the time the mortgage was given, was valid, because the intention of the legislature was only to prevent the corporation from purchasing lands, and not to prohibit it from taking security, in good faith, for the payment of its debts. *Silver *Lake* [*109
Bank v. *North*, 4 Johns. (N. Y.) Ch., 370; *Baird* v. *Bank of Washington*, 11 Serg. & R. (Pa.), 411. It is the opinion of the court, that by the true construction of the act of Congress now in question, the government are not prohibited from taking security upon lands, through the action of the proper department, for debts due to the United States, and that the court erred in giving the act such a construction as to avoid the deed from the bank to the trustees.

The trustees purchased, at a judicial sale, the legal title to the reserved square, and paid for it out of the money of the United States; but they had previously taken in trust, by way of security, an equitable title thereto, and this transaction, though under the forms of a purchase, was, in truth, nothing more than relieving this parcel of land of an incum-

brance, so that, when they should sell, they might obtain the entire benefit of the security. The purpose was precisely the same as that which induced the conveyance to them by the bank, and is not a purchase by the United States, prohibited by the act of Congress, for the same reasons that the original conveyance is not within that act.

It remains to consider another view taken in argument by the counsel for the defendant in error. The argument is, that the Supreme Court of Indiana may have affirmed the judgment of the Circuit Court, upon the ground that the deed to the trustees not containing the word heirs, conveyed only a life estate, the reversion remaining in the bank; and that, as the trustees were all dead when the action was brought, the estate in fee simple in possession had reverted to the plaintiff, Lagow. It has been settled, by a series of decisions in this court, beginning with *Miller* v. *Nichols*, 4 Wheat., 311, and coming down to *Smith* v. *Hunter*, 7 How., 738, that it must appear from the record that the highest court of the state passed on one of the questions described in the twenty-fifth section of the Judiciary Act; and different modes in which this may appear by the record are pointed out in *Armstrong* v. *The Treasurer of Athens County*, 16 Pet., 281. It has never been held that the record of the proceedings of the highest court must state in terms a misconstruction by that court of the act of Congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an act of Congress, and annul a right or title, otherwise valid, by reason of such misconstruction. Any other rule, confining this court to an inspection of that part of the record which sets out the proceedings of the highest court alone, would be a departure from the general principle, that the whole of an instrument is to be looked at to determine the effect of each part of it, would present for decision an artificial and not a real case; and, inasmuch as *the highest state court often simply affirms or reverses the judgment below, would, in all such cases, deprive the citizen of the rights secured to him by the Constitution and the twenty-fifth section of the Judiciary Act. And it has been the practice of this court, whenever necessary, to look at the record of the proceedings of the inferior state court in connection with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter. Now the bill of exceptions taken in this case in the Circuit Court shows that the construction of the act of Congress was in question in that court, was misconstrued there, and a deed, under which the plaintiff in error

*110]

deduced title, was decided to be void by reason of such misconstruction.

This decision being excepted to, was, by the appeal, brought before the Supreme Court; and when that court determined that the judgment of the Circuit Court be in all things affirmed, it must be taken that the Supreme Court affirmed the correctness of the decision thus excepted to, unless it appears by the record that they proceeded on some other ground; and so the inquiry still remains, Whether the Supreme Court did not affirm the judgment of the Circuit Court, upon the ground suggested in argument by the counsel for the defendant in error, that the deed in question conveyed only a life estate, which had terminated before action brought. We cannot make that deduction from this record. It does not appear that the question, what that deed conveyed, if valid, was in any manner raised in the Circuit or Supreme Court; and, assuming that the Supreme Court were not confined on the appeal to points raised in the court below, but might have decided upon any ground shown by the record before them to be tenable, we cannot infer that the decision rested on this ground, because we are of opinion it is not tenable. If it had appeared affirmatively in the record that the Supreme Court did decide that the deed conveyed only a life estate, this court would not inquire into the correctness of that decision; but when put to infer what points may have been raised, and what that court did decide, we cannot infer that they decided wrong; otherwise, nothing would be necessary in any case to prevent this court from reversing an erroneous judgment under the twenty-fifth section of the Judiciary Act, but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon.

Now, on looking into the deed from the bank to the trustees, we find that the grant is to them and their successors, in trust, to sell and convey in fee simple absolute. The legal estate being in trust, must be commensurate therewith, and will be *deemed to be so without the use of the usual words of limitation.[1] *Newhall* v. *Wheeler*, 7 Mass., 189; *Stearns* v. *Palmer*, 10 Met. (Mass.), 32; *Gould* v. *Lamb*, 11 Id., 84; *Fisher* v. *Fields*, 10 Johns. (N. Y.), 505; *Welch* v. *Allen*, 21 Wend. (N. Y.), 147. As the execution of the trust required the trustees to have a fee simple, in order to convey one, we are of opinion that the deed to them conveyed a fee, and con- [*111

[1] CITED. *Webster* v. *Cooper*, 14 How., 499.

sequently we cannot infer that the state court decided that only a life estate passed by the deed.

The opinion of the court is, that the judgment of the court below should be reversed, and the cause remanded for another trial to be had therein.

Order.

This cause came on to be heard on the transcript of the record, from the Supreme Court of the state of Indiana, 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 case be, and the same is hereby remanded to the said Supreme Court for further proceedings to be had therein, in conformity to the opinion of this court.

NATHANIEL WILLIAMS, AS PERMANENT TRUSTEE FOR THE CREDITORS OF JAMES WILLIAMS, AN INSOLVENT DEBTOR, PLAINTIFF IN ERROR, *v.* CHARLES OLIVER, ROBERT M. GIBBES, AND THOMAS OLIVER, EXECUTORS OF ROBERT OLIVER, AND JOHN GLENN, AND DAVID M. PERINE, TRUSTEES.

In 1839, a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic."

Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico, under General Mina, in 1816. See the case of *Gill* v. *Oliver's Executors*, 11 How., 529.[1]

The proceeds of one of the shares of this company were claimed by two parties; one as being the second permanent trustee of the insolvent owner of the share, and the other as being the assignee of the first permanent trustee.

The Court of Appeals of Maryland decided that the plaintiff, viz., the second permanent trustee, did not take the claim under the insolvent laws of Maryland.

This decision is not reviewable by this court, under the 25th section of the Judiciary Act; and the case is similar to that of *Gill* v. *Oliver's Executors*, 11 How., 529.[2]

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[1] REFERRED to *Mayer* v. *White*, 24 How., 320. See also *McBlair* v. *Gibbes*, 17 Id., 232; *Williams* v. *Gibbes*, Id., 239; s. c. 20 Id., 536; *Millingar* v. *Hartupee*, 6 Wall., 262; *Klinger* v. *State of Missouri*, 13 Id., 263; *State ex. rel. Mullen* v. *Drew*, 32 La. Ann., 1044.

[2] Where the *validity* of a state law is not attacked, but the question is whether it has been correctly construed by the state court, the Supreme Court has no jurisdiction on error. *Commercial Bank of Cincinnati* v. *Buckingham*, 5 How., 317; *Grand Gulf R. R. &c. Co.* v. *Marshall*, *post* *165; *Lawler* v. *Walker*, 14 How., 149; *Robertson* v. *Coulter*, 16 Id. 106; *Michigan Central R. R. Co.* v. *Michigan Southern R. R. Co.*, 19 Id., 378; *Congdon* v. *Goodman*, 2 Black, 574.

Nor does jurisdiction accrue in this case in consequence of the additional fact that the legislature of Maryland passed a law curing certain defects in the assignment to Oliver, the validity of which law was drawn into question, as impairing the obligation of a contract; because, if there had been no such law, the decision of the state court would have been the same.[1]

The former decisions of this court respecting its jurisdiction under the 25th section of the Judiciary Act, examined and explained.

THIS case was brought up from the Court of Appeals of Maryland, by a writ of error issued under the 25th Section of the Judiciary Act.

It was a branch of the case of *Gill* v. *Oliver's Executors*, reported in 11 How., 529, although it differed from that case in some particulars, which will be mentioned. The history of the Baltimore Mexican Company was given in the report of that case, and need not be repeated.

James Williams was the owner of one of the shares of the company, and applied for the benefit of the Insolvent Laws of Maryland on the 24th of June, 1819. George Winchester was appointed provisional trustee, and gave bond as such; and James Williams conveyed and assigned to him, as provisional trustee, all his property whatever for the benefit of his creditors. On the 2d of August, 1819, Winchester executed a bond without security, reciting that he had been appointed permanent trustee, and the bond was conditioned for the faithful performance of his duties as such. The laws of Maryland required security to be given when such a bond was executed.

At March term, 1825, Baltimore County Court passed the following order:—

"*In Baltimore County Court, March Term*, 1825.

"In the case of James Williams, an Insolvent Debtor:

"Ordered by the court, that the trustee dispose of any part of the personal estate of the said insolvent debtor remaining unsold at public or private sale, as he may judge best.

"WM. H. WARD."

On the 2d of April, 1825, Winchester assigned to Robert Oliver the share in the Mexican Company belonging to Williams, and signed a receipt for $2000 as the consideration for the sale.

Winchester having died, Nathaniel Williams, the plaintiff

[1] If the judgment of the state court can be supported on any ground within the exclusive cognizance of that court, it will not be reversed because some point subject to re-examination in the Supreme Court, was erroneously ruled. *Erwin* v. *Lowry*, 7 How., 172; *Rector* v. *Ashley*, 6 Wall., 142; *Gibson* v. *Chouteau*, 8 Id., 650.

in error, was appointed permanent trustee of James Williams, the insolvent, on the 15th of November, 1841, and gave bond with security, as required by law.

In the report of the case of *Gill* v. *Oliver's Executors*, it was stated in what manner the money came into the hands of Glenn and Perine as trustees, and how it came to be deposited in court for claimants to make out their title.

On the 29th of January, 1842, Nathaniel Williams filed his petition, claiming the amount which belonged to the share of his insolvent, James Williams.

*113] *On the 9th of March, 1842, the Legislature of Maryland passed an act (December Session, 1841, chapter 309), entitled "An act to confirm the titles of purchasers in the cases therein mentioned;" which act was passed on the memorial of Oliver's representatives, and was alleged to cure the defects resulting from Winchester's assignment without his having given security upon his bond as permanent trustee.

On the 2d of May, 1842, the executors of Oliver and the trustees filed their answer to the petition of Nathaniel Williams. They claimed the share of James Williams on two grounds: 1st, under the purchase from Winchester; 2d, because the award of the commissioners was a full and complete bar of all right and title on the part of Nathaniel Williams.

On the 5th of December, 1846, Baltimore County Court decreed in favor of the executors of Oliver, holding the act of 1841 to be constitutional. On the second point the court decided that the award of the commissioners was not conclusive.

Williams prosecuted an appeal to the Court of Appeals of Maryland.

At June term, 1843, the Court of Appeals affirmed the decree of the County Court, three judges sitting. One of them, Judge MARTIN, filed the following reasons, viz.:

I think that George Winchester is to be considered, upon the facts exhibited in this record, as duly and legally appointed the permanent trustee of James Williams; that the sale by him of the shares in controversy to Robert Oliver, was fairly and *bonâ fide* made within the meaniug of the act of Assembly of 1841, ch. 309; and that that statute being, in my opinion, neither repugnant to the Constitution of the United States nor the Constitution of the State of Maryland, is to [be] regarded as a valid exercise of legislative power.

The other two judges, viz., Chief Justice DORSEY and Judge SPENCE, stated that the grounds upon which they

affirmed the judgment were, first, the reasons assigned by the majority of this court for the reversal of the decree in *Oliver's Executors et al.* v. *Gill, Permanent Trustee of Goodwin;* and because, under the proceedings based on, or originating from, the insolvent petition of James Williams and the act of Assembly applicable thereto, Robert Oliver acquired a valid title to all the interest of said James Williams in the fund in controversy.

The reasons assigned by the majority of the court for the reversal of the decree in *Oliver's Executors et al.* v. *Gill*, and which are adopted as above and made part of the reasons for the decision given in the present case of *Williams, Trustee*, v. *Oliver's Executors*, were published in the report of the case of *Gill* v. *Oliver's Executors*, in 11 How., 529. They are here repeated:

* "The majority of this court, who sat in the trial of [*114
this cause, (and by which was decreed the reversal of the decree of the County Court), at the instance of the solicitors of the appellees, briefly state the following as their reasons for such reversal: They are of opinion that the entire contract, upon which the claim of the appellees is founded, is so fraught with illegality and turpitude as to be utterly null and void, and conferring no rights or obligations upon any of the contracting parties, which can be sustained or countenanced by any court of law or equity in this state or of the United States. That it has no legal or moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such a claim does not pass to or vest in the trustee of an insolvent petitioner. It forms no part of his property or estate, within the meaning of the legislative enactments constituting our insolvent system. It bears no analogy to the cases decided in Maryland, and elsewhere, of claims not recoverable in a court of justice, which, nevertheless, have been held to vest in the trustees of an insolvent or the assignees of a bankrupt. In the cases referred to, the claims, as concerned those asserting them, were, on their part, tainted by no principle of illegality or immorality; on the contrary, were sustained by every principle of national law and natural justice, and nothing was wanting to render them recuperable but a judicial tribunal competent to take cognizance thereof. Wholly dissimilar is the claim before us. Such is its character, that it cannot be presented to a court of justice but by a disclosure of its impurities; and if any thing is conclusively settled, or ought to be so regarded, it is that a claim, thus imbued with illegality and corruption, will never be sanctioned or enforced by a court either of law or equity.

"Entertaining this view of the case, it is unnecessary to examine the various minor points which were raised in the argument before us."

These reasons, as has been before remarked, are made applicable to the present case of *Williams* v. *Oliver's Executors*.

Williams sued out a writ of error and brought his case up to this court.

It was argued by *Mr. Dulany* and *Mr. Schley*, for the plaintiff in error, and *Mr. Campbell* and *Mr. Johnson*, for the defendants in error.

The counsel for the plaintiff in error contended for the following positions:

1. The record presents a case, within the appellate jurisdiction of this court, under the provisions of the 25th section of the Judiciary Act.

*115] *In support of the jurisdiction claimed, two grounds were assumed: 1st. The effect of the treaty with Mexico, and the effect of the act of Congress of the 12th of April, 1840, and the effect of the award, as establishing the amount and validity of the claim of the Mexican Company of Baltimore, were all necessarily involved in the decision of the case, if the decree is to be considered as based, in any degree whatever, on the imputed turpitude of the contract of said company with General Mina: 2d. The validity of the act of the General Assembly of Maryland, (act of 1841, ch. 309,) was drawn in question, on the ground of its alleged repugnancy to the Constitution of the United States, and its validity was maintained by the Court of Appeals. The following authorities were relied on: *Crowell* v. *Randell*, 10 Pet., 392, and the various cases referred to, and commented on, in the opinion in that case; *Scott* v. *Jones*, 5 How., 376, and the cases cited in the opinion in that case; *Smith* v. *Hunter*, 7 How., 744.

2. The imputed turpitude in the original contract of said Mexican Company with General Mina, even if such turpitude at any time attached to the contract, was not a ground which the Court of Appeals was at liberty to assume as the basis of their said decree. In doing so, they refused to give effect to an award based on the said treaty and said act of Congress. The right to receive the money was conclusively established. The only open question properly before that court was this, Who was entitled to the share accruing in right of said insolvent? The following authorities were relied on: *Comegys* v.

Vasse, 1 Pet., 193; *Frevall* v. *Bache*, 14 Id., 95; *De Valangin's adm'rs* v. *Duffy*, 14 Id., 291.

3. Apart from this notion of original turpitude, the claim vested in the permanent trustee of the insolvent, for the benefit of his creditors. *Plater* v. *Scott*, 6 Gill & J. (Md.), 119; *Stevens* v. *Bagwell*, 15 Ves., 139; *Comegys* v. *Vasse*, 1 Pet., 193; Wheat. Int. Law, 56–63.

4. Independently of the act of 1841, the representatives of Robert Oliver had no right to this share, which could have been enforced in any tribunal of law or equity. The Insolvent laws of Maryland, and particularly the act of 1808, ch. 71, sec. 3; *Winchester, Trustee of Williams*, v. *Union Bank*, 2 Gill & J. (Md.), 73; *Winchester, Trustee of Gooding* v. *Union Bank*, Id., 79; *Glasgow* v. *Sands*, 3 Id., 96; *Glenn* v. *Karthaus*, 4 Id., 385; *Kennedy* v. *Boggs*, 5 Har. & J. (Md.), 408; *Brown* v. *Brice*, 2 Har. & G. (Md.), 24; *Williams* v. *Ellicott*, 6 Har. & J. (Md.), 427.

5. The act of 1841, chap. 309, is repugnant to the tenth section of the first article of the Constitution of the United States. It is a law which, in its application to this case, impairs the obligation of a contract.

*In the discussion of this point, it was insisted that it impairs the obligation of the original contracts of the [*116 insolvent with his various creditors; that it impairs the obligation of the bond given by Mr. Winchester as provisional trustee; that it impairs the rights of creditors, as *cestuis que trust*, and the rights of the plaintiff in error as permanent trustee, under the deed of trust to Mr. Winchester, as provisional trustee; that it also impairs, as to the creditors, the obligation of the bond of the plaintiff in error as permanent trustee. It will also be insisted that the plaintiff in error, on his appointment as permanent trustee, and his qualification, by filing an approved bond, became entitled by law to his commission on the assets composing the estate of the insolvent, and which vested in him, on his qualification as permanent trustee, and also deprived him of his right to allowance out of said estate, for his necessary disbursements; and that such, his right, is based on contract, within the true interpretation of the said section of said article of the Constitution; and that said act, as to him, is unconstitutional and void, as it does not save his commission nor make provision for payment of his disbursements. In the discussion of this point, the following authorities were relied on: *Bronson* v. *Kinzie*, 1 How., 311; *Green* v. *Biddle*, 8 Wheat., 1; *McCracken* v. *Hayward*, 2 How., 608; *Gantley's Lessee* v. *Ewing*, 3 Id., 707; *Cook* v. *Moffatt*, 5 Id., 295; *Planters' Bank* v. *Sharp*, 6 Id., 318,

and the cases cited in the opinion in that case; 12 Wheat., 311, 312; *Rogers* v. *Wright*, 9 Gill & J. (Md.), 184. The following cases were referred to for illustration, and as showing, by analogy, the rights which attached to the claims of creditors on the application of the insolvent: *Scott* v. *Jones*, 4 Cla. & F., 397, 398; *Freake* v. *Cranefield*, 3 Myl. & C., 499, and in 14 Eng. Cond. Ch. Rep., 500; *Welch* v. *Stewart*, 2 Bland (Md.), 41; *Post* v. *Mackall*, 3 Id., 498. It was also insisted, in the discussion of this point, that the said act, in its application to this case, impaired the obligation of the contract of sale made by said insolvent, before his application, to the firm of Stump & Williams, of the one half of his said share; and that the said act, as to the representatives of Stump & Williams, is unconstitutional and void. *Mitford* v. *Mitford*, 9 Ves., 87, and notes; *Wright* v. *Morley*, 11 Id., 17; *Dyer* v. *Pearson*, 3 Barn. & C., 38, in 10 Eng. C. L., 13; 2 Story Eq. Jur., §§ 1411, 1038, 1040 b, 1044; *E. & S. Kip* v. *The Bank of New York*, 10 Johns. (N. Y.), 63; *Muir* v. *Schenck*, 3 Hill (N. Y.), 228.

The counsel for the defendant in error presented the following points:

1st. The decision below turns upon two grounds, each of *117] *which is conclusive of the case, and the second, to wit, that "under the proceedings based on or originating from the insolvent petition of Williams and the act of Assembly applicable thereto, Oliver acquired a valid title to all the interest of James Williams in the fund in controversy," resting upon the conjoint operation of the sale made by order of court and the act of Assembly, is not subject to revision here, because the effect of the sale so made was exclusively for the court below, and it does not appear to what extent that consideration affected the decree of the Court of Appeals.

2. The petition of the plaintiff in error does not specially set up or claim any right or title under the convention with Mexico, or the act of Congress, or the award made in pursuance of them, nor does the court below decide against any such right or title. The petition denies the title of Oliver's executors, and rests its demands on the official character of the plaintiff in error, as giving him title under the insolvent laws of Maryland, and on the trusts of the deed of the 8th May, 1841, as constituting them trustees for him being so entitled, and the decision of the state court turns altogether on its construction of those insolvent laws, which confer, in its judgment, no title on the plaintiff in error. *Udell* v. *Davidson*, 7 How., 771; *Smith* v. *Hunter*, 7 Id., 743; *Maney* v. *Porter*,

4 Id., 55; *McDonogh* v. *Millaudon*, 3 Id., 705; *Downes* v. *Scott*, 4 Id., 502; *Kennedy* v. *Hunt*, 7 Id., 593; *Fulton* v. *McAffee*, 16 Pet., 149; *Coons* v. *Gallagher*, 15 Id., 18; *McKenney* v. *Carroll*, 12 Id., 66; *Crowell* v. *Randell*, 10 Id., 392; *Montgomery* v. *Hernandez*, 12 Wheat., 129; *Williams* v. *Norris*, 12 Id., 117; *Hickie* v. *Stark*, 1 Pet., 98; *Mathews* v. *Zane*, 7 Wheat., 206; *Owings* v. *Norwood*, 5 Cranch. 344; *Smith* v. *The State of Maryland*, 6 Id., 286; *Plater* v. *Scott*, 6 Gill & J. (Md.), 116; *Hall* v. *Gill*, 10 Id., 325; 1 U. S. Stat. at L., 384.

3. The decision of the state court, that Williams's claim did not pass to his permanent trustee on account of its illegality and turpitude, does not conflict with the award, or the treaty or act of Congress under which the award was passed, because the commissioners were empowered to decide nothing but the liability of Mexico for the claims set up against that republic, which were admitted by Mexico prior to the treaty, but long after Williams's application; and because the said convention or treaty of 1839 and the proceedings under it cannot affect the question, whether the insolvent laws of Maryland did or did not operate in 1819 to transfer the claim to the trustee of Williams, the force and effect of these laws at the time when Williams applied, being the question before the court below. **Comegys* v. *Vasse*, 1 Pet., 212; [*118 *Sheppard* v. *Taylor*, 5 Id., 713; *Frevall* v. *Bache*, 14 Id., 97; Maryland Acts of 1805, ch. 110, and 1816, ch. 221; *Hall* v. *Gill*, 10 Gill & J. (N. Y.), 325.

4. By the well-settled law of Maryland, as applicable to Williams's and all other applications for the benefit of the insolvent laws at that period (1819), the plaintiff in error, as trustee of Williams, under his application, took title to no property, rights, or claims of Williams, the insolvent, but such as he had at the date of his application. At that period Williams had no possible right or claim against the government of Mexico, which did not come into existence for several years afterwards, nor against the then existing government of Spain in Mexico, which Mina's expedition was designed to overthrow; and the only alleged or possible claim he (Williams) then had was against Mina, under Mina's contract with the Mexican Company; and this contract with Mina, as the state court has declared by its decision, was illegal, and created no right or claim in Gooding which could or did pass to his trustee under his said application in 1819. The decision of the state court, therefore, involved but two questions, the first of which was, whether said contract with Mina vested any rights in Williams, at the date of his appli-

cation in 1819, which passed to his trustee; and the second, whether the treaty and award, allowing as against Mexico the claim of the Mexican Company, under its said contract with Mina, had any such operation or retrospect, as to that contract, as to validate it in Maryland as between the original parties, and to validate it *ab initio*, so as to vest in the trustee by retroactive rights and claims under that contract, which had no legal existence at the period of Williams's application. The first question the defendants in error will maintain, is conclusively established by the decision of the state court, and is not open to inquiry here, as it involves nothing but the decision of the Maryland court upon a Maryland contract, as to the rights created by it, and the transfer of those rights, in 1819, to the trustee of the insolvent. The second, and, as the defendants will maintain, the only possible question open here, will be as to the operation of the treaty and award. And, as the state court has not expressed any specific opinion as to the treaty, or any right or title set up or claimed under it, the jurisdiction can only be maintained, if at all, by establishing that such a right or title was involved in the decision of the question, and that the treaty did so retroact as to validate said contract, *ab initio*, and vest in the trustee of 1819 the rights given by that contract, which rights, so vested in the trustee, the decision of the state court denied him. And the defendants in error will maintain that, even if there be
*119] any such right, title, *or privilege specially set up or claimed under the treaty, as to give jurisdiction, which they deny, yet the treaty could not have, and was not intended to have, any such operation or retrospect. They will insist that the treaty and award under it had and could have no other effect than to establish the liability of Mexico to pay that claim under the treaty, and settled nothing but the validity of that claim against Mexico; and that, by the award made under it to Glenn and Perine, the trustees of the defendants, the defendants have the only right or title set up, claimed, or obtained under the treaty, which the plaintiff in error can controvert only by showing that they were entitled to the claim thus allowed to the defendants, and that the treaty and award settled no rights as between the claimants, but merely the obligation of Mexico to pay the claim. They will further insist that the question, whether the original contract between Mina and the Mexican Company gave Williams any rights which passed to his trustee in 1819, was a question of Maryland law upon a Maryland contract, upon which Mexico's subsequent recognition or agreement to pay that claim, as due by herself, could have no influence; that Mexico's subsequent

agreement to pay the claim herself had no bearing upon the question, as to what were the rights of Williams in Maryland under the original contract between Mina and the Mexican Company; and that the express waiver by Mexico, or even by the Spanish government which she overthrew, or the objection of illegality as far as she was concerned, could not affect the question of the validity of the original contract, in Maryland and under the laws of Maryland, and, above all, could not retrospect so as to repeal the laws of Maryland, by validating that original contract, *ab initio*, and passing the rights under it to the trustee of 1819. And, as the result of the whole, therefore, the defendants in error will maintain, that the decision of the state court has conclusively established the original invalidity of the contract, and that the trustee took no rights under it; and that the treaty, if there be any question raised under it, gave the plaintiff in error no right, title, or privilege which can affect that decision, or was denied by the state court. *Milne* v. *Huber*, 3 McLean, 102; and authorities under 1st and 2d points.

5. The act of Assembly of 1841, ch. 309, does not impair the obligation of contracts. *Saterlee* v. *Mathewson*, 2 Pet., 414; *Watson* v. *Mercer*, 8 Id., 110.

Mr. Justice NELSON delivered the opinion of the court.

This case is not distinguishable from the case decided at the last term of *Gill* v. *Oliver's Executors*, and which was dismissed for want of jurisdiction.

*It is reported in 11 How., 529. That case involved the right to the share of Lyde Goodwin as a member of the "Baltimore Mexican Company" in the fund that had been awarded to the members of that company by the commissioners under the convention of 1839 with Mexico. Gill claimed it as permanent trustee under the insolvent laws of Maryland, the benefit of which Goodwin had obtained in 1817, on the assignment of all his property for the use of his creditors. [*120

The executors of Oliver claimed the right of Goodwin to this fund under an assignment made by himself 30th May, 1829.

The money awarded by the commissioners to this company under the treaty, had, by the agreement of all parties claiming an interest in the same, been deposited in the Mechanics' Bank of Baltimore, to be distributed according to the rights of the respective parties claiming it.

The Court of Appeals of Maryland decided against the right of Gill, as the permanent trustee of Goodwin, under the

insolvent proceedings, and in favor of the right of the executors of Oliver.

The case was brought here by writ of error for review, and was dismissed as we have stated for want of jurisdiction.

The Court of Appeals of Maryland had decided against the right of Gill, on the ground that the contract made by the "Baltimore Mexican Company" with General Mina, in 1816, by which means were furnished him to carry on a military expedition against the territories and dominions of the King of Spain, a foreign prince with whom the United States were at peace, was in violation of our Neutrality Act of 1794, and consequently illegal and void, and could not be the foundation of any right of property, or interest existing in Goodwin in 1817, the date of the insolvent proceedings, and hence, that no interest in the subject-matter passed to the permanent trustees, setting up a title under them.

After the revolutionary party in Mexico had achieved their independence, and about the year 1825 the public authorities, under the new government, recognized this claim of the Baltimore Company, as valid and binding upon it, and as such it was brought before the board of commissioners, under the convention of 1839, and allowed.

It was not denied on the argument, and, indeed, could not have been successfully, that the contract with General Mina in 1816, was illegal and void, having been made in express violation of law: and hence that no interest in, or right of property arising out of it, legal or equitable, could pass, in 1817, the date of the insolvent proceedings of Goodwin, to the trustee, for the benefit of his creditors. But, it was urged, *121] that the subsequent *recognition and adoption of the obligation by the new government, had relation back, so as to confirm and legalize the original transaction, and thereby give operation and effect to the title of the trustee at the date mentioned.

And upon this ground it was insisted that the decision of the court below, denying the right of Gill, the permanent trustee, was a decision against a right derived under the treaty and award of the commissioners, which therefore brought the case within the 25th section of the Judiciary Act.

Undoubtedly, upon this aspect of the case, and assuming that there was any well-founded ground to be found in the record for maintaining it, jurisdiction might have been very properly entertained; and the question as to the effect of the recognition of the obligation by Mexico, and award under the treaty in pursuance thereof, upon the right claimed by the trustee under the insolvent proceedings, examined and de-

cided. The decision below, in this aspect of the case, must have involved the effect and operation of the treaty, and award of the commissioners under it.

But, a majority of the court were of opinion that no such question existed in the case, or was decided by the court below; and that the only one properly arising, or that was decided, was the one growing out of the contract with General Mina of 1816, and of the effect and operation to be given to it under the insolvent laws of Maryland.

The money awarded to the Mexican Company was a fund in court, and had been brought in by the consent of all parties concerned, for distribution according to their respective rights. The plaintiff in error claimed the share of Goodwin, under the insolvent proceedings of 1817, as trustee for the creditors through the contract with Mina—the defendants by virtue of an assignment from Goodwin himself in 1829, after Mexico had recognized and acknowledged the claim as valid. The money had been awarded to certain persons "in trust for whom it may concern," without undertaking to settle the rights of the several claimants. The court, in giving effect and operation to the insolvent laws of Maryland, as to the vesting of the property and estate of the insolvent in the hands of the trustee, for the benefit of the creditors, held, that no interest or right could be claimed under them through the contract of 1816, but that the right of Goodwin to the fund passed by his assignment in 1829 to the defendants.

Mr. Justice Grier, in delivering the opinion of the majority of the court, speaking of that decision, observes, that in deciding the question, the courts of Maryland have put no construction on the treaty or award asserted by one party to be the true one, and denied by the other. It was before them as a fact only, and *not for the purpose of construction. [*122
Whether this money paid into the court under the award, and first acknowledged by Mexico as a debt in 1825, existed as a debt transferable by the Maryland insolvent laws in 1817, or whether it, for the first time, assumed the nature of a *chose in action* transferable by assignment after 1825, when acknowledged of record by Mexico, and passed by the assignment of Lyde Goodwin to Robert Oliver, was a question wholly *dehors* the treaty and award, and involving the construction of the laws of Maryland only, and not of any treaty, or statute, or commission, under the United States. And Mr. Justice Woodbury, who dissented on the question of jurisdiction, observes, that the claim, so far as it regards the enforcement of the treaty with Mexico, does not seem to have been overruled in terms by the state court. That court did not

decide that the treaty was corrupt or illegal, or in any way a nullity, when they held that the original contract violated the laws of neutrality. So far, too, as regards the award made by the commissioners, that the Baltimore Mexican Company, and their legal representatives, had a just claim under the treaty for the amount awarded, it was not overruled at all.

Again, he observes, that all must concede, that the state court speaks in language against the Mina contract alone as illegal, and in terms do not impugn either the treaty or the award; and it is merely a matter of inference or argument that either of these was assailed, or any right properly claimed under them overruled. But it is true the court held that Oliver's executors, rather than the appellant, were entitled to the fund furnished by Mexico, and long subsequent to Mina's contract; but in coming to that conclusion, they seem to have been governed by their own views as to their own laws and the principles of general jurisprudence. The treaty or award contained nothing as to the point whether Gill or Oliver's executors had the better right to his share, but only that the Mexican Company and their legal representatives should receive the fund. This last the court did not question.

The decision of the court below, therefore, not involving the validity of the treaty, or award of the commissioners, or lawfulness or character of the fund, but simply the right and title to the respective shares claimed in it, after the fund had been paid over by the government, and brought into court for distribution according to the agreement of all concerned, and which distribution depended upon the laws of the state, a majority of the court, taking this view of the case, held, that there was a want of jurisdiction, and dismissed the writ of error; and that the decision, whether right or wrong, could not be the subject of review under the 25th section of the *123] Judiciary Act, as it involved *no question, either directly or by necessary intendment, arising upon the treaty or award, or connected with the validity of either; and if this court were right in the view thus taken of the case, there can be no doubt as to the correctness of the conclusion arrived at. A different view of the case might, of course, lead to a different conclusion.

Now, in the case before us, the plaintiff in error claims the share of John Gooding, one of the members of the Mexican Company, as permanent trustee under the insolvent laws of Maryland, having been appointed 29th January, 1842, Gooding having taken the benefit of these acts, and assigned his property for the benefit of the creditors as early as 1819.

George Winchester had been previously appointed provis-

sional trustee on the 23d June, 1810, to whom all property had been assigned, and on the 2d May, 1823, had been appointed permanent trustee, and gave a bond for the faithful execution of his duties without surety, and on the 2d April, 1825, sold the interest of Gooding in this share to Robert Oliver, under an order of sale made by the Baltimore County Court, having jurisdiction in the matter, for the consideration of $2000. And in 1841 the Legislature of Maryland passed a law confirming this sale, a doubt having been suggested as to its validity, for want of a surety to the official bond of the trustee.

In this state of the case the Court of Appeals of Maryland held, that the interest of Gooding in the Mexican contract did not pass, under their insolvent laws, to the plaintiff in error as permanent trustee, for the reasons assigned in the previous case of *Gill* v. *Oliver's Executors*. And that if it did or could have passed under these laws, it passed to Winchester, the previous trustee, in connection with the confirming act of the legislature of 1841.

It is apparent, therefore, if the decision in the case of *Gill* v. *Oliver's executors* involved no question that gave to this court jurisdiction to revise it here, as has already been decided, none exists in the case before us; for, as it respects the question of jurisdiction, the two stand upon the same footing, and involve precisely the same principles.

The counsel for the plaintiff in error sought to distinguish this case from the previous one, and to maintain the jurisdiction of the court, upon the ground that the act of the Legislature of Maryland of 1841, confirming the authority of Winchester, the permanent trustee, was in contravention of a provision of the Constitution of the United States, as a "law impairing the obligation of contracts."

But, admitting this to be so, (which we do not,) still the admission would not affect the result. For the decision upon the *previous branch of the case denied to the plaintiff any right to, or interest in, the fund in question, as [*124 claimed under the insolvent proceedings, as permanent trustee, and hence he was deemed disabled from maintaining any action founded upon that claim.

It was of no importance, therefore, as it respected the plaintiff in the distribution of the fund, whether it was rightfully or wrongfully awarded to Oliver's executors. He had no longer any interest in the question.[1]

In order to give jurisdiction to this court to revise the judgment of a state court, under the 25th section of the Judiciary

[1] QUOTED. *Williams* v. *Gibbes*, 17 How., 254.

Act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or, in the language of some of the cases on the subject, "the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of Congress, or a decision against the validity of the right, title, privilege, or exemption set up under it." 3 Pet., 292, 302. Or, as stated by Mr. Justice Story, in *Crowell* v. *Randell*, (10 Pet., 392,) where he reviewed all the cases, it must appear "from the facts stated by just and necessary inference, that the question was made, and that the court below must. in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." And in a recent case, (5 How., 341,) following out the doctrine of the previous cases, "It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and that this claim was overruled by the court; but it must appear by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

It is not intended, nor to be understood, from these cases, that the question, thus material to the decision arrived at, must be confined exclusively and specially to the construction of the treaty, act of Congress, &c., in order to give the jurisdiction, as this would be too narrow a view of it. Points may arise growing out of, and connected with the general question, and so blended with it as not to be separated, and, therefore, falling equally within the decision contemplated by the 25th section. The cases of *Smith* v. *the State of Maryland*, 6 Cranch, 281, and *Martin* v. *Hunter's Lessee*, 1 Wheat., 305, 355, afford illustrations of this principle.

Now, as the decision of the question involving the right and *title of the plaintiff in error to Gooding's interest in this fund under the insolvent proceedings was against him in the court below, and was one which, in our judgment, involved only a question of state law, and, therefore, not the subject of revision here, and was conclusive upon his rights, and decisive of the case, it follows that we have no jurisdiction within the principle of the cases to which we have referred; for the determination of the court upon the validity of the act of the legislature of 1841 in no way controlled the judgment at which the court arrived, as respected the plain-

*125]

tiff. That turned upon the decision as to the right of the plaintiff to the fund under the insolvent proceedings, as permanent trustee of Gooding, and whatever might have been the opinion of the court upon the other question, the result of their judgment would have been the same.

For the reason, therefore, that this case falls directly within the decision of *Gill* v. *Oliver's Executors*, and is not distinguishable from it, the case must take the same direction, and be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals of the state of Maryland for the Western Shore, 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 the want of jurisdiction.

NATHANIEL WILLIAMS, AS PERMANENT TRUSTEE FOR THE CREDITORS OF JOHN GOODING, AN INSOLVENT DEBTOR, *v.* CHARLES OLIVER, ROBERT M. GIBBES, AND THOMAS OLIVER, EXECUTORS OF ROBERT OLIVER, AND JOHN GLENN AND DAVID M. PERRINE, TRUSTEES.

The decision in the preceding case of Williams, Trustee, *v.* Oliver's Executors, again affirmed.[1]

THIS case was also, like the preceding one, brought up from the Court of Appeals of Maryland, by a writ of error issued under the 25th section of the Judiciary Act.

The circumstances of the two cases were the same. In both, Winchester was the trustee who sold the share to Oliver, and the same act of Assembly applied to both. The judgment and *reasons of the Court of Appeals covered both cases, and they were argued in this court together by the same counsel. [*126

Mr Justice NELSON delivered the opinion of the court.

This case involves the same principles as the case of Williams, permanent Trustee of James Williams, already decided;

[1] See *Citizens Bank* v. *Board of Liquidation*, 8 Otto, 141.

and we refer to the opinion there delivered for our decision in this case.

The case is dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals of the state of Maryland for the Western Shore, 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 the want of jurisdiction.

GREENBERRY DORSEY, COMPLAINANT AND APPELLANT, *v.* SAMUEL PACKWOOD.

An agreement, whereby the purchaser of a plantation "bound himself to transfer to his son-in-law one half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one half of the cost of said property, either with his own private means, or with one half of the profits of the plantation," was deficient in mutuality. The son-in-law was not bound to render any services nor pay any money. It was a *nude pact.*[1]

It was not an alternative obligation upon the son-in-law, because the election to pay his half out of the profits would have been merely paying with another man's money.

Even if the agreement possessed mutuality, there was no performance, or offer of performance by the son-in-law for twenty-seven years.[2]

Moreover, fifteen years after the agreement, when the plantation was likely to prove a ruinous purchase, the son-in-law abandoned and released all his claim.[3]

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

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[1] Want of mutuality is fatal to a claim for specific performance. *Bronson v. Cahill*, 4 McLean, 19. So is gross inadequacy of consideration. *Surget* v. *Byers*, Hempst., 715.

[2] In an action for specific performance, the complainant must show performance or an offer to perform, his part of the agreement. *Colson* v. *Thompson*, 2 Wheat, 336. S. P. *Boone* v. *Missouri Iron Co.*, 17 How., 340; *Denniston* v. *Coquillard*, 5 McLean, 253; *McNeil* v. *Magee*, 5 Mason, 244; *Kendall* v. *Almy*, 2 Sumn., 278. And see *Mason* v. *Newell*, 2 Chic. L. N., 1. Delay, on complainants' part, amounting to laches, will defeat the action, especially if the value of the property has changed and new interests have intervened. *Harkness* v. *Underhill*, 1 Black, 316; *McNeil* v. *Magee*, 5 Mason, 244; *Mason* v. *Wallace*, 4 McLean, 77; *Holt* v. *Rogers*, 8 Pet., 420.

[3] Where a father agreed to give to the intended wife of his improvident son a lot of ground, upon her agreement to build a house thereon with her own money, specific performance was decreed, possession of the lot having been given and the house erected. *Neale* v. *Neale*, 9 Wall., 1. See *Dean* v. *Nelson*, 10 Wall., 170.

The leading facts in the case are stated in the opinion of the court, to which the reader is referred.

Upon the hearing in the Circuit Court, the bill was dismissed, and Dorsey appealed to this court.

It was argued by *Mr. Henderson* for the appellant, and *Mr. Butler* for the appellee.

Mr. Henderson, for the appellant, filed an elaborate argument, *consisting of upwards of one hundred pages, in which he examined the grounds upon which Dorsey's claim was resisted. [*127

He said, our claim is chiefly resisted on three grounds.

1. That the agreement is void for want of valuable cause or consideration.

2. If ever valid, the right has been abandoned by complainant.

3. If ever valid, the right has been legally released by complainant.

Other objections are interposed to our recovery by the defendant, and some of them as if they separately constituted distinct bars to our suit; but, on examination, it will be seen that, beside the three grounds of defense above specified, among the other objections, one only has any plausible claim of being separately considered a bar to the action, viz., Dorsey's intervening bankruptcy. We think, however, this point of bankruptcy is easily answered, if we succeed in overcoming the first three objections.

We admit, too, that, to maintain our action, the agreement of 16th April, 1821, must appear to have been made for a valuable consideration, and we must also overcome the defendant's pleas of abandonment and release.

First, then, as to the consideration for said agreement. The agreement being signed by both parties, binds each equally to the terms, conditions, and stipulations imposed on each, and confers the rights either has conceded to the other. We admit Dorsey's rights are more clearly expressed in this contract than his duties; but it is plain enough that Dorsey accepts the obligation Packwood has incurred, to convey to him, on the terms expressed, one half of the property mentioned. And it is as plain in sense and meaning, though not as explicit in expression, that Dorsey does undertake to pay for one half the cost of said property, in one of two ways, viz., either from his "own private means, or with the one half of the profits of the plantation." Under the first alternative, it is obvious he might have paid up one half in advance of the payments due

to Lafarge, though the duty would have been fairly performed by meeting those payments as they became due, or by paying up the half due after the profits had paid part.

But the alternative in the agreement was at Dorsey's election, 1 Poth. Ob., p. 284, § 3; Old Code La., p. 276, art. 89, 90.

And it is the plain language of the contract, that Dorsey might "pay for one half the cost of said property * * * with the one half of the profits of the plantation." The evidence fully shows he elected this alternative, and the question now is, *how might he thus pay for one half? He could only do this by aiding to produce results and profits from the plantation, and by husbanding and appropriating their proceeds to this end. To do this was the consideration, the necessary consideration, pledged and promised, as resulting from this alternative of the agreement. Hence the consideration, we insist, appears on the face of the agreement. In the first alternative, to pay one half in money; in the second, in such services as would make the plantation pay one half from half its profits. And his rights, duty, and services, under this second alternative of the agreement, go hand in hand.

*128]

And there can be no doubt that, under any exigency which might have arisen, Dorsey could have been obliged by the courts to perform his part of the agreement, or to account in damages, or to have his contract cancelled. Just as certainly so as in any other case of contract for personal services.

But suppose it were the meaning of this agreement, as defendant's counsel has argued, that Dorsey might at any time have discharged himself from its obligations, by forfeiting all he had done or paid toward it; yet it is valid in this aspect as a lawful agreement as in any other; and most conclusively is, after it has been fully executed by Dorsey. 13 La., 249; 10 Rob., 369, 370; Code La., 1920, 1921; 11 Mart. (La.), 221; 4 Mart. (La.), N. S., 266; Jer. Eq., 435; 1 Madox, 376, 377; 1 Edw. (N. Y.), 1 to 7.

A consideration, then, is apparent on the face of the agreement, upon a fair interpretation of its terms by the court; and the evidence fully shows that the parties, too, have given it this construction, and the manner in which they have understood and executed it, shall bind them. On this rule, that the practical construction of a contract by the parties shall govern, see Old Code La., p. 270, art. 56 to 64; New Code of 1825, art. 1051; 3 Rob. (La.) 187, 188; 10 Id., 369, 370; 12 Id., 170; Story Eq., § 168; 3 Story, 263, 264, 269, 270, 271, 282, 285.

But, by the local law of Louisiana, not only is it unneces-

sary the consideration should appear in a written agreement, but in its absence a consideration is presumed. 12 Rob. (La.), 329; 5 La., 78.

Assuming, however, that the burden of proof is on Dorsey, to distinctly show consideration, yet, by the laws of Louisiana, the rule is clear, we may show consideration for the contract by parol. Old Code La., p. 264, art. 31, 32; Code of 1825, art. 1757, 1887, 1888, 1890, 1894, 1897.

Same rule, 1 Greenl. Eq., § 215. And acts done in execution of a contract may be proven by parol. 13 La. 264.

That we rendered the services on which we rely to show consideration, *is abundantly confessed by the defendant in his answer, though he assumes those services were gratuitous. [*129

[The counsel then went into a minute examination of the answer and evidence, to show that Dorsey was expected to render, and did render, financial and other services of a personal nature in the concern and business of the plantation.]

With respect to the second proposition, viz., that Dorsey abandoned the concern by advising Packwood to sell and get out of the scrape, the counsel contended that the subsequent correspondence and transactions of Packwood showed that he did not so construe the letter at the time, but that such construction was an after-thought.

With respect to the third proposition, viz., the release, the counsel contended that it was given to Theodore, the son of Packwood, out of friendly feelings to him, and to promote his interest; and that as it affected the father, it was merely donative and void, because not an authentic act, and not accepted by Packwood.

At the date of this paper, Dorsey's rights under the agreement of 1821, had, according to complainant's calculation, become equitably consummate and complete. If the cost of the plantation had then been paid for from its profits, the condition of his purchase was accomplished. 13 La., 261; 1 Domat, p. 71, § 2, and p. 48, § 8.

In such aspect the right had become an equitable title—an informal title to property. 3 Mart. (La.), N. S., 337; 2 La., 460, 461; 3 Id., 397; 13 Id., 261.

From this time at least, if not from the beginning, Packwood held the title in trust, as to one half, for Dorsey. 1 Sch. & L., 214, 226, 227; 7 Mart. (La.) Rep., 244; 10 La., 420.

And courts of the United States uniformly distinguish legal from equitable titles in Louisiana, as elsewhere. 3 How., 512, 514, 515. It is especially so of a trust which results from fraud. 2 Id., 650; 10 La., 420.

The contract to sell on a suspensive condition, when the condition is performed, becomes equivalent to a contract to sell without a condition. And the latter contract, in Louisiana, is a sale. Old Code, p. 346, art. 4, 9.

At common law, a release is known as a designated instrument of conveyance of a right in land; a deed, transmissive of title. 2 Bl. Com., 324. It is also used at common law for remitting and discharging personal obligations. Used for either object it must be a deed, under seal, the seal importing a consideration, conclusive at law, except for fraud. If not under seal, though upon valuable consideration, it fails as an instrument to convey title to land. But if without seal, and *130] *without consideration in fact, it is void, and no proof of purpose or intention can sustain it.

In the civil law system, the release is utterly unknown as a technical instrument of conveying or relinquishing a right or title in land. In this system, its more accurate name is remission; and its functions are exclusively limited to the remission of debts and personal obligations. C. C., arts. 2195, 2202.

Limited to these objects, it is regarded as the act of simple donation, and governed by the laws and rules of donation. 1 Poth. Ob., p. 310, 312.

The office of release and remission in the civil law does not even extend to the discharging of accounts between parties. Such acts are denominated "transactions," (C. C., art. 3038, 3050,) though governed by much the same rules as a release in like case at common law; inasmuch as renunciation thereby made, extends only to rights and claims actually settled. And as conclusive proof, that the doctrine of release and remission aplies only to debts and personal obligations, the Civil Code requires "an act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property, of slaves or incorporate things, such as rents, credits, rights, or actions, under the penalty of nullity." Art. 1523, 1525." A donation *inter vivos*, even of movable effects, will not be valid unless an act be passed of the same, as is before prescribed. Such an act ought to contain a detailed estimate of the effects given."

It being seen, then, that a release, in the civil law, is but a donation, it is obvious that if it applied to lands, slaves, and goods, which it does not, still, a donation of lands, slaves, or goods, or rents, must be executed before a notary, etc., or it is void. Hence, this instrument is null and void under the local law. And this is also shown by the manuscript record in this case (p. 340, 342) of *Packwood* v. *Heirs of Alice Packwood*, and the decisions of the court there pronounced and decided;

also, (9 Rob. (La.), 416,) that the right acquired to vest estate by an accepted bid at auction, is such a title as the purchaser could not relinquish by parol agreement, but a retrocession in writing must be made. Art. 2415, 2586. And Dorsey's rights, vested by agreement of 1821, could not require less than a like retrocession, with cause and description of property relinquished.

But though a release is not a designated instrument of conveyance at the civil law, we do not pretend but that an instrument resembling it in form of expression may be a conveyance under private signature, as per C. C., art. 2415.

In such case, however, it must have all the essentials of a sale, viz.: it must be for a price. C. C., art. 2414, 2439. And this price must be stipulated on agreement. Art. 1792, 1794, 2431, 2439. *And such sale implies that the vendor, and not the vendee, was the owner. Art. 2481. [*131

Now, the reverse of all these qualifications to a sale are either proved, or averred and admitted by the defendant in this case. As to ownership, for instance, defendant claims to have been sole owner since 18th January, 1825. Ans. p. 58.

Of the legal title, as distinguished in equity, this is literally true, as he has held this from date of purchase in 1821. But defendant means the relinquishment of Dorsey's equitable contingent interest. Occupying such grounds, he cannot say the paper of 1836 was a sale. This paper has, therefore, no civil law basis for validity, but is null *per se*. And viewed as a release, at common law and in equity, it is clearly null and void for want of a seal, or at all events for want of a consideration which a seal at common law implied. 13 Johns. (N. Y.), 87; 7 Id., 169; 1 Cow. (N. Y.), 122; 5 Watts & S. (Pa.), 486; C. C. art. 1887; 21 Pick. (Mass.), 101; 2 Sumn., 11; 8 How., 158, 159.

And a release, like a receipt, is only held valid for the causes and matters computed on at the time. 1 Edw. (N. Y.), 38, 39, and cases cited; 8 How., 158; 13 Conn., 136; 7 Watts & S. (Pa.), 317. In this it precisely resembles the "transaction," or compromise of the civil law. C. C. art. 3040, 3048.

And a release must be just, equitable, and meritorious, or it is held for naught, and especially in matters of trust. 1 Sch. & L., 226; 16 Pet., 276–279; 4 How., 561, and the case of *Kennedy's Heirs* v. *Collins*, manuscript decision, Sup. Ct. U. S., Dec. Term, 1850, 10 How., 174. Release explained, put on its merits, and annulled. 3 Story, 268, 269.

Upon all the preceding authorities, it is obvious that this pretended release is utterly null—shadow, without substance.

It is null, also, upon the pleadings. The bill attacks this release for the directly imputed reason, that it is destitute of all consideration. The answer (as in the place of a plea) does not deny this, but avers the paper is a release, notwithstanding this defect.

Such form of defense is held for naught, and no proof could remedy it. The plea in such a case, must aver and set forth what the consideration was. Story Eq. Pl. §§ 796, 797; Mitf. Pl., 261–263, 322–324.

Mr. Butler, for the appellee, made the following points amongst others which are omitted, (because the decision of the court did not turn upon them.)

II. The bill does not allege any substantial act of part performance by complainant, nor does it contain any offer to pay the one half of the cost of the property. Upon such a bill, *132] specific *performance of the agreement of April 16, 1821, would not have been decreed, even had the bill been filed before 1825.

First. Packwood promises to transfer to Dorsey, for a certain price to be paid by him, the one half of the plantation, &c. Such a promise, by the law of Louisiana, is a sale; and to entitle the vendee to a specific performance, he must show that he has paid, or must offer to pay, the stipulated price. Old Civil Code of Louisiana, in force in 1821, 346, art. 9; Louisiana New Civil Code, art. 2437; Code Napoleon, art. 1589.

Secondly. So far as the agreement provides for the payment of the price by the one half the profits, or promises to account therefor, it creates, not a joint interest or partnership, as assumed in the bill, but an informal and void donation.

1. It is not a contract of partnership, because Dorsey does not bind himself to put any thing into it. Old Civil Code, 388, art. 3; New Civil Code of La., art. 1757; Domat, Liv. 1, tit. 8, § 2, art. 12; Pothier, Traité du Contrat de Société, ch. 1, § 3, art. 8; Story on Partnership, §§ 8, 15.

2. It is a donation, because nothing is given or promised by Dorsey; and as such it is void, because not in the form required by the law of Louisiana. Old Civil Code of Louisiana, p. 208, arts. 1, 2, pp. 218, 219; arts. 43, 52,; pp. 220, 221; arts. 53, 65.

Thirdly. The agreement was without consideration or mutuality; and Courts of Equity will not decree specific performance of such agreements.

1. The agreement on the part of Packwood, was wholly gratuitous. Such agreements, if actually executed, and if

otherwise unobjectionable, will be sustained; but if, as in the present case, merely executory, they will not be enforced. 2 Story Eq. Jur., §§ 787, 793, *a; Wycherly* v. *Wycherly*, 2 Eden, 177; *Colman* v. *Sarrell* 1 Ves., 54; *Ellison* v. *Ellison*, 6 Id., 662; *Bunn* v. *Winthrop*, 1 Johns. (N. Y.) Ch., 329, 336, 337; *Minturn* v. *Seymour*, 4 Id., 497; *Acker* v. *Phœnix*, 4 Paige, (N. Y.), 305; *Black* v. *Cord*, 2 Harr. & G. (Md.), 100; *Caldwell* v. *Williams*, 1 Bail. (S. C.) Eq., 175.

The modern cases, in which executory agreements, in favor of children and other relatives, though voluntary, have been enforced, besides being, some of them, of questionable authority, all proceed on the ground that such agreements being made for the benefit of persons for whom the party was bound to provide, are founded on a consideration, meritorious, though not on a valuable, and are, therefore, inapplicable to the present case. Story Eq. Jur. § 793, b; White's Lead. Cas. in Eq., 49 Law Lib., 167, 193, Eng. ed., 192, 213, Am. ed.; Id. for Am. Cas., pp. 213, 220.

2. The agreement, as interpreted by the allegations and claims of the bill, is wholly without mutuality, and, therefore, equity *will not enforce it. 2 Story Eq. Jur. §§ 742, [*133
750, 769, 771, 776, 790, 793, 796. *Armiger* v. *Clark*, Bun., 111; *Lawrenson* v. *Butler*, 1 Sch. & L., 13; *Withy* v. *Cottle*, 1 Sim. & Stu., 174; *Howell* v. *George*, 1 Madd. Ch., 12; *Adderley* v. *Dixon*, 1 Sim. & Stu., 607; *Martin* v. *Mitchell*, 2 Jac. & W., 413; *Flight* v. *Bolland*, 4 Russ., 298; *Hamilton* v. *Grant*, 2 Dow. P. C., 33; Sugden's Law of Prop. (in House of Lords,) 48 Law Lib. N. S., 58 Eng. ed., 69 Am. ed.; *Benedict* v. *Lynch*, 1 Johns. (N. Y.) Ch., 373; *German* v. *Machin*, 6 Paige (N. Y.), 292, and cases cited by Ch. Walworth; *Woodward* v. *Harris*, 2 Barb. (N. Y.), 442; *Phillips* v. *Berger*, Id., 610.

III. The letter of complainant of the 18th of January, 1825, and his subsequent correspondence and acts amount to a full waiver and abandonment of all rights and claims of every nature and description under the agreement. As to the effect of waiver and abandonment in cases of specific performance, see 2 Story's Eq. Jur. §§ 770, 771, 776, and cases there cited. See also cases cited *post*, point 7.

V. If the complainant, under the agreement of 1821, had any rights in the plantation, &c., they were all released by the instrument of the 28th of January, 1836.

1. Such an instrument, by the law of Louisiana, is valid and effectual as a remission or release, though without consideration, and not under seal. Civil Code of Louisiana, arts. 2126, 2195 to 2202, 3061, and particularly art. 2197. French—

"*La remise d'une dette*," &c.; English—"The release or remission of a debt," &c. Id. arts. 812 to 816. In each art. French —"*la remise;*" English—"the release." 4 Favard de Langlade, 831, word "*remise*." Word "*remise*," in Pothier on Obligations, as translated by Evans and Martin.

2. Such conventional releases are favored by the civil law. Bardet, tom. i. liv. 3, ch. 24, *arrêt du* 8 *Feb.*, 1629; *Moulton* v. *Noble*, 1 La. Ann. of La., 192, and authorities there cited by Eustis, Ch. J. *Bourgoin* v. *Bourgoin*, Sirey, 1814, 1st part, p. 85; 10 Duranton, 321, Paris ed. of 1844, No. 339; *Ardouin* v. *Ardent*, in Court of Cassation, 2d April, 1823, Sirey, 1823, 1st part p. 238, 2d part p. 113, quoted and approved in 4 Favard de Langlade, p. 821, 17 Ledru Rollin, 1006, 10 Dalloz, 612.

3. Such a release is valid, though the contract it was intended to release remain in the hands of the obligee or of a third person. Authorities above cited under this point; 12 Duranton, 441, Paris ed. of 1844, No. 360.

VII. Complainant's claim is wholly barred by prescription and lapse of time.

1. The respondent having acquired the plantation, &c., in good faith and by a just title, and the complainant being a *134] resident *of Louisiana, his claim was barred by the prescription of ten years, provided by the law of that state. Civil Code of Louisiana, arts. 3442 to 3464, 3494, to 3498, 3508 to 3511; 2 Story Eq. Jur. § 1520 and note 3.

2. Independently of positive prescription, the general doctrines of the Courts of equity forbid, after such laches, such lapse of time, and such changes in the property as have occured in this case, the granting to the complainant of any part of the relief sought by him. 2 Story Eq. Jur, § 723, and sections cited under point 2; Id., § 1520, note 3; *Smith* v. *Clay*, 3 Bro. Ch., 639 *n.*; *Hovenden* v. *Annesly*, 2 Sch. & L., 636; *Brashier* v. *Gratz*, 6 Wheat., 528; *Piatt* v. *Vattier*, 9 Pet., 405, 416; *Taylor* v. *Longworth*, 14 Pet., 174; *McKnight* v. *Taylor*, 1 How., 167; *Wagner* v. *Baird*, 7 Id., 235; *Maxwell* v. *Kennedy*, 8 Id., 221.

Mr. Justice GRIER delivered the opinion of the court.

The record of this case covers 840 pages; and the abstracts and briefs of counsel, nearly three hundred. But as the merits of the case, when extricated from the mass of matter with which it is enveloped, depend on the application of undisputed principles and axioms of the law, to a few leading facts, it will not be necessary that our statement of it should be proportionally voluminous.

Dorsey, the complainant and appellant, filed his bill in the Circuit Court of Louisiana in March, 1848, claiming the specific execution of a contract in writing, executed on the 16th of April, 1821, which is as follows:

"Samuel Packwood, now in the city of New Orleans, having lately purchased the plantation heretofore belonging to John La Farge, situated below town on the right bank of the river, about eleven leagues, binds himself, his heirs, and executors, to transfer unto G. Dorsey, his heirs and executors, one half of the plantation above mentioned, also one half of the slaves, cattle, and stock, farming utensils, &c., &c., as soon as said G. Dorsey shall pay for one half of the cost of said property, either with his own private means, or with one half of the profits of the plantation; but it is agreed upon and well understood by said G. Dorsey, that Samuel Packwood, until said transfer is made, has the right and privilege of selling and disposing and transferring of said plantation to any person or persons that he may think proper to sell to, without consulting or asking the consent of said G. Dorsey, and the consent of said G. Dorsey shall not be necessary to make the sale good; and it is further agreed upon, that Samuel Packwood is to have the entire and complete control of said plantation, and every thing that appertains to it until said transfer *is made to G. Dorsey; but if said Packwood should sell at any time previous to said transfer to G. Dorsey, [*135 he shall be answerable for and shall account to said G. Dorsey for one half of the net profits of said sale."

At the time this paper was executed, Packwood resided in New York, but was owner of valuable property in New Orleans, from which he derived his principal income. Dorsey was his son-in-law, and a member of the mercantile firm of Morgan, Dorsey & Co. This firm was in good credit, and acted as the financial agent of Packwood, lending him their acceptances, and advancing money for him, to enable him to complete his purchases, up to the time of their failure and bankruptcy in 1825. At this time the firm was largely in advance to Packwood; but the balance due was afterwards paid by him, with interest. Dorsey had been chiefly instrumental in persuading Packwood to make this purchase, and owing to his expectation of a share in the speculation in case it should turn out to be profitable, the commissions charged for these financial accommodations were probably not so great as they otherwise might have been, and for the same reasons, also, Dorsey took an interest in the management of the plantation, made additional purchases, gave advice and superintendence, without at first making such additional charges as

might have been made for similar services rendered to a stranger.

When this purchase was made, the parties seem to have expected that after the first payment of $25,000 was made by Packwood, the profits of the plantation might in a great measure be depended on, to liquidate the balance of its cost. But they were greatly deceived in this expectation. For many years the crops did not equal the expenses; so that, at the time of the failure of the firm of Morgan, Dorsey & Co., in 1825, Packwood was in debt for the plantation and the additional purchases of land and negroes, a sum exceeding one hundred and fifty thousand dollars, ($150,000). Dorsey had paid nothing, and was then unable to pay anything. The speculation seeming likely to turn out disastrous, he ceased to expect any advantage from it, or claim any interest in it, and accordingly he advised Packwood to sell the greater part, if not all of it, "with the hope that he (Packwood) might get out of the scrape in four or five years." Indeed for some years after this it appeared doubtful whether Packwood would be able to extricate himself from his pecuniary embarrassments consequent on this purchase. He finally succeeded, however, after a further struggle of some twelve or fifteen years, by sales of his other property and the profits of the plantation, to rescue himself from impending ruin, and pay the debts in which he had been involved. During all
*136] *this time, Dorsey was unable to help Packwood out of his difficulties, and ceasing to consider his expectations from Packwood's contract with him to be of any value, and as it might be considered a cloud upon the title, at the request of Packwood he voluntarily executed and sent to him the following release, witnessed by his wife:—

"This is to certify, that I hereby abandon and release unto Mr. Samuel Packwood, any claim I have or might have to any interest in or to his plantation, in the parish of Plaquemines, or profits of the same, by virtue of any written documents he may have given, or verbal promises made upon the subject.

New Orleans, 28th January, 1836. G. Dorsey."

Witness: E. H. Dorsey.

From this time till 1838, Dorsey had the agency of the plantation under a power of attorney from Packwood. In that year Packwood cancelled his power of attorney, and appointed another agent, alleging that Dorsey had misused his power by indorsing his principal's name to sustain his private credit. This was the beginning of a coldness between the parties, which, after the refusal of Packwood to incur liabilities for Dorsey in 1840, and after the death of Mrs. Alice

Packwood, the mother of Mrs. Dorsey, and the marriage of Packwood to a second wife, became a bitter family quarrel, followed by much litigation between the present parties. The nature and result of these suits, it is not necessary, for the purposes of the present case, to specify. Suffice to say, that Dorsey now revived his claim to a share in the Myrtle Grove property, on the ground that his half of the purchase-money had been paid by the rents and profits of the estate, and finally instituted this suit in March, 1848.

In the original bill, the complainant founds his title to relief on an alleged lost agreement, dated on the 12th of April, 1823. But after the production by the respondent, of this instrument, dated 16th of April, 1821, he amended his bill, and made his claim under it. The respondent, in his answer, denies the existence of any other agreement either written or parol, and there is no proof to show the existence of either. The right of the complainant to relief will therefore depend on this instrument of writing, in connection with the facts, a brief outline of which we have endeavored to give, so far as we think them material to the decision of the cause.

There is no allegation in the bill, or proof, that any clause was omitted from this instrument, either through mistake or inadvertence. It is signed by both parties in presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. *It imposes no obligation on [*137
Dorsey whatever. He is not bound either to render services or pay money as a consideration for one half the land. Packwood could not support a suit upon it to compel Dorsey to do any thing. It is not an alternative obligation, because Dorsey is not bound to perform either alternative. The allegation that "Dorsey elected the alternative of paying for the land out of the profits," (or, in other words, with Packwood's money), amounts only to this: That he was willing to accept one half of the plantation as a gift, but would pay no part of the purchase-money out of his own pocket. Nor is there any evidence, that Dorsey ever notified Packwood of his election to do any thing. On the contrary, in January, 1825, before the failure of the firm of Morgan, Dorsey & Co., when the speculation appeared likely to be a ruinous one, he *elects* to have Packwood "get out of the scrape," the best way he could, and his release, given in 1836, shows his election to claim no interest in the property whatever. But even assuming that Dorsey was bound by this contract, it cannot come within the category of alternative obligations, where one of

the alternatives was to pay with Packwood's money, and give nothing of his own.

"An obligation," says Pothier, "is not alternative, where one of the things is not susceptible of the obligation intended to be contracted; but in this case the obligation is a determinate obligation of the other. Therefore it was decided, in l. 72, § 4, ff. *de sol*, that if a person promised me in the alternative two things, whereof one belonged to me already, that he had not the liberty of paying that in lieu of the other—not even although it might afterwards cease to belong to me; because this not being, at the time of the contract, susceptible of the obligation contracted in my favor, the other only was due; *cum re sua nemo deberi possit.*" Evans's Pothier, Part 2d., C. 3, Art. 6, No. 249. Assuming the obligation to be mutual, Dorsey was bound to "pay with his own private means one half of the cost" of the property, or offered to do it within a reasonable time, before he could claim the interference of a court of equity to enforce a specific execution of this contract. Equity will not decree the specific execution of mere nude pacts, or voluntary agreements not founded on some valuable or meritorious consideration. The same rule is applied to imperfect gifts, *inter vivos*, to imperfect voluntary assignments of debts or other property, to voluntary executive trusts, and to voluntary defective conveyances.

When the obligation is mutual, the party asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt and eager to perform the con-
*138] tract. If *he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed.

It is clear, then, from this statement of the facts and law as they affect this case, that the complainant has not shown a case which will entitle him to a decree in his favor.

For 1st. If he was bound at all, he has shown no performance, or offer of performance, after an interval of twenty-seven years.

2dly. The agreement by Packwood to convey one half of the land purchased and paid for by himself, in consideration of a payment "from the profits of the plantation," which equally belonged to himself, was but the promise of a gift, a nude pact which equity will not enforce.

3dly. The release of the complainant in 1836, fifteen years after the agreement, when he had paid nothing for the land, either out of his own pocket, or even "by the profits of the

plantation," (if such could be called a payment) was a voluntary abandonment of all claim under it. Whether, if he had paid one half the purchase-money, and had a good equitable title to the land, a release without a consideration would operate as an equitable bar to his claim, we need not inquire. But as cumulative evidence of a total abandonment of all claim under an executory agreement of which he had performed no part, it furnishes an additional reason for refusing him a decree, to which he would not be entitled, even if such release had never been given.

The decree of the Circuit Court is therefore affirmed with costs.

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.

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*GILBERT C. RUSSELL, APPELLANT, *v.* DANIEL R. SOUTHARD, SAMUEL D. TOMPKINS, AND WILLIAM C. BULLETT AND WILLIAM H. POPE, ADMINISTRATORS OF JAMES BURKS, DECEASED, WILLIAM L. THOMPSON, GUARDIAN TO JAMES BURKS, SAMUEL BURKS, CHARLES BURKS, AND NANCY BURKS, INFANT CHILDREN OF JAMES BURKS, DECEASED, MATILDA BURKS AND JOHN BURKS, HEIRS OF SAID JAMES BURKS, DECEASED.[1] [*139

When the question before a court of equity is, whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage.[2]

Upon such a question as this, depending upon the general principles of equity jurisprudence, this court does not hold itself bound by the decisions of the highest court of the state in which the land in question was, but will be governed by its own view, of those principles.[3]

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[1] Further decision, *Southard* v. *Russell*, 16 How., 547.

[2] FOLLOWED. *Babcock* v. *Wyman*, 19 How. 299. See note to *Morris* v. *Nixon*, 1 How., 118.

[3] FOLLOWED. *Neves* v. *Scott*, 13 How., 272. See also *United States* v. *Knight*, 1 Black, 489; *Villa* v. *Rodriquez*, 12 Wall., 339; *Morgan* v. *Shinn*, 15 Id., 110; *Peugh* v. *Davis*, 6 Otto, 337; *Howland* v. *Blake*, 7 Id., 627; *Brick* v. *Brick*, 8 Id., 516; *Pana* v. *Bowler*, 17 Id., 541; *Mobile Building, &c., Assoc.* v. *Robertson*, 65 Ala., 389; *Shear* v. *Robinson*, 18 Fla., 451; *Delaigle* v. *Denham*, 65 Ga., 491;

The decisions of the courts of Kentucky examined.

Such evidence is admissible when it is alleged and proved that a loan on security was really intended and the defendant sets up the loan as a payment of purchase-money and the conveyance as a sale.

In examining the question whether the transaction was a sale or mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale.

In the present case, the court decides, from the evidence, that the consideration was grossly inadequate; that he was a stranger, without friends or other resources there than the land in question; that it is true he offered to sell, but there is no evidence to show that he offered to sell for the amount of money which he actually received.

The papers executed between the parties show a conditional sale; but in doubtful cases the court leans to the conclusion that the reality was a mortgage and not a sale.[1]

The absence of a personal obligation by the grantor to repay the money furnishes no conclusive test to determine whether the conveyance was a mortgage or a conditional sale.

Nor do the facts that the grantor endeavored to obtain the relinquishment of his wife's dower, and actually surrendered the paper under which he had the right to reclaim his land, amount to a bar of his claim, under the circumstances of this case.

Three years after the transaction the grantor received one hundred dollars from the grantee upon the ground of an arithmetical error, and signed a release of all further demands. But apart from other considerations bearing upon the purchase of an equity of redemption, in the present case it was the duty of the grantee to correct errors, and consequently he paid nothing for the equity of redemption.

Where there was a long lapse of time and the original mortgagee had been dead for many years, an account of rents and profits and of interest upon the money loaned, will be decreed to commence from the filing of the bill.

Where there were purchasers during the intermediate time, and the record did not enable this court to determine upon their rights, the case will be remanded to the Circuit Court for its adjudication thereon.

A motion made in this court after the decision of the case here, to set aside the decree and remand the case to the Circuit Court for further preparation and proof, upon the ground that new and material evidence has been discovered since the trial of the case in that court, — cannot be sustained.

Affidavits of newly-discovered testimony cannot be received. This court must affirm or reverse upon the case as it appears upon the record.

The established chancery practice is so, and if it were not, the act of Congress, passed on March 3, 1803, would be decisive of the question.

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

*140] *It was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the court. Upon the trial, the Circuit Court dismissed the bill, and Russell appealed to this court.

Lynnell v. *Lyford*, 72 Me., 284; *Booth* v. *Robinson*, 55 Md., 451; *Hack* v. *Norris*, 46 Mich., 594; *Thompson* v. *Hicks*, 8 Abb. (N. Y.), N. C., 163 *n.* See note to *McCollum* v. *Eager*, 2 How., 61.

[1] S. P. *Conway* v. *Alexander*, 7 Cranch, 218; *Flagg* v. *Mann*, 2 Sumn., 486.

It was argued by *Mr. Underwood* and *Mr. Morehead*, with whom was *Mr. Clay*, for the appellant, and by *Mr. Nicholas* for the appellee.

The counsel for the appellant made the following points:

1. That the execution of a defeasance simultaneously with the absolute conveyance, constitutes them, in legal contemplation, one instrument; and that in this case the execution of the defeasance was so. 3 J. J. Marsh. (Ky.), 354; Pow. on Mort., 67.

2. That in all doubtful cases the law will construe the contract to be a mortgage, and that courts are less inclined to consider a contract for land a conditional sale than the same kind of contract for personalty; because land is not so liable to the casualties incident to personal, and especially living property. The general and governing principle in this entire class of cases is, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will construe it so. 5 Bac. Ab., 5. In the case of *Edrington* v. *Harper*, decided by the Court of Appeals of Kentucky, 3 J. J. Marsh. (Ky.), 354, the general rule is laid down, that if there be no other fact to illustrate the intention of the parties, but an absolute sale on one side and a defeasance on the other, the court will incline to the construction that the contract was a mortgage.

In the case of *Flagg* v. *Mann*, 2 Sumn., 535, the same doctrine is ably enforced; the presiding judge, in the course of his decision, remarking that "it is well known that courts of equity lean against construing contracts of this kind to be conditional sales; and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage," and concluding that "the *onus probandi* is on the defendant to establish it to be a conditional sale. If it be doubtful, it must be construed to be a mortgage."

3. That a sale in form, but which in fact and substance may be avoided by the payment of money within a given time, is, and will be held to be, a mortgage; if a mortgage until that period elapses, it must continue a mortgage until lapse of time or some other matter changes it. *Wheeland* v. *Swartz*, 1 Yeates (Pa.), 579; *Stoever* v. *Stoever*, 9 Serg. & R. (Pa.), 434; *Wharf* v. **Howell*, 5 Binn. (Pa.), 499; [*141 *Dimond* v. *Enoch*, Add. (Pa.), 356; *Coldwell* v. *Woods*, 3 Watts, (Pa.), 487; *Friedly* v. *Hamilton*, 17 Serg. & R. (Pa.),

70; 7 Watts & S. (Pa.), 339; *Kunkle* v. *Wolfersberger*, 6 Watts (Pa.), 126; *Kerr* v. *Gilmore*, Id., 405; *Rankin* v. *Mortimere*, 7 Id., 372; *Brown* v. *Nickle*, Pa. St., 390; *Hamet* v. *Dundass*, 4 Id., 178; *Flagg* v. *Mann*, 2 Sumn., 532; *Skinner* v. *Miller*, 5 Litt. (Ky.), 85; Hard. (Ky.), 6; 2 J. J. Marsh. (Ky.), 471; 3 Id., 354; 1 Dev. Eq. (N. C.), 373; 2 Call (Va.), 421; 2 Mon. (Ky.), 40; 1 Wash. (Va.), 125; 4 Hen. & M. (Va.), 161; 3 Yerg. (Tenn.), 525; 2 Hayw. (N. C.), 26; 2 Edw. (N. Y.), 138; 7 Johns. (N. Y.) Ch., 40; 2 Id. 34, &c.; 6 Watts (Pa.), 406, where the cases are reviewed.

4. That the simultaneous execution of the deed and an instrument giving four months to repay the money, with interest, no matter what may be the clauses or covenants intended to restrict the redemption to this precise period, necessarily import the loan of money on one side and security on the other, and, if so, a court of equity will always construe it a mortgage.

5. That calling it a conditional sale does not make it so; and that the extraordinary language used in this case, so far from making it such, tends strongly to show that the spirit and real substance of the contract were understood, but attempted to be avoided by the artful dress thrown around the transaction.

The counsel then examined the extrinsic evidence bearing upon these points, of which it is impossible to give an abstract.

6. Whether, construing this transaction as a mere security for money advanced, any subsequent event has deprived the complainant of his right to redeem? The giving up the defeasance and execution of the receipt, it is insisted, amounted to a relinquishment or release of the equity of redemption. Russell called on Southard, after the period stipulated for redemption, to make good the advance mentioned in the deed. The receipt recites the several sums which, with the addition of this $100, make the amount stated in the deed, and concludes by saying it was in full of all demands. According to the face of the papers, Russell was allowed to redeem only by paying $4,929.81, whereas he had only received $4,829.81. He insisted on the $100 to make the sum he received equal to the obligation he had imposed on himself. This is so clearly shown by the receipt itself that it would be useless to enlarge upon it. The words at the end of the receipt, "This is in full of all demands upon J. Southard," can only be construed as having reference to monied claims. Russell, after the receipt of the $100, had no demand upon Southard, and it only increased by that sum the demand which Southard held on him. Increasing the sum which Russell was equitably bound

to pay, if it be considered a mortgage, and releasing all further demands on the mortgagee, *cannot be construed as destroying the liability which the advance only [*142 enlarged, and the right to redeem must consequently be considered as unaffected by the receipt. The giving up the defeasance at the same time was, therefore, without consideration.

Admitting, however, that it was an attempt on the part of Southard to extinguish the right to redeem, will a court of equity sanction it?

The civil law was, perhaps, more rigid on this point than ours, regarding, as it did, the mortgagor as a minor, and as having no will to do a valid act which would deprive him of the right to redeem. Our courts of equity have never gone to this extent, but they always look upon any act done under the influence resulting from the relation between mortgagor and mortgagee with great suspicion, and never fail to examine it with the severest scrutiny. It is not denied that the mortgagee may purchase the equity of redemption for a fair price and full consideration, under circumstances where the mortgagor could exercise a will unembarrassed by necessity. A court of equity will never sanction an arrangement by which the right of redemption is surrendered without adequate consideration. *St. John* v. *Turner*, 2 Vern., 418; 1 Ridgew., 295; Pow. on Mort., 122, note *n.; Holdridge* v. *Gillespie*, 2 Johns. (N. Y.), Ch., 30; *Henry* v. *Davis*, 7 Id., 41; 2 Cow. (N. Y.), 322; 2 Day (Conn.), 246; 1 Murph. (N. C.) 117; *Hicks* v. *Hicks*, 5 Gill & J. (Md.), 75.

7. With respect to lapse of time, the suit was commenced within twenty years of the date of the original transaction, and within less than seventeen years after the advance of the $100.

The points made by *Mr. Nicholas* were the following:

1. Does the written proof concerning the agreement show a conditional sale or a mortgage?

Over and above the unequivocal express language of the agreement itself, that it is, and was intended to be, a conditional sale from Southard, and not in the nature of a mortgage from Russell, there is the absence of any of those *indicia*, upon which courts rely in construing a *quasi* conditional sale to be a mortgage or security for a loan.

1st. There is no agreement, express or implied by Russell, to pay the $4,900.

2d. There is no acknowledgment, express or implied, which imports, or from which there could be inferred, an indebted-

ness from Russell to Southard. There is nothing creating any personal liability upon Russell, or by which Southard could have coerced the payment of the $4,900. There is nothing on the face of the writings importing a loan, or anything else *143] than *what they purport to be, the evidence of a conditional or defeasible sale.

There is, therefore, the want of that mutuality in the agreement, which, according to all the approved authorities, is indispensable to the construing of a conditional sale into a mortgage. *Robinson* v. *Cropsey*, 2 Edw. (N. Y.), Ch., 138; 19 Wend. (N. Y.), 518.

The legality of these sales is, at this day, beyond all doubt, even if there ever was room for a fair legal doubt on the subject. "To deny it," (says Ch. J. Marshall, delivering the opinion of the whole court, in *Conway* v. *Alexander*, 7 Cranch, 236,) "would be to transfer to a court of chancery, in a considerable degree, the guardianship of adults as well as infants." In *Flagg* v. *Mann*, 14 Pick. (Mass.), 480, the court says: "Such a contract is known and recognized in law, and is as much to be enforced as is a mortgage, or any other contract or agreement. A decision to the contrary would essentially, unnecessarily, and unjustly fetter and impair the right to manage and dispose of property, according to the wants and interests of the owners." In *Glover* v. *Payne*, 19 Wend. (N. Y.), 522, the Supreme Court of New York says: "Until the courts are prepared to make contracts for parties, and to assume the guardianship of adults as well as infants, such a contract cannot be declared a mortgage." "Conditional sales, or defeasible purchases," says Chancellor Kent, "though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers; and the time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost. The court never relieves the grantor who neglects to perform the condition on which the privilege of repurchase depends."

The obvious reason for this departure from the ordinary chancery rule, in requiring such strict performance of the condition is, because there would otherwise be no mutuality in the agreement. The conditional vendee would be allowed to speculate on the chances of a rise in the value of the property, by lying by an indefinite time before he made his election to redeem, whilst the vendor had no power to compel a redemption. For the same reason, the want of power to coerce the payment of the purchase-money, is held by all the authorities as a controlling circumstance against construing a conditional sale into a mortgage. Some of the earlier authorities say, that

want of mutuality is not an unanswerable argument, and some *dicta* in more modern decisions seem to recognize that doctrine; but it is believed that no case of approved authority can be found within the last seventy years, construing a conditional sale into a mortgage, where such mutuality did not exist. 19 Wend. (N. Y.), 522; 1 A. K. Marsh. (Ky.), 160.

*The written proof in this case shows "no previous debt or dealing, no loan in contemplation, no stipulation for the repayment of the money advanced, or right to coerce it, and no proposition for a treaty about a mortgage," but does most clearly negative each of those propositions. We may, therefore, safely conclude, that the agreement cannot be construed into a mortgage from the written evidence in the cause. [*144

2. The next inquiry is,—can parol proof be let in, to contradict or vary the construction of the written agreement, for the purpose of converting it into a mortgage?

The familiar general rule is, that this cannot be done either at law or in chancery. The exception to the rule at law is, where the parol proof is offered to establish alleged fraud in obtaining the agreement, or some vice or illegality in its consideration. Chancery allows the further exception, where a party comes to obtain the correction of an alleged mistake in the construction of the agreement. These are the only exceptions allowed in either court. In every other instance the rule is inflexible and invariable in its rigid application.

It might be inferred, from the loose language of some respectable authorities, and the case of *Conway* v. *Alexander*, (7 Cranch,) is among the number, that the letting in of parol proof, to establish the loan of money in this class of cases, without any charge of usury, was an additional exception. But it is believed never to have been so decided, where that was the turning point in the case. The contrary has been expressly and repeatedly decided by the Appellate Court of Kentucky, and such has long been the settled law of that state. In 1824, that court, composed of those eminent jurists, Boyle, Owsley, and Mills, after acknowledging that there had been difference of decisions in that court, as elsewhere, on the question, determined that the parol proof could not be allowed. The rule, thus settled, has constantly been enforced ever since. It has become a law of property in Kentucky. Its direct, and indirect recognition, can be found in at least twenty printed cases. In 1829, when there was a change in the members of the court, the rule was solemnly affirmed in the strongest manner, in *Fishback* v. *Woodford*, 1 J. J. Marsh (Ky.), 87. Again, in 1839, when there was another change in the members

of the court, and it was composed of judges Robertson, Ewing, and Marshall, an effort was made to convert an absolute deed into a mortgage, by parol proof, without charge of accident or mistake, and the rule was reaffirmed in the following language, in *Thomas* v. *McCormack*, 9 Dana (Ky.), 109.

"There being no written memorial of any condition or defeasance, neither the public interest, nor the established principles of jurisprudence, will allow a court of either equity *145] or law to *admit parol testimony, in opposition to the legal import of the deed, and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or of some vice in the consideration. This rule, though it may operate harshly in a particular case, is, nevertheless, so salutary and conservative, that an inflexible adherence to it is necessary for effectuating the policy of the statute of frauds, and of giving proper security to property, and full effect to solemn contracts in writing." "To admit such testimony, would operate a mischievous relaxation of wholesome rules of law, open a wide door to perjury, and greatly impair, if not altogether destroy, the efficacy and value of written memorials of contracts."

3. If correct in this position, then the complainant must fail, as there is no foundation laid for letting in any parol proof, to show the original transaction to have been a mere loan and intended security for its repayment.

4. The next question is, whether Russell is not bound by his release under seal.

5. The next question is, does the parol proof establish, in contradiction to the writings, that the parties intended a mortgage, and not a conditional sale?

The claim to the relief sought here should be sustained by the fullest and most indisputable proof, because of its staleness; because it is in contradiction to the written agreement of the parties, fairly made; because it is asserted long after the death of James Southard, the principal party, and that of Warden Pope, the intelligent and respectable draftsman of the agreement; because, no sufficient excuse is even pretended, much less proved, for the long delay; because it is in opposition to Russell's voluntary release, made seventeen years before; and because all the material allegations are positively denied, on oath, by the defendant, Daniel Southard, who is charged to have been personally cognizant of the whole transaction.

Such is not at all the character of the proof. On the contrary, it very strongly corroborates the import of the writings,

and tends to show that the parties really intended a conditional sale, and not a mortgage.

The counsel then examined the evidence upon this point.

Mr. Justice CURTIS delivered the opinion of the court.

This is a suit in equity to redeem a mortgage, brought here by appeal from the Circuit Court of the United States for the District of Kentucky.

On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee-simple, to James Southard, *deceased, whose brother and devisee, Daniel R. Southard, is the principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the city of Louisville. [*146

At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows:

"Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell's farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of $4,929.81\frac{1}{2}$ cents, which has been paid and fully discharged by the said Southard, as follows, viz., first two thousand dollars, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson Circuit Court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of $\$1,558.87\frac{1}{2}$; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of $1,270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, &c., and James C. Johnston, &c., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can.

"The said James Southard agrees to resell and convey to the said Russell the said farm and two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] $81\frac{1}{2}$ cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, &c., that if

the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void; and the wife of said Russell shall relinquish her dower within a reasonable time as per agreement of this date. This agreement of resale by the said James Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of $4,929.81\frac{1}{2}$, and interest thereon from this date as aforesaid. And this agreement is to be valid
*147] and obligatory only upon the said James Southard, *upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

"In witness whereof the parties aforesaid, have hereunto set their hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

GILBERT C. RUSSELL, [SEAL.]
JAMES SOUTHARD, [SEAL.]

"Witness present, signed in duplicate—
J. C. JOHNSON."

The first question is whether this transaction was a mortgage, or a sale.

It is insisted, on behalf of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to, their contents. But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be. In *Conway* v. *Alexander*, 7 Cranch, 238, C. J. Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances, which are to determine whether it was a sale or a mortgage;" and in *Morris* v. *Nixon*, 1 How., 126, it is stated: "The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

These views are supported by many authorities. *Maxwell* v. *Montacute*, Pr. in Ch., 526; *Dixon* v. *Parker*, 2 Ves. Sr.,

225; *Prince* v. *Bearden*, 1 A. K. Marsh. (Ky.), 170; *Oldham* v. *Halley*, 2 J. J. Marsh. (Ky.), 114; *Whittick* v. *Kane*, 1 Paige (N. Y.), 202; *Taylor* v. *Luther*, 2 Sumn., 232; *Flagg* v. *Mann*, Id., 538; *Overton* v. *Bigelow*, 3 Yerg. (Tenn.), 513; *Brainerd* v. *Brainerd*, 15 Conn., 575; *Wright* v. *Bates*, 13 Vt., 341; *McIntyre* v. *Humphries*, 1 Hoffm. (N. Y.), 331; 4 Kent, 143, note A., and 2 Greenl. Cruise, 86, *n.*

It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles. *Robinson* v. **Campbell*, 3 Wheat., 212; *United States* v. *Howland*, 4 Id., 108; *Boyle* v. *Zacharie et al.*, 6 Pet., 658; *Swift* v. *Tyson*, 16 Id., 1; *Foxcroft* v. *Mallett*, 4 How., 379. But we do not perceive that the rule held in Kentucky, differs from that above laid down. That rule, as stated in *Thomas* v. *McCormack*, 9 Dana (Ky.), 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration. [*148

But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration—and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and we know of no court which has stated this doctrine with more distinctness, than the Court of Appeals of the state of Kentucky. In *Edrington* v. *Harper*, 3 J. J. Marsh. (Ky.), 355, that court declared:—"The fact that the real transaction between the parties was a borrowing and lending, will, whenever, or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised." We proceed then to examine this case by the light of all the evidence, oral and written, contained in the record.

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil

a transaction differing in reality from the appearance it assumed?

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. *Conway* v. *Alexander*, 7 Cranch, 241; *Morris* v. *Nixon*, 1 How., 126; *Vernon* v. *Bethell*, 2 Eden, 110; *Oldham* v. *Halley*, 2 J. J. Marsh. (Ky.), 114; *Edrington* v. *Harper*, 3 Id., 354.

Upon this important fact the evidence leaves the court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal *149] highways *leading to that city. A dwelling-house, estimated to have cost from $10,000 to $12,000, was on the land.

In May, 1826, about 16 months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of $12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Russell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was $2,000 in cash, and the assignment of two claims then in suit, amounting, with the interest computed thereon, to $2,829.81, not finally reduced to money by Russell, till October, 1830, upwards of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our

investigations, the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about $2,000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies,—"Russell *was anxious to sell; indeed he was importunate that I should purchase." And a letter is [*150 produced by the defendant, D. R. Southard, written to James Southward, by Wing, containing a proposal for a sale. The letter is as follows:—

"*Sunday, Noon.*

"Sir: Having had some conversation in relation to Col. Russell's plantation, I will take the liberty of submitting for your consideration, 1st, how much will you give for the place, crops, stock, utensils, and implements, or how much without the same, to be paid as follows: in one sixth cash in hand, the balance in one, two, three, four, and five equal annual instalments, which may be extinguished at any time with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation.

"Respectfully, yours, J. W. Wing.

Mr. Southard.

"N. B. Please leave an answer for me at Allan's, say this evening. Yours, &c., J. W. W."

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell's necessity to have $2,000 in cash, the offer to take one sixth cash, and the balance in one, two, three, four, and five annual instalments,

indicates that Russell then expected about $12,000 for the property, and had that sum in view as the price, when these terms were proposed. This offer to sell differs so widely from the terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell, about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, $13,000 or $14,000, and that he should consider it a sacrifice at $10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between $4,000 and $5,000 on the place, but that, in case he owned the place, it would cost him $10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing *151] *directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that "James Southard and Gilbert C. Russell, I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subseqent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one,

after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendant's counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defense a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway* v. *Alexander*, 7 Cranch, 218; **Flagg* v. *Mann*, 2 Sumn., 533; *Secrest* v. *Turner*, 2 J. J. Marsh. (Ky.), [*152 471; *Edrington* v. *Harper*, 3 Id., 354; *Crane* v. *Bonnell*, 1 Green (N. J.) Ch., 264; *Robertson* v. *Campbell*, 2 Call. (Va.), 421; *Poindexter* v. *McCannon*, 1 Dev. (N. C.) Eq., 373.

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon* v. *Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. *Floyer* v. *Lavington*, 1 P. Wms,, 268; *Lawley* v. *Hooper*, 3 Atk., 278; *Scott* v. *Fields*, 7 Watts. (Pa.), 360; *Flagg* v. *Mann*, 2 Sumn., 533; *Ancaster* v. *Mayer*, 1 Bro. C. C., 464. And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the

parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown* v. *Dewey*, 1 Sandf. (N. Y.), Ch. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. *Ancaster* v. *Mayer*, 1 Bro. C. C., 464; 2 Greenl. Cruise, 82 *n*, 3. But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled that an action of assumpsit will lie. *Tilson* v. *Warwick Gas-Light Co.*, 4 Barn. & C., 968; *Yates* v. *Aston*, 4 Ad. & El. N. S., 182; *Burnett* v. *Lynch*, 5 Barn. & C., 589; *Elder* v. *Rouse*, 15 Wend. (N. Y.), 218.

*153] *Some reliance was placed on the facts, that in August, 1830, the plaintiff wrote a letter to his wife requesting her to release her dower, and that, in October, 1830, Russell surrendered the written memorandum, under circumstances which will be presently stated. It is urged that these acts show he understood the original transaction was not a mortgage. But the utmost effect justly attributable to these acts is, that Russell thought he then had no further claim to the property, and this belief may as well have arisen from the terms of the memorandum, as from his knowledge that a sale was intended. In our judgment, however, these acts, taken in connection with other facts proved, do not tend to support the defendants' case. Russell had, by his written contract to procure the release of his wife's dower, subjected himself to pay liquidated damages to the extent of three thousand dollars; and he might desire to escape from this liability by having his wife release her right, even if he then believed he had a right to redeem and expected to redeem; for in that event, such release could do neither him nor his wife any harm. But, on the other hand, if he then thought he had no such right, it would be a balancing of disadvantages to have such a release made, and the question would be, whether the

right of dower was more important than the liability to damages. And, as to the surrender of the written memorandum in October following, it appears, from the testimony of Colonel Woolley, that Russell, even after this surrender, thought he had a just right of redemption, though he undoubtedly believed that it was greatly embarrassed, if not lost, by his failure to pay on the stipulated day and by his relinquishment of the written memorandum.

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.

Being of opinion that this was in its origin a mortgage, the next inquiry is, whether the right of redemption has been extinguished. In October, 1830, Russell was temporarily in Louisville, and while there, called on Southard, and informed him there was a mistake of one hundred dollars in the computation of the amount due on the claims assigned to him. Southard insisted it was the mistake of W. Pope, who, he said, was Russell's agent, and that he, Southard, was not liable to make it good. He also set up a claim that he had a right to redeem, or, as D. R. Southard says, repurchase the farm. This, also, Southard denied. It does not appear, from any proofs, what further negotiations, if any, took place between the parties; but *the result was, that, on the payment [*154
by Southard of one hundred dollars, Russell wrote and signed the following receipt on the back of the written memorandum, which he surrendered to Southard:

"Received, 6th Oct., 1830, of James Southard, by the hand of Daniel Southard, one hundred dollars, which makes the two debts of Brown and Johnston, with the $2000, amount to the sum of $4929.81½; and nothing but the act of God shall prevent the relinquishment of dower of Mrs. Russell being deposited in the Clerk's office by the 1st of January next. This is in full of all demands upon J. Southard.

(Signed) GILBERT C. RUSSELL." [Seal.]

A mortgagee in possession may take a release of the equity of redemption. *Hicks* v. *Cook*, 4 Dow, P. C., 6; *Hicks* v. *Hicks et al.*, 2 Gill & J. (Md.), 85. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the

whole conduct of the business, has shown himself ready and skilful to take advantage of the necessities of the borrower. Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale in *Webb* v. *Rorke*, 2 Sch. & L., 673, that "courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given." And Chancellor Kent, in *Holdridge* v. *Gillespie*, 2 Johns. (N. Y.), Ch., 34, says, "the fairness and the value must distinctly appear." *Wrixon* v. *Colter*, 1 Ridg., 295; *St. John* v. *Turner*, 2 Vern., 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially, if the latter be in needy circumstances, the purchase by the former of the equity of redemption, is to be carefully scrutinized, when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property, all
*155] that any one would have been willing to give. *We do not deem it for the benefit of mortgagors that such a rule should exist.

In this case it is unnecessary to rely on such a rule. For by his own showing, in his answer, it is clear that Daniel R. Southard, as the agent of his brother, either paid no consideration whatever for the extinguishment of the equity, or at the utmost only one hundred dollars. We think nothing was paid for it; and that the surrender of this right, claimed by Russell and denied by Southard, was insisted on as a condition for the correction of an actual mistake, which Southard was justly obliged to correct, without any condition: and we do not hesitate to declare, that a release of this equity, obtained by the mortgagee in possession, under a denial by him of the existence of the right to redeem, for no consideration at all, or as a condition for the correction of a mistake which in equity he was bound to correct, the written defeasance having been purposely so prepared as apparently to cut off the right of

redemption prior to the time when the equity was released, cannot stand in a court of equity.

Indeed, if it were not for Russell's subsequent acquiescence, of which we shall speak hereafter, the question would not admit of a moment's doubt. Though this acquiescence is not without effect upon the complainant's rights, as will presently be seen, yet we do not think, that under the special circumstances, it ought to operate as a bar, to prevent redemption. The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made, and which, so far as appears, continued to exist down to the filing of the bill, coupled with the conviction, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar.

The inquiry then arises, on what terms is the redemption to be decreed.

An account of the rents and profits is ordinarily an incident to a decree for redemption against a mortgagee in possession. But it is not an inseparable incident. This right to an account may be extinguished by a release, or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim, as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account. A mortgagee in possession is deemed by a court of equity a trustee; but there is no other than a constructive trust, raised by implication, for the purpose of a remedy, to prevent injustice; *Kane* v. *Bloodgood*, 7 Johns. (N. Y.), Ch., 111; and it would be contrary to the fundamental principles of equity, to imply a trust, the execution of *which might work [*156
injustice. And accordingly it will be found, that in such cases, courts of equity have refused to order accounts against *quasi* trustees.

Thus, in *Downer* v. *Fortescue*, 3 Atk., 130, Lord Hardwicke, speaking of the case of an heir in possession under a legal title, which he is obliged by a decree to surrender to one having an equitable title, says, the court will order an account from the time the title accrued, unless upon special circumstances; as "when there hath been any default, or laches, in the plaintiff, in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill." So in *Pettiward* v. *Prescott*, 7 Ves., 541, a case of constructive trust, Sir William Grant restrained the account of the rents and profits to the time of filing the bill, on account of the lapse of nearly twenty years; and similar

cases may be found referred to in *Drummond* v. *The Duke of St. Albans*, 5 Ves., 433, and note 3 to page 339; and in *Roosevelt* v. *Post*, 1 Edw. (N. Y.), 579. Indeed in *Acherly* v. *Roe*, 5 Ves., 565, where there was a trust created of a term, for the purpose of raising a sum of money, and the *cestui que trust* had been long in possession without objection, Lord Chancellor Loughborough refused even to carry the account back to the filing of the bill, upon the special circumstances of that case. This court, in *Green* v. *Biddle*, 8 Wheat., 78, gave its sanction to the rule as laid down by Lord Hardwicke, and declared it to be fully supported by the authorities.

This bill was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard, the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights, must not be allowed to subject the defendants to the risk of injustice. The defendants, and James Southard, have treated the property as their own, and have improved its condition. There is no suggestion of waste in the bill. The value of the land has greatly appreciated, from the growth of the neighboring city; and though we think James Southard designed to take an unconscientious advantage of Russell, and that the defendant, D. R. Southard, obtained the surrender of the defeasance, under such circumstances as rendered it constructively fraudulent, yet neither of them appears to have concealed any facts from Russell, or to have done anything to prevent him from exhibiting his real case to counsel. To such a case, the language of the Vice-Chancellor, in *Bowes* v. *East London* *157] * *W. W. Co.*, 3 Madd., 384, exactly applies. "The plaintiff ought to have looked into his rights; and as by his negligence to obtain information concerning them and to assert them, the lessees may have been led to expenditure on the premises, the benefits of which they will lose, I shall not direct an account beyond the filing of the bill." To this extent his acquiescence must be taken to have concluded his right, and we shall direct that the account of the interest due upon the money loaned, and of the rents and profits of the farm, commence at the date of the filing of the bill.

We can perceive no ground for charging Southard with the money received from the insurance company, on account of the destruction of the house. He was in possession, claiming

to be the absolute owner of the farm and its appurtenances. He obtained the policy to cover his interest, and paid the premium. If there were any equities against him arising out of the receipt of this money, they would be in favor of the underwriters, and not of the mortgagor. *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet., 501.

It remains only to advert to the cases of the defendants, who claim as purchasers under D. R. Southard. The questions arising therein were not argued by counsel, and upon looking into that part of the record, we find some of them not capable of being fully settled upon the facts therein disclosed.

It was probably understood by counsel, that these questions would remain for consideration, in the court below, if the case should be remanded.

Samuel D. Tompkins claims to have been a purchaser for valuable consideration of thirty acres of this land, and to have received a deed of conveyance thereof, and paid a part of the consideration-money without notice of Russell's title, and before the institution of this suit. He also claims to have made permanent and valuable improvements on the land purchased by him, but whether before or since the institution of this suit does not appear. William H. Pope, as the executor and trustee of his father, William Pope, claims that his father, in his lifetime, purchased at a sale on four executions against Southard another part of these lands, and that Southard omitted to redeem the land by paying what was due on three of the executions, and a suit is shown by the record to be pending in the Court of Appeals of Kentucky, wherein Russel's right to redeem is in contestation.

Matilda Burks, the widow of James Burks, deceased, and John Burks, one of the sons of James, and William L. Thompson, as guardian of other children of James, and James Guthrie, assignee of J. R. Trunstall, the husband of a daughter of James, *claim a lien on these lands by virtue of a mortgage thereof executed by Daniel R. Southard, and [*158
Southard insists that Guthrie has been paid; it is not ascertained whether the debts intended to be secured on these lands, are or are not, fully secured upon other lands of Daniel R. Southard, which are embraced in the same mortgage. In this posture of the cause, it is not practicable for the court to pass finally upon the rights of these parties; and the cause will therefore be remanded, without deciding upon the existence or extent of the right of either of them as a purchaser.

A decree is to be entered, reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that

Russell is entitled to redeem the same, and remanding the cause to the Circuit Court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.

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 Kentucky, and was argued by counsel. On consideration whereof, it is the opinion of this court that the conveyance by Gilbert C. Russell, the complainant, to James Southard, and dated the 24th day of September, 1827, as set out in the transcript of the record, was a mortgage, and that said Russell is entitled to redeem the same. Wherefore, 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, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein, in conformity to the opinion of this court and as to law and justice may appertain.

After the opinion of the court was pronounced, a motion was made on behalf of the appellees for a rehearing, and to remand the cause to the Circuit Court for further preparation and proof, upon the ground that new and material evidence had been discovered since the case was heard and decided in that court.

Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered.

The opinion of the court upon this motion was delivered by Mr. Chief Justice TANEY.

The decree of the Circuit Court, in this case, was reversed during the present term, and a decree entered in favor of the appellant. *A motion is now made in behalf of Daniel R. Southard, one of the appellees, to set aside the decree in this court, and to remand the case to the Circuit Court for further preparation and proof, upon the ground that new and material evidence has been discovered since the case was heard and decided in that court. In support of this motion affidavits have been filed stating the evidence newly discovered, and that it was unknown to him when the case was heard in the court below.

*159]

It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We

cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. *Eden* v. *Earl Bute*, 1 Bro. P. C., 465; 3 Id., 546; *Studwell* v. *Palmer*, 5 Paige (N. Y.), 166.

Indeed, if the established chancery practice had been otherwise, the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes.

The motion is therefore overruled.

MOSES B. IVES PLAINTIFF IN ERROR, *v.* THE MERCHANTS BANK OF BOSTON.

The surety for the appellants from a decree in admiralty gave bond to pay all costs and damages which might be adjudged by this court.

This court having affirmed the decree of the Circuit Court with costs and six per cent. damages, judgment was entered upon the receipt of the mandate by the Circuit Court, for the amount of the original judgment together with the amount of costs and damages calculated up to that day; and execution was awarded.

Under this execution, the vessel, which had been attached under the libel, was sold for less than this aggregate amount.

The surety is not entitled to have a relative proportion of the proceeds of sale applied to the reduction of his bond, but is responsible upon it to the entire amount.

By the 26th section of the Judiciary Act, the courts have power to assess damages upon bonds, &c., and to render judgment for so much as is due according to equity, in cases of default or confession or demurrer. This section does not apply to a case heard on agreed facts.

But then when the case heard on agreed facts was the case of an appeal-bond, it was proper for the court to give judgment for the penalty of the bond (being less than the judgment under the mandate) and allow interest from the date of the institution of the suit, although the amount to be paid in this way would exceed the penalty of the bond.[1]

*THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Rhode Island. [*160

[1] In an action on a bond the judgment can in no case exceed the amount of the penalty, with interest added from the time of the breach. *United States* v. *Arnold*, 1 Gall., 348. See also *United States* v. *Ricketts*, 2 Cranch C. C., 553; *Bank of Mount Pleasant* v. *Sprigg*, 1 McLean, 178; *Lawrence* v. *United States*, 2 Id., 581; *Goldhawk* v. *Duane*, 2 Wash. C. C., 323; *The Wanata*, 5 Otto, 617, 618; *Wallace* v. *Wilder*, 13 Fed. Rep., 716.

It was a consequence of the case of the *New Jersey Steam Navigation Company* v. *The Merchants Bank of Boston*, decided by this court at December term, 1847, and reported in 6 How., 344.

The Merchants Bank of Boston were the plaintiffs in the Circuit Court, and the cause of action is thus stated in the brief of the counsel for the plaintiff in error in this court. There was a special declaration in the Circuit Court, to which the defendant demurred:—

The facts set forth in the declaration and admitted by the demurrer, upon which the questions here presented arise, are shortly these.

The suit in admiralty—*New Jersey Steam Navigation Company, Appellant and Libellee* v. *The Merchants Bank of Boston, Libellant and Appellee*, lately decided by the Supreme Court of the United States, and commonly called the Lexington case, was commenced in the District Court of the District of Rhode Island, by attachment of the steamer Massachusetts, then belonging to the Navigation Company. The suit coming by appeal to the Circuit Court of the United States for the District of Rhode Island, a decree therein was rendered against the Navigation Company at the November Term, 1843; whereupon an appeal was taken by the company to the Supreme Court of the United States, and Moses B. Ives, the plaintiff in error, entered into appeal-bond, as surety for the company, of which he was a member, in the penal sum of $2500, with the following condition:

"Now, therefore, if the said New Jersey Steam Navigation Company shall prosecute their said appeal before the said Supreme Court of the United States with effect, and shall well and truly pay all such costs and damages as shall be adjudged for them to pay by said Supreme Court, or by said Circuit Court by reason of said appeal, then the before-written obligation to be void and of no effect, otherwise it shall remain in full force and effect."

The suit terminated in the Supreme Court in a decree in favor of the libellant and appellee, and execution finally issued against the Navigation Company for the sum of $28,302.26 debt, and costs taxed at $680.50, which, together with the sum of 75 cents for the execution, made the whole amount of the execution $28,983.51, the debt drawing interest from the 19th day of June, 1848.

Of the debt, so called, embraced in the above execution, the sum of $6,228.78, consisted of the costs and damages of the
*161] *appeal decreed by the Supreme Court, that is to say, $6078.26 of it was interest on the amount decreed,

accruing during the pendency of the appeal, given by way of damages of the appeal, and the balance $150,52 were the costs of the appeal. This sum, $6228.78, drawing interest from the 19th day of June, 1848, is the sum for which Mr. Ives would have been liable, to the extent of the penalty of the appeal-bond, had the execution remained wholly unsatisfied. But the above execution was levied by the marshal upon the steamer Massachusetts, attached as aforesaid on the original process in the suit, and on the 26th day of July, 1848, the Massachusetts was sold by the marshal under the levy for the sum of $25,000, and, deducting therefrom the sum of $883.38, the marshal's fees and expenses, the sum of $24,116.62 was paid over by the marshal to the Merchants Bank, and the execution thereupon returned satisfied for that amount, and unsatisfied for the balance, that is to say, between four and five thousand dollars of the execution remained unpaid.

The present action is an action by the Merchants Bank against Mr. Ives, the surety on the above appeal-bond to recover the costs and damages of appeal; and the plaintiff and defendant in error claimed, below, that he was entitled to apply the 24,116.62, net proceeds of the Massachusetts, first to that portion of his execution not protected by the appeal-bond, and was compelled to apply the balance only to that portion of the execution protected by the appeal-bond, treating the sum made upon the execution in the same manner as if it had been a voluntary payment without direction by the payor, in which case the right of appropriation remains with the payee. To this result the learned judge who tried the case below, for various reasons came, and rendered judgment againt Mr. Ives for the penalty of the bond, with interest from the day of demand by action brought.

The cause was argued in this court by *Mr. Ames*, for the plaintiff in error, and by *Mr. Pitman*, upon a brief of *Tillinghast & Bradlee*, for the defendant in error.

The plaintiff in error contended.

1. That, under the facts set forth in the declaration, judgment should not have been rendered against him for a greater sum, at the most, than what would remain due of the costs and damages of the appeal, after deducting therefrom the amount thereof received from the net proceeds of the Massachusetts, applied *pro rata* to every portion of the execution, as well to the costs and damages of appeal for which the plaintiff in error was liable as surety for the Navigation Com-

pany, as to that portion of it for which he was not liable. In other words, we say that the net *amount made by the levy of the execution paid upwards of eighty per cent. of the amount of the same. Equally apportioned to the costs and damages of appeal, which it should have been, it paid upwards of eighty per cent. of them, that is to say, about $5000 of them; leaving about $1200 of them due with interest from the day of demand by action brought, for which, at the most, judgment below should have been rendered against us, instead of for the whole penalty of the bond with interest.

*162]

2. That so far from the law permitting the defendant in error to apply the amount made on the execution exclusively to the portion of the debt not secured by the appeal-bond, it will itself apply it, in the first instance, to the payment of the costs and damages of appeal in exoneration of the surety on the bond.

3. That, at all events, judgment should not have been rendered for a sum exceeding the penalty of the bond, which is the utmost extent of our liability; the judgment, so far as interest on the penalty is concerned, being erroneous.

The points raised by the counsel for the defendant in error were the following:

1. That the plaintiff in error upon the bond in this suit is a substitute for the New Jersey Steam Navigation Company, and that his liabilities are the same as those of the company would have been, had the bond been executed by them.

2. That the plaintiff in error is, at all events, nothing more than a surety for the accommodation of the company.

3. That, in either light, he cannot claim a discharge from his liability, until the debt to the Merchants Bank is paid; and this, 1st, upon the principle illustrated in the cases 1 Gill & J. (Md.), 346, and 15 Conn., 437. See also *Kyner* v. *Kyner*, 6 Watts (Pa.), 222. That a creditor holding a security for both portions of his debt, and a surety also for one portion, may, and the court will, so apply the securities, as to pay the whole debt. The surety is not entitled to any transfer or appropriation of securities for his benefit, until the whole debt is paid. 2d, Upon the rule of the civil law to be followed in its analogies in our courts of equity, which makes a positive appropriation of any payment first to the debt upon a judicial demand, and not first to the interest or damages allowed for the detention of such a debt. 3d, Because such appropriation is the only mode by which the purpose of the court in requiring an appeal-bond, can be accomplished, and justice done between the parties.

4. We submit that interest on the penalty of a bond from the date of the writ is allowed against the obligor and sureties on a bond in the courts of the United States, as shown by the decisions in 1 Paine and 1 Gallison, both confirmed in the Supreme Court, and such also is the prevailing doctrine in other courts.

*Mr. Justice CATRON delivered the opinion of the [*163 court.

At November term, 1843, in the Circuit Court of Rhode Island, the Merchants Bank of Boston recovered against the New Jersey Steam Navigation Company, by decree in an admiralty suit, the sum of $22,224 and costs of suit. From which decree the respondents appealed to this court; and on December 14, 1843, Moses B. Ives, the present plaintiff in error, became bound as surety for the appellants in a penal bond of $2500, with a condition, "that the said Navigation Company should prosecute their appeal with effect, and should well and truly pay all such costs and damages as should be adjudged for them to pay by said Supreme Court, or by said Circuit Court, by reason of said appeal, in case of failure. At December term, 1847, the appeal was heard before the Supreme Court, and the decree affirmed, with costs and six per cent. damages. On return of the mandate, a judgment was entered in the Circuit Court against the Navigation Company, for the original amount; and also for $6,078.20 damages, arising by reason of the appeal, and for $529.98, being costs covered by the appeal bond. The entire sum for principal, damages, and costs, being $28,452.78. Execution issued for the aggregate sum, and the steamboat Massachusetts was sold, 20th July, 1848, for $25,000, by virtue of the writ. The vessel had been attached when the proceeding was commenced, and continued subject to a lien until sold; but, not bringing a sum equal to the final decree, Ives was sued on his appeal-bond, and the Circuit Court gave judgment against him for the amount of the penalty, and also for six per cent. interest on the $2500, from October 10th, 1848, being the time when he was served with the writ; the penalty and interest amounting to $2,605.80, for which judgment was rendered at the June term, 1849. To bring up this judgment, Ives sued out the present writ of error.

First, it is insisted, and assigned for error, that the $25,000, made by a sale of the vessel, covered about eighty per cent. of the amount included in the execution, and ought to have been proportioned to every part of the demand, and if thus applied to damages and costs, would have reduced them to

about $1200, and that plaintiff in error was responsible for no more.

Ives was bound to pay such damages as might be awarded by the Supreme Court, and costs; and could have been sued and a judgment had against him, had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part, because of a payment made by his principals, leaving an amount due equal to the bond.

This is the plain equity of the case. If the appeal had not *164] *been taken, and the property attached had been sold in due time after the first decree for $25,000, no damages would have been sustained by the plaintiffs below, and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned, and which enlarged the amount. The second ground relied on to reverse is, that by uniform practice costs are deducted from the first proceeds collected on an execution including them; and that a surety for costs is never held liable when an amount sufficient to cover costs is made of the principal.

It is not necessary at present to decide this matter of practice, nor shall we do so, as the unsatisfied damages, exclusive of costs, far exceeded the judgment rendered by the Circuit Court.

The third and remaining question is one of general importance and some difficulty. The surety was bound in a penal bond, and this penalty the Circuit Court exceeded, by allowing interest on it from the time of demand by suit; and it is insisted that in this there was error. The action was debt, with an allegation of damages sustained by its detention. The parties came to a hearing on an agreed case which set forth the facts, and submitted the law arising on them to the court; and, as the 26th section of the Judiciary Act of 1789 only gives the courts power to assess damages and to render judgment for so much as is due according to equity, in cases of default or confession, or on demurrer, it does not apply in cases heard on agreed facts, or tried upon pleadings and proofs. This court so held in *Farrar & Brown* v. *The United States*, 5 Pet., 385, and which construction we follow. In the same cause it was adjudged that, in an action of debt against the sureties of a surveyor who had received moneys of the United States to disburse, and given bond with sureties to account for them, the practice was to render judgment in debt for the penalty, to be discharged by the amount actually due, and that this amount could not exceed the penalty.

In cases where unascertained damages are claimed, about which there is a contest, the foregoing is the proper rule; although it was departed from in the case of *McGill* v. *The Bank of the United States*, 12 Wheat., 514, where payments had been made by the sureties after a defalcation, and an account was taken between the parties, and interest calculated on both sides and a balance struck, which, when added to previous payments, exceeded the penalty of the bond. But these cases widely differ from the present. Here the surety was bound to pay damages that might be adjudged against his principal in the Supreme Court. They were established and settled at $6,078.26; and this judgment bore six per cent. interest from *its date. It was conclusive as against [*165
the principal; and equally conclusive of the fact, that the surety was bound to pay it to the extent of $2500. Then this amount was due by the bond, which could have been at once enforced by suit; and if the Supreme Court had been vested with power to render judgment against the surety on the appeal-bond, as is the case in some of the states, no reason would seem to exist, why the bond should not bear interest from the date of judgment in the Supreme Court against the surety as well as against the principal. But as Ives only guaranteed the payment of damages, and it was a duty imposed on the principal to pay the entire judgment, the moderate rule has been applied of requiring interest from the time that demand of payment was made by suit; a rule now so generally established in similar cases, by state courts of high authority, that this court could not violate it without manifest impropriety.

Of course we are dealing with an appeal-bond, and do not intend to go beyond the case before us. It is, therefore, ordered, that the judgment rendered by the Circuit Court 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 Rhode Island, 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.

THE GRAND GULF RAILROAD AND BANKING COMPANY, AND ALFRED INGRAHAM AND GEORGE READ, ASSIGNEES OF SAID COMPANY, INTERVENORS, PLAINTIFFS IN ERROR, *v.* JOHN R. MARSHALL.

In order to bring a case within the reviewing power of this court, as prescribed by the 25th Section of the Judiciary Act, it is necessary that the record should show that the point giving jurisdiction to this court, was raised and decided in the state court.[1]

The preceding decisions upon this subject referred to.

Hence, where it appears from the record that the decision of the state court turned upon the construction and not the validity of a state law, and that the question of its validity was not raised, this court has no jurisdiction.[2]

THIS case was brought up from the Supreme Court of the
*166] *state of Louisiana, by a writ of error issued under the 25th section of the Judiciary Act.

The facts are set forth in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Strawbridge*, for the plaintiffs in error.

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

This is a writ of error to the Supreme Court of the state of Louisiana.

The Grand Gulf Railroad and Banking Company was chartered by the state of Mississippi in the year 1833. In 1840 an act was passed by the legislature of that state declaring that it should not be lawful for any bank in Mississippi to transfer by indorsement or otherwise any note, bill receivable, or other debt. And in 1842, after the passage of this act, the bank having become insolvent and its notes greatly depreciated, assigned and transferred all of its notes, bills receivable, and other assets of any value to John Lindsey and Alfred Ingraham, in trust for the payment of its debts, in the order specified in the deed.

Some of the debtors of the bank, whose notes and mortgages were included in this transfer, resided in the state of Louisiana. And in 1843 John R. Marshall, the defendant in error, being the holder of the notes of the bank payable to bearer to the amount of $5,400, obtained an attachment from one of the district courts of Louisiana against the property

[1] See *Richardson* v. *City of Boston*, 19 How., 263, and notes to *Matheson* v. *Branch Bank of Mobile*, 7 How., 269; *Smith* v. *Hunter*, Id., 738.

[2] See *Murdock* v. *City of Memphis*, 20 Wall., 633; *Moore* v. *Mississippi*, 21 Id., 639, and note to *Williams* v. *Oliver*, *ante*, *111.

and credits of the bank, and laid it in the hands of these debtors as garnishees. The bank appeared and answered, and averred that the debts and property in question had been transferred to the trustees above named previous to the attachment; and the trustees intervened and claimed the debts and property as belonging to them by virtue of the assignment of the bank.

The defendant in error replied that the assignment was null and void by the laws of Mississippi and the laws of Louisiana, and that it was without consideration and in fraud of the creditors.

Testimony was taken on both sides to show the object of the assignment, and the circumstances under which it was made; and several questions of law were raised in the District Court upon the admissibility of testimony and upon the manner in which the deed to the trustees had been executed. But it is unnecessary to state either the testimony or the questions raised at the trial, because neither the proofs nor the points made can have any bearing upon the question upon which the case must be decided in this court.

*The District Court gave judgment in favor of the defendant in error, from which the bank and trustees [*167 appealed to the Supreme Court of the state where the judgment of the District Court was affirmed. And this writ of error is brought under the 25th section of the act of 1789, to revise that judgment.

The plaintiffs in error claim jurisdiction for this court upon the ground that the assignment by the bank to the trustees was adjudged to be void by the state court under the act of the state of Mississippi of 1840, hereinbefore mentioned; and that this act is a violation of the charter granted to the bank and impairs the obligation of the contract which the charter created between the state and the corporation.

If the record brought that question before us, undoubtedly we should have jurisdiction, and the judgment of the state court could not be maintained. For it is the same question which this court decided in the case of *The Planters Bank of Mississippi* v. *Sharp*, 6 How., 301, and in *Baldwin and others* v. *Payne and others*, Id., 332.

But in order to give this court jurisdiction the record must show, that the point was brought to the attention of the state court and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question and the judgment founded upon its validity. This is evidently the meaning of the 25th section of the act of 1789,

which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States. But if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for any thing that appears in the record the judgment of the state court might have been in his favor if its attention had been drawn to the question. The rule upon this subject is distinctly stated in the case of *Armstrong and others* v. *The Treasurer of Athens County*, 16 Pet., 285, where the court said, that when the proceeding is under the law of Louisiana it must be shown that the point arose and was decided, either by the statement of facts, and the decision as usually set out in such cases by the court, or it must be entered on the record of the proceedings in the appellate court, (in cases where the record shows that such a point may have arisen and been decided,) that it was in fact raised and decided. In suits at common law the question is usually presented by the pleadings or by an exception to the opinion of the court.

In the case before us the proceedings were under the
*168] Louisiana *laws. And the opinion of the court, according to the practice in that state, is entered on the record, and sets forth the principles of law upon which the decision was made. And it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees.

Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided.

This writ of error must therefore be dismissed for want of jurisdiction.

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 this cause be, and the same is hereby, dismissed for the want of jurisdiction.

MARY BEIN, AND RICHARD BEIN, HER HUSBAND, G. S. HAWKINS, AND JAMES M'MASTERS, PLAINTIFFS IN ERROR, *v.* MARY HEATH.

The proper condition of an injunction-bond is "to answer all damages which the defendant may sustain in consequence of the injunction being granted."

Where a bond was given in order to obtain an injunction to suspend proceedings, under an order of seizure and sale, and the condition was that the principal and sureties "would pay to the plaintiff, in the case of seizure and sale, all such damages as he may recover against us, in case it should be decided that the said injunction was wrongfully obtained," this bond was irregular.

It conformed to the Louisiana practice, by which, if an injunction be dissolved judgment is at once given for the debt, interest, and damages, against the principal and sureties in the injunction-bond.

But the equity practice in the courts of the United States is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress; and one of those rules is, that, when not otherwise directed, the practice in the High Court of Chancery, in England, shall be followed.[1]

According to these rules, a court of equity cannot, when it dissolves an injunction, give judgment, at the same time, against the obligors. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction.[2]

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 by the defendant in error upon an injunction-bond, and was a consequence of the case of *Bein et al.* v. *Heath*, reported in 6 How., 228.

*A brief recital of the circumstances may be neces- [*169
sary.

In May, 1838, Mary Heath lent some money to Mary Bein, the wife of Richard Bein, and took a mortgage upon the separate property of the wife to secure the payment of two notes, one for $10,711.71, and the other for $535.50.

In 1840 Richard Bein applied for the benefit of the insolvent law, notwithstanding which the interest upon the loan continued to be paid to Mary Heath, until 1842.

The interest then becoming in arrear, Mary Heath applied for, and obtained, a writ of seizure and sale of the mortgaged property in May, 1843.

Bein and wife then filed a bill in the Circuit Court of the

[1] S. P. *Van Hook* v. *Pendleton*, 2 Blatchf., 85; *Goodyear* v. *Providence Rubber Co.*, 2 Fish. Pat. Cas., 499; s. c. 2 Cliff., 351. *Motte* v. *Bennett*, Id., 642; *Jenkins* v. *Greenwald*, Id., 37; *Hubbard* v. *Turner*, 2 McLean, 519, *Pomeroy* v. *Manin*, 2 Paine, 476; *Smith v. Burnham*, 2 Sumn., 612.

[2] DISAPPROVED. *Russell* v. *Farley*, 15 Otto, 444. See also *Deakin* v. *Lee*, 11 Biss., 32, 36, 39, 42; *Lee* v. *Deakin*, 13 Fed. Rep., 515; *Browning* v. *Porter*, 12 Id., 460; s. c. 2 McCrary, 582; *Texas &c. Ry. Co.* v. *White*, 57 Tex., 134.

United States for the Eastern District of Louisiana, to set aside the mortgage, upon the ground that it was not executed conformably to law, and praying for an injunction to suspend proceedings, under the order of seizure and sale. On the 28th June, 1843, the court passed the order directing the injunction to issue as prayed, upon the complainants giving a bond with certain sureties named in the order, to answer all damages which the defendant in that suit might sustain in consequence of said injunction being granted, should the same be thereafter dissolved.

On the 21st of June, 1843, a bond was executed in the penalty of $3000, signed by Mary Bein, G. S. Hawkins, and James McMasters; but instead of the condition being in the manner prescribed by the court, it was as follows:—

"Now the condition of the above obligation is, that we, the above bound Mary Bein, Gilbert S. Hawkins, and James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant in said injunction and plaintiff in said case of seizure and sale, all such damages as she may recover against us, in case it should be decided that the said injunction was wrongfully obtained.

Signed, M. Bein,
G. S. Hawkins,
James McMasters."

Upon the trial of the cause in the Circuit Court, that court decided that the mortgage was well executed, and dissolved the injunction. Bein and wife appealed to this court. It came up for hearing at January term, 1848, and is reported in 6 How., 228. This court having affirmed the judgment of the Circuit Court, the order of seizure and sale became released from the injunction, and was executed by the marshal. The mortgaged property was sold for only $7000.

In December, 1848, Mary Heath brought a suit, by way of *petition, upon the injunction-bond, alleging that she *170] was greatly damaged by the wrongful issuance of said injunction; that she encountered long delays in obtaining any portion of the sum due to her; that she incurred many and heavy expenses in consequence of the said injunction, and was subjected to great vexation and trouble.

That she is entitled by law to damages, at the rate of ten per cent. per annum upon the amount enjoined; that she has paid various large sums to lawyers for their professional services in defending said injunction, and in getting the same dissolved, viz., to Messrs. Ellmore & King, attorneys at law,

seven hundred dollars; to John R. Grymes, attorney at law, five hundred dollars; to J. W. Smith, five hundred dollars; and to attorneys and counsellors in Washington to attend the argument of the case in the Supreme Court—to Walter Jones, attorney at law, two hundred and fifty dollars, and —— Bradley, Esq., attorney at law, two hundred and fifty dollars.

That the trouble and labor of the petitioner was an injury to her of at least one thousand dollars.

That the damages thus caused to the defendant, as above alleged, amount to about eight thousand six hundred dollars, which the said Mary Bein and the said Gilbert S. Hawkins are bound *in solido* to pay to the petitioner, by virtue of the foregoing allegations, and the bond signed by them to the extent of three thousand dollars. As the damages greatly exceed the amount of the bond, the petitioner is entitled to judgment against the defendant for the whole penal sum of the said bond, viz., for three thousand dollars, with interest from the date of judicial demand.

To this petition the general issue was pleaded, and in May, 1849, the cause came on for trial before the court, a jury being waived by agreement.

Two bills of exceptions were taken to rulings of the court in admitting certain evidence, as follows:

Circuit Court of the United States, Fifth Circuit.

Be it known, that on the trial of the above suit, the counsel for the plaintiff, to maintain the allegations of his petition, offered to prove by witnesses the amount of fees paid by the plaintiff to Ellmore & King, J. R. Grymes, and J. W. Smith, Esqrs., her attorneys in the court below, in the suit in chancery of Bein and wife against said Heath, and in the proceedings had in the seizure and sale obtained by said Heath against said Bein, which said seizure and sale were enjoined in said suit in chancery, to the introduction of which the defendants, by their counsel, objected, on the ground that the employment of said counsel by *said plaintiff occurred before the issuing of the injunction and executing and filing [*171 of the injunction-bond in the suit, and before the said defendants had incurred any obligation to pay any damages, interest, or costs in said suit.

And at the same time and place the said plaintiff, to maintain the allegations in her said petition, offered to prove by an attorney at law the supposed value of the legal services rendered by the counsel for the plaintiff, in the said chancery

suit in the Supreme Court of the United States; to the introduction of which said evidence the defendants by their counsel, objected, on the ground that no evidence could be offered of a *quantum meruit*, under the issue formed between the parties aforesaid, the plaintiff in her petition having pleaded the payment to said counsel of a specific sum of money as their fees. But the court being of the opinion that all of said evidence was admissible, received the same. Whereupon the counsel for the defendant excepted to both rulings of the court as contrary to law, and prays that the bill of exceptions may be signed and sealed, and made a part of the record, which is accordingly done.

THEO. H. MCCALEB, [SEAL.]
U. S. Judge.

Circuit Court of the United States, for the Fifth Circuit and District of Louisiana.

Be it known, that on the trial of this suit the plaintiff, by her counsel ——— ———, to maintain the allegations of her petition, offered to prove that a large portion of the rent of the mortgaged premises, for the sale of which she had issued against Mary Bein her executory process, has not been paid over to her by the tenant to whom the premises had been leased before the issuing of the injunction to stay said process; to the introduction of which evidence the defendants, by their counsel, objected as irrelevant to the issue joined, and because the court had appointed the marshal of the United States the receiver to collect said rent, and to hold the same subject to the final judgment of the court; and that the loss of said rent constituted no part of the damage sustained by the plaintiff by the issuing of the injunction, for which the defendants are legally liable on the injunction bond sued on; but the court being of the opinion that said evidence was admissible, received the same. To the admission of which said evidence the defendants, by their counsel, except and pray that this their bill of exceptions may be signed, sealed, and made a part of the record, which is done.

THEO. H. MCCALEB, [SEAL.]
U. S. Judge.

*172] *On the 14th of May, 1849, the court pronounced its judgment, and after sundry proceedings which it is not necessary to state, on the 15th of June, 1849, the judgment was signed as follows:

Judgment.

MARY HEATH
v. } No. 1751.
MARY and RICHARD BEIN et. al.

The parties herein having waived the jury and submitted this case to the court, after argument on the evidence, and the court being satisfied from the evidence that the plaintiff has suffered damages from the injunction obtained by Mary Bein and her husband, to a greater extent than the amount of the penalty in the bond sued on, and that the plaintiff is entitled to recover in this suit to the extent of the penalty of the bond against the defendants *in solido:*

It is hereby ordered, adjudged, and decreed, that the plaintiff have judgment against Mary Bein and Gilbert S. Hawkins, and James McMasters, *in solido*, for the sum of three thousand dollars, with interest from the second day of December, A. D. 1848 until paid, and costs of suit.

Judgment rendered 14th May, 1849.

Signed 15th June, 1849.

THEO. H. McCALEB, [SEAL.]
U. S. Judge.

On the 19th of June the court passed the following order:

On motion of — Eggleston, Esq., of counsel for defendants, and on his representing to the court that the said defendants felt aggrieved at the judgment herein rendered on the 15th instant, and that they desire to have a writ of error, that the proceedings may be reviewed in a higher court, it is ordered, that a writ of error be, and the same is, hereby allowed to the said defendants, returnable to the next term of the Supreme Court of the United States, on their furnishing bond with S. W. Oakey, as surety, in the penal sum of four thousand six hundred dollars, conditioned as the law requires.

Upon this writ of error the case came up to this court.

It was argued by *Mr. Coxe*, for the plaintiffs in error, and *Mr. Bradley*, for the defendant.

Mr. Coxe, for the plaintiffs in error, made the following points:

1. Under the law of Louisiana, no action of debt will lie upon *an injunction bond for the purpose of fixing the damages. The act of 25th March, § 3, p. 102, declares [*173

that on the trial of injunction, the surety on the bond shall be considered as a party plaintiff in the suit; and, in case the injunction is dissolved, the court, in the same judgment, shall condemn the plaintiff and surety, jointly and severally, to pay the defendant interest at the rate of ten per centum, &c. *McMillen* v. *Gibson*, 10 La., 518, 519. This statute always received a rigorous construction. *De Lizardi* v. *Hardaway*, 8 Rob. (La.), 21. Where the sum enjoined carries the highest conventional interest, further interest will not be allowed on a dissolution. See, also, *McCarty* v. *McCarty*, 19 La., 200; *Dabbe* v. *Hernken*, 3 Rob. (La.), 125; *Erwin* v. *Bank of Louisiana*, 5 La. Ann.; *Maxwell* v. *Mallard*, Id., 702.

2. In an action on a penal bond, and especially against sureties, no damages can be recovered, except such as are proved to have resulted from a breach of the condition; and such breach must be distinctly averred in the pleadings.

The condition of the bond in this case is, to pay M. H. all such damages as she may recover against us, in case it should be decided that the said injunction was wrongfully obtained. No breach of this condition is alleged or proved. It obviously was framed with a view to the Louisiana statute. The damages must have been ascertained in the suit in which the injunction was obtained; and then the payment of such damages as shall have been awarded may be recovered on failure to pay them. The fees paid to the Louisiana counsel were allowed to be proved, although, as the first exception shows, they were paid to them as attorneys, not only in the suit in chancery in which the injunction was obtained and the injunction-bond given, but also in the proceedings had in reference to the seizure and sale. These proceedings were anterior to and independent of the injunction, and the fees paid in them cannot, under any proper pleadings upon any form of an injunction-bond, constitute an item of damage to be recovered in an action upon such bond.

The item for fees paid to the counsel in the Supreme Court, was inadmissible upon two grounds. 1st. The plaintiff, in her petition alleges that the injunction was dissolved by the decree of the Circuit Court. The injunction was, in fact, dissolved July 27, 1844. At that day, the responsibility of the obligors was fixed; for the damages sustained up to that time from the injunction they were answerable, but for none accruing subsequently, in the further progress of the cause. 2d. The petition avers that the sum of two hundred and fifty dollars was paid to each of the Washington counsel; the exception shows that plaintiff offered to prove, by an attorney-at-law,

the supposed value *of the legal services rendered by the counsel in the Supreme Court. This was objected to, but the objection was overruled. We submit that this was error. It is in express contradiction of the decisions in Louisiana. In *Brashiers* v. *Wilkins*, 9 Rob. (La.), 57, it was ruled that one who has obtained a dissolution of the injunction cannot recover for attorney's fees as special damages, where the evidence does not show that any was actually paid, but only the value of the services. *Rhodes* v. *Skolfield*, 10 Rob. (La.), 133. No counsel fees allowed as special damages where none proved to have been paid.

3. The non-payment of the rents by the tenant of the mortgaged premises constitutes no breach of the condition of the injunction-bond, for which the obligors are responsible. These parties never became sureties for the tenant; they never understood that he should pay anything to the plaintiff. The petition in this case charges no such obligation, and avers no breach of it. The charge has no foundation in law.

The exception, however, sets forth as a specific ground of exception that the court had appointed the marshal to be the receiver to collect these rents, and to hold the same subject to the final judgment of the court. To enforce this item of claim against these parties would be to make them, by a most strained construction of their bond, sureties for the tenant that he would pay his rent, and then sureties for the marshal that he should faithfully discharge his trust.

Upon each and every of these grounds, it is submitted that the judgment of the Circuit Court should be reversed.

Mr. Bradley, for the defendant in error, contended:

That, by the laws of Louisiana, the party suing out an injunction shall be answerable for all such damages as may have been sustained by the defendant, in case it should be decided that the injunction had been wrongfully obtained. Co. Prac., art. 304.

By the act of 25th March, 1831, (Greiner's Dig., art. 1602), it is further provided that, on the trial of an injunction, the surety on the bond shall be condemned with the principal in the same judgment, in case the injunction shall be dissolved, to pay interest at the rate of ten per cent. per annum on the amount of the judgment, and not more than twenty per cent. damages, unless damages to a greater amount be proved.

After an injunction issues against an order of seizure and sale, no proceedings can take place under the latter process until the injunction is finally disposed of. And, if the plain-

tiff be nonsuited, he may take a suspensive appeal therefrom, on giving his bond for a sum exceeding one half the amount
*175] of the *judgment against him. And in case the plaintiff, in the order of seizure, attempt to sell under it, he may be restrained by a writ of prohibition from the Supreme Court, until the injunction suit be finally disposed of in that tribunal. *State* v. *Judge Buchanan*, 19 La., 171. A suspensive appeal is defined in arts. 575, 578, Lou. Co. Prac.

In this case, the proceeding was to subject real estate to sale, and the bond was taken in time, within ten days after the execution of the judgment, in a sum directed by the judge, under article 578.

The injunction was not finally disposed of by this court until January term, 1848, and no action could be maintained on the bond until after that dissolution.

The remedy may be by action on the bond, and it is sufficient to allege the order of seizure and sale, the interruption of its execution by the injunction; its dissolution, the damages sustained thereby by the plaintiff, and the failure of the principal and his surety to comply with their engagement. *Penniman* v. *Richardson*, 3 La., 103; *Florance* v. *Nixon*, Id., 291; and see 2 Rob., 180; Id., 213.

The damages claimed are for long delays in obtaining any portion of the sum due to her; many and heavy expenses in consequence of the injunction, and great vexation and trouble.

She shows that the property mortgaged sold for the sum of seven thousand dollars only, leaving a large amount still due; and that she paid large sums to attorneys and counsel for professional services in defending the said injunction suit.

By law, in the discretion of the judge, she is entitled to damages not exceeding twenty per cent. on the amount of the judgment enjoined. If she claims more she must plead it specially, and prove it. *Landry* v. *L'Eglise*, 3 La., 221. And counsel fees may be allowed as special damage, over and above the twenty per cent. Ib.; *Benton* v. *Roberts*, 3 Rob. (La.), 226; *Ricard's heirs* v. *Heriart*, 5 La., 245; *Wilcox* v. *Bundy*, 13 La., 381; *Pargrout* v. *Morgan*, 2 La., 102.

The allowance of special damages and interest is within the discretion of the court. *Arnous* v. *Lessessier*, 12 La., 126. And where it appears plaintiff is acting wholly in bad faith in suing out an injunction, he will be visited with the full measure of damages and interest. *Selby* v *Merrienneaux*, 11 La., 485. And counsel fees may be allowed, although they have not in fact been paid. *Brown* v. *Lambeth*, 2 La. Ann., 822; *Farrar* v. *The New Orleans Gas Light Company*, Id., 873.

There could be no objection to the admissibility of the proof

in the second branch of the first exception. Although the claim was for a specific sum, it was not founded on an express contract *or agreement between Mrs. Heath and Mrs. [*176
Bein and her securities. It was for the court to say whether the sums paid were reasonable or not; and if the plaintiff had proved that she had paid a specific sum for the services of the counsel, she would not necessarily have been entitled to that, but only to so much as the judge should find was reasonable.

But, in the absence of proof of the payment of a specific sum, it was clearly competent for her to show what would be a reasonable allowance.

In regard to the second exception, it seems quite clear that the evidence objected to was admissible to show the damages which the plaintiff had sustained by the injunction. The basis of the law, allowing damages beyond interest, is indemnity. It is intended not only to secure the payment of the interest and costs, but the consequential injuries resulting from the unjust obstruction of legal process, and, for the trouble, expense, and actual loss. Now, part of the injury here, was clearly occasioned by the plaintiff's interference by this injunction, which, in its progress, caused the loss of those rents, the receipt of which might have gone far to diminish the amount of the debt and interest, and thereby the loss has been enhanced beyond the penalty of the bond.

And, finally, the whole question of fact was tried by the court. The interest alone, at ten per cent., would amount to much more than the whole penalty of the bond; and damages at twenty per cent., would be equal to two thirds, and the counsel fees paid and proved, added to this, also exceed it; and whether the judgment is for interest or for damages, justice has been done between the parties by the judgment; and the evidence which was admitted can have done no harm to the plaintiff in error, and could not have affected the decision one way or the other.

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

This is an action on an injunction-bond given by Mary Bein, one of the plaintiffs in error in a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana, in which Bein and wife were complainants, and Myar Heath, the present defendant in error, the respondent.

It appears that Mary Bein executed certain promissory notes for the payment of a large sum of money, and mortgaged her separate and individual property to secure the debt. These

notes and the mortgage became the property of Mary Heath, as the legal representative of Sherman Heath, who loaned the money for which they were given, and who died before any proceedings were instituted to recover it.

*177] *The notes not being paid, Mary Heath obtained a writ for the seizure and sale of the mortgaged premises, according to the laws of Louisiana. And Bein and wife thereupon filed their bill in the Circuit Court of the United States, setting forth that the separate property of Mary Bein, which had been seized, was not legally or equitably chargeable with the payment of this debt, and praying an injunction to stay the sale. It is unnecessary to state the grounds on which the complainants asked relief, as the merits of that controversy are not involved in the present suit. The court passed the order directing the injunction to issue, as prayed, upon the complainants giving a bond with certain sureties named in the order, to answer all damages which the defendant in that suit might sustain in consequence of said injunction being granted, should the same be thereafter dissolved.

The bond was given in the penalty, and with the sureties, mentioned in the order. But, instead of making the condition such as the court had directed, which was the proper one, according to established chancery practice, the complainants adopted, we presume, the form used in the state courts of Louisiana, in cases where the law requires an injunction-bond to stay execution on a judgment or order of seizure and sale. The condition is as follows:

"Now, the condition of the above obligation is, that we, the above bounden Mary Bein, and Gilbert S. Hawkins, (and) James McMasters, sureties, will well and truly pay, to the said Mary Heath, the defendant in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us, in case it should be decided that the said injunction was wrongfully obtained."

The injunction, however, was issued by the clerk upon the filing of this bond. And the suit proceeded to final hearing, when the court passed the following decree:

"This cause came on for trial on the 29th day of May, 1844, and was argued by counsel; wherefore, in consideration of the law and the evidence, and the rules and principles of equity being in favor of the respondent, Mary Heath, it is ordered, adjudged, and decreed, that the complainant be dismissed with costs. And it is further ordered, adjudged, and decreed, that the injunction granted in this case be dissolved, and the respondent be allowed to proceed with the writ of seizure

and sale granted, in accordance with the prayer of her original petition."

The complainants appealed to this court, and, after argument by counsel, the decree of the Circuit Court was affirmed, with costs. And, thereupon, the present defendant in error brought *the suit which is now before us, upon the [*178 injunction-bond hereinbefore stated, to recover certain damages stated in her petition, for which she alleges the obligors in that bond are liable. The suit is by petition, in the usual form of Louisiana practice, and the judgment of the Circuit Court being in favor of the plaintiff in that suit, the plaintiffs in error, who were defendants in the court below, have brought the case before this court.

It appears, from the exceptions, and the judgment in the case, that the Circuit Court regarded this bond as the same in principle with the bond required by the laws of Louisiana, where an injunction is obtained to stay execution upon an order for the seizure and sale of mortgaged property; and therefore considered this bond as creating the same obligations and giving the same rights to parties as if it had been given under the laws of the state. And by these laws, when the party obtains an injunction, and fails to support it at the trial, judgment is given against him and his sureties for the debt, interest, and damages, at the time the injunction is dissolved, and it forms part of the same judgment. 8 Rob. (La.), 20. The sureties in the bond are treated as parties to the suit; and the amount of interest and damages which the court may award by their judgment is regulated by the laws of the state. It is with reference to this mode of proceeding that the injunction-bond in question appears to have been framed; and it is to this judgment, as prescribed by the laws of the state, that the condition must refer, when it binds the obligors to pay all such damages the obligee might recover against them, in case it should be decided that the injunction was wrongfully obtained. There must be a recovery, that is, a judgment against them, before the condition is broken, and before any proceeding could be had upon the bond.

Now, there is manifest error in subjecting the parties to an injunction-bond, given in a proceeding in equity in a court of the United States, to the laws of the state. The proceeding in a Circuit Court of the United States in equity is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress. And the 90th rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England, shall be followed. The 8th rule authorizes the Circuit Court, both judges con-

curring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction-bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

*179] *And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit.

But the bond, in the case before us, is not one to pay the damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court proceeding, according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the Circuit Court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agree to pay, has not, therefore, happened, and the condition

of the bond is not broken, and consequently no action can be maintained upon it. It would be against the well-established rule of the chancery court to extend the liability of the surety, by any equitable construction, beyond the terms of his contract. And, in a proceeding upon the bond, the liability of the principal obligor cannot be extended beyond that of the surety.

In this view of the case, it is unnecessary to examine the questions which have been raised as to the Louisiana laws in *relation to injunction-bonds. The judgment of the Circuit Court must be reversed, and a *venire de novo* [*180 awarded.

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, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein, in conformity to the opinion of this court.

PELEG WILBUR, APPELLANT, *v.* SAMSON ALMY.

Where there were two trustees of the property of insolvents, and one of them made an assignment, but the other neither joined in it nor assented to it afterwards, the assignment was void.[1]

And in the present case, also, the assignee appears to have received an assign-

[1] A trustee having once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his co-trustees. All the trustees must unite in a disposal of the trust property and a deed by two, while a third is living, is not valid. The trustees take as joint-tenants, and must all unite in the execution of the trust, and especially in a deed of lands. *Brennan* v. *Willson*, 71 N. Y., 502, 507; s. c., 4 Abb. N. Cas., 279. S. P. *Larned* v. *Welton*, 40 Cal., 349. In general, all the trustees must act together, but where the will creating the trust expressly authorizes a majority to act and execute their acts, their acts in pursuance of the trust, done in good faith, are valid and effectual. *Crane* v. *Decker*, 22 Hun (N. Y.), 452. And where one of several trustees on whom a power has been conferred to convey in execution of the trust, resigns, and his resignation is accepted by the surrogate, the trust may be executed by the remaining trustees without a new appointment. *Re Bernstein*, 3 Redf. (N. Y.), 20.

ment of the property only as security, until its profits should pay a debt due to him by the insolvents. That debt being extinguished, he has no right, as owner, to claim an account of further profits from the holder of the property.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island, sitting as a court of equity.

The facts in the case are stated in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Rockwell* and *Mr. Johnson* for the appellant, and *Mr. Bradley* for the appellee. The following are the points made by the counsel respectively, upon each of which numerous references were made to the evidence in the record.

Points by the counsel for the appellant.

I. The assignment to the plaintiff, Almy, was void. Charles Low and Thomas R. Hazard were the assignees of R. G. Hazard & Co., and the conveyance to Almy was made by R. G. Hazard and R. G. Hazard & Co., and assented to by Thomas R. Hazard alone, but was never authorized nor assented to by Charles Low, the other assignee. 2 Story Eq. Dig., 521, § 1280; *Ex parte Rigby*, 19 Ves., 463; 1 P. Wms., 241; 3 Atk., 584; Lewin on Trusts, 265; 1 Cruise Dig., 455; *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 543, 553–554, 582–584.

II. The assignment to the plaintiff, Almy, of 9th March, *181] *1830, was not an absolute assignment, either of the contract or of the interest of the parties in the machinery. It was a conditional assignment to secure a debt, which debt has since been paid.

III. Messrs. Low and Fenner owned one half of the contract of R. G. Hazard & Co., with Lippitt, and of the interest in the machinery; and as R. G. Hazard & Co. owned only the one half, neither Almy nor their assignees could convey more than that half.

The record in the case of *Hunt & Fenner* v. *Hazard & Co.*, furnishes conclusive evidence that Low & Fenner paid for, and owned, one half of the contract and machinery.

The record, in that case, to show the fact of the payment, and the application of the amount, is clearly admissible and conclusive. 1 Stark. Ev., 183, § 57, 188, § 58, 189; *Green* v. *New River Company*, 4 T. R., 590; *Floyd* v. *Brown*, 1 Rawle (Pa.), 121; *March* v. *Pier*, 4 Rawle (Pa.), 273, 285; 4 Cow. & Phil. Ev., 1281, n. b.; *Adams* v. *Broughton*, 2 Str., 1078; *Curtis* v. *Grant*, 6 Johns. (N. Y.), 168; *Livingston* v. *Bishop*, 1 Johns. (N. Y.), 290; *Farwell* v. *Hilliard*, 3 N. H., 318; *Gil-*

more v. *Carr*, 2 Mass., 171; *Ward* v. *Johnson*, 13 Mass., 148; *Lechmere* v. *Fletcher & Co.*, 1 C. & M., 623, 634, 635; 1 Greenl. Ev., 631, § 527; 2 Phil. Ev., 3.

The fact that Low & Fenner owned one half of the contract and machinery, is also shown by the testimony of a number of witnesses.

The plaintiff, therefore, receiving from the assignee of Hazard & Co. only one half of the machinery, and not being authorized, or purporting to act for Low & Fenner, could not, in any event, recover more than one half of the value of it.

"A part owner, who sues alone, is entitled to recover, unless the defendant plead in abatement; but he cannot recover more than the value of his own share." 3 Stark. Ev., 1165; 2 Phil. Ev., ch. 15; 4 Cow. & Phil. Ev., 229; *Brown* v. *Hodges*, 1 Salk., 290; 2 Wms. Saund. (ed. 1825,) p. 136; *Addison* v. *Overend*, 6 T. R., 766, 770; 7 T. R., 279; *Wheelwright* v. *Depeyster*, 1 Johns. (N. Y.), 472, 485; *Brotherston et al.* v. *Hodges et al.*, 6 Id., 108; *Bradish* v. *Schenck*, 8 Id., 151; *Rich* v. *Penfield*, 1 Wend. (N. Y.), 380; *Gilbert* v. *Dickinson*, 7 Id., 449.

IV. R. G. Hazard & Co., and S. Almy, their successor under the contract with Lippitt, have received the entire amount of the cost of the machinery, either from Low & Fenner or Lippitt; and neither of them, when this suit was brought, had any interest in it.

V. The course pursued by the plaintiff not only shows that he considered himself as having no further interest in the machinery *or contract, but precludes him from setting up such interest if he had any. [*182

1. He concealed from Christopher Lippitt the execution of the agreement between himself and Hazard & Co., although he wrote to Lippitt the day after the execution of the agreement, and although he had agreed to act as his agent and friend.

2. After the execution of the contract, he declares that he is using the machinery to secure a debt, and when he ceases to supply cotton to the mill, states that his debt is paid, and claims no interest in, or lien on, the machinery; and from that time, September 11, 1832, to 1836, he never sees the machinery, or goes near the mill, nor communicates with Lippitt or any one else, nor ever claims to be the owner of it, or to have any interest in it.

3. Although the machinery was conveyed by Lippitt to Wilbur and the other mortgagees, on the 8th December, 1835, he makes no claim of any kind in relation to it until the 15th October, 1836, more than ten months, when Hazard professes to make a claim in his behalf. November 25, 1836, he makes

a demand for the machinery; and from that time to October, 1840, nearly four years, says and does nothing on the subject. He then writes a short letter, and refers the defendant to Hazard, and two years after files his bill.

Under these circumstances it operates as a fraud for the plaintiff to set up a claim to the owership of this machinery; he has estopped himself, by his acts and declarations, from so doing. *Packard* v. *Sears*, 6 Ad. & Ell., 475, (33 E. C. L., 117); *Gregg* v. *Wells*, 10 Ad. & Ell., 90 (37 E. C. L.); *Bushnell* v. *Church*, 15 Conn., 54, 406, 419, 420; *Roe* v. *Jerome*, 18 Conn., 153.

VI. The contract between Lippitt and R. G. Hazard & Co., which, it is claimed, created a lien on the machinery, never having been recorded, does not, according to the laws of Connecticut, give title to the machinery against a *bonâ fide* purchaser, mortgagee, or attaching creditor, the machinery having remained in the possession of Lippitt, and treated as his own during the time. *Swift* v. *Thompson*, 9 Conn., 72; *Mills* v. *Camp*, 14 Id., 225; *Kirtland* v. *Snow*; 20 Id., 23; *Patten* v. *Smith*, 4 Id., 450; *Tobey* v. *Reed*, 9 Id., 216; *Talcott* v. *Wilcox et al.*, 9 Id., 134; *Pettibone* v. *Stevens et al*, 15 Id., 19.

1. The mortgage was made to secure several distinct, independent debts of a number of creditors residing in different places, having no connection with each other; and there is no claim in the bill, or proof, tending to show that any, except Peleg Wilbur and C. H. Lippitt, had any knowledge of the existence of any contract between Hazard & Co., and Lippitt, *183] concerning *the machinery, or are in any manner chargeable with notice.

2. The defendant, Wilbur, had not any notice of there being any lien on the property when it was mortgaged to himself and other creditors. He positively denies in his answer any notice of the existence of any lien. He was aware of the existence of a contract for manufacturing, and that Hazard & Co. made advances to Lippitt.

3. Even if the defendant, Wilbur, having notice of the existence of a contract between Hazard & Co., and Lippitt, were chargeable with notice of the terms of the agreement, and of the lien of Hazard & Co. on the machinery, by the law of Connecticut, under the circumstances of the case, his rights as mortgagee are not affected thereby. *Swift* v. *Thompson*, 9 Conn., 63, and other cases above cited.

VII. In the month of March, 1836, Christopher Lippitt made an assignment, under the insolvent laws of Connecticut, of his interest in the machinery to commissioners; and on the 15th October, 1836, they sold the equity of redemption in this

machinery to John W. Fanning, the purchaser of the equity of redemption in the real estate. This conveyance was a valid one, and conveyed the property, subject only to the mortgages which were recorded, and was not subject to any secret lien of Almy on the machinery. *Swift* v. *Thompson*, 9 Conn., 63.

VIII. This machinery, subsequently to the mortgage to Wilbur and others, was attached by other creditors of Lippitt, and the suits prosecuted to judgment. This attachment constituted a lien on this property, which would not be affected by any prior lien unrecorded. Neither did those creditors have any notice of any lien by Hazard or Almy.

IX. R. G. Hazard & Co., failed to perform their contract with Lippitt. They assigned the contract, and their assignee refused to furnish cotton and continue it.

This contract was an advantageous one to Lippitt to a far greater amount than the balance claimed to be due to R. G. Hazard & Co., or Almy, under it.

X. The demand by Bailey, on behalf of Almy, of the 25th November, 1836, is not evidence of a conversion by Wilbur, even if he were not entitled to hold the property as security for his own debt.

1. Because he was bound to hold the property until the *bonâ fide* creditors, secured by mortgage without notice, had received the amount of their debts as above stated.

2. Because the commissioners, under the insolvent laws of Connecticut, had received a valid conveyance of the machinery, not subject to any lien by Almy.

*3. Because the property was at the time under attachment on behalf of *bonâ fide* creditors, who subsequently [*184 obtained judgments on their claims, and the property so attached was receipted to the officer by Wilbur himself.

4. At the time when the demand was made, the machinery was not in the possession of Wilbur. While Lippitt was in possession for Wilbur and other mortgagees, (27th October, 1836,) he executed an agreement with John W. Fanning, by which he surrendered the mill and machinery to Fanning, and took a lease from him. The possession of Lippitt was thus the possession of Fanning.

There is no allegation in the bill that Wilbur was ever in the possession of the machinery. The 6th interrogatory in the bill is, "whether said Peleg Wilbur does not claim to be the owner of the said property, or did not, on the 25th day of November, 1836; and if said Wilbur had sold or conveyed the same, when, to whom, and for how much."

XI. The statute of limitation furnishes a complete bar to this action.

"The statute of limitation is applied by courts of equity in all cases when at law it might be pleaded." *Coulson* v. *Walton et al.*, 9 Pet., 62, 82.

The mortgage of Wilbur and others was dated December 8, 1835; the bill was filed October 17, 1842.

1. The cause of action arose when Wilbur took possession of the property on the 8th December, 1835, and the statute then begins to run. He then took possession for himself and his co-mortgagees, and claimed to hold it adversely, denying the right of all others to the possession. *Murray* v. *Burling*, 10 Johns. (N. Y.), 172; *Bristol* v. *Burt*, 7 Id., 254; *Reynolds* v. *Shuler*, 5 Cow. (N. Y.), 323; *Hyde* v. *Noble*, 13 N. H., 494.

2. If it did not commence at that time, it certainly did on the 15th October, 1836, when Hazard, at the time of the sale of the commissioners, publicly, and in the presence of Wilbur, as the agent of Almy, declared that Almy was entitled to the property under a prior lien.

3. If these did not constitute a conversion, there is no evidence of conversion furnished by the demand and refusal of the 25th November, 1836, for the reasons before stated.

The demand and refusal furnish no evidence of a conversion, if at the time Wilbur had not possession, or if he had not the right to relinquish it; nor if the person for whom the demand was made had no right to the possession at the time. If, therefore, a demand and refusal were *necessary* as the *only* evidence of a conversion, the action cannot be sustained.

XII. There was complete and adequate remedy at law.

*185] *The 16th section of the Judiciary Act (1 Stat. at L., 82), provides, "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law."

If the plaintiff has any claims at all, he could have enforced them, as the assignee of the mortgage and machinery, by an action of trover. *Montgomery* v. *Kerr*, 1 Hill (S. C.), 291; *Langdon* v. *Buel*, 9 Wend. (N. Y.), 80; *Oliver's executors* v. *Palmer & Hamilton*, 11 Gill & J. (Md.), 426.

XIII. If Wilbur is liable at all, he cannot be subject beyond the amount received by him, of $407, or, at the most, for the proportional amount which that sum bore to the entire amount received by the creditors under the mortgage, and if Low and Fenner owned one half the machinery, to only one half the amount.

The points raised by the counsel for the appellee were as follows:

I. The facts in this case give jurisdiction in equity.

1. The remedy at law was not plain, adequate and complete.

2. An account was necessary.

The ascertainment of damages involved necessarily the transactions between Lippitt and Hazard & Co.; and Lippitt and complainant; and Lippitt and defendant with Hazard and Co., and with complainant, respectively.

3. If the complainant is to be considered in equity as a mortgagee or assignee of a mortgagee, equity alone had jurisdiction to enable the mortgagor or his assignee to redeem or to foreclose the mortgage.

4. If Almy had a lien on the property, a court of equity was the proper forum to give him relief.

II. What is the true construction of the contract between Lippitt and Hazard & Co.?

1. Is it a mortgage in the true meaning of that term?

The essential characteristics of a mortgage are a debt or duty, and an obligation to repay the debt or perform the duty secured by a conveyance or assignment of some valuable thing. The form is immaterial, but the obligation must clearly appear. Here there is no obligation. A right or privilege is given, but there is no corresponding duty to take the property and pay.

The Hazards were the purchasers, took the bills in their own names, and were necessarily the general owners. He who pays the money is the general owner, no matter in whose name the conveyance is made. 2 Story Eq., § 1201, and notes.

Even if the bills had been in the name of Lippitt, it would have made no difference. 1 Hill. Ab., 307, §12–28, 382, § 42. It was not a joint purchase.

*2. How did the parties themselves understand it? [*186
This is admissible evidence. 1 Hill. Ab., 273, 274. Neither of the parties treated Lippitt individually as debtor.

See R. G. Hazard, dep. 56. "His understanding at the time of the contract was that R. G. Hazard & Co. were to be absolute owners of the machinery, but C. Lippitt had a right to become the owner and to require a title from R. G. H. & Co. on performing certain conditions." Again, in 1830, when he was proposing to sell to Lippitt, he says: "I reminded him of his obligation under the contract to buy at a certain price. He argued that machinery was then low, and he would give me as much for it as it was then worth." Again, "I afterwards told Lippitt he must regard S. Almy as the owner."

So as to Lippitt, &c., in 1828 he insured $6,000 on the

machinery belonging to R. G. Hazard & Co., and in 1829, to Hazard's assignees. In his application for insurance he says "the buildings and fixtures belong to me, and the machinery to R. G. Hazard & Co." In his own deposition he says "the assignees of R. G. Hazard & Co. proposed to sell me the interest they had in the machinery." In his letters to Almy he proposes to Almy to buy it from the assignees, by which he would save some $3,000, or to assist him in purchasing.

He had the privilege of becoming the owner, but was not bound to exercise it.

The case of *Conway's Executor* v. *Alexander*, 7 Cranch, 218, 237, and 8, 9, is in point both as to the general principle and the admissibility of extrinsic circumstances to determine whether it was a mortgage or not. It was not a mortgage in the ordinary meaning of that term.

III. It was a contract for a special and limited partnership, by which the ownership of the machinery remained in the Hazards until it should be paid for out of half the earnings of the factory, or in some other mode appointed in the contract.

1. It is an executory contract.

2. A contract for the employment of capital put in by either party, for the service of both parties, and for a division between the parties of the profits to be made out of such capital and services.

Lippitt gives the use of his mill, water privilege, &c.

Hazard, the use of the machinery.

Both, their services.

3. To the world they were partners, and the property used in the business was liable; with each other it was separate property.

4. Neither party could convey or burden the partnership property for his private debt; nor could legal process for a separate debt affect it.

*187] *5. The possession of one partner could not alter these principles.

6. The assignment by Hazard & Co. to the complainant of their contract, which was communicated to Lippitt by R. G. Hazard, and the continuance by Lippitt of the business after such assignment and notice, made Almy a partner, with the same rights, duties, and liabilities.

7. These rights continued till the partnership business was settled.

To third point we cite *Rogers et al.* v. *Batchelor et al.*, 12 Pet., 221, 229, 230, 231, &c.; *Ex parte* Hamper, 17 Ves., 403, and Amer. notes by Sumner; Story Part. § 27, pp. 37–42.

In this view the assignment by Lippitt to defendant was void, with or without notice.

The statutes of fraud and enrolment do not apply. It is not a conveyance by a man who has the title and retains a possession inconsistent with the deed, but a possession by a man consistent with the rights of the true owner, a lawful possession.

IV. But if it is a mortgage or a lien, as collateral security, to be treated in equity as a mortgage, the defendant is not a *bonâ fide* purchaser without notice, and having notice, he must redeem or account for the property.

The evidence of this knowledge will be found in his answer. He knew that half the profits of that mill could not have amounted to 10,000 up to December, 1835.

He knew the facts. He was bound to know the law. Either there was a partnership, and he could not buy from one partner; or he knew the machinery was held as collateral security, and he was bound to inquire how that account stood.

Again; on the 2d December, 1835, R. G. Hazard went to see Lippitt, at the request of Almy, to get a settlement. Lippitt declined; same day he left. He returned in the spring, told Wilbur of the cause of his abrupt departure, and that "he knew he had no more right to take that machinery from C. Lippitt in payment of his debt than he would have had to take Samson Almy's pocket-book, if he had left it in the keeping of Lippitt." He did not deny the charge.

Notice may be expressed or implied. "Whatever is sufficient to put a party upon inquiry, (that is whatever has a reasonable certainty as to time, place, circumstances, and person,) is in equity held to be good notice to bind him." 1 Story Eq., § 400; and see § 399, and notes to both sections; *Buck* v. *Holloway*, 2 J. J. Marsh. (Ky.), 176; *Hardy* v. *Summers*, 10 Gill & J. (Md.), 317; *Hoxie* v. *Carr*, 1 Sumn., 172.

Where a party has knowledge of the facts, he has notice of the legal consequences resulting from those facts. *The Ploughboy*, 1 Gall., 41.

*It affects the conscience of the party. *Smith* v. *Shane & Morgan*, 1 McLean, 27. Notice of such facts [*188 as with ordinary diligence will lead to a knowledge of an outstanding equity, is sufficient. *Hinde et al.* v. *Vattier et al.*, 1 McLean, 118; 2 Powell on Mort., ch. 14, p. 562; 2 Eden, 224; 2 Sch. & L., 315, 328; 2 Sim. & Stu., 372, 380.

Independent of the evidence, Wilbur, in his answer, admits, first, he knew of the contract; second, that Hazard purchased the machinery; third, they were to be paid for it out of one half the profits.

He knew it had not been paid for at the time of their failure. Almy claims under them; Wilbur claims under Lippitt; he is bound by the knowledge of the facts, and purchased with notice.

V. The statute of limitation is not a bar.

1. The right of action accrued 25th November, 1836; action brought 17th October, 1842—less than six years.

2. Wilbur went into actual possession, he says, 8th December, 1825, in his own right, and as agent and attorney of some of his co-mortagees, yet the use and custody was not changed, nor did he set up a claim till demand and refusal.

3. His custody and that of Lippitt was consistent with the complainant's right till the demand and refusal.

4. The notice given by Hazard, 15th October, 1836, was notice to purchasers at that sale of an unrecorded lien, known to Wilbur. Wilbur did not purchase. Wilbur did not set up any claim to the possession of, or right to, the machinery. The sale was subject to prior existing equities.

VI. The exceptions to the master's report were properly overruled.

1. The first and second exceptions depend on the admissibility of the record found at pp. 196, 197, and 198, in a case to which neither Almy nor Wilbur was a party. See 16 Pet, 331, 332.

2. The third exception assumes, that Almy is entitled to recover only what he paid the Hazards. We refer to the contract itself, and the letter of Lippitt.

3. The fourth exception sets up a *pro rata* scale of diminished value. We rely first on the master's report.

The value is to be proved,

First. By an estimate of persons who never saw it.

Second. By those who have seen it, examined or used it.

Third. By the rents or products.

1st. Except Lippitt, no one of the witnesses of Wilbur ever saw it; and Lippitt says it was worth about $2000. Yet he himself said, in 1830, it was worth about $8000; insured it in 1836 for $6500; and when it was insured in 1844, the insurance company paid $35,000.

*189] *2d. Complainant's evidence is mainly from persons who had seen it, or used it. Phillips, worth two thirds; A. Fenner, had seen it, worth one half; J. Fenner, had rented it, worth two thirds; Isaac Thompson, made an inventory of, and examined it, about two thirds; Alfred Ladd, hired it, value two thirds; E. Manton's estimated value, two thirds, insurance company.

3d. The rents or product. A. Fenner, J. Fenner, E. S.

Williams, Manton, Ladd. The result is, that this mill rented at a rate which put the value of the machinery at about $7000.

4. The fifth exception is, that the master would not permit the defendant to contradict his answer.

1st. He could not have so amended it; *à fortiori* he could not disprove it. Rule 60, Sup. Ct.; 7 Gill & J. (Md.), 389; *Greenwood* v. *Atkinson*, 4 Sim., 61. This would essentially have changed the ground of defense, and the whole issue. *West. Res. Bank* v. *Ryker*, 1 Clarke, 380; 2 Bland (Md.), 261, *n.*

No amendment can be allowed, unless the plaintiff will be left in the same situation as before. *Jackson* v. *Parish*, 1 Sim., 505; Daniel, 916, 917. Nor after the cause is set down for hearing. 4 Russ., 486.

5. The sixth exception is wholly unsupported by proof.

VII. It was not objected, in the court below, that the assignment of machinery to Almy was void.

In the bill, complainant states that he purchased from the assignees of said Hazard & Co. all the interest which said R. G. Hazard & Co, and the said assignees had in the said contract with said Lippitt, together with all their interest in said machinery &c. (p. 6). It is not denied, or in any manner put in issue by the pleadings or answer. It is in proof, that Low assented to the whole machinery being put into the hands of Almy; and that R. G. Hazard was the agent of the assignees.

The assent of Low would bind him as trustee. 2 Story Eq., §§ 1281 to 1284; 4 Kent Com., 307; *Monell* v. *Monell*, 5 Johns. (N. Y.), Ch., 296; Willis on Trus., 194–196; *Hewitt* v. *Foster*, 6 Beav., 259.

Mr. Justice CURTIS delivered the opinion of the court.

Samson Almy filed his bill in the Circuit Court of the United States for the District of Rhode Island, stating that one Christopher Lippitt, on the 7th day of March, 1828, entered into a contract in writing with Hazard & Co., the effect of which was to create an equitable mortgage on certain machinery for the price thereof advanced by Hazard & Co., who were to supply Lippitt with cotton, receive and sell the cloth, allow him three and a half cents per yard for manufacturing, and credit half the profits towards paying for the machinery, retaining the other *half for their own services and the interest on the cost of the machinery. The bill [*190 further states, that in May, 1829, Hazard & Co. failed in business and transferred all their property to Thomas R. Hazard

and Charles Low, in trust for the benefit of their creditors; and that on the 9th of March, 1830, the complainant purchased of the assignees their interest under the contract with Lippitt, by a written instrument of sale, of that date, a copy or which, annexed to the bill, is as follows:

The assignees of R. G. Hazard & Co. hereby sell and convey to Samson Almy the right, title, and interest which they have to a certain contract with Christopher Lippitt, bearing date March (3d mo.) 7th, 1828 (a copy of which is hereto annexed), together with the balance due from said Lippitt on account of payment for machinery, as expressed in said contract; also their right, title, and interest, to the machinery held as collateral security for the said balance due from said C. Lippitt agreeable to the aforesaid contract, a schedule of which is hereto annexed, for which Samson Almy agrees to pay them (the said assignees) or account with them for the sum of five thousand dollars; and it is further agreed, that if Low and Fenner should redeem their one half of the aforesaid contract by the payment of the drafts drawn upon them by R. G. Hazard & Co. on account thereof, and to return one half of the aforesaid five thousand dollars to said Samson Almy, he relinquishing to said Low and Fenner all claims upon the aforesaid one half part of the said contract.

Providence, 3d month 9th, 1830.

For assignees of R. G. Hazard & Co.

R. G. HAZARD,

R. G. HAZARD & CO.,

Witness: A. E. Forbush. SAMSON ALMY.

Whereas, R. G. Hazard, for the assignees of R. G. Hazard & Co., has made an agreement with Samson Almy, bearing date 3d month 9th, 1830, relative to contract existing between Christopher Lippitt and R. G. Hazard & Co., dated March 7th, 1828, and of the machinery held by them as collateral security, by debts due from Christopher Lippitt and drafts drawn on Low and Fenner, I hereby ratify and confirm the above agreements the same as if made by myself as assignee of R. G. Hazard & Co.

South Kingston, 3d month 10th, 1839.

THOMAS R. HAZARD, Assignee.

Witness: Robert Rathbone.

The bill further states, that from the time of the failure of Hazard & Co. till his purchase from the assignees, the com-

plainant supplied Lippitt with cotton, pursuant to the original *contract between Hazard and Co. and Lippitt, having [*191
agreed with the assignees so to do; that after his purchase from the assignees, he continued to supply cotton to Lippitt, till September, 1832, when Lippitt refused to receive more; that in August, 1831, he also furnished to Lippitt a speeder, which cost five hundred and fifty dollars; that in September, 1832, when Lippitt ceased to receive cotton from him, there was due upon the mortgage the sum of five thousand four hundred and five dollars $\frac{87}{100}$, for which sum he then had a lien on the machinery; that Lippitt transferred the machinery to Wilbur, the defendant, with notice of the complainant's rights, and after the complainant had demanded the machinery of Wilbur, the latter sold it and refuses to account. The bill prays for an account of the value of the machinery, and that Wilbur may be decreed to pay to the complainant, out of the sum found to be its value, the money due upon the mortgage, including the amount of the advance made by the complainant to purchase the speeder.

The cause was heard in the Circuit Court, on the bill, answer, and evidence, and a final decree made in favor of the complainant; and thereupon the respondent appealed to this court.

The title of the complainant, as a purchaser from the assignees of Hazard & Co., not being admitted in the answer, it is obvious that proof of the assignment to him is indispensable. The bill alleges it to have been made by the written instrument, a copy of which has been given. By reference thereto, it appears to have been executed by R. G. Hazard, for the assignees. R. G. Hazard is examined as a witness by the complainant, but does not state that he had any authority from the assignees to act for them in this behalf, nor is there any evidence of such authority in the record.

His act is ratified in writing by Thomas R. Hazard, one of the assignees. This is not sufficient. Trustees must unite to pass any title to property jointly held by them. *Ex parte Rigby*, 19 Ves., 463; *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 543, 583; *Kirby* v. *Turner*, 1 Hopk. (N. Y.), 309; 2 Story Eq., § 1280; Willis on Trustees, 136. The previous authority or subsequent assent of Low must be shown.

It is urged that, though Low, the other assignee, did not sign the paper, nor ratify Hazard's act, by any writing, he did, by acts *in pais*.

There are reasons why very clear proof of such ratification should be required in this case. The first is, that the bill itself states no such ratification. It relies on the written

paper alone, and does not suggest that after the execution of the paper, one of the assignees ratified the transfer, by acts *in pais*. But another, and more important reason, is, that this *192] transaction *between Almy and R. G. Hazard, who undertook to act for the assignees, was not in accordance with the trusts, on which the assignees held the property. The nominal consideration of the transfer to Almy was five thousand dollars; the real consideration was a debt due to Almy from Hazard & Co. at the time they became insolvent, and the purpose of the transfer to Almy was to prefer that debt. This, neither Hazard & Co. nor the assignees, had a right to do. And the proof should be very clear, to induce the court to declare that a trustee has ratified, or acquiesced in, a breach of his trust, amounting to a fraud on the other creditors of Hazard & Co., whose rights he was bound to protect. We do not find such proof in the record. There is no evidence tending to show that Low was ever informed of the true nature of the transaction between R. G. Hazard and Almy, or had knowledge that the purpose of those parties was to give a preference to Almy's claim. And, consequently, if he had acquiesced in or even expressly ratified the transfer, while ignorant of its real character, it would have been open to him afterwards to have disaffirmed it. But it is not shown that Low did acquiesce in, or ratify the act of R. G. Hazard. The complainant put in evidence certain letters from Low to Lippitt, which have an important bearing on this part of the case. They are as follows:

PROVIDENCE, 6th February, 1832.

DEAR SIR: Yours, dated four days since, is just at hand. Contents noted. With regard to the contract, I am as desirous to have it adjusted as you, and am ready to attend to it at any time you may name. It will be necessary for you to take an account of what cotton, yarn, cloth, &c., you have on hand. You stated that Mr. Hazard informed you that he had purchased the contract of the assignees. That is not the case. I have made no disposition of it.

CHARLES LOW, *Assignee.*

PROVIDENCE, October 26, 1832.

"Mr. Christopher Lippitt, Sir: Having been notified by you that you wish to close up the contract under which you have been manufacturing, and to take the machinery, you paying the deficiency of your half of the profits, you are hereby authorized and requested not to receive any more cotton from Samson Almy to manufacture under said contract, and to

manufacture what cotton you have on hand as soon as practicable. You are requested also to render your accounts as soon as practicable, and we will have the accounts of the profits prepared as soon as practicable, with a view to a prompt and final settlement of the whole business.

* "Mr. Almy was never authorized to supply you [*193 with cotton under the contract for his own account.

Respectfully, your obedient servant,

CHARLES LOW, *for self and*
T. R. Hazard, assignee for R. G. Hazard & Co."

PROVIDENCE, Nov. 13, 1832.

"DEAR SIR: I should like to know if you are furnishing yourself with cotton and not receiving it from Mr. Almy, as you have been heretofore. As for Rowland Hazard being my agent for settling the business, he cannot produce any thing to show that I ever empowered him to act for me in any one instance. I shall call upon Mr. Almy within a few days and ask him for a settlement.

Yours, &c.,

CHARLES LOW, *Assignee for*
R. G. Hazard & Co."

In these letters, Low not only denies R. G. Hazard's agency, but Almy's right to supply cotton on his own account, and declares, in so many words, that he has made no disposition of the contract which created the mortgage, and Mr. Lippitt testifies that Low always told him R. G. Hazard never was appointed the agent of the assignees, and had nothing to do with their business. It does not appear that up to the time when he wrote the last of these letters, he was aware that Almy was supplying cotton to Lippitt by reason of an assignment of the contract to him. It does not appear that he knew Lippitt received cotton from Almy under the contract; but this he had done for nearly a year before Almy took the assignment of the contract, by virtue of an arrangement between Almy, Lippitt, and the assignees of Hazard & Co. as the bill itself states; and notice of the discontinuance of that arrangement is not brought home to Low, until after Almy had ceased to supply cotton to Lippitt. The acquiescence by Low in Almy's acts of furnishing cotton, under the contract, is not therefore referable to an assignment of the contract to Almy, and still less does it amount to a ratification of such an assignment as the assignees were not able to make without a breach of trust.

If it were necessary therefore to decide the case upon this

point, we must hold that Almy has failed to show a valid title from the assignees. But we are of opinion that independent of this defect in his title, the bill cannot be maintained.

It has already been stated that Almy did not purchase this mortgage, but took an assignment of it for the purpose of obtaining payment of a debt, which Hazard & Co. owed him at the time of their failure. This is proved; and at the same *194] time *it is shown that when he ceased to furnish cotton to Lippitt, in September, 1832, his debt was paid. Christopher H. Lippitt testifies:

"I did converse with Samson Almy, at different times, while he was stocking the mill, in relation to the interest he had in doing so. He said the only interest he had in furnishing stock for the mill was to get a debt to him from R. G. Hazard & Co.; that he did not care to continue the business after said debt was paid, and that after that it made no difference to him who stocked the mill, whether my father or anybody else. I told Mr. Almy that if it would be any damage to him for my father to stop receiving stock from him, that he might still continue to furnish the mill. Mr. Almy replied that it would be no damage to him, and that my father had better stock the mill himself, as he, Mr. Almy, had got his debt, and more too. Subsequent to my father's furnishing the mill, Mr. Almy gave him a letter of recommendation to a house in New York, for the purpose of aiding him in purchasing cotton. He did state that he had no further interest in having the mill run for him, as he had secured his debt as I stated in my answer to the previous cross interrogatory. He said it was a matter of indifference to him whether the mill and machinery was run any longer for him, or not, but that he would run it for my father's benefit, if so desired." Christopher Lippitt also testifies: "At the time I stopped manufacturing for Mr. Almy, we had some conversation about furnishing cotton. Mr. Almy says, that, if I were in your place, I wouldn't manufacture for them any longer, they are all bankrupt, you don't know who you are manufacturing for. I observed to Mr. Almy that, if I stopped receiving cotton from you, won't it be an injury to you? He said, no, not in the least, for I think I've got my pay, and more too. I then observed to him, that probably I might stand in need of some assistance from him, if I commenced on my own account; he promised to render me all the assistance that he well could, give me some recommendations and introductions, where I might buy cotton. Afterwards, some time in the year 1834, he gave me introductions to go to New York to buy cotton. I stopped by the advice and consent of Mr. Almy. The letter he gave was addressed

to Messrs. Jenkins, Merrick & Co., New York; I was also advised by Mr. Almy to send my goods to them for sale, and I did send most of my goods to them in future, accordingly. I never heard him say that he had any lien or claim on the machinery whatever. He said the contract between me and R. G. Hazard & Co. was placed in his hands by them for the purpose of getting a debt that R. G. Hazard & Co. owed him, or that he had become obliged or bound to pay for them."

*There is nothing to control this evidence except the testimony of R. G. Hazard. He says, "S. Almy, [*195 the only probable purchaser, to whom it seemed safe to sell, objected on account of apprehension of difficulty with Low and Fenner, but by promising my personal services in the subsequent management of the business, and obligating myself by some other conditions, I prevailed upon him to make the purchase."

This is far too vague an account of the consideration and terms of the sale to be relied on to control the explicit declarations of Almy, and the inferences to which his conduct gives rise.

This conduct tends to show he had only a conditional interest in the property and that his interest had terminated. He not only ceased to supply cotton in 1832, declaring, at the same time, that his debt was paid, and he had no longer any interest in the matter, but he suffered Lippitt to run the machinery, and treat it as his own, until his failure in December, 1835, when Lippitt conveyed it to Wilbur and others. It rested in their hands until November, 1836, when Almy demanded it of Wilbur. Nothing more appears to have been done or said by him in reference to the property, till October, 1840, when he wrote the following letter:

"PROVIDENCE, 10th month 23d, 1840.

"PELEG WILBUR,

"Respected Friend: I have consulted counsel respecting the claim I have against thee, and have made up my mind to commence a suit immediately, unless there is a settlement. If thee would like to see Mr. Hazard, he will be in town on the 26th instant.

"Thy friend,

SAMSON ALMY."

Two years more elapsed, making ten years, from the time when he ceased to have anything to do with the machinery. This bill was then filed, and R. G. Hazard is very active in the management of the suit, as he says, by reason of an under-

standing between Almy and himself, when the assignment was made. This understanding must have been included by him in that part of his testimony, where he speaks of promising his "personal services in the subsequent management of the business, and obligating himself by other conditions;" and, if one of those conditions was that Almy took the transfer, by way of security, and his debt had been paid, it is quite consistent with Almy's real relation to this property that he should lie by ten years, and when he moved that R. G. Hazard should be active also.

*196] *But we find another piece of evidence in the record, to which it is proper to advert. It is the examination of Almy before the master upon the subject of his title, in which he has undertaken to give what he calls "the history of the whole matter." It is as follows:

"In reply, I must give you the history of the whole matter. In 1829, I think, I made arrangement with Rowland G. Hazard, Low & Fenner, and Christopher Lippitt, to furnish stock to Christopher Lippitt under the contract made by R. G. Hazard & Co., and Christopher Lippitt, they agreeing to give me one half of the profits for doing the business. We went on in that way, until I made the purchase of the machinery, after which I became sole owner and went on under the contract. At the time of R. G. Hazard & Co.'s failure, they owed me five or six thousand dollars, due by note, and the consideration of the contract or bill of sale was those notes, so far as they were required; that is, the agreement was that that bill of sale, so far as it went, should go to cancel these notes. The notes thus cancelled, it is my impression, were surrendered to R. G. Hazard, as agent for the assignees. I can't say that Mr. Hazard acted as agent of the assignees when I surrendered the notes to him: he did when the contract was made. I can't remember when I surrendered the notes to Mr. H., nor how many of them there were. I could ascertain, if time were allowed."

This is perfectly explicit, except on one point, and that is, whether the transfer to him was an absolute sale, extinguishing the notes, or by way of collateral security for the notes. A close examination of his statement will tend to show it to have been the latter.

He says, "the consideration of the contract, or bill of sale, was those notes, so far as they were required; that is, the agreement was, that that bill of sale, so far as it went, should go to cancel those notes."

But, if the consideration of the sale was the extinguishment of the notes, what is meant by its extinguishing them, so far

as it went? This language is intelligible, if the agreement was that he should work out his debt through this contract with Lippitt. In such case, the bill of sale might be said to extinguish the notes so far as it went; that is, so far as it should prove to be effectual for that purpose. And this construction is much strengthened by the fact that he does not profess to have surrendered any of the notes at or about the time when the transfer was made to him, and there is no reason to believe he did so before his debt was paid. Taking this statement of Almy, in connection with his repeated declarations to the Lippitts and his conduct in reference to this property, we cannot doubt that the transfer *was made solely [*197
to enable him to obtain payment of these notes by means of the contract with Lippitt, and that payment was thus obtained.

Other questions have been made in the case, which we have not found it necessary to decide. Our opinion is that the decree of the Circuit Court should be reversed and the bill dismissed with costs.

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, adjudged, and decreed by this court, that the decree 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 dismiss the bill of complaint with costs.

ANDREW ERWIN, APPELLANT, *v.* WILLIAM S. PARHAM, JAMES DICK, AND HENRY R. W. HILL.

Where a bill in chancery states that, at an execution sale, which was alleged to have been open and fair, the complainant purchased, for the sum of $600, certain promissory notes secured by mortgage, amounting in the whole to $260,000, and the bill was demurred to, and the demurrer sustained by the Circuit Court, this judgment must be reversed.

Mere inadequacy of price does not, of itself, furnish a sufficient reason for dismissing the bill, or deciding that the complainant was entitled to no relief whatever.[1]

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[1] See note to *Shriver's Lessee* v. *Linn*, 2 How., 43.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana, sitting as a court of equity.

It came up upon a demurrer to a bill filed by Andrew Erwin, which demurrer was sustained by the court, and the bill dismissed with costs. The facts set forth in the bill, arranged in chronological order, were as follows:

In the year 1839, James M. Wall, a citizen of the state of Mississippi, appears to have been in possession of two plantations in Louisiana; and on the 16th of November, in that year, sold them, together with the stock and slaves upon them, to William S. Parham, for a sum amounting very nearly to $300,000. Of this consideration, $35,200 were in cash, and the residue in thirteen promissory notes, each for the sum of $20,369.23, payable on the 1st of January, 1842, 1843, 1844, *198] 1845, 1846, *1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854. These notes were drawn in favor of Wall, made payable and negotiable at the Citizens Bank of New Orleans, and were indorsed "*ne varietur*" by the notary before whom the deed was acknowledged, and secured by a mortgage of the property. It was further stipulated in the deed, that Parham was to settle all claims against the property, and have a credit upon the notes for whatever sums he might pay. A list of the mortgages outstanding upon the property was waived by the parties, because, as was stated in the deed, "Parham was advised of the mortgages existing on said property." The list nowhere appeared in the record.

In 1842 Wall, being a resident of Mississippi, was sued in the Circuit Court of the United States for that district, by one William M. Beal, a resident and citizen of Louisiana; and a judgment was recovered at the May term in said suit for $2,365.13. An execution was issued upon this judgment against Wall, which was returned "*nulla bona.*"

On the 1st of August, 1842, Parham conveyed to his mother, Elizabeth Jane Parham, who was also the mother of Wall, all the property which had been conveyed to him by Wall on the 16th of November, 1839. The consideration for this deed was, that the grantee should pay the thirteen promissory notes above mentioned (except the sum of $18,000, which was stated to have been paid on account of them); that the grantee should also pay to one W. Ford, Jr., $6,986.52, which Parham owed in three separate notes, and should also pay sundry small debts, not exceeding in the whole five thousand dollars.

On the 20th of November, 1845, Beal filed a petition in the Ninth District Court of the State of Louisiana, setting forth

the judgment which he had recovered against Wall in the State of Mississippi, and praying that it might be made executory in Louisiana. An order of seizure and sale was accordingly granted, and, on the 19th of January, 1846, a writ of *fieri facias* was issued to the sheriff of the parish of Madison, commanding him to seize all and singular the property movable or immovable, rights and credits of Wall within his parish.

On the 24th of January, 1846, the sheriff levied this execution upon the thirteen promissory notes above described.

On the first Saturday, in May, 1846, the said sheriff, after having carefully and strictly observed and complied with and performed all the solemnities and formalities required by the law and the statute in such case made and provided, sold two of the thirteen promissory notes, viz., the two which were due on 1st January, 1846 and 1847, to Andrew Erwin, the appellant, and one John W. Nixon, as equal proprietors, for the sum of $300, *that being the last and highest bid, and conveyed the same to the purchasers in due form of law. [*199

On the same day, and after the above sale, the sheriff exposed to sale the remaining eleven notes, which were purchased by Erwin alone, and a deed executed for them by the sheriff.

On the 31st of January, 1846, between the seizure and sale, Wall acknowledged, before a notary public, that he was indebted to Dick and Hill in the sum of $35,979.53; that he had given them his promissory note for that amount, due on 1st April following; and that, to secure the payment thereof, he, on that day, pledged, transferred, and delivered to said Dick and Hill, two of the thirteen notes above mentioned, viz., those which were due on 1st January, 1845 and 1846, respectively.

In the mean time, but when the record did not show exactly, Elizabeth Parham, the mother, died, leaving Parham and Wall her heirs at law.

At some period subsequent to the above transactions, but when the record did not show, Dick and Hill got possession of the rest of the thirteen promissory notes, two of which had been pledged to them by Wall, as above stated.

On the 2d of January, 1847, Dick and Hill, being thus in possession of the notes, caused the mortgaged property, for the purchase of which the notes were given, to be levied upon and seized by the sheriff of the parish of Madison, and exposed to sale at public auction. They became the purchasers at the sale for the sum of $50,000.

On the 26th of February, 1847, Erwin filed his bill in the Circuit Court of the United States for Louisiana, setting forth, in great detail, the above facts; and averring that Nixon had sold his half of the two notes purchased by him and Erwin conjointly, to some person unknown. The bill charged Dick and Hill with a corrupt, fraudulent, and iniquitous combination and conspiracy, to and with Wall, to cheat, defraud, and injure the creditors of Wall, and especially the complainant. It averred, that Dick and Hill were the creditors of Wall (if at all) only for advances made upon crops, which advances had been fully paid; that the sale by them of the mortgaged property was therefore wholly unnecessary; that the sum of $50,000 was an inadequate price; that, if they had a claim upon Wall for a sum less than $50,000, the residue, after paying themselves, ought to be shared amongst the creditors of Wall, amongst whom the complainant was one; that Wall was in the enjoyment of all the large revenues from the property. The bill then prayed that Parham should be adjudged to pay, &c., and in default thereof that the property might be sold. It further prayed for an injunction upon Parham, Dick, and Hill, forbidding *them from selling the property, or disposing in any manner of any of the revenues or crops.

*200]

An injunction was granted, and the defendants appeared and answered; but afterwards withdrew their answers and demurred to the bill.

On the 8th of February, 1848, the Circuit Court dissolved the injunction, and dismissed the bill, with costs; whereupon, the complainant appealed to this court.

It was argued by *Mr. Johnson*, who made the following points:

1. That the notes, from 1 to 13, inclusive, by virtue of the executory process of seizure and sale and purchase, averred in the bill, became the property of the complainant in his own right as to eleven of them, and to one half of the other two; the other half having been originally in J. W. Nixon.

2. That, as such owner of said notes, he had a specific lien upon the property, real and personal, mentioned in the bill.

3. That, upon that ground alone, as well as upon the ground of discovery, he had a right to the relief prayed.

4. That he was entitled to relief, also, upon the ground of the corrupt combination and conspiracy between the defendants, Dick and Hill, and James M. Wall, to defraud the complainant, as well as upon the ground of like combination and

conspiracy between Dick and Hill, and William S. Parham, to defraud the creditors of said Wall.

5. That if the property, subject to the incumbrance of said notes, is not in the hands of Dick and Hill responsible for the whole amount of the notes, it is at least responsible in the proportion that said amount bears to the sum of $35,979.79, with the interest thereon, being the amount of the note made by Wall to Dick and Hill, dated 31st January, 1846.

6. The rule established in 5 Peters and 11 Gill & Johnson, is that if, besides inadequacy of price, there be suspicion of fraud, equity will leave the party to his remedy at law. But here there is nothing but mere inadequacy of price. We bought at a judicial sale, and all the preliminary steps required by law are alleged in the bill, and admitted by the demurrer to have been taken.

Mr. Justice CATRON delivered the opinion of the court.

This case comes up from the equity side of the Circuit Court for the Fifth Circuit and District of Louisiana, by appeal from a decree supporting a demurrer to a bill of complaint filed by the present appellant.

The bill, filed 24th February, 1847, states, in substance, that *in the year 1842, one William M. Beal, a resident [*201
of the city of New Orleans, obtained judgment in the United States Circuit Court for the Southern District of Mississippi, against James M. Wall, for the sum of $2265.13 besides costs. That upon this judgment execution was issued in the last-mentioned district, where Wall then resided, and that such execution was returned "*nulla bona*." That subsequently, and in the year 1845, this judgment being in full force and unpaid, Beal filed his petition in the Ninth District Court of the state of Louisiana, held in and for the parish of Madison, setting forth the jndgment and praying that by the law of Louisiana it might be made executory in that state, and that process thereon might be granted him against all the property, real and personal, rights and credits of Wall, in the state of Louisiana, and that they might be applied to the satisfaction of his rightful claim. That executory process was granted by the court so petitioned, and that in pursuance of an order of seizure and sale thereupon made, a writ of *fi. fa.* was, on or about the 19th March, 1846, issued to the sheriff of the parish of Madison, commanding him to seize all the property, rights and credits of Wall, within his parish, and to sell them for the liquidation of the aforesaid judgment. That in accordance herewith, the sheriff did, on the 24th January, 1846, seize all the right, title and interest of Wall, in and to

thirteen certain promissory notes, each and all of them bearing date on the 16th January, 1839, each for the sum of $20,369.23, payable respectively on the 1st of January, 1842, and upon each succeeding 1st of January until and including the 1st of January, 1854. Each and all of these notes being signed and executed by William S. Parham to and in favor of James M. Wall, and paraphed "*ne varietur*" by A. J. Lowry, Esq., Notary Public in and for the parish of Madison, in order to identify the said notes with an act of mortgage and sale, passed before said Lowry on 16th November, 1839, between William S. Parham as vendee, and James M. Wall, as vendor, by which deed the payment of these thirteen notes bore a mortgage and privilege upon certain property, movable and immovable, in said deed described, together with all and singular the mortgage, liens and privileges by said deed created, or which, by operation and effect of law, subsisted to and in favor of James M. Wall.

That the sheriff did advertise the property so seized for the satisfaction of the judgment in favor of Beal; and on the first Saturday of May, 1846, having complied with all the requisites of the law, exposed for sale, at public auction, two of the promissory notes, viz.: those falling due the 1st of January, in the years 1846 and 1847; and that these two notes were, for the sum of $300, purchased by this appellant and one John
*202] W. *Nixon conjointly, together with all the right, mortgages, equities and privileges appertaining thereto, that being the last and highest bid. Whereupon said two notes, together with all the mortgages, &c., pertaining to them, were conveyed by the sheriff to the appellant and said John W. Nixon.

That at the same time, the eleven other of the said notes were, for the further sum of $300, sold and conveyed by the sheriff to the appellant, together with all and singular the equities, &c., attaching to them. The following is the sheriff's return on the execution, exhibited as part of the bill.

"Received on the 19th day of January, 1846, and executed on the 24th day of January of the same year, by attaching, in the hands of William S. Parham, all the notes described in the notice of seizure, and by seizing the same as described in the said notice of seizure, by virtue of the within writ; and after having advertised the same for the space of fifteen clear days, the sale to take place on the first Saturday of March, 1846, and on which first Saturday of March, 1846, I proceeded to offer the same for sale for cash, after causing the same to be appraised, and no person present bid for said property two

thirds of the appraisement of the same, no sale was effected. Wherefore I, the sheriff, re-advertised the same upon a credit of twelve months, for the space of thirty clear days, the sale to take place on the first Saturday of May, 1846, on which said first Saturday of May, 1846, I, the said sheriff, proceeded to offer the said property for sale upon a credit of twelve months, at the court-house door in Richmond, La., and J. J. Amonette being present and acting as agent for Andrew Erwin, and Robert Garland being present and acting as agent for John M. Nixon, bid for the notes described in said notice of seizure, due 1st January, 1846, and 1st January, 1847, the sum of $300, which being the last bid or offer made, the same was struck off and adjudicated to the said Erwin and Nixon, at and for the said sum of $300; and at the same above-described day I, the said sheriff, proceeded to offer the eleven other notes, as described in the notice of seizure annexed hereto and made a part of this return, on the terms and conditions above described, and no person, being present, bid therefor two thirds of the appraised value of the said property, no sale was effected. Whereupon I, the said sheriff, re-advertised the same, the sale to take place at the town of Richmond aforesaid, on the first Saturday of May, 1846, upon a credit of twelve months, for the space of thirty clear days; I, the said sheriff, proceeded to offer, on the said first Saturday of May, 1846, at the town of Richmond aforesaid, the said property; and James J. Amonette being present, and acting as agent for Andrew Erwin, bid therefor the *sum of $300, which being the last and highest bid or offer made, I the said sheriff, [*203 struck off and adjudicated the said property to the said Andrew Erwin, at and for the said sum of $300; and the said Amonette, acting as counsel for the plaintiff herein, has authorized me, the sheriff, to credit this writ the amount of each of said bids, $600.

"Richmond, La., May 13, 1846."

That at the time of the seizure of all these several promissory notes, they were in the possession or control of James M. Wall, and he was at that time invested with all the liens, equities, &c., pertaining to them.

That of all the proceedings of the sheriff of Madison, by virtue of this execution, and of the sale of the several notes to the appellant and Nixon, both Wall and Parham, and all claiming under them, had due legal and constructive notice.

That Nixon had, a few weeks before the filing of the bill, parted with all his interest in the two notes which he had pur-

chased conjointly with the appellant, to some person unknown to the appellant.

The bill then states, that on or about the 16th of November, 1839, James M. Wall was seized and possessed of two large and valuable plantations, of a great number of negroes, and of a large stock and all the utensils, &c., pertaining to so extensive an estate; and being so seized and possessed, he, on the day and year last mentioned, conveyed the same to William S. Parham, in consideration of the sum of $299,999.99, of which a portion was paid in cash, and the rest was represented by the thirteen several promissory notes above referred to.

That notwithstanding James M. Wall and all claiming under him had legal and constructive notice of the sheriff's seizure on the 24th of January, 1846, of these various promissory notes, yet the said Wall did, on the 31st of January of the same year, execute his promissory note to James Dick and Henry R. W. Hill for $1,846.46, payable on the 1st of April, 1846, and, as security therefor, pledged those two of the notes of Parham in favor of Wall, falling due the 1st January, 1845, and 1st January, 1846.

The bill further states, that within a few weeks before the date thereof, the said Dick and Hill had become possessed of the eleven other notes, but by what means the appellant knows not. That said Dick and Hill had recently discharged William S. Parham from all liability to Wall, or any person or persons claiming under said Wall. That the notes of Parham, in favor of Wall, and above referred to, cannot be met by the drawer unless the property purchased by him of Wall, and charged with the payment thereof, be subjected to their liquidation.

*204] *That the said Dick and Hill, being possessed of the said thirteen promissory notes, and professing to act in virtue of the mortgages, equities, and liens pertaining to such notes, had, on the 2d of January, 1847, levied upon, seized, and at public auction sold to themselves, as highest bidders, the property charged with the payment of these notes, for the sum of $50,000; but the complainant cannot state by virtue of and for what particular note or notes.

That the sum of $50.000, the alleged consideration-money for this sale, was less than one third of the real value of the property sold.

The bill alleges that the proceedings between Dick and Hill and Wall, and between Dick and Hill and Parham, were the result of combination and conspiracy to defraud the complainant. That on the 1st of August, 1842, William S. Parham, by deed, conveyed to Mrs. Elizabeth Jane Parham, (the

mother of the said Parham and of James M. Wall,) all and singular the property, real and personal, which in the year 1839 had been conveyed by said Wall to said Parham, for and upon consideration, amongst others, that the said Elizabeth Jane Parham would discharge the thirteen promissory notes charged upon the property, but that the said Elizabeth Jane Parham was at the time of this conveyance aged and infirm, and without any other means of paying for the property than by the profits of the property itself; charges said conveyance to be fraudulent and void as to the creditors of Wall or Parham; that it could interpose no hindrance to complainant's recovery. That Elizabeth Jane Parham died in the year 1844, leaving William S. Parham and James M. Wall her heirs at law.

The bill alleges, that the property in question, and upon which the notes are a lien, is not adequate security for their payment, unless all the revenues, issues, and profits of the estate be appropriated to their liquidation. That since the sale of the estate to Parham, such property has greatly depreciated, and that it would not, at time of bill filed, bring at public sale any thing like its real and just value. That the revenues and profits of the estate are from $20,000 to $30.000 per year. That ever since the conveyance to Mrs. Elizabeth Jane Parham, James M. Wall and William S. Parham have resided upon the estate; the first having the sole management and control of the property, its issues and profits, and both deriving their maintenance and support therefrom.

The bill claims, that if the sale by Dick and Hill was lawful and in good faith, that the proceeds of that sale should be distributed *pro rata* among the several thirteen promissory notes; and after propounding interrogatories, prays the court to award *to the complainant the possession of the [*205
thirteen promissory notes, and that he be decreed to have all the liens and privileges pertaining to said notes: That the conveyance to Mrs. Elizabeth Jane Parham be set aside. That the sale of the 2d January, 1847, under which Dick and Hill claim, be declared null; that a receiver be appointed, and that the defendants be restrained by injunction from intermeddling with, or disposing of the property in question, or using or disposing of any of the said thirteen promissory notes.

On the 5th of March, 1847, a writ of injunction was granted, and afterwards answers were put in by the defendants, but were subsequently withdrawn, by agreement of counsel, and a demurrer filed, alleging that the bill made out no title to the

discovery sought in the interrogatories, and did not contain sufficient matter of equity to establish the claim for relief.

The hearing coming on upon bill and demurrer, on the 8th of February, 1848, the demurrer was sustained, the injunction dissolved, and the bill dismissed with costs, and from this decree the complainant below prosecuted an appeal to this court.

The appellant contends:

1. That the notes from one to thirteen inclusive, by virtue of the executory process of seizure, sale and purchase, averred in the bill, became the property of the complainant in his own right as to eleven of them, and to one half the other two, the other half having been originally in J. W. Nixon.

2. That as such owner of said notes, he had a specific lien upon the property, real and personal, mentioned in the bill.

3. That upon that ground alone, as well as upon the ground of discovery, he had a right to the relief prayed,

4. That he was entitled to relief also upon the ground of the corrupt combination and conspiracy between the defendants, Dick and Hill and James M. Wall, to defraud the complainant, as well as upon the ground of like combination and conspiracy between Dick and Hill and William S. Parham to defraud the creditors of said Wall.

5. That if the property subject to the incumbrance of said notes is not in the hands of Dick and Hill responsible for the whole amount of the notes, it is at least responsible in the proportion that said amount bears to the sum of $35,979.79, with the interest thereon, being the amount of the note made by Wall to Dick and Hill, dated 31st January, 1846.

No counsel appeared for the appellees, Dick, Hill, and Parham; and as it does not appear by the demurrer on what grounds of defense the respondents relied in the Circuit Court, or wherefore the court dismissed the bill, we have examined for ourselves, so far as we were enabled, whether any legal defect exists in the *proceeding and process under which the notes were seized and sold. The bill alleges that all the steps taken were in due form of law; nor is any thing found in its statements contrary to the laws of Louisiana, so far as we can ascertain, that will render the sale void.

*206]

And as the bill stands on demurrer, and nothing beyond its allegations can be considered, it is not possible for us to say that the complainant is entitled to no relief at all, and therefore dismiss his bill. He paid only six hundred dollars for these thirteen notes, calling, in the aggregate, for $260,000; but this was paid on an execution sale, admitted by the de-

murrer to have been open to competition, regular, and fair. The payer, Parham, may have been insolvent, and the mortgage of no value for want of title in the mortgagor. In such event no startling inadequacy of price could be predicated of the enormous disparity between the nominal amount of the notes, and the price paid for them. Complainant is entitled to relief as the case now stands, certainly to the extent of the six hundred dollars, and interest on it; and he having a right of possession, and owning the judgment, it is not perceived how he could be deprived of the notes until his whole judgment was satisfied. Or, his rights may extend to an enforcement of the mortgage and all the notes. We deem it useless further to speculate on these matters at present.

On the other hand, the execution sale may be void for reasons that can be brought out in evidence, but which are not now open to controversy, because the bill alleges that the proceeding under which complainant purchased was regular and *bonâ fide*. Or again, because of want of title in Wall to the notes and mortgaged property at the date of the levy and sale. These matters, or any others set up in defense, respondents may bring forth by their answer if they think proper to do so.

All we mean now to say is, that complainant has made a *primâ facie* case for answer and for relief; and it is the duty of respondents, if they mean to defend, to meet that case by answer, and to show, if they can, that no relief should be granted; or, if any, to what modified extent compared with the entire relief prayed. We therefore feel ourselves bound to reverse the decree, and to overrule the demurrer, with leave to respondents to answer in the Circuit Court, when this cause is returned there on our mandate.

Mr. Justice NELSON dissented.

I am unable to assent to the decision of a majority of the court in this case.

The complainant has purchased, at sheriff's sale, thirteen promissory notes, given as part of the purchase money upon a *sale of a large plantation and slaves; and secured by mortgage on the same to an amount exceeding $260,000 [*207 for the small sum of $600; and asks the interposition of the extraordinary powers of this court on the equity side to aid him in realizing this enormous speculation.

I think he should be left to his remedy at law, and this, upon the established course of proceeding of a court of chancery in these cases.

In *Seymour* v. *Delancey and others*, (6 Johns. (N. Y.) Ch.,

222,) Chancellor Kent held that a specific performance of a contract of sale is not a matter of course; but rests entirely on the discretion of the court, upon a view of all the circumstances. And that though mere inadequacy of price, independent of other circumstances, is not, of itself, sufficient to set aside the transaction, yet it may be sufficient to induce the court to stay the exercise of its discretionary power to enforce a specific performance. All the cases on this subject will be found reviewed in that case; and, also, by Chief Justice Savage in the Court for the Correction of Errors where the decree in that case was affirmed. 6 Cow., 445.

The Chancellor, after having referred to many of the cases particularly, observed that these cases show the antiquity of the doctrine of the court; and that the power of awarding the specific execution of contracts, for the sale of land, rested in sound judicial discretion, and was not to be applied to cases that were hard, or unfair, or unreasonable, or founded on very inadequate considerations.

The strong ground against enforcing a contract, where the consideration is so inadequate as to render it a hard bargain, and an unequal and unreasonable bargain, is that, if a court of equity acts at all, it must act *ex vigore*, and carry the contract into execution with unmitigated severity; whereas, if the party be sent to law, to submit his case to a jury, relief can be afforded in damages, with a moderation agreeable to equity and good conscience, and when the claims and pretensions of each party can be duly attended to, and be permitted to govern the assessment.

In the case before us, if the court undertakes to give relief, it would seem, from the established rules of proceeding in equity, that it will be bound to award to the complainant the full amount of the notes in question; and thus enable him to realize upwards of $260,000 upon a purchase at the price of $600; in other words, virtually awarding to him, for this small consideration, an estate, which Wall, one of the defendants, had sold for a sum exceeding $260,000, as the notes in question constitute part of the purchase-money and the payment secured upon this estate.

*208] *The inadequacy of the consideration is far beyond that of any case that has come under my observation in the course of this examination, and is such as to shock the common sense of mankind.

In many of the cases in which the court has refused to interfere, mainly on the ground of inadequacy of price, only half the value had been agreed to be given. That was considered as sufficient evidence of a hard and unconscionable

bargain, to induce the court to pause, when its extraordinary powers were invoked to the aid of the party seeking to realize the advantage of the contract, and turn him over to a court of law.

The complainant in this case is not without a remedy. If he has got a legal right, he can go into a court of law and enforce it. But I do not think it a fit case for the interposition of a court of equity.

I do not regard the allegation of a fraudulent attempt on the part of the defendants, to prevent the complainant from realizing the benefit of his purchase; as the question, whether or not a court of equity should interfere and grant the relief prayed for, in my judgment, is wholly unaffected by any such considerations; for, assuming the fraud should be hereafter established, and this impediment to the enforcement of the claim set up under the purchase, removed, even then, according to the course of proceeding in a court of equity, as already stated, that court would withhold its extraordinary power from aiding the party to obtain so unjust and unconscionable advantage, and turn him over to a court of law. By entertaining the case, as presented in the bill, and directing an answer, the court assumes that, if the complainant can establish the fraud in the transfer of the notes as charged, he is entitled to its decree for the whole amount of his purchase; for, as we have seen, a court of equity must act, if at all, *ex vigore*, and carry into execution the purchase as it has been made. It cannot consistently, in the exercise of its power on this subject, carry the purchase into partial execution by separating it, granting the execution in part, and withholding it in part. This would be arbitrary, and unsupported by any rule or principle to guide the judgment of the court.

Whether the court will entertain the case at all, or not, and give the relief prayed for in these cases, is a question of judicial discretion; but, when once entertained, and held to be a proper case for the relief, there can be no other given, consistent with established principles, than such as the legal title or right set up carries along with it. If it gives to him an estate in land, the court cannot stop at a moiety of it; nor, in this case, in awarding any amount less than the $260,000. The legal title to the whole amount is as complete as to any portion of it.

*For these reasons, thus briefly given, I am obliged to dissent from the decision in this case. [*209

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, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to overrule the demurrer of the defendants with leave to them to answer, and for such further proceedings, in conformity to the opinion of this court, as to law and justice may appertain.

The Unted States, Appellants, *v.* Michael Moore.

An historical account given as to what officer in Louisiana possessed the power to grant part of the king's domain.

In September, 1797, Morales, who was intendant, had not the power. And a receipt of that date, given by him for the purchase-money of lands sold, could convey no title.

By the regulations of O'Rielly, made in 1770, the front proprietors of land upon the Mississippi were bound to make mounds or levees, and also to clear and ditch the whole front of the depth of two arpents, within three years from the date of their purchases. In default thereof, the land reverted to the king.

This condition not having been complied with in the present case, and the alleged proprietor not having asserted any claim from 1797 to 1835, the presumption is that he surrendered his purchase and had his money refunded.[1]

The claim is also barred by lapse of time.

The District Court decreed that "in case any of the lands claimed by the petitioner should have been sold by the United States, he, the petitioner, should be authorized to enter, in any land-office in the state of Louisiana, a like quantity of public lands."

This decree was erroneous. The act of 1844 revived the act of 1824, but did not revive the act of 1828; and the act of 1824 required the grantees of the United States to be made parties in order that they might come in and defend their title. It also intended that these grantees should produce their titles, so that the court might ascertain their boundaries and quantities, and decree accordingly. But in the decree in question, this was not done.[2]

This was an appeal from the District Court of the United States, for the Eastern District of Louisiana.

The act, approved 17th June, 1844, [4 Stat. at L., p. 676], revived and continued for five years, and extended to the state of Louisiana the expired act of 26th May, 1824, entitled

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[1] S. P. *United States* v. *Simon*, *post*, *433; *United States* v. *Hughes*, 13 How., 1, 4, 7; *United States* v. *D'Auterive*, 15 Id., 14.

[2] Followed. *United States* v. *Davenport*, 15 How., 9; *United States* v. *Roselius*, Id., 36. See also *United States* v. *Rodriguez*, 7 Sawy., 637.

"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." [*210
4 Stat. at L., p. 52.

Under this act, Michael Moore presented his petition to the District Court of the United States for the District of Louisiana, on the 17th June, 1846, claiming sixty thousand arpents of land situated in the District of the Atchafalaya, in the sharp end of land or angle where the Atchafalaya and Mississippi rivers join, or the point formed between the said rivers at the place the Atchafalaya leaves the Mississippi.

The title presented by the petitioner was the following:

No. 2. — *Sale of Royal Lands; page* 31.

Don Juan Ventura Morales and Don Gilberto Leonard, intendant and comptroller, *pro tempore* of the Province of Louisiana.

We have received from Don Antonio Iriarte twenty-four thousand bits (12½ cts. each), for the value of sixty thousand superficial arpents of land, at the rate of five cents per arpent, which land has been sold to him for amount of the royal treasurer in the district of country of Chafalaya and the Mississippi, on the point where the two unite; which payment is entered in folio 31 of the journal of this treasury department, and seven hundred and eight bits (12½ cents each), the amount due for the two and a half per cent. for the duty of half-yearly tribute, and eighteen per cent. for the transportation of said half-yearly tribute to Spain, have also been paid, as shown by the amount below, namely:

	Bits.	Bits.
For the value of said land,	24,000	
The half-yearly tribute, and eighteen per cent. for its transportation to Spain,	708	
		24,708

New Orleans, 11th September, 1797.

(Signed) MORALES.
LEONARD.
VALDES.

On the 8th of January, 1835, Don Roque Moreno, then residing in Madrid, purchased the claim from Don Antonio Iriarte for fifty thousand bits (12½ cents each); and in order to obtain a formal transfer of the title, he presented a petition on the 17th of February, 1835, to the Lieutenant Mayor of Madrid, requesting that the acknowledgment of Iriarte to the

transfer might be made in due form. Accordingly, Iriarte appeared before the Lieutenant Mayor, and acknowledged the deed in the presence of three notaries.

*211] *In 1838, Roque Moreno wrote several letters to the house of Rosendo Fernandez & Co., at Havana, requesting them to sell the claim, and in May indorsed the document to them for this purpose by the following order:

"Pay to the order of Messrs. Don Rosendo Fernandez & Co., the value of the document hereto annexed, for value in account with said gentlemen. ROQUE MORENO.

"Madrid, 27th May, 1838."

On the 15th of September, 1838, Fernandez & Co. assigned the documents to Cuesta, who transferred them to Moore, the petitioner, as appears by the following transfers:

"Agreeably to a letter from Don Roque Moreno, of 28th of July last, we transfer the above documents to Don Antonio Garcia Cuesta, or order, without any recourse whatsoever against us. R. FERNANDEZ & Co.

"Havana, 15th September, 1838."

"I hereby assign, transfer, and convey to Michael Moore, all my right, title, and interest, and the interest of Roque Moreno and R. Fernandez & Co., to the foregoing title, and to the sixty thousand arpents of land herein mentioned.

ANTONIO GARCIA CUESTA."

The petitioner, Moore, also, presented in evidence the following letter from Leopold O'Donnell, Governor and Captain-General of the Island of Cuba, verified by Robert B. Campbell, Esq., consul of the United States at Havana. The letter was addressed to the Spanish consul at New Orleans.

"In my official letter of the 22d of February, I communicated to your Excellency what follows:

"His Excellency, the Intendant of the Army, Sub-Intendant-General, and Delegate of the Royal Treasury of this city, in his official letter of the 18th of this month, communicates to me what follows:

"ESTEEMED SIR, — In order to be able to answer your official letter of the 8th inst., in which you inclosed me a letter from the consul of her Majesty in New Orleans, asking certain information, I sent said letter to the general archives of the royal treasury, and have obtained the following informa-

tion. At folio 31 of the book (journal) of the Comptroller for the Army and Department of the Royal Treasury for the Province of Louisiana, for the year 1797, is an entry, of which what follows is an exact copy:

*"September 11th. We have received from Don Antonio Iriarte twenty-four thousand bits, for the value of sixty thousand superficial arpents of land, at the rate of five cents per arpent, which land has been sold to him for amount of the royal treasury, in the district of country of Chafalaya and the Mississippi, on the point where the two unite; and the seven hundred and eight bits, for the balance due for the duty of 2½ per cent. for half-yearly tribute on the value of the land, and eighteen per cent. for the transportation of said half-yearly tribute to Spain, have also been paid, as appears by the account below: [*212

For the value of said lands, . .	24,000 bits.	
The half-yearly tribute, and 18 per cent. for its transportation to Spain,	708	
		24,708 bits.

MORALES, LEONARD, VALDES.

Antonio Iriarte, 24,708 bits.

"This is all that appears in relation to the transfer which the Spanish government made in Louisiana to Don Antonio Iriarte, of the 60,000 arpents of land of which mention is made in the official letter of his Excellency the Captain-General, and also in the letter of the consul of her Majesty at New Orleans, inclosed therein; whether it be in consequence of the documents appertaining to the subject-matter not having been transferred to this office, now under my charge, or whether they were among those which have been lost on the way to this island, or of those which were destroyed by the moths and humidity in the place where they had been deposited since they were received here; neither can be found the decree or copy issued by the tribunal of this intendancy, ordering to be made out the calculations of the amount to be paid by the purchaser for said land; and consequently this office cannot give any thing more than what has already been stated in relation to the boundaries, dimensions of the land, or furnish any thing by which the parties interested may do so. The above is in answer to your letter above mentioned, and I transmit this information to you for your knowledge, and in answer to your letter of the 25th of last month having reference to this subject.

"I transmit to you the above information, in case the first

communication of a similar nature should have been mislaid or lost.

"May God preserve you many years.

LEOPOLD O'DONNELL.

"Havana, 11th April, 1845."

Several witnesses were examined on behalf of the petitioner *who verified the signatures of Rosendo Fernandez & Co., of Roque Moreno, of Morales, Leonard, and Valdes. One of the witnesses, Charles Louis Blacke, being shown the original document, said, "Cannot explain why the document A is cut, as it appears to be; believes that it must have been done in wantonness. States that documents in the intendancy department were never cut in that way."

*213]

Jose Martinez del Campo, witness for plaintiff, being recalled, states, that the discolored appearance of the paper, the document A, in his opinion, arises from certain things, which he states as follows: That the officers of quarantine in Spain, in order to prevent the spreading of infectious diseases, immerse documents in vinegar, and cut them in the manner of the document A in question, in order to make the vinegar penetrate more easily. This, he thinks, has been the case with the document A, and therefore, its discolored and cut appearance.

States, that all the documents from Spain are cut in like manner; that he has often seen them; he has in his possession letters cut in the same way.

The petitioner also offered evidence to prove the genuineness of the letters from Roque Moreno, above mentioned.

The District Attorney put in a general denial, on the part of the United States, and offered sundry original documents in evidence to show Morales's habitual mode of signing officially, and also Leonard's mode of signature.

At May term, 1848, the cause came on for trial before the District Court; the petitioner having entered a disclaimer as to the lands claimed by Butler and Black, confining his claim, as to them, to a float from the United States. The following is the decree of the District Court:

"It is hereby ordered, adjudged, and decreed, that the petitioner, Michael Moore, is the true and lawful owner of, and has good title against the United States, the defendants, in and to all the lands and hereditaments claimed by him in his petition, to wit, to sixty thousand superficial arpents of land, situated in the state of Louisiana, between the rivers Mississippi and the Atchafalaya, in the angle formed by the said

two rivers, commencing at the point where the Atchafalaya River leaves the Mississippi, and running down between the two rivers, with the said rivers as boundaries on two sides, for the above quantity.

"It is further ordered, adjudged, and decreed that, in case said lands, so claimed by said petitioner, or any part or portion thereof, shall have been sold by the United States, or otherwise disposed of, said petitioner, Michael Moore, shall be, and is hereby, authorized to enter in any land-office in the state *of Louisiana, in parcels conformable to sectional divi-
sions and subdivisions, a like quantity of public lands, [*214
after the same shall have been offered at public sale.

"And it further appearing that Thomas Butler and John Black hold their lands by title acquired from the United States, it is ordered, adjudged, and decreed, that they be quieted in their titles, and that the petitioner recover nothing from them.

"And that judgment, *pro confesso*, be entered against John Hagan, Charles W. Hopkins, and H. L. Williams, A. Ledoux, and A. Miltenberger, they not having answered the petition filed in this case.

"Judgment rendered June 28th, 1848.

"Judgment signed June 30th, 1848.

(Signed,) THEO. H. MCCALEB, [Seal.]
United States Judge."

From this decree, the United States appealed to this court.

It was argued for the appellants by *Mr. Crittenden*, Attorney-General, who insisted that the claim was fraudulent and void.

1. The claim is not founded on any grant, concession, warrant, or order of survey; and so not within the statute which authorized claimants to institute suits against the United States.

It is simply a receipt for money paid into the treasury of Spain by Iriarte, for land which he desired to purchase; the description of the land is the sole act of Iriarte himself, not founded on any previous act of the officer of Spain for the Province of Louisiana, who was authorized to make grants, concessions, warrants, and orders of survey; nor is it sanctioned and ratified by any subsequent act of grant, concession, warrant, or order of survey, to define the boundaries and sever the land from the public domain. By our own laws, any person may deposit in the treasury of the United States, for the purchase of the land he desires to make, and take the trea-

surer's receipt therefor. But that receipt confers no right or interest in the land which is described by the depositor. He must thereafter apply to the proper officers of the United States, who are entrusted by law to make sales of the public lands and carry them into grant. It would not do for such depositor to stop at his deposit of money in the treasury, omitting all the subsequent means required by law, in order to obtain a title to the lands mentioned in the treasurer's receipt. If such a depositor should hold such a receipt for thirty or forty years, and then claim the land mentioned in the receipt, his claim would be pronouneed ridiculous and absurd.

*215] *The claim of Moore, founded upon the simple receipt produced, unaccompanied by any authoritative act, previously or subsequently had and done, to signify a grant, concession, warrant or order of survey, is ridiculous and absurd. The letter of O'Donnell, Governor and Captain-General of Cuba, introduced by the petitioner, shows that the receipt is not of itself a grant, concession, warrant, or order of survey.

2. The petition contains no excuse whatever; no reason for the delay, for the laches and neglect, for the length of time during which Iriarte and those claiming as assignees under him have slept upon this receipt, without claim, enjoyment, or effort to enjoy the land claimed under it.

The petition, by the express command of the statute under which it was filed, is to be governed and conducted according to the rules of a court of equity. And, as the bill alleges no excuse for the great laches, inactivity, and neglect, it is bad upon general demurrer. *Bowman & others* v. *Wathen & others*, December term, 1843, 1 How., 193; *Maxwell* v. *Kennedy's Heirs*, December term, 1840, 8 Id., 221, 222. In these two cases various decisions upon the subject are cited.

From 11th September, 1797, to the filing of this petition, on 17th June, 1846, (a period of forty-eight years and more,) this claim slept, without any attempt to obtain a survey, without any possession, without any claim known or heard of in Louisiana. It was first stirred in Madrid, in the year 1835, by Moreno; sent to Havana, and passed from hand to hand there, until Michael Moore became assignee, without date, and asserted the claim in the year 1846.

That this receipt was suffered to sleep for such a great length of time, without one single effort to obtain the land, lays the foundation for the legal presumption that it has been in some way compensated and cancelled. Its discolored, cancelled, cut, and carved condition is but ill accounted for by the witness Campo, who seems not to understand the meaning of quarantine. This document, A, was in Madrid, and

upon the petition of Moreno, was there assigned and acknowledged by Iriarte; certified there; thence inclosed in a letter by Moreno to Fernandez & Co., at Havana, and never returned to Spain. That document sent *from* Spain should, by "the officers in quarantine *in Spain*," be immersed in vinegar, and cut to make the vinegar penetrate more easily, "in order to prevent the spreading of infectious diseases," is reversing the order and regular course of things. Vessels ariving in Spain are subjected to quarantine by the officers of quarantine in Spain. But that the officers in Spain should immerse in vinegar, and cut, to make the vinegar penetrate more easily, this receipt to be sent from Spain, and *that "all the documents from Spain are cut in like manner," is a tale not [*216 credible because of the swearing of Jose Martinez del Campo.

Iriarte was resident in Louisiana at the date of the receipt, and for years after. If in the beginning the receipt was true, good, and effectual, and had not, by some after transaction, become of no effect, why did Iriarte, from 1797 to 1835, sleep upon his right, neglect to pursue his claim, and totally fail to seek the enjoyment of that which was his own?

The legal presumption in courts of law and in courts of equity, arising out of such laches, inactivity and supineness for such a great length of time, is that this receipt may have been for a bill, order, or note never paid; or that the money had been withdrawn from the treasury; or that the half-yearly tribute of two and a half per cent. upon the value of the land, and eighteen per cent. for transporting it to Spain, was found too onerous by Iriarte, and therefore he abandoned his claim to the land, refused or neglected to pay the half-yearly tribute, cancelled his intended purchase, or refused to complete it; or that, by some means or other, now forgotten in the lapse of such a great number of years, this receipt was compensated, extinguished, and abandoned.

That legal presumption "stands upon a clear principle, built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him."

"Upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, where the circumstances are incapable of raising anything like belief, instead of belief, (which is the foundation of the judgment upon a recent transaction,) the legal presumption holds the place of particular individual belief."

"Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights,

have recourse to some general principle to take the place of individual, specific belief."

After twenty years, this presumption will hold unless repelled by something to excuse and account for the failure for so many years to seek to enjoy what is his own. *Hillary* v. *Waller*, 12 Ves., 265, 266.

3. This petition was not presented to the court within the two years prescribed by the statute under which it professes to have been filed.

4. The description of the land mentioned in the receipt is too vague and indefinite.

As these two last points are not involved in the opinion of the *court, the arguments of the Attorney-General in *217] support of them are omitted.

Mr. Justice CATRON delivered the opinion of the court.

The petition states, that about the 11th September, 1797, Antonio Yriarte, a resident of the Province of Louisiana, for the sum of 24,708 reals by him paid, purchased from the proper authorities under the government of Spain, to wit: Juan Ventura Morales, the Intendant of the Province of Louisiana, and Gilbert Leonard, the Treasurer of said Province, sixty thousand arpens of land, &c., all of which more fully appears from the annexed certificate, signed by the said Morales, Leonard and Carsetano Valdes, secretary of the Intendant, acknowledging the receipt of the consideration and the sale of the land above expressed.

The first question arising on this statement of facts is, whether the paper exhibited affords any evidence that the "proper authorities" of Spain sold the land to Yriate, as this party can only sue for lands claimed by virtue of any French or Spanish grant, concession, warrant, or order of survey, "legally made."

His petition alleges that the land was purchased on the 11th September, 1797, from Morales, the Intendant, and Leonard, the Treasurer of the Province. The act positively requires that the date of the sale, concession, &c., shall be set forth, and by whom it was made, in order that it may be seen whether the officer making the concession, or sale, had power to do so, at the time it was done; and here, the question of power existing in the Intendant is raised by an allegation of the fact, and a denial in the answer. Undoubtedly, Leonard had no authority to sell, or distribute by donation, any part of the public domain; but this would be of no consequence if Morales had such power. When the paper exhibited bears date, a controversy existed between the Intendant Morales and the

political and military Governor of Louisiana, as to which of them appertained the power to sell and distribute the King's domain, the Intendant claiming authority under the laws of the Indies, and the Governor relying on a royal order of August, 1770. The following historical account will best explain how the matter stood in 1797, when (as is alleged) this sale was made.

O'Rielly, by commission dated 16th April, 1769, was appointed Governor and Captain-General of Louisiana, with "special power to establish in this new part of the King's dominions, with regard to the military force, police, administration of justice and finances, such a form of government as might most effectually secure its dependence and subordination, and promote the King's service and the happiness of his subjects. 2 Mart., 2.

*Unzaga, colonel of the regiment of Havana, who had come with O'Rielly, had a commission as Governor; [*218 but was not authorized to enter upon his duties until the departure of O'Rielly, or the declaration of his will. On the 1st December, 1769, O'Rielly made the declaration, and Unzaga assumed the functions of Governor. 2 Mart. (La.), 13.

On the 18th February, 1770, O'Rielly made the regulations relating to the granting of land, known by his name. The 12th article declares that all grants shall be made in the name of the King by the Governor-General of the Province. 2 White's Recop., 230.

A royal order of the 24th August, 1770, states, that O'Rielly had communicated the regulations made by him to his government, and these declaring that the granting of land had been confided by His Majesty to the Governor and Comisario Ordenador, he considered it would be better in future, that the Governor alone should be authorized by His Majesty to make those grants. The order to the Governor then proceeds: "The King having examined these dispositions and propositions of the said Lieutenant-General, approves them, and also, that it should be you and your successors in that government only, who are to have the right to distribute the royal lands, conforming in all points, as long as His Majesty does not otherwise dispose, to the said instructions, the date of which is 18th February of this present year." 2 White's Recop., 460.

The Governors who succeeded Unzaga were, Galvez, colonel of the regiment of Louisiana, to whom Unzaga, when he was appointed Captain-General of the Caraccas, was directed to surrender the government provisionally, by a *cedula* of 10th

231

July, 1776.—Galvez entered on the duties of his office 1st January, 1777. 2 Mart. (La.), 39.

Miro succeeded Galvez; the government of the province being provisionally vested in him on the departure of Galvez in 1782. 2 Mart. (La.), 68.

Carondelet was promoted from the government of San Salvador, and entered on his duties 1st January, 1792. 2 Mart. (La.), 81.

Gayoso, the commandant at Natchez, succeeded Carondelet in the beginning of 1797. 2 Mart. (La.), 149. His regulations for the administration of posts and distribution of lands, are dated 9th September, 1797.

So far as we have seen, the exclusive authority vested in the Governors to make grants, stood unrevoked up to this time. But on the departure of Rendon, who had been Intendant in 1796, the functions of Intendant devolved on Morales, who had been contador. 2 Mart. (La.), 131. Morales, thus Intendant *ad interim*, in a letter to Governor
*219] Gayoso of the 29th August, 1797, *(a few days before the latter issued his regulations), claimed the right to grant the lands. 2 White's Recop., 470. Gayoso declined to yield, but "resolved to submit the question to higher authority, and to allow no innovation until the resolution of His Majesty be made known." 2 White, 470, 471. Morales also wrote a long letter to Spain on the subject.

A royal order of 22d October, 1798, addressed to Gayoso, states the receipt of his and Morales's communications "respecting the right of granting and distributing royal lands in the district under your command, which right has been vested in the political and military Governor since the order of August 24, 1770," and proceeds thus: "The King has resolved for the sake of the better and more exact observance of the 81st article of the royal ordinance for Intendants of New Spain, that the exclusive faculty of granting and distributing lands, of every class, shall be restored to the Intendancy of the province, free from the interference of any other authority, in the proceedings as established by law, consequently the power hitherto residing in the government to those effects is abolished and suppressed, being transferred to the Intendancy for the future." 2 White's Recop., 478.

The royal order was communicated from Spain to Morales on the same 22d October, 1798. In the communication to Gayoso, and that to himself, Morales is styled Intendant *ad interim*.

The royal order seems to have reached Morales in February, 1799, before it did Gayoso. Some correspondence then took

place between them, and Morales became vested with the power of making sales and grants. 2 White, 478–484. He issued his regulations 17th July, 1799. Id., 234.

It will thus be seen, that the authorities in Spain considered the royal order of 24th August, 1770, as of force up to February, 1799. The language is too plain to admit of a doubt. The preamble of Morales's own regulations states, that the power to grant was vested in the military and political government, from 24th August, 1770, to 22d October, 1798.

To the same effect is the report of Pintado, dated at Havana in 1822, respecting lands in Florida, communicated to our government. 2 White's Recop., 339. See, also, 2 Mart. (La.), 158.

At the date of the receipt to Yriarte, 11th September, 1797, the question between Gayoso and Morales had not been settled by the King. In fact, it was only a few days after he had addressed the first letter to Gayoso on the subject.

In the correspondence of Morales and Gayoso and the authorities in Spain, he refers to the eighty-first article of instructions to Intendants, as giving some foundation for his claim. The instructions were dated in December, 1787. 1 White's *Recop., 360. They will be found more at length in 2 White, 67, and it will be seen to apply only [*220 to twelve intendancies thereby created and expressly named in New Spain; it did not apply to Louisiana. This article seems not to have been sent to Louisiana, or been known there until Morales brought the question up in 1797. The royal order of 1798, transferring the power to distribute the land for the future, is conclusive that the eighty-first article had no application to Louisiana.

Some of the governors acted also as Intendants; but that would not alter the power conferred. It was in their capacities as governors they were authorized to make grants, and not as superintendents of the finances.

The first Intendant seems to have come to the country with O'Rielly. His name was Francisco de Loyola. 2 Mart. (La.) 2. He died in 1670, and was succeeded by Gayaree, as Intendant, *ad interim*. 2 Mart. (La.), 21.

Unzaga had the office of Intendant united to that of Governor. 2 Mart. (La.), 34. Galvez, when appointed Governor was also appointed Intendant. 2 Mart. (La.), 39. During the time he was engaged in the expeditions against the British possessions in West Florida, he had no time to bestow on fiscal affairs, and Martin Navarro was appointed Intendant in the beginning of 1781. 2 Mart. (La.), 54. He left the province for Spain in 1788, and the two offices were again united.

in the person of Miro. 2 Mart. (La.), 180. Carondelet was Intendant as well as Governor. 2 Mart. (La.), 111. On his representation the office of Intendant was separated from that of Governor, and Francisco de Rendon, who had been the Secretary of the Spanish Legation in the United States, was appointed, and arrived in New Orleans in the beginning of 1794. 2 Mart. (La.), 122. Rendon was afterwards sent to Zacatecas, and Morales was appointed *ad interim*, 1796. 2 Mart. (La.), 131.

Thus it appears that Morales in his letter of August 29th, 1797, to Governor Gayosa de Lemos, claimed the right to sell, distribute, and grant the public lands; and insisted that the Governor should not oppose the intendancy in the free and open jurisdiction appertaining to it, and with which no one had a right to intermeddle. And, on the next day, (30th August, 1797), the governor replied that, as discussion of the question would embarrass the King's service, and as the Intendant claimed cognizance of causes respecting sales, agreements, and distributions of royal lands, he resolved to submit the question to higher authority, "and to allow no innovation until the resolution of his majesty be made known."

The Governor having partly shrunk from the contest, it is highly probable that the Intendant did assume to make the sale set forth by the receipt, which bears date twelve days after the *Governor's letter. As no authority existed *221] in the Intendant to deal with the King's domain from 1769, when Spain first got possession of Louisiana, up to the date of the King's order, made in October, 1798, it is manifest that Morales had no power to sell in September, 1797; and there is no evidence that the King sanctioned this sale, nor can it be inferred from any thing appearing in the case. We think the contrary is apparent.

In 1797, Yriarte resided at New Orleans, and continued in this country for ten years or more, as Blache states, and then removed to old Spain. He resided at Madrid, when he transferred the receipt to Moreno in 1835. Yriarte never took possession of the land claimed, nor did he take any further step to secure the property.

By the regulations of O'Rielly, made in 1770, and sanctioned by the King, Yriarte was compelled, if he was owner, to make mounds or levees in front of his land on the banks of the Mississippi, and also to clear and ditch the whole front of the depth of two arpens within three years from the date of his purchase; and, in default of fulfilling these conditions, the land was to revert to the King's domain and be granted anew. Neither could he sell until after three years' posses-

sion, and until the above-mentioned conditions were entirely fulfilled; and, says the third regulation, "To guard against every evasion in this respect, the sales of said lands cannot be made without a written permission from the Governor-General, who will not grant it, until, on strict inquiry, it shall be found that the conditions above explained have been duly executed." That is to say, no sale could be made or formal title issued, until these conditions were complied with.

The land claimed fronted on the Mississippi River for twenty miles and more, and on the great western outlet, the Atchafalaya, to an equal extent; and, if no mounds were made, the country below must have been overflowed every year to a ruinous extent. Levees were indispensable; their construction was a high public policy, and forfeiture an inevitable necessity, in case of failure. These were laws and ordinances of the government under which the claim originated, and which the act of 1824 instructs us to observe; the Spanish government was not bound to complete the title; but, on the contrary, under a necessity to declare it forfeited. This is plainly manifest. Even admitting that Morales, as Intendant, had full power to make the sale, still forfeiture was inevitable. Under these circumstances it is idle to assume that Morales's act of sale received any sanction from the King of Spain, or from any one exercising his authority.

Embarrassed as Yriarte was with the want of power in Morales to sell, and the stringency of O'Rielly's regulations compelling *him to occupy, clear, ditch, and levy, a necessity was imposed on him to surrender his purchase and have his money refunded; and there are several reasons apparent why we think he did so. In the first place, he labored under no disability or impediment; he remained quiet, never took possession, nor asked for a survey up to the change of flags in 1804; nor did he ask for a confirmation of Morales's void act from the Spanish authorities. And, after the United States assumed jurisdiction, boards of commissioners almost constantly existed before which his claim could have been presented, and through them, reported to Congress for political action thereon; yet no step was taken, and the claim slept in the hands of Yriarte until 1835, when he sold it in Madrid; and it first made its appearance in this country, when presented to the District Court, in June, 1846. When there adduced in evidence, the receipt was cut in gashes and stained, having the appearance of a neglected, valueless, and cancelled paper. To account for its appearance, one Campo deposed for plaintiff, that, in his opinion, the cut and dilapidated condition of the document grew out of this fact: [*222

"that the officers of quarantine in Spain, in order to prevent the spreading of infectious diseases, immersed documents in vinegar, and cut them in this manner. This was in order to make the vinegar penetrate more easily, and this he thinks has been the case with the document in question, and, therefore, its discolored and cut appearance." He further states, "that all the documents from Spain are cut in like manner; that he has often seen them; he has in his possession letters cut in the same way."

This was obviously a private receipt held by Yriarte, and carried by him to Spain; and as the money he had paid in Louisiana went to the royal treasury and was transmitted to Madrid as the receipt shows, the fair presumption is, that when the receipt was there presented, and the money refunded, the marks of cancellation were made by cutting the paper in gashes, as no reason can be perceived why the holder would thus deface his own document; nor can it be imagined why a mere sheet of paper should be thus cut to let in an acid, if such practice prevailed, which we suppose, however, to have no foundation in fact, as witnesses in abundance could have been produced to support this improbable account, if it were true that all documents, coming from Spain, are cut in like manner and stained with vinegar.

We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time.

The party was under no disability, and slept on his rights, as he now claims them, for nearly fifty years, without taking
*223] a *single step. He makes no excuse for his long delay, and cannot now get relief by having his title completed.

No case has come within our experience, where the obscurity and antiquity of the transaction more forcibly than in the present case, required a court of equity to bar a complainant on legal presumptions founded on lapse of time; and where the bar should take the place of individual belief.

The government had taken possession, and had sold out these lands to a great extent, and was bound in good faith to protect its vendees; that these private owners could have relied on the lapse of time, and defeated the claim set up, is clear; and on principle, their vendor could do so likewise.

Even had this claim been adjudged valid by this court, still the decree below is in part erroneous. The part referred to is as follows: "It is further ordered, adjudged, and decreed, that, in case said lands so claimed by said petitioner, or any part or portion thereof, shall have been sold by the United

States, or otherwise disposed of, said petitioner, Michael Moore, shall be, and is hereby, authorized, to enter in any land-office in the state of Louisiana, in parcels conformable to sectional divisions and subdivisions, a like quantity of public lands, after the same shall have been offered at public sale."

By the act of 1824, it is provided that if it shall so happen that the lands decreed to any complainant "shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity on other lands." Here the decree is general against the United States, and awards to complainant floating warrants for all lands that the United States may have sold, or otherwise disposed of within the bounds of the tract decreed. The act requires the names of all persons claiming the land sued for, or any part of it, to be set forth in the petition, and that they shall be made defendants in due form by citation; and if the entire tract is claimed by private persons, then they shall be sole defendants; but if the government is owner in part, or of the whole, then this fact shall be stated, and the attorney of the district must be served with process, and be allowed to answer for the United States. The purpose of Congress was first, to authorize a suit against the United States; and, in the next place, to give judicial cognizance of a description of incipient claims having no standing in a court of justice before the act was passed; and, thirdly, that the petitioner should be bound to sue private persons, claiming the same land, so that those having an interest, and better knowledge of facts, and more capacity to defend, than the United States, might be drawn into the contest; and that they should be compelled to produce their title, so that if a *decree was made for complainant, the court could ascertain what part of the land should be granted to him by patent; and as this could only be done by a specific ascertainment of interfering claims, the decree must of necessity specify their boundaries and quantities. Nor can it stop here; it must adjudge that a warrant shall issue, and be subject to location. This decree is not only in general terms, but it is contingent, that in case all the lands claimed, or any part or portion of them, have been sold or otherwise disposed of by the United States, then the petitioner shall be authorized to enter a like quantity, &c. [*224

The District Court, as we apprehend, did not proceed to adjudge other lands as an equivalent, on the act of 1824, as it originally stood, but on amendatory and repealing clauses found in the 8th section of the act of May 23d, 1828, extending the law to Florida; and especially to the 2d section of the act of 24th May, 1828, giving further time to claimants in

Missouri and Arkansas to institute suits; both of which clauses declare that so much of the act of 1824 as requires petitioners to make adverse claimants parties to the suit shall be, and are thereby repealed. The act of 24th May, 1828, contains various other provisions; some of which modify, and others repeal parts of the act of 1824.

The act of June 17, 1844, provides that so much of the act of May 26, 1824, as relates to the state of Missouri is thereby revived and re-enacted; and the same jurisdiction is given to the District Courts of Arkansas, Louisiana, Alabama, and Mississippi, as was exercised under said act in Missouri; with the exception of that part of the act (being section 14 and 15) that applied exclusively to the territory of Arkansas, which only allowed claims of a league square, and under, to be adjudicated. The thirteen previous sections stand incorporated in like manner as they would be, if they had been copied into the act of 1844. No language to this effect, could make it plainer; any attempt to incorporate likewise the act of 24th May, 1828, into that of 1844, would not only be a forced construction, but a manifest perversion. It follows that the law as found in the thirteen first sections of the act of 1824, furnishes all authority the District Court had, to proceed, and to decree an equivalent; and, that the true mode of proceeding, according to the law as it stands, is as above stated, we suppose to be not open to controversy.

This view of the act of 1844 was very forcibly presented to us by the Attorney-General in the case of the *United States* v. *Boisdoré's Heirs*, coming up from Mississippi, 11 How., 77, but as we then apprehended that no similar irregularity might again occur, no notice was taken of it in the opinion, dismissing the cause on its merits.

*225] * Being of opinion that this cause is destitute of merits, it is ordered that the decree of the District Court be reversed, and the petition 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 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 District Court in this cause be, and the same is hereby, reversed and annulled, and that this cause be and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimants.

238

Wyllys Lyman, George P. Marsh, John Peck, and John H. Peck, Plaintiffs in Error, *v.* The President, Directors, and Company of the Bank of the United States.[1]

Where persons were indebted to a bank and gave their promissory note for the amount of the debt, the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were questions for the jury.[2]

All the notes having been paid except the last, and the action not being

[1] Reported below, 1 Blatchf., 297.

[2] The acceptance, by the creditor, of a negotiable note, does not extinguish an antecedent debt, in the absence of an agreement between the parties that it shall have such effect. *Peter* v. *Beverly*, 10 Pet., 532; *Bank of United States* v. *Daniel*, 12 Id., 33; *Bank of United States* v. *Beverly*, 1 How., 134; *Downey* v. *Hicks*, 14 Id., 249; *Weed* v. *Snow*, 3 McLean, 265; *Allen* v. *King*, 4 Id., 128; *Kimball* v. *The Anna Kimball*, 2 Cliff, 4; s. c. 3 Wall., 37. Such is the rule in Alabama. *Marshall* v. *Marshall*, 42 Ala., 149; *Graves* v. *Shulman*, 59 Id., 406. S. P. *Re Hurst*, 1 Flipp., 462; *Morris* v. *Harvey*, 75 Va., 726; and Arkansas, *Brugman* v. *McGuire*, 32 Ark., 733; and Connecticut, *Wright* v. *Lawton*, 37 Conn., 167; and Georgia, *Phillips* v. *Bullard*, 58 Ga., 256; but see *Thweatt* v. *State*, 66 Id., 673; and Illinois, *Archibald* v. *Argall*, 53 Ill., 307; *Wilhelm* v. *Schmidt*, 84 Id., 183; and Indiana, *Hill* v. *Sleeper*, 58 Ind., 221; *Little* v. *Amer. Button-Hole, &c. Co.*, 67 Id., 67; and Michigan, *Brown* v. *Dunckel*, 46 Mich., 29; and Mississippi, *Guion* v. *Doherty*, 43 Miss., 538; *Wadlington* v. *Covert*, 51 Id., 631; but see *Lean* v. *Friedlander*, 45 Id., 559; and in Missouri, *Doebling* v. *Luce*, 45 Mo., 150; but see *Ames Packing, &c. Co.* v. *Tucker*, 8 Mo. App., 95; and New Jersey, *Middlesex* v. *Thomas*, 5 C. E. Gr., 39; *Swain* v. *Frazier*, 8 Stew. (N. J.), 326; and Ohio, *Emerine* v. *O'Brien*, 36 Ohio St., 491; and Pennsylvania, *League* v. *Waring*, 85 Pa. St., 244; but see *Cake* v. *Lebanon Bank*, 86 Id., 303; and West Virginia, *Feamster* v. *Withrow*, 12 W. Va., 611.

But in Massachusetts, it will be presumed such was the intention, until such presumption is repelled by evidence. *Hudson* v. *Bradley*, 2 Cliff, 130; *Kimball* v. *The Anna Kimball*, Id., 4; *Re Clap*, 2 Low, 226, 230; *Amos* v. *Bennet*, 125 Mass., 120; *Swett* v. *Southworth*, Id., 417; *Brigham* v. *Lally*, 130 Id., 485; but see *Lord* v. *Bigelow*, 124 Id., 185; *Lowell* v. *Williams*, 125 Id., 439; and such is also the law in Maine, *Ward* v. *Bourne*, 56 Me., 161; *Mehan* v. *Thompson*, 71 Id., 492; but see *Hussey* v. *Sibley*, 66 Id., 192; and Iowa, *Farwell* v. *Salpaugh*, 32 Iowa, 582; and North Carolina, *Currie* v. *Kennedy*, 78 N. C., 91; and in Wisconsin, *Mehlberg* v. *Fisher*, 24 Wis., 607; but see *Hœflinger* v. *Wells*, 47 Id., 628.

In New York the acceptance of a note has the effect of extending the time of payment, and until the note becomes due the creditor cannot enforce the collection of the claim. *Happy* v. *Mosher*, 48 N. Y., 313; but see *Nidig* v. *Nat. City Bank*, 59 How. Pr., 10; *Board of Education* v. *Fonda*, 77 N. Y., 350; *Nat. Bank* v. *Wells*, 79 Id., 498. S. P. in Rhode Island, *Wilbur* v. *Jernegan*, 11 R. I., 113; *Nightingale* v. *Chaffee*, Id., 609.

The following cases hold that if the note is one governed by the law-merchant, its acceptance will be presumed to extinguish a pre-existing indebtedness of the maker to the payee; but if not governed by the law-merchant the note will not have such effect, unless by express agreement. *Alford* v. *Baker*, 53 Ind., 279; *Smith* v. *Beltger*, 68 Id., 254; *Teal* v. *Spangler*, 72 Id., 380; *Weston* v *Wiley*, 78 Id., 54.

brought upon the note but upon the original consideration, the bank was not bound to bring the prior notes into court: the presumption of law was, they had been given up by the holder at the time of payment. If the fact was not so, the burden lay upon the defendants to show it.

So also, a part of the consideration being the purchase of real estate, the bank was not bound to prove the execution and delivery of proper conveyances to the defendants. Having given their notes for the purchase-money, the court was bound to presume that they were satisfied with the conveyances. If not, it was their duty to show it.

Where the bank had become insolvent and had made an assignment of its effects to trustees for the benefit of its creditors, the bank was allowed to sue in its own name at the instance, and for the benefit of creditors, and the case was the same as if the law permitted the suit to be brought, and the same had been brought, in the name of such trustees.

Although the bank had indorsed a note amongst its other assets to its trustees, yet under the circumstances it could maintain a suit upon the note, because,

Where a party who is the holder of a note has transferred it for purposes of collection, and it is not paid but is found in the possession of the original holder, he can recover, as he is remitted to his original rights, notwithstanding the indorsement; and if the note is not paid, the plaintiff may give it up and recover upon the original consideration.

Before the defendants became indebted to the bank, the bank had made a compromise of certain claims, which, amongst others, were the subject of the sale by the bank and purchase by the defendants. Two of the defendants had knowledge of the conditions of this compromise, and their knowledge must be considered as extending to the other defendants. It was a question for the jury to determine what the defendants purchased.[1]

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

*226] *It was a suit brought by the Bank of the United States, under the following circumstances:

During the existence of the charter granted by Congress to the Bank of the United States, it had established a branch of that institution at Burlington, in the state of Vermont. The Bank, when chartered by Pennsylvania, became the owner of the property and effects of the former corporation, and of course of the property and effects of the branch at Burlington. Being about to close and withdraw that branch, the board in Philadelphia received the following offer:

To the President and Directors of the Bank of the United States.

John Peck and Lyman and Marsh and others, propose to purchase of the Bank of the United States the property of the office at Burlington, Vt., as it was upon the 2d day of March, 1836, upon the following terms, viz.:

Bills discounted, 2d March, 1836,	$70,121 01	
Bills receivable, same date, . .	2,133 46	
		$72,254.47

[1] See *Proctor* v. *Baldwin*, 82 Ind., 374.

With average of interest.			
McIntire & Burdick's debt, . .	$24,128.12	At the face.	
McIntire & Blood's debt, . .	2,000.00		
Blood & Burdick's debt, . .	1,600.00		
McIntire & Bean & Rolfe's debt, .	3,000.00		
Gates & Co.'s debts, . .	23,795.28		
			54,523.40
Suspended debt, ...			5,000.00
Banking-house and appurtenances, and house and lot in Vergennes. . .			10,000.00
			$141,777.87

To be paid in four or five annual instalments, with 5 per cent. interest, and such security given as shall be satisfactory.

JOHN PECK, *for himself and others.*

Philadelphia, 10th March, 1836.

The offer was accepted, and the plaintiffs in error signed four joint and several notes, dated on the 1st of April, 1836, payable to the order of Mr. Jaudon, cashier, at the Union Bank, in the city of New York. Each note was for $35,500 dollars, and they were payable one, two, three, and four years after date. Separate notes were given for the interest payable at intervals of six months, and the small balance remaining being paid in cash.

When the first note was becoming due, Peck & Co. were not prepared to pay it, and requested the bank to discount other paper for them to the amount of $15,000 to place them in funds; *and amongst this other paper was a note by Lyman & Cole for $5000, which was indorsed over to the bank by Peck & Co. The bank having acceded to this proposition, the first note was given up as paid, as was also the second and third when they became due. The note by Lyman & Cole, however, was not paid, and constituted one of the items of this suit. [*227

By reference to the above list of assets, it will be perceived that the "suspended debt" is valued at $5000. Two of these items were brought forward in the bill of exceptions, and are noticed in the opinion of the court. It is proper, therefore, to give the following explanation of the matter, copied from the brief of Mr. Phelps:

Among the items of the suspended debt sold to the defendants for the sum of $5000, the nominal amount being over $26,000, were two sums standing upon the books of the bank in the list of suspended debts, as due from one Burrows, and

from the firm of Truesdell & Co. The debt of Truesdell & Co. had been compromised by the payment of fifty per cent., so that the balance of 50 per cent., which stood upon the books of the bank at the time of the sale to the defendants, was not due. The amount paid by Truesdell & Co. had been deducted from the original debt, so that the sum apparently due was only the remaining half.

The Burrows debt had also been compromised, and was in a similar condition, except that the sum to be paid by him under the compromise had not been paid.

The compromise of the debts against Truesdell & Co. was made by the directors of the branch, with the approbation and concurrence of the parent board. At the time when this was done two of the defendants were directors of the branch, and acted in the matter.

The directors of the branch were directed by the parent board to make semi-annual returns, showing the condition of the branch, the suspended debts, &c. Two of these returns, signed by two of the defendants as directors, show the precise condition of these debts. They being marked with the letter D, signifying desperate, and a note being appended, showing that the apparent balances were not due. These transactions took place long before the sale to the defendants. The defendants claim that they should be indemnified for the amount of these apparent debts not really due.

In October, 1849, the bank brought suit against Peck & Co., in the Circuit Court of the United States for the District of Vermont. The declaration contained the usual money counts, an account stated, and also counts for the original consideration of the notes. The defendants pleaded the gen-
*228] eral issue and statute of *limitations. At the trial the jury found a verdict for the plaintiff at $21,621.47, and costs.

In the course of the trial several exceptions were taken to the admissibility of evidence, and upwards of one hundred pages of printed matter were incorporated into, and made part of, the bill. It is obvious, therefore, that the whole of it cannot be inserted.

To sustain the issue, on the part of the plaintiffs, the counsel for the plaintiffs offered in evidence the testimony of Lloyd Mifflin, John Ramsey, Samuel Jaudon, and Thomas B. Taylor, with the several papers and exhibits thereto attached, and referred to in their testimony, which testimony was taken under a commission issued from this court, and which testimony, papers, and exhibits, are on file in said suit, and are hereby referred to, and incorporated with, and made part of, this bill

of exceptions, together with the promissory note, dated April 1, 1836, for thirty-five thousand five hundred dollars, payable to "Samuel Jaudon, Esq., cashier," or order, four years from date, at the Union Bank, in the city of New York, signed by the defendants; and the note for five thousand dollars, dated March 25, 1837, signed by Lyman & Cole, payable to defendants, or order, on the first day of June, 1837, at the Union Bank, city of New York, which promissory notes are also annexed to said testimony on file, as aforesaid, and are referred to, and made part of, this bill of exceptions.

To the reading of which testimony, exhibits, and notes, the counsel for the defendants made the following objections:

1. To the reading of the said thirty-five thousand five hundred dollar note, upon the ground that it was not payable to the plaintiffs but to Samuel Jaudon, and not indorsed by said Jaudon.

2. Objected to the "explanatory memorandum" upon exhibit B, referred to in, and annexed to, the deposition aforesaid of said Mifflin, on the ground that the defendants were not, nor either of them, parties to, nor in any way connected therewith.

3. To the testimony of said Mifflin, under the fifth interrogatory, tending to prove that the consideration of said thirty-five thousand five hundred dollar note moved from the plaintiffs, and the practice of the plaintiffs, in taking notes payable to the cashier; and to the testimony of said Jaudon, under the 7th, 8th, and 9th interrogatories, tending to prove that the plaintiffs advanced the consideration of the said thirty-five thousand five hundred dollar note, shown to said witness Jaudon, and the other notes referred to by him, given by the defendants at the same time, and that it was the property of the plaintiffs, and tending to prove the practice of the plaintiffs in taking notes thus payable; and also to all the evidence tending to prove the same facts, on the ground that the legal effect of the note could not be varied or controlled by parol evidence.

*4. To the testimony of said Mifflin, under the 7th interrogatory, on the ground that neither parol evidence nor a copy of the instructions was the best evidence, and that the original should be produced; and objected to the evidence of said Mifflin, under the 8th interrogatory, on the ground that the original paper, sent to the Branch Bank at Burlington, should be produced. [*229

5. The defendants objected to the testimony of said Mifflin, under the 10th interrogatory, tending to prove the signature of Wyllys Lyman to paper or exhibit marked E, on the ground

that neither the acts of Lyman, done by him in his official capacity as director of the Branch Bank at Burlington, nor any knowledge derived by him in the performance of his duties as such director, could affect the other defendants, or in any way affect the rights of the defendants in this action; and also claimed that, if admissible, it would be evidence only against Lyman. But the court overruled the objections, and admitted the evidence generally, so as to affect all the defendants.

6. The defendants objected to the evidence of said Ramsey, under the 6th interrogatory on the direct examination, relating to the ability of Silas E. Burrows, on the ground that the solvency or insolvency of said Burrows was immaterial, and also on the ground that the testimony of the witness, as given in his answer, is not legal evidence, tending to prove the inability or insolvency of said Burrows; the witness (as defendants insisted) stating no facts, but inferences merely.

7. The defendants objected to the testimony of Samuel Jaudon, under the third interrogatory, on the ground that the doings of the corporation, (parties to the sale,) could not be proved of parol.

8. The defendants objected to the evidence of said Samuel Jaudon, under the 10th, 11th, 12th, and 13th interrogatories, on the ground that the same is irrelevant and immaterial, and on the ground that the power to negotiate the note or transfer the legal interest therein, is matter of law, and not a subject-matter of proof.

9. The defendants objected to the testimony of said Jaudon, under the 17th interrogatory on the direct examination, on the ground that the contract was in writing, and that parol evidence was not admissible. The court overruled all the objections, and the evidence was read to the jury.

All the depositions and schedules, exhibits and papers, thereto annexed, above mentioned, were read in evidence to the jury. The plaintiffs also introduced as a witness, Morton Cole, one of the signers of the five thousand dollar note aforesaid, whose testimony proved that said note last aforesaid was executed by himself and Lyman, the other maker, as an accommodation note, that is, without consideration, and for the accommodation of the payees in said note.

*230] *The plaintiffs also introduced a copy of the charter of the Bank of the United States, by the state of Pennsylvania, which is referred to as part of the case; and also introduced a letter from John Peck, dated May 30, 1844, which is also referred to as part of the case.

The defendants introduced the paper hereto annexed, and

made part of the case, (marked X), together with the testimony of Charles F. Warner, whose testimony proved that said paper was in the handwriting of Thomas Hockley, who is mentioned in the depositions introduced by the plaintiffs, and that said Hockley died in November, 1836, and continued to act as the agent for the plaintiffs, in the matters relative to the Branch Bank at Burlington aforesaid, up to the time of his death; and the defendants claimed that this paper was furnished to them, (at the time of the sale by plaintiffs to defendants), by said Hockley, as agent of the plaintiffs, as a list of the debts embraced in said sale, and that they bought, relying on that and the paper (marked O) annexed to the deposition of John Ramsey, and referred to in his answer to the third and fourth and fifth interrogatories by defendants, as furnished to defendants by said Ramsey, on behalf of plaintiffs, at the time of said sale, and on the faith of which they made the purchase, as defendants claimed.

The plaintiffs also introduced evidence, tending to prove that this suit was prosecuted by the consent and by direction of Robertson and others, trustees.

No other evidence was introduced on either side.

The plaintiffs claimed to recover the amount of the balance of the account annexed to the deposition of Thomas B. Taylor, (marked W), and interest thereon, from the first of January, 1846, to the time of trial; that is, $17,638.87, and interest thereon from January 1, 1846, to the time of trial.

The defendants' counsel insisted, and asked the court to instruct the jury,—

1. That upon this evidence the plaintiffs were not entitled to recover.

2. That the $35,500 notes, given for the original purchase, were payable to Samuel Jaudon and not to the plaintiffs, and that as the notes were not indorsed by Jaudon, there could be no recovery in this action, in respect of the notes upon any of the counts in the declaration; and that there was no evidence in the case tending to prove an account stated between plaintiffs and defendants.

3. That the notes given by defendants to Samuel Jaudon, as aforesaid, are *primâ facie* given in payment of the original purchase, and that, therefore, this action cannot be sustained in the *name of the plaintiffs, either upon the notes, or the consideration as evidenced by the notes, or upon [*231 the original contract of sale.

4. That if the notes were not to be treated as payment as matter of law, yet as the proof shows that the notes were given in payment, that the plaintiffs could not recover; and

if the court would not so instruct the jury, then to instruct them that if they should find that the notes were given and received in payment, then the plaintiffs could not recover.

5. That if the notes were not given in payment, yet, as it appears from the evidence that they were assigned to Robertson and others, before the commencement of the action, and are still the property of said Robertson and others, that the notes thereby operate as payment or an extinguishment or suspension of the original cause of action, and that such would be the effect if the jury so found the facts, and that in that event the plaintiffs could not recover.

6. That the plaintiffs cannot recover on the original contract or consideration, without bringing into court all the notes, or showing that such as are not brought into court have been given up to defendants, more especially as it appears that the notes were given payable to a third person, and have been assigned.

7. That there can be no recovery for the real estate without showing a conveyance to defendants by deed, or some conveyance of the real estate, and that as the plaintiffs had alleged a conveyance, the proof without evidence of such conveyance did not support the declaration, and that the payments made must be applied to the items of plaintiff's account, legally proved, and not to the items for real estate, unless found by the jury to have been specially made upon the items for real estate.

8. That the plaintiffs cannot recover upon the $5,000 note while it appears to have passed by assignment by plaintiffs to Robertson and others, indorsed in blank by defendants and Robertson and others, still the owners, and also for the reason that it appears to be indorsed to M. Robertson, and the legal title still in him and out of the plaintiffs.

9. The defendants' counsel also insisted and claimed, that if the plaintiff was entitled to recover, that the amount of the three securities or debts against J. Truesdell & Son, amounting to $4,884.48, and two securities or debts against Silas E. Burrows and J. Truesdell & Son, amounting to $2,536.86, contained in schedule as exhibit (O) referred to in the testimony of John Ramsey, should be deducted from the plaintiffs' claim, which securities or debts the plaintiffs claimed were purchased by defendants as subsisting and valid debts, and that they had been compromised and discharged by the plaintiffs; and asked the court to instruct the jury that if they

*232] should *so find the facts, to deduct the amount of such debts, or such or so much of them as they should find were so purchased by defendants, and compromised and dis-

charged by plaintiffs, from the amount of the plaintiffs' claim; and if the court did not so instruct them, then to instruct them to deduct so much as they should estimate the debts to have been worth at the time of such purchase, which were discharged by the plaintiffs; and that at all events the defendants were entitled to have deducted the amount or value of the note taken by plaintiffs in the compromise of the Burrows debt.

10. The defendants further insisted and asked the court to instruct the jury, that it was a question of fact for them to find whether the defendants, or either of them, had knowledge of the condition of these debts, or whether, at the time of the purchase, said debts, or either of them, had been compromised and discharged; and that if they should find that Wyllys Lyman and John Peck, or either of them, had knowledge of the condition of said debts, and that they had been compromised and discharged, or either of them, at the time of the purchase, and that they derived such knowledge by and while acting in their official capacity as directors, or as committee of said Branch Bank at Burlington, that such knowledge would not affect the other defendants, or defeat or affect the right of the defendants to have a deduction from the plaintiffs' claim on account of said debts as aforesaid.

The court refused to instruct the jury agreeably to the defendants' first request, to which the defendants tendered their exceptions, which are allowed and sealed by the court.

Upon the points raised in the second request by the defendants, the court charged the jury that the action was not brought, nor did the plaintiffs seek to recover upon the $35,500 notes, and that there could be no recovery upon said notes, as the same were payable to Samuel Jaudon, and had not been indorsed by him, and that the evidence did not tend to prove an account stated with the plaintiffs, but with Robertson and others, trustees, to whom the debt had been assigned, and who were the owners thereof at the time.

In answer to the third request of the defendants, the court refused to charge as requested, and charged the jury that the notes given at the time of the purchase were not *primâ facie* payment; that as the notes were given to Samuel Jaudon as agent of the plaintiffs, they were in judgment of law the property of the bank, and for this purpose the same as if given payable to the plaintiffs. That the note in one sense may be considered as *primâ facie* payment, until it reaches maturity. It suspends the remedy till then. To which refusal of the court to charge as requested the defendants tendered their

bill of exceptions, which is allowed, and signed and sealed by the court.

*233] *In answer to the fourth request the court refused to charge as requested by defendants, and charged the jury, that it was a question of fact for them to find, whether the notes were given and received in payment and satisfaction of the debt or original consideration, and that if so the plaintiffs could not recover. That in order to operate as a satisfaction, they must have been given and received as actual payment; that if goods are sold and bills receipted by the vendor "received payment by note," that is no payment; that means payment when the note is paid, and is not payment or satisfaction until such note is paid. That the rule is, that the giving of a note is no satisfaction of the original debt or consideration, unless there is an agreement that the note shall be in payment, and that the question in this case is, whether at the time of the purchase the parties superadded an agreement that the notes should be in satisfaction; if not, then they would not operate as a satisfaction. To which refusal of the court to charge the jury as requested, and to the charge as given, the defendants tender their bill of exceptions, which is allowed, and signed and sealed by the court.

The court refused to charge the jury as requested in the defendant's fifth request, and charged the jury that Robertson and others were assignees and trustees for the benefit of creditors, and held the debt for the benefit of creditors of the bank, and that the suit was instituted by the plaintiffs (the bank), at the instance and for the benefit of creditors, and the case is the same as if the law permitted the suit to be brought, and the same had been brought, in the name of such trustees. To which refusal of the court to charge the jury as requested, and to the charge as given to the jury, the defendants tender their bill of exceptions, and the same is allowed, and signed and sealed by the court.

The court refused to charge the jury as requested in the defendants' sixth request, and did instruct the jury, that although the two intermediate notes given at the time of the purchase were not accounted for, yet as the plaintiff conceded that they had been paid by the defendants, the legal presumption was that they had been given up to the defendants; that the law obliges a party to give up a note when paid, and that the burden lay on the defendants to show that the notes were outstanding and indorsed before due under such circumstances; that the holders were *bonâ fide* holders before the defendants could claim that the notes are outstanding, or object that the notes are not brought into court. To this

refusal of the court to instruct the jury as requested, and to this instruction of the court, the defendants tender their bill of exceptions, and the same is allowed, and signed and sealed by the court.

*The court refused to charge the jury agreeably to [*234
the seventh request, and charged the jury that it was objected by the defendants that the plaintiffs could not recover the items for real estate without showing a conveyance of the real estate; that this objection would be well founded if the contract was executory, but that this contract was executed, and, therefore, the plaintiffs might recover without showing a conveyance of the real estate; and that, without showing such conveyance, the proof supported the declaration in this respect. To the refusal of the court to instruct the jury as requested, and to the instructions as given, the defendants tender their bill of exceptions; which is allowed, and signed and sealed by the court.

The court refused to charge the jury agreeably to the eighth request, and charged the jury that, where a party who is the holder of a note has transferred it for purposes of collection, and it is not paid, but is found in the possession of the original holder, he can recover, as he is remitted to his original rights, notwithstanding the indorsement, whether stricken out or not; and that another answer to defendant's objection was that if not paid the plaintiffs may give it up, and recover upon the original consideration. To this refusal of the court to instruct the jury as requested, and to the instructions as given, the defendants tender their bill of exceptions, and the same is allowed, and signed and sealed by the court.

The court refused to instruct the jury agreeably to the ninth and tenth request of the defendants, and instructed them that it was a question whether the plaintiffs sold the debt of Truesdell & Son, as it stood upon the books, and the same as to the debt of Silas E. Burrows, or whether defendants bought these debts with a full knowledge of the circumstances of these debts; that it appeared that, in pursuance of instructions of the parent bank to the branch bank, that it was the duty of the branch bank to make semi-annual returns, showing what debts were good, and what bad, and what were considered desperate; that in June, 1836, and in November, 1835, returns were made, and in that of June, 1835, there is a memorandum opposite the Truesdell debt: "This balance due after compromise;" and opposite the Burrows debt is put down "compromised at the New York office," and a similar entry in the return of November, that it is claimed by defendants that, as those debts are put in at the original amount in the

list, it is a representation that the debts are due; but that the answer to this is, that Lyman and Peck were directors at the Burlington branch, and are to be presumed to have been cognizant of the condition of these debts; and further instructed the jury, that, as it appeared that Lyman and Peck knew the fact of the compromise and condition of these debts at the time *235] *of the purchase, although the defendants' objections would be well founded if notice to Lyman and Peck was not notice to the other defendants, yet notice to Lyman and Peck was in law notice to all the defendants, and their knowledge was to be in law imputed to the other defendants; and inasmuch as the purchasers knew at the time of the purchase that these debts had been compromised, the bank was not bound to make any deduction on account of these debts, and that if the plaintiffs recovered, they were entitled to recover the amount of the balance of $17,638.87, as by the account annexed to the deposition of Thomas B. Taylor, marked (W,) and interest thereon, from January 1, 1846, to time of trial. To which refusal of the court to charge agreeably to the ninth and tenth requests, and to the charge of the court as given, the defendants tender their bill of exceptions, which exceptions are allowed, and signed and sealed by the court. The jury returned a verdict for the plaintiffs, for amount of said account last mentioned and interest, amounting to $21,621.47. To all which several decisions of the court, and refusal to instruct the jury as requested, and to the instructions of the court as given to the jury, the defendants tendered exceptions and prayed that the same be allowed, and which were severally allowed, and signed and sealed by the court.

S. Nelson, [seal.]
Asahel Peck,
Attorney and Counsel for defendants.

Upon these exceptions the cause came up to this court.

It was argued by *Mr. Phelps*, for the defendants in error, no counsel appearing for the plaintiffs in error.

Mr. Phelps. This action is brought by the assignees of the bank under the assignment of September 4, 1841, in the name of the bank, and contains several counts, viz., a count upon an account stated, which was not relied on at the trial; a count for money had and received, and several counts in *indebitatus assumpsit* for the various descriptions of the property sold, including one for real estate "sold and conveyed."

Various points are raised by the bill of exceptions, which relate, 1st, to the admission of the evidence; and, 2dly, to

the charge to the jury; and these will be examined in their order.

1. The note for $35,500 is objected to upon the ground that it is payable to Jaudon, and is not by him indorsed.

It is sufficient to say here, that the note was not offered as the foundation of the suit, or as of itself sustaining it. It was offered as a part of the transaction testified to by the witnesses, and for the purpose of showing a consummation of the contract, *the price to be paid, and, in connection with the account current, the balance due the plaintiffs. [*236 The effect of taking the note in this form upon the plaintiffs' remedy will be considered hereafter.

2. The explanatory memorandum on exhibit B, attached to the testimony of Mifflin, is objected to.

Exhibit B is the original proposition of the defendants for the purchase. If exhibit A is referred to, which was an estimate of the value of the property made by the witness to enable the board to judge of the proposition, it is a document in all respects immaterial, having no possible bearing upon the issue. The memorandum is of the same character. It was introduced by the witness of his own motion. It will not do to hold that the introduction of circumstances, wholly immaterial, by a witness in detailing a transaction, is error, and a ground of reversal.

Had this been objected to specifically, it would probably have been waived by the plaintiffs; but it is here urged in support of a general objection to the whole testimony.

3. The third ground of objection has reference to the proof as to the origin of the note, from whom the consideration moved, what it was, and as to the fact that Jaudon is, in regard to the note, a mere trustee for the bank. This objection is founded upon the mistaken supposition that the action is brought upon the note to enforce it; whereas the plaintiffs waive their remedy on the notes, and seek to recover upon the original contract of sale.

Whether the taking the notes in the name of Jaudon bars this action is another question.

There is nothing in the nature of a promissory note which precludes an inquiry into the facts, as to what the consideration was, from whom it moved, or whether the payee holds it as trustee, whenever the inquiry is pertinent to the issue; whether the contract expressed on its face can be varied by parol, is a very different question.

But if this objection is well founded, the whole defense in the case falls to the ground. If we are not at liberty to connect the note in this way with the transaction between these

parties, then it is to be regarded as a matter between other parties having no connection with this controversy, and no bearing upon the case. In this point of view the whole testimony in regard to the notes becomes immaterial, and affords no reason for reversing the judgment, unless an improper effect was given to it in the charge to the jury. The judge, however, directed the jury, in substance, to disregard the notes, unless they found that they were in fact received in payment.

4. To the testimony of Mifflin, in answer to the 7th interrogatory. This testimony relates to the general practice of *237] the *bank, and the instructions generally given to the branches. This was clearly competent evidence. And, in describing that practice, it was certainly proper for the witness to refer to a printed copy of the instructions themselves; for, in this point of view, one copy is as much an original as another. The general practice of the bank might not be material, standing alone; but that is not the objection.

The answer to the eighth interrogatory merely states the fact, that a copy of the circular was sent to the branch, which certainly does not fall within the rule excluding parol evidence.

When this fact appeared, all further inquiry of the witness, as to the contents of that particular paper, is of course precluded, unless the paper is produced or accounted for. Here was no attempt to control a writing by parol.

The paper produced speaks for itself; and the fact that one of the printed circulars was forwarded to the branch in Vermont does not conflict with the paper itself, nor is it descriptive of its contents.

Besides, this paper was attached to a deposition taken under a commission, the defendants being present at the taking, and filed in court long before trial. This was of itself sufficient notice to the defendants to produce what they call the original.

Some of them having been directors during the whole existence of the branch, they must be supposed to have the custody and control of it. This view of the subject imposes no hardship upon the defendants. They may produce the paper, if necessary, in their defense, and it involves no surprise, as they have notice by the return of the commission that the plaintiffs will use the copy if they do not.

5. The fifth objection involves two questions: 1st, whether notice to Lyman, as director, is evidence of knowledge in him in his private capacity; and, 2dly, whether notice to him is legally notice to all the defendants.

The first point is disposed of by a simple statement of the case. Lyman was appointed director of the branch by the parent board. He stood, therefore, in no official relation to that board, but was simply their agent. In that capacity he compromised the debts with Truesdell & Co., and reports his doings to his principal. He afterwards purchases the suspended debt. The question then becomes this,—whether an agent who reports his proceedings to his principal is supposed to know what he has done or what he reports? And if he deals with his principal afterwards, both parties relying upon what the agent communicates, and it prove untrue, the principal or the agent is defrauded.

As to the other point, it is very clear that notice to one is *notice to all. They are joint contractors, and notice must necessarily affect all or none. I know of no [*238 exception to this rule, unless it be in the case of joint indorsers of a note or bill, which depends upon peculiar principles not applicable to this case.

In regard to the Burrows debt, the evidence is, that he signed a report, dated in November, 1835, in which that debt is reported as "compromised at the New York office," and marked as desperate.

6. To the answer of Ramsey to the 6th interrogatory. The solvency of Burrows was material. His debt was purchased by defendants (if purchased at all) as a doubtful debt; but $5,000 having been given for the whole list of suspended debts, amounting to over $26,000. If defendants have any claim upon the plaintiffs, by reason of the debt not being due, it is only for what they have lost.

The proof of the fact is also proper. The court cannot go into a settlement of a man's estate to ascertain his solvency. It is a matter of reputation and opinion, and the opinion of the witness, with the grounds of it, was competent proof.

The fourth, fifth, and sixth objections have reference to the claim of the defendants upon the plaintiffs, on account of the Burrows and Truesdell debts. But the whole of the evidence on that subject was unimportant. The matter was not properly in issue. There is no plea of set-off in the case, and the failure of consideration being partial merely, could not be set up as a defense. The matter got into the case by the plaintiffs anticipating the claim, and taking evidence under the commission to rebut it.

7. The seventh objection to the testimony of Jaudon, in his answer to the 3d interrogatory, is founded on the exploded notion, that a corporation cannot contract except under seal.

It is now well settled that a corporation may contract through its agents by parol.

At all events, the defendants purchased of the new bank, after the old charter had expired, and have had the full benefit of their purchase; it is not now competent for them to question the plaintiffs' title.

8. The eighth objection, viz., the testimony of Jaudon, is altogether misconceived. The witness does not testify to matters of law, but to the authority which the bank conferred, as a matter of fact, upon its agents.

9. The ninth objection to the answer of the same witness to the 17th interrogatory is equally unfounded. This testimony is unimportant, inasmuch as the defendants offered no proof of an express warranty. But it was technically admis-
*239] sible, for the *transfer of the property was not in writing. The defendants' proposition was in writing, and they were advised by letter that the proposition was accepted; but no written transfer of the property was executed. There might, therefore, have been a verbal warranty, and to meet such a suggestion the proof was taken.

II. As to the exceptions to the judge's charge:

1. The first is general, and depends upon the other points in the case; it need not therefore be discussed.

2. The second request of the defendants' counsel was most fully conformed to by the judge, who told the jury explicitly, that the plaintiffs could not recover upon the notes, nor upon the account stated.

3. The charge of the court upon the third point suggested by the counsel was doubtless correct. Had the notes been made payable to the plaintiffs, they might have waived their remedy upon the notes, and sued on the original contract. A note is a mere security for a debt. It is upon this principle that a note may be given in evidence under a count for money had and received.

The real question in the case is not, as the counsel seem to suppose, whether a recovery can be had upon the notes in the name of the bank, as parties to the notes; but whether the taking the notes in the name of Jaudon will, under all circumstances, bar the action on the original contract?

Had the notes been made payable to the bank, they clearly would not have that effect.

Does the fact that they were payable to Jaudon make any difference? They were made payable to him, as an officer of the bank, in trust for the bank, he having personally no interest in them; they have never been put in circulation, but have ever remained, and still are, in possession of the bank,

except so far as they have been paid and delivered up to the defendants.

Can any reason be given why the bank should not have the same remedy in this case as if they were payable to the bank directly?

4. If the notes are not payment of the original debt by operation of law, the only remaining question is, whether they were intended by the parties to have that effect?

This question was very fairly left to the jury, with the instruction that, as the legal effect of the notes was not to extinguish the original cause of action, they could not have that effect, unless by agreement of the parties.

5. The fifth request of the counsel assumes, that the assignment to Robinson and others, trustees, divested the bank of all interest in the claims; and, therefore, that they cannot recover. *But the assignment was made of the effects [*240 of the bank for the purpose of closing its business, and for the benefit of its creditors. The claim, therefore, passed to the assignees precisely as the bank held it; and they had the same election in regard to the remedy as the bank had. Had the notes been put in circulation upon a new consideration, moving from a third party, the two remedies would have been separated, the election made, and the right of election determined; but passing, as they did, together, the character and condition of the claim in either form, was not changed by the assignment.

6. The sixth request assumes, very properly, that it is incumbent on the plaintiffs, either to bring the notes into court or otherwise account for them. But the account current attached to the deposition of Taylor, shows that the three notes first payable were paid, and how they were paid. The plaintiffs admitted the payment on trial. The legal presumption, then, is, that they were given up to the defendants; especially as ten years had elapsed at the time of trial after the last of the three notes became payable, and the statute of limitation had run upon it more than four years before.

The testimony of Ramsey shows that the note first due was given up to the defendants, and this fortifies the presumption that the others were.

7. The seventh request relates to the count for the sale of the real estate.

The objection is, that the proof does not support the declaration.

Nothing can be made, on this point, of the suggestion of a variance; for the proof, if it show anything, shows an execution of the contract, as stated in the declaration; and as the

defendants executed their notes agreeably to their proposition, it is to be presumed, in the absence of all proof, that they received such a conveyance as was satisfactory.

If there be any foundation for this exception, it must be on the ground that the deed of conveyance, or a copy of it, should be produced as the best evidence. If the title to the real estate were in controversy, the conveyance should undoubtedly be produced, that the court might judge whether it were effectual. But the allegation in this case is, that the defendants "being indebted for certain real estate," &c., "promised," &c. The material fact is the indebtedness. If that indebtedness is admitted, it is enough. The defendants, by giving the notes for that consideration, agreeably to their first proposition, admit the indebtedness. Why, then, should the deed be produced? It would not prove the indebtedness if it were. That would depend, after all, upon other proof. Nor is it *241] necessary to show *that the deed conveyed a perfect title. The defendants may have stipulated for a release merely, and may have acquired no title, and yet may be liable on their promise.

The title is not in issue in any form. There is no pretence that the defendants have given a defective title for which they are responsible, or that the consideration of the notes has failed, either in whole or in part, or that the plaintiffs failed to execute the contract fully.

Inasmuch, then, as the deed would not prove an indebtedness if produced, (it not being a security executed for such a purpose, and indeed would contain an acknowledgment of payment of the consideration-money,) and as the title is in no way in issue, for what rational purpose should it be produced? It would simply show the fact that a conveyance of some kind was executed; a fact necessarily admitted by the execution of the notes.

After all, the point is immaterial. A judgment will not be reversed for an erroneous decision, if it appear that the result of the case must be the same, whether the point be ruled one way or the other.

The court very properly adopted the amount agreed to be paid upon the purchase, (whatever was included in it,) as the basis of the verdict, directing the jury to find the balance after deducting payments as stated in the account current.

This they must have done if no evidence had been offered under the count in question, or if it had been stricken out.

There being no plea in offset, and no proof of failure of any part of the consideration attempted or supposed to be passed, the simple question is, whether the real estate was included

in the purchase or not. This question becomes unimportant, when it is considered that the price to be given for the purchase, whatever was included in it, must be paid.

The result is, that the plaintiffs would be entitled to their verdict upon the other counts, and to the same verdict if the count in question were expunged. The question, therefore, is reduced to this simple point of technicality, whether, the verdict being general, the existence of a count in the declaration, not sustained by evidence, vitiates the verdict.

8. The eighth exception to the charge is analogous to the fifth, and admits of the same answer. It relates to the smaller note which was given in part substitution for one of the original notes. The assignees had the same right to elect their remedy that the bank had, and might treat the note as no payment, and resort to the original cause of action. Besides, if the assignees were the real owners, they could put the suit in the name of any person as their trustee.

*9 and 10. The ninth and tenth exceptions relate to [*242 the claim of the defendants on account of the debts of Burrows and Truesdell. This claim was not properly in issue, as there was no plea in offset, nor could the defendants avail themselves of it as a partial failure of consideration.

But it is utterly groundless. It appears in evidence, that two of the defendants, as directors, had themselves compromised the debt of Truesdell, and had reported the balances to the plaintiffs due from both as mere nominal balances, not in reality due. The whole difficulty arises from the fact that these balances were not transferred on the books of the bank to the account of profit and loss, as they should have been, but were suffered to remain upon the list of suspended debts. The defendants have seized upon this circumstance as amounting to a representation that they were due. But if the defendants were fully advised of the condition of these debts, they could not have been deceived or defrauded. They knew how these items came upon that list, and how they should have been taken from it.

There was certainly no express warranty that these debts were due; and there can be no implied one against facts which are fully disclosed to the party.

The utter groundlessness of the defendants' claim, so far as regards the Burrows debt, is further apparent from the fact, that all the securities for that debt had been surrendered to Burrows in May, 1835, and there was in the Burlington branch, at the time of the purchase (March, 1836), no evidence of any indebtedness on the part of Burrows. Of course, no such securities could have been delivered to the defen-

dants. But, when they came to execute their contract, they would be governed, not by the list of suspended debts, but by the securities actually delivered. They could not suppose they purchased what was not delivered; and how could they suppose they were purchasing a debt for which there was no security in existence? It will not do to say that they purchased relying on the entry in the books alone; for those who were directors had the custody of the securities before the purchase. Nay, even if they did purchase relying on the entries in the books, how are they defrauded? The directors of the branch had not only the custody and control of the securities, but of the books also. The parent board could know nothing of either, except by information from the branch itself. If there was a discrepancy between the statement on the books and the reality, who was in fault? If the defendants furnished the deceptive document upon which the parties act, who is defrauded? Or, rather, who would be defrauded, if the plaintiffs are to be held liable to the defendants for a fraudulent representation furnished by the defendants themselves?

*243] *Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Vermont.

The suit was brought in the court below by the bank against the defendants to recover a balance claimed to be due, of the purchase-money agreed to be given for the property and assets of their branch at Burlington. The amount of the purchase-money was a fraction under one hundred and forty-two thousand dollars ($142,000), payable in instalments; and for securing payment of which four notes of thirty-five thousand five hundred dollars ($35,500) each, were executed and delivered at the time. These notes were payable to "Samuel Jaudon, Esq., cashier, or order," and had not been indorsed by him to the plaintiffs, nor in blank.

The declaration contained the usual money counts, an account stated, and also accounts for the original consideration of the notes.

On the trial the plaintiffs offered in evidence the last of the series of notes, the previous ones having been paid, for the purpose of sustaining the action, which was objected to on the ground that no title was shown in the bank, the note not having been indorsed. This objection was sustained and the note excluded, but the plaintiffs were permitted to recover under the count for the original consideration.

The question, therefore, whether or not it was competent to connect the plaintiffs with the note by parol evidence, that it had been given to their cashier, and was their property, is not in the case, and need not be passed upon.

It was objected at the trial that the plaintiffs could not recover under the counts for the original consideration, on the ground that the notes had been received in payment and satisfaction of the indebtedness; and hence the recovery must be upon the notes themselves if at all. But the court held that the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and that, whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transactions warranted such an inference, were questions for the jury; and submitted the questions accordingly.

It was also objected, that, in order to entitle the plaintiffs to recover under the counts for the original consideration, they must first produce all the previous notes given for the purchase-money, and surrender them in court. And, further, that before there could be a recovery for that portion of the consideration, consisting of the real estate, the plaintiffs were bound to prove the execution, and delivery of the conveyances of the same to the defendants. But the court held, as to the first objection, that, *as it was conceded on both sides that the previous notes had been paid, the presumption of law was, they had been given up by the holder at the time of payment, as the party was not bound as a general rule to make the payment, without receiving the note as his voucher; and, that, if the fact was otherwise, the burden lay upon the defendants to show it. And as to the second objection, inasmuch as the contract had been executed, and the defendants had given their notes for the purchase-money, the court was bound to presume that they were satisfied with the execution on the part of the plaintiffs, and, of course, that the proper conveyances had been made and delivered, and that, if the fact was otherwise, it was incumbent upon the defendants to show it. [*244

This court is of opinion that no error was committed in either of the various rulings at the circuit to which we have referred, nor, indeed, as it respects either of the other questions in the case, not thus far particularly noticed; but which appear upon the record.

Those remaining that bear upon the merits of the defense, and which we propose to notice, relate to two items of indebtedness upon the books of the branch bank at Burlington—the debt of Truesdell & Son of $4,884.48, and of Silas E. Burrows

of $2,538.86. These items were among those on the list of suspended debts made out by the cashier of the branch preparatory to the negotiation for a purchase by the defendants of its assets, and to the settlement of the terms of sale by the parent bank. They were of considerable standing at the branch, and had been previously returned by the directors to the parent bank in several semi-annual returns as not only bad but desperate, and were inserted in what was called the list of suspended debts, amounting in the aggregate to a fraction short of $27,000 preparatory to the sale, and for which the defendants offered and the plaintiffs accepted five thousand dollars ($5000).

These two items, it was insisted, should be credited to the account of the defendants, inasmuch as they had been compromised, as was contended, and settled by the plaintiffs before or after the time of purchase; and that, as they had been inserted in the list of suspended debts, the defendants had reason to believe, when they made the purchase, they were outstanding existing demands, though of doubtful value.

It was admitted by the counsel for the plaintiffs, that, if his clients had compromised either of these debts, or had received any portion of them since the sale, they would be responsible for the fair value of the demands or the money received, at the election of the defendants. But that, if these demands, or either of them, had been compromised, and closed previously to the *sale to the defendants, by the board of directors of the branch at Burlington, inasmuch as there was no warranty of the debts, and two of the purchasers were members of the board, and, of course, cognizant of the compromise, and settlement, all the defendants being joint purchasers, were chargeable with knowledge, and, therefore, there was no ground for an implied fraudulent representation on account of these two items having been inadvertently placed on the suspended list.

*245]

It was also urged by the counsel for the plaintiffs, that the condition of the debts on the books at the Burlington branch must have been well known to the board of directors there—much better known to them, than to the board of the parent bank; and, that the latter must necessarily have relied mainly upon information derived from the former as to the condition of the assets, with a view to make an estimate of their value.

The court took this view of the case at the trial, and left the facts to the jury. And, upon a review here, it is the opinion of this court, that no error was committed in the direction.

The facts were, that the Truesdell debt had been com-

promised by the directors of the branch at Burlington, with the assent of the parent bank, more than a year previous to the sale to the defendants, and the original debt discharged; and the better opinion from the evidence is, that the amount for which the debt was compromised was paid at the Burlington branch previous to the sale. At all events, there is no evidence whatever that any part of it has been received by the parent bank since that time. If it has been paid since, it must have been paid to the defendants who held the substituted paper under the transfer of the assets of the branch.

Under these circumstances, we think, the defendants were bound to show, in order to entitle themselves to the credit for this item of the suspended debts, that the parent bank had either received the money on it or had appropriated the securities so as to make them their own since the sale. And, as there was no evidence warranting either conclusion, it follows, the direction of the court below was right.

As it respects the Silas E. Burrows debt—it appears that this debt was compromised at 33⅓ per cent. as early as May, 1835; and the original securities surrendered on taking the new security for $922.17. This security has never been interfered with by the parent bank; and if unpaid at the time of the sale, remained in full force at that time, and since, in the hands of the defendants.

The parent bank subsequently, in December, 1840, compromised a large indebtedness of Burrows, but in this, and all other *subsequent negotiations with him, they expressly excluded the debt at the Burlington branch, as no longer under their control. [*246

For these reasons we are satisfied the judgment of the court below is right, and 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 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 Circuit Court in this cause be, and the same is hereby affirmed with costs and damages at the rate of six per centum per annum.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* JOSEPH B. WILKINSON, CHRISTOPHER ROSELIUS, JOHN L. LEWIS, LOUIS BRINGIER, MANDEVILLE MARIGNY, AND JOHN R. GRYMES.

Where the bill of exceptions purported to have been taken at April term, 1848, but the record showed that, at that time, no suit between the parties was pending, and that the trial took place in April, 1849, the date of 1848 must be considered as a clerical error. The certificate from the Circuit Court showed that the bill of exceptions was regularly allowed upon the trial, and this must be conclusive upon this court.

Where the suit was upon a postmaster's bond and the district-attorney offered to read in evidence an authentic copy thereof, which the court refused to receive, this refusal was erroneous.[1]

Although the presumption of law is in favor of the correctness of the court below where no reasons appear, yet, in this case, the record itself shows the error. If there was any fact which made the copy of the bond inadmissible, it ought to have been shown by the defendants, and set forth in the exception.[2]

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

The facts are set forth in the opinion of the court.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Mr. Johnson*, with whom were *Mr. Benjamin* and *Mr. Micon*, for the defendants.

Mr. Crittenden. There is but a single question for this court to supervise and review, which is contained in the bill of exceptions.

The United States sued, on the 11th day of July, 1848, the sureties of McQueen, late postmaster at New Orleans, on
*247] their *bond dated 8th June, 1840, a copy of which bond, certified by the auditor of the Post-Office Department, was annexed to the petition, and therein referred to.

On the trial on the 8th day of May, 1849, being at the April term of the court, the Attorney for the United States offered in evidence to the jury the certified copy of the bond annexed to the petition, and therein referred to, to which the defendants objected; the judge sustained the objection, and refused to allow the said copy of the bond to be read in evi-

[1] By the act of Congress of 1797, certified copies of official bonds are evidence in all cases where such evidence is required. *United States* v. *Vanzandt*, 2 Cranch, C. C., 338; *United States* v. *Lent*, 1 Paine, 417.

[2] Whenever an error is apparent on the record, it is open to revision whether it appear by a bill of exceptions, or in any other manner. *Suydam* v. *Williamson*, 20 How., 428.

dence to the jury; "whereupon the Attorney for the United States excepted to the ruling of the court," and tendered his bill of exceptions, which was signed and sealed by the judge, and entered on the record.

The counsel for the defendants, in their printed brief, have labored to prove that there is no bill of exceptions, because it is headed "April term, 1848;" "and recites twice distinctly in the body of the bill, that it was taken at a trial held at April term, 1848, and on Tuesday, the 8th day of April, 1848."

There is in the record an abundance to correct the mistakes seized and harped upon by the counsel for defendants, and to show, without doubt, that the bill of exceptions applies to the trial had on the 8th day of May, 1849, being at and during the April term of the court in the year 1849, and not at April term, 1848; that the mistake is by putting 1848 instead of 1849; all else is correct.

The suit is numbered 1727; the bill of exceptions is taken and spread upon the record in suit No. 1727.

The trial is in suit No. 1727; begun on 7th May, 1849, at the April term thereof, 1849; the trial is resumed on 8th May, 1849, in suit No. 1727, on which day and year the panel of the jury was completed and the verdict rendered and recorded.

Immediately succeeding, in suit "*United States* v. *Wilkinson et al.*, No. 1727, April term," the bill of exceptions is entered of record, as of the proceedings in that very suit and no other.

There was no trial between the United States and Wilkinson et al. at April term, 1848.

The suit, "No. 1727," was instituted on the 11th day of July, 1848; and, therefore, there could not have been a trial in said suit, No. 1727, in April, 1848, before the suit was commenced.

There is no record showing that there was any suit pending or tried at April term, 1848, between the United States and Wilkinson and others, to which a bill of exceptions could apply. The maxim is, "*De non apparentibus et de non existentibus eadem est ratio.*"

The petition, after setting forth the bond, refers to a certified copy thereof, annexed to the petition; and the bill of exceptions states that the Attorney of the United States offered to read in *evidence to the jury the instrument [*248
"being the bond annexed to the petition, or information in this cause," * * * "dated on the 8th day of June, in the year 1840."

Upon the whole record it is manifest that the bill of exceptions was tendered, signed, sealed, and enrolled, in this suit, No. 1727, at the April term, 1849, and in no other.

The bill of exceptions is certified, and comes up as a part of the record in the case, No. 1727, in which the writ of error was prayed and granted.

No principle is clearer than that an error of description in one part of a deed, record, or other instrument, may be corrected by other descriptions in the same deed, record, or instrument.

The copy, as certified by the auditor of the Post-Office Department, was legal evidence, according to the act of Congress of 2d July, 1836, § 15. 5 Stat. at L., 82.

The bill of exceptions is to a single point; a single opinion of the judge in refusing to suffer the certified copy of the bond by the postmaster and his sureties, "annexed to the petition, or information in this cause," to be read in evidence to the jury.

If the counsel for the defendants, in the court of original jurisdiction, assigned no specific cause of objection to the testimony offered, or did not choose that his cause of objection should be set down in the bill of exceptions; and if the judge did not give any reason for refusing to suffer the certified copy of the bond to be read in evidence, and did not choose to insert his reason (if he had any) for refusing to suffer the certified copy of the bond to be read in evidence to the jury, the want of such cause of objection, and the absence of the reason of the judge for such ruling of the objection to the testimony, cannot be attributed to the District Attorney as his fault, nor be charged as a defect in the bill of exceptions.

As to the cases cited in the brief for the defendants, it seems to me they are foreign to the matter of this bill of exceptions, which states clearly the point ruled by the judge, and presents a single, distinct, and substantive case of a rejection of the evidence offered by the plaintiff as the matter to be reviewed by the appellate court.

The counsel for the defendants in error contended, that the record shows nothing but a petition or declaration,—the pleas and answers of the defendants, the trial by jury, the general verdict for defendants, and judgment rendered in accordance with that verdict. There is in the record no bill of exceptions, nor any thing else presenting a question of law for the consideration of this court—nothing to support a writ of error; and it would, therefore, appear certain that the judgment of the Circuit Court must be affirmed.

*249] *But at page 17, of the printed transcript, is to be found a paper called a bill of exceptions. It is headed "April Term, 1848," and it recites twice, distinctly, in the

body of the bill, that it was taken at a trial held at the April term, 1848, and on Tuesday the 8th day of April, 1848.

It appears by the transcript, that the verdict and judgment complained of by the plaintiffs in error, were rendered in May, 1849, and that the trial of the cause, which resulted in that verdict and judgment, took place in May, 1849, thirteen months after the date of the only bill of exceptions found in the record.

It is therefore plain that no bill of exceptions was taken at the trial of the cause, or noted at the trial, and subsequently sealed *nunc pro tunc*. This court cannot therefore take any notice of this bill of exceptions as forming part of the record, nor will it consider the matter contained in it. *Walton* v. *United States*, 9 Wheat, 651; *Ex parte Martha Bradstreet*, 4 Pet., 102; *Shepard et al.* v. *Wilson*, 6 How., 261; *Law* v. *Merrills*, 6 Wend. (N. Y.), 269; 7 Serg. & R. (Pa.), 219; 8 Id., 211.

But if it should be found possible by any means to connect the bill of exceptions, printed at page 17, and dated at the April term, 1848, with the trial which occurred in May, 1849, then the defendants in error submit that said bill cannot be sustained as affording a ground for reversing the judgment of the Circuit Court.

It is impossible to understand, from that bill, what was the document offered in evidence, or what was the objection made to its admission, or what was the point of law decided by the court. It exhibits no fact nor circumstance which can enable this court to determine whether or not the court below erred in rejecting the paper, whatever it may have been, that was offered to be read to the jury.

The bill states that: "The attorney of the United States offered in behalf of the United States, to be read in evidence to the jury, a certain instrument, being the bond annexed to the petition or information in this cause, being an authentic copy of a bond signed by William McQueen as principal, and the parties herein defendants as sureties, for the faithful discharge of the duties of the office of postmaster at New Orleans, dated on the 8th day of June, in the year one thousand eight hundred and forty; to the reading in evidence of which bond, the counsel of defendants objected, and the court sustained the objection, and refused to allow the document to be read."

How is it possible to ascertain, from this statement, whether the decision of the judge was right or wrong? The bill of exceptions declares that the paper which was offered was an

instrument, a bond, a copy of a bond, and a document. The
*250] *statement seems to imply that there were two papers, a bond and a copy of a bond, and does not specify which of the two was offered in evidence, nor can it be discovered what was the objection sustained by the court. All the presumptions of the law are in favor of the correctness of the decision of the judge. It may be that the copy was rejected because the original had already been offered, and the copy therefore inadmissible and irrelevant: it may be that the bond was rejected because it was mutilated, or that there were erasures on its face not accounted for; or for some other good and legal cause of objection. This court has always held that the party taking exception is confined to the specific objection made at the trial: that the point excepted to must be shown. In the present case the point, that is, the question of law, does not appear; the fact alone is stated that some objection was made, and that the document was not received in evidence, but the point of law raised at the trial, to wit, the nature of the objection, does not appear and cannot be ascertained.

In *Dunlop* v. *Munroe*, 7 Cranch, 270, the language of Mr. Justice Johnson is: "Each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the minds of the parties, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for." Chief Justice Marshall lays down the same rule in *Pendleton* v. *United States*, 2 Brock, 80. See also *Hinde's Lessee* v. *Longworth*, 11 Wheat., 209.

In a subsequent case this court censured the practice of excepting generally to a charge of a judge, and declared that it would dismiss the writ of error unless the rulings objected to were specifically pointed out. *Stimpson* v. *West Chester R. R. Co.*, 4 How., 380; *Zeller's Lessee* v. *Eckert et al.*, 4 Id., 297.

The principle that the party taking the exception must state the point, and is confined to that alone, is established in the jurisprudence of every state to whose reports we have access. We refer to Bacon's Abridg., vol. 2, p. 113, edition of 1846, and authorities there cited. Also Raymond on Bills of Exceptions, p. 33.

In Louisiana, where the state practice has been adopted in the federal courts, a long and unbroken series of decisions recognizes this principle to its fullest extent. *Pratt* v. *Flower*, 2 Mart. (La.), N. S., 333; *Balfour* v. *Chew*, 5 Id., 519; *Miller* v. *Breedlove*, 1 La., 323; *Ohio Ins. Co.* v. *Edmonson*, 5 Id., 301; *Holmes* v. *Holmes*, 6 Id., 471; *Keene* v. *Relf*, 11 Id., 309: *Hen-*

nen v. *Wetzel*, 12 Id., 265. In the case last cited the bill of exceptions *was taken to the offering in evidence of a promissory note, the ground being stated in the bill to [*251 be "a very material variance between the note offered in evidence and that described in petition." The court refused to examine the bill of exceptions because it did not set forth in what the variance consisted, although both the note and petition were copied into the transcript.

The counsel for the defendants in error also referred to the following authorities: *Kensington* v. *Inglis*, 8 East, 280; *Carroll* v. *Peake*, 1 Pet., 21; 4 Phillips on Ev., edition of 1850, with notes by Cowen and Hill and Vancott, p. 778, where all the authorities are collected.

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

This action was brought against the defendants in error as sureties in the official bond of William McQueen, who was appointed postmaster at New Orleans in 1840.

The proceeding was by petition according to the practice in Louisiana, and a copy of the bond was set forth in the petition, and also annexed to and filed with it, and the United States alleged that McQueen had received, as postmaster, twenty thousand and sixty dollars and ninety-two cents, which he had neglected and refused to pay over.

The defendants, in their answers, took three grounds of defense:

1. They admitted their several signatures to the bond set forth in the petition, but denied that it had ever been delivered by them or accepted by the Postmaster-General.

2. That there had been a former recovery against them for the same cause of action.

3. That the suit was barred by limitations, not having been instituted against the sureties within two years after the default of the postmaster.

At the trial the jury found a verdict for the defendant, and judgment was entered accordingly, and the United States have brought this writ of error upon the judgment.

It appears by the record duly certified to this court, that the following exception was taken:

United States v. *Wilkinson et als.*

Bill of Exceptions.

THE UNITED STATES
v.
J. B. WILKINSON et al. } No. 1727.

**In the Circuit Court of the United States, for the Fifth Circuit sitting for the Eastern District of New Orleans.*

Present, Hon. T. H. McCaleb, Judge of the District Court, presiding alone.

April term, 1848.

Be it remembered, that at the April term of the Circuit Court aforesaid, in the year 1848, on Tuesday, the 8th day of April, 1848, on the trial of the above-named cause, the attorney of the United States offered in behalf of the said United States to [be] read in evidence to the jury a certain instrument, being a bond annexed to the petition or information in this cause, being an authentic copy [of] a bond signed by William McQueen as principal, and the parties herein defendant as sureties, for the faithful discharge of the duties of the office of postmaster at New Orleans, dated on the eighth day of June, in the year one thousand eight hundred and forty; to the reading in evidence of which bond the counsel of defendants objected, and the court sustained the objection, and refused to allow the document to be read.

Whereupon the attorney of the United States excepted to the ruling of the court, and tenders this as his bill of exceptions, praying that the same may be signed by the court, and made a part of this record.

THEO. H. MCCALEB. [SEAL.]
U. S. Judge.

This exception, it will be observed, states that it was taken on the 8th day of April, 1848; and the record shows that the suit was not instituted until the 11th of July in that year, and that the trial took place on the 7th and 8th of May, 1849; and that the verdict was rendered on the day last mentioned.

It is insisted on behalf of the defendants that, as this exception is stated to have been taken on the 8th of April, 1848, more than a year before the trial, it cannot be regarded by this court as an exception legally taken, nor noticed in its judg-

ment. And, further, that if it be considered as an exception regularly taken and certified, yet the opinion of the court rejecting the testimony was correct.

The exception is certainly very loosely framed, and the date above mentioned cannot be reconciled with the rest of the record. It is evidently a clerical mistake, arising, most probably from the pressure and hurry of business, which is sometimes unavoidable in a court of original jurisdiction. For the titling at the head of the exception states it to be taken in No. 1727, which is the number by which this suit appears to have been marked in the Circuit Court throughout the proceedings; and in the body of the exception it is said to be offered at the trial. *There is nothing [*253 in the record from which it can be inferred that a suit was pending between the same parties on the 8th of April, 1848. And this exception is regularly certified by the Circuit Court as a part of the proceedings in this case, and as one taken at the trial. This certificate from the Circuit Court, is conclusive upon this court, and the exception must be regarded as duly taken and regularly brought up by the writ of error.

With respect to the opinion excepted to, we can see no ground for rejecting the testimony. The exception in substance states that the District attorney offered to read in evidence a certain instrument, annexed to the petition, being an authentic copy of a bond signed by the defendants as sureties for McQueen. It is admitted by the answers, that the defendants had signed the original bond of which this is a copy: and moreover, the copy offered is said to be authentic. The possession of the original bond by the proper officers of the United States, was *primâ facie* evidence that it had been delivered and accepted. The bond was a necessary part of the evidence in behalf of the United States, and as the copy was duly authenticated, according to the act of Congress, we are at a loss to understand upon what ground it could have been rejected.

It is said that there might have been objections which do not appear in the exception, and that every presumption is to be made in favor of the judgment of the inferior court, and that it is to be presumed right until the contrary appears. This is true. But the contrary does appear in the present case. If, indeed, the exception had merely stated that the plaintiff offered a certain paper without describing it, or without showing its application to the matter in controversy, and the court had rejected it without stating the grounds of its decision, undoubtedly the judgment would be presumed to be correct.

But here the paper is shown by the statement in the exception to be legally admissible. The error, therefore, is apparent; and no presumption can be made in favor of a judgment, where the error is apparent on the record.

If there was any fact which, notwithstanding the authentication of the copy, made it inadmissible, it ought to have been shown by the defendants, and set forth in the exception. And where no such fact appears, it must be presumed not to exist. A contrary rule would make the right to except of no value to the party, and would put an end to the revisory power of the appellate court whenever the inferior tribunal desired to exclude it—"*De non apparentibus et de non existentibus eadem est ratio*," is an old and well-established maxim in legal proceedings, and is founded on principles of justice as well as of law. And for error *in rejecting the testi- *254] mony which upon the facts in the exception ought to have been received, the judgment of the Circuit Court must 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 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*.

JOSHUA B. BOND, ADMINISTRATOR OF MARY ANN CADE, PLAINTIFF IN ERROR, *v.* JAMES BROWN.

By the Louisiana practice, if neither party claims a trial by jury, the whole case is decided by the court; matters of fact as well as of law.

Where, upon such a trial, no testimony is objected to, and it does not appear that any question of law arose or was decided, and the case is brought to this court by writ of error, the judgment of the court below must be affirmed.

The decision of the court below, upon questions of fact, is as conclusive upon this court as the verdict of a jury would be.[1]

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[1] S. P. *Saulet* v. *Shepherd*, 4 Wall., 502; *Insurance Co.* v. *Tweed*, 7 Id., 44; *Bassett* v. *United States*, 9 Id., 38; *Norris* v. *Jackson*, Id., 125; *Copelin* v. *Insurance Co.*, Id., 461. See *Burr* v. *Des Moines Co.*, 1 Wall., 103; *City of Richmond* v. *Smith*, 15 Id., 438; *Mercantile Mut. Ins. Co.* v. *Folsom*, 18 Id., 249; *The Abbotsford*, 8 Otto, 442.

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 a suit brought by Brown, a citizen of Mississippi, against Bond, as the administrator of Mary Ann Cade, upon a bond with a collateral condition, given by one Witherspoon, for which Mary Ann Cade was responsible.

The petition set out the bond and the breaches. The defendant answered, denying some of the material facts stated in the petition, and alleging other facts, which, if proved, were sufficient to bar a recovery. Neither party claimed a trial by jury; and, according to the Louisiana code of practice, articles 494, 495, the whole case was submitted to the judge.

In February, 1849, the cause came on for trial, and, after argument, the court pronounced the following judgment:

"JAMES BROWN
v. } 1596.
J. B. BOND, Adm'r, &c.

"This cause having been argued and submitted to the court, *on a former day, on the pleadings, law, and evi- [*255
dence, and the court having maturely considered the same, and being fully advised in the premises, and satisfied that the plaintiff has fully substantiated the allegations in his petition, it is ordered, adjudged, and decreed, that judgment be rendered in favor of the plaintiff, James Brown, and against the defendant, Joshua B. Bond, administrator of the estate of Mary Ann Cade, widow of Elias M. Witherspoon, for the sum of fourteen thousand dollars, with interest thereon, at the rate of five per centum per annum, from the eleventh day of January, in the year eighteen hundred and thirty-seven, until paid; and costs of suit to be taxed.

"Judgment rendered 13th June, 1849.

"Judgment signed 18th June, 1849.

"THEO. H. MCCALEB, [SEAL.]
U. S. Judge."

The defendant sued out a writ of error, and brought the case up to this court.

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

Mr. Marr contended that, according to the pleadings, the judgment of the court was equivalent to a general judgment

for the plaintiff. There was no objection in any form to any portion of the testimony offered on the trial, no bill of exceptions taken, no motion for a new trial, no case stated by argument of counsel. It is not the province of this court to determine questions of fact, merely as such, on a writ of error. It must legally presume that the allegations of the petition were proven by sufficient and competent testimony; and the decision of the Circuit Court, to this effect, is as conclusive upon this court as if the facts stated in the petition had been found to be true by the verdict of a jury; 5 How., 289; 7 How., 846; and the authorities cited by Mr. Justice Wayne, 7 How., 865.

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

The record in this case is voluminous; but a very brief statement will show the grounds upon which it is decided in this court.

The suit was brought by the defendant in error in the Circuit Court of the United States for the Eastern District of Louisiana, upon a bond with a collateral condition. The breaches for which he sued are set out in the petition. The plaintiff in error answered, denying some of the material facts stated in the *petition, and alleging other facts, which, if supported by testimony, were sufficient to bar the recovery.

*256]

Upon these issues the parties proceeded in the case, and evidence on both sides was offered, which is stated at large in the record. And, as neither party demanded a jury, the fact as well as the law was, according to the Louisiana practice, submitted to the court.

The plaintiff in error has not presented any argument in this court, nor assigned any particular error of which he complains. None of the testimony on either side appears to have been objected to in the Circuit Court. Nor does it appear, from the pleadings, or by exception, or by the opinion of the court, that any question of law arose or was decided in the case. On the contrary, the opinion of the court, inserted in the record, according to the Louisiana practice, states that, being satisfied that the defendant in error had fully substantiated the allegations in his petition, the court proceeded to give judgment in his favor. The language of the opinion, when taken in connection with the pleadings and issues, implies that the case turned upon the comparative weight of the testimony; upon the fact, and not upon the law. And, whether the fact was rightly decided or not, according to the

evidence, is not open to inquiry in this court. The decision of the court below, in this respect, is as conclusive as the verdict of a jury when the case is brought here by writ of error. And, as no error in law appears in the record, the judgment of the Circuit Court must 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 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 and damages, at the rate of six per centum per annum.

JAMES DUNDAS, MORDECAI D. LEWIS, SAMUEL W. JONES, ROBERT L. PITTFIELD, AND RORERT HOWELL, APPELLANTS, *v.* ANNE HITCHCOCK.

Where a mortgage was executed by a husband, his own name only being used in the body of the instrument, but it was signed by his wife also, who relinquished her *right of dower, and made her acknowledgment in an after part of the instrument; and there is sufficient evidence, from an inspection of the whole instrument, to believe that the intention of the parties was to consider the whole paper as forming one assurance, the wife will be barred of her dower, as far as the mortgage is concerned.[1] [*257

Where a statute requires a private examination of the wife, to ascertain that she acts freely, and not by compulsion of her husband, but prescribes no precise form of words to be used in the certificate, it is sufficient if the words of the acknowledgment have the same meaning, and are in substance the same, with those used in the statute.[2]

Where a widow was allowed one year, after probate of her husband's will, to elect whether to take under it or not, and by the will she was sole devisee for herself and children, and before the expiration of the year she released

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[1] A widow's right to dower is a legal right which cannot be barred unless it has been relinquished in the manner prescribed by law. *David* v. *McDonald*, 42 Ga., 205.

[2] A substantial compliance with all the requirements of the statute for acknowledgment of a wife's deed must affirmatively appear by the certificate; else the deed is inoperative to convey her interest. *Little* v. *Dodge*, 32 Ark., 453. S. P. *Petition of Bateman*, 11 R. I., 585.

The omission of the words "freely" and "voluntarily" will not vitiate the certificate, if otherwise correct. *Allen* v. *Lenoer*, 53 Miss., 321; *Anderson* v. *Bewley*, 11 Heisk. (Tenn.), 29; nor will the use of the word "restraint" instead of "constraint." *Edmondson* v. *Harris*, 2 Tenn. Ch., 427; but omitting to state that she signed the deed "for the purposes therein contained," &c., is fatal. *Little* v. *Dodge*, 32 Ark., 453. The omission of the word "husband" in the clause "without undue influence of" &c., is not fatal. *Gorman* v. *Stanton*, 5 Mo. App., 585.

to the mortgagee all her estate, right and claim to the mortgaged premises, styling herself widow and sole devisee, she cannot afterwards avail herself of her right of election and set up a claim to dower, outside of the will; she is estopped by her deed.[1]

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama. There were two cases between the same parties, depending upon the same principles, and only differing as to the property mortgaged. The notice of one will suffice for both.

The plaintiffs in error were the trustees of the Bank of the United States, being the assignees of Cowperthwaite, Dunlap, and Cope, the original trustees.

In July, 1838, Henry Hitchcock, of Mobile, Alabama, came to a settlement of many transactions of loans and discounts with the Bank of the United States, and was found indebted to the amount of six hundred and twenty thousand, five hundred and thirty dollars, and ninety-six cents ($620,530.96). He gave his bond for this sum, payable in four instalments, and to secure it executed a mortgage, which gave rise to one of the questions in the present suit, the point being whether or not his wife so far joined in the mortgage as to relinquish her right of dower. Her dower in the equity of redemption was not called in question, but was worth nothing.

The mortgage commenced in this way:

"Know all men by these presents that I, Henry Hitchcock, of the city and county of Mobile, in the State of Alabama," &c., &c., and concluded in this way: "Provided, always, and these presents are upon this express condition, that if the said Henry Hitchcock shall well and truly pay to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, with eight per cent. interest per annum, from the first day of March, A. D. one thousand eight hundred and thirty-eight, thereon accruing, payable semi-annually, according to the condition of a certain bond by the said Henry Hitchcock given, *258] payable to the said Joseph *Cowperthwaite, Thomas Dunlap, and Herman Cope, bearing even date with these presents, then these presents shall cease, determine, and be void; otherwise to be and remain in full force and virtue.

[1] A widow does not estop herself from claiming separate moneys of hers, received by her husband to invest for her, but which he did not invest, by her acceptance of a provision under his will which makes a limited provision for her, to be received, with income under a certain trust deed, in satisfaction of dower *Walker* v. *Walker*, 8 Wall., 744.

Given under my hand and seal, this fourteenth day of July, in the year of our Lord one thousand eight hundred and thirty-eight.

H. HITCHCOCK,
ANNE HITCHCOCK.

Signed, sealed, and delivered in the presence of —

And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish by these presents, all my right and title of dower in and to the above described premises, to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor, forever.

Witness my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight.

ANNE HITCHCOCK. [SEAL.]

Attest: CHARLES A. MARSTON.

THE STATE OF ALABAMA,
Mobile County.

Personally appeared before me, Charles A. Marston, notary-public in and for said county, the above-named H. Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned. And also appeared personally before me, Charles A. Marston, Anne Hitchcock, wife of the said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed and delivered the said indenture of mortgage freely, and of her own accord, and without any fear, threats, or compulsion of her said husband.

Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838. CHARLES A. MARSTON.

The first instalment of debt and interest became due in March, 1839, in the life of Hitchcock. He made default in the payment of the first instalment. The Bank of the United States then filed their bill to foreclose the mortgage in the Court of Chancery at Mobile. Hitchcock resisted the payment of the debt *upon the plea of usury. There had been no decision of this suit at the date of Hitchcock's death, which took place on 11th August, 1839. [*259

275

In August, 1839, Hitchcock made his will, legally authenticated, and devised his property in trust to his wife, for the use of his wife and children, after the payment of certain legacies.

This will was admitted to probate in the Orphans' Court of Mobile county, in August, 1839, but neither letters testamentary nor of administration were issued until February, 1840.

After the death of Hitchcock, his widow, Anne, took possession of the estate, and executed many leases, but never qualified as executrix. James Erwin, her brother, purchased at sheriff's sale, all the right and title of Hitchcock, to a part of the property, for fifty dollars, and procured an attornment from the tenants. This gave rise to a suit which is reported in 4 How., 58.

In February, 1840, sundry negotiations took place between the parties, which eventuated in the execution of the following deeds and releases; viz.:

1. On the 8th of February, 1840, Anne Hitchcock executed a deed to Cowperthwaite, Dunlap, and Cope. It commenced thus: "This indenture, made this eighth day of February, A. D. 1840, by and between Anne Hitchcock, widow and sole devisee of Henry Hitchcock, late of Mobile county, acting under and by virtue of the last will and testament, and the several codicils thereto annexed, of the said Henry Hitchcock, duly proved and of record in the Orphans' Court of Mobile county, of the first part, and Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the city of Philadelphia, and state of Pennsylvania, of the second part, witnesseth: That the party of the first part, for and in consideration of the sum of seven hundred and fifty-three thousand four hundred and fifty-two dollars and twenty-three hundredths dollars, to her well and truly in hand paid, at and before the ensealing and delivery of these presents, by the said parties of the second part, the receipt whereof she doth hereby acknowledge, hath remised, released, conveyed, and forever quitclaimed, and doth by these presents remise, release, convey, and forever quitclaim, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, all the estate, right, title, interest, use, trust, property, claim and demand whatsoever, at law as well as in equity, in possession as well as in expectancy, of, in, to, or out of all and singular the following described lands and premises; that is to say," &c., &c. Then followed a conveyance of the mortgaged property, leases, and all.

2. On the 10th of February, James Erwin executed a deed to Cowperthwaite, Dunlap, and Cope for the property which

he had bought at sheriff's sale. The consideration was one hundred and fifty thousand dollars, which, it was alleged, was to be appropriated to the payment of other debts of Hitchcock, which were not secured by mortgage.

3. A release by the bank to Anne Hitchcock. This recited the bond, the mortgage, the delivery to the bank, by Anne, of the lands and houses devised to her, and then agreed that the bank should look only to the mortgaged property for the payment of its debt, and should surrender the notes and bills given by Hitchcock to the bank.

After the execution of these deeds, but within a year from the death of her husband; viz., on the 15th August, 1840, Anne refused to qualify as executrix, and repudiated the provisions made for her in the will, and claimed dower in lieu thereof. These papers were filed and recorded in the Orphans' Court of Mobile county; whereupon Isaac H. Erwin was appointed administrator with the will annexed.

In 1840, the bank filed a bill in the Court of Chancery at Mobile, against Isaac H. Erwin, Anne, and her children, which court decided that the property was properly held by the bank under the deeds, and that the defendants should be foreclosed unless the debt and costs were paid by a certain day. This decree was carried by appeal to the Supreme Court of Alabama, and there affirmed at January term, 1845.

On the 23d of April, 1847, Anne Hitchcock filed a bill in the Circuit Court of the United States for the Southern District of Alabama, against the bank, claiming dower in the lands included in the mortgage. The bank answered; evidence was taken, and the judge of the Circuit Court decided that the complainant was entitled to dower, and decreed that it should be set off to her. From this decree the bank appealed to this court.

It was argued by *Mr. Bradley* and *Mr. Campbell*, for the appellants, and by *Mr. Hopkins* and *Mr. Badger*, for the appellee.

The following is an outline of the arguments of the respective counsel.

The counsel for the appellants contended:

1. That the deed of Mrs. Hitchcock, written underneath the deed of her husband, dated of the same date, and which, she says in her answer to the trustees of the Bank of the United States in the chancery suit, was designed as a joining in the mortgage of her husband, was legal, valid, and operative, and that this has been already determined judicially.

The complaint of Mrs. Hitchcock is, that the notary, in
*261] describing *the paper acknowledged by her, says that it was the said "Indenture of Mortgage," and that by no construction can these words be held to describe the deed of relinquishment of dower. It is said she did really sign and seal the mortgage with her husband, but she employed no terms of grant in its body; and that her acknowledgment must be confined to the execution of that paper, and to have no relation to the deed immediately following, and signed the same day, and which was present, and held by the notary who took the acknowledgment.

We contend that the mortgage to the bank consisted of the estate of Henry Hitchcock, unembarrassed by the claim for dower, and that there was no misnomer in the designation of the whole instrument, which exhibited the grant of that estate, and the renunciation of the dower claim, "as an indenture of mortgage."

We contend, further, that the acknowledgment certified must be taken to have been of the whole transaction to which Mrs. Hitchcock was a party, and which is contained in the instrument executed by her. Such was the intention of all concerned with it.

Mrs. Hitchcock, in her relinquishment, refers to the deed of her husband four times. She describes herself as the wife of the said Henry Hitchcock; she refers twice to the grantees as the said Cowperthwaite, &c.; she refers to the premises as "the above-described premises." The instrument is of the same date.

The principle of construction applicable, then, to this instrument is that found in Lord Cromwell's case, Coke's R., book 2, 75. "The law will not adjudge by parcels in subversion of the intent and agreement of the parties; but when all acts are done in performance of the original contract and agreement of the parties, the law will judge upon the whole as executed at one and the same time."

Here the execution of the deed and the acknowledgment bear the same date, are on the same paper, and are obviously pursuant to the same contract. "The end of the law is to settle, repose, and make peace between man and man concerning their possessions, and it would be too dangerous a thing to make any construction against the allowance in common assurances; for thereupon would rise infinite contentions, quarrels and suits, which would be inconvenient." *Selwyn* v. *Selwyn*, 2 Burr., 1131; *Vaughan* v. *Atkins*, 5 Id., 2764, 2787. There the court says, "that the several parts and ceremonies neces-

sary to complete a conveyance shall be taken together as one act, and operate from the substantive part of it, by relation."

It is not denied that the manifest intention was that the dower *of Mrs. Hitchcock should not encumber the estate of the mortgagees. It was designed that the [*262 mortgage should cover that estate. When her signature appears on the mortgage, and her acknowledgment is, that she executed the "indenture of mortgage," what is the interpretation to be put upon her words? Must we not hold that her acknowledgment applies to the papers executed by her, and under which her acknowledgment is certified? *Lawrence* v. *Blatchford*, 2 Vern., 457; *Van Hagen* v. *Van Rensselaer*, 18 Johns. (N. Y.), 420; 16 Vin. Abr., 138; Chit. on Contr., 90.

The same principle of construction has been fully recognized in Alabama. *Bradford* v. *Dawson*, 2 Ala., 203; *Hines* v. *Bank of Alabama*, 2 Id., 452, 482; *Sewall* v. *Henry*, 9 Id., 24.

For applications of the same principle, see 11 Vt., 221; 15 Id., 472.

The court would then look to the whole instrument to find what was understood by the acknowledgment made by Mrs. Hitchcock with a view of sustaining the conveyance.

2. We contend that if the question were open, upon the authorities and arguments we have adduced, a similar decision would be proper.

3. We contend that, on the 8th February, 1840, in so far as we are concerned, Mrs. Hitchcock accepted the provisions of her husband's will, and was invested with every right it gave, and divested of every right antagonistic or adverse. That this election appears by the deed to the trustees, and was for a valuable consideration. That she conveyed by that deed every right and estate in the land she had or might derive from the most solemn and authentic acceptance of the terms of the will, and we say that this conclusion legally results from the decree of the Court of Chancery.

4. We contend that, whether the renunciation of Mrs. Hitchcock had been prior or subsequent to the execution of her deed of the 8th of February, the effect of her deed is the same. That the deed operates upon the estates, rights, and claims she then had of every name and nature. That the deed bars an inchoate or unassigned dower estate, as well as an equity of redemption.

It is perfect and all comprehensive, not only as a release and quitclaim but as a conveyance. It purports to transfer rights as well as to discharge claims.

5. We contend that all these claims were properly raised,

or might have been raised, in the suit in chancery at Mobile between Mrs. Hitchcock and the plaintiffs in error. That the adjudication in that court covers all the questions of right that *263] are *embraced in this suit, or that were the appropriate subjects of adjudication then, and waived by her if not legally presented. That the title of the trustees was quieted by that litigation, and ought not to be disturbed.

The counsel then proceeded to argue these points, and cited *Drew* v. *Norbury*, 3 Jon. & Lat., 284, to show that where a person had several estates and interest, they all passed under a deed. Sugd. on Powers, 82; Hob., 153; 10 Ves., 246; Note 7 to Appendix 2 Co. Litt., 800, (Thomas's Coke); and that even supposing that the widow's dower did not pass under the mortgage, and that her deed to the trustees only conveyed her interest under the will, still she could not recover in this suit. That she was estopped by her deed from disputing the validity and binding operation of the will, and from defeating the estate she claimed under it, by holding up a title she might have possessed at the time of her deed in contradiction to that she purports to convey under the will. 1 Metc. (Mass.), 180; 8 Ohio, 180; 6 East, 105; *Carver* v. *Jackson*, 4 Pet., 85, 86; *Harding* v. *Ambler*, 3 Mees & W., 279; 2 Ad. & E., 278; 1 Id., 792; 1 Ired. (N. C.), 566.

Whether, in the absence of any statutory provision, her acts, apart from this deed, would amount to an acceptance of the provisions of the will, will appear from 2 Yeates (Pa.), 102; 6 Rand. (Va.), 541; 17 Serg. & R. (Pa.) 16; 4 Har. & M. (Va.), 23; 3 Yeates (Pa.), 79; 3 Fairf., 138; 10 Johns. (N. Y.), 30.

The counsel for the appellee made, amongst others, the following points:

1. The mortgage is the deed of Henry Hitchcock only. His wife is no party to it. It contains no words of grant from her. Her name is not mentioned in the deed, not even in the clause of attestation. If she signed and sealed the mortgage, such acts would not make it her deed, and would leave her right to dower unimpaired. 4 How., 241, 242; 9 Mass., 218; 3 Mason, 347, 349; 16 Ala., 130; 7 Ohio, 195; 10 Id., 305–307; 7 Mass., 14; 13 Id., 223.

2. The certificate of the notary that she acknowledged she signed, sealed, and delivered the indenture of mortgage, gives no effect to the mortgage against her right to dower, because the acknowledgment was of the deed of mortgage, which could not convey her right of dower, as it was not her deed, and contained no grant from her. The interest of a married

woman in real estate can be conveyed only by a grant from her in a deed, to which she is a party. The execution of her deed must be acknowledged by her before an officer authorized to receive it, and in the mode prescribed by law. The fact that she made the *acknowledgment and in the legal [*264 mode, can be proved only by the certificate thereof made by a proper officer, and the one before whom the acknowledgment was made. 4 How., 242; 3 Mason Rep., 348, 349; 9 Mass., 218; 2 Story Eq., 618, § 1391; Macqueen on Husband and Wife, Appendix No. 1, 37, 38; Id., No. 2, 49.

6. The relinquishment, if she had acknowledged the execution of it, would be no bar to her right to dower. The statute law requires such a deed to be made and acknowledged by a wife as would convey her own estate, if her deed included her own land. Such a deed, properly acknowledged, will convey her dower, if her right to dower be her interest in the real estate, included in her deed. Clay Dig., 155, §§ 27, 28; 7 Mass., 14, 20; Aik. Dig., 93, § 29.

11. The effect of the acts of Mrs. Hitchcock, in taking possession of the mortgaged premises and conveying the equity of redemption, was not an election on her part of the trust made in the will for her benefit. Her possession and conveyance were in effect as trustee for the creditors who were beneficiaries. She did no act, in her individual character, unconnected with the relation of trustee which she bore to others, and secured by her conveyance no benefit for herself. 1 P. Wms., 315, 318; 1 Ves., 335; 12 Id., 136; 3 Stew. (Ala.), 375.

If her acts had evinced her intention to elect the trust intended by the testator for her benefit, they would not bind her, as it does not appear that she then had full knowledge of her rights. 2 Ves., 572, 577; 12 Id., 151, 152; 2 Johns. (N. Y.) Ch., 451; 2 Ves., 367, 371.

The deposition of Cope proves that the deed of Mrs. Hitchcock to the trustees of the bank, and the deed of release from Cope and others to her were delivered at the same time. This is competent evidence. 3 Mason, 348; 15 Pet., 21. They are therefore parts of the same contract, and the release of Cope and others to her was the consideration of her deed to them. 1 Ves., Sr., 127, 133; 7 B. Mon. (Ky.), 345, 347; 2 Wheat., 290, 291, 299. As Mrs. Hitchcock received no consideration in money or in any thing else of value to herself, her dower would not be barred by the deed, if a release of her right to dower were expressly made in the deed, and she had intended to make it. 3 Johns. (N. Y.), 478, 479–488; 16 Id., 47, 48.

The answer of the appellants in effect admits that the release of the mortgage debt was the consideration of Mrs. Hitchcock's deed to the trustees of the bank.

It is stated in the answer that the sum of one hundred and fifty thousand dollars was paid to Mrs. Hitchcock or her agent, *265] *as a part of the consideration for her release, to be applied to the payment of other debts of her husband. If the whole consideration had been money paid by the bank upon an agreement with Mrs. Hitchcock, that it should be applied by her to the payment of other debts of the mortgagor, it would not enlarge the operation of her release of the equity of redemption, and make it a conveyance also of the dower. 7 Cranch, 34, 35, 46, 47.

Mr. Justice GRIER delivered the opinion of the court.

The respondent, Mrs. Anne Hitchcock, was complainant below, in two bills filed in the Circuit Court of Alabama, claiming her dower in certain property in the city of Mobile, of which her late husband, Henry Hitchcock, was seized in his lifetime, and of which the appellants, as trustees of the United States Bank, were in possession, claiming under a mortgage given by said Henry.

The answer admits the marriage of complainant, and the seizin and death of her husband, and that the appellants hold the property under a deed of mortgage from him; but deny that complainant has any right of dower in the premises.

1st. Because she was a party to the deed of mortgage, and had relinquished her right of dower by her deed duly executed and acknowledged.

2d. That after the death of her husband, the complainant took possession of his property as sole devisee in fee, and surrendered the possession to the mortgagees in satisfaction of the debt, and for a large consideration paid to her executed a full and absolute release to them of all her right, title, interest, and estate, in the mortgaged property.

3d. That she was estopped by a decree of the court of Alabama, on a bill filed by the mortgagees for a foreclosure and to have their title quieted.

If the appellants can succeed in establishing either of these three grounds of defense, they will be entitled to a decree in their favor.

We will therefore consider them in their order.

I. The instrument of mortgage is dated on the 14th July, 1838. The first part of it is a deed poll in the usual form: "Know all men, &c., that I, Henry Hitchcock of Mobile, &c., in consideration of the sum of $620,530.96, to me in hand

paid, by these presents do grant, bargain, sell, &c.," and concluding, "Given under my hand and seal," and signed "Henry Hitchcock, Anne Hitchcock," with their respective seals; also these words, "Signed, sealed, and delivered in presence of," but no names of witnesses annexed.

*Under these signatures and attestation is the following release, signed and sealed by Anne Hitchcock: [*266

"And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish by these presents, all my right and title of dower in and to the above-described premises, to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor, forever.

Witness my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight.

ANNE HITCHCOCK. [Seal.]

Attest: Charles A. Marston.

The acknowledgment which appears to have been taken at the same time is as follows:

"THE STATE OF ALABAMA,
Mobile County.

Personally appeared before me, Charles A. Marston, notary-public in and for said county, the above-named Henry Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned. And also appeared personally before me, Charles A. Marston, Anne Hitchcock, the wife of said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely, and of her own accord, and without any fear, threats, or compulsion of her said husband.

Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838.

CHARLES A. MARSTON."

The objections to the sufficiency of this instrument to bar the dower of the wife, are, 1st, "That the mortgage is the

deed of the husband only. It contains no words of grant by the wife — her name is not mentioned in the deed."

2d. That the relinquishment of dower is a several and separate deed, which should have the signature of the husband, to show his consent, and that it was the joint act of husband and wife.

3d. That the acknowledgment of Mrs. Hitchcock is of "the said indenture of mortgage," and not of her relinquishment of dower.

*267] *And, 4th. That the acknowledgment is not in due form of law.

The first three of these objections are founded on the assumption that the release of Mrs. Hitchcock forms no part of the deed of mortgage, but is a separate and distinct deed. It is true, if that portion of the instrument, above the joint signatures of the husband and wife, is to be construed as the whole indenture of mortgage, the first proposition cannot be denied. For the instrument, thus far, does not purport to dispose of any right or interest vested in the wife; and if nothing further had been added, the deed would have been wholly inoperative for that purpose. But the face of the instrument shows that it does not end there: for it proceeds, "And I, Anne Hitchcock, &c., in consideration of the sum of one dollar to me in hand paid by the said Joseph, &c., do relinquish all my right and title of dower in and to the above-described premises to the said Joseph, &c."

Usually this initiate and contingent right of dower is barred, in deeds of sale and mortgage, by a conveyance making the grant in the joint names of the husband and wife, in the same manner as if the estate belonged to the wife; the deed operating by way of estoppel when the right of dower becomes complete by the death of the husband. But when the legal estate is vested wholly in the husband, and the right of the wife is but a contingent incumbrance, there is no necessity that she should join in the grant of the fee, the release of her inchoate right acknowledged in due form, being all that is necessary to bar her from setting up a claim of dower, after the death of her husband.

The insertion of the clause of release of dower might generally be considered by conveyancers as in better taste, if it had preceded the signature and attestation of the other covenants which affected the fee of the husband; but there is no stringent unbending rule of law, which requires a deed to be in such form, or in any peculiar form, in order to operate as a valid conveyance. The intention of the parties is to be gathered from an inspection of the whole instrument of assurance

taken together. It ought not to be dislocated and rent into separate fragments by a captious or astute construction, whose only result is to defeat the plain meaning and intention of the parties.

The acts of Assembly of Alabama concerning conveyances, frequently use the phrase "deeds and relinquishments of dower," which is probably the cause or the consequence of this form of conveyancing in that state, and that in popular parlance, a conveyance of land in this form is described as if a "relinquishment of dower" was not a deed, or a portion of the conveyance, assurance, or grant, though made at the same time, and forming *a portion of it. The instrument [*268 before us, composed of what is popularly called the mortgage and relinquishment of dower, constitutes but one deed or conveyance executed by husband and wife for the purpose of conveying the fee vested in the husband, and releasing the inchoate right of the wife. It was all written on the same paper or parchment, for one purpose, the latter sentences connected with those which precede it, by a copulative conjunction. It was all executed at the same time, and acknowledged by husband and wife at the time of its execution; and they have each signed that portion of the conveyance which purports to grant or release their several interests. The relative position of the signatures of the husband and wife, or the unnecessary duplication of either, is of little importance, where the instrument, by apt and proper terms, clearly shows the intention of the parties, that the husband should convey the fee, and the wife join with him in the deed, for the purpose of releasing her contingent estate of dower. In such cases, and especially where this form of assurance is in common use, the *astutia* of a court would be illy employed in criticising the form of the conveyance, in order that one of the parties may be enabled to escape from his covenants, and thus wrong and defraud the other.

Let us now examine whether the acknowledgment of the wife is sufficient, according to the statutes of Alabama, to operate as a conveyance or relinquishment of her right of dower.

The act of Assembly of Alabama on this subject (Aik. Dig., 93, § 29), is as follows:

"No estate of a *feme covert*, in any lands, tenements, or hereditaments, lying and being in this territory, shall pass by her deed or conveyance, without a previous acknowledgement made by her on a private examination apart from her husband, before one of the territorial judges, or one of the justices of the County Court, that she signed, sealed, and delivered the

same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof, written on or under the said deed or conveyance, and signed by the officer before whom it was made; and every deed or conveyance so executed and acknowledged by a *feme covert*, and certified as aforesaid, shall release and bar her right of dower, and be good and effectual to convey the lands, tenements, and hereditaments thereby intended to be conveyed."

One of the objections to the acknowledgment of Mrs. Hitchcock is, that she acknowledges to have signed and sealed "the said indenture of mortgage," and not that part of it called the "relinquishment of dower." This objection we think is hypercritical. "*Hæret in litera.*" It is founded on the assumption which we have just noticed, that the several cove-
*269] nants signed *by the husband and wife do not constitute one assurance or deed of mortgage. The same criticism would annul the acknowledgment of the husband, which is, "that he executed the foregoing indenture," whereas the deed signed by him is a deed poll and not an indenture. Surely no court would declare his acknowledgment invalid for this slight misnomer. It would, certainly, be no great latitude of construction, even if they were separate and distinct instruments, to refer the acknowledgment of the wife to that one which contains her own grant or release, and which she has signed and sealed. Even in cases of doubtful construction, the rule of law is, that the court should construe the instrument *ut res magis valeat*, and not annul it by such fanciful criticism.

It is objected, also, that this acknowledgment is not in the very words of the statute. In place of the words, "as her voluntary act and deed, freely," it substitutes the words, "freely and of her own accord."

That the words of the acknowledgment have the same meaning, and are in substance the same with those used in the statute it needs no argument to demonstrate; and that such an acknowledgment is a sufficient compliance with the statute to give validity to the deed of the wife, is not only consonant with reason, but, as the cases cited by counsel show, supported by very numerous authorities. The act requires a private examination of the wife to ascertain that she acts freely and not by compulsion of her husband, but it prescribes no precise form of words to be used in the certificate, nor requires that it should contain all the synonymes used in the statute to express the meaning of the legislature. In other acts of the same legislature, where a precise form of acknowledgment of certain deeds is prescribed, it is provided, that "any certificate of probate or acknowledgment

of any such deed, shall be good and effectual if it contain the substance, whether it be in the form or not, of that set forth in the first section of this act." Clay Dig., 153. The legislature have thus shown a laudable anxiety to hinder a construction of their statutes, which would require a stringent adherence to a mere form of words without regard to their meaning or substance, and make the validity of titles to depend on the verbal accuracy of careless scriveners.

We are, therefore, of opinion that the certificate of the acknowledgment of the complainant of the deed executed by her, is valid and sufficient in law to bar her claim of dower in the mortgaged premises.

II. But, even if this deed of mortgage were not a sufficient bar to the claim, we are of opinion that the deed of release executed *by the complainant on the the 8th of February, 1840, is a complete bar and estoppel to the claim set up in her bill. [*270

Henry Hitchcock died in August, 1839, having first made his will, in which he devises all his estate, real and personal, to the complainant in trust to sell and dispose of the same, and invest it for the use of herself and children, share and share alike. Under this devise she entered and took possession of the estate of her husband, and, in consideration of the sum of $150,000, paid to her by the trustees of the bank, and of a release by them of all claim upon the other estate of the deceased, she executed, on 8th of February, 1840, a deed of release of the mortgaged property, containing the following recitals and covenants. "This indenture, made, &c., between Anne Hitchcock, widow and sole devisee of Henry Hitchcock, acting under and by virtue of the last will and testament of said Henry Hitchcock, duly proved, &c., of the first part, and Joseph Cowperthwaite, &c., of the second part, witnesseth, that the party of the first part, for, and in consideration of the sum of $773,352, &c., hath remised, conveyed, and forever quitclaimed, and doth remise, &c., to the said parties of the second part, all the estate, right, title, interest, use, property, claim, and demand whatsoever, at law as well as in equity, in possession as well as in reversion of, in, to, or out of all and singular, the following described premises, to wit, &c., &c.: "To have and to hold all and singular the aforesaid lands, tenements, improvements, and appurtenances, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of said survivor to their own proper use, benefit, and behoof forever; so that neither the said party of the first part, her heirs or assigns, nor any person or persons whatsoever, in trust for

them or her, or in her or their name or names, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest or estate of, in, to, or out of all and singular the premises above described, and hereby released and conveyed; but therefrom and thereout are and shall be by these presents for ever excluded and debarred."

By the law of Alabama, the widow is allowed one year after probate of the will to make her election, whether to take under it or not. The will of Henry Hitchcock was admitted to probate on the 17th August, 1839, and on the 14th of August, 1840, the widow filed her election, renouncing all benefit under the will and electing to take her dower. This bill was filed on the 29th of April, 1847, nearly seven years afterwards.

She makes no offer in her bill to restore the sum of $150,000 paid to her or her agent, or to surrender the release given to her by the trustees of the bank which was the consideration *271] paid for *her release, but contends that she is remitted to her original rights by her last election, and is not estopped by her deed which was merely the execution of a power, and could not affect her personal right, or bar her claim to dower in the land conveyed or released.

It is admitted, that the mere equity of redemption of this property was worth nothing; on the contrary, the other property of the mortgagor would have been liable for a large portion of the bond which accompanied the mortgage. Yet, it is contended, that the widow may elect to take under this devise in the will; that, under pretence and belief of such election, she may get her husband's estate released from a debt and receive a large consideration in money for a release of her title as "sole devisee," and afterwards change her election, defeat all the covenants of her own deed, and yet retain the whole consideration paid for it. It is not worth while to examine what acts of a widow amount to an election *in pais* to take under the will. It is clear she cannot take possession, under the will and sell the title in fee conferred upon her by the devises in it, and then revoke her grant by changing her election within the year. The time given to the widow by the law, to make her election, is intended for her protection, and not that she shall use it as a weapon of offence to defraud others. Courts of equity do not exert their powers, even in favor of widows, to assist them in such a transaction. The deed executed by the complainant in 1840 is an estoppel, both in law and equity, against this claim of dower. By this deed, she professes to convey, as "widow," "sole devisee," and

under the powers vested in her by the will. She releases all claim or demand in law or equity, in possession or expectancy, "so that neither she, nor her heirs, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest, or estate in the premises." It is hard to conceive how any conveyancer could devise language more comprehensive, or legal phraseology more stringent, to convey every possible estate of the grantor and operate as a perfect legal estoppel against all possible claim in any character whatever. If this had been a mere naked power of appointment, or to make a conveyance of the title of the deceased, not coupled with an interest, and the widow had intended merely to exercise such power without affecting her own right in the property, her deed should have been carefully drawn, so as to show on its face an intention to save her own rights, if she did not intend to convey them. For, it is a settled rule of construction, that "whoever conveys to a purchaser, without restraining the operation of his conveyance, shall be deemed to convey in every character, which enabled him to give effect to his deed." *Sugd. on Pow., 82; [*272
Coxe v. *Chamberlain*, 4 Ves., 637, &c.

This case is much stronger against the grantor; for her deed was worthless, unless she had elected to take the devise under the will, and having recited in her deed, that she was "widow and sole devisee," she is thereby estopped from denying that she conveyed all rights held in either character, or, as between her and the grantees, ever asserting that she had not elected to take as sole devisee.

Being, therefore, of opinion, that the complainant below is doubly estopped from setting up this claim of dower, it will be unnecessary to consider the third point of defense urged by appellant's counsel, as to the effect of the decree of foreclosure.

The decree of the Circuit Court is therefore reversed, and the bill dismissed with costs.

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 Alabama, 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, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to dismiss the bill of complaint with costs.

TRISTRAM CLARK, ROYAL WILLIAMS, EBENEZER MCLELLAN, THOMAS MCLELLAN, AND JAMES R. S. WILLIAMS, CLAIMANTS OF THE BARQUE SUSAN W. LIND, APPELLANTS, *v.* NATHANIEL BARNWELL AND JAMES RAVENEL, COPARTNERS TRADING UNDER THE FIRM OF BARNWELL & RAVENEL.

Where goods are shipped and the usual bill of lading given, "promising to deliver them in good order, the dangers of the seas excepted," and they are found to be damaged, the *onus probandi* is upon the owners of the vessel, to show that the injury was occasioned by one of the excepted causes.[1]

But, although the injury may have been occasioned by one of the excepted causes, yet still the owners of the vessel are responsible if the injury might have been avoided, by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper, to show the negligence.[2]

Where spools of cotton thread, put up in boxes, were shipped at Liverpool for Charleston, and the vessel had a voyage of sixty-one days going far south into a warm climate, and the thread was an article peculiarly subject to the effect of dampness, some of the inside boxes being stained, whilst the outside ones were not, the cargo *also being well stowed and dun-
*273] naged, the injury must be attributed to the dangers of the seas.

The usage of trade is to bring sacks of salt in the same vessel with dry goods; and the evidence in this case is that, if the salt be well stowed, it does not increase the humidity of the vessel, but rather acts the other way.[3]

In this case, also, there was no evidence that the shipmaster was guilty of any negligence in omitting to provide proper precautionary measures. He was not responsible for the effect of boisterous weather or adverse winds.

The words "contents unknown" being annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the cases, as to their external condition. He might justify himself by

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[1] FOLLOWED. *Propeller Niagara* v. *Cordes*, 21 How., 29. CITED. *The Delaware*, 14 Wall., 597; S. P. *Rich* v. *Lambert*, *post* *347; *The Howard* v. *Wissman*, 18 How., 231; *Bearse* v. *Ropes*, 1 Sprague, 331; *The Emma Johnson*, Id. 527. See also *Nelson* v. *Woodruff*, 1 Black, 160; *The Commander-in-Chief*, 1 Wall.,51; *The Maggie Hammond*, 9 Id., 459; *Transportation Co.* v. *Downer*, 11 Id., 134; *The Bark Caroline*, 9 Ben., 11; *The Bark Vincenzo T.*, 10 Id., 229; *The Ship Shand*, Id., 311; *The Brig Sloga*, Id., 320; *Wertheimer* v. *Pennsylvania R. R. Co.*, 17 Blatchf., 422; *The T. A. Goddard*, 12 Fed. Rep., 177; *The Burswell*, 13 Id., 907; *The Tominy*, 16 Id., 693; *Little Rock &c. Ry. Co.* v. *Talbot*, 39 Ark., 530; *Miller* v. *Hannibal &c. R. R. Co.*, 90 N. Y., 435; S. C. 24 Hun, 610; *Sherman* v. *Inman Steamship Co.*, 26 Hun 110, 111.

The bill of lading itself is *primâ facie* evidence that the goods were shipped in good order. *Zerega* v. *Poppe*, 1 Abb., 397; *Nelson* v. *Woodruff*, 1 Black, 156; *Turner* v. *The Black Warrior*, McAll., 181; *The Zone*, 2 Sprague, 19; *Seller* v. *The Pacific*, 1 Oreg., 409.

[2] Losses by "dangers of the seas," as the phrase is used in bills of lading, are such as are of an extraordinary nature, or arise from irresistible force, which cannot be guarded against by the ordinary exertions of human skill and prudence. *The Reeside*, 2 Sumn., 567; *Bearse* v. *Ropes*, 1 Sprague, 331. Where it appears the vessel encountered an unusually violent storm, which would fully account for the damage to the goods, the burden of proving negligence is cast upon the shipper. *The Neptune*, 6 Blatchf., 193.

[3] S. P. *Rich* v. *Lambert* *post* *347.

showing that the contents were not in good order, but the evidence in this case shows that they were so; and the injury made must be attributed to the dangers of the seas.[1]

THIS was an appeal from the Circuit Court of the United States for the District of South Carolina.

It was originally a libel, filed in the District Court by Barnwell & Ravenel against the ship Susan W. Lind, under the following circumstances:

On the 4th of March, 1848, Richard Shiel & Co. shipped, at Liverpool, in the ship Susan W. Lind, Tristram Clark, master, twenty-four boxes of cotton thread, consigned to Barnwell & Ravenel at Charleston. The bill of lading contained the usual clause, "to be delivered in like good order, (all and every, the dangers and accidents of the seas and navigation, of whatsoever nature and kind, excepted,") and was signed by Clark, with the remark, "contents unknown."

The vessel sailed from Liverpool on the 14th of March, and arrived at Charleston on the 13th of May.

On his arrival, the captain made a protest, showing that the voyage had been very boisterous, and that the vessel had often shipped large quantities of water.

On the 15th of May, the captain requested the wardens of the port to make the survey of his vessel, and they continued the inspection during the discharging of the cargo. The following is that part of their report which related to the goods in question:

"On the 29th and 31st, the wardens examined twenty-two cases marked C [B R] ‡ 71 & 92. After they were landed and in store, found many of them stained outside with mud, dry, and in good order; on opening the cases, the wood inside in several of the cases appeared stained; inside of these cases were stowed small boxes; on opening them, the cotton thread contained therein was found musty, mouldy, and damaged; which, in our opinion, has been caused by the great humidity, sweat, and dampness of the hold."

Barnwell & Ravenel also had a survey made by Mood and Smith, who reported as follows:

"That we found the whole of the contents of the said twenty-two *cases to be in a damaged and unmerchantable condition; and we concurred in recommending an early sale thereof at public auction, for account of whom it may concern. And we do further certify that, if the said [*274

[1] S. P. *Nelson* v. *Woodruff*, 1 Black, 156; *The Martha*, Olc., 140; *Bradstreet* v. *Heron*, 2 Blatchf., 116; *The Columbo*, 3 Id.. 521.

cotton sewing-thread had been landed in a sound and merchantable state, the same would be worth in this market, at the present time, for cash, forty-five dollars per box, containing one hundred dozen spools, say 22 cases, each containing 6 boxes of 100 dozen.

132 boxes *a* $45 per box, ... $5940

"Witness our hands, at Charleston aforesaid, the thirty-first day of May, in the year 1848. WM. G. MOOD,
THOS. P. SMITH."

The goods were sold at auction, and produced only the net sum of $3,335.09; but the duties being abated by $376.02, the loss was claimed to amount to $2,228.89.

On the 31st of May, 1848, Barnwell & Ravenel filed their libel in the District Court of the United States against the ship, her tackle, apparel, and furniture, and against Clark and all persons who should intervene.

On the 13th of June, 1848, Clark filed a claim for himself, Royal Williams, Ebenezer McLellan, Thomas McLellan, and James R. S. Williams, all of Portland, in Maine; and afterwards an answer was filed, denying all the allegations of the libel.

A considerable amount of evidence was heard, tending to show the value of the articles shipped, the state in which they were landed, the amount of damage sustained and the causes to which it could be attributed.

On the 24th of June, 1848, the district judge dismissed the libel on the ground of there not being introduced at the trial of the cause, sufficient evidence to establish the fact of the goods being in good order and condition at the time of their shipment.

The libellants appealed to the Circuit Court. Additional testimony was taken to show that the goods were shipped in good condition.

On the 8th of May, 1849, the Circuit Court reversed the decree of the District Court, "conclusive evidence having been given to this court which was not produced before the said District Court as to the shipment of the goods at Liverpool in good order and condition," and decreed that the respondents should pay to the libellants the sum of $2,228.89 with costs.

The respondents appealed to this court. It was argued by *Mr. Evans* for the appellants, and *Mr. Coxe* for the appellees.

The whole evidence having been brought up and the argu-
*ment consisting chiefly of an examination of the facts
proven, it is obvious that only the points made by [*275
counsel can be stated.

The counsel for the appellants contended,

1. That the injury which the thread was found to have received was not occasioned by any defect or want of seaworthiness of the vessel, or any want of care in the stowage of the cargo, or in navigating the vessel; nor by any neglect, fault, or mismanagement of the master or crew. That salt in sacks is not an unsuitable article to compose a part of the cargo in a general ship.

That the injury which the thread appeared to have sustained was not occasioned by the salt which composed a portion of the cargo; but, if sustained on board, arose from other causes, for which the vessel and owners are not responsible.

2. If the injury was occasioned by the dampness of the hold of the vessel necessarily and naturally incident to such a voyage, the vessel and owners are not responsible, it being one of the perils of navigation within the exception of the bill of lading.

The exception is: "All and every the dangers and accidents of the seas and of navigation, of whatever nature and kind."

All vessels are subject to dampness in the hold, and especially vessels laden at Liverpool, which is a damp and wet place. "Liverpool is very damp." "Ships, with or without cargo, are always damp, more or less, especially in summer, on a voyage from Liverpool to Charleston." "The heat of the ocean and other causes do produce dampness," &c.

3. That the thread was insecurely and insufficiently packed for so long and boisterous a voyage as this was. This is manifest from the frequent instances of injuries received by other thread, similarly put up; from the practice of other manufacturers to pack in tin cases, and from the adoption of that mode by Coates & Co., in consequence of the repeated instances of damages sustained on the voyage by thread packed in wooden boxes.

4. That the proof is insufficient to show that the thread was in good order at the time of shipment. In some of the boxes the spools in the centre were injured, while the layers above and around them were uninjured, which could not have happened if the injury arose from exposure to dampness on board ship.

The bill of lading is not conclusive that the goods were in good order at the time of shipment.

"It is obvious that the quality, and frequently also the quantity, of the goods must be unknown to the master, and *276] the *Commentator on the (French) ordinance (Valin), informs us, that by the quality, the exterior and apparent quality only is meant," &c.

Abbott on Ship., part 4, ch. 4, § 9, also § 1; *Bates* v. *Todd*, 1 Moo. & R., 106; *Berkley* v. *Watling*, 7 Ad. & El., 29. Memorandum at foot of bill lading,—"contents unknown."

The goods in this case were delivered apparently in the same condition as received.

5. The respondents are not liable for the two cases stowed near the salt, the injury to which was of the same kind and degree and arose from the same cause, as existed in regard to the others.

6. That the libellants are not entitled to maintain this process, having no property or interest in the goods, and not being parties to the contract.

"The party really entitled to the relief should always be made the libellant. The practice of instituting a suit in the name of one person, for the benefit of another, to whom the right has been transferred, or of making one person libellant as the representative of many others, does not obtain in the admiralty," &c. Benedict's Admiralty, p. 210, § 380.

"The court looks only to rights in the thing itself; to ownership general or special, and to such claims as are direct in the proprietary interest, such as a legal title, a *jus in re;* or to such as are indirect, as a lien or *jus ad rem.*" Per Story, *Ship Packet*, 3 Mason, 258.

"If the person to whom delivery is ordered is only an agent of the shipper and has no property in the goods, it has been thought that he cannot maintain an action in his own name against the master for not delivering them; not in assumpsit, for the contract was not made with him, but with a third person, the consignor of the goods; not in trover, because no property having passed to him, he can have no right to complain of their non-delivery or conversion, as an injury to himself." Abbott on Ship., part. 4, ch. 4, §§ 6, 7.

Mr. Coxe, for the appellees.

From the abstract of the case, it appears that the decision of the District Court rested entirely upon a defect in the evidence; and of the Circuit Court upon the ground that new and additional testimony had been introduced to cure that defect. If so, the case comes precisely within the language of

Lord Chancellor Truro, in the recent case of *Stuart* v. *Lloyd*, 15 Jur., 411; 4 Eng. Law and Eq., 3: "Were I called upon in this case to review the judgment of the Lord Chancellor upon matters of fact, I should require a very strong case to be made out to induce *me to overrule that opinion, as I think that the better course is to rest satisfied with the [*277 opinion of one judge upon such matters." Such a doctrine promulgated from such high authority needs no comment.

Should the court, however, consider the question as entirely open, or that it involves any question of law of a debatable character, then the appellees submit,—

1. That the *onus probandi* is always on the carrier to exempt himself. Story on Bailm., § 529.

The bill of lading, which, on its face, says, "shipped in good order," is, at least so far as regards the exterior appearance, conclusive evidence of the condition of the goods. *Benjamin* v. *Sinclair*, 1 Bail. (S. C.), 174. The fact of damage being positively established, it devolves upon the carrier to show that it resulted from the only exception to responsibility which the bill of lading recognizes, "the dangers and accidents of the seas and navigation."

It is perhaps unnecessary for us to contend that it is conclusive evidence. It will be sufficient for us to say what can scarcely be denied, that it is *primâ facie* and cogent evidence of what it asserts. It may be impugned for fraud, but I am not aware of any decision which avows it to be questioned upon any other ground. Some *dicta* may be found which put it upon the footing of a receipt for money, and permit it to be explained, or even contradicted, but no such doctrine is established by any judicial decision of which I am aware.

Bates v. *Todd*, 1 Moo. & R., 106, is a *nisi prius* decision. It is inaccurately given in Abbott, 324. In the original report it is distinctly stated that fraud proved is a sufficient ground to impeach a solemn deed or even a judgment. Abbott, however, omits to notice this important feature in the case.

Berkley v. *Watling*, 7 Ad. & El., 29, was an action of assumpsit in a common-law court, brought by an assignee of a bill of lading. In p. 35, Patteson, J., refers to this circumstance, and asks, Where is the contract between the shipper and the assignee?

The decision of that case was put on the ground that plaintiff's agent was cognizant of the true state of facts varying from the bill of lading, and that knowledge of the agent is knowledge of the principal.

Whatever weight is to be given to the bill of lading in this

particular, the evidence *dehors* is strong, if not, as the Circuit Court considers it, conclusive upon this point.

Mr. Coxe then examined the testimony.

2. The evidence furnished by the bill of lading being, in this case, corroborated by the positive testimony of witnesses, *278] it can *scarcely be that any doubt can exist upon the questions of law which grow out of the facts. The carrier can only exonerate himself from the responsibility thus *primâ facie* established, by showing affirmatively his exemption. He must either disprove the evidence upon which he is charged; the character of the goods when shipped; that they were in good condition when delivered; or that the damage which they have suffered is attributable to the act of God, or the public enemy. Abbott on Ship., 420, 467; Story on Bailm., § 509; 2 Kent Com., 602; *Forward* v. *Pittard*, 1 T. R., 27. Even in a case where any negligence on the part of the carrier is negatived. *Siordet* v. *Hall*, 4 Bing., 607.

In the case at bar it was, on the other hand, affirmatively shown that there was a quantity of salt shipped on board the vessel, and that such a cargo has a tendency to produce dampness, which is calculated to damage goods of the character of those shipped by libellants. Story on Bailm., § 509. For an injury thus resulting, the carrier is, unquestionably, responsible. The cause of the injury is not one of those for which he can claim exemption from responsibility.

3. The thread was insecurely and insufficiently packed, the counsel on the other side contends, for such a long and boisterous voyage as this was.

The voyage was two months, and the ship sustained no damage. No ocean-water was found in her.

But it is said that the libellants, being consignees, have no right to bring this suit. The bill of lading was executed by the master of the ship, and its obligation enured to the benefit of all those who are interested in the goods shipped. In this case the contract is expressly to deliver these goods to the libellants by name, and that undertaking is conditional on the payment of freight at Charleston, the port of delivery. They are thus made, in terms, parties to the contract. So far as regards the simple fact of delivery, the contract was performed; the goods were delivered at Charleston to the libellants. The bill of lading further stipulates that the goods are to be delivered "in like good order and condition." As libellants were entitled to receive the goods, they were entitled to have them delivered in good condition.

The shippers were merely consignees, and never had any

other interest or concern in the property. (See their testimony).

The authorities cited in appellants' brief show that these shippers could not have brought this suit, they having no interest in the property. But these authorities do not admit of the construction given to them. The language of Mr. Justice Story, as cited from 3 Mason, has not the remotest connection with the *doctrine it is invoked to support. [*279
In that case the New England Marine Ins. Co. filed a libel on a bottomry-bond. This company was an underwriter upon the vessel, and a loss having ensued the ship was abandoned to the underwriter, but the company had refused to accept the abandonment; and in deciding against its right to institute the suit, Judge Story employs the language cited by the counsel. The correct doctrine is laid down in Abbott, 325, 328, 330, 335. In 337 it is said the consignee will be deemed to have the property, unless the contrary appears. That he is the proper party to enforce the obligations of the bill of lading, is most clearly and conclusively shown in 6 Serg. & R. (Pa.), 429. See particularly the opinion of Tilghman C. J., and Duncan, J.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the District of South Carolina in admiralty.

The libel was filed against the ship Susan W. Lind and owners for alleged damage to cargo shipped to the libellants, as consignees, from Liverpool to Charleston, through the neglect and fault of the master. The goods shipped were twenty-four boxes of cotton thread, which on delivery at Charleston were damaged to the amount of some fifty per cent. The spools of thread were packed in small wooden boxes lined with paper, one hundred dozen in each box, and again inclosed in a large wooden box, six small boxes in each large one, lined with paper between the small boxes. When these boxes were delivered and opened, the spools of thread in each of the small boxes were more or less stained, and spotted by dampness and mould, though the large and small boxes themselves were generally dry, as was also the paper covering the thread.

The respondents in their answer allege, that, if the contents of the boxes were in a damaged state when opened, the damage must have existed, or originated in causes that existed, before they were delivered on board the ship, though not indicated by the external appearance of the boxes; or must have been produced by the effects of the dampness of the atmos-

phere in the hold of the vessel to which goods, wares, and merchandise are exposed, and, especially such as were shipped for the libellants, in all vessels, however tight and stanch, with cargoes however well stowed, on as long and boisterous a passage as was experienced by the Susan W. Lind; or, the same was caused by such dampness in consequence of the neglect of the shipper in not having packed the cotton thread in boxes calculated to exclude the damp air which otherwise it must be subject to in the transportation across the Atlantic.

*280] *The vessel sailed from Liverpool on the fourteenth day of March, 1848, and arrived at Charleston, her port of destination, on the fourteenth day of May following, making a long voyage of sixty-one days, during which she encountered rough weather and violent gales, causing her to labor heavily, and occasionally ship water.

As we have already stated, the cotton thread, when the boxes were delivered to the consignees and opened, was found damaged on account of stains and spots, the effect apparently of dampness and mould happening in the course of the shipment.

The bill of lading admits that the twenty-four boxes were shipped in good order, and bound the respondents to deliver the same in like good order, "all, and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted." And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading? For, as the masters and owners, like other common-carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for,

then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. On this ground in the case of *Muddle* v. *Stride*, 9 Car. & P., 380, which was an action against the proprietors of a steam vessel to recover compensation for damage to goods sent by them as carriers, Lord Chief Justice Denman, in *summing up to the jury observed, "if on the whole, it be left in doubt [*281 what the cause of the injury was, or, if it may as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover; but, if the perils of the seas require that more care should be used in the stowing of the goods (articles of silk and linen) on board, than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. That the jury were to see clearly, that the defendants were guilty of negligence before they could find a verdict against them."

Now, applying these principles to the facts disclosed in the record, we shall be enabled to determine whether or not the respondents in the court below are liable for the damage that happened to the goods in question, as they settle, with great clearness, the rule of responsibility, and, also, on which side the burden of proof lies to charge or exonerate them as common-carriers. And, on looking into these facts, it will be seen, that all the witnesses concur in the conclusion that the damage was occasioned by the humidity of the atmosphere and dampness of the ship's hold, producing mould and mildew upon the cotton spools, and thereby staining and spotting the thread, impairing its strength, and rendering it unmerchantable. The article appears to be peculiarly subject to the effect of humidity and dampness, as the paper with which it was covered in the small boxes was generally dry, and unaffected, when at the same time the thread beneath was mildewed and stained, and what is more remarkable, in many instances the upper layers of the spools were perfectly dry and sound, while those lying in the centre were mouldy and spotted; and in other instances, the only part affected were the layers in the centre.

The vessel was a general ship, tight and stanch, well equipped, and manned; and was laden with a mixed cargo, consisting of cases and crates of dry goods, hardware, and

about two thousand sacks of salt. The cargo was well stowed and dunnaged. The sacks of salt when discharged were dry as usual, and in good condition; and no part of the cargo, except the cases in question appears to have been injured in the voyage, or the subject of any complaint.

It was insisted on the argument, that the respondents were in fault in taking on board their vessel the goods in question with salt as part of the cargo; but, the evidence is full that salt in sacks is part of a mixed cargo of nearly all the vessels engaged in the trade between Liverpool and Charleston. One witness, who has been in the Liverpool trade for ten years, states, that salt is part of the cargo of nine out of ten vessels trading from that port to the United States. Several ship-masters who have been engaged in this trade, state, that salt
*282] always constituted a part *of their cargo, and they never knew any damage occasioned to the other goods. Indeed, the evidence is all one way on this point. In consequence of damage occasionally happening to these goods, and others of like character, in vessels of a mixed cargo of which salt was a part, some merchants latterly gave particular directions to their correspondents not to send their goods in a ship of this description. But this only shows that the general usage of the trade would justify the shipment with salt as part of the cargo, and hence the necessity of the particular instructions.

The weight of the evidence also seems to be, that the presence of salt as part of the cargo of the ship does not prodnce humidity or dampness in the atmosphere; but tends rather to diminish it by attracting and absorbing the humidity; and that unless in contact with the salt, or exposed to the drain from it by bad stowage, no injury would accrue to the other goods.

Some attempt was also made upon the argument to show that the salt was badly stowed, regard being had to the nature and character of the goods in question; and that the damage was properly attributed to this circumstance. But there is no foundation for the argument upon the evidence. The salt was not within thirty feet of the cases of dry goods, with the exception of two cases, which were well dunnaged with matting and an inch board between them and the salt. The spools of thread in these were not damaged more than in the rest of the boxes.

Now the evidence showing very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship, or navigation of the same, or in the stowage, is one of the

dangers and accidents of the seas for which the carrier is not liable, the burden lay upon the libellants to show, that it might notwithstanding have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. For, it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Campb., 119; 6 Taunt., 65; Abbott on Ship., 428, (Shee's ed.) But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage on account of the humidity and *dampness of the ship, which is, more or less, incident [*283 to all vessels engaged in trade and navigation, especially upon the high seas. Notwithstanding, therefore, the proof was clear, that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libellants to show, that the respondents might have prevented it by proper skill and diligence in the discharge of their duties; but no such evidence is found in the record. For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question. And hence we are obliged to conclude that it is to be attributed exclusively to the dampness of the atmosphere of the vessel, without negligence or fault on the part of the master or owners.

No doubt the unusual duration of the voyage, on account of tempestuous weather and adverse winds, in connection with the fact that it was one in which the ship passed from a northern to a southern latitude, and in a season of the year when the change from a cold to a warm climate must have been considerable, greatly increased the dampness, and also the influence of it upon goods liable to damage from that cause.

But the carrier is not responsible for delay in the voyage on account of boisterous weather or adverse winds, low tides, or the like, as was held in the case of *Boyle* v. *M'Laughlin*, 4 Har. & J. (Md.), 291. These are dangers and accidents of the navigation over which he has no control, and against which his contract contains no warranty.

Another point was made on the part of the respondents below, which it may be proper briefly to notice. It was insisted that these goods had not been packed in good condition in the boxes at Paisley by the manufacturer, or if otherwise, that the damage might have happened to them in the conveyance from that place to Liverpool, before they were shipped for Charleston.

The bill of lading contained the usual clause, that they were shipped in good order; but there was added, at the conclusion, "contents unknown."

It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board, extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes. Abbott, 339, (Shee's Ed.) p. 216, (Story's Ed.) And if the evidence on the part of the defense laid a foundation for a reasonable inference, that the damage resulted from an imperfection in the goods when packed in the cases, or had occurred previously to their *284] being shipped on board, *the burden was thrown upon the libellants to rebut the inference. It was accordingly assumed in this case, and evidence produced as to the condition of the thread when packed at Paisley, and also in respect to the mode of conveyance from that place to Liverpool, preparatory to the shipment. The explanation is as full perhaps as could be well furnished, or as is usual, under the circumstances, and brings the case down, we think, to the question of damage occasioned by the effect of the humidity and dampness of the vessel in the course of the voyage. We have already expressed our views on that question, the result of which is that the decree must be reversed.

Mr. Chief Justice TANEY and Mr. Justice WAYNE dissented.

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 South Carolina, 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 reversed, with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, in conformity to the opinion of this court.

WILLIAM W. TEAL, PLAINTIFF IN ERROR, *v.* MARY C. FELTON, BY HER NEXT FRIEND, CHARLES T. HICKS.

The 13th and 30th sections of the act of Congress, passed in 1825 (4 Stat. at L., 105–111), forbid a writing or memorandum from being written on a newspaper, or other printed paper, pamphlet, or magazine, and transmitted by mail.

The Postmaster-General directed that if the wrappers of newspapers, pamphlets, or magazines, should be found to contain any manuscript or memorandum of any kind, either written or stamped, or marks or signs made in any way, by which information shall be asked or communicated, it should be charged with letter-postage.

The part of the order relating to marks or signs was not justified by the law.

Hence, where a postmaster refused to deliver a newspaper upon which there was an "initial," unless the person to whom it was addressed would pay letter postage, he was properly held liable in an action for trover. It was not a case calling for discretion in the discharge of his duties. The law, and not the instructions of a department, furnishes the guide to officers.

The state court had jurisdiction to try the case. State courts had jurisdiction over all cases of trover, and the Constitution of the United States did not abrogate their jurisdiction in such cases as the present.[1]

THIS Case was brought up from the Supreme Court of the *State of New York, by a writ of error, issued under the 25th section of the Judiciary Act.[2] [*285

Teal, the plaintiff in error, was postmaster in Syracuse, in the State of New York, and the case arose in the following manner:

The 13th section of the act of 1825 (4 Stat. at L., 105), provided as follows: "Any memorandum which shall be written on a newspaper, or other printed paper, pamphlet, or magazine, and transmitted by mail, shall be charged with letter-postage." And the 30th section of the same act (4 Stat. at L., 111), provided as follows: "If any person shall inclose or conceal a letter or other thing, or any memorandum in writing, in a newspaper, pamphlet, or magazine, or in any package of newspapers, &c., &c., or make any writing or memorandum thereon, which he shall have delivered into any post-office, or to any person for that purpose, in order that the same may be carried by post free of letter-postage, he shall forfeit the sum of five dollars for every such offense, and the letter, newspaper, package, memorandum, or other thing shall not be delivered to the person to whom it is directed, until the amount of single letter-postage is paid for each article of which the package is composed."

[1] See *Claflin* v. *Houseman*, 3 Otto, 142; *Raynsford* v. *Phelps*, 43 Mich., 344; *Robinson* v. *Nat. Bank of Newberne*, 81 N. Y., 391.

[2] Reported below. 1 N. Y., 537.

The act of 1845, sections 1, 2, and 16, fixes the rates of postage upon letters and newspapers, and defines a newspaper to be "a printed publication issued in numbers, consisting of not more than two sheets, and published at short intervals of not more than a month, conveying intelligence of passing events, and the *bonâ fide* extras and supplements of any such publication."

On the 4th of December, 1846, the Postmaster-General issued the following circular:

"*To Postmasters:*

"I am directed by the Postmaster-General to call your special attention to the multiplied and increasing attempts to violate the laws and defraud the revenue, by writing on the wrappers, margin, or other portion of newspapers, pamphlets, and magazines, sent by mail.

"The cheap postage system has removed every reasonable excuse for violating or evading the law, and too much vigilance cannot be exercised by postmasters to detect and punish the offenders; and public sentiment, when well informed, will not fail to sustain you in the faithful discharge of this duty, which is as imperative upon you as any other. That frauds of this kind may be detected and traced to their origin, you are particularly instructed to stamp, or mark in writing, any transient (by which is meant all not regularly sent to subscribers) newspapers, pamphlets, or magazines, with the name of the office and the amount of postage.

*286] * "The wrappers of all such newspapers, pamphlets, and magazines, when they have reached their destination, should be carefully removed, and if upon inspection found to contain any manuscript or memorandum of any kind, either written or stamped, or by marks or signs made in any way, either upon any newspapers, printed circular, price-current, pamphlet, or magazine, or the wrapper in which it is inclosed, by which information shall be asked for or communicated, except the name and address of the person to whom it is directed, such newspaper, printed circular, price-current, pamphlet, or magazine, with the wrapper in which it is inclosed, shall be charged with letter-postage by weight. If the person to whom the newspaper, printed circular, price-current, pamphlet, or magazine is directed, refuses to pay such letter-postage thereon, the postmaster will immediately transmit the same to the office from whence it was forwarded, and request the postmaster thereof to prosecute the same for the penalty of five dollars, as prescribed by the 30th section of the act of 1825. Suits may be brought either in district courts,

or before state magistrates having civil jurisdiction in actions of debt, for this amount, under the respective state laws; the name of the sender written or stamped either upon the newspaper, printed circular, price-current, pamphlet, or magazine, or the wrapper in which it is enclosed, communicates such information, as subjects it to letter-postage, and the consequential penalties if such postage is not paid at the place of its destination. The diminution of the revenue of the Department under the cheap postage system, and the great and increasing demand for additional mail facilities throughout the country, whose territory now extends to the Pacific, renders it absolutely necessary, not only that every cent of lawful revenue be collected and accounted for, but that the utmost vigilance should be exercised for the prevention of fraud, and the sure and speedy infliction of the proper penalty upon the offender. This can only be accomplished by the strictest attention of postmasters, who are the sworn agents of the Department, and bound to see the laws faithfully administered.

"W. J. BROWN,
"*2d Assistant Postmaster-General.*
"Post Office Department, Dec'r 4, 1846.

In February, 1847, there came to the post-office at Syracuse, a newspaper, called the Michigan Expositor, which was put into the box of Mr. Hicks. There was an initial upon the wrapper of the paper, distinct from the direction, and no part of it, the initial being a single letter. In consequence of this, it was charged with letter-postage, which Mr. Hicks refused to *pay, but tendered the newspaper postage. It was admitted that Mr. Hicks had authority to demand the [*287
paper for Mary C. Felton, to whom it was addressed, and that its value was six cents.

Hicks brought an action of trover against Teal, the postmaster, before a justice of the peace for Onondaga county, before whom the question of jurisdiction was raised. The justice, however, sustained his jurisdiction, and gave judgment against the postmaster, (the cause being tried by a jury) for six cents damages and two dollars and eighty-nine cents costs.

A writ of *certiorari* removed the cause to the Court of Common Pleas, in and for the county of Onondaga, which, at May term, 1847, affirmed the judgment of the justice, with twenty-two dollars and ninety-five cents costs.

Teal then carried the case to the Supreme Court of the state of New York, which, in June, 1848, approved the judgment of the Court of Common Pleas, with thirty-seven dollars

and sixty cents additional costs, making, in the whole, sixty dollars and fifty-five cents.

This decision was reviewed by the Court of Appeals, who decided that there was no error in it; and gave judgment for seventy-five dollars and sixty-four cents, making, in the whole, one hundred and thirty-six dollars and nineteen cents.

A writ of error, sued out by Teal, brought the case up to this court.

It was argued by *Mr. Dillage*, for the plaintiff in error, and *Mr. Seward*, for the defendant in error.

The points made by *Dillage* were the following:

I. That the justice had no jurisdiction.

1. Because the plaintiff in error acted under and by virtue of the statutory laws of the United States. Constitution U. S., art. 1, sect. 8; Circular of the P. M. Gen. 1845; 3 Laws United States by Story, 1990.

2. Because, if the action complained of was a violation of duty, the right it violated never existed at common law, nor by virtue of State Constitutions or laws. 2 Hildreth's History U. S., 181; 9 Anne, c. 9; 15 Encyclopædia Britannica, 424; 2 Hildreth's History U. S., 327; 9th art. of the Confederation; 4 Elliot's Deb., 354, 355; 3 Story Com., § 1124; 3 Story Laws U. S., 2066, § 3.

3. Because the state courts possess no jurisdiction, but such as they derived from the common law, and under their own state constitution and laws. Constitution U. S., art. 3, § 1; *Martin* v. *Hunter*, 1 Wheat., 330; *United States* v. *Lathrop*, 17 Johns. (N. Y.), 8; 3 Story Com., § 1749.

4. Because such jurisdiction would not only be a usurpation
*288] *of authority, but opposed to the policy of the general government. *McCullock* v. *The State of Maryland*, 4 Wheat., 316; Federalist, No. 80; *Sturges* v. *Crowninshield*, 4 Wheat., 122; Montesquieu, Esprit des Lois, liv. 11, c. 61; 1 Toullier, Droit Civil, c. 9, § 122. It would enable courts to adjudicate where the legislative authority could not act. *United States* v. *Bevans*, 3 Wheat., 336; *United States* v. *Cornell*, 2 Mason, 60; 3 Story's Com., § 1752; *Wayman* v. *Southard*, 10 Wheat., 13.

5. Jurisdiction is not acquired by state courts, by reason of those courts having jurisdiction in the kind of action in which the suit is brought, if the remedy depends upon a statute law peculiar to the United States general government. 17 Johns. (N. Y.), 4; *Gelston* v. *Hoyt*, 3 Wheat., 246; *United States* v.

Cornell, 2 Mason, 63; *Slocum* v. *Mayberry*, 2 Wheat., 1; *Osborn* v. *Bank of the United States*, 9 Id., 747.

6. Because the postmaster is alone subject to the control of the power which created him its instrument. *McClung* v. *Silliman*, 6 Wheat., 598.

Finally. Because the authority of the general government would not be supreme, if the courts of every state could vary and regulate its officers in the performance of their duties. *Cohens* v. *Virginia*, 6 Wheat., 264; Federalist, No. 80.

II. The plaintiff in error, was an officer of the government, and required by law to exercise his judgment in the performance of the duty the law imposed upon him in fixing the amount of postage on the paper for which this action was brought.

Officers required by law to exercise their judgment are not answerable for mistakes of law, or mere errors of judgment. *Drewe* v. *Colton*, 1 East, 563 in note; *Seaman* v. *Patten*, 2 Cai. (N. Y.), 312; *Jenkins* v. *Waldron*, 11 Johns. (N. Y.), 114; *Weaver* v. *Devendorf*, 3 Den. (N. Y.), 117; *Kendall* v. *Stokes*, 3 How., 97; 2 Op. Att. Gen., 1018.

Mr. Seward, for defendant in error, made the following points:

I. The justice had jurisdiction. *Wilson* v. *Mackenzie*, 7 Hill. (N. Y.), 95. See also case, Opinion of Justice Gridley, 43–46; *Bruen* v. *Ogden*, 6 Halst. (N. J.), 370, 377, 379, 381; Story on Agency, §§ 319, 319 *a*, 319 *b*, 320, 321, 322; Cowp., 754; 1 Kent Com., 386.

II. The only question in the case upon the merits was one of fact; and the jury having found for the plaintiff in the court below, the court will not disturb the verdict. 18 Wend. (N. Y.), 141; 1 Hill (N. Y.), 61; 2 Johns. (N. Y.), 378; 3 Id., 435–439. See also Opinion of Justice Gridley in the case, 46, 53. See also the *Opinion of Wright, judge, in the Court of Appeals, on the decision of this case, *Teal* v. *Felton*, 1 N. Y., 537–549, and the authorities cited by the judge. [*289

Mr. Justice WAYNE delivered the opinion of the court.

This suit was brought in a justice's court to recover from the plaintiff in error the value of a newspaper, received by him as postmaster at Syracuse, which he refused to deliver to the defendant in error to whom it was addressed. The plaintiff in error had charged the newspaper with letter-postage, on account of a letter or initial upon the wrapper of it, dis-

tinct from the direction. This the defendant refused to pay, at the same time tendering the lawful postage of a newspaper. The postmaster would not receive it, and retained the paper against the will of the defendant; upon that demand and refusal the suit was brought. The action was trover, and the general issue was pleaded. In the course of the trial when the defendant in error, who was plaintiff in the suit below, was introducing testimony in support of his case, the defendant objected to a further examination of the case by witnesses, upon the ground that the court had not jurisdiction of the case. The objection having been overruled, the trial of the case was continued; and after the plaintiff had proved that he demanded from the defendant the newspaper, tendering the lawful postage, and that the postmaster refused to deliver it to him, he rested his case.

The defendant below then moved for a non-suit, which having been denied, he offered in evidence a circular from the Post-Office Department of the 4th December, 1846, marked in the record as A, and also the Post-Office act of 1845. The case was submitted to a jury. A verdict was rendered by it against the defendant, upon which a judgment was entered. The defendant carried the case to the Court of Appeals, and the judgment of the lower court was affirmed. It is brought to this court by a writ of error. As the Court of Appeals could not have adjudicated the case without having denied to the defendant a defense which he claimed under a law of the United States, the case is properly here under the 25th section of the Judiciary Act of 1789.

The circular from the Post-Office Department is as follows: "The wrappers of all such newspapers, pamphlets and magazines, when they have reached their destination, should be carefully removed; and if upon inspection they are found to contain any manuscript or memorandum of any kind, either written or stamped, or by marks or signs made in any way, either upon any newspaper, &c., &c., or the wrapper upon which it is inclosed, by which information shall be asked or communicated, except the name of the person to whom it is
*290] directed, such newspaper, *&c., &c., with the wrapper in which it is inclosed shall be charged with letter-postage by weight."

If the person to whom the newspaper is directed, refuses to pay the letter-postage, the postmaster is directed to transmit the same to the office whence it came, with a request that the person who sent it may be prosecuted for the penalty of five dollars, according to the 30th section of the act of 1825. Those parts of the 30th section mentioned, upon which the

circular was issued, and of the 13th section of the act directing that a memorandum which shall be written on a newspaper, shall be charged with letter-postage are: "If any person shall inclose or conceal a letter or other thing, or any memorandum in writing in a newspaper, pamphlet or magazine, or in any package of newspapers, &c., &c., or make any writing or memorandum thereon, which he shall have delivered in any post-office or to any person for that purpose, in order that the same may be carried by post, free of letter-postage, he shall forfeit the sum of five dollars for every such offense, and the letter, newspaper, package, memorandum or other thing, shall not be delivered to the person to whom it is directed until the amount of single letter-postage is paid for each article of which the package is composed. That part of the 13th section of the act mentioned is: "Any memorandum which shall be written on a newspaper or other printed paper, pamphlet or magazine, and transmitted by mail, shall be charged with letter-postage." 4 Laws of the United States, 105–111. Those parts of the law of 1845, in any way applicable to this case, are the 1st and 2d sections fixing the rates of postage upon letters and newspapers, and the 16th section, which defines a newspaper to be a printed publication issued in numbers, consisting of not more than two sheets, and published at short intervals of not more than a month, conveying intelligence of passing events, and the *bonâ fide* extras and supplements of any such publication. 5 U. S. L., 732, 737.

From the evidence in this case, we do not think that the initial or letter upon the wrapper of the newspaper in this case, subjected it either under the 13th or 30th section of the act of 1825 to letter-postage. Why it was placed there, supposing it not to have been accidental, cannot be found out from this record, and it must have been a meaningless mark to the postmaster. It may have excited a suspicion, that it was a sign arranged between the person sending it and the person to whom it was directed, to convey information of some sort or other, for which letter-postage would have been charged, if it had been conveyed in words. The act forbids a memorandum in the 13th section; and in the 30th, providing for a penalty, the terms are, "any writing or memorandum," but in neither are found, the terms "marks *or signs," as used in the circular. No provision is made [*291 for such a case. It must be obvious too, that frauds of that kind cannot be prevented in the transmission of newspapers, without legislation by Congress, subjecting newspapers conveyed by mail to letter-postage, whenever there shall be, either upon the newspaper or the wrapper of it, any letter, sign, or

mark, besides the address of the person to whom it is sent. A single letter or initial upon the wrapper of a newspaper, is neither a memorandum nor a writing in the sense in which either of those terms are ordinarily used, or as we think they were intended to be used in the 30th section of the act. Both mean something in words to convey intelligence, a remembrance for one's self or to another. The act speaks of something concealed in a newspaper or package of newspapers, of a writing or memorandum, from which it may be seen to have been the intention of the sender to convey information clandestinely under the wrapper, or upon it in a form, though not disclosing what it is, which will leave no doubt of his intention. The initial in this case does not seem to have been one or the other. It is not a memorandum certainly, and a single letter of the alphabet can convey no other idea than that it belongs to it, unless it is used numerically. This was not a case in which judgment could be used to determine any fact, except by some other evidence than the letter itself. Nor was it one calling for discretion in the legal acceptation of that term in respect to officers who are called upon to discharge public duties. What was done by the postmaster, was a mere act of his own, and ministerial, as that is understood to be, distinct from judicial. It could not have been the intention of Congress to put it in the power of postmasters, upon a mere suspicion raised by a single letter or initial, to arrest the transmission of newspapers from the presses issuing them, or when they were mailed by private hands.

This view of the law, disposes also of that point in the argument, claiming for the postmaster an exemption from the suit of the plaintiff, upon the ground that he was called upon, in the act which he did, to exercise discretion and judgment. In *Kendale* v. *Stokes*, 3 How., 97, 98, will be found this court's exposition upon that subject, with the leading authorities in support of it. The difference between the two, must at all times be determined by the law under which an officer is called upon to act, and by the character of the act. It is the law which gives the justification, and nothing less than the law can give irresponsibility to the officer, although he may be acting in good faith under the instructions of his superior of the department to which he belongs. Here the instructions exceed the law, and marks and signs of themselves, *292] without some knowledge of their meaning, and *the intention in the use of them, are, as we have said, neither memoranda nor writings. *Tracy* v. *Swartwout*, 10 Pet., 80.

But it is said that the courts of New York had not jurisdic-

tion to try the case. The objection may be better answered by reference to the laws of the United States, in respect to the services to be rendered in the transmission of letters and newspapers by mail, and by the Constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States, and the courts of the states, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach their destination, by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the 2d section of the 3d article of the Constitution, he adds, "this is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary." We will add, that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find, in the 25th section of the Judiciary Act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, "where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity." *We are satisfied that there was no error in the decision of [*293

the Court of Appeals in this case, and the same is affirmed by this court.

Order.

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

JAMES C. ACHISON, PLAINTIFF IN ERROR, *v.* JONATHAN HUDDLESON.

Under an act passed by the State of Maryland, and an assent given to it by Congress, no toll could be levied, for passing over the Cumberland Road, upon coaches which carried the United States mail.

In 1843, the Legislature of Maryland passed an act imposing a toll upon all passengers in mail-coaches, and if it were not paid, a toll of one dollar for each coach for every time that it passed over the road.

The toll upon passengers in mail-coaches was inconsistent with the compact made between Maryland and Congress, and therefore void.

And the toll per coach, of one dollar, is more properly a commutation of tolls than a penalty, and therefore void also.[1]

THIS case was brought up from the Court of Appeals of Maryland, by a writ of error issued under the 25th section of the Judiciary Act.

It was originally a suit brought in the County Court of Alleghany County, in Maryland, by Jonathan Huddleson, superintendent of that part of the United States Road within the limits of the state of Maryland, against Stockton, Falls, Moore, and Achison, trading under the firm and style of Stockton, Falls & Co., who were the contractors for carrying the mail across the Alleghany Mountains.

The acts of Congress and of the states through which the Cumberland Road passes, were set forth in 3 How., 151, 720. A brief summary is all that is now required.

In 1832, the state of Maryland passed an act relative to the Cumberland Road, proposing to collect certain tolls upon it for the purpose of keeping it in repair. This act contained the following:

"And provided further, That no tolls shall be received or

[1] See *Erie R'y Co.* v. *Pennsylvania*, *Stokes*, 3 How., 151, and *Neal* v. *Ohio*, 21 Wall., 498, and note to *Searight* v. Id., 720.

*collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the states composing this Union."

The Congress of the United States, by an act approved July 3d, 1832, entitled "An act making appropriations for certain internal improvements for the year 1832," gave the assent of Congress to the provisions of the aforesaid act of the Legislature of Maryland, in the words following, to wit: "And of an act of the General Assembly of the State of Maryland, entitled 'An act for the preservation and repair of that part of the United States road within the limits of the State of Maryland, passed the twenty-third day of January, one thousand eight hundred and thirty-two;' to which said acts the assent of the United States is hereby given, to remain in force during the pleasure of Congress."

It was admitted by agreement of counsel that Stockton, Falls & Co., during the whole time for which the charge for the transit of stages upon the said United States road was made, were the carriers of the United States mails, in four-horse post-coaches, under a contract with the Postmaster-General of the United States, two articles of which looked to the transportation of passengers with the mail.

On the 10th March, 1843, the Legislature of Maryland passed an act, the first three sections of which were as follows:

"Sect. 1. Be it enacted, by the General Assembly of Maryland, that from and after the passage of this act there shall be demanded and received by the toll-collectors on that part of the United States road, within the limits of the State of Maryland, from the owner or owners of every passenger or mail coach or stage passing the gates on said road, the sum of four cents for every passenger carried in the same, for every space of ten miles on said road, and so in proportion for every greater or less distance, which shall be taken and received in lieu of the tolls now established by law on all coaches or stages with four horses passing over said road, and which shall be collected, paid out, and expended as other tolls on said road are collected, paid out and expended, under existing laws.

"Sec. 2. And be [it] enacted, That it shall be the duty of the proprietor or proprietors, his, her, or their agent, to furnish under oath, on the first Monday of every month, to the gate-keeper at number one, a list, showing the number of passengers transported over said road in their respective coaches, for the month next preceding the time when said list is so returned.

"Sec. 3. And be it enacted, That in the event of said pro-
*295] prietors *or agents failing or refusing to comply with the provisions of the second section of this act, then and in that case it shall be the duty of the gate-keeper, at gate number one, to demand of and receive from, such proprietor or proprietors so failing, the sum of one dollar for each and every stage-coach passing over said road its entire length."

In the agreed statement of facts in the County Court, the counsel further agreed as follows:

"It is agreed that the stage-coaches, for which the sum of one dollar each is sought to be recovered in this action, were four-horse stage-coaches, used and employed by the defendants in the transportation of the United States mails, under the contract in that behalf before mentioned, and that the passengers for the failure of the defendants to furnish the lists of whom, under the act of Legislature of Maryland last above mentioned, the said sum of one dollar per stage-coach is charged and demanded in this action, were passengers transported in the said coaches, carrying the said United States mails as aforesaid.

"It is further admitted, that the number of coaches in which the said mails were carried, were necessary for the said carriage of the said mails, and that there was no unfairness nor fraud, on the part of the defendants, in dividing the said mails so as to use a greater number of coaches for the carriage of said mails than were actually necessary for such purpose.

"It is further admitted, that the defendants did carry passengers daily in the said four-horse coaches, and that the said defendants did not comply with the provisions of the second section of the act of the General Assembly of Maryland aforesaid, passed on the 10th day of March, 1843, as aforesaid, by returning a list on the first Monday of every month, or at any other time, showing the number of passengers thus transported over the said road in the said coaches. It is admitted that the said acts of Assembly of Maryland did not increase the tolls above a sum necessary to defray the expenses incident to the preservation and repair of said road.

"If, upon this statement of facts, the court shall be of opinion that the plaintiff is entitled to recover, either upon the present declaration or upon an amended declaration, for the four cents per passenger for every ten miles, the judgment to be entered for the plaintiff for seven hundred and sixteen dollars. If the court shall be of opinion that the plaintiff is not entitled to recover in either case, then judgment to be given for the defendants; either party will be at liberty to appeal to the Court of Appeals, or sue out a writ of error."

Upon this statement of facts, the County Court gave judgment for the plaintiff, for the amount mentioned in the statement.

*Achison, who was the representative of Stockton, [*296
Falls & Co., carried the case to the Court of Appeals of Maryland, where the judgment was affirmed, and he then brought it up to this court.

It was argued by *Mr. Price* and *Mr. Nelson*, for the plaintiff in error, and by *Mr. Frick* and *Mr. McKaig*, for the defendant in error.

The counsel for the plaintiff in error contended that the provisions of the act of Assembly of Maryland, of 1843, were in violation of the compact between that state and the United States, and referred to in the cases in 3 How., 151, 720.

The counsel for the defendant in error insisted, that this case is clearly distinguishable from the cases of *Searight* v. *Stokes et al.*, 3 How., 151; and *Neil, Moore & Co.* v. *The State of Ohio*, Id., 720. That the act of Maryland, of the 10th March, 1843, is not liable to the objections which prevailed in the cases, in 3 Howard, referred to. That the provision of the act of 1843, on which this action is founded, embracing all passengers in four-horse coaches or stages, is not in violation of either the letter or the spirit of the compact between the state of Maryland and the United States, contained in the Maryland act, passed January 23d, 1832.

Mr. Justice CURTIS delivered the opinion of the court.

This action was brought by the defendant in error, as superintendent of that part of the National Road lying within the state of Maryland, to recover a sum of money from the plaintiff in error, as the owner of stage-coaches passing over that road, and conveying passengers and the mails of the United States. The Court of Appeals for the Western Shore of the state of Maryland having rendered a final judgment in favor of the plaintiff, the defendant brought the case here by a writ of error, under the twenty-fifth section of the Judiciary Act.

The nature and extent of the compact between the United States and the several states of Ohio, Virginia, Maryland, and Pennsylvania, touching the parts of the road lying within the limits of each of those states, having been much considered by this court in the cases of *Searight* v. *Stokes*, 3 How., 151, and *Neil et al.* v. *The State of Ohio*, Id., 720, it is only necessary to state some of the conclusions there arrived at, and apply them to the law of Maryland now in question.

In the second of those cases it was decided, that the state of Ohio could not change the tolls fixed by its act, which Congress assented to, so as to vary the relative position and privileges of mail-coaches, in regard to tolls, as prescribed by that act.

*297] *This decision is equally applicable to the original act of Maryland, to which Congress gave its assent; and the first inquiry is, whether the subsequent act of Maryland, now in question, will bear that test. The second section of the law of Maryland, to which Congress gave its assent, imposed, among other tolls, the following: "For every chariot, coach, coachee, stage, wagon, phaeton, chaise, or other carriage, with two horses and four wheels, twelve cents; for either of the carriages last mentioned, with four horses, eighteen cents." And, inasmuch as coaches conveying the mail were not subject to any toll, there was by this law a discrimination in favor of mail-coaches, their proprietors bearing none of the burden of supporting the road, while the proprietors of other four-horse coaches did bear a part of their burden. On the 10th of March, 1843, the General Assembly of Maryland passed the act now under consideration, the material provisions of which are as follows:

"An act to amend the act entitled a supplement to an act entitled an act for the preservation and repair of that part of the United States road within the limits of the state of Maryland.

"Sec. 1. Be it enacted by the General Assembly of Maryland, that from and after the passage of this act there shall be demanded and received by the toll-collectors on that part of the United States road, within the limits of the state of Maryland, from the owner or owners of every passenger or mail-coach or stage passing the gates on said road, the sum of four cents for every passenger carried in the same, for every space of ten miles on said road, and so in proportion for every greater or less distance, which shall be taken and received in lieu of the tolls now established by law on all coaches or stages with four horses passing over said road, and which shall be collected, paid out, and expended, as other tolls on said road are collected, paid out and expended, under existing laws.

"Section 2. And be it enacted, That it shall be the duty of the proprietor, or proprietors, his, her, or their agent, to furnish under oath, on the first Monday of every month, to the gate-keeper at number one, a list showing the number of passengers transported over said road in their respective coaches,

for the month next preceding the time when said list is so returned.

"Sec. 3. And be it enacted, That, in the event of said proprietors or agents failing or refusing to comply with the provisions of the second section of this act, then, and in that case, it shall be the duty of the gate-keeper, at gate number one, to demand of, and receive from, such proprietor or proprietors so failing, the sum of one dollar for each and every stage-coach passing over said road its entire length."

*The discrimination which, under the original law, [*298 was made in favor of the proprietors of mail-coaches using the road, is not only destroyed by this law, but all toll is removed from the proprietors of other four-horse coaches, and a toll is imposed upon the proprietors of mail-coaches. It was held in both the former decisions, that the stipulation in the compact, that the United States should not thereafter be subject to any expense to maintain the road, was inconsistent with the imposition of a tax upon the contractors for carrying the mail in four-horse coaches, because the United States, requiring the mail to be so carried, would thus indirectly be made, through the enhancement of the price for this service, to bear a part of that burden. The effect of this law of Maryland is, therefore, to impose upon the United States, through the contractors for carrying the mail in four-horse coaches, a tax for the support of the road. It is argued that it is a tax upon the passengers, and not within the former decisions. But we do not so consider it. It is true, if he were to carry no passengers, and make the required returns of that fact, the proprietor would not be liable under this law to pay any toll. But the regulations of the Post-Office Department require him to take passengers for the security of the mail. If he carry the mail, he must also be a carrier of passengers; and this law would not have imposed a toll dependent upon the carriage of passengers in mail-coaches, unless it considered they would be carried. The real effect and meaning of the law is, therefore, to impose a tax on the proprietor of a four-horse coach which carries the mail, making the amount of that tax depend on the number of passengers carried. Now, the objection is not to the amount, but to the existence of the tax. Not having the power to impose any tax, it is no answer to say, its amount is regulated by the number of passengers.

This action is brought under the third section of the act to recover from the proprietor of mail-coaches the sum of one dollar for every mail stage-coach passing over the road. It is contended this is not a toll, but a penalty, for not complying with the directions contained in the second section of the act,

to make returns. We think it more properly a commutation as to amount, for the tolls payable under the first section. It fixes their amount by operation of law, and without regard to the number of passengers carried; and is certainly subject to difficulties quite as great as would attend a demand for the tolls, under the first section.

Our opinion is, that, by reason of the compact between the United States and the state of Maryland, the tolls sued for could not be legally demanded, and that the decision of the Court of Appeals was erroneous and must be reversed.

*299] *Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals of the Western Shore of the State of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Court of Appeals 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 Court of Appeals, in order that such further proceedings may be had therein, in conformity to the opinion of this court, as to law and justice may appertain.

AARON B. COOLEY, PLAINTIFF IN ERROR, *v.* THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA, TO THE USE OF THE SOCIETY FOR THE RELIEF OF DISTRESSED PILOTS, THEIR WIDOWS AND CHILDREN, DEFENDANTS.

SAME *v.* SAME.

A law of the state of Pennsylvania, that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the relief of Distressed and Decayed Pilots, their widows and children, one half the regular amount of pilotage, is an appropriate part of a general system of regulations on the subject of pilotage, and cannot be considered as a covert attempt to legislate upon another subject. under the appearance of legislating on this one.

Nor can the exemption of American vessels engaged in the Pennsylvania coal-trade from the necessity of paying half pilotage, be declared to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of the port of Philadelphia.

The law of Pennsylvania is, therefore, not inconsistent with the second and third clauses of the tenth section of the first article of the Constitution of the United States. Imposts, and duties on imports, exports, and tonnage, were understood, when the Constitution was formed, to mean totally distinct things from fees of pilotage.

Nor is the law repugnant to the first clause of the eighth section of the first

article of the Constitution, because, as the charge is not a duty, import, or excise, there is no necessity for its being uniform throughout the United States.

Neither is the law repugnant to the fifth clause of the ninth section of the first article of the Constitution; because it neither gives a preference of one port over another, nor does it require a vessel to pay duties.

Upon this point, the act of Congress, passed in 1789, (1 Stat. at L., 54,) recognizing the pilot-laws of the states, is entitled to great weight, as showing that these laws neither levied duties nor gave a preference of one port over another.

Moreover, the law is not inconsistent with the third clause of the eighth section of the first article of the Constitution.

It is true that the power to regulate commerce includes the regulation of navigation, and that pilot-laws are regulations of navigation, and, therefore, of commerce, within the grant to Congress of the commercial power.

But the mere grant of the commercial power to Congress, does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon *others different rules in different localities. [*300
The power is exclusive in Congress in the former, but not so in the latter class.[1]

Although Congress may legislate upon the subject of pilotage throughout the United States, yet they have manifested an intention not to overrule the state laws, except in one instance. The law of Pennsylvania, not being overruled, is not repugnant to the Constitution of the United States.[2]

THESE two cases were brought up from the Supreme Court of Pennsylvania, by writs of error, issued under the twenty-fifth section of the Judiciary Act.

They both depended upon the same principle, were argued and decided together, and will be treated as one. The only difference between them was, that the pilotage was demanded from two different vessels, the Undine and the Consul. Cooley was the consignee of both vessels.

The twenty-ninth section of the act passed by the Legislature of Pennsylvania on the 2d of March, 1803, is set forth at length in the opinion of the court and need not be repeated.

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[1] APPLIED. *Gilman* v. *Philadelphia*, 3 Wall., 727. FOLLOWED. *Chicago &c. R. R. Co.* v. *Fuller*, 17 Wall., 569. CITED. *Henderson* v. *Mayor, &c. of New York*, 2 Otto, 272.

[2] FOLLOWED. *Steamship Co.* v. *Joliffe*, 2 Wall., 468. NOT IN POINT. *Conway* v. *Taylor*, 1 Black, 635. See also *Crandall* v. *State of Nevada*, 6 Wall., 42; *Hinson* v. *Lott*, 8 Id., 152; *State Tonnage Tax Cases*, 12 Id., 219; *Ex parte McNeil*, 13 Id., 242; *State Freight Tax Case*, 15 Id., 280; *Osborne* v. *Mobile*, 16 Id., 482; *The Lottawana*, 21 Id., 582; *Packet Co.* v. *Keokuk*, 5 Otto, 88; *Pound* v. *Turck*, Id., 463; *Hall* v. *DeCuir*, Id., 488, 497, 499, 516; *Ex parte Siebold*, 10 Id., 385; *Wilson* v. *McNamee*, 12 Id., 575; s. c. 1 Morr. Tr., 574; *County of Mobile* v. *Kimball*, 12 Id., 698, 701; s. c. 1 Morr. Tr., 465, 468; *Packet Co.* v. *Catlettsburg*, 15 Otto, 563; *Turner* v. *Maryland*, 17 Id., 56: *Pana* v. *Bowler*, Id., 702; *Huse* v. *Glover*, 15 Fed. Rep., 295; s. c. 11 Biss., 554; *The Glenearne*, 7 Fed. Rep., 607; *The Clymere*, 9 Id., 166; *Webb* v. *Dunn*, 18 Fla., 728; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill., 574; *Tinken* v. *Stillwagon*, 1 City Ct. (N. Y.) Rep., 393; *Virden's Appeal*, 13 Phil. (Pa.), 152; *Com. ex rel. Reed* v. *The Sheriff*, Id., 447.

The statute referred to (Act of Mch. 2, 1803) does not make it obligatory on a vessel to take a pilot; she may take a pilot or pay half pilotage, at the option of the master. *Smith* v. *The Creole*, 2 Wall. Jr., 485.

The board of wardens brought an action of debt before Alderman Smith, against Cooley for half-pilotage, due by a vessel which sailed from Philadelphia without a pilot, when one might have been had. The magistrate gave judgment for the plaintiffs, and the defendant appealed to the Court of Common Pleas.

In that court, a declaration in debt was filed by the plaintiff below. In the case of the Undine, the defendant demurred, and upon the demurrer, judgment was given for the plaintiff.

In the case of the Consul, the defendant put in two pleas.

1. That the Consul was engaged in the coasting trade, sailing under a coasting license from the United States.

2. That the said schooner was bound from the port of Philadelphia, in the state of Pennsylvania, to the port of New York, in the state of New York.

To both of which pleas there was a demurrer and a joinder in demurrer, and a judgment for the plaintiff.

The case was then carried to the Supreme Court of Pennsylvania, which, in January, 1850, passed the following judgment:

That "the judgment of the Court of Common Pleas for the city and county of Philadelphia be affirmed, because this court is of opinion that the twenty-ninth section of the act of the state of Pennsylvania, of the 29th of March, A. D. 1803, entitled An act to establish a Board of Wardens for the port of Philadelphia, and for the regulation of pilots and pilotages, and for other purposes therein mentioned, is not in any of its provisions involved in this cause, at variance with any of the provisions of the Constitution or laws of the United States, but is a constitutional and legal enactment."

Cooley then brought the case up to this court.

*301] *It was argued by *Mr. Morris* and *Mr. Tyson*, for the plaintiff in error, and by *Mr. Campbell* and *Mr. Dallas*, for the defendants.

For the plaintiff in error, it was contended that the law of Pennsylvania was unconstitutional and void, because:

1. It is repugnant to the first and third clauses, eighth section, first article of the Constitution of the United States.

The first clause declares that all duties, imposts and excises, shall be uniform throughout the United States; and the third, that Congress shall have power to regulate commerce with foreign nations, and among the several States.

Upon the first clause we argue, that the constitutional uniformity enjoined in respect to duties and imposts, is as real

and obligatory on the states in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress. The twenty-ninth section of the act of Pennsylvania, of 29th March, 1803, in question, and the second section of the act of June 11th, 1832, overthrow everything like uniformity.

No penalties, then, imposed by either of these acts can be binding.

Upon the third clause we argue, that the power to regulate commerce is exclusive in Congress.

2. It is repugnant to the second clause of the tenth section first article of the Constitution of the United States, to wit:—"No state shall, without the consent of Congress, lay any imposts, or duties, on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports and exports shall be for the use of the treasury of the United States." And to the subsequent branch of the same clause, which declares, "No state shall, without the consent of Congress, lay any duty on tonnage."

The present case resembles *Brown* v. *The State of Maryland*, 12 Wheat., 419. There the tax was exacted for the privilege of selling. Here for the privilege of introducing or sending away.

The defendant in this case is the consignee, the merchant. This is, in reality, a tax upon imports. Judge Grier, *Norris* v. *The City of Boston*, 7 How., 458, 459. It is a tax upon those engaged in the business of importation, arising out of their position as importers.

It is a tax for a particular purpose, the support of a hospital for decayed pilots. If the state can appropriate the funds to this purpose, she can appropriate them to any other,—a general hospital for mariners, or an alms-house for indigent foreigners.

If the right be once admitted, and she choose, she can make *the tax so high as to exclude commerce altogether. She can exclude all vessels not engaged in particular [*302 trades.

If this is a tax or duty, which we think is clearly shown, it is a tax or duty on tonnage, and, therefore, contrary to the second clause, tenth section, first article of the Constitution of the United States: "No state shall, without the consent of Congress, lay any duty on tonnage."

This is a duty on a tonnage of seventy-five tons or more, and increases with the increased draught of water. The same

power might increase the duty or tax, varying it with the increased tonnage.

It may be said that Congress has consented, by the act of 7th August, 1789, section 4,—

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the state, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." The act of Congress 2d March, 1837, 5 Stat. at L., 153, is a repeal of the part of the act of 1803 now in question.

But this act of Pennsylvania which we object to, is not an act to regulate pilots. It is an act to raise a fund for the support of decayed pilots.

We answer further: Congress may adopt state legislation when within constitutional limits, no doubt; yet it cannot be, that by general legislation of this kind, they can prospectively confer upon the states powers not given by the Constitution, or enable individual states to legislate on subjects clearly within the powers of Congress, and to support that legislation even against subsequent acts of Congress upon the same subject.

The Chief Justice, in speaking of this act in the license cases, 5 How., p. 580, says:

"Undoubtedly Congress had the power, by assenting to the state laws then in force, to make them its own, and thus make the previous regulations of the states the regulations of the General Government. But it is equally clear, that as to all future laws by the states, if the Constitution deprives them of the power of making any regulations on the subject, an act of Congress could not restore it; for it will hardly be contended that an act of Congress can alter the Constitution, and confer upon a state a power which the Constitution declares it shall not possess."

All that has been said applies equally to the case of the Consul. In addition to which we set up by plea,—

1. The coasting license.

*303] 2. That she was bound from one port in the United States, to another port in the United States.

Let it be granted that the power to regulate commerce is not so exclusive as to prevent state legislation, in the absence of legislation by Congress.

Yet Congress having legislated, so far as regards coasting vessels, by the act of 18th Feb., 1793, § 4, the Pennsylvania act of 29th March, 1803, § 29, which is in conflict therewith, is

unconstitutional and void, so far as it relates to coasting vessels. 4 Smith's L., 76; 1 Stat. at L., 305.

To make out these propositions, we argue,

First, That pilot-laws are regulations of commerce, within the meaning of the Constitution of the United States.

Second, That the act of Pennsylvania is no exception to the general rule.

Third, That the act of Congress, 18th Feb., 1793, § 4, has regulated the navigation of coasting vessels, and limited the exactions to which vessels so employed can be subjected.

1. Regulations of navigation are regulations of commerce and within the jurisdiction of Congress.

"Commerce is intercourse. The power to regulate commerce extends to the regulation of navigation." Per Chief Justice Marshall, *Gibbons* v. *Ogden*, 9 Wheat., 189; see Id., 191, 192, 193.

Again,—Mr. Justice Johnson, Id., 229, says, "When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it, as vital motion is from vital existence."

This power comprehends navigation within the limits of every State in the Union. Id., 107. *Norris* v. *The City of Boston*, and *Smith* v. *Turner*, 7 How., 414, 415, 462.

Pilotage laws are regulations of navigation. They prescribe the terms of commercial or maritime intercourse. They take possession of the vessel as she appears upon the coast, or as soon as she leaves the wharf.

Clearly stated by Chief Justice Taney, License Cases, 5 How., 580. By Judge Rodgers, *Flanigan* v. *The Insurance Co.*, 7 Barr., 311.

Congress has exercised the jurisdiction, and it has never been questioned. Act of Congress, 7th August, 1789, § 4, adopting the state laws then in force. 1 Stat. at L., 53. Act of Congress, 2d March, 1837, c. 22, § 1, authorizing a navigator of waters, bounding two or more states, to employ a pilot duly authorized by either; any law or usage of the contrary notwithstanding. 5 Stat. at L., 153.

*2. The act of Pennsylvania, 29th March, 1803, (in question), is no exception to the general rule, but is a clear regulation of commerce. [*304

It cannot be considered as an act to regulate the port police. The very terms of the act forbid it being so considered.

The act is confined to vessels arriving from, or bound to foreign ports or places, and to vessels of seventy-five tons and

upwards, sailing from, or bound to ports not within the river Delaware. Its principal force is expended without the port.

Suppose the obligation to take a pilot to be a regulation of port police.

This act cannot be so considered, because it does not insist on the pilot being employed, but suffers the parties to compound by paying a certain sum for the support of an institution which may, or may not be a good one. Its operation is that of a scheme to raise revenue for a particular purpose. The character of a police regulation is assumed and fallacious.

By the act 11th June, 1832, Pamph. Laws, p. 620, vessels engaged in the Pennsylvania coal trade are exempt from half pilotage. An invidious distinction in favor of a particular branch of commerce, which shows the character of the whole legislation.

3. Congress has legislated upon the subject by the act 18th Feb., 1793, § 4; 1 Stat. at L., 305. The state law is at variance with this act, and must give way.

This section makes it the duty of collectors in their districts, on application made and the fulfilment of certain conditions, (the duty of six cents per ton being first paid), to grant a license for carrying on the coasting trade.

This act of Congress was passed by virtue of the power to regulate commerce, and declares the terms upon which vessels shall be entitled to a coasting license.

The license gives a right to trade, and does not merely confer the American character.

"The enrolment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards, and requires no circumstances essential to the American character. "The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do;—that is, to give permission to a vessel, already proved by her enrolment to be American, to carry on the coasting trade." *Gibbons* v. *Ogden*, 9 Wheat., 214.

*305] *The license to carry on the coasting trade, granted under this act, transfers to the licensed vessel all the right which the government can transfer, and limits the impositions with which such a trade may be burdened. *Gibbons* v. *Ogden*, 9 Wheat., 210, 211, 212, 213, 214, &c.

This is the main point ruled in *Gibbons* v. *Ogden*, and is unshaken, and of immense importance. The question arose

on an act of the state of New York, giving to the heirs of Fulton, and those having license from them, the exclusive right to navigate the waters of New York by steam for a period of ten years.

The owners of two steamboats plying between New Jersey and New York, having a coasting license from the United States, contested the validity of the state act, and insisted upon their rights under their coasting license.

Decree in Gibbons v. *Ogden.*

"This court is of opinion that the several licenses to the steamboats, the Stondinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery in the state of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the United States, gave full authority to those vessels to navigate the waters of the United States by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of New York to the contrary notwithstanding; and that so much of the several laws of the state of New York, as prohibit vessels licensed according to the laws of the United States, from navigating the waters of the state of New York, by means of fire or steam, is repugnant to the said Constitution, and void."

In our case, instead of purchasing a license from the heirs of Fulton, we are required to purchase a right of navigation by paying a tax to the state, or, what is the same thing, to an institution created by the state.

The decision in *Gibbons* v. *Ogden*, has never been in the least degree questioned or shaken. Inferences, drawn from some expressions of the court in that case, which were supposed to imply that the states could not legislate on matters affecting commerce, even in the absence of any exercise of their powers by Congress, are disavowed by perhaps a majority of the judges in the License cases in 5 Howard. But the principle of the decision in *Gibbons* v. *Ogden*, upon which we rely, was not in the smallest degree impeached. On the contrary, it is expressly *adopted. Any other rule would [*306
be fatal to the peace of the country.

The 29th section of the act of the 29th March, 1803, is repugnant to the 5th clause of the 9th section of the 1st article of the Constitution of the United States, to wit: "No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor

shall vessels to or from one state, be obliged to enter, clear, or pay duties in another."

The Consul was bound from the port of Philadelphia to the port of New York; and under this act was required to pay the duty, tax, or toll in dispute.

A preference is given to the ports of Delaware, and to such ports of New Jersey as are within the river Delaware.

The counsel for the defendants in error contended that the law of Pennsylvania was not in violation of any provision of the Constitution.

I. Not of the third clause, 8th section, art. 1. (To regulate commerce, &c.)

Because,—1st. The act in question is no regulation of commerce. It was passed in the exercise of a power of the state not granted or surrendered, to control the ports and harbors by which her commerce enters, and to protect the property and lives of those engaged in it. *Gibbons* v. *Ogden*, 9 Wheat., 208. It is local in character and object, an essential exercise of one branch of the police power of the state, to aid, and not to regulate commerce. *City of New York* v. *Miln*, 11 Pet., 132; *Passenger Cases*, 7 How., 402. 2d. Even if it be a regulation of commerce, the power of Congress is not exclusive. No conflicting legislation by Congress exists, and the state law is therefor valid. *License Cases*, 5 How., 504.

II. Nor to the first clause, 8th section, art. 1. (All duties, imposts, and excises, shall be uniform, throughout the United States.)

Because,—1st. This clause has reference to an exercise of power by Congress. The subject of pilotage is incapable of uniformity throughout all the states, and could not have been intended to be included in it. *Passenger Cases*, 7 How., 402; 2d. The sum demanded is not a duty, impost, or excise, in terms or in design. *Brown* v. *State of Maryland*, 12 Wheat., 419; *License Cases*, 5 How., 504. It is a compensation to the pilot for time, watchfulness, labor, and risk in seeking for the vessel and offering his services. *Commonwealth* v. *Ricketson*, 5 Met. (Mass.), 417, (Shaw, C. J.) 3d. Nor is there any such constitutional obligation upon the states, in the absence of legislation by Congress, to legislate uniformly as to duties, imposts, or excises, (as is submitted by brief of plaintiff in error.)

*307] *III. Nor to the first and the second clause of the 10th section, art. 1. (No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, &c., or of tonnage.)

If the law in question does regulate commerce at all, it is

contended, that it does so by the means specified in these clauses. But they do not affect it,—

Because, — 1st. The sum demanded is neither a duty or impost on imports or exports (already referred to), nor a duty of tonnage. Nor does *Brown* v. *The State of Maryland*, 12 Wheat., 419, apply to the case, for it was decided upon the ground that a duty upon imports was laid without the consent of Congress. Here there is no duty (as already contended) nor impost charged, and Congress has consented, by act of 1789 (next referred to), and of act of 1837. Nor is it material that the defendant is the consignee; if the power exist to require payment of the sum demanded, the person by whom it is to be paid, whether captain, mate, owner or consignee, is immaterial. It is no more or no less a duty upon imports or tax of tonnage (if it be either), whether paid by or chargeable upon either.—2d. If it be either, or both, Congress has consented to its being laid. Act of Congress, 7th Aug., 1789, 1 Stat. at L., 53; Id. 2d March, 1837, 5 Stat. at L., 153.

Congress may,—1st. Adopt State legislation. *Gibbons* v. *Ogden*, 9 Wheat., 207; Passenger Cases, 7 How., 402; License Cases, 5 How., 580,—2d. Where the authority is given by the Constitution, consent to the exercise of state power. The extract from the opinion of the Chief Justice is misapplied; it was addressed to the question of the exclusive power of Congress to regulate commerce, and not to the authority given by the Constitution to consent to the laying of imposts or duties on imports or exports or on tonnage by the states. Such consent may either be by adoption of existing, or by the grant of authority to make future laws. — 3d. If the sum demanded be a duty on imports or on tonnage, the act in question does not transcend the consent given, and is properly part of a system for the regulation of pilots.

A reference to the European codes, as well as legislation by the states, will show this.

I. European. — 1st. Hanseatic Ordinances (about A. D. 1457), ch. 25. Captain to take pilot under penalty ("*amende*") of one mark of gold. (II. 486).—2d. Maritime Law of Sweden (about A. D. 1500). Captain to take a pilot, and if he neglects to do so, shall pay one hundred and fifty thalers, one third to the informer, one third to the sufferer ("*plaignans*") or pilot offering, and one third to the poor mariners. (Cap. 7, III. 172). — 3d. Maritime Law of Du Pays Bas. Captain to take pilot, under *penalty of fifty reals, and be responsible for any loss to the vessel. (Cap. 24, tit. 9, IV. 83). — 4th. Maritime Law of France. Ordinances Louis [*308

XIV. (A. D. 1681), ch. 26. If the mariners refuse a pilot, they shall suffer corporal punishment, and the one who tenders himself must be employed. And provides also for the examination of pilots by competent persons (IV., 395). Moreover, they who are engaged in navigating royal vessels into ports or rivers have not the option of taking or refusing a pilot; in the same case merchant vessels are required to take pilots, under the penalty of fifty livres, to be applied to the Marine Hospital, and the repairing of any damage from stranding. (Art. 5, tit. 1, livre II., ordinance of April, 1689. See Repertoire de Jurisprudence, tome 9, p. 236). — 5th. England (A. D. 1716), 3 Geo. I. ch. 13. A penalty of £20 if piloted by any but a licensed pilot, to be received for the use of superannuated pilots, or the widows of pilots.

The obligation on the captain to take a pilot or to be responsible for the damage, and punishment of pilots for negligence, will also be found in, — 1st. Roman Law Digest, book 19, tit. 2, Edict Ulpianus. I., 110. — 2d. Laws made at Oleron. I., 232. — 3d. Consulate de la Mer. II., 250. — 4th. Maritime Law of Denmark. III., 262 (Pardessus).

II. The United States. — Acts in which provision, more or less extensive, is made for payment of a sum when no pilot is taken.

1st. Massachusetts: Act 1783, ch. 110, sects. 4, 6, 7, 10; Rev. Sts., 295. — 2d. New York: Act Feb. 19, 1819, sect. 20. — 3d. New Jersey: Digest published 1847, p. 1054. — 4th. Delaware: Act 5th, Feb. 1819. Acts published by authority, 1829, p. 433. — 6th. Maryland: Act November Sessions, 1803; 1 Dorsey, 483. — 7th. Virginia: 10th Feb., 1820; 15th Feb., 1820; Revised Code, 123, 515; Supplement to Id., p. 386; Code 1849, p. 432. — 8th. North Carolina: Rev. Sts. 1836–7, p. 461, vol. 1. — 9th. South Carolina: Trott's Laws, 613; 2 Cooper's Stat. at Large, pp. 51 (1C90), 127 (1617), 173. — 10th. Georgia: Act 6th Dec., 1799, sect. 8. — 11th. Alabama. — 12th. Louisiana: Act 31st March, 1805; Liflet's Dig., 1828, p. 511. — 13th. Pennsylvania: Act Province of Pennsylvania, 6 Geo., 3, ch. 5, passed Feb. 8, 1766.

(Copy of material sections annexed, No. 2). Continued and supplied in some details by intervening acts, in all of which provision is made for payment in case no pilot is taken, an act of 29th March, 1803. (The law in question). By state judicial decisions it is also so regarded as part of a system for the regulation of pilots. And the laws have been acted upon as a valid exercise of state power, either inherent or concurrent, or to which Congress had given consent. *Commonwealth* v. *Ricketson*, 5 Metc. (Mass.), 416; 8 Id., 329; 9

Id., 371; 12 Id., 346; 13 Wend. (N. Y.), 64; R. M. Charlt. (Ga., 307.)

*These laws having then the consent of Congress, and not exceeding the power of Congress, are to be regarded as though passed by Congress. [*309

IV. Nor is the act in question repugnant to the 5th clause of the 9th section of the 1st article. (No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another,)

Because,—1st, the clause refers to the power of Congress (and the right to pass such laws remains, as already submitted, with the states.) Nor is the act, as contended, a regulation of commerce or revenue.—2d. The law does not (from whatever fountain of power derived) give a preference to the ports of one state over those of another; it limits the demand to those cases where the labor, skill, and risk of the pilot is really required; nor would such preference, if it exist, render the residue of the law invalid.—3d. The sum demanded is not a duty which vessels, bound to or from one state to another, are obliged to pay.

V. Nor does the act of Congress (18th Feb. 1793, coasting license; the Consul, No. 100) conflict with the law in question. It is averred to do so, inasmuch as the act of Pennsylvania is contended to be a regulation of commerce, and that by the law relative to coasting vessels, Congress has legislated upon and regulated their navigation, and by such legislation has exempted them from the sum demanded.

But, 1st,—The act in question, as already submitted, is not a regulation of commerce.—2d. Even if it be, the act of Congress, Feb. 18, 1793, was not legislation upon, nor directed towards the same subject-matter, and did not therefore exclude the inherent or the coexisting power of the states, nor affect the consent given by the act of 1789.

The act of 1793 was intended either to give or to limit to certain vessels, defined commercial privileges. If to give the right, it was to enter and navigate the ports and harbors of the United States, at a less tonnage-duty, and without the necessity of entry on every voyage. If it was to limit a pre-existing right to trade, it licensed such trade at less than the ordinary tonnage-duties, and relieved from the necessity of entry at every voyage, as required of all other vessels. Beyond this, nothing. It did not, in its policy or by its words, affect or legislate in reference to harbor, nor health, nor quarantine

regulations, nor profess to interfere with pilotage, nor repeal the act of 1789, nor revoke the consent it contained.

Gibbons v. *Ogden*, 9 Wheat., 208, does not sustain the position as contended for, that such vessels are discharged by virtue of a coasting license, from liability to such regulations of police or commerce (if any) which a state may enact, nor *310] especially *from such tonnage-tax or duty on imports (if this be either) as Congress has consented that the state may establish.

Here, in effect, the question is between two acts of Congress, one by enactment, and the other by adoption or consent, but of equal authority. So regarding them, the provisions of the one do not limit, contradict, or affect those of the other.

Nor is the act of Feb. 18, 1793, repugnant to the statute in question, regarded as the act of Pennsylvania alone. Such repugnance must be direct, and these acts are not even inconsistent. Pilots and their regulation, which include an examination as to their competency, their licenses, their rewards and their punishments, form the subject of the state law.

The encouragement of a particular branch of commerce, its regulation, the privileges conferred, and the penalties for infractions, are the subject of the act of Congress; the one aids, and does not conflict with the other.

The only legislation by Congress upon pilots or pilotage, since the act of 1789, is the act of 2d March, 1837. 5 Stat. at L., 153. This was directed to "alter a single provision of the New York law, leaving the residue of its provisions untouched." Chief Justice Taney, 5 How., 580.

The provisions of the statutes of New York have been referred to, and included in them coasting vessels above a certain tonnage. Stat. N. Y., Feb. 19, 1819; Act Oct. 16, 1830; 13 Wend. (N. Y.), 64. And the laws of the other states referred to were then in force.

The act of 1793, as to coasters, was not regarded by Congress, therefore, as being in conflict with an act requiring payment by them of half-pilotage, nor as requiring any revocation of the consent already granted, or any further legislation.

The validity of these laws has been repeatedly, and, it is believed uniformly acknowledged by counsel and by the court, wherever referred to, as justified either by the inherent or coexisting power of the state to regulate commerce, or under the act of 1789. *Gibbons* v. *Ogden*, 9 Wheat., 18, 203, 207; *New York* v. *Miln*, 11 Pet., 149; *License Cases*, 5 How., 380, 383; *Passenger Cases*, 7 How., 402, 470, 557.

Nor can the subsequent legislation of Pennsylvania, cited by the plaintiffs in error, affect the question presented on

these records. The act of 1803 is alone before the court; the recent enactments may or may not be unconstitutional. When demands or exemptions are claimed in virtue of their provisions, their validity will form a proper subject for consideration.

Nor is the manner in which the fund is distributed after its collection material. The question is one of power merely, and if the sum demanded is justly within its limit, and not an *attempted evasion, under its color, the purpose to which it is applied, cannot make it more or less constitutional. If it was directed to be paid to the pilot offering his services, or the crew of his boat, it would not be more or less a valid enactment. *Passenger Cases*, 7 How., 495. The manner in which it is appropriated does but show more clearly the true character of the law. [*311

Mr. Justice CURTIS delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the Commonwealth of Pennsylvania.

They are actions to recover half pilotage fees under the 29th section of the act of the Legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the state has decided against a right claimed by him under the Constitution of the United States. That right is to be exempted from the payment of the sums of money demanded, pursuant to the State law above referred to, because that law contravenes several provisions of the Constitution of the United States.

The particular section of the state law drawn in question is as follows:

"That every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward-bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit

and pay the sum of sixty dollars. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, &c., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that, in case of an inward-bound vessel, a pilot did *312] *not offer before she had reached Reedy Island; or, in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." It constitutes one section of "An act to establish a Board of Wardens for the port of Philadelphia, and for the regulation of Pilots and Pilotages, &c.," and the scope of the act is in conformity with the title to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as a part of the system of pilotage, in many places, may be inferred from their existence in so many different states and countries. Like other laws they are framed to meet the most usual cases *quæ frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage-service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this

cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the Legislature of Pennsylvania, of the 11th of June, 1832, proves that the state had other objects in view than the regulation of pilotage. That section is as follows:

"And be it further enacted, by the authority aforesaid, that from and after the first day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade."

*It must be remembered, that the fair objects of a [*313 law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the river Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade, and the tonnage of vessels engaged therein.

We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving from the charge of half-pilotage, such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services. In our judgment, though this law of 1832 has undoubtedly modified the 29th section of the act of 1803, and both are to be taken together as giving the rule on this subject of half-pilotage, yet this change in the rule has not changed the nature of the law, nor deprived it of the character and attributes of a law for the regulation of pilotage.

Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be adminstered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

For these reasons, we cannot yield our assent to the argument, that this provision of law is in conflict with the second *and third clauses of the tenth section of the first article of the Constitution, which prohibit a state, without the assent of Congress, from laying any imposts or duties, on imports or exports, or tonnage. This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties, are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage-duty, or an impost on imports or exports, may be levied under the name of pilot-dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its

*314]

charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

It is further objected, that this law is repugnant to the fifth clause of the ninth section of the first article of the Constitution, viz.—"No preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels, to or from one state, be obliged to enter, clear, or pay duties in another."

But, as already stated, pilotage-fees are not duties within the meaning of the Constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring *the masters, owners, or consignees of vessels [*315
sailing to or from that port, to pay the charges imposed by the twenty-ninth section of the act of 1803. It is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot-laws. This state, by its act of the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charge now in question. Similar changes may be observed in the laws of New York, Massachusetts, and other commercial states, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

In addition to what has been said respecting each of these constitutional objections to this law, it may be observed, that similar laws have existed and been practised on in the states since the adoption of the federal Constitution; that, by the act of the 7th of August, 1789, (1 Stat. at L., 54,) Congress declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states, &c.; and that this contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution, as levying a duty not uniform throughout the United States, or, as giving a preference to the ports of one state over those

of another, or, as obliging vessels to or from one state to enter, clear, or pay duties in another. *Stuart* v. *Laird*, 1 Cranch, 299; *Martin* v. *Hunter*, 1 Wheat., 304; *Cohens* v. *The Commonwealth of Virginia*, 6 Id., 264; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet., 621.

The opinion of the court is, that the law now in question is not repugnant to either of the above-mentioned clauses of the Constitution.

It remains to consider the objection, that it is repugnant to the third clause of the eighth section of the first article. "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look *316] to the *nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stat. at L., 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can

perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different states, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with *foreign nations and among the several states, over [*317
which it was one main object of the Constitution to create a national control. Conflicts between the laws of neighboring states, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by state laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, Congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different states, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837, in the following words:

"Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom, to the contrary, notwithstanding."

The act of 1789 (1 Stat. at L., 54), already referred to, contains a clear legislative exposition of the Constitution by the first Congress, to the effect that the power to regulate pilots was conferred on Congress by the Constitution; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporane-

ous construction, and the practice of Congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first article of the Constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, sect. 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold *318] it to *have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares, that pilots shall continue to be regulated in conformity, "with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress?"

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law, enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the states of all power to regulate

pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), *and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. *Sturges* v. *Crowninshield*, 4 Wheat., 193; *Moore* v. *Houston*, 5 Id., 1; *Wilson* v. *Blackbird Creek Co.*, 2 Pet., 251. [*319

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclu sive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived *them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is in any case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of

*320]

the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further.

*We have not adverted to the practical consequences [*321
of holding that the states possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the states, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the states of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations

upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the states to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this state law was enacted by virtue of a power, residing in the state to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Mr. Justice McLean and Mr. Justice Wayne dissented; and Mr. Justice Daniel, although he concurred in the judgment of the court, yet dissented from its reasoning.

Mr. Justice McLEAN.

It is with regret that I feel myself obliged to dissent from the opinion of a majority of my brethren in this case.

As expressing my views on the question involved, I will copy a few sentences from the opinion of Chief Justice Marshall in the opinion in *Gibbons* v. *Ogden*. "It has been said," *322] says that *illustrious judge, "that the act of August 7th, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the states." But this inference is not, we think, justified by the fact.

"Although Congress," he continues, "cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be in future presupposes the right in the maker to legislate on the subject."

"The act unquestionably manifests an intention to leave this subject entirely to the states, until Congress should think proper to interpose; but the very enactment of such a law

indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the bays, inlets, rivers, harbors, and ports of the United States, which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only, 'until further legislative provision shall be made by Congress,' shows conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the states or provide one of its own."

Why did Congress pass the act of 1789, adopting the pilot-laws of the respective states? Laws they unquestionably were, having been enacted by the states before the adoption of the Constitution. But were they laws under the Constitution? If they had been so considered by Congress, they would not have been adopted by a special act. There is believed to be no instance in the legislation of Congress, where a state law has been adopted, which, before its adoption, applied to federal powers. To suppose such a case, would be an imputation of ignorance as to federal powers, least of all chargeable against the men who formed the Constitution and who best understood it.

Congress adopted the pilot-laws of the states, because it was *well understood, they could have had no force, as [*323 regulations of foreign commerce or of commerce among the states, if not so adopted. By their adoption they were made acts of Congress, and ever since they have been so considered and enforced.

Each state regulates the commerce within its limits; which is not within the range of federal powers. So far, and no farther could effect have been given to the pilot laws of the states, under the Constitution. But those laws were only adopted "until further legislative provisions shall be made by Congress."

This shows that Congress claimed the whole commercial power on this subject, by adopting the pilot laws of the states, making them acts of Congress; and also by declaring that the adoption was only until some further legislative provision could be made by Congress.

Can Congress annul the acts of a state passed within its admitted sovereignty? No one, I suppose, could sustain such a proposition. State sovereignty can neither be enlarged nor diminished by an act of Congress. It is not known that Congress has ever claimed such a power.

If the states had not the power to enact pilot laws, as connected with foreign commerce, in 1789, when did they get it? It is an exercise of sovereign power to legislate. In this respect the Constitution is the same now as in 1789, and also the power of a state is the same. Whence, then, this enlargement of state power. Is it derived from the act of 1789, that pilots shall continue to be regulated "in conformity with such laws as the states may respectively hereafter enact?" In the opinion of the Chief Justice, above cited, it is said, Congress may adopt the laws of a state, but it cannot enable a state to legislate. In other words, it cannot transfer to a state legislative powers. And the court also say that the states cannot apply the pilot laws of their own authority. We have here, then, the deliberate action of Congress, showing that the states have no inherent power to pass these laws, which is affirmed by the opinion of this court.

Ought not this to be considered as settling this question? What more of authority can be brought to bear upon it? But it is said that Congress is incompetent to legislate on this subject. Is this so? Did not Congress, in 1789, legislate on the subject by adopting the state laws, and may it not do so again? Was not that a wise and politic act of legislation? This is admitted. But it is said that Congress cannot legislate on this matter in detail. The act of 1789 shows that it is unnecessary for Congress so to legislate. A single section covers the whole legislation of the states, in regard to pilots. Where, then, is the necessity of recognizing this power to exist in the states? There is no such necessity; and if there
*324] were, it would not make the *act of the state constitutional; for it is admitted that the power is in Congress.

That a state may regulate foreign commerce, or commerce among the states, is a doctrine which has been advanced by individual judges of this court; but never before, I believe, has such a power been sanctioned by the decision of this court. In this case, the power to regulate pilots is admitted to belong to the commercial power of Congress; and yet it is held, that a state, by virtue of its inherent power, may regulate the subject, until such regulation shall be annulled by Congress. This is the principle established by this decision. Its language is guarded, in order to apply the decision only to the case before the court. But such restriction can never

operate, so as to render the principle inapplicable to other cases. And it is in this light that the decision is chiefly to be regretted. The power is recognised in the state, because the subject is more appropriate for state than federal action; and consequently, it must be presumed the Constitution cannot have intended to inhibit state action. This is not a rule by which the Constitution is to be construed. It can receive but little support from the discussions which took place on the adoption of the Constitution, and none at all from the earlier decisions of this court.

It will be found that the principle in this case, if carried out, will deeply affect the commercial prosperity of the country. If a state has power to regulate foreign commerce, such regulation must be held valid, until Congress shall repeal or annul it. But the present case goes further than this. Congress regulated pilots by the act of 1789, which made the acts of the state, on that subject, the acts of Congress. In 1803, Pennsylvania passed the law in question, which materially modified the act adopted by Congress; and this act of 1803 is held to be constitutional. This, then, asserts the right of a state, not only to regulate foreign commerce, but to modify, and, consequently, to repeal a prior regulation of Congress. Is there a mistake in this statement? There is none, if an adopted act of a state is thereby made an act of Congress, and if the regulation of pilots, in regard to foreign commerce, be a regulation of commerce. The latter position is admitted in the opinion of the court, and no one will controvert the former. I speak of the principle of the opinion, and not of the restricted application given to it by the learned judge who delivered it.

The noted *Blackbird Creek case* shows what little influence the facts and circumstances of a case can have in restraining the principle it is supposed to embody.

How can the unconstitutional acts of Louisiana, or of any other state which has ports on the Mississippi, or the Ohio, or *on any of our other rivers, be corrected, without the action of Congress? And when Congress shall act, the [*325 state has only to change its ground, in order to enact and enforce its regulations. Louisiana now imposes a duty upon vessels for mooring in the river opposite the city of New Orleans, which is called a levee tax, and which, on some boats performing weekly trips to that city, amounts to from $3000 to $4000 annually. What is there to prevent the thirteen or fourteen states bordering upon the two rivers first-named, from regulating navigation on those rivers, although Congress may have regulated the same at some prior period? I speak not

of the effect of this doctrine theoretically in this matter, but practically. And if the doctrine be true, how can this court say that such regulations of commerce are invalid? If this doctrine be sound, the passenger cases were erroneously decided. In those cases there was no direct conflict between the acts of the states taxing passengers and the acts of Congress.

From this race of legislation between Congress and the states, and between the states, if this principle be maintained, will arise a conflict similar to that which existed before the adoption of the Constitution. The states favorably situated, as Louisiana, may levy a contribution upon the commerce of other states which shall be sufficient to meet the expenditures of the states.

The application of the money exacted under this act of Pennsylvania, it is said, shows that it is not raised for revenue. The application of the money cannot be relied on as showing an act of a state to be constitutional. If the state has power to pass the act it may apply the money raised in its discretion.

I think the charge of half-pilotage is correct under the circumstances, and I only object to the power of the state to pass the law. Congress, to whom the subject peculiarly belongs, should have been applied to, and no doubt it would have adopted the act of the state.

Mr. Justice DANIEL.

I agree with the majority in their decision, that the judgments of the Supreme Court of Pennsylvania in these cases, should be affirmed, though I cannot go with them in the process or argument by which their conclusion has been reached. The power and the practice of enacting pilot-laws, which has been exercised by the states from the very origin of their existence, although it is one in some degree connected with commercial intercourse, does not come essentially and regularly within that power of commercial regulation vested by the Constitution in Congress, and which by the Constitution must, when exercised by Congress, be enforced with perfect equality, and without any kind of discrimination, *local *326] or otherwise in its application. The power delegated to Congress by the Constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced; and do not necessarily nor even naturally extend to the means of precaution and safety adopted within the waters or limits of the states by the authority of the latter for the preservation

of vessels and cargoes, and the lives of navigators or passengers. These last subjects are essentially local—they must depend upon local necessities which call them into existence, must differ according to the degrees of that necessity. It is admitted, on all hands, that they cannot be uniform or even general, but must vary so as to meet the purposes to be accomplished. They have no connection with contract, or traffic, or with the permission to trade in any subject, or upon any conditions. They belong to the same conservative power which undertakes to guide the track of the vessel over the rocks or shallows of a coast, or river; which directs her mooring or her position in port, for the safety of life and property, whether in reference to herself or to other vessels, their cargoes and crews, which for security against pestilence subjects vessels to quarantine, and may order the total destruction of the cargoes they contain. This is a power which is deemed indispensable to the safety and existence of every community. It may well be made a question, therefore, whether it could, under any circumstances, be surrendered; but certainly it is one which cannot be supposed to have been given by mere implication, and as incidental to another, to the exercise of which it is not indispensable. It is not just nor philosophical to argue from the possibility of abuse against the rightful existence of this power in the states; such an argument would, if permitted, go to the overthrow of all power in either the states or in the federal government, since there is no power which may not be abused. The true question here is, whether the power to enact pilot-laws is appropriate and necessary, or rather most appropriate and necessary to the state or the federal governments. It being conceded that this power has been exercised by the states from their very dawn of existence; that it can be practically and beneficially applied by the local authorities only; it being conceded, as it must be, that the power to pass pilot-laws, as such, has not been in any express terms delegated to Congress, and does not necessarily conflict with the right to establish commercial regulations, I am forced to conclude that this is an original and inherent power in the states, and not one to be merely tolerated, or held subject to the sanction of the federal government.

* *Order.* [*327

This cause came on to be heard on the transcript of the record from the Supreme Court of Pennsylvania, for the Eastern District, 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.

SAMUEL SMYTH *v.* STRADER, PEVINE & CO.

If a writ of error does not set out the names of all the parties to the judgment of the Circuit Court, the case will be dismissed.[1]

THIS was a writ of error from the Southern District of Alabama.

Mr. Pryor, counsel for the defendants in error, moved the court to dismiss the case, on the ground that the writ of error does not contain the names of the parties to the judgment set out in the record.

Whereupon, the court passed the following order:

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 Alabama, and it appearing to the court here that this writ of error is vicious and defective, inasmuch as it does not set out the names of all the parties to the judgment of the Circuit Court, it is thereupon, on motion of *Mr. Pryor*, of counsel for the defendants in error, now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed, with costs.

UNION BANK OF LOUISIANA, COMPLAINANTS AND APPELLANTS, *v.* JOSIAH S. STAFFORD AND JEANNETTA KIRKLAND, HIS WIFE, DEFENDANTS.

The 25th section of the law of Louisiana incorporating the Union Bank of Louisiana declares that in all hypothecary contracts and obligations entered into by any married individual with the bank, it shall be lawful for the wife to unite with him; and in such case the property of the wife, whether dotal or of any other description, shall be affected by the contract.

*Where a wife united with her husband in mortgaging property to the
*328] bank, the mortgage was good under this clause.

[1] FOLLOWED. *Davenport* v. *Fletcher*, 16 How., 144; *Simpson* v. *Greeley*, 20 Wall., 158. See also *The Protector*, 11 Id., 86.

A sale of the mortgaged property for a twelve months' bond under an order of seizure and sale was not a novation or extinguishment of the original mortgage.

Where the mortgage is payable by instalments, some of which were not due at the filing of the bill, the statute of limitations will not apply. The possession of the mortgagor was not adverse to the mortgagee.

Where other parties had a nominal interest as defendants, and resided beyond the jurisdiction of the court, it was error in the Circuit Court to dismiss the bill because they were not made parties. Under the act of Congress of 1839, the court should have gone on to decree against the actual defendants; and in this case all who have a beneficial interest are in court.[1]

THIS was an appeal from the District Court of the United States for the District of Texas.

The facts are set forth in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Hale* and *Mr. Coxe* for the appellants, and *Mr. Harris* for the appellees.

The points made by the appellants' counsel were the following:—

IV. The matters of defense set up by Mrs. Stafford are not sufficient to prevent this court from pronouncing a decree against her. The first of her defenses consists of the bar of the statute of limitations of Texas, passed Feb. 5, 1841, which provides "that all actions of debt grounded upon any contract in writing shall be commenced and sued within four years next after the cause of such action accrued and not after," and "that if any person against whom there is or shall be cause of action, is or shall be without the limits of this republic at the time of the accruing of such action, or at any time during which the same might have been maintained, then the person entitled to such action shall be at liberty to bring the same against such person or persons after his or their return to the republic, and the time of such person's absence shall not be accounted, or taken as a part of the time limited by this act. Hartley's Dig., §§ 2377, 2395.

1. This plea is not applicable to an equitable demand of this nature. The debt may be barred, and yet the right to foreclose subsist. *Bank of Metropolis* v. *Guttschlick*, 14 Pet., 20, 32; *Thayer* v. *Mann*, 19 Pick. (Mass.) 536; *Baldwin* v. *Nor-*

[1] Where the case may be completely decided as between the parties litigant, an interest in some other person or persons beyond the reach of process, will not prevent a decree. *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Mallow* v. *Hinde*, 12 Id., 193; *Vattier* v. *Hinde*, 7 Pet., 252; *New Orleans Canal &c. Co.* v. *Stafford*, *post* *343. See also *Louisville &c. R. R. Co.* v. *Letson*, 2 How., 497, and note; *Clearwater* v. *Meredith*, 21 Id., 489; *Doremus* v. *Bennett*, 4 McLean, 224; *State ex rel. Mullen* v. *Drew*, 32 La. Ann., 1044.

ton, 2 Conn., 163; *Clark* v. *Bull's Ex'r.*, 2 Root (Conn.), 329; 1 Powell on Mort., 392 *a*, 396 *b*; Angell on Lim., 494, *n.* 1; *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Case of Cholmondeley* v. *Clinton*, explained by *Stewart* v. *Nichols*, 1 Tamlyn, 207.

2. The fact that the bill was filed within four years after the *removal of the defendants to Texas, is sufficient of itself to remove the bar; and the language of the 22d section of the act has always hitherto been construed to apply to strangers. *Southerst* v. *Graeme*, 3 Wills, 145; 5 Bac. Ab., 236; *Dwight* v. *Clark*, 7 Mass., 518; *Bulger* v. *Roche*, 11 Pick. (Mass.), 39, 40; *Little* v. *Blunt*, 16 Id., 363; *Ruggles* v. *Keeler*, 3 Johns. (N. Y.), 257; *Chomqua* v. *Mason*, 1 Gall., 344, 346; *Estis* v. *Rawlins*, 5 How. (Miss.), 258; *Hysinger* v. *Baltzell*, 3 Gill & J. (Md.), 158; *Sissons* v. *Bicknell*, 6 N. H., 557; *Dunning* v. *Chamberlin*, 6 Vt., 127; *Case* v. *Cushman*, 1 Pa. St., 241; *King* v. *Lane*, 7 Mo., 241. *329]

3. The opposite construction given to the 1st and 22d sections of the act by the Supreme Court of Texas, will not be followed by this court, because it would give the act an extra-territorial effect, is contrary to reason, and cannot apply to cases within the chancery jurisdiction of the United States. And this court has never held a less period than twenty years as sufficient to bar the enforcement of a trust or equitable demand. *Reimsdyk* v. *Kane*, 1 Gall., 380, 381; *Boyle* v. *Zacharie*, 6 Pet., 659; *Robinson* v. *Campbell*, 3 Wheat., 212; *United States* v. *Howland*, 4 Id., 108; *Fletcher et al.* v. *Morey*, 2 Story, 567; *Gordon* v. *Hobart*, 2 Sumn., 402; *Flagg* v. *Mann*, Id., 544; *Thomas* v. *Hatch*, 3 Id., 176; *Bellows* v. *Peck*, 3 Story, 434; *Hughes* v. *Edwards*, 9 Wheat., 489; *Elmendorf* v. *Taylor*, 10 Id., 162; *Prevost* v. *Gratz*, 6 Id., 481; *Michoud et al.* v. *Giroud et al.* 4 How., 561; *Dexter et al.* v. *Arnold*, 1 Sumn., 110; *Gordon et al.* v. *Hobart et al.*, 2 Id., 401; *Gould* v. *Gould et al.*, 3 Story, 536; *Piatt* v. *Vattier*, 1 McLean, 160, 162; *Rhode Island* v. *Massachusetts*, 15 Pet., 233.

4. The terms of the obligation and mortgage of 1841, show that a new cause of action accrued on the failure to pay each successive instalment, as they became due; and such a cause of action did therefore accrue within four years before filing the bill. 1 Pothier, Obl. Evans, 404; *Baltimore Turnp. Co.* v. *Barnes*, 6 Harr. & J. (Md.), 57; Angell on Lim., 105. And the running of the time was sufficiently interrupted by the proceedings upon the twelve months' bond of William M. Stafford against the mortgaged slaves, in February and March, 1845. Print. R., 350, 354, 440, 441, 444.

5. The complainants have used all the diligence in their

power, under the circumstances of the case, to enforce their demand, and are not culpable for laches.

V. The defense of coverture is also insufficient, because by the laws of Louisiana, Mrs. Stafford was authorized to become surety for her husband's debts by renouncing her privileges; and by the charter of the bank, she was specially empowered to do *so; and there is no satisfactory proof of her separate interest in the property. [*330

Beauregard's Ex'rs v. *Piernas and wife*, 1 Mart. (La.), 294; *Brognier* v. *Forstall*, 3 Id., 577; *Chappellon and wife* v. *St. Maxent's Heirs*, 5 Id., 167; *Perry* v. *Grebau*, 7 Id., 489; *Banks* v. *Trudeua*, 2 Mart. (La.) N. S., 39; *Tremé* v. *Lanaux's Syndic*, 4 Id., 230; *Drew* v. *His Creditors*, Id., 659; Civ. Co. La., § 2412; *Gasquet* v. *Dimitry*, 9 La., 586; Act of La., March 27, 1835; *Bank of La.* v. *Farrar and wife*, 1 La. Ann., 49; *Mechanics and Traders Bank* v. *Rowley*, Id., 1847, 373; *Farrar* v. *N. O. Gas-light Co.*, Id., 1847, 874; *Bein* v. *Heath*, 6 How., 223; Print. R., 309, 323, 324; Civ. Co. La., § 2403; *Bertie* v. *Walker, Sheriff*, 1 Rob. (La.), 431; Civ. Co. La., § 2355; *Babin* v. *Brosset*, 11 La., 59; *Lasé* v. *Dimitry*, 7 Id., 479.

VI. The defense resting on the ground that the order of seizure and sale on the mortgage of 1841, was a merger of the debt is simply absurd; the mortgage itself being the judgment, and the order the mere mode of executing it. Code Pr. La., §§ 732, 733, 734.

VII. The defense set up in argument that the mortgage lien was discharged by the sale in 1843 to William M. Stafford, cannot be sustained; because, 1st, the facts are not pleaded as constituting such defense nor for that object. 2 Dan. Ch. Pr., 815; *Cline* v. *Beaumont*, 13 Jur., 326.

2. Because the sale is not proved, the sheriff's return being fatally defective in not showing a compliance with the Code of Practice of Louisiana, in the particulars mentioned in the objections filed by the counsel for the complainants, and no act of sale having been produced. *Patterson* v. *Gaines and wife*, 6 How., 601; Code Pr. La., §§ 664, 665, 666, 667, 671, 681, 682; *Lawrence, syndic*, v. *Bowman*, 6 Rob. (La.), 21; *Duke* v. *Routh*, Ann. R., 1847, 385, 386; *Wright* v. *Higginbottom*, 10 Rob. (La.), 30; Code Pr. La., §§ 691–698; *Dufour* v. *Camfrane*, 11 Mart. (La.), 675, 706, 709.

3. Because a sheriff's sale for credit, on a twelve months' bond for the payment of the price, cannot, by the laws of Louisiana, or the Constitution of the United States, extinguish the debt or release the mortgage lien. Civil Co. La., §§ 2186, 2188; Pothier on Obl., Nos. 559, 564; Mulenbruch, Doct. Pand., § 475; Just. II., 29, 3; Partidas, V., 14, 15; *Bouillo*,

syndic, v. *Merle et al.*, 9 La., 216, 224; *Pointz et al.* v. *Duplantier*, 2 Mart. (La.), 178, 331; *Williams* v. *Brent*, 7 Mart. (La.) N. S., 205; *Reboul's Heirs* v. *Behren et al.*, 9 La., 90; *Turner* v. *Parker et al.*, 10 Rob. (La.), 154; *Dunlap* v. *Sims*, 2 La. Ann., 1847, 239; Const. U. S., art. 1, § 10; and the language of the case of *Offut* v. *Hendsley et al.*, 9 La., 1, is readily explained, and only applies when the twelve months' bond is
*331] *paid. Troplong, Comm. de Privileges, No. 996 *et seq.* compared with Nos. 720, 721; Civ. Co. La., § 3374; Code Nap., 2180; Dig., XX. 6 fr. 6, § 1, 2 (Ulpian); Mackeldey, Mod. Civ. Law, vol. 1, 399.

VIII. The objection to the want of M'Waters, William M. Stafford, and Thomas, as parties, is also unavailing, as their interest is not sufficiently proved, and they reside out of the jurisdiction of the court, and have not, although apprised of the pending of the suit, made themselves parties voluntarily. The act of Congress of Feb. 28, 1839, was intended to provide for all such cases, and introduces a more indulgent rule. Answer of Mrs. Stafford, Print. R., 122, 123; Story, 1 Eq. Pl., § 79, 135; *Mallow* v. *Hinde*, 12 Wheat., 193; Depositions of Thomas and M'Waters. Print. R., 378, 383; Act of Congress, Feb. 28, 1839, Ch., sec. 1 (15 Stat. at L., 321); Rules in Chancery, xlvii; *McCoy* v. *Rhodes*, 11 How., 41.

As to M'Waters, the conveyance in trust to him was not proved, and the trust property and beneficiary are both within the jurisdiction of the court; no decree is sought against him personally.

As to William M. Safford, he has parted with all the interest he ever had, and in fact he possessed none, never having paid the price bid for the slaves at the sheriff's sale.

As to Isaac Thomas, he sets up no interest, and is shown to have divested himself of all title. The Canal Bank appears to be the only party concerned under Thomas's purchase in 1840, and the rights of the two banks, which are prosecuting their suits together, and unite in holding by the receiver, the property in dispute, may be settled in the District Court. The sale to Thomas, being under a mortgage given by Mrs. Stafford in 1836, when she was a minor, is inferior to the title of the complainants under their mortgage of 1837, ratified in 1841, the ratification relating back even against third parties. Troplong, Comm. de Priviléges Nos. 495, 496, *seq.*

IX. The last objection material to be noticed is that no relief can be given, as the title to about forty-eight of the slaves appears to be in other persons than the defendants; and there is nothing to show what particular slaves are thus exempt from the operation of the mortgage. In answer to this

we say, that the defendants set up title to all the slaves in themselves, and cannot avail themselves of this objection. Also that the ground of the objection is not true, since the mortgage of 1837, being ratified, binds the defendants, and the title to the slaves referred to purchased by Thomas in 1840, is not shown ever to have legally passed from them. If any party is interested in these slaves it is the Canal Bank, and the contending claims of the *two banks may be de- [*332
cided by a reference to a master in the District Court. Thomas having left the slaves once claimed by him in the possession of the defendants, without reasserting his claim, or recording his conveyance in Texas, these slaves fall again within the mortgage of the Union Bank. Act of Texas, Feb. 5, 1840, § 12; Hartley's Dig., § 2774.

It is also insisted that the state of the case cannot prevent a decree, even upon the ground taken by the defendants; and that in any event this court would not dismiss the bill, but remand the cause, with leave to take further proof, and to make parties, if necessary. *Doddridge* v. *Washington's Ex'rs*, 2 Pet., 370; *Hunt* v. *Wickliffe*, Id., 201; *Caldwell* v. *Taggart, et al.*, 4 Id., 190.

X. Should a decree be rendered for the appellants in this court, they are clearly entitled, under their prayer for general relief, to the application of the hire of the slaves while in the possession of the receiver, amounting now to about $15,000, to be appropriated to the satisfaction of the mortgage debt. *Boone* v. *Chiles*, 10 Pet., 177; *Caldwell* v. *His Creditors*, 9 La., 267; *Skillman and Wife* v. *Lacy*, 5 Mart. (La.), N. S., 52; *Hutching's Widow and Heirs* v. *Johnson's Heirs*, 19 La., 437; Troplong, Comm. de Priviléges, Nos. 404, 697, 778, 840. 2; Expropriation Forcée, No. 29; Proudhon, Dom. de Propriété, Nos. 92, 95, 719; Dig. XX., 1 fr., 16, § 4; Civ. Code La., §§ 461, 467, 537, 3148, 3371.

Mr. Harris, for the appellees contended, that the court below ought not to have taken jurisdiction of this cause, because the proper and necessary parties have not been, and cannot be, made. It is submitted that Isaac Thomas, in his own right, and as the executor of M. P. Flint, has an interest in this case. The mortgage to Thomas and Flint is anterior to that of the bank, and their rights and claims were not released or renounced by what was done, but merely postponed. They only agreed that the bank should have a preference over them, but they have an adverse interest to that institution, in adjusting the amount for which this preference shall exist. They have also the right to avail themselves of any act of the bank,

or its agents, since the confirmatory act of 1841, which might tend to defeat the claim of the complainants entirely, and bestow upon them their original preference. For this purpose, it is contended, they could make any defense to the action. Besides, the mortgage shows Isaac Thomas has a prior claim to about forty-eight of the said slaves.

Mr. Stafford is also a proper and necessary party. He, at the instance of the bank, purchased the property in controversy, under the same mortgage which the plaintiffs are now *333] endeavoring *a second time to foreclose. This they are seeking to do, in the absence of any allegation in the bill that this sale to William M. Stafford is either void or voidable. The record not only discloses the fact that the sale of this property was, at the instance of the bank, made to William M. Stafford, but that he has made a partial payment of the purchase-money, and has received a credit therefor. Can the bank cause the sale to be made? Can it subsequently in effect confirm it, by receiving (and still holding) a portion of the purchase-money; and can it then, in a court of equity, treat this sale as a mere nullity? Under such circumstances, it is most respectfully submitted, that William M. Stafford ought not to be passed by as an unnecessary party to this cause.

It is conceived to be not less obvious that James A. M'Waters, the trustee to whom this property was conveyed by William M. Stafford, ought not to be regarded as an unnecessary party.

The first and third answers of Mrs. Stafford to the interrogatories propounded to her by the complainant, and the evidence of Frey and Frenet prove that the obligation and mortgage were not given in consideration of money loaned by the bank.

Exhibit No. 4, and the sheriff's return, show that this mortgage was foreclosed, and that William M. Stafford purchased the slaves in controversy.

By the art. 2412 of the La. Code, (notwithstanding art. 2256,) the wife cannot in any manner bind herself for the debts of her husband. The true nature of the contract, (whatever may be its form,) will be inquired into under the laws of Louisiana, where this was made and executed. 2 Mart. (La.) N. S., 39; 5 Id., 431; 7 Id., 252; 8 Id., 693; 9 La., 590; 10 Id., 147.

In the year 1824 the Civil Code of Louisiana was adopted by the legislature, and it went into effect in June, 1825, containing the article 2412. This was but a re-enactment of the old law. At the same session of the legislature the Bank of

Louisiana was chartered. A clause was inserted in this charter, permitting married women to become bound with their husbands in certain obligations to that institution. It is submitted that this being an exception to the general law, should be strictly construed. A similar provision was accorded to several other bank charters; and in 1832 the Union Bank was created. By the 25th section of the act, it is provided that in all hypothecary contracts and obligations entered into "according to the true intent and meaning of this act," it shall be lawful for the wife to bind herself with her husband, &c. So she can only bind herself in an hypothecary contract made according to the intention of the charter.

The first class of these hypothecary contracts was such as is *contemplated by sections 2, 3, 4, 8, and to these the 25th section would apply. But Stafford and wife not being stockholders, the provisions of these sections cannot be made to apply to this case. [*334

The next class to which the 25th section was intended to apply, was hypothecary contracts of the husband and wife for the loan of money from the bank. By the laws of Louisiana, a bank cannot loan any thing but specie or its own notes, the representatives of specie. It cannot pay out the notes of another bank at its counter, consequently it cannot make a loan of them. Then, with much less propriety could it be said, it would loan or pay out, in this instance, the insolvent obligations of Thomas Barrett & Co. See art. 12 Louisiana Code, 4 La., 57; 6 Id., 243; and art. 2412 of the code, which is a prohibitory law. These, construed in connection with the 25th section of the charter, it is submitted that, under the laws of Louisiana, Mrs. Stafford was not bound by the contract of 1837 or that of 1841.

It is further contended that the original debt of Stafford and wife (if any ever existed) was extinguished by novation, one of the modes by which obligations may become extinct. See Louisiana Code, art. 2126 and 2181, and notes in Pothier on Obligations, part 3, chap. 2, No. 546, vol. I, 339.

The debt (if any) being extinguished as prescribed by art. 2126, the mortgage being only a security for its payment, must also be extinguished. See articles 3251, 3252, 3374, Louisiana Code.

If a debt ever existed it was extinguished by novation, according to the provisions of art. 2185 Louisiana Code. See also *Barrow* v. *How*, 2 Mart. (La.) N. S., 144, where a creditor took a note in payment of an account, &c.; also *Abat, &c.*, v. *Nolte, &c.*, 6 Id., 637, and *Hunt* v. *Boyd, & Co.*, 2 La., 111; also art. 2185 Louisiana Code, and Pothier, No. 563, p. 39.

The two last authorities show, when taken in connection with the evidence of Mr. Frey, the cashier, and that of the other witnesses, that the bank, by its agreement and its action in execution thereof, made William M. Stafford its new debtor in the place of J. S. Stafford and wife, and thereby discharged the liability of the latter. By agreement the purchaser was to pay by instalments.

It is contended that the sale of the property by the bank to William M. Stafford, by virtue of an execution and under an agreement with the purchaser, that he was to give no security upon his twelve months' bond, (which the law required should be given,) fully released the defendants from all liability which might have existed on account of said debt.

*335] See 3 Rob. (La.), *156; case of *Overton* v. *Ricaud*, in La. Ann., 1847, No. 9, p. 805; and Co. Pract., art. 681.

It will be seen by the testimony of Mr. Frey, that a payment was made by William M. Stafford, the purchaser, and a credit given on his twelve months' bond by the bank.

When William M. Stafford became the purchaser of this property, independently of his special contract with the bank, the law would have created a new debt and a new security. Code of Practice, art. 681. In case the new agreement was not complied with, execution must have issued on the bond, and not on the original mortgage. 10 Mart. (La.), 425; Code Prac., art. 719, 720; see also art. 703, 705; 9 La., 92; Bullard and Curry's Dig., 435, § 15.

The record shows that when William M. Stafford purchased the slaves, he also purchased a plantation, belonging to J. S. Stafford and wife. Upon the twelve months' bond the bank issued an execution, sold this as the property of William M. Stafford, and became the purchaser of it. Then the bank understood William M. Stafford to be the debtor, and treated him accordingly. If he acquired title to the land by purchase under this execution, why did he not acquire a title to the slaves also? They were purchased at the same time, and under the same execution. La. Code, art. 3252.

But it is contended, that though, in this instance, the debt might exist, the mortgage would be extinguished. La. Code, art. 3374; 6 La. 283.

If the sale had been irregular it would be contended that the bank could not annul or attack it. For it was made at the instance and under the directions of the bank, and that institution, as the warrantor of Mr. William M. Stafford, is bound to make his title valid. La. Code, art. 2599, and authorities cited under it. The sale on execution transfers

the property of the thing to the purchaser. La. Code, art. 2508; C. Prac., art 711; 4 La., 9, 10; Mart. (La.), 222.

By taking out execution on the twelve months' bond the plaintiff ratified this sale. La. Code, arts. 2252, 2254.

The adjudication of the sheriff is a complete sale. La. Code, arts. 2585, 2586, 2601; 9 La., 180; Code of Practice, arts. 690–695.

The plaintiff in execution is the warrantor of the purchaser under it. He cannot have the sale made and then repudiate it. See La. Code, art. 2599.

The bill alleges that the slaves in controversy remained in the state of Louisiana until about the 28th February, 1845, and that the defendants then unlawfully, and with the intent to defraud the complainants of their just rights in the premises, and of their *claims, liens, and privileges, &c., &c., upon said slaves, fraudulently removed, and caused to [*336 be removed, said slaves from the said state of Louisiana to the Republic of Texas. Record, p. 161, shows that said slaves had been, at the instance of the bank, previously sold to William M. Stafford. This is relied on, in part, to show that the trustee and Mrs. Stafford held adverse possession of the sales for more than two years before the filing of the bill. See Angell on Lim., 171 and 513; 2 Story Eq., 1520, and note.

The bill, the allegations contained in the plea, and the petition of the bank, show that the right of action on the obligation and mortgage accrued to the complainants on the 1st of March, 1842.

It is further contended that the plea of the statute of limitations of four years is a bar to the plaintiff's action. For the 22d section of this act intended that the statute should cease to run only in the case in which a resident should absent himself from Texas. The supplement to the act must have this effect, or have none at all. This has now become the settled law by the decisions of the Supreme Court of the state of Texas. See the case of *Snodeley* v. *Cage*, and *Love* v. *Dock and Tims*.

Mr. Justice GRIER delivered the opinion of the court.

The Union Bank of Louisiana filed a bill in the District Court of the United States for Texas, claiming the seizure and sale of certain negro slaves which had been mortgaged to them by the defendants in Louisiana and afterwards removed to Texas. The bill was dismissed by the court below for want of proper parties, and the complainants have appealed to this court. It will be necessary to select, from the voluminous record of the case, only so much of the allegations in the

pleadings and of the evidence connected therewith, as will exhibit the several points of law which have been argued and relied upon in this court.

The bill sets forth a mortgage made by the respondents through their attorney to the complainants, dated on the 6th of June, 1837, to secure the payment of a loan of $45,000, payable in one year from its date. Among other things, this mortgage included 102 slaves, with their increase. When this mortgage became due, the defendants refused to pay, and opposed the sale of the slaves, on the ground that, at the time of its execution, Mrs. Stafford was a minor. After some time a compromise was effected between the parties by the intervention of friends. The bank accepted the notes of J. S. Stafford for about twenty thousand dollars of their debt, and Mrs. Stafford joined her husband in a mortgage on the same property for the sum of $30,000 payable, the interest annually, *337] and the principal in annual instalments, *commencing on the first of March, 1844, and ending in 1851. This mortgage is dated on the 22d of May, 1841. It recites the original mortgage of 1837, acknowledges the loan of $45,000 by the bank to respondents "for the purpose of assisting them in their pecuniary matters and for the particular purpose of paying debts due by the wife." It recites that the wife being now of full age, "is anxious to do away with any vice, defect, or informality which might vitiate or impair the previous mortgage," and thereby "approves, ratifies, and confirms it to the amount and extent of $30,000, so that the two instruments shall be considered as one mortgage." Isaac Thomas also intervened and became a party to this mortgage, in his own right, and as administrator of Michah P. Flint, stating that Stafford had given a mortgage to Flint in his lifetime on a part of these negroes (dated 9th June, 1836) to secure him for indorsements, and likewise a mortgage to said Thomas and Flint, dated 22d of April, 1837, for $100,000 for the same purpose; and agreeing to release and discharge both these mortgages so far as to give priority to the mortgage to the Union Bank. "This waiver and postponement by said Thomas, however, being made without prejudice to the rights acquired by him in a portion (about 48 in number) of the above-named slaves, at a sheriff's sale of the property at the suit of the New Orleans Canal and Banking Company on the 8th day of August, 1840."

The bill further alleges, (and this allegation is fully proved by the evidence in the cause) that these slaves remained in the possession of the respondents from the date of the mortgage till February, 1845, when they were fraudulently removed

by them to the state of Texas for the purpose of evading the payment of this and other debts secured upon them; and that Stafford has threatened to remove them out of that state to Mexico if such a step should be necessary to prevent them from being seized to satisfy his debts.

To prevent this, a receiver was appointed by the court, and by means of a writ of assistance, a part of the slaves have been taken into his possession with much difficulty and at great expense.

The answer of Mrs. Stafford admits the mortgages, and that the slaves have been brought to Texas, and that she holds them in her possession, subject to the order of the court. Without attempting to give an abridgment of the various matters alleged in this answer, we shall proceed to notice the several points of defense made by counsel in the argument, stating the allegations, and facts which tend to elucidate them; without regarding the order or peculiar statement of them in the answer.

I. Was this mortgage valid and effectual to pass or bind the *interest, "property, and right of the wife, whether dotal or of any other description?" [*338

In the decision of this question, it is not necessary to take into consideration the doctrines of the civil law or of the Louisiana Code (art. 2412) concerning the power of the wife to bind herself as surety for the debts of her husband; as we are of opinion that the 25th section of the act of April 2d, 1832, incorporating the Union Bank of Louisiana, is conclusive upon this point. It is as follows:

"Sect. 25. Be it further enacted, &c., that, in all hypothecary contracts and obligations entered into by any married individual, with or in favor of said Union Bank of Louisiana, or with any of its offices of discount and deposit, according to the true intent and meaning of this act, it shall be lawful for the wife of the said individual to bind and oblige herself jointly and *in solido* with him; and in such case, the property and right of the wife, whether dotal or of any other description, shall be affected by the said contracts or obligations: Provided, That the said wife be of the age of majority at the time of entering into such obligations or contracts."

Now, it is admitted that, when the latter instrument of mortgage was executed, the wife was of full age.

That it is a hypothecary contract for the loan of money by the bank, is evident from the face of the deed. And if the recital in the mortgage, that it was given for a loan of money, be not conclusive evidence of that fact, the testimony in the case fully shows that the consideration of it was the loan of

$45,000, which was set to the credit of Stafford on the books of the bank, and drawn out by his checks. The purpose to which this money was applied was a matter with which the bank had no concern, and which cannot affect the validity of its security.

This instrument was a public act, duly acknowledged, and was therefore a binding contract or obligation, to affect the "property and right of the wife, whether dotal or of any other description," and by the laws of Louisiana, operated as a judgment, with lien on the property specially described it it. See *Bank of Louisiana* v. *Farrar*, 1 La. Ann., 49.

II. It is alleged in the answer, that this contract of mortgage has been novated and extinguished.

The facts on which this objection rests are as follows:— The instrument of mortgage contains a covenant that, "in case of failure on the part of the mortgagors to pay any or either of said instalments, or any or either of the amounts of interest, it shall be sufficient cause to foreclose the same and enforce the payment by such legal process as the nature of
*339] the case shall *or may require." The mortgagors, having failed to make any payment of the annual instalments of interest, in April, 1843, the bank obtained an order of seizure and sale of the mortgaged property. According to the usual course of proceeding in such cases, when the sheriff cannot obtain a bid for cash, to the amount of two thirds of the appraised value of the property, it is again offered for sale on a credit of one year, the purchaser giving what is called a twelve months' bond; and if the purchase-money be not paid in that time, the mortgagee may have an order of seizure and sale on this bond. On this last sale, the property is sold for cash (subject to all previous liens) to the higher bidder. In this case the mortgaged property was bid off by William M. Stafford, a brother of respondents; he gave his twelve months' bond; the property remained, as usual, in the possession of the respondents; and no part of the purchase-money was paid at the end of the year. The bank then issued process for a final sale of the property to the highest bidder, for cash. The lands included in the mortgage were sold; but the negroes were fraudulently carried off by the defendants to Texas. The amount for which the lands sold did not satisfy the first instalment of the principal of the mortgage, due in March, 1844.

The question which arises on these facts is, whether this sale to William M. Stafford, and his twelve months' bond, is a novation or extinguishment of the original mortgage. If it was, the complainants should have filed their bill on the

twelve months' bond, which operated as a judgment and mortgage on the property, and not on the original mortgage, as has been done in this case.

"A novation takes place in three ways" (Louis. Code, art. 2185.) "1st. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished. 2d. When a new debtor is substituted to the old one, who is discharged by the creditor. 3d. When, by the effect of a new engagement, a new creditor is substituted to the old, with regard to whom the debtor is discharged."

Whether this twelve months' bond operates as a novation, and discharges the mortgage or judgment without actual payment or satisfaction, is a question depending so entirely on the peculiar laws of Louisiana, that we must look alone to the decisions of the tribunals of that state for its solution. The cases of *Offut* v. *Hundsley*, 9 La., 1; *Reboul* v. *Behren*, Id., 90; and *Dunlap* v. *Sims*, 2 La. Ann., 239, are directly in point on this question. In the latter case, the court says, "No principle is better settled in our law than that a sale of property under execution, on a credit of twelve months, neither satisfies the judgment nor novates the debt."

*On this point of defense, therefore, we must decide, [*340 that the sale to William M. Stafford and his twelve-months' bond (which it is admitted has never been paid) did not novate or extinguish the lien or debt secured by the original mortgage to the bank. This result is consonant with the true equity and justice of the case, as it is transparently clear, from the whole transaction, that William M. Stafford's interposition in this matter was merely to gain further time for the respondents, he being wholly unable to satisfy the debt of the bank, according to the tenor of his bond. His transfer of the negroes to Mrs. Stafford, or to M'Waters as her trustee, left the case, as between these parties, in precisely the same position as it stood at first. The negroes always remained in possession of respondents, subject to the lien of the mortgage, notwithstanding this complication of sales and nominal transferees.

III. The respondent, both by her pleas and in her answer, sets up the statute of limitations of Texas as a bar to the proceedings in this case; she relies, first, on the section which limits all actions of debt, upon any contract in writing, to four years; and, secondly, "that all actions for detaining personal property, or for converting such property to one's own use, shall be commenced and sued within two years next after the cause of such action or suit, and not after;" and alleges

that "she has converted the slaves to her own use, and held them adversely to the complainant, from the 9th of April, 1845, until after the commencement of this suit, that is to say, for more than two years before the filing of this bill."

However much it may be the policy of Texas (as it is alleged in the cases of *Love* v. *Dock*, and *Snodely* v. *Cage*, lately decided in the Supreme Court of that state) to give a liberal construction to their statutes of limitation in favor of debtors, for the purpose of encouraging immigration, it is abundantly apparent that these sections can have no application to a bill in equity to enforce the sale of mortgaged property, whether the slaves in question be considered either as personalty or realty.

The first of the eight instalments of the principal debt became due on the 1st of March, 1844, and the last in 1851; and the bill was filed in February, 1848, less than four years after the first instalment became due; so that, if this were an action of debt, the plea could apply only to the instalments of interest payable before 1844. And in such an action, it would be no answer to this objection to the plea of the statute, that the creditor had a right to sell the mortgaged property on the failure or neglect of the mortgagor to pay the first instalment. In cases of concurrent jurisdiction, courts of equity are said to act in obedience to the statutes of limitation, and in other
*341] cases they act *upon the analogy of the limitations of law. A bill to foreclose a mortgage and enforce the sale of the mortgaged property has no analogy to an action of *trover*, *detinue*, or trespass. The claim of the mortgagee is a "*jus ad rem*" not a "*jus in re*." He does not claim as owner of the property. The possession of the mortgagor is not adverse, but under the mortgagee. And, although this species of realty is movable, and may be carried away or fraudulently concealed from the pursuit of the mortgagee, such acts cannot be alleged in a court of equity as an adverse possession, which will defeat the lien of the creditor after two years, in analogy to the limitation of actions at law for taking and carrying away or converting to one's own use the property of another. A chancellor will not permit a party to plead his own fraud to defeat the equity of the complainant. This plea must therefore be overruled.

V. The court below decided the three points of defense which we have just considered against the respondents, but dismissed the bill of complainants for want of proper parties.

This constitutes the fourth and last ground of defense which has been urged in the argument of the case in this court.

It is contended, that William M. Stafford, James A. M'Wa-

ters, and Isaac Thomas should have been made parties to this bill, and that without such parties the court cannot proceed to a decree in favor of complainants.

It is admitted, that William M. Stafford, James A. M'Waters, and Isaac Thomas reside in the state of Louisiana, and out of the jurisdiction of the court. And it is contended that, as the complainant cannot therefore compel them to become parties, he is utterly remediless, notwithstanding the original mortgagors are in court, and have in their possession the property subject to the lien of his mortgage.

It is true that, if these persons had been within the jurisdiction of the court, they might properly have been made parties; but there is no decree sought against either of them, nor will a decree in favor of the complainants affect any rights which they may have.

It is unnecessary, in the consideration of this point, to bring under review the doctrines advanced on this subject in treatises on equity practice and pleadings, or cases decided in England or elsewhere. The act of Congress of 28th of February, 1839, is conclusive of this point. It enacts, "that where, in any suit at law or in equity commenced in any court in the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed *to trial and adjudi- [*342
cation of such suit between the parties who may be properly before it. But the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of the parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit." Notwithstanding the complication of mortgages, sales, and transfers of the slaves now in question, it must be observed, that they have never been out of the possession of the respondents till seized with a strong hand by the marshal on a writ of assistance, and delivered to the receiver appointed in this case. And, as we have seen, the transfer to William M. Stafford by the sheriff, on his giving a twelve months' bond, left them still subject to the lien of the mortgagees, as the bond was never paid. The transfer from Stafford to M'Waters, for the separate use of Mrs. Stafford, one of the original mortgagors, did not affect the rights of the mortgagees; neither Stafford nor M'Waters have or claim any beneficial interest in the property. M'Waters was examined as a witness, and might have

been made a party if he chose. It would be a strange perversion of justice, if the remedy on a mortgage could be defeated by transfers of this description to persons living out of the jurisdiction of the court. If this act of Congress had never been passed, a court of equity would not suffer the remedy of a mortgagee to be defeated by such a scheme.

If it were true that Isaac Thomas still retained his claim to forty-eight of the slaves included in the mortgage, it would be no reason why the complainant should not be entitled to his decree as against the respondents, leaving Thomas to prosecute his claims, if he had any, at such time and in such manner as he might elect. But the plea set up in the answer on this point must be taken with the facts connected with it, as alleged by the respondent, in connection with the testimony of Thomas himself, who was examined as a witness in the case. By these it appears that the New Orleans Canal and Banking Company had a previous mortgage for $10,000 on these forty-eight slaves, executed by Stafford and wife; that a writ of seizure and sale issued thereon, and these slaves were sold to Isaac Thomas, who left them in possession of the respondents, but never paid for them; that the slaves were then sold as the property of Thomas, and purchased by one Flint, who afterwards released his right to the Canal Bank, who sold to William M. Stafford, who transferred his right to M'Waters in trust for Mrs. Stafford. It appears also, by the record, that the Canal Bank have filed their bill, claiming their lien on these slaves, who are in the hands of the receiver appointed in this case, and who, by arrangement between *the parties, holds them subject to their respective rights. The Canal Bank, though not formally made a party to this bill, is in court claiming its rights through Thomas. The court have therefore before them all the parties claiming any beneficial interest in these slaves, and before they distribute the proceeds of the mortgaged property, can compel the parties interested either to settle their respective claims amicably, or by action, or interpleader, and thus make a final decision binding on all the parties who have any claim to the property.

*343]

The decision of the District Court dismissing the bill for want of proper parties must therefore be reversed, and the record remitted to the court below, with directions to enter a decree in favor of the complainants, and have such further proceeding as to justice and equity may appertain.

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 Texas, 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 District 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 District Court, with directions to that court to enter a decree in favor of the complainant, and for such further proceedings to be had therein as to law and justice may appertain.

NEW ORLEANS CANAL AND BANKING COMPANY, APPELLANTS, *v.* JOSIAH S. STAFFORD AND JENANETTA KIRKLAND, HIS WIFE.

The principles established in the preceding case of the Union Bank of Louisiana, against Stafford and wife, again affirmed.

THIS was an appeal from the District Court of the United States for the District of Texas.

Although the complainants were not the same as in the preceding case of the *Union Bank of Louisiana* v. *Stafford and Wife*, yet the respondents were the same and the subject-matter was a breach of the same transaction. The only difference is stated fully in the opinion of the court; and by agreement of parties the two cases were consolidated in the court below and to be argued together.

It was argued by *Mr. Crittenden*, (Attorney-General) for the appellants, and *Mr. Harris* for the appellees.

[*344

**Mr. Crittenden* contended,

1. That the court below erred in dismissing the bill for the want of proper parties, and cited 6 Wheat., 559; 10 Id., 167; 11 Id., 133, 134. Act of Congress, 28 Feb., 1839; 5 Stat. at L., 321, § 1.

2. That there was no proof of Mrs. Stafford's minority, and if there were, that she afterwards confirmed the mortgage.

3. That there was no proof of her matrimonial or dotal rights or their amount.

4. That the statute of limitations could not apply. No court of equity would sanction a fraudulent removal of the property with a view to found a place of limitations upon it. 2 Story Eq., 188, ch. 23, § 903. Eden on Injunc., ch. 16, pp. 349, 350.

Mr. Justice GRIER delivered the opinion of the court.

The New Orleans Canal and Banking Company filed their bill in the District Court of the United States for Texas against Josiah S. Stafford and wife, setting forth that the bank by an act of contract of sale and mortgage made on the 12th of July, 1844, in the parish of Rapides and state of Louisiana, sold to William Mainer Stafford thirty-three negro slaves, which the bank had purchased at a sheriff's sale of the property of Isaac Thomas, at the suit of Adelia E. Flint. By this act of sale and mortgage, William M. Stafford covenanted to pay, as the price of the slaves, the sum of $12,853, with interest in eight annual instalments. That in addition to the vendor's privilege reserved on the slaves sold, William M. Stafford further mortgaged his interest in some other slaves which said Stafford had purchased on the 6th of November, 1843, at a sheriff's sale at the suit of the Union Bank of Louisiana. That Stafford agreed that in case any of the instalments were not paid when they severally became due, then the bank might obtain an order of seizure and sale, (or judgment in the ordinary way at their option) and sell the mortgaged premises to the highest bidder without benefit of appraisement. That the respondents, with full notice of this act of sale and mortgage and of the claims of the complainant, fraudulently removed and transported all the slaves to Texas, and now hold and detain them, and endeavor to scatter and secrete them, for the purpose of evading the just claims of complainant. That the slaves are now in possession of the court by a receiver in a certain suit pending between the Union Bank of Louisiana and the respondents. That four of the notes secured by complainant's mortgage are due and payable, and remain unpaid. That William M. Stafford has no property in Louisiana; that he resides in the state of Louisiana and without the jurisdiction of the court, and cannot therefore be made a party to the bill.

*345] *This bill was taken *pro confesso* against the husband. The wife filed an answer in which she admits the contract of sale and mortgage between the bank and William M. Stafford, but alleges a purchase of them by James A. M'Waters, who holds them by a deed of trust for her separate use. She claims that she is a *feme covert*, and that by the laws of Louisiana she has a lien upon all the slaves in the bill mentioned for the security of her matrimonial, dotal, and paraphernal rights, to the amount of $66,000. She admits the slaves were all brought to Texas except five, four of whom are dead, and that the others are now in possession or ordered to be delivered to a receiver appointed by the court at the suit

of the Union Bank of Louisiana, and prays that the bill may be dismissed, because William M. Stafford, James A. M'Waters, and the Union Bank are not made parties to the bill.

To meet the allegation of matrimonial, dotal, and paraphernal rights, the complainants amended their bill and gave in evidence a mortgage by respondents, duly acknowledged to bar the rights of the wife, dated 11th May, 1836; and including the thirty-three slaves now in question, with some others. Also, that an order of seizure and sale of forty-five negroes, including these thirty-three, was regularly issued, and the slaves sold to General Isaac Thomas on the 8th of August, 1840.

That on the 15th of September, 1840, Thomas mortgaged them again to the bank to secure the payment of ten thousand dollars. That in November, 1842, Adelia E. Flint, by execution on a judgment which had a lien on the property of Thomas anterior to the mortgage of the bank, sold at sheriff's sale thirty-three of said negroes, which were purchased and paid for by the Canal Bank in 1844.

The amended answer of the wife sets up the defense, that she was a minor in 1836, and therefore the first mortgage to the bank was not valid to bind or affect her rights; she pleads, also, the statute of limitation of two years, averring that, since the slaves were brought to Texas, she has held them adversely to the claim of the mortgagee. But there is no evidence on the record to show that she was a minor in 1836, or that William M. Stafford sold the slaves in question to M'Waters, or that M'Waters had any title to them whatever. That the slaves were carried to Texas by respondent's husband clandestinely, to avoid the pursuit of creditors, is also satisfactorily proved.

The defenses made on the argument in this court were:—

1. The minority of the plaintiff.

This was an allegation of the answer not responsive to the bill, and there was no proof to substantiate it.

The statement of a witness, in his cross-examination, that he *heard Stafford say his wife was not of age in 1836,
was not responsive to any question proposed to him by [*346
the respondents, and is no evidence of the fact.

2. The charter of the Canal Bank, complainant, has a section in the same words with that which we have noticed in the opinion just delivered in the case of the Union Bank; and what we have said in that case, as to the power of the wife to join her husband in such securities to the bank, equally applies to the present case, and need not be repeated.

3. The plea of the statute of limitations has also been disposed of in the preceding case.

4. What was said in the previous case, as to the propriety of dismissing the bill for want of proper parties, equally applies to this.

The forty-five slaves sold to Thomas, including the thirty-three now in question, were never taken from the possession of respondents; and, though Thomas proves that he offered a reward of $500, he was unable to get information by which to distinguish or sever them from the other slaves in possession of respondents. Hence we see the reasons for these transfers to William M. Stafford, the younger brother of respondents, who was without means to pay; and the very liberal terms given by the bank were evidently for the purpose of favoring the defendants, and leaving the slaves in their possession. We cannot shut our eyes also to the fact that respondents were the real actors and persons interested in all these manifold and complicated mortgages, sales, and transfers, which all seemed to have but one result, to wit, that the respondents kept possession of the slaves, and never paid their debts. And having clandestinely carried them away and attempted to scatter and conceal them from the pursuit of their creditors, it would be a reproach to a court of equity, if it could be truly said that it was unable to afford the complainants a remedy because the nominal and insolvent obligee in the mortgage lived in a different state from those who, in combination with him, have transported the mortgaged property within the bounds of a different jurisdiction.

The difficulty arising from the conflicting claims of the Union Bank can be settled by the court, as we have already shown in our opinion in that case. In fact, this bill is itself in the nature of an intervention, setting up the claim of complainants to property already in possession of the court. And the court have it fully in their power to compel the banks to interplead with one another as to the priority of their lien or rights to the property or its proceeds; as each of them has shown a right to a decree as against the title of the respondents, they will be indifferent as to the result, unless the property shall produce more than sufficient to pay both mortgages.

*347] *The decree of the District Court is therefore reversed, and the record remitted with directions to enter a decree in favor of complainant, and cause such other proceedings as to justice and equity may appertain.

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 Texas, 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 District 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 District Court, with directions to that court to enter a decree in favor of the complainant, and for such further proceedings to be had therein as to law and justice may appertain.

ABRAHAM RICH AND JAMES HARRIS, CLAIMANTS OF THE SHIP MARTHA, HER TACKLE, APPAREL, AND FURNITURE, APPELLANT, *v.* CHARLES LAMBERT AND ROBERT LAMBERT, COPARTNERS, TRADING UNDER THE FIRM OF LAMBERT AND BROTHER, AND OTHERS. SAME *v.* SOUTH CAROLINA RAILROAD COMPANY.

Where several owners of a cargo filed libels *in rem* against the vessel for damages done to the goods, and these libels were consolidated by order of the court, which afterwards decreed damages in favor of the libellants, in some cases to more and in some to less than $2,000, those cases where the damages are less than that sum must be dismissed, on an appeal to this court, for want of jurisdiction.[1]

Where further evidence was taken after the appeal to this court was entered, under the authority of an act of Congress passed in 1803, (2 Stat. at L., 244,) the issuing of the commission by the clerk of the Circuit Court, and the uniting by both parties in its execution, furnish a presumption that the proper order was given. If not, the parties have waived all objection.

Where goods on board of a ship received a damage which must necessarily have accrued during the voyage, the *onus probandi* is upon the master and owners to show that it was occasioned by one of the perils of navigation within the exception of the bill of lading.[2]

The master is not to blame for bringing sacks of salt between decks, if it be well stowed and packed, and secured with proper dunnage. The usage of trade is to carry salt in that way.

The evidence in the present case shows that the damage was caused by the perils of navigation.

THESE two cases were included in the same judgment of the Circuit Court of the United States for the District of South

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[1] APPLIED. *Seaver* v. *Bigelows*, 5 Wall., 210. DISTINGUISHED. *Shields* v. *Thomas*, 17 How., 5. See note to *Spear* v. *Place*, 11 Id., 552.

[2] FOLLOWED. *Propeller Niagara* v. *Cordes*, 21 How., 29. See note to *Clark* v. *Barnwell*, *ante* *272. See also *Morewood* v. *Enequist*, 23 How., 494; *Nelson* v. *Woodruff*, 1 Black, 160; *The Maggie Hammond*, 9 Wall., 459; *Shutte* v. *Thompson*, 15 Id., 161; *Merrill* v. *Petty*, 16 Id., 345; *Paving Co.* v. *Mulford*, 10 Otto, 148; *The Connemara*, 13 Id., 755; s. c. 1 Morr. Tr., 461; *Chatfield* v. *Boyle*, 15 Otto, 233; *Russell* v. *Stansell*. Id., 304; *Ex parte Baltimore &c. R. R. Co.*, 16 Id., 5.

Carolina, and were argued together in this court, upon an appeal from that judgment.

*348] *Originally, ten several libels were filed by the owners or consignees of goods shipped on board the Martha at Liverpool, bound to Charleston. The libels claimed damages on account of injury to the property by the negligence or misconduct of the respondents, and particularly that a large quantity of salt was improperly stowed. The proceeding was *in rem* against the vessel, in the District Court of the United States.

Richard Rich, captain of the ship, intervened for himself as master, and for the owners, Abraham Rich and James Harris of Massachusetts, and Samuel Snow of Maine.

The answers denied all charges of neglect and mismanagement, and averred that all the cargo on board was well and securely stowed according to the usage of shipping; that the ship was sound, stanch, and every way fitted for the voyage; that she encountered severe gales and heavy seas on the voyage, and made much water, and in consequence thereof, and of the leakage of the ship, and the change of latitude and consequent warm weather, the water so taken in became warmed and was converted into steam, and caused a damp atmosphere to pervade the lower hold of the ship, which no power, care, or diligence, on the part of the master, could have avoided, but that the same was the inevitable result of the ordinary dangers of navigation, &c.

The answers further aver, that the salt on board was stowed on the second deck, where it was necessary to be stowed, in order to steady the ship and prevent injury to the cargo in the hold; that access between that deck and the hold where the libellants' goods were stowed, was wholly and effectually cut off, and was independent of the cargo in the hold, and could have no effect upon the same more than if it had been stowed in another ship; that the salt was well stowed in the ordinary and customary part of the ship, according to the approved usage of vessels trading to the United States from Liverpool.

Nine of the ten separate libels were ordered by the court to be consolidated. The tenth case, in which the South Carolina Railroad Company were libellants, was not included in this order.

A trial was had in the District Court upon libels, answers, and proofs, which resulted in the passage of a decree in favor of the libellants, awarding to them, separately, the following sums of money:

No. 1	Claim of	Lambert & Brother . . .	$2,077 39
" 2	"	John Graveley	447 90
" 3	"	Barnwell & Ravenel . . .	1,628 42
" 4	"	A. Moffett & Son . . .	136 97
" 5	"	W. & J. E. Adger . . .	868 29
" 6	"	A. Gordon	442 34
" 7	"	W. L. Timmons	806 77
" 8	"	Dick & Crews	350 02
" 9	"	Morton & Courtney . . .	214 64
" 10	"	Jas. Adger & Co. . . .	623 40
" 11	"	S. N. Hart	368 02
" 12	"	Watson & Johnston . . .	460 26
" 13	"	Roosevelt, Hyde & Clark . .	172 09
" 14	"	S. Mowry & Son	173 69
" 15	"	South Carolina Railroad Company	2,045 11
			$10,815 31

From this decree, the claimants appealed to the Circuit Court, where further evidence was heard, and the decree of the District Court affirmed, with the further addition of $774.90, which had in the interim been paid to the respondents by the South Carolina R. R. Company.

The respondents appealed to this Court, and after the entry of the appeal took further evidence under the act of Congress of 3d March, 1803. 2 Stat. at L., 244.

It was argued by *Mr. Evans* and *Mr. Hunt*, for the appellants, and by *Mr. Coxe* and *Mr. Butler* for the appellees.

The points made by the counsel for the appellants were the following:

The allegation in the libel is that the ship was loaded between decks with a quantity of salt in bags; that the goods damaged were stowed in the lower hold, under the middle deck, and that the salt, between decks, leaked and passed through the deck, and damaged the goods.

Unless this proposition is established as a fact, the libellants have no case. The ground taken is, that such stowage was unskilful and dangerous, and therefore the storms and tempests, which were proved to have occurred, will not excuse this unseamanlike and dangerous stowage.

This leading allegation of the libellants is denied, and it is contended that the proof establishes,—

I. That, in point of fact, the salt did not leak or drip any brine upon the goods in the hold, for these reasons:

1st. That the bags, when unloaded, were dry.

2d. That the dunnage was dry.

3d. That the surface of the between-decks was unstained around the piles of salt.

*350] *4th. That the quantity of salt water, which all admit was necessary to produce the injury, say, "many hogsheads," could not, in the nature of things, have deliquesced from the salt, between decks, without wetting the bags and decks. The hatches being found tight, and being higher than the surface of the deck, the brine, if any did leak, must have gone through the seams of the second deck, and yet no external stain was found around the piles of salt.

II. That the stowage was seamanlike and necessary; the weight of the salt being required to steady the ship.

III. That the decks were well calked when the voyage commenced; and if any injury had occurred, it is solely attributable to stress of weather. This point was partially established by the testimony taken before the district and circuit judge, but has since been put beyond controversy by the examination of the ship-carpenter, taken by commission, and now introduced for the first time, so that the case of the claimants depends upon these two propositions: 1st. That the salt stowed between decks did not, and in the nature of things could not, have caused the damage. 2d. That the stowage, under the circumstances, was well warranted by the usage in such instance, and if any damage was caused by it, it resulted from a change of facts produced by heavy storms and working of the vessel.

IV. These being established, the next important proposition is, that the storms and waves, as fully proved to have been met on the voyage, is the only remaining cause of loss, and is a risk which falls on the insurer, and not on the carrier; as we contend that, as soon as the liability of the insurer begins, that of the common-carrier ends.

Certainly, if on the inception of the voyage, the cargo was properly stowed, and the vessel sea-worthy, the allegations being identical and confined to one fact, the stowage of the salt, we must look to the answer which raises the issue.

The issue is raised in the pleadings by the allegations by libellants, that certain salt stowed between decks was the cause of injury, by the salt dripping in large quantities through the second deck, and injuring the goods stowed in the hold; and a full or unequivocal denial, by claimants, that said salt was improperly stowed, and especially, that it was delivered safely in Charleston, dry and in good order, and that none

but the goods in the hold were injured, and fully accounted for by the dangers of the seas.

This issue is to be resolved by the testimony, which, on behalf of the libellants, failed in any positive proof that the salt caused the injury, or that it was unseamanlike stowage.

The counter proof was positive. The admitted fact that the *salt was found dry on opening the hatches, not a stain on the lower bags, no marks of brine from the pile [*351 of bags, all rendered it a physical impossibility that a large quantity of brine had leaked out during the voyage; and, consequently, being impossible, it was not true.

The witnesses may be divided into the following classes:

1. Those who examined the vessel when the hatches were taken off, and broke out the cargo.

2. Those who state the usages of shipmasters to prove the salt well stowed.

3. The crew and captain, and the new testimony of the ship-carpenter, to prove the vessel was stanch, and particularly that the decks were well calked, and but for the storms the goods would have been safely landed.

The testimony was then examined.

The counsel for the appellees contended:—

1st. That so far as regards the eight libellants, to whom these decrees award sums less than $2,000, the appeals should be dismissed for want of jurisdiction. The interest of these parties are wholly distinct and independent; as such they were presented in separate libels; as such they were established by independent evidence; as such they were reported on by the clerk; and as such they are adjudicated upon by both the District and Circuit Courts.

The decisions of this court have established this principle so far as the interests of the claimants are separable. *Oliver* v. *Alexander*, 6 Pet., 143; *Stratton* v. *Jarvis*, 8 Id., 11; *Spear* v. *Place*, 11 How., 522.

2d. On the merits. There does not seem to be any contrariety in the evidence as to the principal facts in the case, viz., that the goods of the libellants sustained damage during the voyage from Liverpool to Charleston. The main question which presented itself was as to the cause of that damage.

The following points are established by the evidence:

1. The goods were shipped in good order and condition, as shown by the bills of lading. *Benjamin* v. *Sinclair*, 1 Bail. (S. C.), 174.

2. That they were damaged when delivered at the port of discharge.

3. This throws upon the carrier the burden of showing that

the injury resulted from some cause for which he is not responsible. *Forward* v. *Pittard*, 1 T. R., 27; Story on Bailm., 509; 2 Kent Com., 602; 1 Bing., 607.

4. The evidence shows that this injury did not result from a storm or the dangers of the seas, for the vessel appears to have sustained no injury.

*352] *5. It did result from the salt which was on board between decks.

6. The evidence is not, when properly examined, contradictory, but if so, it preponderates against the appellants.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States, held in and for the District of South Carolina in admiralty.

The several libels were filed in the District Court, against the ship Martha, by the owners of cargo brought in the same from Liverpool to Charleston, for damage done to the goods in the course of the voyage.

Five of the separate owners of cargo joined in one of the libels, and each of the others filed separate libels; to each of which answers were put in by the respondents, and the parties proceeded in the usual way to take their proofs. Pending the proceedings, all the cases were consolidated by an order of the court on the motion of the proctors for the libellants.

The District Court held the respondents liable, as carriers, for the damage done to the goods; and referred the cases to the clerk to take the necessary proofs, and ascertain the loss which each of the several parties had sustained, and report the amount, which was done accordingly. And, in the coming in of the report, a decree was entered adjudging to each of the fifteen several owners the amount of the loss they had respectively sustained.

On an appeal by the respondents to the Circuit Court, this decree was affirmed. And the cases are now before us on an appeal to this court from that decree.

With the exception of two of the cases, the sum decreed against the respondents in favor of the several owners of the cargo is below the amount that authorizes an appeal to this court. And, it is insisted, on the part of the appellees, that the appeal should be dismissed for want of jurisdiction as to all parts of the decree, except the part relating to the two cases mentioned.

On the part of the appellants, it is contended, that the objection to the jurisdiction is not available to the five separate owners joining in the libel, as the aggregate amount decreed

to them exceeds two thousand dollars; nor to any of the parties, on the ground that all the cases were consolidated by the orders of the District Court on the motion of the proctors for the libellants.

We are of opinion that neither of these grounds are sufficient to maintain the jurisdiction, and that the appeal must be dismissed *as to all the cases except the two in each of which the amount in the decree exceeds the two thou- [*353 sand dollars.

The joining of several owners of cargo conveyed in the same ship in a libel *in rem* for damages done to the goods in the course of shipment, and the consolidation of libels filed separately by the respective owners for like damage, is allowed by the practice of the court for its convenience, and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties.

In cases where the several claims against the ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted.

The defense will usually be the same in all the cases; but, if otherwise, the parties will not be prejudiced, as they may avail themselves in the answers of any defense existing against either of the several owners. For, although the proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits.

We do not perceive, therefore, any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout. Clearly, a libellant could not have appeal, unless his claim exceed two thousand dollars. Nor can the respondent, upon the same principle, unless the amount decreed against him in the particular case, exceeds that sum. The principle, in effect, we think, has been already decided in this court. 6 Pet., 143; 8 Id., 11; 11 How., 522.

There is another preliminary question which it is necessary to notice before proceeding to the merits.

Further evidence has been taken, on the part of the respondents, since the appeal to this court was entered, which is objected to by the appellants.

The act of 3d March, 1803, (2 Stat. at L., 244) allows additional evidence to be furnished by either party before this court in cases of appeals in admiralty and prize causes. And by the 27th rule of the court the evidence is to be taken under a *commission to be issued from this court, or from the Circuit Court, under the direction of any one of the judges thereof.

*354]

The objection taken to the evidence is, that it does not appear from the record that any order was obtained from either court for the issuing of the commission. We have, however, before us the commission itself, issued in the usual form by the clerk of the Circuit Court, and in the execution of which both parties have joined. An order, therefore, must have been entered, or, if not, it was waived by the act of the parties in suing out the commission, and joining in its execution. For these reasons we think the further evidence furnished to this court admissible.

This brings us to the merits of the case.

The different libels filed in the several cases are in form and substance the same. And so are the several answers of the respondents.

The libels charge that the ship Martha being at Liverpool on the 6th September, 1847, and bound on a voyage to Charleston, the libellants caused to be shipped on board the same, divers goods, wares, and merchandise, then in good order and condition, of great value, &c., to be taken care of and safely delivered in like good order and condition, (the dangers and accidents of the seas and navigation excepted,) they paying certain freight therefor as per bills of lading. That afterwards, on or about the twenty-first of the same month, the said ship, having on board the said goods, set sail from Liverpool, and on the ninth November following arrived at Charleston, and soon thereafter delivered the same to the said libellants.

That the said goods, wares, and merchandise were not taken care of and safely carried and delivered according to the tenor and effect of the bills of lading; but, on the contrary, although no damage accrued from any dangers or accidents of the seas, or navigation, the said goods were so badly taken care of by the said master, and the cargo of said ship, and particularly a quantity of salt on board thereof was stowed so improperly, that through the neglect, and mismanagement of the master,

the said goods were greatly damaged, and great loss thereby sustained.

The answers of the respondents admit the taking on board of the vessel the goods as stated in the libels; and allege, that she was loaded with an assorted cargo in the hold and with sundry sacks of Liverpool salt between decks; that the ship was sound, stanch, and in every way well fitted and equipped for the voyage, and capable of carrying safely the cargo taken on board, the dangers of the seas only excepted. That the cargo was well and securely stowed and packed with proper dunnage, and according to the usage, and custom of the trade, by the master and officers of the ship; that the hatches leading from the between-decks *and the lower hold were well secured and calked, wholly separating the one from the other. That the ship encountered several violent gales, and very boisterous weather during her voyage, causing her to labor heavily, and straining her badly, the sea at times breaking over her, so that she shipped a great deal of water from leaks, and stress of weather, requiring the constant use of the pumps, which were faithfully attended to, and every effort made to preserve the ship, and save the cargo from damage. [*355

The respondents further allege that in consequence of the heavy seas, and the leaking of the vessel, and the change of latitude from a cold to a warm climate, the water shipped became heated, producing steam, and a wet and damp atmosphere in the lower hold, which no care or diligence, on the part of the master and crew could not have prevented; that this was the unavoidable result of the dangers of navigation, and proceeded from the storms, winds and waves; and not from any defect in the ship or want of skill, care or diligence on the part of the master and hands, and caused the damage to the goods complained of.

They further say, that the salt stowed between decks was safely carried, and delivered dry and in good order at Charleston, without being wet, or any evidence of drainage from the same either upon the sacks, the dunnage, and matting upon which the sacks were stowed, or upon the lower deck, through the seams of which the drainage must have passed to the goods in the hold, if at all; and they deny that the damage to the goods in the hold proceeded from the salt thus stowed between decks.

The proofs in the case show, that a mixed cargo, consisting of crates, and boxes of dry goods, and hardware, and a quantity of bars of railroad iron, was stowed in the hold of the vessel, the railroad iron placed at the bottom. And, that some

twelve hundred sacks of salt were stowed between decks fore and aft the main hatch of the lower deck. That she left Liverpool on the 21st September, 1847, and arrived at Charleston on the 9th of November following, after a passage of forty-nine days; that during the voyage she encountered on the first and second of October two very violent gales, the vessel on the wind at the time, causing her to roll heavily and the sea to break continually over her, and to ship great quantities of water, so that it was necessary to keep the pumps going most of the time while the storm continued.

On opening the upper hatches a day or two after the arrival of the vessel for the purpose of discharging the cargo, the salt between decks was found dry and in good condition; and, after the discharge of the same, no unusual wet or dampness appeared upon the matting or dunnage upon which it was *356] stowed, nor *upon the flooring of the deck, nor any evidence of drainage from the sacks of salt in any part of the between decks. All the witnesses concur on this point who had the best opportunity of becoming acquainted with the facts; and whose connection with the discharge of the salt precludes the possibility of mistake, including the port-warden present at the opening of the hatches, the purchasers of the salt, the consignee, the stevedores, the inspector of the customs, and the mate of the vessel. Nor is there any evidence in the case to the contrary.

On opening the hatches of the lower deck, leading to the hold of the ship, which was about the 15th November, five or six days after her arrival, great heat issued immediately therefrom, and much dampness and vapor were found to pervade this part of the vessel; and on breaking the cargo and commencing the discharge, the greater portion of it was found seriously damaged.

The boxes of dry goods were found wet, or damp, and stained to a very considerable extent, and the hardware, and bars of railroad iron, wet and badly rusted; and indeed, the whole cargo throughout the hold more or less damaged. Drops of water, or vapor, apparently formed from the heat and dampness of the hold, or by drainage from above, were found pendant from the seams of the under part of the lower deck, affording very satisfactory evidence of the immediate cause of damage to the cargo; but, leaving the question open to controversy as to the source whence these indications proceeded; some of the witnesses, and among them three of the port-wardens, testifying that these drops proceeded from the drainage of the salt that had been stowed between decks, and others, from the heat and dampness of the hold, aggravated by the

quantity of sea-water shipped during the storm, and stress of the vessel.

We have already stated, that the libellants charge in the several libels the damage to the goods to have been occasioned exclusively from the improper stowage of the cargo, and especially of the sacks of salt in the between decks over the goods in the hold of the vessel. This is denied in the answers, and as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the part of the libellants to maintain this ground by the proofs, in order to charge the respondents.

The real questions in the case therefore, are, 1. Whether or not the respondents were guilty of neglect, and mismanagement in the stowage of the cargo, and especially of the stowage of the sacks of salt between decks? And, 2. If they were, whether the damage to the goods in the hold of the vessel was properly attributable to this cause?

The goods having been found to be damaged on the arrival *of the ship, and which must necessarily have accrued [*357 in the course of the voyage, the burden devolved upon the respondents to show, in order to excuse themselves, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. That burden they have assumed; and have shown by nearly an unbroken current of testimony, that the conveyance of the salt between decks, in a mixed cargo, was according to the established custom and usage of the trade between Liverpool and this country; and that it was well stowed, and packed, and secured with proper and sufficient dunnage.

This ground, therefore, for charging the respondents with the damage to the goods, entirely fails.

They have shown further, that the vessel encountered severe gales and boisterous weather in the course of her voyage, during which she labored heavily, the sea frequently breaking over her, and much water shipped by stress of weather, so that it was necessary to keep the pumps in constant operation to preserve the vessel, and protect the cargo. Thus presenting a state of facts, in connection with the condition of the hold, and appearance of the goods on the opening of the hatches, when the vessel arrived at her port of destination, that might well account for all the damage by reason of the perils of the navigation.

It is to be observed also, that even assuming, according to the theory of the libellants, the damage was occasioned by the drainage of the salt coming in contact with sea-water, if the water was shipped from the violence of the storm or stress of

weather, as there was no fault chargeable to the master as to the place of stowage or as to the stowage itself, it is apparent, that even in that aspect of the case, the damage would still be attributable to the perils of the seas, and not to the fault of the master or ship.

In order to avoid these necessary conclusions the learned counsel for the libellants have sought to maintain upon the proofs, that the seams of the lower deck were not properly calked, but were open, so that the drain from the salt readily dripped through upon the cargo in the hold; and, that conceding it to have been properly stowed between decks, if the seams of the deck had been tight, the damage would not have happened.

Assuming the facts to be true, as contended for in this proposition, the conclusion is admitted. But if the opening of the seams was occasioned by the straining of the vessel in the storms encountered during the voyage, and in favor of which view there is much evidence in the court below, the respondents would still not be answerable. The further proof taken on this appeal would seem to remove all doubt on this point that may have previously existed.

*358] *That shows the ship, when about to sail from Liverpool, was inspected by a competent ship-builder, and repaired; and among other repairs, her lower deck was well calked and payed where any defects were discovered, and put in good order. The fact, therefore, that the seams were open on the arrival of the vessel, if admitted, must have happened in the course of the voyage, and may be fairly attributable to the storms she encountered.

But, it is not important to pursue this inquiry. For, the proofs in the case show beyond all reasonable doubt, that the damage could not have been occasioned by any drainage from the sack of salt between decks. We have already referred to the witnesses on this point, and need not repeat the evidence.

The salt was taken from the stores at Liverpool, and not from lighters, and was dry when put on board, and also, when discharged at Charleston; and there was not the slightest indication of unusual wetness or dampness upon the sacks or the matting and dunnage upon which it was stowed, or upon the flooring or any part of the between-decks. On this branch of the case there is no contrariety or discrepancy in the evidence.

And all the witnesses concur who speak on the subject, and common observation confirms their conclusion, that, if the water came from drainage of the salt, so as to occasion the damage to the goods, some traces of its effects would have

been found upon the sacks, and upon the mats and dunnage and deck of the vessel.

The only ground urged for a contrary conclusion is an inference drawn from the fact that drops of water of a brackish taste indicating, as supposed, the presence of salt in a degree, beyond that of sea-water, was found along the seams underside the lower deck; and of salt in the concrete found upon parts of the cargo in the hold. From these circumstances alone, three of the port-wardens out of four, expressed the opinion that the damage must have been occasioned by the drainage of the salt above, notwithstanding the decisive facts as to the condition of the salt when put on board, and when discharged, and the absence of any traces of it in the between-decks.

It would be exceedingly difficult, if not impossible, to reconcile this opinion with the facts of the case, even if there was no other way to account for the circumstances stated, on which the opinion of the port-wardens was founded.

But when all of them may be accounted for as the natural, if not necessary effect, of the presence of the quantity of sea-water shipped by stress of weather in the course of the voyage, wetting the cargo as the vessel rolled and labored during the storms she encountered, producing great heat, and dampness in the hold, we think the opinion altogether unsupported by the evidence.

*As to the appearance of salt in the concrete upon [*359 parts of the goods, it is quite probable, that the water in the hold thrown up the sides by the labor of the vessel in the gales may have brought it in contact with the salt between her timbers, and thus leaving traces of it upon the goods.

Most of the vessels that have been built for many years, particularly eastern vessels, are filled with salt between their side timbers and outside and inside plank or ceiling, up to the air-streak, for the purpose of preserving the timbers, and preventing them and the planks from shrinking. When water comes in contact with this salt either through the small openings below, or air-streak above, or otherwise, the tendency of it is to settle down in the space it occupies, by becoming more compact; and when the ship makes water in the hold, and rolls heavily by stress of weather, throwing the water up the sides, portions of the salt may escape from the small openings below and pass off along the water-way each side of the keelson to the well-pump. This, however, as is apparent, can happen rarely, if at all except when the ship labors heavily after having shipped much water in consequence of rough and boisterous weather. The effect of the salt, from its inherent

tendency to attract and absorb moisture, is to tighten the seams of the ceiling, rather than open them, and thus prevent any escape of the particles of salt through them.

It has been suggested, that, assuming the presence of salt in the hold may be properly accounted for in the way above stated, this should be considered as evidence of fault in the ship, so as to charge the respondents.

But in the first place, to permit the libellants to recover upon this ground would be a departure from that upon which they have chosen to place their right of action in the pleadings. That is founded exclusively upon their improper stowage of the salt between decks; and the proofs in the case, have been taken with reference to the issue upon that allegation.

In the next place, there is no evidence before us of any defect or fault in the vessel in respect to the ceiling or other parts of her connected with the process of thus salting the timbers. On the contrary, the port-wardens, themselves, speak of the seams of the ceiling as being tight and in good order.

The truth is, that all the cases proceeded below, on the part of the libellants throughout, upon the allegation in the libels that the damage was occasioned by drainage from the sacks of salt between decks, where, as supposed, it was improperly stowed. And the evidence in the record in respect to the condition of the ceilings and other parts of the hold of the vessel, was mere incidental and casual, no point having been made in the proofs on that subject.

*360] *We have already expressed our views upon this the main question involved in the case, and are satisfied, that the damage could not have been occasioned for the cause set forth in the libels; but happened from the perils of the navigation. We will simply add, what was omitted in the proper place, that nearly all the witnesses concur who speak on the subject, that the goods in the hold were most damaged by wet and dampness at the bottom, or lower tier, and diminishing in the advance to the upper. And that in many instances, the boxes of goods, and crates of hardware were wet, or very damp, and stained at the bottom, and dry and sound on the top and sides, confirming the view that the damage proceeded from below.

Our conclusion is, that the decree of the court below is erroneous, and must be reversed with costs, as to so much as awards damages to T. Lambert & Brother, and to the South Carolina Railroad Company, and that the proceedings be remitted to the court below with directions to enter a decree

in favor of the appellants with costs; and as to the residue of the decree the appeal is dismissed for want of jurisdiction.

Mr. Justice DANIEL dissented.

This case is one of a class over which, according to my opinion, heretofore repeatedly expressed, the admiralty courts of the United States have no jurisdiction under the Constitution. It is the case of a contract entered into upon land, that is, in the city of Liverpool, to be fulfilled, partly, nay, chiefly on land; that is, by the delivery of merchandise in the city of Charleston. The remedy for the infraction of this undertaking, if any had in reality existed, would have been an action in a court of common law, upon the bill of lading, the written evidence of the undertaking of the carrier. In the exposition made by the court, of the evidence, as explaining the origin and character of the injury complained of by the libellants, I entirely concur.

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 South Carolina, 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 reversed with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

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*THE UNITED STATES, PLAINTIFFS, *v.* THOMAS REID [*361
AND EDWARD CLEMENTS.

Where two persons were jointly indicted for an offence committed against the United States, viz., a murder committed upon the high seas, and were tried separately, it was not competent for the person first tried to call the other as a witness in his behalf.[1]

[1] On the trial of a joint indictment, one of the defendants is not a competent witness for the other, unless he has been acquitted. *United States* v. *Hughes*, 3 Hughes, 509. S. P. *State* v. *Martin*, 74 Mo., 547; *Henderson* v. *State*, 1 Ala. L. J., 52; *Poteete* v. *State*, 9 Baxt. (Tenn.), 261. An indicted *accomplice*, previously acquitted, is not a competent witness for the *defense*. *Meyers* v. *State*, 8 Tex. App., 321; *Contra*, *Collins* v. *People*, 98 Ill., 584. But the court may direct a verdict of acquittal as to one defendant in order to use him as a witness *against* the other. *United States* v.

The trial took place in Virginia, and the evidence would have been competent under a law of Virginia passed in 1849.

But the 34th section of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, meant only to include civil cases at common law, and not criminal offences against the United States.

The law by which the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the judiciary Act of 1789.

Without laying down any general rule, how far the affidavits of jurors impeaching their verdict ought to be received, it is decided that the affidavits of two jurors, stating that, whilst impannelled, they read a newspaper report of the preceding evidence, but which had no influence upon their verdict, were not sufficient ground for a new trial.[1]

THIS case came up from the Circuit Court of the United States for the Eastern District of Virginia, upon a certificate of division in opinion between the judges thereof.

The facts are all stated in the opinion of the court.

It was argued by *Mr. Joynes* and *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Mr. Crane* and *Mr. Scott*, for the defendants.

Davis, 2 N. Y. Leg. Obs., 35. In North Carolina, one co-defendant may testify for another jointly indicted with him for the same offense, notwithstanding the possibility that he may receive the benefit of his own testimony. *State* v. *Smith*, 86 N. C., 705. S. P. *State* v. *Stewart*, 51 Iowa, 312, and in Arkansas, one jointly indicted with another, or who is separately indicted, is a competent witness, though convicted, if he has not been sentenced. *Casey* v. *State*, 37 Ark., 67.

[1] The early cases hold that jurors' affidavits cannot be read to show mistake, miscalculation or misconduct on the part of the jury. *Ladd* v. *Wilson*, 1 Cranch C. C., 305; *Cherry* v. *Sweeny*, Id., 530; *Holmead* v. *Corcoran*, 2 Id., 119; *Mirick* v. *Hemphill*, Hempst., 179; and such affidavits should not, in any case, be admitted either in support of or against the verdict, except as a last resort. *Hodges* v. *State*, 3 Tex. L. J., 7. S. P. *United States* v. *Clements*, 3 Hughes, 509; *State* v. *Mims*, 26 Mo., 183; S. C., 2 N. W. Rep., 683; *People* v. *Sprague*, 53 Cal., 491; *People* v. *Gray*, 9 Pac. C. L. J., 778. But if such misconduct affects the fairness of the trial, it vitiates the verdict, and may be shown by the voluntary affidavit of a juror. *Anschicks* v. *State*, 6 Tex. App., 524; *Hunter* v. *State*, 8 Id., 75. Affidavits which contain incompetent evidence are, however, properly rejected. *Presser* v. *State*, 77 Ind., 274.

Where a new trial is sought, upon proof showing that a juror had previously formed and expressed an opinion, the juror implicated is a competent witness to deny or explain the charge against him. In such a case, it is not error to admit the proof of the good character of the juror. *Roder* v. *State*, 5 Lea (Tenn.), 610.

A verdict cannot be impeached upon an affidavit of jurors that they would not have assented thereto but for a refusal of the judge to give further instructions respecting certain evidence about which they made inquiry. *State* v. *McConkey*, 49 Iowa, 499. Nor will a juror be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty, if he had known that the punishment fixed by law for the crime charged was death. *State* v *Shock*, 68 Mo., 552. See also *Vance* v. *Campbell*, 1 Black, 431; *United States* v. *Rosenburgh*, 7 Wall., 582; *Tennessee* v. *Davis*, 10 Otto, 298; *United States* v. *Stone*, 8 Fed. Rep., 259; *In re Smith*, 13 Id., 27; *Hayden* v. *Oriental Mills*, 15 Id., 606; *United States* v. *Cameron*, Id., 796; *United States* v. *Baugh*, 4 Hughes, 511.

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

This case comes before the court upon a certificate of division between the judges of the Circuit Court for the District of Virginia.

Thomas Reid and Edward Clements were jointly indicted for murder, committed by them on the high seas, on board the American ship J. B. Lindsey.

They were, by the permission of the court, separately tried, and, upon the trial of Reid, he proposed to call Clements as a witness on his behalf. The court rejected the testimony, being of opinion that, as he was jointly indicted with the prisoner on the trial, he was not a competent witness. Reid was found guilty by the jury.

At a subsequent day he moved for a new trial upon two grounds: 1st. Because the testimony of Clements was improperly rejected: and, 2d. For misbehavior in two of the jury who tried the cause. In support of the second objection, he offered in evidence the voluntary affidavits of the two jurors, one of whom deposed "that, while the case was on trial, and [*362 the jury were impanelled, a newspaper was sent to him by some of his family from his counting-room. It was a newspaper for which he was a subscriber, which was regularly left at his counting-house, and which he was accustomed to read. He looked slightly over it, and saw that it contained a report of the evidence which had been given in the case under trial, a part of which he read and put the paper in his pocket; that, while the jury were in their room deliberating on their verdict, he read over the report of the evidence in the newspaper; he read it from curiosity, and thought it correct, and that it refreshed his memory; but it had no influence on his verdict, and that he had made up his mind before he read it. There was no conversation about the newspaper report in the jury-room, nor did he speak of it there to any one, nor does he know that the other jurors knew that the report of the evidence was in the newspaper they saw him reading."

The other juror deposed "that he saw this newspaper while the jury was impanelled in the court-room, and, upon looking at it, saw that it contained a report of the evidence that had been given in the case under trial. He looked over a few sentences and put the paper aside, and did not see it afterwards. He did not think the report accurate; it had not the slightest influence on his judgment."

Upon the argument of the motion above mentioned the following questions arose:

1st. Ought the court to have received the evidence of Cle-

ments in behalf of the prisoner; and does the refusal of the court to admit his testimony entitle the prisoner to a new trial?

2d. Ought the affidavits of the two jurors to be received; and do the facts stated in them entitle the prisoner to a new trial?

And upon each of these points the judges of the Circuit Court were opposed in opinion, and ordered that the questions be certified to the Supreme Court for its decision.

The difficulty in the first question arose upon the construction of the 34th section of the act of Congress of 1789.

By a statute of Virginia, adopted in 1849, it is provided "that no person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof." And if the section in the Judiciary Act above referred to extends to the testimony in criminal cases in the courts of the United States, then the testimony of Clements was improperly rejected.

The section in question declares that the laws of the several *363] *states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.

The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided.

Neither could the court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country, for reasons that will presently be stated. Nor is there any act of Congress prescribing in express words

the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offences. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. The subject is a grave one, and it is therefore proper that the court should state fully the grounds of its decision.

The colonists who established the English colonies in this country, undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony. And among the most cherished and familar principles of the common law was the trial by jury in civil, and still more especially in criminal cases. And, however the colonies may have varied in other respects in the modifications with which the common or statute law was adopted, *the trial by jury in all of them of English origin was regarded as a right of inestimable value, and [*364 the best and only security for life, liberty, and property.

But as the law formerly stood, the value of this right was much impaired by the mode of proceeding in criminal cases. For when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.

It is true that Lord Coke, in his 3 Inst., part 3, 79, declares in strong terms that the rule which prohibited the witnesses for the accused from being examined on oath, was not founded in law. Yet the rule, at the period we speak of, was daily sanctioned and acted on in the English Courts. 2 Hale, P., 283, 4 Bl. Com., 355, 358, 359, and was in full force when the English colonies were planted in this country.

This oppressive mode of proceeding had been abolished in England and the Colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practised under it had not passed away. And the thirteen Colonies who united in the declaration of independence, as soon as they became states, placed in their respective constitutions or fundamental laws, safeguards against the

restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen states which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression. And the provisions in the Constitution of the United States in this respect are substantially the same with those which had been previously adopted in the several states. They were overlooked in the Constitution of the United States as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States, the same mode of trial, and the same mode of proceeding, that had been previously established and practised in the courts of the several states.

It was for this purpose that the 5th and 6th amendments were added to the Constitution. The 6th amendment provides that in all criminal prosecutions, the party accused shall *365] be entitled *to a trial by jury, to be confronted with the witnesses against him, to have compulsory process for the witnesses in his favor, and to have the aid of counsel in his defense.

The Judiciary Act of 1789, § 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each state, according to the mode of forming juries therein as then practised, so far as the law of the state shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state. Both of these provisions are confined by plain language to the state laws as they then were.

The Crimes Act, as it is usually called, of 1790, § 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impanelled.

But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdic-

tion in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain.

But this could not be the common law as it existed at the time of the emigration of the colonists, for the Constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. And this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states *for the qualifications of jurors and the mode of selecting them. And as the courts of the [*366 United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial: and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary.

The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state made since 1789, can affect the mode of proceeding or the rules of evidence in criminal cases:

and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial.

The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.

It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is however unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict.

We shall therefore answer the first question in the negative: and to the second, that the facts stated in the affidavits of the jurors do not entitle the prisoner to a new trial; and certify accordingly to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the *367] *record from the Circuit Court of the United States for the Eastern District of Virginia, and on the points or questions on which the judges of 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. On consideration whereof, it is the opinion of this court—1st. That the said Circuit Court ought not to have received the evidence of Clements in behalf of the prisoner; and that the refusal of the court to amit his testimony does not entitle the prisoner to a new trial; and 2dly. That the facts stated in the affidavits of the jurors do not entitle the prisoner to a new trial. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JOHN H. BENNETT AND E. P. HUNT, ADMINISTRATORS OF JOHN D. AMIS, DECEASED, APPELLANTS, *v.* SAMUEL F. BUTTERWORTH, AND MARY EMILY, HIS WIFE.

Where slaves are in the possession of a mortgagee, who renders an account of the profits of their labor and the expenses which he has incurred on their behalf, he must be held bound to exercise a reasonable diligence in keeping them engaged in useful employments.

It is not a sufficient excuse for allowing them to remain idle, to say that he managed them as they had been managed by their former master, the mortgagor.

If the mortgagee is charged with their hire from a period commencing three months after the death of the mortgagor, he is not charged too much.

Where the account of the master charged the mortgagee with a certain sum for their hire, exclusive of clothing, medical treatment, or other expenses, it was a correct mode of stating the account.[1]

THIS was an appeal from the District Court of the United States for the District of Texas.

The facts are fully stated in the opinion of the court.

It was argued by *Mr. Harris* and *Mr. Crittenden*, for the appellants, and by *Mr. Howard*, for the appellees.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery from the decree of the District Court for the District of Texas.

Butterworth and wife filed their bill against Bennett, and also against Hunt, who is administrator of Amis, representing that Amis, the father of Mrs. Butterworth, conveyed to her by deed, or bill of sale under seal, in consideration of natural love and affection, certain negroes named, on the 8th of April, 1846. That, a short time afterwards, Amis died, and that Hunt, the *defendant, administered upon his estate. That, on application to the administrator for the slaves, it was [*368 found they were in possession of Bennett, the other defendant, who claimed to hold them by an absolute bill of sale, executed in June, 1845, by the said Amis, and that the slaves were, and had been, from the date of the bill of sale or shortly afterward, in the possession and under the control of Bennett, who received the profits of their hire. That the negroes were transferred to him to secure an indebtment, and also to secure future advances. The negroes were demanded of Bennett, but he refused to surrender them, on the ground that his debt had not been paid.

[1] See *Jackson* v. *Hall*, 84 N. C., 492.

In his answer, the defendant, Bennett, says, the negroes were in his possession at the death of Amis; that he is unwilling to surrender the possession of them until his claim shall be fully satisfied; he denies that the proceeds of the labor of the slaves were sufficient to discharge his debt, &c.

The defendant, Hunt, in his answer, states that, on the 1st April, 1846, in the lifetime of Amis, matters of difference between him and Butterworth were submitted to the arbitrament of James H. Smith and W. W. Humphries, who awarded that Butterworth should deliver to John D. Amis two negro men named, or pay $2500; that other negroes should be delivered and certain moneys paid by Butterworth, and that he should do certain other things, &c.; and that Amis on his part, should transfer all the interest he might have to any portion of the estate formerly owned by him, to Mary E. Butterworth, wife of the complainant. And he alleges that Butterworth did not comply with the award on his part; and the defendant asks that he may be compelled to perform it; and that the bill of sale by Amis to Mrs. Butterworth, of the negroes, was given in pursuance of this award.

It appears that John D. Amis and William D. Amis, on the 15th of December, 1839, by an indenture, conveyed to Andrew Harris and others, their creditors, to whom they owed debts amounting to $73,269.88, a large amount of real and personal property, to secure the payment of that sum. A large number of negroes were included in this transfer.

Bennett also pleaded in bar the recovery of a judgment by Butterworth against defendant in the District Court, for the negroes named in the amended bill, or, if the same could not be had, it was adjudged that he should recover twelve hundred dollars, the value of the negroes.

The court made an interlocutory decree, that the bill of sale was a mortgage, and that the complainants had a right to redeem, &c.,; and James Love was appointed to take an account of the amount due Bennett on the mortgage, and *369] also to take an *account of the hire of the negro slaves in the possession and under the control of Bennett; and the master was directed to credit him with any extraordinary expenditures which were necessary on account of the health of the negroes, and also for rearing the children, &c.; and that the master should report, &c.

A report was made by the master, as directed, which showed that the mortgage-money and interest had been paid by the hire of the negroes, &c., and that a balance was due to the complainant of $318.90.

Exceptions were taken to this report, which were overruled

by the court, and a decree was entered confirming the report, and ordering the sum found due to the complainants to be paid, and that the negroes in controversy, in the hands of a receiver, should be delivered to the complainants.

On this appeal, the rulings of the court, on the exceptions taken, are the points to be considered.

The first exception is that, in his report, the master states: "The defendant has filed and proved an account marked No. 1, of the receipts and expenditures under the mode of management in said report stated, which he did not investigate," as he assumed a different mode of management to have been necessary to exempt the defendant, by the terms of the decree, from "wilful default."

In his report, the master says: "It appears in evidence that Bennett treated the slaves with unusual indulgence and humanity, and in the manner that was pursued by Amis in his lifetime. He rented houses for them, furnished them food and clothing with great liberality, and proper medical attendance when necessary. That he sometimes hired them by the day, and sometimes by the month. It is also in proof, that the negroes frequently hired themselves to others, and were paid by their employers."

The defendant having possession of the slaves, and an entire control over them, was bound to exercise a reasonable diligence in keeping them engaged in useful employments, so as not only to pay their necessary expenses, but also to obtain a reasonable compensation for their labor. That he treated them with humanity, provided for their wants, and made them comfortable, is not sufficient. Nor is it a sufficient excuse for him to say that he managed the slaves as they had been managed by Amis, their master. Bennett held them as a pledge, and he was not at liberty to indulge them in idleness, as their master may have done. In his peculiar relation, as trustee, he had active duties to perform; and we think the master did right in rejecting the account rendered, under a management which showed, *on his part, gross negligence, or in the language of the interlocutory decree, "wilful default." [*370

It appears that Amis died on the 1st of August, 1847, at which time the slaves were in the possession of Bennett, and continued to be in his possession at the time the account was taken. Three months were allowed by the master, after the death of Amis, before the account commences; and as there was considerable sickness at Galveston, where the slaves were situated, "he allowed one hundred dollars as extraordinary expenditures for medical attendance, food, house-rent, and nursing." And he says he allowed nothing for medicine or

medical bills, except during the prevalence of the yellow fever, because the allowance for hire was made on a basis which covered all deductions for loss of time or other contingencies.

The second exception is, that the master in an account, No. 2, filed by him, stated the charge for hire of the slaves as commencing on the 1st of November, 1847, when he was restricted from making such charge prior to the 20th of March, 1849.

No such restriction is perceived in the answer of Bennett, nor in any other part of the proceeding. It seems that Bennett was in possession of the slaves before the death of Amis, and as is alleged in the answer, at least a part of the hire was paid to Amis during his life. But the account for the hire is made to commence three months after his death, at which time it is admitted the estate of Amis was indebted to Bennett $1433.72

The third and last exception to the report is, "that the master, in account No. 2, filed, states a balance due complainants on the 1st of June, 1850, of $318.90, which is contrary to the evidence of complainants and defendant now filed with said report marked No. 3 and No. 4; and hath not, in his said report, allowed and credited the defendant the expenses proved to have been incurred in the management of the slaves.

As this exception refers to the evidence before the master, we have examined it, and although there is a discrepancy between some of the witnesses as to the hire of the slaves, yet the weight of evidence seems to be in favor of the report of the master. He made no special allowance for expenses, medical or otherwise, as he stated the allowance for the service of the slaves, at a sum which such services were proved to be worth, clear of all deductions for clothing, loss of time, or medical treatment.

It is probable that the sum allowed by the master exceeded, considerably, the actual money received for the hire of the slaves. But the negligence or want of attention by Bennett, in giving indulgence to the slaves, or in failing to have them suitably employed, should not excuse him from an equitable
*371] charge of what *they could have earned. On this basis the master acted in making out the account, and we think it was properly assumed by him. And in this view there appears to be no error or mistake in the account stated, which should have prevented the District Court from sanctioning it.

The charges by Bennett for the superintendence and management of the slaves, were not allowed by the master, nor

the charge for commissions. These items, if the defendant were entitled to an equitable allowance for the services stated, would amount only to a small sum, and we think, under all the circumstances of the case, neither this omission, nor the other exceptions to the report of the master, are of a character to require the reversal of this decree.

There was no action on the plea in bar filed by Bennett, which is an irregularity, not important, however, to be noticed on the appeal. Nor does it appear that any notice was taken in the District Court of the award set up in his answer by Hunt, the administrator. As the consideration for the transfer of the slaves by Amis to his daughter was natural love and affection, as appears by the bill of sale, it could not have been considered as within the award stated.

The decree of the District Court is affirmed with costs.

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 Texas, 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 District Court in this cause be, and the same is hereby, affirmed with costs.

PHINEAS O., NABBY, JABEZ AND BENJAMIN B. SARGEANT, HEIRS OF SAMUEL SARGEANT, PLAINTIFFS IN ERROR *v.* THE STATE BANK OF INDIANA.

By the strict rules of the common law, a bond for conveyance while it could not confer a legal title might be adduced in support of a possession of twenty years held in pursuance of the bond to corroborate such possession against an action founded upon the mere right of entry in the obligor or his heirs.

But when the bond was given to carry out the policy of a state in establishing the seat of justice for a new county, it was proper to allow it to be given to the jury as competent evidence to be weighed by them in expounding the provisions of the statute.

Where a court, acting under a state law, appointed a commissioner to convey the legal title, after the death of the obligor of the bond, and the record of that court *said that proper and legal notices had been given, it was not competent to offer evidence in another court for the purpose of showing that legal notice had not been given.[1] [*372

[1] S. P. *Williams* v. *United States*, 1 How., 290. "In favor of long possession, everything which has been done, shall be presumed to have been rightfully done; and though it do not appear to have been done, the law will presume that whatever was necessary has been done." *Strother* v. *Lucas*, 12 Pet., 411.

Sargeant et al. *v.* The State Bank of Indiana.

THIS case was brought up by writ of error, from the Circuit Court of the District of Indiana.

It was an ejectment brought by the plaintiffs in error, citizens of Vermont, against the State Bank of Indiana, under the following circumstances.

By a law passed on the 14th of January, 1824, the Legislature of Indiana provided that whenever any new county should be laid off, five commissioners should be appointed to locate the seat of justice therein, to receive donations in land, and take title-bonds for the conveyance of it to such persons as the county commissioners should direct.

In 1826 the county of Tippecanoe was about to be laid off, and on the 20th of January, 1826, an act was passed creating the county of Tippecanoe, which so far altered the act of 1824 as to substitute a board of five justices of the peace in lieu of county commissioners. But these justices of the peace were not to be appointed until June. The rest of the act was to go into operation on the first Monday in May.

Accordingly, on the first Monday in May, a majority of the commissioners appointed to locate the seat of justice, met and designated Lafayette as the town. On the 4th of May they received two bonds, with the name of Samuel Sargeant as an obligor; in one of which he was the sole obligor, and in the other a joint obligor with other persons. These bonds bound Sargeant to convey the land "to the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office."

On the 8th of July, 1826, the board of justices, having been elected, met and organized. Samuel Sargeant was county clerk and *ex officio* clerk of the board of justices. They received the report of the locating commissioners, and ordered a public sale of the lots for which title-bonds had been given, to take place on the second Monday of the ensuing October.

In the latter part of July, 1826, Samuel Sargeant died. His co-obligors in the bond conveyed their title to the justices, according to the tenor of the bond.

By the act of 1826, it was provided that in case of the death of any person who had executed or might execute such a bond, the obligee might apply to the Circuit Court of the county to appoint a commissioner to convey the title, provided four weeks' personal notice should be given to the heir of the obligor, or certain advertising if a non-resident.

At the term of the Tippecanoe Circuit Court, which was held *in November, 1827, the board of justices prayed the court to appoint a commissioner to convey Sar-

*373]

geant's title; whereupon the court passed an order concluding in the following words, viz:

"And it appearing to the satisfaction of the court now here, that proper and legal notices have been given of this motion, it is therefore, by the court now here, ordered, that Richard Johnson be appointed commissioner to convey by good and sufficient deed unto the board of justices of Tippecanoe county, or their successors in office, said lots and parcels of ground in pursuance of the aforesaid bonds, in fee-simple, for and on behalf of the heirs of the said Samuel Sargeant, deceased."

On the 5th of April, 1828, Richard Johnson executed the deed.

On the 17th of November, 1846, Phineas O. Sargeant, Nabby Sargeant, Jabez Sargeant, and Benjamin B. Sargeant, heirs at law of Samuel Sargeant, deceased, and resident citizens of Vermont, brought an action of ejectment in the Circuit Court of the United States, for a part of the property, against the State Bank of Indiana.

In May, 1848, the cause came on for trial, when the jury, under certain instructions from the court, found a verdict for the defendant.

The bill of exceptions extended over twenty-five pages of the printed record, and, therefore, cannot be inserted at length.

The plaintiffs having proved a title in Sargeant and their heirship, rested their case.

The defendant gave in evidence the record-book of the justices of Tippecanoe county; the report of the commissioners appointed to locate the seat of justice; the execution of the title-bond; and then offered in evidence the record of the Tippecanoe Circuit Court relative to the execution of the deed by Johnson.

To the production of which aforesaid record in evidence by the said defendant the said plaintiffs then and there objected, upon the following grounds assumed by them, namely: The proceedings were *coram non judice*, and void; as the court had no jurisdiction of the person nor of the subject-matter; the bond being void, the court had no jurisdiction to entertain proceedings upon it; the proceedings were between no parties known at the time to the law in Indiana. There was no legal notice of the proceeding; the preliminary steps were not taken to confer jurisdiction, and jurisdiction never attached; and at the time of making said objection, and before the said defendant had closed its evidence, the said plaintiffs offered to

produce in evidence to the court the following authenticated copy of a paper, to wit:

*374] *(The paper was a notice published in the newspaper, which was for the heirs to appear at a different time and term from that at which the proceedings were held, and an affidavit of its publication, indorsed "Filed 7th November, 1827," Hoover, clerk.)

To the production of this paper in evidence, the defendant objected.

The defendant then offered in evidence a confirmatory deed, signed by Sargeant's co-obligors in the bond, and by Johnson as representing Sargeant.

To the production of which last-mentioned copy in evidence the said plaintiffs then and there objected, on the grounds assumed by them that the same was void, having been executed without any authority of law, and there being no vendors named in the deed; which said several objections, so made by said plaintiffs as aforesaid, the court then and there overruled, and permitted the said papers and copies, and each of them, so offered by said defendant as aforesaid, to be read in evidence, and they were read in evidence to the jury by the said defendant.

This was all the material testimony on behalf of the defendant.

After the evidence for the defendant had been closed, the plaintiffs proved that the first election for justices of the peace, for Tippecanoe county, was held on the third Monday in June, eighteen hundred and twenty-six, pursuant to the proclamation of the Governor of Indiana in that behalf, and that the commissions of said justices, as appears from the records of the Secretary of State of Indiana, bear date on ; and that said justices held their first session on the eighth day of July, eighteen hundred and twenty-six, (being Saturday,) as set forth in the foregoing record thereof; and that said justices did not hold any other session, or meet as a board at any other time, until after the death of said Samuel Sargeant.

And after the evidence on both sides had been closed, the said plaintiffs moved the court to charge the jury as follows, to wit:

1. That the title-bond given in evidence by the defendant is void as against Samuel Sargeant and his heirs, for want of an obligee in being capable of being contracted with at the time of the delivery of said bond.

2. That the said title-bond is a nullity as against said Sargeant and his heirs.

3. That the record and proceedings of the Tippecanoe Cir-

cuit Court, and the commissioner's deed in pursuance thereof, are wholly void, and did not divest the title of Samuel Sargeant's heirs.

*4. That the certified copy of the notice, and proof [*375 of publication given in evidence by the plaintiffs, is a part of the record of the proceedings of the Tippecanoe Circuit Court, and as such may explain and qualify the statement in the record, that proof was made that "due and legal notices had been given;" which said several instructions and each of them the court refused to give to the jury; but charged the jury that the said record of the Tippecanoe Circuit Court is not void, and that the above proof, so produced and given in evidence by the said defendant, is competent evidence to prove a dedication to public use, and the title of the premises in controversy out of the lessors of the plaintiffs.

To which said several opinions and decisions of the court in admitting said evidence, so as above offered by the defendant and objected to by the plaintiffs, and in refusing to charge the jury as moved by the said plaintiffs, as above stated, and to the charge so as above given by the court to the jury, the said plaintiffs except, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record in this cause, which is done, &c.; both parties agreeing in open court that in making up of the record, whenever the words "here insert" occur in this bill of exceptions, the clerk shall copy and insert the documents indicated. And that the printed statutes of Indiana, so far as applicable to this cause, shall be deemed and taken as part of the record in this cause, and so considered by the Supreme Court.

JOHN MCLEAN. [SEAL.]

Upon these exceptions, the case came up to this court, and was argued by *Mr. Smith* for the plaintiffs in error, and *Mr. White* for the defendant.

Mr. Smith for the plaintiffs in error, contended that the court suffered illegal evidence to go to the jury, as stated in the bill of exceptions, in admitting in evidence the title-bond set forth in the bill of exceptions, because it created at most but an equity, and could not be set up against the legal title in the case, even if valid, and could not legally be given in evidence in the action of ejectment. See 2 Blackf. (Ind.), p. 300, where the court uses this language: "A person claiming by virtue of a title-bond only, the premises for which an action of ejectment was brought, applied to be made a defen-

dant in the cause. Held, that as the claim was merely of an equitable nature, the application could not be granted."

This case sustains our position, that the title-bond was illegally admitted in evidence upon general principles. But we
*376] do not rest the question here. We insist that the title-bond was *void for the want of parties *in esse* at the time of its execution, as appears upon its face. It was made payable thus, "Held, and firmly bound unto the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office." There was no board of justices or county commissioners in existence at the time, and no delivery of the bond could then take place. It was therefore void at common law. Shep. Touch., 235; 1 Cruise, 418; 9 Mass., 419; Bac. Abr., Obl. C; 4 Ohio, 169. The latter case is precisely in point, the very question having been before the court and decided. The bond was also void as a statutory bond, as the commissioners appointed to locate the county seat were not authorized to take such a bond. The act conferring the powers on these commissioners provides that, "the commissioners shall take a bond to be made payable to the board of county commissioners, and their successors in office." It is clear that the bond which they were authorized to receive was to be made payable to a corporation in existence and its successors, and not to a corporation thereafter to be created, or in other words, they were only authorized to receive a valid common-law bond. It was therefore clearly void as a statutory bond, as well as a common-law bond. This point was expressly decided, as we contend, in the case of *John Sloane* v. *David McConahy*, 4 Ohio, p. 169.

2. That the proceedings of Tippecanoe Circuit Court were void, because in this particular it was a court of special and limited jurisdiction, and it had not brought itself within it.

3. That the charge of the court was erroneous, because,

1st. It decides the weight and conclusiveness of the proof, and leaves nothing for the jury to try, whose province it was to weigh the testimony and find the facts, under the charge of the court, as to the law of the case.

2d. The court in effect charges, that the title-bond and other evidence, as given, prove a legal title in the defendant, which we maintain is not the law, and cite the authorities already referred to upon the same question.

3d. The court charges in effect, that the proof in the bill of exceptions sustains this as a dedication to public use of the property in question. If this be so, then we yield the case, provided, a parol dedication can be given in evidence in ejectment to defeat the legal title; but we submit that this was no

dedication, and if it was, that a dedication by parol does not carry the fee under the laws of Indiana by which the case must be decided, and therefore a dedication cannot be given in evidence to bar the legal title in the action of ejectment, unless there is an adverse possession of twenty years, which is not pretended or set up in this case.

*(The counsel then argued that this was not a dedi- [*377
cation.)

Mr. White, for defendant in error, contended that as to the objection to the admissibility of the title-bond, because it proved only an equitable title, we say,

It was also admissible, to relieve those proceedings from the imputation of fraud, by showing the bond to have been the act and deed of Samuel Sargeant, and that the consideration for which it was given, was executed.

The title-bond was a part of the transaction, being the form recognized by statute for making donations of land in such cases.

A party in possession under a title-bond, may, when sued in ejectment, produce the title-bond to show that he was entitled to notice to quit. *Taylor* v. *McCrackin*, 2 Blackf. (Ind.), 260.

In *Right ex dem. Lewis* v. *Beard*, on a contract of purchase (part paid,) Lord Ellenborough held notice to quit, necessary. 13 East., 210. See 1 Johns. (N. Y.), 322; 9 Id., 330.

It was also allowable, to show an adverse possession of twenty years, the conditions of the purchase or grant having been complied with. In 2 Pa., 454, the court say: "Whether F. went into possession under an equitable title or under no title at all, is immaterial, if he held as his own and denied the right of J."

In *Weakley ex dem. Yea* v. *Bucknell*, Cowp., 473, Lord Mansfield allowed the party in possession to show an unstamped contract for a lease under which he had held for eighteen years, although the lease had never been executed.

In replying to the remaining objection of the plaintiffs in error against the title-bond, viz.: "that it is void for want of an obligee *in esse* at the time it was made," we would refer the court to the several statutes of Indiana.

(The counsel then referred to several statutes of Indiana.)

It is objected that the record of Tippecanoe Circuit Court cannot be given in evidence, but that the proceedings of that court were void.

The general proposition is so well settled, that the judgment of a court of general jurisdiction cannot be collaterally impeached before another tribunal, that we shall only quote

authorities by way of illustrating the peculiarity of the points presented in each case.

2 Binn. (Pa.), 41; 1 Pet. C. C., 155; 18 Pick. (Mass.), 393; 15 Ohio, 447; 17 Wend. (N. Y.), 483; 2 How., 319; 4 Dana (Ky.), 429; 10 Pet., 449; 7 Blackf. (Ind.), 547.

As to the paper offered by the plaintiffs, relative to the notice, it was but a loose office paper, and is not certified to be a part of the proceedings.

*378] *Mr. Justice DANIEL delivered the opinion of the court.

The facts upon which this case is founded are to the effect following: The legislature of Indiana, having by a law bearing date on the 20th January, 1826, laid off and established the county of Tippecanoe in that state; by the same act appointed four commissioners for the purpose of selecting and establishing a seat of justice for the county thus created, in conformity with the provisions of another statute of the state, passed on the 14th of January, 1824, entitled "An act establishing seats of justice in new counties," and with the provisions of other acts amendatory of the law last mentioned. Pending the investigation of the commissioners who took upon themselves the fulfilment of the duties prescribed by the statutes above mentioned, proffers were made to them by various persons, proprietors of land in and adjacent to the town of Lafayette, of certain lots and parcels of land as donations to the county of Tippecanoe, and amongst these proffers was that of the land involved in this suit, then held by Samuel Sargeant, from whom the lessors of the plaintiffs deduce their title. The commissioners having accepted the donations offered as above mentioned, and selected the town of Lafayette as the seat of justice for the county of Tippecanoe, took from the several donors their joint and several title-bond, dated May 4th, 1826, in the penalty of ten thousand dollars payable to the board of justices of the county to be thereafter organized, with condition that these obligors should convey by deed with general warranty to the board of justices, on the 1st day of October, 1826, the lots and parcels of land contained in their respective donations within the town of Lafayette, and took also the separate bond of Samuel Sargeant, conditioned to convey at the same period, by a like deed to the board of justices, another parcel of land of ten acres, adjoining the town, as in the conditions annexed to those bonds set forth. The board of justices appointed by the Governor of Indiana for the county of Tippecanoe, was organized on the 8th day of July, 1826, and on that day received the

report of the commissioners appointed by law to select the seat of justice for the county of Tippecanoe, and at the same time received and accepted the joint and several obligation of Samuel Sargeant and others above mentioned; and also the separate bond of Samuel Sargeant, conditioned for the execution of a deed with general warranty to the board of justices for the tract of ten acres of land as before referred to, the said Samuel Sargeant having been chosen their clerk by the board of justices, entered upon the record their acceptance of the title-bonds given by himself and others in his own handwriting. Samuel Sargeant having died before the execution of any deed either by the obligors in the joint and several bond, *or by Sargeant alone, in pursuance of his separate obligation, proceedings were instituted at the [*379 November term, 1827, of the Circuit Court of the county of Tippecanoe, for the appointment of a commissioner, for the purpose of conveying to the board of justices the title and interest held by Samuel Sargeant in his lifetime in the lots and parcels of land mentioned in the joint and several bond of Sargeant and others, and in the ten acres of land mentioned in the separate title-bond executed by Sargeant. The Circuit Court appointed Richard Johnson a commissioner, in conformity with the application, and this commissioner, conjointly with all the obligors except Sargeant, executed to the board of justices a deed with general warranty for the lands mentioned in the joint and several bond, and a separate deed for the ten acres of land described in the bond given by Sargeant individually. The proceedings of the Circuit Court of Tippecanoe, upon the petition of the board of justices, and the conveyances ordered by that court, took place in the years 1826 and 1827, and are of record.

In the year 1846, the lessors of the plaintiffs, representing themselves to be heirs at law of Samuel Sargeant, instituted this their action of ejectment against the State Bank of Indiana, as the tenant in possession of lots No. 90 and 132, situated in the town of Lafayette. The said defendant also deducing title mediately from Samuel Sargeant, by purchase from the board of justices for the county of Tippecanoe, no question therefore is raised upon the validity of the title as originally existing in Samuel Sargeant.

At the trial, the lessors of the plaintiffs having introduced evidence to show the death of Samuel Sargeant on the 31st of July, 1826, and that the said lessors were his heirs at law, and evidence also of the value of the property in dispute, there rested their cause.

The defendant then offered in evidence the report of the

commissioners appointed under the act of the legislature of January 20th, 1826, to locate the seat of justice for the county of Tippenanoe; the record of the appointment and qualification of the board of justices for the said county in July, 1826; the delivery to them and their acceptance of the title-bonds from the locating commissioners; their petition to the Circuit Court in order to obtain a conveyance of the lands mentioned in the title-bonds; the record of the proceedings of the Circuit Court of Tippecanoe upon the petition of the board of justices, and the conveyances to them made in pursuance of the judgment of that court, as comprised in the foregoing statement of facts. Upon the evidence thus submitted the jury found a verdict for the defendant.

*380] *The questions presented for our consideration by this record arise upon exceptions to the rulings of the court refusing certain instructions asked by the plaintiffs with regard to the evidence adduced by the defendant, and in charging the jury upon the law applicable to that evidence as expounded by the court. Thus the plaintiffs prayed the court to instruct the jury,—1. That the title-bonds given in evidence by the defendant were void as against Samuel Sargeant and his heirs for want of an obligee in existence capable of being contracted with at the time of the delivery of these bonds.

2. That the title-bonds are a nullity as against the said Sargeant and his heirs.

3. That the record and proceedings of the Tippecanoe Circuit Court and the commissioners' deed in pursuance thereof are wholly void, and did not divest the title of Samuel Sargeant's heirs.

4. That the certified copy of the notice and proof of publication given in evidence by the plaintiffs, is a part of the record of the proceedings of the Tippecanoe Circuit Court, and as such, may explain and qualify the statement in the record, that proof was made that "due and legal notice" had been given.

These several instructions the court refused to give, but charged the jury that the said record of Tippecanoe Circuit Court was not void, and that the proof produced and given in evidence as aforesaid by the defendant was competent to prove a dedication to public use, and the title of the premises in controversy out of the lessors of the plaintiffs. It was agreed by the parties in this case that the printed statutes of Indiana, so far as they are applicable to the case, should be deemed and taken as parts of the record in this cause, and be so considered by this court.

In considering the three first charges asked for by the plain-

tiffs, this court can perceive no essential difference between them, but regards them as resolving themselves into the single objection of the want of an obligee or grantee capable of receiving any legal rights from the acts of Samuel Sargeant; for it follows necessarily that if any legal or equitable rights were invested or transferred by the title-bonds delivered by Sargeant in his lifetime to the commissioners, such rights could not remain in his heirs. The fourth charge required of the court presents quite a different question, and one going rather to the mode or form by which the title to the property has been transferred or ratified, than to the foundation of the right or title itself.

Although, if tested by the rules of law applicable to conveyances of real property, bonds like those executed and delivered by Samuel Sargeant in his lifetime could not confer a legal title, yet if adduced in support of a possession of twenty years, *held as in this instance, in pursuance of the express condition of those bonds, they would seem [*381 to corroborate such possession against an action founded upon the mere right of entry in the obligor or his heirs.

But these bonds should not be judged of by the strict rules of the common law, nor by the general principles applicable to uses and trusts in the conveyance of legal titles, but should be interpreted according to the local policy of the community which called them into existence, and which has defined both their objects and effects. Whatever these bonds were designed to be,—whatever purposes they were, by the local policy and laws of Indiana, intended to accomplish in respect to the makers thereof, or the beneficiaries therein named, this court should endeavor to effectuate.

By the general law of Indiana, approved January 14th, 1824, entitled "An act to establish the seats of justice in new counties," it is provided in section first, "that whenever any new county shall be laid off, five commissioners shall be appointed, whose duty it shall be to locate the seat of justice in such new county, to receive donations in land, and to take bond or bonds of any person proposing to give any such lands, payable to the board of county commissioners and their successors in office, and conditioned for the conveyance of such tract or tracts of land so given or sold to such person as the county commissioners shall appoint to receive the same, which bond or bonds the said commissioners shall deliver to the county commissioners, together with a plain and correct report of their proceedings, containing a particular description of the lands so selected for the county seat." By section fourth of the same act, it is declared "that the county commissioners,

so soon as the report of the locating commissioners is received, shall appoint a county agent, who shall receive deeds for such donated lands, and lay them off into lots," &c. The act of the Indiana legislature creating the county of Tippecanoe, passed January 20th, 1826, by section seventh, so far alters the general law of 1824, for the establishment of new counties, as to substitute a board of five justices of the peace, who shall constitute a board for transacting all other county business, as well as the duties theretofore devolving on the board of county commissioners in organizing a new county. This statute was to take effect on the 1st of March, 1826, and, by its second section, the board of commissioners were appointed by name for the purpose of fixing a permanent seat of justice for the county on the first Monday in May, 1826. The election or appointment of the board of justices for the county of Tippecanoe was, by the proclamation of the governor, to take effect not until the day of June following. The grants
*382] *or donations to the locating commissioners having been authorized by law from the first Monday in May, 1826, and the grantees or ultimate beneficiaries, viz., the board of justices, not being chosen or their election authorized until after the day of June, 1826, if the objection alleged to the donations made or received by the locating commissioners, viz., the absence of a competent obligee or grantee, be sustained, then the whole legislation of the state upon this subject, and the obvious purposes of that legislation, must be defeated. Such a result, however, can hardly be reconciled with either the provisions or the purposes of the legislation of Indiana in reference to this subject; for by the general law of that state, approved January 14th, 1824, regulating the establishment of new counties, we find it provided that the commissioners appointed to locate the seat of justice in a new county, and to receive the donations and to take the bonds mentioned in that law, are required, together with their report, to deliver said title-bonds to the county commissioners. This delivery, therefore, of the bonds so taken, must have been by this general provision intended to refer to some period after these county commissioners or board of justices had come into existence. We think there can be no question as to the power of the state to create or authorize a contract which should operate in this mode.

The acts of the board of commissioners for selecting the county seat, those of the board of county justices, and of the donors of lands to the county, all conform to this construction. Thus in the case before us, the title-bonds were taken by the former board, were by them subsequently, together with their

report, delivered to the board of justices; and Samuel Sargeant, who had previously deposited the title-bonds executed by himself with the former board, and who had been subsequently appointed the clerk of the county justices, in his character of clerk, certifies the record of these proceedings. We think, therefore, that the Circuit Court for the District of Indiana properly refused to pronounce the bonds executed by Samuel Sargeant, and the proceedings of the board of commissioners and of the board of justices void, and correctly allowed them to be given to the jury as competent evidence to be weighed by them in expounding the provisions of the statutes of Indiana above referred to.

Should it be conceded that the execution of the title-bonds by Samuel Sargeant in his life-time, and the proceedings on the part of the board of commissioners and of the board of justices did not, under the statutes of Indiana, confer a legal title on the county, or clearly divest the title of Sargeant; yet, these acts standing alone and unconnected with the proceedings of the Circuit Court of Tippecanoe, show an equity on the part of the *county which clearly authorized them [*383
to call for the legal title from Sargeant. They show a written contract formally entered into and solemnly recognized by him, and a fair equivalent or consideration for that contract, in the enhanced value of property arising from the establishment of the seat of justice, forming an obligation from which neither Sargeant nor his heirs could withdraw without the perpetration of a gross fraud.

This brings us to a consideration of the fourth charge asked of the Circuit Court in the trial below, and of the decision of the court thereupon, involving the regularity of the proceedings at the suit of the county justices in the Circuit Court of Tippecanoe, in order to perfect their title stipulated for in the bonds executed by Samuel Sargeant. The court was requested by the proposed charge to say to the jury, that a certified copy of a notice and proof of publication offered in evidence by the plaintiffs, were a part of the record of the proceedings of the Tippecanoe Circuit Court, and, as such, might explain and qualify the statement of the record itself, that proof was made that "due and legal notices had been given," which charge the court refused to give, but charged the jury that the said record of the Tippecanoe Circuit Court is not void, and that the above proof, so produced and given in evidence by the said defendant, is competent evidence to show a dedication to public use, and the title of the premises out of the lessors of the plaintiffs.

Of the correctness of the Circuit Court in refusing this last

charge, we entertain no doubt whatever. With a view of determining the propriety of this rejection by the Circuit Court, it may be proper here to refer to an act of the legislature of the State of Indiana, approved on the 20th of January, 1826, entitled "An act amendatory of the law for the better advancement of justice," (under which statute the decision of the Circuit Court of Tippecanoe, impugned by the plaintiffs below, was made.) By the tenth section of this statute it is provided, "that whenever any person or persons who shall have executed, or hereafter shall execute his or their obligation for the conveyance of any real estate to any person or persons, body politic or corporate, shall die intestate or without having made the necessary provisions by will for the conveyance of such estate, it shall be lawful for the obligee or obligees in such bonds, or his or their assignees, to apply to the Circuit Court of the county in which such real estate lies, to appoint a commissioner to convey the same in conformity with the conditions of the said obligation, by a deed to be by such commissioner executed, of the same tenor and effect as the deceased obligor was bound to make in his lifetime; provided the person or persons making such application as aforesaid, shall first give four weeks personal notice to *384] *the heir or heirs of such obligor or obligors if residents of the State, and if non-residents, then three months notice of such application, by advertising the same three weeks successively in the nearest public newspaper to which the said real estate is situate — and the commissioner shall," &c., &c.

Under the authority of the section just quoted, application in the name and on behalf of the county of Tippecanoe was made by petition to the judges of the Circuit Court of that county, for the appointment of a commissioner to convey the lands mentioned in the title-bonds executed by Sargeant, and which he had failed to convey in conformity with those obligations. In setting forth the action of the court upon this petition, the record contains the following statement: "Came into court Peter Hughes, agent for the county of Tippecanoe by his attorneys, and moves the court now here to appoint a commissioner to convey real estate under and in conformity to a title-bond given by Samuel Sargeant, deceased, and others therein named in his lifetime, to the board of justices of Tippecanoe county and their successors in office, which bond he now here files, for the conveyance of certain town lots in the town of Lafayette in the said bond mentioned and numbered. Also files a bond given by the said Samuel Sargeant deceased, by himself, for the conveyance of ten acres of land east and

adjoining the town of Lafayette, to the board of justices of the county and their successors in office, and it appearing to the court now here, that proper and legal notices have been given of this motion, it is by the court now here ordered, that Richard Johnson be appointed commissioner to convey by good and sufficient deed unto the board of justices of Tippecanoe county and their successors in office, the said lots and parcels of ground, in pursuance of the aforesaid bonds in fee simple, for and on behalf of the heirs of Samuel Sargeant, deceased." It is this record of the decision of the Circuit Court of Tippecanoe county, and particularly that portion of it which states that the decision was pronounced after proper and legal notices had been given to the heirs of Samuel Sargeant, that the plaintiffs asked of the court to charge was irregular and void, upon the strength of a paper purporting to be a notice which they urged the court to consider as a part of the record of the proceedings of the Tippecanoe Circuit Court, and as such, explaining and qualifying the statement in that record, that proof was made to the court of due and legal notice to the heirs of Samuel Sargeant.

With respect to the propriety and regularity of this application to the Circuit Court, we would remark in the first place, that the mere fact of a paper being found amongst the files of a cause, does not of itself constitute it a part of the record of the *cause. In order to render it a part of the record, it should form some part of the pleadings [*385 in the cause, or be brought under and ingrafted upon the action of the court by some motion from the parties. Without this, such a paper can no more be a portion of the record than would the knowledge of facts on the part of a witness, who had been summoned and not examined, or the oral testimony given to a jury, and not noted by exception or otherwise. There is nothing in the record of the Circuit Court of Tippecanoe to show that the paper on which this fourth charge asked for by the plaintiffs is founded, was ever brought to the notice of the court last mentioned. The real veritable record informs us, that legal and sufficient notice was given to the heirs of Samuel Sargeant, but whether by this paper or in what other mode (except that it was legal and sufficient) we are not told, and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined

collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice, would unsettle nine tenths of the rights and titles in any community, and lead to infinite confusion and wrong. In support of a principle so obvious and of such universal acceptation as is that just above stated, a recurrence to cases would seem to be wholly unnecessary. We will mention, however, one in this court, which, from its direct appositeness to the question now under consideration, may be regarded as conclusive. The case alluded to is that of *Grignon's Lessee*, v. *Astor*, 2 How., 319. This was an action of ejectment brought by the heirs of a decedent to recover lands which had been sold by the personal representative, who, by the law of Michigan, was, in the event of a deficiency of the personal assets to pay debts, authorized to sell the real estate, upon a license granted him to effect such sale, but to be obtained only upon proofs prescribed by the statute to be made before the court by which the license to the administrator was to be granted. The objection to the title of the purchaser was, that by the record of the court granting the license to the administrator to sell, it was apparent that the prescribed evidences of deficiency of the personal assets had not been adduced, and that the court had therefore exceeded the powers with which it was clothed by the statute. The language of the record is as follows: "The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of
*386] Brown, deceased, *was filed, praying for an order from the court to authorize him to dispose of the real estate of the said Pierre. In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered, that he be empowered as aforesaid."

In overruling the objection made to the title derived from the personal representative, this court said, p. 339: "The record of the County Court shows that there was a petition representing some facts by the administrator who prayed for an order of sale; and the court took those facts into consideration, and for these and divers other good reasons, ordered that he be empowered to sell." Again this court say, p. 340: "After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court. Their order of sale was evidence of that or any other fact which was necessary to give them the power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff

has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter." Again say the court, "The record is absolute verity, to contradict which, there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party obtaining it." Several decisions by this court upon this particular point will be found cited in the opinion above quoted as delivered by the late Justice Baldwin, who concludes that opinion with the following striking and cogent observations: "We do not," said that learned judge (alluding particularly to the case of *Vorhees* v. *The Bank of the United States*, 10 Pet., 473,) "think it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that case and those which preceded it rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents by order of those courts to whom the laws of the states confide full jurisdiction *over the subjects." By the doctrine thus ruled the [*387
decision of the Circuit Court is fully sustained, and, upon a review of the whole case, it is the opinion of this court that the decision of the Circuit Court be, and the same is hereby, 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 Indiana, 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.

Alanson Saltmarsh *v.* James W. Tuthill.

Where an appeal was taken in a common-law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error to bring the case up to this court, it was error in the court below to quash the execution and supersede the judgment.

The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party or the court.[1]

The question whether this court has the power to issue a mandamus to the judge below, commanding him to set aside the supersedeas and order the clerk to issue an execution, not decided.[2]

A MOTION was made for a mandamus in this case, to compel the district judge to set aside an order of supersedeas and to order the clerk to issue an execution.

The circumstances were these:—

At the fall term, 1849, of the District Court of the United States for the Middle District of Alabama, Tuthill obtained a judgment against Saltmarsh in a common-law case.

Saltmarsh took an appeal in open court, and at the same time executed an appeal-bond, in a penalty of double the amount of the judgment.

After the expiration of ten days, Tuthill caused execution to be issued on the judgment. Before the return of this writ, Saltmarsh sued out a writ of error, and filed a writ of error bond.

At the return term of the execution, viz., May, 1850, Saltmarsh moved the court to quash the execution and to supersede the judgment. Both motions were granted. The execution was quashed, and it was further considered and ordered by the court, that a writ of supersedeas be, and the same is hereby, awarded, commanding the clerk of the District Court of the *388] *United States for the Middle District of Alabama not to issue execution, or any other process, on said judgment rendered at the December term of this court, in the year of our Lord one thousand eight hundred and forty-nine, while the writ of error to the Supreme Court of the United States is pending, nor until a decision is had thereon. And also to command the marshal of the United States for the district aforesaid, that from every and all proceedings on execution, or in anywise molesting the plaintiff in error on account of the said judgment, he entirely surcease, the same being superseded.

[1] See note to *Stockton* v. *Bishop*, 2 How., 74.

[2] See also *Slaughter House Cases*, 10 Wall., 292; *French* v. *Shoemaker*, 12 Id., 100; *Brown* v. *Evans*, 8 Sawy., 504.

The writ of error having brought the case up to this court, a motion was made by *Mr. Pryor* and *Mr. Seward* for a mandamus to compel the district judge to set aside the order of supersedeas, and to order the clerk to issue an execution.

1. The order was void for the want of jurisdiction in the court. There was no subject-matter in controversy of which the court could take jurisdiction, to hear and determine. Judiciary Act, 1789, ch. 20, §§ 22, 23; Act regulating appeals, 1803, ch. 40, § 2; *Wiscart* v. *Dauchey*, 3 Dall., 327; *Murdock ex parte*, 7 Pick. (Mass.), 303, 321; *Wetherbee* v. *Johnson*, 14 Mass., 412, 420; *Livingston* v. *Jefferson*, 1 Brock., 203, 211; *The San Pedro*, 2 Wheat., 132, 141; *Sarchet* v. *United States*, 12 Pet., 143, 144; *Parish* v. *Ellis*, 16 Id., 451, 452, 453, 454; *United States* v. *Wouson*, 1 Gall., 4, 10, 11; *Villabolo* v. *United States*, 6 How., 81, 90, 91; *United States* v. *Currey*, Id., 106, 112, 113; *Hudson* v. *Guertier*, 7 Cranch, 1; *The Avery*, 2 Gall., 386, 389; *Jackson* v. *Ashton*, 10 Pet., 480, 481; *ex parte Crenshaw*, 15 Id., 119, 123; *Cameron* v. *McRoberts*, 3 Wheat., 591, 593; *Griffith* v. *Frazier*, 8 Cranch, 9, 10; *Patterson* v. *United States*, 2 Wheat., 221, 225, 226; *Hickey* v. *Stewart*, 3 How., 750, 762; *United States* v. *Moore*, 3 Cranch, 159, 172, 173; *Durousseau* v. *United States*, 6 Id., 307, 313, 314; *United States* v. *Goodwin*, 7 Id., 108; *ex parte Kearney*, 7 Wheat., 38, 42; *ex parte Watkins*, 3 Pet., 193, 201; *United States* v. *Nourse*, 6 Id., 470, 493, 494, 495, 496, 497; *Wood* v. *Lide*, 4 Cranch, 180; *Hogan* v. *Ross*, 11 How., 294.

2. But if the court did have jurisdiction, then the jurisdiction was improvidently exercised, and this court ought to issue the mandamus. This court has a general superintending control over inferior courts of the United States, and may issue such process as is necessary to enable it to make this control effectual. Judiciary Act, 1789, ch. 20, §§ 13, 14; *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 6 Wheat., 368; *ex parte Crane*, 5 Pet., 190; *Life & F. Ins. Co.* v. *Wilson*, 8 Id., 291, 306; *Marbury* v. *Madison*, 1 Cranch, 137; *ex parte Bradstreet*, 6 Pet., 774.

**Mr. Campbell* in opposition to the motion. [*389

The 23d section of the Judiciary Act (1 Stat. at L., 85), does not take away the power which existed in the courts to grant a supersedeas upon the allowance of a writ of error. Tidd Pr., 1070, *et seq.*; 1 Arch. Pr., 517, *et seq.*; 10 Wend. (N. Y.), 624; 7 Hill (N. Y.), 162; 3 How., 405; 2 Miles (Pa.), 108.

The remedy by mandamus is not proper. Tillinghast & Yates's Treatise, 449.

The remedy open to the plaintiff is a writ of error. 6 Pet., 648; 1 Bibb (Ky.), 346; 1 Stew. & P. (Ala.), 187; 9 Port. (Ala.), 275.

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

The judgment in this case being in a common-law proceeding, it was not removed to this court by the appeal; and, consequently, the appeal-bond did not operate as a supersedeas.

The writ of error afterwards sued out, has brought the case regularly before this court. But as it was not sued out within ten days after the rendition of the judgment, the writ of error-bond does not stay the execution under the act of 1789.

Nor is there any equitable power in the Circuit Court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial in this respect whether it was the mistake of the party or the court. For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of Congress regulating appeals and writs of error, upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States* v. *Curry and others*, 6 How., 113; and *Hogan and others* v. *Ross*, 11 Id., 297. The Circuit Court therefore erred in setting aside the execution which the plaintiff had issued on the judgment.

But we do not think it necessary at this time to determine whether this court has the power to issue the mandamus, requiring the Circuit Court to issue the execution. Because we are satisfied from the facts before us, that the Circuit Court, without any coercive process, will conform to the opinion of this court, and issue execution when informed of this decision.

The question, therefore, as to the power of this court to issue the mandamus, is, for the present, reserved.

SAMUEL DINSMAN, PLAINTIFF IN ERROR, *v.* CHARLES WILKES.

Under the Act of Congress, passed on the 2d of March, 1837, (5 Stat. at L., 153,) the commander of a squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it. See 7 Howard, 89.

The decision of this question, by the commander, was final and conclusive; and if the marine did not conform to it, he was liable to punishment.

So, too, the commander was the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination; and he is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.[1]

But at the same time he is bound never to inflict any severer punishment than he conscientiously believes to be necessary to maintain discipline, and due subordination in his ships.

The question being one of motives, the jury are to judge whether he was actuated alone by an upright intention to maintain the discipline of his command, or whether punishment was in any manner or degree increased or aggravated by malice or vindictive feeling.[2]

In deciding this question, the jury are to take into consideration all the circumstances of the case.

A letter from one of the officers of the squadron to the commander, upon the temper and disposition of the marines in one of the ships, was proper evidence for the jury.

But the proceedings of a court-martial, for the trial of men for offences committed long before, was not evidence, because it did not show the spirit existing at that time.

Nor was evidence admissible, of the flogging of two other persons merely by the authority of the commander without a court-martial.

Nor was evidence admissible, that the commander refused to give to the marine, a certificate, under the act of Congress before referred to; because the commander claimed to hold him by voluntary enlistment.

In order to show the motive by which the commander was actuated in confining the marine in a fort, on shore, it was admissible for the commander to offer evidence that merchant seamen from American ships were confined there, and also for the marine to offer evidence to rebut it.

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 the same case which is reported in 7 How., 89. It was then *Wilkes* v. *Dinsman*, and this court, having reversed the judgment of the Circuit Court, sent it down to be tried again. Upon such new trial, the verdict was for Wilkes, and Dinsman brought it up again upon the exceptions to the rulings of the court.

The statement of the evidence offered by the plaintiff in the Circuit Court was the same, in substance, with that set forth in 7 Howard, and need not be now repeated. The exceptions taken at the trial were the following:

"On the further trial of this cause, and after the foregoing

[1] FOLLOWED. *Jecker* v. *Montgomery*, 18 How., 123.

[2] S. P. *United States* v. *Alden*, 1 Sprague, 95. When the intent with which an act is done, becomes the subject of inquiry, it is exclusively a question for the jury. *United States* v. *Quincy*, 6 Pet., 460; *Lee* v. *Lee*, 8 Id., 44. Thus, whether an alleged libel was maliciously published, *White* v. *Nichols*, 3 How., 267; or whether malice may be inferred from the facts in evidence, *Wheeler* v. *Nesbitt*, 24 How., 545; or whether a sale of goods was colorable merely, *Warner* v. *Norton*, 20 How., 448; or whether a bond was delivered absolutely or as an escrow, *Duncan* v. *United States*, 7 Pet., 448, are all questions of fact for the determination of the jury.

evidence was given on the part of the plaintiff, and which is made part hereof, the defendant, for the purpose of showing probable cause and the absence of malice, on his part offered
*391] to read in *evidence the following paper marked A; (letter of Lieut. Emmons,)* having first proved that the same was in the handwriting of Mr. Emmons, who was a lieutenant of said ship, and that the other signatures are genuine; which said paper being in the possession of the defendant, as an official paper, was produced on the trial by the defendant; to the admissibility of which said letter, the plaintiff, by his counsel, objected; but the court overruled the objection, and admitted the same paper to be read in evidence, to which the plaintiff excepts, and this his exception is signed, sealed, and enrolled, this 30th day of November, 1849."

Second Bill of Exceptions.

"On the further trial of this cause, and after the evidence contained in the plaintiff's aforegoing exception and statement of evidence, and which is made part hereof, the defendant produced to the court two original records of the trial of Riley and Ward, respectively, and proved the same to be the originals; and offered to read to the jury so much of the said records as contains the charges, specifications, and finding of the court-martial as relates to mutinous conduct as follows: † In order to show the defendant had probable cause for, and to repel any presumption of malice arising from the fact of the imprisonment by the defendant of the plaintiff, as aforesaid, in the said fort. To all which said evidence the plaintiff, by his counsel, objects; and the court overrules the objection, and admits the same; whereupon the plaintiff prays an exception thereto; and that the court may sign and seal this his bill of exceptions, and cause the same to be enrolled according to the statute. All which is done this 30th of November, 1849."

Third Bill of Exceptions.

"On the further trial of this case, and after the evidence contained in the aforegoing exceptions, made part hereof, and after the defendant had read to the jury Lieut. Emmons's letter, and so much of the records of the court-martial as stated in the aforegoing exception, the plaintiff to rebut the same, and for the purpose of showing the state of the disci-

* The letter of Lieut. Emmons was not in the record; but its object was to show the temper and disposition of the marines in one of the vessels of the squadron.

† The offences with which Ward and Riley were charged, were committed on the 29th September, 1839.

pline of the ship Peacock, at and about the time of committing the trespasses laid in *the declaration, offered to ask Lieut. Walker, the first lieutenant of said ship, what [*392 was the general conduct and character of Riley, Ward, and Lewis, aforesaid, for subordination and fidelity to duty, at the time of the holding of said court-martial, and prior thereto, and during the time embraced in charges against them as contained in the said letter of Lieut. Emmons; but the defendant objected thereto, and the court refused to allow the said question and evidence to be put and admitted; to which refusal the plaintiff excepts, and this his exception is signed, sealed, and enrolled, this 30th day of November, 1849."

Fourth Bill of Exceptions.

"On the further trial of this cause, and after the evidence contained in the aforegoing exceptions, and made part hereof, and after the defendant had given evidence of particular instances of insubordination and misconduct among the crew of the said ship Vincennes, from the time of her arrival at Oahu, to the time of the imprisonment of the plaintiff, in order to prove that the discipline of the same was relaxed and impaired; and after the defendant had closed his evidence in chief, the plaintiff, to rebut the same, offered to read from the log-book of said ship, at a date after her said arrival, to wit, "that on the 16th day of October, 1840, at the said island, a certain Leo Weaver and Henry Waltham, two of the crew of said ship, were flogged thereon, the first with sixteen lashes, and the last with eighteen lashes, for desertion, insolence, and neglect of duty; and that the same did not appear by said log-book to have been done by the sentence of a court-martial; but the court refused said offered evidence, and the plaintiff excepts thereto, and this his exception is signed and sealed this 30th November, 1849."

Fifth Bill of Exceptions.

"Upon the further trial of this case, after the evidence contained in the aforegoing exceptions made part hereof had been given, and after the plaintiff and defendant had both closed their evidence in chief, and after the defendant had given evidence that he had, subsequent to the sailing of the said squadron, shown marks of favor to the plaintiff, and had promoted him to the rank of corporal, in order to repel any inferences of malice on his part towards the plaintiff; but the plaintiff offered evidence tending to prove that the defendant claimed his right to hold the plaintiff in the said squadron under and by virtue of an act of Congress, approved March 2,

1837, entitled "An act to provide for the enlistment of boys, &c." And further offered to prove *that the defendant had failed, and refused to certify, as required by said act, by reason whereof the plaintiff had been and was denied the benefit of the additional pay, as is by said act provided. And the plaintiff offered this evidence to rebut that of the defendant, and to show a continuing malice on his part towards the plaintiff; but the court refused the said offered evidence, and the plaintiff excepts, and this his exception is signed and sealed this 30th November, 1849."

*393]

Sixth Bill of Exceptions.

"On the further trial of this case, and after the evidence contained in the aforegoing exceptions, made part hereof, and after the evidence in chief on both sides had been closed, and after the defendant had given evidence to prove that at the time the plaintiff was confined in said fort there were merchant seamen of the United States confined there, for the purpose thereby of inferring a knowledge by the defendant that said fort was a proper place for the imprisonment of the plaintiff:

"The plaintiff, by way of rebutting the same, offered evidence tending to prove that it was a general and uniform practice and custom in the naval service at the time aforesaid, and long before, as well established, to confine on the armed ships of the United States in any foreign port, any and all merchant seamen of the United States, who might there deserve such confinement by reason of their own ship or master not being able to confine them; which offered evidence the court refused, and the plaintiff excepts thereto, and this his exception sealed this 30th day of November, 1849."

Seventh Bill of Exceptions.

"And thereupon the defendant, by his counsel, prayed the court to instruct the jury that,—

"If, from the whole evidence aforesaid, the jury shall find that the plaintiff, being an enlisted marine, signed the paper as aforesaid, marked A, (the same being the contract to serve during the cruise,) the court instructs the jury he was thereby bound to serve in the exploring expedition till the ships returned to the United States; and

"If they further find the defendant was the commander of that expedition, was lying with his squadron in the harbor of Honolulu, the ships were undergoing repairs, and refitting for the purpose of further prosecuting the objects of said expedition, and the commander and many of the officers on shore

pursuing their investigations, that the said discipline of said squadron was *thereby greatly relaxed, and the defendant received such information as led him to believe, [*394 and he did believe, that the marines on board the said squadron were unwilling to serve out the said cruise, and would refuse to do duty, and require to be sent home at the respective periods they might think their original terms of enlistment expired; and after four of the marines on board the ship Vincennes, under the immediate command of defendant, had in fact refused to do duty, on the ground that the terms of their original enlistment had expired, the plaintiff in like manner refused on like grounds; then it was in the discretion of the defendant to confine said plaintiff in said squadron, or on said island, as he might deem best, for a few days, and until the squadron was ready to sail; and he is not responsible for confining the plaintiff on the island, (if the jury shall find he was confined there by the order of defendant,) notwithstanding they shall be of opinion that he might have been confined in the squadron.

"And if the jury shall further find that the plaintiff was confined in the fort on the island, that said fort was the only public place of imprisonment on the island, was used by the consuls for the confinement of seamen, and by the authorities of the island for persons criminally charged, and for seamen who had deserted from the ships, and that seamen were shipped from said fort into said squadron; that the defendant refitted his ships, and brought the plaintiff on board, and sailed with all reasonable despatch; then it is not competent for the jury to infer malice or corrupt motive in the defendant in so ordering the plaintiff to be sent to said fort, if he would not go to duty; although the jury may be of opinion that he might have been kept safely, and with more comfort to said prisoner, on board said squadron; and in the absence of all proof that defendant gave any order as to the mode of his confinement of said plaintiff, or for denying him any comforts, or that he had any knowledge of the manner of said imprisonment, or of his being deprived of comforts, or of the circumstances of hardship stated in the evidence, it is not competent for the jury to infer malice or corrupt motive in the defendant, from the facts (if the jury shall find them so) that plaintiff was confined, and lodged, and fed as stated in the plaintiff's evidence; and without proof of malice the plaintiff is not entitled to recover in this action. Which instruction the court gave as prayed, and the plaintiff, by his counsel, excepts thereto, and prays the court to sign and seal the same,

and cause the same to be enrolled according to the statute, which is done accordingly this 30th November, 1849."

Eighth Bill of Exceptions.

*395] * "On the further trial of this cause, and after the evidence contained in the foregoing statement of evidence and exceptions made part hereof; and after the whole evidence had been closed, and after the court had instructed the jury according to the prayer of the defendant as aforesaid, the plaintiff prayed the court to instruct the jury as follows:

"1st. If the jury believe from the whole evidence that the plaintiff was put and kept in the said fort by order of the defendant, then, notwithstanding the defendant had a right to put and keep him there, yet the motive with which the same was done is a question for the jury; and if the jury believe that such motive was founded either on malice, cruelty, or any species of oppression, then the defendant is liable therefor, and the jury may give such damages as upon the whole evidence they think the plaintiff ought to have.

"2d. If the jury believe from the whole evidence aforesaid that the defendant was captain of the ship Vincennes, and that the said ship was in a state of sufficient discipline, and the plaintiff could have been securely confined thereon, with safety to said ship, the officers, and crew, at the time he was sent to said fort, and during the time he was confined therein, then it was the duty of the defendant to know the same, and the jury may presume he did know the same; and it is competent for them to infer therefrom that the defendant acted maliciously toward the plaintiff in confining him in said fort. And if the jury believe he was confined in said fort by order of the defendant, they may give such damages therefor as upon the whole evidence they think the plaintiff ought to have.

"3d. If the jury believe from the whole evidence that the plaintiff was imprisoned in the said fort by order of the defendant, and that the defendant acted therein from malice, cruelty, or any species of oppression, he is responsible therefor, and the jury may give such damages therefor as upon the whole evidence they think the plaintiff ought to have.

"4th. If the jury believe from the whole evidence that the plaintiff was put and kept in the said fort by order of the defendant, and that the same was done through malice, or any species of oppression, then the defendant is liable therefor, and the jury may give such damages as they think the plaintiff ought to have; notwithstanding the jury may find that the

defendant considered the said fort to be a more proper and safe place of confinement than the vessels of said squadron.

"5th. If the jury believe, from the whole evidence, that the plaintiff was imprisoned in the said fort by order of the defendant, *and that the same was accompanied by malice on the part of the defendant, then the plaintiff is [*396 entitled to recover, and the jury may give such damages therefor as they think the plaintiff ought to have. Notwithstanding the jury may believe that, under all circumstances, the said imprisonment was considered by the defendant to be with more propriety and safety than in the squadron.

"6th. If the jury believe from the evidence that the plaintiff was put and kept in the said fort by order of the defendant, and are of opinion that there was no justifiable cause for the act; and are further of opinion, from the whole evidence, that the same was wantonly done by the defendant, with a wilful disregard of right or duty, and contrary to his own convictions of duty, as a mere exercise of power, without any sense of its being right, then it is competent for the jury to infer that the same was maliciously done; and if so done, the defendant is responsible, and the jury may give such damages therefor as, upon the whole evidence, they think the plaintiff ought to have.

"7th. If the jury believe from the evidence that the plaintiff was confined in the said fort by order of the defendant, when he could, without any difficulty, have been confined on the said ship, and that he knew he could have so confined him; and that the plaintiff was, in said fort subjected to cruel and barbarous treatment, and the defendant could have prevented the same, and it was his duty to prevent the same, and he did not interfere so to do, then it was competent for the jury to infer malice therefrom in the conduct of the defendant, and he is responsible therefor; and the jury may give such damages as, upon the whole evidence, they may think the plaintiff ought to have.

"8th. If the jury believe from the evidence that the plaintiff was confined in the said fort by order of the defendant, in a small cell, with irons on his hands, arms, and legs, and, while so confined, was subjected to cruel, unusual, and barbarous treatment, which the defendant could have prevented, and which it was his duty to prevent, then it is competent for the jury to infer malice on the part of the defendant, and he is responsible therefor; and the plaintiff may recover in this action.

"Which said prayers, and every and each of the same, the court refused to grant; to which refusal the plaintiff, by his

counsel, excepts, and this, his exception, signed, sealed, and enrolled, this 30th day of November, 1849."

Ninth Bill of Exceptions.

"On the further trial of this cause the counsel for the plaintiff, in his summing up to the jury, having stated that the
*397] evidence, *and the only evidence, on which he relied to show the knowledge of the defendant of the severities alleged to have been practised on the plaintiff, by being imprisoned in the said fort, was, that the said ships, the Peacock and Vincennes, were in a good state of discipline, and the plaintiff might have been safely kept in one of them; that it was, by the rules and regulations of the navy, made the duty of the captain to look after the comfort of his men; that no articles of food or clothing were sent from said ship to said plaintiff while in said prison; that defendant and the sergeant of marines were on shore most of the time while the plaintiff was so imprisoned, and the facts and circumstances of said imprisonment itself, as stated in plaintiff's evidence; the defendant, by his counsel, prayed the court to instruct the jury, that, from the said evidence, if the same is believed by the jury, it is not competent for them to find that defendant had knowledge of the severities said to have been practised on the said plaintiff in said prison, and without such knowledge the plaintiff is not entitled to recover in this action.

"Which instruction the court gave, and the plaintiff excepts thereto; and so excepting to the granting of the same, the plaintiff denies that the same sets forth the whole evidence on which he relied, as proving the malice of the defendant, or his knowledge of the treatment of the plaintiff during all his said imprisonment, and at the commencement, continuation, and end thereof; and he excepts to said instruction on said grounds, and all other grounds to which the same may be liable, and this, his exception, is signed, sealed, and enrolled, this 30th November, 1849.

Tenth Bill of Exceptions.

"On the further trial of this case, and after the plaintiff's counsel had summed up to the jury, and the court had, after such summing up, granted the defendant's prayer, marked P, the plaintiff prayed the court further to instruct the jury as follows:

"That, from the whole evidence aforesaid, it is a matter of fact for the jury to find whether the said whipping of the plaintiff was immoderate, excessive, and malicious on the part of the defendant, under all the circumstances.

"That, upon the whole evidence aforesaid, if believed, it is competent for the jury to find that the defendant did, unwarrantably and maliciously, imprison the plaintiff in the said prison or fort.

"That, upon the whole evidence aforesaid, if believed, it is competent for the jury to find that the defendant wilfully neglected the personal comfort and cleanliness of the plaintiff while imprisoned by his order in the said fort; and if the jury shall *find such wilful neglect, then the defendant is liable to this action; provided the jury shall further find that, while so imprisoned, the condition of the plaintiff was uncomfortable, wretched, and filthy, and his food unwholesome and unpalatable. [*398

"Upon the whole evidence aforesaid, if believed, it is competent for the jury to find that the imprisonment of the plaintiff in said fort was unnecessary and unjustifiable by the exigencies of the case; and that, in ordering said imprisonment, the defendant was actuated by malice, and an unlawful desire of punishing the plaintiff cruelly and immoderately.

"That from the whole evidence, if believed by the jury, it is competent for them to find that the defendant wilfully neglected to bestow proper attention to the health, comfort, and cleanliness of the plaintiff while imprisoned in said fort; and such wilful neglect, if found by the jury, amounted in law to express malice on the part of the defendant.

"That it is competent for the jury, from the whole evidence aforesaid, if believed by them, to find that the imprisonment of the plaintiff, so stated in the evidence, in said fort, was longer than the exigency of the case required; and if the same shall be found by the jury, then the plaintiff is entitled to recover, provided the jury shall further find that the prolongation of such imprisonment was the result of malice on the part of the defendant towards the plaintiff.

"If the jury find, from the whole evidence, that the plaintiff was placed in the said fort by order of the defendant, then the defendant was bound to know the kind of treatment to which the plaintiff was subjected by said imprisonment; and he cannot be presumed ignorant thereof, especially if the jury find that, during said imprisonment, the defendant neglected to make inquiry into the condition and treatment of the plaintiff.

"That, upon the whole evidence aforesaid, if believed by the jury, they shall find that the defendant, in all the acts complained of by the plaintiff, was actuated alone by an upright intention to maintain the discipline of his command, and the interests of the service on which he was engaged, then the

plaintiff is not entitled to recover; but if the jury shall find that said acts, or any of them, proceeded from, or were aggravated by cruelty, malice, and oppression towards the plaintiff, then the plaintiff is entitled to recover.

"Which instructions, and each and every of them, the court refused to give; to which refusal the plaintiff excepts, and this, his exception, is signed and sealed this 30th November, 1849."

*399] **Eleventh Bill of Exceptions.*

"Upon the further trial of this cause, the plaintiff prayed the court to instruct the jury that, upon the whole evidence aforesaid, if believed by the jury, it is competent for them to find a verdict for the plaintiff, and to assess such damages as they shall think, under the circumstances, the plaintiff is entitled to recover.

"Which instructions the court refused to grant; to which refusal the plaintiff excepts, and this, his exception, is signed, sealed, and enrolled, this 30th day of November, 1849."

Upon these exceptions the case came up to this court.

It was argued by *Mr. Addison* and *Mr. May* for the plaintiff in error, and by *Mr. Bradley* for the defendant in error.

The counsel for the plaintiff in error made the following points:

1. That there is evidence in this case of "malice and oppression" in the act of the plaintiff's imprisonment, both by direct and implied proofs. 2 Greenl. Ev., 453; 3 How., 267, 291, 292; 7 Id., 89; 4 Barn. & C., 255; 2 Stark. Ev. (Metcalf's ed.), 904, 905; 3 Kent Com., 181, 182, 183; 4 Serg. & R. (Pa.), 423; 1 Wend. (N. Y.), 140; 2 Stark., 388, 389; *Hueneford* v. *Horn*, 2 Carr. & P.; 3 Bing. N. C., 950.

2. That even if the act of imprisonment was free of malice, yet there is evidence of "malice, cruelty, and oppression" in the mode and circumstances attending the said imprisonment. *Wall* v. *Namara*, quoted in 1 T. R., 536, 537; *The Six Carpenters' Case*, 1 Smith Lead. Cas., Amer. ed., and the cases there referred to; *Bradley* v. *Davis*, 2 Shep. (Me.), 44; *Malcolm* v. *Spoor*, 12 Met. (Mass.), 280; *Melville* v. *Brown*, 15 Mass., 82; *Jarratt* v. *Gwathmey*, 5 Blackf. (Ind.), 239; *Lambert* v. *Hodgson*, 1 Bing., 317; *Fabrigas* v. *Mostyn*, 1 Cowp., 161; 1 Chit. Pl., 539; *Duncan* v. *Thwaite*, 5 Dowl. & Ry., 462; *King* v. *Root*, 4 Wend. (N. Y.), 137; *Dexter* v. *Spear*, 4 Mason, 118.

3. That on the evidence in the case the *quo animo* of the

424

defendant was a question of fact for the jury. 4 Burr., 1971; *Parks* v. *Ross*, 11 How., 362; *Turner* v. *Walker*, 3 Gill & J. (Md.), 386; *Scott* v. *Lloyd*, 9 Pet., 418; *Greenleaf* v. *Brith*, 9 Id., 292; *Ches. & O. Canal Co.* v. *Knapp*, 9 Id., 541; *Fergusson* v. *Tucker*, 2 Har. & G. (Md.), 183; *Gray* v. *Crook*, 12 Gill & J. (Md.), 236; *White* v. *Nichols et al.*, 3 How., 266; *Mitchell* v. *Jenkins*, 5 Barn. & Ad., 593, 594; *Ravenga* v. *Makintosh*, 2 Barn. & C., 493; *Taylor* v. *Willans*, 2 Barn. & Ad., 845, 848; *Venafra* v. *Johnson*, 10 Bing., 301; *Panton* v. *Williams*, 2 Ad. & Ell., 632; 42 Eng. Com. Law; *Turner* v. *Ambler*, 10 Ad. & Ell., 252, 259; Abbott *on Ship., 179, *n.* 5th Am. ed., 236; *United States* v. *Ruggles*, 5 Mason, 192; *Magee* v. *Ship Moss*, Gilp., 21; *Relp* v. *The Maria*, 1 Pet. Adm., 86, 174 *n.*, 175 *n.*; Gilp., 32. [*400

4. That the letter of Lieut. Emmons was not admissible in evidence. 1st exception.

5. That the records or the trials by court-martial of Riley and Ward were not admissible in evidence. 2d exception.

6. That the evidence of Lieut. Walker, of the character and conduct of Riley and Ward, to rebut the presumption sought to be raised by their conviction by court-martial, was admissible. 3d exception.

7. That the entries in the log-book of the punishment of Weaver with sixteen and Waltham with eighteen lashes, without the sentence of a court-martial, was admissible to rebut the proof offered on the part of the defendant, that the discipline of the squadron was relaxed. 4th exception.

8. That the evidence that the defendant claimed to hold the plaintiff under the act of Congress of 2d March, 1837, and that he refused to certify that he detained the plaintiff under said law, by reason whereof the plaintiff was deprived of the additional pay, provided for by said act, was evidence proper to be admitted to rebut the inference of absence of malice sought to be raised from marks of favor shown to the plaintiff by the defendant. 5th exception.

9. That the evidence that it was the custom and uniform practice to confine on the armed ships of the United States, in a foreign port, all merchant seamen of the United States, who might there deserve such confinement when they could not be confined on their own ship, was admissible to rebut the inference of a knowledge by the defendant, that the native fort was a proper place for the imprisonment of the plaintiff, sought to be established by the proof that merchant seamen were confined in said fort at the time the plaintiff was there imprisoned.

Mr. Bradley, for the defendant in error.

The substance of this case will be found in 7 How., 98. The evidence is varied only so far as relates to the evidence of a corrupt motive in the defendant in ordering the imprisonment complained of.

The facts are substantially embraced in the defendants' prayer granted by the court, forming plaintiff's 7th exception. This, taken in connection with the 9th and 11th bills, will present the whole case to the court. They cannot well be abbreviated.

The first sets out those facts, which being found by the jury, constitute probable cause. It proceeds on the hypothesis that the defendant had reason to believe, and did believe, in the existence of that state of facts.

*401] *If he did so believe, a case arose for the exercise of his discretion. If in the exercise of that discretion he did no more than issue a conditional order, and the plaintiff would not comply with the condition, he is not responsible for the execution of that order, provided he directed no more than the ordinary and usual course of its execution, and was ignorant in fact of any excess in that execution.

That malice means wilful neglect, omission or commission. And unless knowledge was brought home to him of the omission of some inferior officer to discharge his duty, by which under the pretended execution of his order the plaintiff suffered, the defendant is not responsible.

The basis of the whole is a reasonable belief in the existence of a particular state of facts—a discretion to act under that belief, and a resort to ordinary means to execute that act.

The plaintiff, on the other hand, maintained, that if the case arose for the exercise of his discretion, he was bound to see to the execution of his order in detail, and was responsible for any injury which arose in the course of such execution; that is to say, if there was probable cause, malice alone was sufficient to enable him to recover.

And again: the plaintiff so framed his prayers as to submit the whole question of probable cause to the jury.

The defendant will rely on the case in 7 Howard, and on the cases cited by the plaintiff in error, and endeavor to show that there is no error in any one ruling, to which the plaintiff has excepted.

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

This case was before the court on a former occasion, and is fully reported in 7 How., 89. The present defendant in error

was then the plaintiff, and the judgment of the Circuit Court was reversed, and a *venire de novo* awarded, the new trial to be governed by the principles decided by this court. Upon the trial under the mandate the judgment was in favor of the present defendant, and the plaintiff thereupon brought this writ of error. The testimony, so far as the question of law upon the merits are concerned, is substantially the same with that offered at the former trial.

The case, as it now comes before the court, is somewhat confused by the number of instructions asked for by the counsel for the different parties, and which are merely given or refused, without any explanatory instructions by the court itself. This mode of proceeding complicates the case and makes it difficult to understand, from the exceptions, what principle of law the Circuit Court intended to decide.

*But it would seem, from the various instructions moved for by counsel and given or refused, that the [*402 court likened the case to a suit for a malicious prosecution, and supposed it was to be governed by the same principles. And if the Circuit Court understood the opinion of this court to be placed on that ground, they were evidently mistaken. For by referring to the report of the case, in page 130, it will be seen that the court said, in express terms, "that for acts beyond his jurisdiction, or attended with circumstances of excessive severity, arising from ill-will or a depraved disposition, or vindictive feeling, he can claim no exemption."

The case has no analogy to a suit for a malicious prosecution. That action will lie only in cases where a legal prosecution has been carried on without a probable cause. *Johnston* v. *Sutton*, 1 T. R., 524. The action was originally applied to criminal proceedings; to cases where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offence of which he was not guilty. In cases of that kind, where the facts are admitted, or found by the jury, the court, and not the jury, decide whether there was probable cause or not for the prosecution; and if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives. And the reason for the rule, as stated by Blackstone, 3 Conn., 126, is "that it would be a very great discouragement to public justice if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried." The action has been extended to civil as well as criminal cases where legal process has been maliciously used against another without probable cause. But the action for a

malicious prosecution is the only one in which the party is not liable, although he acts from malicious motives, and has inflicted unmerited injury upon another. The rule is not of a character to recommend it to favor; nor to induce a court of justice to extend it beyond the limits to which it has heretofore been confined. And this is not an action for a malicious prosecution; but for an assault and false imprisonment. And whether the acts charged were done or not, and what motives actuated the defendant, are questions of fact exclusively for the jury; and probable cause or not is of no further importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

It is an action by a marine against his commanding officer, for punishment inflicted upon him for refusing to do duty, in a foreign port, upon the ground that the time of his enlistment *had expired, and that he was entitled to his discharge. The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

*403]

At the time these events happened Captain Wilkes was in a distant sea, charged with the execution of a high public duty. He was bound, by all lawful means in his power, to preserve the strength and efficiency of the squadron intrusted to his care, and was equally bound to respect the rights of every individual under his command. It is hardly necessary to inquire whether the plaintiff was or was not entitled to his discharge at the time he demanded it. It is, however, very clear that he was not. But to guard against a misconstruction of this opinion, it is proper to say that the right to determine the question was, for the time being, in Captain Wilkes. In his position as commander, the law not only conferred upon him this power, but made it his duty to exercise it. If, in his judgment, the plaintiff was entitled to his discharge, it was his duty to give it, even if it was inconvenient to weaken the force he commanded. But if he believed he was not entitled,

it was his duty to detain him in the service. Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; and it was the duty of the plaintiff to submit to it, as the judgment of the tribunal which he was bound by law to obey; and for any error of judgment in this respect, no action would lie against the defendant.

Nor did the belief of the plaintiff as to his rights, furnish any justification for his disobedience to orders. For there would be an end of all discipline if the seamen and marines on board a ship of war, on a distant service, were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised. And whether the plaintiff was legally entitled to his discharge or not, his disobedience, when the question had been decided against him by the proper tribunal, was an act of insubordination for which he was liable to punishment.

So, too, as regards the degree of punishment to which he was subjected. It was the duty of Captain Wilkes to maintain *proper discipline and order among the officers [*404
and men under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continued refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience,—or necessary as an example to deter others from a like offence, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.

But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time, conscientiously believed to be necessary to maintain discipline and due subordination in his ships. The almost despotic powers with which the law clothes him, for the time, and which are absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition

to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him. For, in such a case he would be liable whatever were his motives. But the fact to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then *405] the plaintiff is not *entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover.

And, in deciding this question, they are to take into consideration the service in which Captain Wilkes was engaged; the place where these transactions happened; the condition of the vessels under his command; the spirit and temper of the marines and seamen, as he understood it to be, in his own vessel and the other vessels of the squadron, gathering his knowledge from his own observation as well as the information of others; also the nature and character of the voyage yet before him, and which it was his duty, if possible, to accomplish; and how far the conduct and example of the plaintiff might, in the judgment of the defendant, be calculated to embarrass or frustrate it altogether, unless he was reduced to obedience. And further, that, under the order to imprison him in the fort, if the jury believe it to be truly stated in the defendant's testimony, the plaintiff was left at liberty to relieve himself from confinement at any moment by returning to his duty.

But, on the other hand, the jury must likewise take into

consideration the different punishments he received; his confinement in the fort on shore; the situation and condition of the place; the character of the persons by whose authority it was governed; his food; his clothing and general treatment; and whether Captain Wilkes, through proper officers, inquired into his treatment and condition during the time of his confinement. For, certainly, when, from whatever motives he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect; and that he did not suffer for the want of those necessaries which the humanity of civilized countries always provides even for the hardened offender.

As to the questions of evidence, we think the letter of Mr. Emmons, with the papers attached to it, mentioned in the first exception, was properly admitted, since it was calculated to make an impression on the mind of Captain Wilkes as to the temper and disposition of the marines in one of the vessels composing the squadron.

But the proceedings of the courts-martial, mentioned in the second exception in the cases of Ward and Riley, ought not to have been received. For some of the offences with which they *were charged were committed a long time before [*406
the refusal of the plaintiff to do duty, and were not therefore, any evidence of a spirit existing at that time. And when the testimony in this exception is rejected, that offered by the plaintiff in the third exception to rebut it, will also be inadmissible, although it would be legal and admissible if the proceedings of the courts-martial could be legally received. But the evidence stated in both of these exceptions ought to have been refused.

The evidence stated in the fourth exception, as to the punishment of Weaver and Waltham, was properly rejected, as it can have no application to the matter in issue.

The opinion in the fifth exception is also correct. For, it appears from record, that Captain Wilkes claimed the right to detain the plaintiff in service during the cruise, under the contract made by the plaintiff with Commodore Jones, in October, 1837, and not under the act of March 2, 1837. He could not, therefore, certify that he had detained him under that act.

But the testimony offered by the plaintiff in the sixth exception ought to have been received. For, after the defendant had offered testimony to show that American seamen

were confined in the fort at the time the plaintiff was imprisoned there, the plaintiff had a right to show that it was not the usual place of confinement, and that refractory seamen, who could not be safely confined on board their own vessels, were uniformly or generally confined on board American ships of war. The testimony on the part of the defendant was admissible, to show that he was not actuated by vindictive feelings in imprisoning the plaintiff in the fort, and that offered by the plaintiff to rebut it, and to show the contrary. But neither was admissible for any other purpose. And it is for the jury to consider what degree of weight, if any, the testimony on either side mentioned in this exception is entitled to, in deciding upon the motives of Captain Wilkes, taking it in connection with all the evidence in the case.

These six exceptions are the only ones which relate to questions of evidence. The rest of them apply to the merits of the case, and to the principles of law by which it is governed. Upon these we have already expressed the opinion of the court, without deeming it necessary to specify each particular instruction given or refused, that ought, in our judgment, to be affirmed or reversed. We have already said, that there is but a single question of law and but one instruction proper. And, upon the grounds and for the reasons hereinbefore stated, the judgment of the Circuit Court must be reversed and a *venire de novo* awarded.

407*] ** 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, 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.*

JESSE SNEAD, LATE HIGH SHERIFF OF HENRICO COUNTY, AND AS SUCH, ADMINISTRATOR DE BONIS NON OF ALBERT SEEKAMP, DECEASED, APPELLANT, *v.* JULIA MCCOULL, WIDOW OF NEIL MCCOULL, CHARLES L. MCCOULL, ADMINISTRATOR DE BONIS NON OF NEIL MCCOULL, AND THE SAID CHARLES L. MCCOULL, MARY P., JULIA L., AND JOHN JAMES MCCOULL, HEIRS OF NEIL MCCOULL, WILLIAM SELDEN, AND EDMUND CHRISTIAN, MARSHAL OF THE EASTERN DISTRICT OF VIRGINIA ET AL.

Prior to the Revised Code of Virginia in 1819 the lien created upon land by a judgment was the same as in England. In both countries the following rules prevailed:

1. That the lien of the judgment resulted entirely from the right of the plaintiff to sue out an *elegit*, and charge the goods and the moiety of the lands of the debtor.
2. That the election so to charge them by an *elegit* executed, discharges from liability the body of the defendant and the remaining moiety of the lands.
3. That the *capias ad satisfaciendum* executed, is, *pro tanto*, a satisfaction of the judgment which releases *proprio vigore* any previous lien upon the lands, and inhibits all recourse against the goods and chattels or lands of the debtor, with the exceptions of the instances of death whilst charged in execution, or of an escape from prison, or a rescue.[1]

A discharge under the act of Congress for the relief of persons imprisoned for debt (2 Stat. at L., 4, sec. 2,) did not restore the lien originally created by the judgment, and waived by issuing a *ca. sa.*[2]

In 1819 the state of Virginia revised her code. By a part which went into operation on the 1st January, 1820, it was enacted that, thereafter, the issuance of a *ca. sa.* should constitute a lien upon lands.

But as it did not relate to past liens, the purchaser of a lien created under the Revised Code had a good title when compared with a claimant under the lien which existed in 1817, but which had been waived by issuing a *capias ad satisfaciendum.*

After a case had been argued and was under advisement, a motion to permit the complainant to file a further bill by way of supplement and amendment, which would have made an essential change in the character and objects of the cause, was properly overruled in the Circuit Court.[3]

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Virginia.

*The facts in the case are fully set forth in the opinion [*408 of the court.

It was argued by *Mr. Johnson*, for the appellant, and *Mr. Robinson*, for the appellee.

Mr. Johnson said, that prior to 1819, the right to issue an execution was governed by the law of 1748; but in 1819 the

[1] CONCLUSIVE. *Magniac* v. *Thomson*, 15 How., 300.

[2] FOLLOWED. *Rockhill* v. *Hanna*, 15 How., 196.

[3] S. P. *Goodyear* v. *Bourn*, 3 Blatchf., 266; *Shields* v. *Barrow*, 17 How., 130; *Walden* v. *Bodley*, 14 Pet., 156.

Revised Code directed that a *capias ad satisfaciendum* created a lien upon land from its date. Before that, the law was the same as in England. The decree below rests upon the principle that the lien is destroyed by a *ca. sa.* But it is not so where the debtor dies in custody or escapes. The reason is, that if the debtor is taken from prison by a cause over which the creditor has no control, then the creditor does not suffer, but may resort to another execution.

If then he is discharged by an act of Congress, the same reason operates, and the creditor should not lose his lien. The second section of the act (2 Stat. at L., 4 § 2,) expressly says that the judgment shall remain and be in full force. Note 68 Wms. Saund., where the cases are collected. 2 Leigh, (Va.), 257; 4 Id., 425. These cases say that the English rule is the Virginia rule.

The point made by *Mr. Robinson*, upon which the decision turned, was the following.

Under the judicial act of 1789, § 14, (1 Story Laws U. S., 59,) as expounded in *Wayman* v. *Southard*, 10 Wheat., 24, the courts of the United States have power to issue writs of execution on their judgments; and under the process acts of 1789 and 1792, (1 Story Laws U. S., 67, 257,) the forms of executions and the forms and modes of proceeding in suits at common law, including (according to the decisions in *Wayman* v. *Southard*, 10 Wheat., 32, and *Duncan* v. *Darst et. al.*, 1 How., 306,) the conduct of the officer in the execution of the process, whether *mesne* or final, and all the regulations and steps incident to it from its commencement to its termination, are to conform to the law of the State as it existed in September, 1789, so far as that law can be made to apply.

The Virginia act of 1748, concerning executions, (5 Hen. Stat., 526,) which as to this matter was the law of the State in 1789, recognizing that persons recovering judgments, may, at their election, prosecute writs of *fieri facias*, *elegit*, and *capias ad satisfaciendum* for taking the goods, lands or body, and prescribing the form of a writ of *elegit* as well as of other writs, it is not controverted that Seekamp's administrator might in
*409] the first *instance have sued out an *elegit*, and according to the terms and effect of that writ, have extended a moiety of all the lands of which McCoull was seized at the date of the judgment, or at any time after. But having made his election to take out a *ca. sa.* in the first instance, (as he had a right to do both under the Virginia act and the proviso to the process acts,) and having pursued the *ca. sa.*, we insist —That the plaintiff has no longer the capacity to sue out an

elegit, and no longer a lien from the date of his judgment on a moiety of the real estate of McCoull, or any part thereof. 3 Bac. Abr., 393, 394, of Lond. ed. of 1832; 2 Wms. Saund., 68 *b*; *Shaw* v. *Cutteris*, Cro. Eliz., 850; *Williams* v. *Cutteris*, Cro. Jac., 136; Id., 143; *Foster* v. *Jackson*, Hob., 59, (which three cases were decided after *Blumfield's case*, 5 Co., 174); Lord Ellesmere's Observations on Coke, p. 18; Stat. of 21 Jac.; *Burnabey's case*, 1 Str., 663; *Ex parte Warder*, 3 Bro. Ch., 191; *Ex Parte Cater*, 3 Id., 216; *Ex Parte Knowell*, 13 Ves., 193; 5 Hen. Stat. p. 531. §§ 3, 4, 5, 6, 7, 8, 9; Id. p. 539, §§ 27, 28; *Willson* v. *Jackson*, 5 Leigh, (Va.), 102; 8 Hen Stat. p. 329, §§ 8, 9; *Bullock* v. *Irvine's* Adm'rs, 4 Munf. (Va.), 450; *Shirley* v. *Long*, 6 Rand (Va.), 735; 1 Rev. Code of 1819, p. 528, § 10; *Jackson* v. *Heiskell*, 1 Leigh, (Va.), 257, 260, 261, 275, 276; *Foreman* v. *Loyd*, 2 Id., 284, 296, 298; *Beverly* v. *Brooke*, 2 Id., 445; 2 Tuck Com., 345, 358, 373; *Rogers*, &c. v. *Marshall*, 4 Leigh, (Va.), 425, 431, 432, 435; *Leake* v. *Ferguson*, 2 Gratt, (Va.), 432; 1 Lomax's Dig., 302; *Beers* v. *Houghton*, 9 Pet., 362; *Duncan* v. *Darst*, &c. 1 How., 309; 1 Story's Laws U. S., 716; *Bank of U. S.* v. *Weisiger*, 10 Pet., 353; *United States* v. *Stansbury*, &c., 1 Id., 573; *Tayloe* v. *Thompson*, 5 Id., 367, 368, 369; *United States* v. *Morrison*, 4 Id., 124. *Hayling* v. *Mullhall*, 2 W. Bl., 1235; Eng. Insolvent Act of 7 Geo. 4, ch., 57, § 61, Evan's Stat. p. 193, ll.; *Collins* v. *Benton*, 2 Man. & G., 861; 40 Eng. Com. Law., 663; *Freeman* v. *Ruston*, 4 Dall., 214; *Jackson* v. *Benedick*, 13 Johns, (N. Y.), 533.

Mr. Justice DANIEL delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States from the Eastern District of Virginia, dismissing the bill of the appellant who was plaintiff in that court.

On the 3d of December, 1814, Seekamp's administrators recovered a judgment in the Circuit Court of the United States for the Eastern District of Virginia, against Neill McCoull, for $5,688 damages and costs. In February, 1817, this judgment was affirmed with costs, and damages at the rate of six per centum, for which the Circuit Court gave judgment accordingly, in May, 1817, when the mandate was produced.

*On the judgment a *ca. sa.* issued the 29th of July, [*410
1817, which was returned executed upon McCoull, and a bond taken, with condition that he should remain within the bounds of the Superior Court of Henrico county. This admission to the jail limits seems to have been under the act of Congress of January 6, 1800, (2 Stat. at L., 4), expounded

in *United States* v. *Knight*, 14 Pet., 316. See 13 Hen. Stat., p. 373, § 37, and 1 Rev. Code of 1819, p. 535, § 30

In what way McCoull got back into the custody of the marshal does not clearly appear; and perhaps it is not material. He seems while imprisoned to have petitioned to have administered to him the oath prescribed by the act of Congress, for the relief of persons imprisoned for debt. The oath was administered on the 18th of July, 1821, and McCoull then discharged from his imprisonment on this judgment.

Although this proceeding was under the act of Congress, which has no provision requiring a conveyance from the debtor, a deed seems to have been executed by McCoull, under the idea that the state law in 1 Rev. Code of 1819, p. 537, was in some way to be applied to the case. The deed is to John Pegram, then marshal of the Eastern District of Virginia, and conveys to him and his successors in office, to be disposed of according to law, such interest as McCoull, on the day of his discharge, had in any lands or other property; stating, however, on the face of the deed, that all the property had theretofore been conveyed by deeds of record.

It appears that on the 20th of September, 1812, a tract of land in Henrico, known by the name of Marion Hill, was conveyed by Walter Shelton, as commissioner, to McCoull, and by McCoull to John Parkhill as trustee, to secure the purchase-money. McCoull paid to Shelton the money secured by this deed of trust, but failed to get a deed of release from Parkhill.

Between June, 1814, and December, 1817, McCoull sold, and by deeds of bargain and sale conveyed, to individuals, certain lots which were part of the Marion Hill tract.

McCoull died intestate, leaving a widow, Julia, and five children, to wit: Ann, Charles L., Mary P., Julia L., and John J., the three last of whom were infants when this suit was brought.

On the 19th of February, 1829, by an agreement under seal, the widow and two eldest children of McCoull, in consideration of $1,000, transferred and surrendered to William Selden, a certain part of the Marion Hill tract; it being agreed that if they should within six years make to Selden a good title, he should in addition pay to them, or their order,
*411] $20 for each acre to which *such good title should be made, and if within six years they should not make him a good title, then they were to surrender all right of property as well as possession.

On the 14th of September, 1829, a deed of release was made from Parkhill and Shelton, (the parties to the deed of

trust of the 20th of September, 1812), to Selden, which, after reciting Selden's purchase of part of the Marion Hill tract, (supposed to be of 100 acres), and the desire of the widow and heirs that a deed of release should be executed to Selden for that part, contains a full release of the legal title from Parkhill to Selden.

About 14 years after, McCoull was discharged as an insolvent, to wit: In May, 1835, Seekamp's administrators filed their original bill, claiming that by their judgment they acquired a lien upon the lands of McCoull; alleging that of the land purchased from Shelton a considerable portion remained in McCoull's possession unsold at the date of the deed to Pegram, "which by the provisions of the said deed was subjected to the payment of the said judgment;" charging that Selden purchased with knowledge of the said judgment and of the deed to Pegram, given to secure it; that Selden knowing from the situation of the affairs of McCoull, and the lien of the plaintiffs, that no good title could be made him by the widow and heirs of McCoull, did in fact pay them a very trivial consideration for the said 100 acres, compared with the full value thereof; and claiming that they have a valid subsisting lien upon the said 100 acres, and that the same should be applied in satisfaction of their judgment.

The bill also mentions certain lands sold and conveyed by Bartlett Still to McCoull, states that these lands remained in McCoull's possession till his death, and claims that they are liable under the deed to Pegram to satisfy said judgment.

The plaintiffs further claim that they have a right to subject all the other lands and property conveyed in said deed executed for their benefit, to the satisfaction of said judgment in whatever hands they may be found, as said deed operated to bind the property thereby conveyed, from the date of its admission to record.

The bill makes defendants, the widow, heirs and administrators of McCoull, William Selden, and Edmund Christian, the successors (as marshal) of John Pegram, and besides asking certain discoveries, prays the court to decree a sale of the said 100 acres of land conveyed Selden, and the two parcels conveyed by Still to McCoull, and whatever land or other property, subject to the debt of Seekamp's administrators, may have descended or come to the hands of the widow and heirs of McCoull, and that so much of the proceeds of said sale as may be necessary *to pay off and discharge said judgment with interest and costs, may be applied in [*412 satisfaction thereof.

Selden alone filed answer. In this answer he insists that

by the deed of September 14, 1829, from Parkhill and others, the legal title is vested in him, and states, that being aware of many outstanding incumbrances upon the equitable right, he has endeavored to take in those incumbrances which gave preferable liens.

The answer of Selden sets forth amongst other incumbrances prior in time to the deed to Pegram, one created by a judgment of Taylor and Hay rendered in their favor in April, 1821, in a state court of Virginia, against McCoull, and a *ca. sa.* levied on his body the 28th of April, 1821, under which he was discharged the 21st of July, 1821, by taking the oath of an insolvent debtor; and states that Selden, being advised that this execution of *ca. sa.* being levied after the 1st of January, 1820, when the act in the 1st vol. of Rev. Code of 1819, p. 528, § 10, commenced. bound the real estate of McCoull from the time when it was levied, obtained an assignment of this judgment from the representatives of William Dandridge, for whose benefit the judgment was obtained. This lien being prior to the date of the deed to Pegram, under which the plaintiffs claim, he insists has preference over their claim.

He insists that the lien of the plaintiff's judgment was extinguished by the levy of his execution on the body of McCoull, and that the plaintiff can have no other lien on the property of McCoull, except the deed made to Pegram. That amongst the deeds made by McCoull prior to that last mentioned, was one bearing date on the 26th day of May, 1814, and another on the 2d of January, 1821, for the benefit, amongst others, of the wife of McCoull, in consideration of the relinquishment of her dower in the property of her husband, sold and aliened by him; which deeds, as Selden claims also under the widow and heirs of McCoull, he insists should enure to his protection against the claim of the plaintiff. After this answer an order was made June 6, 1836, giving leave to the plaintiff to amend his bill. Nothing was done under this leave for six years, viz.: until June 9th, 1842, when a bill of revivor was filed in the name of the administrator *de bonis non*, of Seekamp against Charles L. McCoull, administrator of Neill McCoull. By an order made on the 19th December, 1843, it is stated that the suit was abated as to the widow of McCoull, and that the plaintiff had by leave, on that day filed an amended bill, making defendants, the representatives of Dandridge, for whose benefit the judgment in favor of Taylor and Hay had been rendered and that those representatives had filed their answer.

*413] *This answer insists that the lien of the representatives of Dandridge (claiming through Taylor & Hay) is

preferable to that of the plaintiff; that the plaintiff, by taking his *ca. sa*, released the lien of his judgment, and can claim only by force of the surrender made by McCoull when he took the insolvent oath; the *ca. sa.* of Taylor & Hay levied the 28th of April, 1821, constituted (by force of the statute of Virginia) a lien on lands from the time of levy, which gave their claim a priority over that of the plaintiff; that moreover, Taylor & Hay (and in their stead the representatives of Dandridge) have a right to be substituted for James Carter and John McCoull, (sureties for Neill McCoull to Taylor and Hay) for whose benefit there was executed a deed of the 10th of January, 1821.

The cause was argued at the May Term of 1846, and the court took time to consider; at the June rules of the court in 1848, a notice was issued by Seekamps's administrator, that he would apply for leave to file an amended and supplemental bill, which application being opposed on the part of Selden and of those who had become some time previously purchasers from him, the court on the 7th of June, 1849, after hearing the petition and the objections made thereto, refused leave to file the proposed bill either as an amended or supplemental bill, and decreed that the bill of the complainants be dismissed with costs.

The important question upon this record and that upon the determination of which the decree of the Circuit Court should be affirmed or reversed, is a question of priority between these parties, growing out of their respective acts and the legal consequences flowing from those acts, with reference to the subject claimed by them both, as having been once the property of Neill McCoull, from whom the rights of both parties are deduced. For the appellant, it is insisted, that by operation of his judgment in May, 1817, the levy of his *capias ad satisfaciendum* on that judgment in July of the same year, and the discharge from custody of McCoull under the insolvent law of the United States, and his deed at the time of that discharge to Pegram the marshal, there was created a lien in behalf of the appellant on all the property held by McCoull, including the land purchased by the defendant Selden, creating a priority in favor of the appellant which neither the acts nor the rights of Selden, nor of others deriving title from M'Coull subsequently to the judgment, execution, and deed above mentioned, could divest. On behalf of Selden and those whom he is instructed to protect, it is contended, that, whatever might have been the capacity of the appellant's judgment to bind the lands of M'Coull from the date of the

judgment, by a proceeding under it such as would have been
*414] *proper to maintain and enforce that lien, yet by the election of the appellant to take the body of McCoull and to retain him in custody from 1817 to 18th of July, 1821, the lien of the judgment was released, and *quoad* all property of the debtor at the date of the judgment could be revived by one of two events only, viz., the escape of the debtor from prison, or his death whilst in custody, the occurrence of neither of which events is pretended. That the act of Congress under which M'Coull was discharged as an insolvent debtor, created or preserved no specific lien, and the deed to Pegram could have no such effect, and conveyed, if any thing, only such interest as McCoull possessed at the date of that deed, the deed itself declaring by its terms, that all the property of McCoull had been theretofore conveyed by prior conveyances of record. That by the acquisition of the legal title to the land in dispute from Parkhill, to whom the legal title had been conveyed by McCoull, three years anterior to the judgment against him by the appellant and the purchase by Selden, of the widow and heirs of McCoull, and the assignment to him of the lien created by the judgment in favor of Taylor & Hay, against McCoull, and the discharge of the latter under a *capias ad satisfaciendum* sued on that judgment and executed on the 28th of April, 1821, previously to the deed to Pegram, Selden had obtained a complete title to the land in question, which could not be overreached or affected by the judgment of the appellant. The truth or the incorrectness of the positions assumed by these parties respectively, must be settled by a proper construction of the laws of the state within which the land in dispute is situated, and within which all the proceedings referred to have occurred.

By the decisions of the highest tribunal in Virginia, the law of that state, prior to the statute of 1819, with respect to the lien of judgments, has been expounded in very close conformity with the common and statute law of England, from which it appears to have been adopted. Thus we find it laid down by compilers and by commentators upon the law of England, that the lien of judgments upon lands in that country was created by the Statute *de mercatoribus*, also styled the Statute of Acton Burnell, 11th of Ed. 1st, and by the Statute of Westminster 2d, 13th Edward, 1st Cap., 18, by the latter of which statutes the writ of *elegit* was given by enacting, that "he who recovereth in debt or damages, may have either a *fieri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and half of his land, until the debt be

levied upon a reasonable price or extent." *Vid.* Bacon's Abridg. tit. Execution A, referring to the statutes above mentioned, and citing Hobart, 60, and 2 Roll. Abr., 475.

*It is said by Bacon, on the authority of Dalton's Sheriff, 144, that the statute of 25th Ed. 3, Cap., 17, [*415 subjected the person of the debtor and gave the *capias ad satisfaciendum* against him in debt, detinue, &c., in the case of a common person, though by this same compiler, it is said, that doubts have been suggested down to a period as late as the time of Lord Mansfield, as to the mode by which a proceeding existing at common law confessedly in behalf of the king alone, and affecting so gravely the personal liberty of the subject, had been placed at the discretion of private persons. Leaving these questions concerning the remote origin of the different modes of final process, as belonging peculiarly to the province of the antiquary, we proceed so far as is necessary for the decision of the case before us, to ascertain the effect of them as settled by judicial interpretation in England, and in the jurisprudence of Virginia, upon which by custom and by statutes they may have been ingrafted. The force and operation of these different modes of final process in England in reference both to the parties resorting to them and to those on whom they are brought to bear, will be seen under the several divisions of the title Execution in the 3d vol. of Bacon. They have also been traced with his characteristic perspicuity and method by Mr. Justice Blackstone, from p. 413 to p. 421 of the third vol. of his Commentaries, chap. 26. In 3d Bacon Abr., Execution D., p. 392, the law is thus stated, "When the plaintiff has judgment he has it in his election to sue out what execution he pleases; but he cannot regularly take out two different executions on the same judgment nor a second of the same nature unless upon failure of satisfaction of the first. Therefore, if the plaintiff upon a judgment or recognizance at common law sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels and a moiety of the land, which being entered upon the record, he is thereby estopped, and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out." The exceptions to this restriction on the plaintiff's right to another execution, are the return of *nihil* on the first, and the return by the sheriff that he hath levied only on the goods of the defendant; because the plaintiff being entitled to levy on the land also, should not be precluded from the benefit conferred by the statute. But if the land be delivered, though

of never so little value, that will be a bar, for the sheriff hath delivered the moiety of the land according to the statute. For this are cited, Bro. Elegit; 15 Roll Abr., 896; Hob., 57; 5 Leon, 87; 2 Bulstr., 97, and other authorities. In conformity with the law as just stated, is the doctrine of Mr. Justice
*416] Blackstone, who *concludes his remarks upon this subject in the following words, vol. 3d, p. 419: "This execution or seizing of lands by *elegit* is of so high a nature, that after it the body of the defendant cannot be taken, but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*, for such *elegit* is in this case no more than a *fieri facias*, so that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law." The origin and effect of the *elegit* have been thus dilated upon, as proper to define the foundation and effect of the lien of a judgment upon lands, to show that it mounts no higher than the *elegit* itself, or the capacity of the judgment creditor to resort to that process, and that where such capacity was wholly taken away or suspended, the lien was affected in the same degree. With regard to the effect of the *capias ad satisfaciendum* upon the rights of the parties to a judgment, we are told by Blackstone, vol. 3d, p. 415, that "The writ of *capias ad satisfaciendum* is an execution of the highest nature, in as much as it deprives a man of his liberty till he makes the satisfaction awarded, and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or his goods."

So in 3d Bac. Abr. tit. Execution D., p. 395, it is said: "It was formerly held, that if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy, because he had determined the choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law, and for this are cited *Foster* v. *Jackson*, Hob., 52; *Williams* v. *Critteris*, Cro. Jac., 136; and Rol. Abr., 903; and it has been ruled that if the plaintiff consent to the defendant being discharged out of execution upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge, should afterwards be set aside; *vid.* 4 Burr., 2482; 1 T. R., 557; 2 East, 243. And as late as 1806 the following language is held by the Lord Chancellor in the case *ex parte Knownell*, 13 Ves., 193. "Considering the bankruptcy out of the case, it is clear that by the taking the body in execution the debt

is satisfied to all intents and purposes. If the debtor being in execution becomes a bankrupt, the creditor, in reason and justice, must have a right to elect; not having contemplated that event, which deprives him of the fruit of his execution. But when the commission has previously issued, and the creditor therefore takes his execution, apprised of the disposition to be made of the effects, and that there may be a *certificate and has his choice, that step upon the same [*417 reason must be an election, and the debt is satisfied, whether by payment or by having the body in execution is not material." The only known exceptions to the effect of the *capias ad satisfaciendum* executed are, 1st, the provision of the statute of 21st Jac., 1st. Cap., 24, that if the defendant shall die while charged in execution, the plaintiff may, after his death, sue out a new execution against his land, goods, or chattels; and the instances of an escape or rescue of the party taken in execution; in which two last instances it has been ruled, that although the sheriff is thereby liable because he ought to have taken the *posse comitatus*, yet the plaintiff may take out any new execution, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.

From this view of the law, as ruled by the English courts, the following points may be considered as conclusively ruled in that country: 1st. That the lien of the judgment results entirely from the plaintiff to elect to charge the goods and the moiety of the lands of the debtor. 2d. That the election so to charge them by an *elegit* executed, discharges from liability the body of the defendant and the remaining moiety of the lands. 3d. That the *capias ad satisfaciendum* executed, is *pro tanto* a satisfaction of the judgment which releases *proprio vigore* any previous lien upon the lands, and inhibits all recourse against the goods and chattels or lands of the debtor, with the exceptions of the instances of death, whilst charged in execution, or of an escape from prison, or a rescue.

Recurring now to the laws of Virginia, upon these same subjects, we find as early as the year 1748 (22 George II.) the statute of the colonial legislature beginning with the following preamble: "Whereas by the common law of England and divers acts of Parliament, which are binding upon the subjects of this colony, all persons recovering any debt, damages or costs, by the judgment of any court of record, may, at their election, prosecute writs of *fieri facias*, *elegit*, and *capias ad satisfaciendum* within the year, for the taking of the goods, lands, or body of persons against whom such judgment is obtained, to the end the said several writs issuing out of

any of the courts of record within this dominion, and the manner of executing and returning the same may be uniform, and the mischiefs arising from incorrect forms and insufficient returns of such writs prevented, Be it enacted, &c." The first thing which strikes the attention in reading this preamble is not only its explicit recognition of the common law and statutes of the mother country, with respect to the binding force and operation of judgments, but also of the modes, and the effect of those modes, as they were known in the mother
*418] *country, to be carried into operation. Thus it is declared that there shall be a *fieri facias* for taking the goods—an *elegit* for taking the lands, and a *capias ad satisfaciendum* for taking the body of any person against whom such judgment is obtained. Not only are these forms of proceedings adopted with the import which their mere terms might convey, but they are adopted with direct reference to the common law and statutes of England (and of course to the judicial interpretations of the law), as decisive of their operation and effect. The statute then proceeds to prescribe the forms of these several writs, and the returns to be made upon them, following, it is believed, literally, the forms in the courts of law in England, with such exceptions only as the difference in situation and the style of the courts rendered indispensable; and in the 3d and 4th sections enacts the provisions contained in the stat. of the 21st of James I., Cap. 24th, authorizing the renewal of execution against the lands and goods of a debtor dying in execution; and protecting the title of purchasers from the prisoner to lands *bonâ fide* sold by him for the payment of any of his creditors, at whose suit he shall have been in execution, and the money paid or secured, to be paid to such creditors with their privity in discharge of his debts, or some portion thereof. The construction of this statute, which, up to the revisal of the laws of Virginia made in 1819, and going into effect in 1820, controlled the question of judgment lien, and the rights of purchasers from a debtor in execution is understood to be definitively settled, and to have established the rules in the state in conformity with the doctrine of the English courts, that the lien of a judgment depends entirely on the right or capacity of the plaintiff to sue out an *elegit*, and that by electing a *capias ad satisfaciendum*, the lien of the judgment is so far destroyed as to be inoperative, except in the instances of death in execution, and of an escape. Indeed, the provision in the statute of 21st James I., and in the Virginia act of 1748, which protect *bonâ fide* sales by debtors in execution, are wholly inconsistent with the idea of a continuation of a judgment lien during the

operation of a *capias ad satisfaciendum* executed, for the lien of a judgment is a legal lien commencing and coeval with the judgment itself. and unless released by charging the debtor in execution, would by its own force and effect go back to the date of the judgment, and override all *mesne* alienations or rights of every description. But this part of the Virginia statute of 1748 has been clearly expounded by the Supreme Court of Virginia, in the case of *Bullock* v. *Irvine's administrators*, reported in 4 Munf. (Va.), 450, which was a suit brought to vacate a sale made by a debtor in execution to one of his creditors, and which sale the Chancellor had decreed to be void as to creditors *under the laws of the [*419 state concerning executions. The Supreme Court, in reversing the decree of the Chancellor, uses this language: "That instead of the decree rendered by the Chancellor in this case, he ought to have directed an issue, to try what was the amount of the consideration which passed from the said Hannah Bullock to James Bailey (the debtor in execution) for the land in question, and whether there was any secret agreement or understanding between the said parties, that the said land was to be holden by the former for the use and benefit of the latter. The court is further of opinion, that if it shall turn out upon the issue aforesaid, that a reasonable consideration did pass as aforesaid, and that there was no such secret agreement or understanding, that then and in that case the bill of the appellees should be dismissed, the transaction in that view being only the preference of one *bonâ fide* creditor over another." Thus it is seen that the *bonâ fides* of the transaction, and not the quality or extent of the legal lien, determined the validity of the transaction, for the existence of such a lien would have deprived the debtor of all power of alienation.

In the revisal of the laws of Virginia, made in the year 1819 (going into operation in the year 1820), a provision was introduced by the tenth section of the law concerning executions, declaring that every sale, conveyance, and transfer of any lands or tenements made by any person charged in execution for any debt or damages, shall be absolutely null and void, as to the creditor at whose suit he is so charged in execution, unless such sale, transfer, and conveyance be absolute and *bonâ fide*, and be made for the payment of the debt and damages due to such creditor or creditors; and that all executions of *capias ad satisfaciendum*, levied after the commencement of this act, shall bind the real estate of the defendant from the time when they shall be levied. It has been insisted, that this execution-lien, given by the 10th section of the act

of February, 1819, so attaches upon the lands and tenements of the debtor, as to cut out all junior incumbrances by judgment, whilst the debtor remains in execution, although the regular proceedings be had upon such junior judgments to enforce the lien created by them (as judgments) upon the lands of the debtor. The first interpretation given to the 10th section of the statute of 1819, by the Supreme Court of Virginia, was in accordance with the position just mentioned, as will be seen by the case of *Jackson* v. *Heiskill*, 1 Leigh (Va.), 257. But the case of *Jackson* v. *Heiskill* having been decided by a bare *quorum* of the court, and by a bare majority of that *quorum*, the question so determined was reconsidered by a full court, in the case of *Foreman* v. *Loyd*, &c., reported in 2 Leigh (Va.), 284; and by the court, with the exception of one judge, *the case of *Jackson* v. *Heiskill* was over-
*420] ruled, and the following interpretation given to the 10th section of the statute of 1819, and to the execution-lien created thereby, namely: That, where several creditors recover judgment and sue out writs of *capias ad satisfaciendum* against the debtor, upon which he is taken and charged in execution; and then another creditor recovers judgment against the same debtor, and sues out an *elegit* on which his lands are extended, and a moiety of them delivered, and then the debtor is regularly discharged from the writs of *capias ad satisfaciendum* as an insolvent debtor, putting into his schedule the whole of his lands which had been extended under the *elegit*, the lien of the writs of *capias ad satisfaciendum* does not overreach and avoid the extent under the *elegit*. The case of *Rogers* v. *Marshall*, 4 Leigh (Va.), is perhaps a still stronger illustration of the extent to which the execution-lien may be affected by a junior incumbrance; as in this last case there was no intervention of a judgment, or of legal process, to operate against the execution-lien; but, in this instance, between the period of the judgment rendered and the *capias ad satisfaciendum* executed, sundry mortgages were made by the debtor to secure debts to other creditors. It was held that, by the actual service of the *capias ad satisfaciendum* on the debtor, the lien of the judgment was destroyed, that the creditor could only stand on the lien given in the *capias* executed by the statute of 1819, sect. 10, and that, therefore, the mortgagees were entitled to precedence. The same doctrine is affirmed in the case of *Leake* v. *Ferguson*, as late as 1846, and reported in 2 Gratt. (Va.), 419.

Upon the review here taken of the decisions of the courts in England upon the subject of judgment-lien, and of the interpretation put by the Supreme Court of Virginia upon

the statutes of that state of 1748, re-enacted in the revisals of 1794 and 1803, and of 1819, we are brought necessarily to the following inquiries: 1st. What lien was ever possessed by the appellant and those he represents upon the lands of McCoull? And 2d. In what way has such lien been affected by the acts of appellant? It is certain that, on the 22d May, 1817, the appellant held a lien by judgment upon all the lands, tenements, and hereditaments of McCoull; but it is equally certain that, by levying a *capias ad satisfaciendum* upon the body of McCoull, in July, 1817, he released the judgment-lien upon such lands and tenements, according to the interpretation given of the statute of 1748, and also by that placed upon the statute of 1819, sect. 10. That the lien surrendered by the service of the *capias ad satisfaciendum* was never revived by the force of the former statute, inasmuch as there was neither an escape nor a dying in custody; and that no execution-lien was created by the service of *a *capias ad satisfaciendum*, and the admission of McCoull, [*421 to the oath of an insolvent debtor, in virtue of the 10th section of the act of 1819, as that section, by express language, applies only to executions levied after the commencement of the act of 1819, and McCoull was already in custody under an execution levied in July, 1817, more than two years anterior to the passage of that act, and under process sued out under the statute of 1748, continued in the revisals of 1794 and 1803. In truth, the oath of insolvency administered to McCoull was not in virtue of either of the State laws above referred to, but under the act of Congress of the 6th of February, 1800, which oath of insolvency created no specific lien in favor of the appellant, and the deed to the marshal, which was neither ordered nor required by the act of Congress, could create no such specific or exclusive lien, and upon its face it purports to create none; but, on the contrary, recites that all the property of McCoull had been conveyed by deeds previously made and recorded. The only lien by execution upon the lands of McCoull, in virtue of the statute of 1819, sect. 10, disclosed by the record, is that of Taylor and Hay, arising from a judgment rendered in a State court of Virginia against Neil McCoull, in April, 1821, and that lien, whatever its effect may be, must enure to the benefit of Selden, who holds an assignment of the judgment against McCoull from the beneficiaries thereof, it being prior in date to the deed of Pegram. The lien which once existed, in virtue of the appellant's judgment, having been extinguished by the levy of the *capias ad satisfaciendum* upon the body of McCoull, and there being no revival thereof by any of the causes known to the law, we are

unable to perceive why Selden, who was a purchaser from the widow and heirs of McCoull, might not fairly and properly obtain the legal title from Parkhill, in whom that title was vested, or get in the lien of the execution existing in favor of Hay and Taylor. By doing so, he invaded no right of the plaintiff, who had relinquished his judgment-lien, and had acquired no other under the deed to Pegram, which professes to convey to him none, and to which he was no party. Selden, having paid his money, committed no wrong on the plaintiff by drawing to himself the elder legal title outstanding in Parkhill, and by fortifying it by the execution-lien of Taylor and Hay, which clearly had precedence of the plaintiff.

After this cause had been heard in argument and taken under advisement by the Circuit Court, the plaintiff petitioned that court to permit him to file a farther bill, by way of amendment and supplement to the original bill and bill of revivor previously filed in the cause; and, after being heard by counsel upon his petition, the court refused to grant the *422] prayer thereof, on the *grounds that the application was made at too late a period, and that the changes proposed by the plaintiff in the character of the cause would have been in reality the presenting of an entirely new case, rather than an amendment of the original bill. This refusal of the Circuit Court we hold to have been sound in principle; and it is sustained by the express language and authority of this court, in the case of *Walden et al.* v. *Bodley et al.*, which declares that, although "there are cases where amendments may be permitted at any stage of the proceedings in the cause, as where an essential party has been omitted; yet amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause is set for hearing, much less after it has been heard." *Vid.* 14 Pet., 156. Moreover, a fact which imparts greater force to the refusal of the Circuit Court to permit amendment at so late a stage of the proceedings is this, that the application to that court appears to have been accompanied with no evidence, and not even by an affidavit, to show that the amendments desired could not have been made portions of the original bill; on the contrary, it is manifest, that they might have formed a part of the case as originally presented to the Circuit Court, if at any time it were proper to incorporate them with the subject-matter, and with the objects proposed by the original bill. The prayer of the original bill was limited to the enforcement of an alleged judgment-lien upon specific property purchased by the defendant, Selden, and to recourse against the heirs and widow of

McCoull, of whom Selden had purchased; the proposed change, by way of amendment and supplement, is a general bill for discovery and relief against all persons alleged or supposed to have been purchasers or grantees from McCoull, and for satisfaction out of the property purchased by him, or to which he had title at the date of the original judgment in favor of Seekamp. Such an essential change in the character and objects of the cause, proposed, too, after a hearing, and when it was manifest that the object of the original bill, namely,—the lien of the judgment, no longer existed, could not have been accorded to the plaintiff by any sound rule of practice. On either aspect of his case, as presented by the appellant, we think that he established no ground for equitable interposition in the Circuit Court, and approving the decree of that court dismissing the bill of the appellant, we hereby order that the same 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 Eastern *District of Virginia, and was argued by counsel. On consideration whereof, it is now here ordered [*423 and adjudged by this court, that the judgment of the Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

DUNCAN LINTON, CHARLOTTE LINTON AND HER HUSBAND, FRANCIS SURGETTE, STEPHEN DUNCAN, GUARDIAN OF MARY LINTON AND JOHN LINTON, MINORS, PLAINTIFFS IN ERROR, *v.* FREDERICK STANTON.

Where the highest court of a state decided in favor of a defendant who pleaded his discharge under the bankrupt law of the United States, and the case was brought to this court under the 25th section of the Judiciary Act, this court has no jurisdiction.

It would have been otherwise if the decision had been adverse to the exemption claimed under the law of Congress.[1]

Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section. The decision of a state court upon their effect cannot be reviewed by this court.[2]

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[1] In no case will a writ of error lie to the Supreme Court, where the decision of the state court is *in favor* of the privilege claimed under an act of Congress. *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Strader* v. *Baldwin*, 9 How., 261; *Reddall* v. *Bryan*, 24 Id., 420; *Roosevelt* v. *Meyer*, 1 Wall., 512; *Ryan* v. *Thomas*, 4 Id., 603.

[2] See *Roosevelt* v. *Meyer*, 1 Wall., 517.

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

The plaintiffs in error, on the 19th of June, 1848, filed their petition in the Third District Court of New Orleans, stating themselves to be residents of Mississippi, and the only heirs and representatives of John Linton, deceased, and as such in possession of his property.

That on the 13th May, 1839, the defendant, Stanton, owed the estate of John Linton, then deceased, the sum of $11,446.60, and on that date exected his two promissory notes in favor of Stephen Duncan, (one of the petitioners, and administrator to Linton,) one for $5,856.40, due the 1st April, 1841, the other for $5,590.20, payable the 1st April, 1842.

The petitioners further state, that on the 25th August, 1842, and also on the 25th December, 1843, the defendant promised to pay each of these notes, but has neglected and refused to do so, and that the debt still remains due and unpaid.

The two notes, they state, were made and fell due in the state of Mississippi, where the legal interest on all debts due and unpaid, is 8 per cent. That the defendant lives in Mississippi, but was then in New Orleans.

They pray judgment against him for the amounts of the notes, with interest from 13th May, 1839, till paid, and for general relief.

*424] *Stanton filed his exceptions, alleging that the petition did not fully set out and state the nature of the demand, requiring the plaintiffs to state whether the promises charged were verbal or written, and if written, claiming oyer.

Plaintiffs filed two letters from Stanton to Duncan, dated, respectively, the 25th day of August, 1842, and the 25th December, 1843, to which in their supplemental petition they refer as the written evidence of the promises alleged in their original petition, and also charge verbal promises by Stanton to pay, made both before and after the dates of these letters.

To this supplemental petition, Stanton filed his exception, alleging that the verbal promises above charged were insufficiently stated, from failure to mention to whom and when they were made.

The plaintiffs filed an amended petition, stating that these verbal promises were made to Stephen Duncan, the representative of John Linton, on each and every day of the years 1842, 1843, 1844, 1845, 1846, and 1847.

Stanton's answer denies all the allegations of the original and supplemental petitions; and specially pleads, that on the — day of ——, 1842, he applied to the United States District

Court, in and for the state of Mississippi, where he then resided, for the benefit of the bankrupt law of the United States; and after due proceeding had, he obtained his discharge and certificate, and that these proceedings and discharge took place after the date of the note sued on.

Pleads his discharge in bar, and also that the plaintiffs demand is barred by prescription.

His supplemental answers allege that the notes on which plaintiffs sue, and which were made before his bankruptcy, were secured by a deed of trust or mortgage upon real estate, and that the plaintiffs, or Duncan, for their use, purchased it and paid for the same by said notes, thus receiving payment and compensation. And further, that by the law of Mississippi, verbal promises to pay a debt discharged by bankruptcy are not binding.

Amongst the testimony offered on both sides, the defendant produced the proceedings in bankruptcy.

The District Court of New Orleans decreed in favor of the defendant.

The plaintiffs appealed to the Supreme Court of Louisiana, which confirmed the decision below, because,—

1st. The jurisdiction of the United States District Court in matters of bankruptcy not having been contested, a decree of that court, declaring that all the requisitions of the bankrupt act had been complied with, was conclusive when drawn collaterally into question.

*2d. Because the subsequent promises of the defendant, relied on by the plaintiffs, did not include this debt. [*425

The plaintiffs then brought the case up to this court.

Mr. Johnson moved to dismiss the writ of error for want of jurisdiction.

1st. Because, over the existence and effect of any promises of defendant to pay the debt after his discharge under the bankrupt act, this court has no jurisdiction.

2d. Because the only statute of the United States involved and drawn into question was that of the 19th August, 1821 (5 Stat. at L., 440,) and that was relied upon only by defendant; and the decision of the court below was in favor of, not against, the only title, right, privilege, or exemption claimed under it. Judiciary Act, 24th Sept. 1789, c. 20, p. 25, (1 Stat. at L., 85); *McKinney* v. *Carroll*, 12 Pet., 67; *Crowell* v. *Randall*, 10 Id., 368; *Gill* v. *Oliver*, 11 How., 529; *Williams* v. *Oliver*, at the present term of this court, MS.

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

This is a writ of error to the Supreme Court of Louisiana for the Eastern District, and a motion has been made to dismiss it for want of jurisdiction.

The plaintiffs in error, it appears, filed their petition in the Third District Court of New Orleans, against the defendant, to recover certain sums of money which they alleged were due to them on two promissory notes which had been executed by the defendant.

The defendant pleaded his discharge under the bankrupt law of the United States, and at the trial offered in evidence the record of the proceedings in bankuptcy in the District Court in which he had obtained his certificate. Objections were taken to the regularity and validity of this discharge, but they were overruled by the court, and judgment rendered for the defendant. The plaintiffs appealed to the Supreme Court of the State, where the judgment of the court below was affirmed, and this writ of error is brought to reverse that judgment.

The writ must, we presume, have been prosecuted under a misconstruction of the 25th section of the act of 1789, ch. 20.

We have no jurisdiction over the judgment of a State court upon a writ of error, except in the cases specified in that section. And the jurisdiction of this court is there limited with great care and in plain terms. It gives a writ of error to this court where a party claims a right or exemption under a law of Congress, and the decision is against the right claimed. Undoubtedly the defendant, in pleading his discharge under the bankrupt law, *claimed a right or exemption under a law of Congress. But in order to give jurisdiction something more is necessary; the judgment of the State court must be against the right claimed. In the case before us the decision was in favor of it, and consequently no writ of error will lie to this court under the provisions of the act of 1789.

*426]

And as we have no jurisdiction, we cannot examine into the objections made to the validity of the proceedings in bankruptcy. The judgment of the State court that they were valid, and the defendant thereby discharged from the debt due to the plaintiffs, is conclusive between the parties.

Nor has this court the power to examine into the other question which appears to have arisen as to the legal effect of certain promises which the defendant is alleged to have made after he obtained his certificate in the bankrupt court. The legal obligation of such promises depends upon the laws of the State in which they were made; and in a suit in a State court

the decision of that question by the highest tribunal of the State cannot be reviewed in any court of the United States.

This case must therefore be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana for the Eastern District, 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 the want of jurisdiction.

THE UNITED STATES, APPELLANTS, *v.* ALEXIS PORCHE.

The act of Congress passed on 26th May, 1824, enabling claimants to land in Missouri and Arkansas, to try their titles, was revived by the act of 17th June, 1844, and extended to Louisiana.

By the fifth section of the act of 1824, the claimants were required to present their claims within two years from the passage of the law.

This section being revived by the act of 1844, claimants were required by the latter act to present their claims before the 17th of June, 1846.

Acts supplementary to that of 1824 were not revived by the act of 1844. Nothing was revived except the original act.

The District Court of Louisiana had no jurisdiction, therefore, over a case where the petition was not presented until the 8th March, 1848.

The ninth section of the act of 1824 does not prevent the United States from appealing, where a claim is for less than one thousand acres.

THIS was an appeal from the District Court of the United States for Louisiana.

*It was a land case arising under the act of 1824, as revived by the act of 1844. [*427

On the 8th of March, 1848, Porche filed his petition in the District Court, claiming a confirmation of an order of survey made by Governor Miro in 1788. It is not necessary to state the title, as the case went off on a question of jurisdiction.

The District Attorney put in a plea that the two years within which, by the act of 1824, petitions were to be presented, had elapsed at the filing of the petition, and that no suit could be brought against the United States after the 17th of June, 1846.

The court overruled the plea, and the District Attorney then answered, repeating his plea of limitations, and also denying the allegations of the petition generally.

After sundry proceedings, which it is not necessary to state,

the District Court, on the 6th of June, 1849, passed a decree confirming the claim.

From this decree the United States appealed to this court.

It was argued by *Mr. Crittenden*, (Attorney-General), for the United States, and by *Mr. Henderson* for the appellees.

Mr. Crittenden contended that the decree ought to be reversed, because,

1. That the court below had no jurisdiction, because the petition was not filed within the two years limited by the fifth section of the act of 1824. That section enacts, that any claim within the purview of the act, which shall not be brought by petition before the said courts "within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and equity, and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to these claims." The act reviving the act of 1824, was passed 17th June, 1844; consequently the two years expired on the 17th June, 1846. The petition in this case was not filed until the 8th of March, 1848, nearly two years after the expiration of the time limited.

In answer to this point it is first said, on the part of the claimant, that the objection was waived by the District Attorney having put in his answer after the plea had been overruled.

The objection, however, was insisted on in the answer, as well as in the plea; but whether this had been so or not is immaterial, because the objection is one affecting the jurisdiction of the court. The jurisdiction is confined to claims, the *428] petitions *in which are presented within two years, and no consent or waiver can confer any more extended jurisdiction. It is also said that the right to institute proceedings extends to five years, under the act of 1844. This question was settled to the contrary in *Boisdore* v. *United States*, 8 How., 120.

But it is further said, that the time for filing petitions limited in the act of 26th May, 1824, was extended by the second section of the private act, entitled "An act for the relief of Phineas Underwood, and for other purposes," of the 22d May, 1826, which enacts, "that the time for filing petitions under the provisions" of the act of 1824, "shall be, and the

same is hereby, extended to the 26th day of May, in the year 1828." 1 Land Laws, 419.

There is another act relating to the same subject, not referred to in the brief on behalf of the claimant. It is an act of the 24th May, 1828, entitled "An act to continue in force for a limited time, and to amend an act entitled," &c., being the act of 1824. It enacts, in the first section, that the act of 1824 shall be continued in force "for the purpose of filing petitions in the manner prescribed by that act, to and until the 26th day of May, in the year 1829; and for the purpose of enabling claimants to obtain a final decision on the validity of their claims in the courts of Missouri and Arkansas respectively; the said claims having been exhibited within the time above specified, the said act shall be continued in force to and until the 26th day of May, 1830, and no longer." 1 Land Laws, 442.

By these acts of 1826 and 1828, the time for filing petitions was extended three years, in addition to the two given by the act of 1824. It will be insisted on hereafter, that the act of 1844 revived only and exclusively the act of 1824. But even if it should be held that the acts of 1826 and 1828 were revived, as well as the act of 1824, for other purposes, yet, for the purpose of extending the time for filing petitions, they were not so revived. There would be something in the argument if these acts had extended the time for filing two years, and one year longer; but the language employed "to the 26th day of May, 1828"—"to and until the 26th day of May, 1829," excludes the idea that these portions of the acts could be revived by the act of 1844. They afforded the relief intended at the time to claimants, but it cannot be extended by analogy to those claiming under the act of 1844.

But the act of 1844 revived only that of 1824. This question has been twice presented to the court, as arising on the point whether it was necessary for the claimants to make individuals holding any portion of the lands adverse to the claimants parties to the petition. The act of 1824 directs them to be made parties, but the act of 1828 repeals this direction. This brought *up the question. The case [*429
in which the point was raised went off on other grounds, and was never decided by this court.

It was maintained, on behalf of the United States, that the act of 1844 revived only that of 1824, as follows:

It is said that the act of 1844 revived the act of 1824, as taken in connection with that of 1828. That, however, must depend upon the intention of Congress, to be gathered from the language of the act itself. 1st. It refers to the act of

1824 by its name, reciting both its date and title. It does not revive the whole of its provisions, but expressly excludes all such portions of said act as referred to the territory of Arkansas. Here is a special reference to this act only, in a form of expression as clear and perspicuous as can be employed. Again, it says, "and the provisions of that part of the aforesaid act hereby revived." What is still more conclusive and decisive is the following provision, thus—"as if these states had been enumerated in the original act hereby revived." The act of 1824 is not only declared to be revived, but re-enacted, excluding all such portions of said act as referred to the Territory of Arkansas.

It is not reasonable to suppose that Congress intended to revive and re-enact the whole of the act of the 24th May, 1828, because no part of the first section could be of any avail. No exceptions are made in regard to this act, and no reference is made to it; while in regard to the act of 1824, the parts rejected are carefully excluded, and the residue only is revived and re-enacted. The established rules of construction show, that where a part is named and excluded, the residue is re-enacted. *Expressio unius est exclusio alterius.* Co. Litt., 210 A, 1836; Bro. Leg. Max., 183, 187.

Every part of the act of 1824, except what relates to the Territory of Arkansas, is revived and re-enacted by express words; the court will readily perceive that this case is distinguishable from one reported in 7 Cranch, 382. In that case the language of the reviving act was general in the reference to the acts which had expired; here it is special and specific, and, by several modes of expression, negatives any such general inference. There is a plain repugnance between the first and eighth sections of the act of 1824, and the second section of the act of 1828. If, therefore, the law of 1824 is revived and re-enacted, it is clear that the law of 1828 remains a dead letter.

Questions bearing a strict analogy have often arisen upon repealing statutes, whether it was the intention of the framers to repeal the whole or only a part of the acts to which such repealing statutes were applied. No better mode occurs of illustrating the subject, than by referring to the standard rules
*430] of construction *which have been adopted by the courts in such cases. The word repeal is not to be taken in an absolute sense, if, from the whole, it appears to be used with a limitation. In every case it is a question of construction, whether it operate as a total, or partial, or temporary repeal. *Rex* v. *Rogers*, 10 East, 573.

Where several acts of Parliament, upon the same subject,

had been totally repealed, and others repealed in part, it was held that it must have been the clear intention of the legislature that only the part of an act particularly pointed out should be repealed. *Camden* v. *Anderson*, 6 T. R., 723; Dwar. on Stat., 675.

The general principle undoubtedly is, that the repeal of a repealing statute revives the first act, unless the new law contained words indicative of a contrary intention of the legislature; in which case no such consequence follows.

So, it is said, if an act of Parliament be revived, all acts explanatory of that so revived are revived also; which may be true, unless in the latter case, as in the former, the language of the act authorizes a different interpretation. *The Bishop's case*, 12 Co., 7; *Tattle* v. *Greenwood*, 4 Bing., 496; Dwar. on Stat., 676; *Brown* v. *Barry*, 3 Dall., 367.

And where some parts of a revived statute are omitted in the reviving statute, they are not to be revived by construction, but are to be considered as annulled. *Ellis* v. *Paige*, 1 Pick. (Mass.), 43, 45; *Rutland* v. *Mendon*, Id., 154; *Blackburn* v. *Walpole*, 9 Id., 97.

The law does not favor implications in construing a repealing or a reviving statute. *Loker* v. *Brookline*, 13 Pick. (Mass.), 342, 348; *Haines* v. *Jenks*, 2 Id., 172, 176; Dwar on Stat., 675.

Mr. Henderson, for the appellee.

We first submit to the consideration of the court with the argument at hearing, a motion to dismiss this suit, for reasons—

1. Because the claim being for less than 1000 acres of land, is not appealable. We believe this was the intention of Congress. See 9th sect. act 26th May, 1824.

2. Because the record on which the appeal was taken to December term, 1849, was not filed in this court till 28th February, 1850.

Should this motion be overruled, we further submit that as the merits of the case upon the facts obviously sustain the decree, therefore we think, the only point deserving note, is the plea in bar interposed, that the suit was not instituted till after two years from the date of the act of 17th June, 1844.

*To this objection in this court our answer is two- [*431
fold. 1st. That as the United States answered to the merits, after their plea had been overruled, the objection was waived, and cannot now be reviewed in this court. To have made that objection available here, the United States should have suffered judgment final upon the plea, and appealed from

that judgment. *United States* v. *Boyd*, 5 How., 51; 16 Pet., 93, 94.

Our second answer is, that the judgment on the plea was right, because the right of action given by the act 17th June, 1845, "to institute proceedings to try, &c., extends to five years; or if not, and the time given to institute the suit is the same as was given to Missouri, then the limitation is four years from 17th June, 1844, to 17th June, 1848. Because the fifth section of the act of 1824 was by the act of 22d May, 1826, extended by amendment to 26th May, 1828; hence the 5th section of the act of 1824 was by said amendment a limitation of four years, and only expired as so amended." And this act, thus liberally construed, avoids this plea as to time.

Mr. Crittenden, in reply.

Two objections are taken to the appeal:

1st. It is said that no appeal lies, the claim being for less than one thousand acres.

By the latter part of the second section of the act of 1824, it is provided as follows: "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." That is the language of the law.

It is supposed, however, that the ninth section restricts the United States in the right of appeal thus given to both parties. This section declares that it shall be the duty of the District Attorney, where the claim exceeds one thousand acres, and the decision is against the government, to report the facts of the case to the Attorney-General, and the decision of the court; and if he shall be of opinion that the decision is erroneous, it shall be his duty to direct an appeal to the Supreme Court, and to appear and prosecute the said appeal. This section, it is very clear, however, is merely directory to the officers named in it; and it was so decided by the court in *Curry and Garland* v. *United States*, 6 How., 111. Its intention is obvious, to provide for greater care being taken in cases of large grants; and it in no way abridged the right of appeal given to both parties in all cases by the second section.

2d. It is said that the appeal should be dismissed, because the record was not filed till 28th February, 1850.

*432] *The decree in the case was delivered on the 8th June, 1849; and on the same day an appeal was prayed and allowed, and citation issued, returnable to December term, 1849. The record was filed on the 28th February, 1850, dur-

ing that term, which did not end until May. The point must have been made by the other side under some misapprehension.

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

It is evident that the District Court had no jurisdiction in this case, and the petition ought to have been dismissed.

The act of June 17th, 1844, under which the petition was filed, extended to Louisiana the act of 1824, and revived such parts of it as had expired. Under this provision, the fifth section of the act of 1824 was revived, and became a part of the law of 1844. And by this section, the time for filing a petition by a claimant under a French or Spanish grant, is in express terms limited to two years from the passage of the law. The time limited, therefore, for filing a petition in Louisiana, expired on the 17th of June, 1846, and this petition was not filed until March 8th, 1848, long after the time fixed by the law. 8 How., 119.

The acts of 1826 and 1828, referred to in the argument, can have no bearing on the question. They are not mentioned, nor in any manner referred to, by the act of 1844. They were special laws enlarging the time given by the act of 1824 to claimants in Missouri and Arkansas to file their petitions. But they are not extended to Louisiana by the act of 1844. Nothing but the act of 1824 is extended. As to the supposed waiver by the District Attorney of his objection as to the time of filing the petition, by answering after his plea was overruled, it must be made, we suppose, upon a mistake as to the fact. For in his answer he insists upon the same defense. And he had a right to avail himself of it by way of answer as well as by plea. But if he had, in express terms, waived it, and entered his waiver on the record, it would not have given jurisdiction to the court, when the act of Congress had not conferred it.

The objection to the regularity with which the appeal was brought up must also, we presume, have arisen from some oversight in the counsel. The record shows that it has been brought up regularly according to the provisions of the act of Congress. The objection that an appeal will not lie on behalf of the United States, where the claim is less than one thousand acres, is too clearly untenable to require discussion.

And as the petition was not filed within the time limited by law, it is not necessary to examine into the merits or want of merits of the claim. The decree of the District Court must be *reversed, and a mandate issued directing the petition to be dismissed. [*433

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed and annulled; and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, APPELLANTS, *v.* EDWARD SIMON.

In 1791 Miro granted an order of survey for some land in Louisiana.
During the ten years that the province remained in the hands of Spain, the grantee neither had a survey, nor took possession, nor did any other act showing an intention of fulfilling the conditions upon which the grant was made.
The regulations of Morales required parties so situated to have their titles made out. In case of neglect the Spanish government was under no obligation to grant the land, and therefore the claim is not good against the United States.[1]

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The case arose under the acts of 1824 and 1844, and was decided by the District Court in favor of the petitioner. The circumstances are stated in the opinion of the court.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States. No counsel appeared for the appellee.

Mr. Justice GRIER delivered the opinion of the court.

Edward Simon, the plaintiff below, filed his petition in the District Court of Louisiana, praying the confirmation of his title to a tract of land on the bayou Sans Façon or Huffpower, containing six thousand four hundred arpens. He claimed by various mesne conveyances through Stephen Flores, who on the 11th of November, 1791, petitioned Governor Miro for a grant of eighty arpens front on each side of said bayou; the petitioner being "desirous," as he states, "of establishing

[1] See note to *United States* v. *Moore*, *ante*, *209.

himself in the post of Opelousas." On the 20th of November, 1791, Governor Miro issued an order to Don Carlos Trudeau to establish the petitioner on the land for which he prays, in the usual form.

*The pleadings in this case do not allege, nor is there [*434
any evidence to prove, that Stephen Flores ever "established himself at the post of Opelousas," or took possession of the land which he desired to have, or obtained a survey thereof, or did any other act showing an intention of fulfilling the known conditions by which such gratuitous concessions could be converted from an inchoate into a complete title. In March, 1820, more than thirty years after its date, the order of survey is transferred by a person calling himself Stephen Flores to John Thompson. In 1825 John Thompson filed his claim with the register; but no action was taken on it, as its genuineness was doubted. In 1836 it was again submitted by the present petitioner to the register and receiver of Opelousas, under the act of 1835, and afterwards reported against by the Solicitor of the General Land-Office, because of "no inhabitation, no cultivation, no possession."

The land supposed to be described in this order of survey has been all, long since, surveyed and sold by the United States. During the twelve or thirteen years that the Province of Louisiana was in possession of Spain and France, Flores showed no desire of complying with the conditions of his grant, in any way, or of obtaining a title for the land offered to him by this order of survey. For twenty years after the land passed to the United States, and after officers were appointed to receive and report claims for confirmation, no act is done to show that this mere equitable inchoate claim was not wholly abandoned. After a neglect of ten years and more to obtain a survey, to settle or improve the land or take possession of it, the Spanish government was under no obligation, equitable or moral, to grant this land to Flores. As was said by this court in the case of *United States* v. *Boisdore*, (11 How., 96) "The policy of Spain was to make gratuitous grants for the purposes of settlement and inhabitation, and not for those of mere speculation. The grantee might have his land surveyed or might decline; he might establish himself on the land or decline; these acts rested wholly in his discretion. But if he failed to take possession and establish himself he had no claim to a title; his concession or first decree in such case had no operation."

The regulations of Morales of 1799, sections 18, 19, 20, 21, and 22, warn those "who have merely asked for land," or "obtained the first decree by which the surveyor is ordered

to measure it and put them in possession," from indulging the notion that they have any title to it, and peremptorily require that they should come forward and have their titles made out within six months. But, although we may believe that these conditions were not rigidly exacted, there is no rea-
*435] son to suppose that persons *who have neglected to take possession, improve or survey the lands which they have requested to be given them, for ten, twenty, or thirty years, can have any just claim on the government for such lands, or to receive others in place of them. Such laches is conclusive evidence of abandonment, if not of their total want of genuineness. But certainly no court of equity can be required to enforce the specific execution of inchoate grants or contracts made without consideration, which have been buried for half a century, and are now exhumed merely for purposes of speculation.

The decree of the District Court is therefore reversed and record remitted, with directions to dismiss the bill or petition of the plaintiff below.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court that the grant is null and void. Whereupon, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed and annulled, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, APPELLANTS, *v.* CONSTANCE LEBLANC, MODESTE LEBLANC, LOUIS LEBLANC, ASPASIA LEBLANC, JOSEPH LEON AND RAPHAEL BROISSARD, LEGAL REPRESENTATIVES AND HEIRS AT LAW OF PIERRE LEBLANC, DECEASED.

A paper, offered as a grant from the Spanish authorities for some land in Louisiana, decided to be incomplete and nothing more than the preamble to Spanish grants.

Moreover, there is no evidence that the claimants are the heirs of the grantee,

nor that any one claiming under him ever took possession or exercised any act of ownership from 1777 to 1846.[1]

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana, being a land case arising under the acts of 1824 and 1844.

The claimants presented in the District Court a paper, of which the following is a translation:

"Don Bernardo de Galvez, Colonel, &c. Having seen the *foregoing proceedings, performed by the commandant of Attacapas, Don Alexander Declobet, respecting the possession which he had given to Peter LeBlanc, of ten arpens of front on the great prairie, with the depth of forty-two, bounded on one side by the lands of Louis Roque, and on the other by vacant lands, and recognizing these proceedings as regular, and that the concession of these lands can be made without injury to others, not having been claimed, but the proceedings acquiesced in on the part of those assisting in them; approving as we do approve, and using, &c. New Orleans, 5th of January, 1777. Don Bernardo de Galvez, by order of his Lordship, Don Joseph Foucher." [*436

"*Register's Office*, New Orleans, La.

I, Louis St. Martin, Register of the Land-Office at New Orleans, Louisiana, do hereby certify the foregoing document to be a true copy, taken from one of the records of my office, entitled 'Libro 1 of French and Spanish Concessions.'

In faith whereof I hereunto subscribe my name, this 18th day of May, 1849.

(Signed) L. ST. MARTIN, *Register*."

Upon this document, the District Court confirmed the claim, and the United States appealed.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Jain* and *Taylor* for the appellees.

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

This claim appears to be a groundless one. The paper produced is a copy, certified by the Register of the Land-Office at New Orleans, to have been taken from one of the records

[1] FOLLOWED. *United States* v. *Rillieux*, 14 How., 192.

of his office entitled "Libro 1 of French and Spanish Concessions." The paper as certified is nothing more than the preamble usually inserted in Spanish grants where a perfect and absolute title is intended to be given as contradistinguished from the order of survey or first concession. And at the end of this preamble is an &c., without any words of concession or grant, and this &c. is followed by the date, New Orleans, 5th of January, 1777, and the names of Don Bernardo de Galvez, by order of his Lordship, Don Joseph Foucher.

It is not suggested that there has been any mutilation of the record, and the paper certified manifestly contains all of the instrument that was ever written in the record-book, and upon the face of it, from the manner in which it terminates with an &c. at the place where the granting clause usually
*437] begins; and from *the unusual manner, also, in which the names of Galvez and Foucher are arranged in the certified copy, it looks much more like a formula written in a record-book for the direction of clerks in making out for signature an absolute and perfect grant, than like a paper intended to convey the title to land. And moreover there is no evidence that the petitioners are the heirs of Pierre LeBlanc named in the paper which is claimed to have been a grant to him; no evidence that he or those claiming under him ever took possession or exercised any act of ownership over it; and no evidence that any right or title was ever claimed to it, by Pierre LeBlanc or any one claiming under him, from the year 1777, when the paper bears date, down to June 16, 1846, when this petition was filed, being a period of sixty-nine years.

The decree of the District Court must be reversed, and a mandate issued directing the petition to 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 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 District Court in this cause be, and the same is hereby, reversed and annulled, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimants.

THE UNITED STATES, APPELLANTS, *v.* JEANNETTE CAROLINE CASTANT, WIDOW IN COMMUNITY OF JACOB BRANDEGEE, DECEASED, AND NATURAL TUTRIX OF HER MINOR CHILDREN, VIZ.: ODILE MADELINE, CAMILLUS JOHN, STEPHAINE, MARIE HENRIETTA BRANDEGEE, AND OF CAROLINE CLOTILDE BRANDEGEE, WIFE OF HENRY LLOYD, BENEFICIARY HEIRS AND LEGAL REPRESENTATIVES OF SAID JACOB BRANDEGEE, DECEASED.

This court again decides, as in 9 How., 127, and 10 How., 609, that by the act of 1824, a claimant of land in Louisiana must aver and prove his residence in that Province at the date of the grant, or on or before the 10th of March, 1804.

Also, that the act was not intended to provide for perfect grants. Over such, the District Court has no jurisdiction.[1]

A decree of the court was erroneous, authorizing the claimants to enter public land, *upon the ground that the United States had sold what was covered by the claim, when there was no evidence that the United States had made any such sales.[2] [*438

THIS was a land case arising under the acts of 1824 and 1844, which came up by appeal from the District Court of the United States for the Eastern District of Louisiana.

The circumstances of the case are stated in the opinion of the court.

It was argued by *Mr. Crittenden* (Attorney-General), for the United States, and *Mr. Soulé* for the appellees.

Mr. Justice DANIEL delivered the opinion of the court.

The claim of the appellees in this case was preferred in virtue of the provisions of the act of Congress of May 26th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri, and the Territory of Arkansas, to institute proceedings to try the validity of their claims;" *vid.* 4 Stat. at L., 52, which provisions were revived by an act of Congress of the 17th of June, 1844, and extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the 31st degree of north latitude, and between the Mississippi and Perdido Rivers. 5 Stat. at L., 676.

[1] S. P. *United States* v. *Pillerin*, 13 How., 9; *United States* v. *McCullough*, Id., 216; *United States* v. *D'Auterive*, 15 Id., 14; *United States* v. *Roselius*, Id., 31, S. C., Id., 36; *United States* v. *Ducross*, Id., 38.

[2] See *United States* v. *Lynde*, 11 Wall., 643.

The original petition, presented in the name of Jacob Brandegee, sets forth that in pursuance of an order of Don Manuel Gayoso de Lemos, Governor-General of Louisiana and West Florida, Don Carlos Laveau Trudeau the royal surveyor, did on the 15th of November, 1798, deliver to Donna Maria Manetta Laveau Trudeau, a tract of land, containing five hundred superficial arpens, situated and bounded as in the petition described, and as contained in a survey or figurative plan accompanying the petition, and as said to have been set forth in a survey alleged to have been previously made by Pintado, Deputy-Surveyor of Louisiana and West Florida. That afterwards, on or about the 12th day of November, 1798, the Governor-General Gayoso de Lemos, made a regular concession or grant of this land to Donna Maria Manetta Laveau Trudeau; that on the 31st of August, 1821, the said Donna Maria conjointly with her husband, Josiah E. Kerr, sold and conveyed the land granted as aforesaid to Brandegee, and the deed to him is made an exhibit in this case. The petition further states, (referring to the metes and bounds of the grant, as described in the survey and evidences of title), that the claim had been presented to the Board of Land Commissioners, whose decision had been adverse thereto; that the whole of
*439] said tract of land, or the greater part *thereof, had either been sold by the United States, or confirmed to actual settlers. The petition then concludes with the prayer, that the title of the petitioner may be held good, and that he may be entitled to enter an equal quantity of land in lieu of that which had been sold or confirmed to others. The petitioner, Jacob Brandegee, having departed this life after the institution of these proceedings, they were revived in the name of his widow in community, and of his children and heirs.

There is not exhibited with the petition or in any part of the prooeedings, an original order from De Lemos to Trudeau, directing the latter to deliver to Donna Maria Manetta Trudeau, the land mentioned, but there is a certificate signed by Carlos Laveau Trudeau, as Royal Surveyor, stating that he had delivered possession to Donna Maria Manetta Laveau Trudeau, of the tract of land of five hundred superficial arpens, corresponding with the figurative plan or survey, in which the boundaries are described with great precision. This certificate is followed by an instrument adopting and confirming it, signed by Gayoso De Lemos, styling himself Brigadier of the Royal Armies, Governor-General and Royal Vice-Patron of the Provinces of Louisiana and West Florida; and this instrument, after reciting the boundaries as contained

in the certificate, concludes in the following terms; "And recognizing the same; approving them as we do hereby approve them, availing ourselves of the faculty which the King has given us, we grant in his royal name, to the aforesaid Donna Maria Manetta Laveau Trudeau, the aforesaid five hundred superficial acres of land; that she may use and dispose of them as her own property, in conformity with the aforesaid acts."

Upon the aforegoing petition, and the documents above referred to, constituting all the evidence in this cause, the District Court, on the 8th of June, 1849, ordered and decreed, "that the grant made by the Spanish government to Donna Maria Manetta Laveau Trudeau was a perfect one; that therefore, the plaintiffs are entitled to the relief granted by the act of Congress, approved on the 17th of June, 1844, and the act of 1824, to which it refers; and that it is therefore ordered and decreed, that the grant is valid against the United States, and that the land described in the said grant and survey thereof, as part of the exhibits, containing five hundred superficial arpens, according to the metes and bounds as described in the said grant and survey, belongs to the petitioners holding under the original grantee." The same court then proceeds to declare; "that whereas it is ascertained that a great part of the land is now held by titles emanating from the United States, it is further ordered, adjudged, and decreed, that for all the land within the limits so *held, which has been sold or otherwise disposed of by the United [*440 States, the petitioners shall be, and they are hereby authorized to enter in any land-office of the United States in the state of Louisiana, a like quantity of public land elsewhere, in conformity with the provision of the 11th section of the act of Congress, approved on the 26th of May, 1824."

This decision of the district judge is palpably inconsistent with the repeated adjudications of this court, upon the language and objects of the act of Congress of 1824, and of the reviving act of 1844; and is indeed contradictory and inconsistent with itself, in the different grounds it assumes for its support. Before proceeding to a more particular examination of the decision of the District Court, it seems proper to advert to the true position of the petitioner, or rather of the grantee, from whom his title is deduced, as described in the petition, and to inquire whether that position, as there described, apart from the question of the completeness or incompleteness of the grant, be one on which the jurisdiction of the District Court could attach. Thus it must be remembered, that in the enumeration in the act of 1824, of the qualifications requisite

for claiming the benefit of that act, is the residence of the grantee within the province of Louisiana, at the date of the grant, or on or before the 10th day of March, 1804. This requisite of residence at one of the periods prescribed, can in nowise be received as a matter of form. It is of the essence of the right to invoke the aid of the act of Congress, which was designed to confer a benefit on actual occupants or settlers. Such being its character, it should, therefore, in every instance in which that act is appealed to, be both averred and proved. In the case before us the petition is wholly silent as to this qualification, and no proof is adduced as to its existence. For this omission alone, then, to aver a material, nay, the most material ingredient in the right to invoke the aid of the act of 1824, the petition presented no case upon which the jurisdiction of the District Court could attach. This point has been ruled in the cases of the *United States* v. *Reynes*, in 9th Howard, 127, and of the *United States* v. *D'Auterive*, in 10th Howard, 609, and in other cases decided during the present term of this court. But let us view this case in other aspects of it, as exhibited upon the face of the petition and documents adduced to sustain it; and as it is characterized in the decree of the District Court, in order to determine whether it be one within either the mischiefs or the remedies described or provided by the act of Congress of May 26th, 1824. By recurrence to the certificate of Trudeau, and to the figurative plan accompanying it, dated November 15th, 1798, the quantity of the land and the boundaries thereof will
*441] be seen to have been *fixed and described with the utmost precision, so as to leave no room for mistake or uncertainty. Turning next to the grant or concession by Gayoso, on the 12th of December, 1798, it will be seen that the certificate of survey by Trudeau, and the figurative plan, are directly referred to, and all the lines and boundaries, the quantity of land, and, indeed, every *indicium* by which it had been described, are adopted by the grantor, in the very lan guage of the certificate; and after such reference and adoption, the grant concludes in the following terms: "Approving them as we do hereby approve them, availing ourselves of the faculty which the King has given us, we grant in his royal name, to the aforesaid Donna Maria Manetta Laveau Trudeau, the aforesaid five hundred superficial acres of land, that she may use and dispose of them as her own property, in conformity with the aforesaid acts." The effect of these proceedings on the part of the Spanish governor was to vest in the grantee a perfect legal estate, in the subject granted the *titulo in forma*. The District Court, upon the strength of

these proceedings, declares what was unquestionably true, viz., that the title vested in the grantee by the Spanish authorities was a perfect one; but the court goes on to deduce from this truth a consequence which it did not warrant, but which it entirely excluded, viz., that "therefore the plaintiffs are entitled to the relief granted by the act of Congress, entitled, &c." The legitimate deduction from the facts above ascertained and admitted by the court, would have been to this effect, and therefore the District Court could have no jurisdiction of the plaintiff's petition, and that the same be accordingly dismissed. It is in this respect that the inconsistency of the decree of the District Court, with the facts on which it professes to be founded, and with the acts of 1824 and 1844, and with itself, is made manifest. It first asserts the completeness of the title of the petitioner, and then declares it to be dependent on aids provided by statute; provided for the purpose of perfecting titles avowedly incomplete, which must continue forever incomplete, except for the means so provided for perfecting them. That interpretation of the acts of Congress of 1824 and 1844, which declares them to be inapplicable to perfect legal titles, can no longer be questioned.

It has been expressly ruled in the cases already cited of the *United States* v. *Reynes*, 9 How., 127, and in the *United States* v. *D'Auterive*, 10 Id., 609; and upon the same interpretation of the statutes above-mentioned, have numerous cases been decided during the present term. The decree of the District Court in this case is marked by other peculiarities which must deprive it of any validity whatsoever. The decree first decides that the title of Donna Maria to the land in question is *good and complete as against the United States, and that, therefore, the land belongs to [*442 the petitioners, as deducing title from her. The decree then proceeds to declare and order, "that whereas it is ascertained that a great part of the said land is now held by titles emanating from the United States, it is further ordered, adjudged, and decreed, that for all the land within the limits so held, which has been sold or otherwise disposed of by the United States, the petitioners shall be, and they are hereby authorized, to enter in any land-office of the United States in the state of Louisiana, a like quantity of public land elsewhere, in conformity with the provisions of the eleventh section of the act of Congress, approved on the 26th of May, 1824."

Now, it is to be observed in the first place, that there is, in this case, on the part of the United States, a general denial of every fact contained in the petition; nothing is admitted directly or by implication. In the next place, there is not in

this record to be found even an attempt to show a grant or confirmation of any portion of this land by the United States to any person whomsoever; nor the possession of it, nor of any portion of it, by any person at any time; not even by the petitioners or those from whom their title is deduced. Indeed, none but the government of the United States is made a party defendant in this case. Upon what proof, or on what surmise even, the District Court could conclude, that the lands had been granted or confirmed by the United States, this court cannot conjecture. Even if the opinion of the court could import intrinsically any proof upon this point, the inquiries would remain, as to what portion of the lands had been granted; by whom, and to whom. Without information upon these heads, it seems difficult to imagine, if the fact of grants having been made were to be conceded, what should be the extent of the equivalent to be substituted for them. The mere assertion of the one or the other can invest no right, and impose no duty. It is too vague and indefinite to be comprehended, much less to be enforced with due regard to the rights of the parties to the cause.

It is, therefore, for the several reasons before assigned, the opinion of this court, that the decree of the District Court be reversed, and the petition 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 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 District
*443] Court in this *cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimants.

THE PROPELLER GENESEE CHIEF, HER TACKLE, APPAREL, AND FURNITURE, WILLIAM L. PIERCE, MASTER, ALEXANDER KELSEY, WILLIAM H. CHENEY, WILLIAM HUNTER, LANSING B. SWAN, GEORGE R. CLARK, AND ELISHA B. STRONG, APPELLANTS, *v.* HENRY FITZHUGH, DEWITT C. LITTLEJOHN, AND JAMES PECK.

The act of Congress, passed on the 26th of February, 1845, (5 Stat. at L., 726,) extending the jurisdiction of the district courts to certain cases upon the lakes, and navigable waters connecting the same, is consistent with the Constitution of the United States.[1]

It does not rest upon the power granted to Congress to regulate commerce.

But it rests upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States, when the Constitution was adopted.

The admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different states, or with a foreign nation.[2]

In the present case of collision between a vessel navigated by steam and a sailing vessel, the evidence shows that the former was in fault.

It is the duty of every steamboat to keep a trustworthy person employed as a look-out; and if there be none such, additional to the helmsman, or if he was not stationed in a proper place, or not vigilantly employed in his duty, it must be regarded as *primâ facie* evidence that the collision was the fault of the steamboat.[3]

THIS was an appeal from the Circuit Court of the United States for the Northern District of New York.

It was a libel filed by Fitzhugh, Littlejohn, and Peck.

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[1] CITED. *Jackson* v. *Steamboat Magnolia*, 20 How., 299, 305. See *Allen* v. *Newberry*, 21 How., 246.

[2] FOLLOWED. *The Hine* v. *Trevor*, 4 Wall., 563; see also *Atkins* v. *Disintegrating Co.*, 18 Wall., 304; *Fretz* v. *Bull*, post *468; *Jackson* v. *Steamboat Magnolia*, 20 How., 340. S. P. *McGinnis* v. *The Pontiac*, 5 McLean, 359; s.c. Newb., 130; *Franconet* v. *The Backus*, Newb., 1; *The Young America*, Id., 101; *The Bacon*, Id., 274; *The Jenny Lind*, Id., 443; *Leonard* v. *The Volunteer*, 1 Chic. L. N., 185; *Wolverton* v. *Lacey*, 18 Law Rep., 672; *The Ohler*, 2 Hughes, 12; *The Petrel* v. *Dumont*, 28 Ohio St., 602; *The Sarah Jane*, 1 Low., 203; *The Elmira Shepherd*, 8 Blatchf., 341; *The Monitor*, 9 Ben,, 78.

[3] FOLLOWED. *New York &c. Transp. Co.* v. *Philadelphia &c. Steam Nav. Co.*, 22 How., 472; *Steamboat New York* v. *Rea*, 18 Id., 225; see note to *St. John* v. *Paine*, 10 Id., 557. See also *Haney* v. *Baltimore Steam Packet Co.*, 23 Id., 295; *The Prop. Commerce*, 1 Black, 579, 580; *The Ottowa*, 3 Wall., 273; *The Grace Girdler*, 7 Id., 201; *St. Paul &c. R. R. Co.* v. *Shurmeir*, 7 Id., 288; *The Belfast*, Id., 639; *The Eagle*, 8 Id., 20–26; *The Fairbanks*, 9 Id., 422; *The Daniel Ball*, 10 Id., 563; *Insurance Co.* v. *Dunham*, 11 Id., 26; *The Ariadne*, 13 Id., 479; *Steamboat Co.* v. *Chase*, 16 Id., 531; *Barney* v. *Keokuk*, 4 Otto, 324, 338; *Ex parte Easton*, 5 Id., 72; *Gillet* v. *Pierce*, 1 Bro. Adm., 555; *The Ant*, 10 Fed. Rep., 297; *The Excelsior*, 12 Id., 200; *Stewart* v. *Potomac Ferry Co.*, Id., 304; s. c., 5 Hughes, 382; *The Golden Grove*, 13 Fed. Rep., 688; *Waldorf* v. *The Prop. New York*, 1 Flipp., 56; *The Steamer Ancon*, 6 Sawy., 123; *Holmes* v. *Oregon &c. R'y. Co.*, Id., 266.

The libellants filed their libel in the District Court for the Northern District of New York, against the propeller Genesee Chief, and Pierce, as master, in which they allege that they were the owners of the schooner Cuba, a vessel of fifty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different states and territories upon the lakes, and navigable waters connecting said lakes. That said schooner, at the time of the loss and collision, thereinafter mentioned, was laden with five thousand nine hundred and fifty-five bushels of wheat; and on Lake Ontario, about forty miles below Niagara, bound from Sandusky, in the state of Ohio, to Oswego, in the state of New York. That the propeller Genesee Chief, of which the appellant, Pierce, was master, and being a vessel of fifty tons
*444] burden and upwards, duly enrolled and *licensed as aforesaid, and then actually engaged in commerce and navigation as aforesaid, while at the place aforesaid, on the sixth day of May, 1847, by the carelessness and negligence of the master and crew, ran foul of and sunk the said schooner, with her cargo; and concluding with the usual prayer for the condemnation of the vessel and for the payment of the damage.

The claimants of Alexander Kelsey and others, and the master, put in their joint and several answer to the libel, admitting the collision and the loss of the Cuba, but denying that the collision happened from any want of care, negligence, or mismanagement of the master or crew of the propeller, and alleging that the collision occurred in consequence of, and was occasioned by the carelessness, ignorance, mismanagement and want of skill of the master and crew of the Cuba. The answer also contains the following objection to the jurisdiction of the court: "And these respondents aver that the respondents Alexander Kelsey, William H. Cheney, Lansing B. Swan, George R. Clarke, Elisha B. Strong, and William L. Pierce, are all citizens of the state of New York, and that the said Henry Fitzhugh and Dewitt C. Littlejohn are also citizens of the state of New York; and they also aver that the collision set forth in the said libel occurred within the territorial boundaries of the said state, and not on the high seas, nor in any arm of the sea, river, creek, stream, or other body of water where the tide ebbs and flows, and therefore they say that this court has no jurisdiction over the matters set forth in the said libel, and they pray that the same effect may be given to their defense in this respect as if the same were made by special plea or exception."

The cause was tried before his honor the district judge, in April, 1848, and a decree passed in favor of the libellants. The respondents appealed to the Circuit Court, and the cause was tried in that court in June, 1849. The decree of the District Court was affirmed.

The master of the propeller, Pierce, was allowed to file a separate answer in the Circuit Court, and he was sworn as a witness for the claimants.

From this decree the owners of the propeller appealed to this court.

It was argued by *Mr. Mathews*, for the appellants, and by *Mr. Grant* and *Mr. Seward*, for the appellees.

The points made by the appellees (the libellants) will first be stated as they were made in the Circuit Court and repeated here. The natural order appears to be that the libellants should prove their case.

**Mr. Grant*, for the libellants, contended that the following facts were proved by the evidence, and made these points: [*445

1st Point. The propeller was bound up the lake with a light load, going eight miles an hour, while the Cuba was bound down the lake, heavily loaded, with a light breeze, making only two miles an hour. The courses of the two vessels were about one hundred rods apart, and they would have passed each other at that distance, had not the propeller swung off from her course.

2d. The Cuba was close hauled on the wind, and having laid her course, was justified in keeping it.

1. A vessel having the wind free must give way to one close hauled, or be responsible for the consequences. 2 Dods., 36, 37; 2 Chit. Gen. Pr., 514; Story on Bailm., 611; Am. Law Journal, vol. 4, No. 4; *Lyle* v. *The Conestoga*; Id. Feb. 1849, 354.

2. A steam vessel is regarded as always having the wind fair. 2 Hagg. Adm., 173; 3 Id., 414; 2 Wend. (N. Y.), 452; 2 Chit. Gen. Pr., 514, 515; Story on Bailm., 611; Conk. Adm. Pr., 305, 308; Abbott on Ship., part. 3, p. 300, 308, 311; 10 How., 558–587.

3. The proceedings on the part of her master were strictly regular; he performed his duty in every respect. Story on Bailm., 611; *The Thomas*, 5 Rob. No., 345; 5 Rob., 316.

4. The Cuba had a good light, which was hung in a con-

spicuous place, and was seen by the propeller four or five miles off.

5. No response was given to the Cuba's hail, and the propeller continuing on her swinging course to bear down directly upon the Cuba, the captain was justified in his order to put the helm down; especially as the danger had then become so imminent, that the putting the helm up or down could not have avoided the collision or changed its result.

6. Pierce is not a competent witness for the appellants. 1 Browne Civ. Co. Law, 500, 501; 1 Story, 96; 1 Ware, 367; Wood's Inst., 315, 316; 2 Paige (N. Y.), 54; 1 Sumn., 343, 344, 401, 432; 2 Gall., 48, 50; How. Rep., 53, 57; 2 Hagg. Adm., 149, 151; 1 Pet. Adm., 139, 141, 211.

1st. The appellants have been guilty of delay. They might have got this testimony in the court below. Conk. Adm. Pr., 755; 1 Sumn., 331.

2d. The moving papers are defective in not showing how the testimony of Captain Pierce is pertinent. 1 Sumn., 344, 345.

7. The collision was occasioned by the carelessness, negligence, and mismanagement of those having charge of the propeller, and the appellants are responsible for all the consequences.

*446] * 1st. The propeller swung from her course, as if to pass the Cuba on her larboard side, and, while thus swinging out, she ran down and sunk the latter, with her engine in full operation.

2d. There was no officer of the watch on duty.

3d. There was no look-out.

4th. The wheelsman is not a look-out. 10 How., 558, 587.

5th. White, the wheelsman, was asleep; if not, he was incapacitated by liquor or imperfect vision.

6th. Boskkirk was not competent as a look-out, even if he had been on duty.

7th. There was no response from the propeller to the hail of the Cuba. Abbott on Ship., 234; Story on Bailm., 6, 611; 3 Kent Com., 230; 5 Id.; *Brig Cynosure*; 7 Law Rep., 222; *The Shannon*, 1 Wm. Rob., 467; 1 Law Rep., 313, 318; Conk. Adm., 305–311.

8th. The engine was not stopped. It was a clear starlight night.

8. The propeller must account for her situation, and show satisfactorily that there was no mismanagement, or mistake, or blame, that can be reasonably imputed to her. *The Perth*, 3 Hagg. Adm., 414, 417.

9. Her excuses are unsatisfactory and untrue, to wit:

1st. That the Cuba had the wind fair; that she changed her course and crossed the propeller's bows.

2d. That the Cuba had no light; and if she had, the night was so thick, smoky, and foggy, it could not have been seen by the propeller.

10. The case, as claimed by the appellants, is not possible; while the one proven by the libellants could have occurred.

Under the former, the vessels could not be brought together by their courses and speed, as is demonstrated by the diagrams.

11. The act of Congress of 1845, extending the jurisdiction of the District Court to the cases therein mentioned, is constitutional. 5 How., 441; 6 Id., 344, 386; *Gibbons* v. *Ogden*, 9 Wheat., 1.

12. The libellants are entitled to recover the amount of damages allowed them in the decree below, together with the interest thereon, "with costs, in the District Court, in the Circuit Court, and in the Supreme Court, and damages and reasonable counsel fee. Rule 17, 20."

Mr. Mathews made the following points:

1st. The District Court had not jurisdiction of the case, and the libel should have been dismissed for that cause. The following three reasons are given for this:

1. It is not a case of admiralty and maritime jurisdiction, *under the Constitution of the United States, which is limited to cases occurring upon waters within the ebb and flow of the tide. *The Jefferson*, 10 Wheat., 428; *The Steamboat Orleans* v. *Phœbus*, 11 Pet., 175; *The United States* v. *Combs*, 12 Id., 72; *Waring et al.* v. *Clarke*, 5 How., 441; *New Jersey S. N. Co.* v. *Merchants Bank*, 6 Id., 344; *Thomas* v. *Lane*, 2 Sumn., 1, 9. [*447

2. It is not a case arising under the Constitution, or any law of Congress. 1 Pet., 512, 545; 10 How., 99.

3. The act of Congress of the 26th February, 1845, is not authorized by the Constitution of the United States, and is in conflict with it, and is void.

The Constitution declares that the judicial power of the federal courts shall extend to all cases arising under the Constitution and the laws of the United States, and to all cases of admiralty and maritime jurisdiction, and to other cases particularly enumerated, but which it is unnecessary to specify here.

It is supposed that the jurisdiction of the federal courts is limited to the cases and subjects particularly enumerated in the Constitution, and that it cannot be extended beyond these. Such has been the uniform construction of that instrument.

In the case of *Marbury* v. *Madison*, 1 Cranch, 137, it was

held that the Supreme Court had not jurisdiction to issue writs of *mandamus*, and that the 13th section of the Judiciary Act of 1790, conferring such jurisdiction, was not authorized by the Constitution, and was void.

In *Hodgson* v. *Bowerbank*, 5 Cranch, 303, jurisdiction was claimed, on the ground that an alien was a party under the 11th section of the Judiciary Act of 1789. "Marshall, C. J. Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution." The same point was ruled in the case of *Mossman* v. *Higginson*, 4 Dall., 12.

In the 83d number of the Federalist, Mr. Hamilton uses the following language: "In like manner, the authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority." And, again, in No. 82, he says: "I shall lay it down as a rule, that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes." And see, also, opinion of C. J. Marshall, in *Marbury* v. *Madison*, 1 Cranch, 173, 174.

*448] *The doctrine which I deduce from these authorities is this: the constitution declares that the judicial power shall extend to certain cases, which are particularly expressed, and limits its exercises to those cases.

If this proposition is sound, then the act of the 26th February is not authorized by, and is in conflict with, the Constitution; but the act extends the jurisdiction to cases which this court has already held are not among the cases particularly specified in the Constitution.

It may, however, be said that, under the power given to Congress to regulate commerce among the several states, and to make all laws which shall be necessary and proper for carrying into execution this power, Congress was authorized to make the law in question. It may be observed, in the first place, that the act does not purport to be a regulation of commerce. The title of the act shows that its object is simply to extend the jurisdiction of the district courts to cases which were not before within the cognizance of those courts. Although the title of an act cannot be regarded as any part of the act itself, it is sometimes resorted to, to ascertain the object and purpose of its enactment. See Dwarr. on Stat., 653.

But I have already shown, that the Constitution contains a

prohibition against extending the judicial power beyond the cases specified in the Constitution. The Constitution must be so construed that all its parts will harmonize. The power to regulate commerce, and to make all laws necessary and proper for that purpose, must be so executed as not to conflict with the prohibition against extending the judicial power beyond the prescribed limits.

It will not be pretended that Congress has the power to make any *ex post facto* law, or to lay any tax or duty on articles exported from any state, in execution of the power to regulate commerce. The prohibition in these cases is expressed; but a prohibition which is necessarily implied, is just as binding upon Congress as if it were expressed. The Constitution has made ample provision for bringing within the cognizance of the federal courts all cases which may arise under any proper regulation of commerce among the states, which may be prescribed by Congress in the general provision, that the judicial power shall extend to all cases arising under any law of the United States.

If this law can be sustained, it is not perceived why Congress may not extend the jurisdiction of the federal courts to every case of contract or tort, growing out of the extensive trade and commerce, now carried on, by land and water, among the states of the Union; and thus draw within the cognizance of these courts one half of the litigation of the country. See opinion of Mr. J. Nelson, 6 How., 392.

*2d. The libellants are not entitled to recover in this case upon the merits, without showing negligence [*449 on the part of the Chief, accompanied with freedom from blame on the part of the Cuba. Abbott on Ship., 238, Perkins's ed., 312. The burden of proving negligence is on the libellants. 2 Hagg. Adm., 145.

3rd. The Chief was without fault. No blame or negligence can be imputed to her.

1. She was well and sufficiently manned.

2. She was well lighted, and lights were in proper places.

3. She had a competent and proper look-out. The captain, the man at the wheel, and one on the deck were sufficient. 10 How., 585. If the captain and the man at the wheel alone were on deck, it was a competent look-out, according to the testimony of all the nautical men in this case.

4. But if the look-out was insufficient, unless the loss can be imputed to that cause, the libellants cannot recover. 6 Law Rep., 111.

5. If the Cuba had no light in her rigging, it was not the fault of the Chief that she was not seen in time to avoid the

collision. In the absence of such light she could not have been seen from the Chief. The smoke or haze on the water, and the position of the Cuba between the Chief and the land prevented it.

4th. The pretence that the Chief suddenly changed her course just before the collision, and swung around to the north, is without any foundation.

1. The weight of evidence is clearly against it.

2. It is improbable. When the testimony is conflicting, the court will be guided by the probabilities of the case. *The Mary Stuart*, 2 W. Rob., 244.

5th. The course of the Chief in going to the leeward was proper. It was according to the law of the sea. 3 Carr. & P., 528–529; Id., 601; 3 Hagg. Adm., 321; 1 Law Rep., 313, 318.

6th. The Cuba was in fault, and her fault was the cause of the collision.

1. She was in fault in bearing away after she saw the Chief's light. The Cuba should have kept her course, on the libellants' own showing. If she was close-hauled, she should have kept her course. *The Celt*, 3 Hagg. Adm., 321, and see fol. 974 and 1312 of case. If she had the wind three points free, then she should have passed to the right even if she had to change her course for that purpose. 1 Law Rep., 313, 318, and see testimony of Capt. Eggleston, fol. 1012.

2. The master of the Cuba says he saw the Chief coming directly towards him. He ought to have known that it was *450] not *by design, and he should have changed his course and hung out more lights.

3. But the proof clearly shows that the Cuba was to the windward of the Chief, and that she went to the leeward crossing the bows of the Chief.

4. The Cuba had no light in her rigging. The weight of evidence is against the libellants on this point.

7th. The declarations and admissions of the master are evidence against the libellants, and are to be treated as the declarations and admissions of the libellants themselves, especially as the libellants have failed to produce the protest. *The Manchester*, 1 W. Rob., 62; Abbott on Shipp., 380, Perkins's ed. of 1846, 465, 466; *The Emma*, 2 W. Rob., 315.

8th. The testimony of the principal witnesses on the part of the libellants is so far discredited that no decree ought to be predicated upon it.

1. The master is dicredited by his own declarations, and this impeachment extends to the crew.

2. As to the light, the master is contradicted by Rickerby and by the men on the Chief.

3. As to the force of the wind, the distance which the Cuba sailed between 6 o'clock and the time of the collision, show most clearly that the statement of her master and Sharp cannot be true.

4. As to the course of the wind: The master and Sharp are contradicted by the men on the Chief, and by Spence, Taylor, Eggleston and Morgan.

9th. If the Cuba was in fault in either of the particulars before enumerated, the libellants cannot recover. This seems to be now the settled law in cases of collision. *Rathbun* v. *Payne*, 19 Wend. (N. Y.), 399; *Barnes* v. *Cole*, 21 Id., 188; *Spencer* v. *Utica* and *S. R. R. Co.*, 5 Barb. (N. Y.), 337.

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

This is a case of collision on Lake Ontario. The libellants were the owners of the schooner Cuba, and the respondents and present appellants the master and owners of the propeller Genesee Chief. The libellants state that on the 6th of May, 1847, as the Cuba was on her voyage from Sandusky, in the state of Ohio, to Oswego, in the state of New York, the Genesee Chief, which was proceeding on a voyage up the lake, ran foul of her and damaged her so seriously that she shortly afterwards sunk, with her cargo on board; and they also allege that the collision was occasioned by the carelessness and mismanagement of the officers and crew of the propeller, without any fault of the officers or crew of the Cuba. The respondents deny that it was *occasioned by the fault of the steamboat, and impute it to the carelessness with which [*451 the schooner was managed.

The proceeding is *in rem*, and in substance as well as in form, a proceeding in admiralty. It was instituted under the act of February 26, 1845, (5 Stat. at L., 726), extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same. The District Court decreed in favor of the libellants, and the decision was affirmed in the Circuit Court, from which last-mentioned decree this appeal has been taken.

Before, however, we can look into the merits of the dispute there is a question of jurisdiction which meets us at the threshold. When the act of Congress was passed, under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admiralty jurisdiction had come before

it, seemed to imply that under the Constitution of the United States, the jurisdiction was confined to tide-waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western states. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to Congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us.

The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same;" and the enacting clause conforms to the title. It declares that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories, as was at the time of the passage of the law possessed and exercised by the district courts in cases of like
*452] steamboats and other vessels *employed in navigation and commerce on the high seas, or tide-waters within the admiralty and maritime jurisdiction of the United States.

It is evident, therefore, from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive their authority from that article of the Constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the Constitution; and which we have no reason to suppose it deemed itself authorized to exercise.

Indeed it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. This law gives jurisdiction to a certain extent over commerce

and navigation and authorizes the court to expound the laws that regulate them. But the jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution. And this act of Congress merely creates a tribunal to carry the laws into execution but does not prescribe them.

Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And the limits fixed by the Constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon the commercial power.

This power is as extensive upon land as upon water. The Constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can with the same propriety and upon the same construction, be extended to contracts and torts on land when the commerce is between different states. And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one state to another, and over the persons engaged in conducting them, and deny to the parties *the trial by jury. Now the judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land. [*453

Besides, the jurisdiction established by this act of Congress does not depend on the residence of the parties. And under the admiralty powers conferred on the District Courts, they are authorized to proceed *in rem* or *in personam* in the cases mentioned in the law although the parties concerned are citizens of the same state. If the lakes and waters connecting them are within the admiralty and maritime jurisdiction, as

conferred by the Constitution, then undoubtedly this authority may be lawfully exercised, because this jurisdiction depends upon the place and not upon the residence of the parties.

But if the admiralty jurisdiction is confined to tide-water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. And in cases of this description they have no jurisdiction, if the parties are citizens of the same state. This being an express limitation in the grant of judicial power, no act of Congress can enlarge it. And if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the District Courts.

If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.

If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the *admiralty court to administer international law, and if the one cannot be established neither can the other.

*454]

Again. The union is formed upon the basis of equal rights among all the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the states bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great naviga

ble streams which flow through the western states. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the states bordering on the Atlantic.

The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry *on trade with a foreign nation, and where [*455
vessels could enter or depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide-waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide-water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of the *Thomas Jefferson*, 10 Wheat., 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide.

*456] *The Steamboat Orleans* v. *Phœbus*, 11 Pet., 175, afterwards followed this case, merely as a point decided.

It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that

deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.

Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide-water river, if they took place in the body of a country. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of the *Thomas Jefferson*, afterwards followed in the steamboat *Orleans* v. *Phœbus*, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide-water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was therefore no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court.

The attention of the court was, however, drawn to this subject in the case of *Waring* v. *Clarke*, 5 How., 441, which was decided in 1848. The collision took place on the Mississippi River, near the bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence. But the majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher.

But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction *of the admiralty by the tide. For if such [*457
be the construction, then a line drawn across the river Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary as well as unjust, and would

make the Constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant.

It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by Congress in 1789 when the government went into operation. For the 9th section of the Judiciary Act of 1789, by which the first courts of admiralty were established, declares that the district courts "shall have exclusive 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."

The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

It so happened that no seizure was made, and no case calling for the exercise of admiralty power arose for a long period of time, upon any navigable water where the tide did not ebb and flow. As we have before stated, there were no navigable waters in the United States upon which commerce in the usual acceptation of the word was carried on, except tide-water, until the valley of the Mississippi was settled and cultivated, and steamboats invented, and no case therefore came before the court during the early period of the government that required it to determine whether this jurisdiction could be extended above tide. It *is perhaps to be regretted that such a case did not arise. For we are persuaded that if one had occurred and attracted the attention of the court to this point

*458]

before the English definition had become the settled mode of describing the jurisdiction, and before the courts had been accustomed to adhere strictly to the English mode of pleading, in which the place is always averred to be within the ebb and flow of the tide, the definition in the act of 1789, which is so evidently the correct one, would have been adopted by the courts, and the difficulty which has now arisen would not have taken place.

This legislative definition, given at this early period of the government, is certainly entitled to great consideration. The same definition is in effect again recognized by Congress by the passage of the act which we are now considering. We have therefore the opinion of the legislative department of the government, twice deliberately expressed, upon the subject. These opinions of course are not binding on the judicial department, but they are always entitled to high respect. And in this instance we think they are founded in truth and reason; and that these laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different states or territories. It does not apply to vessels engaged in domestic commerce of a state; nor to vessels or boats not enrolled and licensed for the coasting trade under the authority of Congress. And the state courts within the limits embraced by this law exercise a concurrent jurisdiction in all cases arising within their respective territories, as broadly and independently as it is exercised by the old thirteen states, (whose rivers are tide-waters,) and where the admiralty jurisdiction has been in full force ever since the adoption of the Constitution.

The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property.

It was a question of jurisdiction only, and the *judgment we now give can disturb no rights of property nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.

The principal objection made to the admiralty jurisdiction is the want of the trial by jury. And it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. But experience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not entangled with the niceties and strictness of common-law pleadings and proceedings. And during the reign of the present Queen, the admiralty jurisdiction has been extended to maritime services and contracts and to torts in navigable waters, although the place where the service was performed or the contract made or the tort committed, was within the body of a county, and within the jurisdiction of the courts of common law. A concurrent jurisdiction is reserved to the last-mentioned courts, if the party complaining chooses to select that mode of proceeding. But in the new and extended jurisdiction of the English admiralty, the old objection remains, and neither party is entitled to a trial by jury. The court in its discretion may send the question of fact to a jury, if it thinks proper to do so. But the party cannot demand it as a matter of right. Yet the English people have certainly lost nothing of their attachment to the trial by jury since the days of Lord Coke. And this recent and great enlargement of the admiralty power is strong proof that the want of it has been felt, and that experience has shown its necessity where the interests of an extensive commerce and navigation are concerned.

But the act of Congress of which we are speaking is free from the objection to which the English statute is liable. Like the English statute, it saves to the party a concurrent remedy at common law in any court of the United States or of a state which may be competent to give it. But it goes farther. It secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great and leading

objection, always heretofore made to the admiralty jurisdiction.

The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly *be questioned. The Constitution declares that [*460
the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it.

In the case before us, no jury was required by the libellants or respondents, and the questions of fact as well as of law were therefore decided by the court.

This brings us to the evidence in the case. And it remains to inquire whether the collision in question was the result of inevitable accident, and if not, by whose fault it happened.

Many witnesses, it appears, were examined. And, as almost invariably happens in cases of this kind, there is a great deal of contradictory testimony—the men belonging to one boat differing, for the most part, from those in the other. It has been examined with great care in the argument at the bar, and fully discussed, and we do not deem it necessary, in this opinion, to go over the whole ground, and compare the relative credit of the witnesses, or the weight and authority to which they are severally entitled.

There are some leading facts in the case which, upon the whole testimony, are free from doubt. The collision took place in the open lake. It was a starlight night, and although there was a haze near the surface of the lake, it was not sufficient to conceal the Cuba from those on board of the propeller. She had a light on her bowsprit, and was seen from the steamboat when she was four or five miles off. And the helmsman

of the propeller states that it was at no time so thick as to prevent him from seeing the light at the distance of half a mile. The wind was light, moving the Cuba, which was heavily laden, not more than two or three miles an hour. The lake was smooth. The steamboat had the entire command of her course and a *wide water, by which she might have passed the Cuba on either side, and at a safe distance. She was going at the rate of eight miles an hour. And if proper care had been taken on board the Genesee Chief, after the schooner was first seen, it would seem to be almost impossible that a collision could have happened with a vessel moving so slowly and sluggishly through the water, even if she was carelessly or injudiciously managed. There was no necessity for passing so near to her as to create the hazard. The steamboat could choose its own distance, and might have approached her slowly and cautiously, if the intervening mist obscured the light after she was first discovered, or occasionally concealed it.

*461]

But there is no evidence of any fault on the part of the Cuba. She changed her course, it is true, when she was some miles distant from the propeller. But a vessel close-hauled with a baffling wind cannot always choose her course, but may be compelled to change it by a slight change in the wind. And the captain states that the course was altered because he observed her sails to be shaking, and the change was necessary to enable her to preserve her headway. And this change was made when she was distant some miles, and there was ample time for those on board the propeller to observe it, and ample room to guard against it.[1] And the captain and crew of the Cuba appear to have been watchful and attentive from the time the propeller was discovered. Nor do we deem it material to inquire whether the order of the captain at the moment of collision was judicious or not. He saw the steamboat coming directly upon him; her speed not diminished; nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought; and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy, that the error of a moment might cause her destruction, and endanger the lives of those on board. And if an error was committed under such circumstances it was not a fault.

Applied. *New York, &c., S. S. Co.* v. *Rumball*, 21 How., 385.

As regards the strength and direction of the wind, the testimony of those on board of the schooner is entitled to much more weight than the witnesses who were on board the steamboat. The movements of the latter were independent of the wind. There was nothing to attract the attention of the captain or crew to the light land breeze that was then blowing. But the movements of the Cuba depended upon it, and the attention of those on board of her was necessarily drawn to it every moment. And while we see nothing to censure in the conduct of the *schooner, there is conclusive evidence of great carelessness on board of the Genesee Chief. [*462

It is possible that their conduct may in some measure be accounted for by the fact, that the captain and helmsman made up their minds, when the light in the Cuba was first seen, that she was bound up the lake, and they would seem to have acted upon that opinion up to the moment of the collision. They may have believed that as they were running on the same course, and as the helmsman supposed with a four mile wind, there could be no danger of a sudden encounter, and that when they neared her, there would be time enough to change the course of the steamboat, and pass at a safe distance. It would seem difficult otherwise to account for the careless manner in which the light of the Cuba was observed even by the helmsman, for he says he saw it at intervals as the vessels were approaching each other, and lost sight of it for three or four minutes immediately before they came together. Now the light was seen at the distance of four or five miles in the first instance, and he states, in his subsequent testimony, that there was not haze enough on the lake to prevent him from seeing it at the distance of half a mile. There was, therefore, nothing to prevent him, when the vessels were within that distance, from seeing it continually if he looked for it, unless he was prevented by the position in which he placed himself in the wheel-house. And if the light was hidden by the haze, still, as he knew that a vessel was ahead and so near, nothing could excuse the rashness of continuing the steamboat at her full speed, if he supposed the schooner was meeting him, and not running on the same course.

If this mistake continued until the collision was about to take place, it would be the strongest proof of negligence, as there was abundance of time to have discovered their error. But however this may be, it is evident that there was not a proper look-out on board of the propeller. By a proper look-out we do not mean merely persons on deck, who look at the light; but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him, and

to receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass. And it appears that the helmsman saw no one, after he and the captain first observed the light of the Cuba, until the vessels met. The captain had not observed her near approach, for when the collision happened he ran to the wheel-house to inquire what was the matter. And when the steersman, by his own imperfect observation, saw that the danger was imminent, and it was absolutely necessary that
*463] the speed of the boat should be *instantly checked, nobody else appears to have seen it, and no one was near him, and he was forced to leave the wheel at the most critical moment in order to ring the bell to reverse the engine. The fact that there was no one near him to whom he could call, and no one but himself that saw the danger, is conclusive evidence of the carelessness with which the Genesee Chief was proceeding. She was running at her usual speed, although the captain knew, half an hour before, that there was a vessel in his path, and caution therefore necessary; and the more necessary if the haze obscured the light of the schooner, as some of the witnesses represent.

It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *primâ facie* evidence that it was occasioned by her fault. She has command of her own course and her own speed; and it is her duty to pass the approaching vessel at such a distance as to avoid all danger where she has room; and if the water is narrow, her speed should be checked so as to accomplish the same purpose. In the present case every proper precaution seems to have been neglected. No pains were taken to ascertain the course of the Cuba; there was no one upon the look-out but the helmsman, and that duty negligently performed by him; and in a starlight night, with four or five miles of deep water on the one side and the open lake on the other, with a light breeze and smooth surface, she run into and sunk a vessel that had been seen half an hour before, at a distance of four or five miles, and which was

sailing at the rate of not more than two or three miles an hour, and doing everything in her power to warn those on board the steamboat of her position and her danger. We are satisfied, from the whole testimony, that there was great and inexcusable carelessness on the part of the propeller, and that the damages are not higher than the loss requires.

The decree of the Circuit Court must therefore be affirmed with costs.

Mr. Justice DANIEL.

From so much of the opinion just announced as claims *jurisdiction in this case, and especially from the ground (for the first time assumed in this court) as [*464 the principal foundation of that jurisdiction, I find myself constrained to declare my dissent. It is not my purpose here to reiterate my views of the extent of the admiralty powers vested by the Constitution in the courts of the United States, nor of the sources from which those powers were conceived by the framers of the Constitution to have been derived. Those views have, on former occasions, been fully developed, particularly in the case of the *New Jersey Steam Navigation Co.* v. *The Merchants Bank*, in 6 How., 344, in my concurrence with the opinion of the late Justice Woodbury, in the case of *Waring* v. *Clark*, 5 How., 441, and in my opinion in the case of *Newton* v. *Stebbins*, 10 How., 586.

The decisions of this tribunal heretofore made, will, upon a correct examination of them, be found to rest the admiralty powers of the federal courts, not solely upon the known and established principles and limitations of the powers and jurisdiction of the admiralty in England, principles and limitations settled in that country at the time of the adoption of the federal Constitution, and rigidly adhered to there until altered by some recent legislative provisions; but they have professed to place those powers upon some supposed enlargement of the admiralty jurisdiction, said to have sprung from the practice of the vice-admiralty courts in the British colonies; a practice which, whilst it has been alleged as a justification of each instance in support of which it has been invoked, no case, no investigation has ever been able to place upon any clear and indisputable authority. It is against this undefined and undefinable warrant for the exercise of power that the objections urged by me on former occasions have been levelled. Moreover it has always seemed to me to imply a palpable contradiction, that there should be ascribed (and that by mere implication) to the vice-admiralty courts, (the creatures of the high admiralty) powers which the latter con-

fessedly never possessed. But the doctrine at present promulged by this court, is based upon assumptions still more irregular in my view, still more dangerous than that above adverted to, because it claims for this court, wholly irrespective either of the Constitution or the legislation of Congress, powers to be assumed and carried into execution by some rule which in the judgment of this court is to be applied according to its own opinions of convenience or necessity. Thus it is admitted that by the decisions in England, the jurisdiction of the admiralty did not reach *infra corpus comitatus*, and was limited to the ebb and flow of the tide; and it is admitted that by the previous decisions of this court the like limitations were imposed on the jurisdiction of the admiralty in this country; and even this limitation, imposed *by former decisions of this tribunal, it is obvious, allowed of some encroachment upon the common-law jurisdiction, in so far as the ebb and flow of the tide might bring the asserted power of the court *infra fauces terrae*, or *infra corpus commitatus*. But even this encroachment is not sufficient to satisfy the aspirations of the jurisdiction, now for the first time asserted; for now it is insisted that any waters, however they may be within the body of a state or county, are the peculiar province of the admiralty power; and although it is admitted that the power was once clearly understood as being limited to the ebb and flow of the tide, yet now, without there having been engrafted any new provision on the Constitution, without the alteration of one letter of that instrument, designed to be the charter of all federal power, the jurisdiction of the admiralty is to be measured by miles, and by the extent of territory which may have been subsequently acquired; a much less natural standard surely, than the nature and character of the element to which the admiralty is peculiarly adapted, and to which it owes its origin; that the Constitution may, nay must be altered by the same process, and must be enlarged not by amendment in the modes provided, but according to the opinions of the judiciary, entertained upon their views of expediency and necessity. My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live; but they are founded upon deliberate conviction as to the nature and objects of limited government, and by myself at least cannot be disregarded; and I have at least the consolation—no small one it must be admitted—of the support of Marshall, Kent, and Story in any error I may have committed. I cannot construe the Constitution either by mere geographical considerations; cannot stretch nor contract it in order to adapt it to such limits, but must interpret it by my solemn

*465]

convictions of the meaning of its terms, and by what is believed to have been the understanding of those by whom it has been formed. In the view taken by the court of the evidence in this case, I entirely concur.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Northern District of New York, 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 and damages, at the rate of six per centum per annum.

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*RALPH S. AND JOHN FRETZ, APPELLANTS, *v.* JOHN C. BULL, WILLIAM J. M'CLURE, AND THOMAS S. FOREMAN, PARTNERS, TRADING UNDER THE NAME AND STYLE OF J. C. BULL & CO., FOR THE USE OF THE FIREMEN'S INSURANCE COMPANY OF LOUISVILLE. [*466

The extent of the admiralty and maritime jurisdiction of the courts of the United States, as explained in the preceding case, again affirmed.[1]

In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases. But all persons entitled, on the same state of facts, to participate in the same relief, may join as libellants, whether the suit be *in personam* or *in rem*.[2]

Hence, where the cargo of a boat was partly insured, but not the boat itself, and the insurance company paid for that part of the cargo which was insured, it was competent for the owners of the boat to file a libel for the use of the insurance company.

In this case, where a collision took place between a steamboat and a flatboat, both descending the Mississippi River, the steamboat was in fault.

The flatboat was in an eddy of the river, and impelled by it towards the steamboat, and the latter should have kept further away.

This was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

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[1] CITED. *Jackson* v. *The Steamboat Magnolia*, 20 How., 341. See also *The Hine* v. *Trevor*, 4 Wall., 565; *The Commander-in-chief*, 1 Id., 53; *The Potomac*, 15 Otto, 634; *The Frank G. Fowler*, 8 Fed. Rep., 364; *The Grand Republic*, 10 Id., 400.

[2] In a suit for collision all the owners must join as libellants. *Woolman* v. *The Richard Doane*, 7 Int. Rev. Rec., 77. Parties whose interests are distinct may still unite if their interests rest upon a cause of action common to all. *American Ins. Co.* v. *Johnson*, 1 Blatchf. & H., 9; and part may sue or defend for the others in interest. *Ib.*; *Wall* v. *Andrews*, 3 How., 568.

The facts in the case are stated in the opinion of the court.

The cargo of flatboat No. 2 consisted of 3,136 sacks of corn, 31 barrels and one keg of lard, 315 sacks of oats, of which there were insured,

1,643 sacks of corn (4,125 bush. at 75c.) .	$3,093 00
158 sacks oats (353 bush. at 40c.) . . .	141 20
17 barrels of lard	333 63
	$3,567 83

which was paid by the insurance company, with a small deduction. When paid, there was an argument between the insurance company and John C. Bull & Co., that the latter would include the insurance company in the libel.

The libel was filed by John C. Bull, William J. M'Clure, and Thomas S. Foreman, trading under the firm of John C. Bull & Co., in the District Court of the United States. They were the owners of the boat and of the corn, and filed the libel for the use of the insurance company. A variety of testimony was taken, the important parts of which are stated in the opinion of the court.

The District Court gave judgment in favor of the libellants, in the sum of $3,753.45.

The defendants appealed to the Circuit Court.

The Circuit Court affirmed the judgment of the District Court, and the defendants appealed to this court.

*467] * It was argued by *Mr. Coxe*, for the appellants, and submitted, on printed argument, by *Mr. Clay*, for the appellees.

The greater part of the argument consisted in an examination and comparison of the evidence, which cannot be reported.

Mr. Coxe, for the appellants, made the following law points:

In cases of collision, the law requires that there should be preponderating evidence to fix the loss upon the party sought to be charged, before he can be condemned to make compensation. *The Ligo*, 2 Hagg. Adm., 356; Curtis Adm. Dig., 144, sect. 6.

A collision may happen without blame being imputable to either party. In such case the loss must be borne by the party upon whom it happens to light. It may be the result of mutual negligence or misconduct. In such case, the Supreme Court of Louisiana has decided that the plaintiff cannot recover. 3 La. Ann., 441.

The general presumption in favor of the party charged is in

this case corroborated by a single fact, in regard to which there is no contrariety in the evidence. It seems agreed, on all hands, that the head of the steamboat had passed the flatboat before the collision occurred, and before any one anticipated the danger. Nothing, under such circumstances, could have led to the catastrophe, but the unexpected movement of the flatboat, occasioned by the eddy.

As to the measure of damages, it is submitted that, in a case of this description, vindictive damages ought not to be allowed; nor is the party entitled to more than indemnification. Under this rule, where the property injured is *in transitu*, and has not reached the port of destination, the prime cost and the necessary expenses incurred, furnish the measure of damages. *Amistad de Rues*, 5 Wheat., 385; *Amiable Nancy*, 3 Id., 546; 1 Paine, 111; *The Lively*, 1 Gall., 308; *The Apollon*, 9 Wheat., 362.

Another question arises in this case. After the master and crew had been carried to New Orleans in the Memphis, in March, 1847, namely, in March, 1848, Bull and his partners bring this suit for the use of the Firemen's Insurance Company of Louisville. From the bill of lading, it appears that the cargo belonged to several individuals. The insurance effected by them, March 22, 1847, covered the entire cargo; but there was no insurance on the boat itself. The amount of loss, $3,496.48, was paid, May 4, 1847; and it was agreed that Bull & Co. should bring a suit for the recovery. The judgment was for $3,753.45, exceeding the loss paid by the insurance company, with interest, and manifestly included the boat, &c.

*The action is brought, as the libel avers, (p. 4), [*468 exclusively for the use of the insurance company; yet the claim embraces the boat, on which there was no insurance.

1. It is submitted that, after the payment of the loss by the company, Bull & Co. had no right to bring this suit, he being already paid.

2. That if the insurance company brought suit, it was entitled to recover no more than what was actually paid by it.

3. That, in this action, the claim for the loss sustained by the cargo was improperly joined with a claim for the injury to the boat, the insurance company having no interest in the latter.

Mr. Justice WAYNE delivered the opinion of the court.

Two objections were urged in the argument of this cause by the appellants' counsel, against this court giving a decision upon its merits.

The one, that the court had not jurisdiction on account of the locality of the collision, it being beyond tide-water; and the other, that the libellants could not prosecute this suit for the benefit of others, as the libellants have no interest in it.

The first may be disposed of, because the court, at this term, has decided, in the case of the *Genesee Chief* v. *Hitzhugh et al.*, that the constitutional jurisdiction of the United States in admiralty was not limited by tide-water, but was extended to the lakes and navigable rivers of the United States.

The other objection is not sustained by the proofs in the cause. Mr. Atwood, p. 39 of the record, states what was the amount of insurance which was paid upon the cargo, by the Firemen's Insurance Company of Louisville, and that nothing was paid to the libellants, Bull & Co., for the loss of the boat.

In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases. But all persons entitled on the same state of facts to participate in the same relief, may join as libellants, whether the suit be *in personam* or *in rem*. Benedict, 211, § 380.

Mr. Atwood, in his testimony, says, how Bull & Co. became united with the insurance company in this suit, though it is not stated in the libel with the precise formality it should have been, yet it appears sufficiently plain in other parts of the libel, and from the proofs in the cause, that the parties named in the libel have respectively an interest, which is covered by the principle just stated, that the same state of facts which will give relief to one will permit others to be joined as libellants. It is no substantial objection, then, that the suit has
*469] been brought *in the name of Bull & Co., for the use of the Firemen's Insurance Company. The insurance, in this instance, was upon the cargo of boat No. 2, and not upon the boat. The cargo, however, was not fully insured. The insurance company, upon being informed of the loss of it from a collision with the Memphis, paid their policy upon it, and that placed them in a condition to bring this suit for its recovery, if it could be ascertained that the collision was produced by the fault of those who were in charge of the steamer belonging to the appellants.

We will now inquire from what cause the collision happened, or who was in the fault.

In the second article we have a description of its locality. It was at a point in the Mississippi River opposite Prophet's Island, in the state of Louisiana, and took place on the 11th April, 1847, on a clear day, between the hours of nine and

ten o'clock, in the forenoon, whilst the flatboat, No. 2, was going down stream in the usual and proper channel. It seems, that she was drawn in towards the shore by an eddy, and that whilst there, the steamer Memphis, also descending the river, and the flatboat came in contact with each other, from which the flatboat was capsized and sunk in less than four minutes, losing her whole cargo, excepting sixteen barrels and one keg of lard. The allegation is, that the steamer, with proper care and skill, might with great ease have been kept clear of said flatboat, and that the flatboat could not possibly get out of the way of the steamboat, but was run against by the steamer with great force and violence, striking her on the starboard quarter and causing her to fill rapidly. The answer of the respondents to this allegation is, that the steamer was carefully going down the Mississippi, being at the time in the proper place for a descending boat, and that the officers on board of said steamboat observed two flatboats in the eddies, on both sides of the river, one in the eddy on the right side of the river, the other in that on the left, the latter being the flatboat, No. 2. It is further stated that when the flatboats were discovered, there was ample space for the steamboat to pass safely between them. The flatboat on the right hand side of the river was nearest the steamboat, and was first passed. It is also stated that in order to leave ample room for passing in safety flatboat No. 2, which was on the left side, that the Memphis was steered as closely to the first flatboat as it was prudent or safe to go; that after that boat had been safely passed, the flatboat, No 2, appeared to be some two hundred yards in the eddy from the course of the steamer, the captain of her requesting that a Louisville paper might be thrown into the river for him, stating that he would send his skiff out for it. Up to this time there was not the slightest apprehension of a *collision. The captain of the Memphis not liking the position of the flatboat, she being [*470 at the time off to the left of his boat, with her bow nearly at right angles to his boat, requested the persons on the boat to throw down her stern. The captain of the flatboat seized the helm and endeavored to do so, but could not succeed. A moment before this, no one could have supposed a collision possible, but just about the time the bow of the Memphis passed the flatboat, she being then a considerable distance to the left of the course of the Memphis, a sudden change in the current of the eddy, or some other cause unknown to these respondents, threw the said flatboat against the larboard wheel-house of the Memphis, nearly bow foremost, which started one of the planks of her bow, causing her soon to fill

with water and sink. That previous to, and at the time of the collision, the Memphis was running in the current of the river, between the two eddies.

From these allegations of the appellants and respondents, substantially agreeing with each other, as to the eddies, the locality of the collision, and the relative positions of the boats to each other at that moment, it would be difficult to determine by the fault of which of them the disaster was occasioned. But from the antecedent navigation of the Memphis from the point where the flatboats were first observed, whether it shall be taken from the narrative of the respondent just recited, or from the evidence in the case, it cannot be doubted that the collision was produced by the carelessness or ignorance or disregard of her pilot of the consequences which those eddies might produce in the positions in which the Memphis and flatboats then were. It is not denied by the respondents, and it is asserted by the libellants, that the flatboat was, from the time the Memphis first saw her, until she was sunk, in the proper channel of downward navigation, floated onward only by the current. The captain of the Memphis, in his downward course, was the first to discover the danger resulting from the position in which his vessel had been placed relatively to the flatboat. He says, he did not like it, and requested those on board the flatboat to throw down her stern. He admits, that the captain of the flatboat endeavored to do so, but could not succeed. He had approached the flatboat, without any change in the position of the flatboat up to that moment. Now, if according to his own declaration, the collision occurred but a moment after, before he can be excused for his near approach to the flatboat, he must show that there was not water-room, and of sufficient depth, to have run the Memphis further off than he did, and that there was not, on either side of the flatboat, a sufficient width of water for him to have passed the flatboat at a dis-

*471] tance greater than the length of the *Memphis, for it is plain, if that had been done, whether the eddy turned the flatboat or not, that the two boats could not have come into collision. The evidence on the part of the respondents, confirms this view of the case; for Galusha says, that at the time of the collision, there was room enough for the Memphis to pass without interfering with the flatboat at all: and Thomas testifies, that the flatboat was floating with the current, and the steamboat running with the stream, and though that at the place of accident, there was an eddy on both sides of the river, that the river was very high and broad, and the Memphis might have passed on either side and thereby pre-

vented the accident. It is further stated by this witness, that the Memphis was coming towards the flatboat, and if we had pulled from her we should have got into the eddy towards her, and she would have run over us; we did every thing we could to prevent said accident, and it was not caused by the carelessness or want of skill of the crew of the flatboat. Yourd, another witness, confirms this statement, and that the Memphis had "a plenty of room to avoid her." Henry Moore, another witness says, that the accident was caused by the fault of the pilot or crew of the steamboat Memphis; that it occurred in daylight, when there was no fog on the river and no wind; that on the left side of the steamboat there were three hundred yards of water; and on the right side one hundred yards; that the steamboat might have passed on either side with perfect safety to herself and the flatboat, as there were neither bars nor snags in that part of the river; but that instead of passing around, she undertook to run between the flatboat and a hay boat that was floating between us and the right-hand shore, and struck our boat as he has stated. The respondents' witness, Bentley, confirms the statement of the last witness, that the steamer run between the two boats, running as near to the boat on the right, in order to leave as much room for the one on the left, as possible; and that he did not, after he had passed the boat on the right, apprehend there was any danger of collision with the boat on the left: that the Memphis kept a straight course down the current of the river, and did not suppose, when the Memphis passed the first flatboat, that he would run within a hundred yards of the boat No. 2. He further states, that the flatboat No. 2 did not change her relative position to the course the Memphis was running, but it was caused by the eddy forcing out the flatboat into the current of the river; that he, as the pilot, ran the Memphis in such a manner as he thought would prevent a collision. He thinks the Memphis was fifty yards from the flatboat, when the bow of the Memphis passed her; at that time witness was running, quartering into the bend on *the left. About that time he was apprehensive of a collision, and that it was caused by the approach of the flatboat. But this witness says, that the river at the place of collision was from three quarters to a mile wide. Now with this fact, stated by himself, why was it necessary to run the Memphis on such a course as that such a collision should have happened? Or why was she not run at such a distance as that it could not have occurred? Added to this, this witness knew the force of the eddies, and should have guarded cautiously against their effect.

[*472

This is a cause of collision happening in broad daylight after the steamer had observed the flatboat for more than the distance of half a mile. The evidence shows, that the steamer could have been differently navigated from the manner in which she was, and that the course she was run, though in the judgment of the pilot was the best under the circumstances, yet that it was a course which caused the collision, and that another might have been taken by which there would have been no possibility of a collision.

The judgment of the Circuit Court is affirmed.

Mr. Justice DANIEL dissented from the decision in this case, on the ground of the want of jurisdiction in the admiralty courts of the United States, in cases like the present.

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, and damages at the rate of six per centum per annum.

MYRA CLARK GAINES, APPELLANT, *v.* RICHARD RELF, AND BEVERLY CHEW, EXECUTORS OF DANIEL CLARK AND OTHERS.

Myra Clark Gaines filed a bill in chancery, alleging her claim to certain property upon the ground that Clark, who died seized of the property, had been married to Zulime, the mother of the complainant.

The claim was resisted upon two grounds. 1st, That no such alleged marriage took place; and 2d, That Zulime was, at the date of the alleged marriage, the wife of a man named Desgrange. The marriage with Desgrange was admitted by the complainant, but it was contended that the marriage was void *ab initio*, because Desgrange, at the time of contracting it, had another wife living, and therefore was guilty of bigamy.

In this case, it is decided that the two principal witnesses for the complainant, to establish *the fact of the marriage between Zulime and Clark, (the parents of the complainant), are unworthy of credit. *473]

That the charge of bigamy against Desgrange is not substantial, because,

1. The depositions of persons who testify to it only state hearsay and rumor.
2. That the naked confessions of bigamy which Desgrange was alleged to have made are incompetent evidence and inadmissible as against the executors of Clark and purchasers holding by sales from them. To hold that either party could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine.
3. A certificate of a priest, given sixteen years after the marriage, that he had

married Desgrange to his alleged first wife, was inadmissible as evidence. There was no register of the marriage in the records of the church.

4. A mutilated record of a suit brought by Zulime against Desgrange, and alleged to have been for the purpose of having her marriage with him declared null and void, does not prove the bigamy of Desgrange. The cause of action is not stated, the petition having been lost.

A sworn copy of an ecclesiastical record, taken at the proper office and produced by the lawful keeper of the records, may be admitted as evidence, the original being produced by the bishop who had charge of the records of the bishopric.

This purported to be a trial of Desgrange for bigamy, and his acquittal. It was competent evidence as rebutting testimony inasmuch as proof of the loss of the record and secondary proof of its contents had been given on the other side.

The depositions of Zulime in this ecclesiastical case, and also in a suit brought by her against Desgrange for alimony, are received by this court as competent evidence, because there was notice of a motion in the Circuit Court to suppress the evidence, but in the course of a long trial no such motion was made. If it had been made, the deponent herself was at hand to testify. No objection having been made to it in the court below, none can be made here. Moreover, the complainant claims under a deed of gift from the deponent, and is estopped by her declarations.

The decree of this court in the case of *Patterson* v. *Gaines*, (6 How., 550,) cannot affect other persons, because these persons were not parties to it, and because that case was not a controversy carried on in earnest.[1]

Mr. Chief Justice Taney and *Mr. Justice McLean* did not sit in this cause.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The bill was originally filed in the Circuit Court by William W. Whitney and Myra Clark Whitney (now Myra Clark Gaines) in 1836. From 1834 to 1836 they had been proceeding in the probate court of Louisiana, until in 1836 their petition was dismissed. They then filed a bill in the Circuit Court of the United States.

At January term, 1839, a motion was made in this court for a *mandamus* to compel the Circuit Court to proceed according to the rules established by this court for the regulation of chancery proceedings. The case is reported in 13 Pet., 404.

It came up again at January term, 1841, upon a certificate of division in opinion between the judges of the Circuit Court, whether chancery practice should prevail there or not, and is reported in 15 Pet., 9.

The defendants below having demurred to the bill, the case came up again upon another certificate of division in opinion at *January term, 1844, and is reported in 2 How., 619, under the name of *Gaines et ux.* v. *Chew et al.* [*474

[1] See also *Gaines* v. *Hennen*, 24 How., 566, 572, 578, 601, 617, 622, 628, 631; *Gaines* v. *New Orleans*, 6 Wall., 711; *Davis* v. *Gaines*, 14 Otto, 406; *Finn* v. *Finn*, 62 How. (N. Y.) Pr., 85.

One of the defendants, Patterson, having answered the bill instead of demurring to it, this branch of the case came before this court again at January term, 1848, and is reported in 6 How., 550.

The present case now came up upon pleas, answers, replications, and evidence, constituting a record of upwards of twelve hundred printed pages. Much of the history of the case and the substance of a considerable portion of the evidence is given in the two reports in 2 How. and 6 How., and the reader is referred to those reports. Some of the most important parts of the additional evidence, introduced into the case for the first time, will be noticed in the present statement.

Mrs. Gaines claimed under two distinct titles; one as the forced heir of her father, Daniel Clark, and the other as the assignee of her mother's share of the estate which had been conveyed to her by her mother. In either view, the lawful marriage between Daniel Clark, her father, and Zulime Carrière, her mother, alleged to have taken place in 1802 or 1803, was the great point in the case to be proved; and the first step to establish that was the capacity of Zulime to marry. Her previous marriage with Desgrange was admitted; but it was alleged to have been null and void *ab initio*, because Desgrange had another wife living when he contracted his marriage with Zulime Carrière. Part of the evidence to sustain this charge of bigamy against Desgrange is recited in the opinion of the court: viz., the testimony of Madame Despau, Madame Caillanet, Joseph Bellechasse, and Madame Bengueril. Two other pieces of evidence were relied upon by the complainant to fix the charge of bigamy upon Desgrange, which are referred to in the opinion of the court with an intimation that the reporter should set them forth with more particularity. They were as follows:

1st. The catholic priest's certificate of Desgrange's prior marriage.

The existence of this paper was discovered in the following manner, as stated in the deposition of James Gardette, taken under a commission:

"And afterwards, to wit, on the 10th July, 1849, appeared Dr. James Gardette, a witness, heretofore called and examined on behalf of complainant, and now by them recalled, doth depose and say,—

"Witness being shown document No. 6, filed with the commissioner by complainant on 23d June, 1849, being a certificate of marriage of one Jacobum Desgrange and Barbara

Orci, he was asked to state when and where the same was found. Witness *says: My mother and myself were looking over the papers of Dr. Gardette, my father; [*475 several papers fell on the floor, and among them this paper was found. This paper was found after the decision of the Patterson case in the Circuit Court of the United States, and before the decision of the same case in the Supreme Court of the United States. And it was handed by my mother to General Gaines or his wife immediately after it was found.

"JAMES GARDETTE.

"Cross-examination waived by Louis Janin, Esq., of counsel for defendants. "J. W. GURLEY,

"*Commissioner.*"

The certificate was as follows. The Latin is given as it is printed in the record.

Exhibit A. A. G., U. S. Com'r.

"*Omnibus has literas, Inspecturis Salutem in Domino.*

Ego infrascriptus sacerdos Catholicus et Apostilicus, pastor Ecclesiæ S. Petri Apostoli, hinc Præsentibus, notum facio et attestor omnibus et singulis, quorum interest, quod die sexta mensis Julij, A. D. 1790, in matrimonium conjunxerum Jacobum Degrange et Barbara m Orci, Testes præsentes fuerunt, Joannes O'Connell, Carolus Bernardi, et Victoria Bernardi. In quorum fidem, has manu propria scripsi, et subscripsi, vigilloq. muniri. Datum Neo Eboraci, vulgo New York, hac die 11d mensis Septembris, A. D. 1806.

"GULIELMUS V. O'BRIEN,

"Reg. pag., '45. "*Pastor Ecclesiæ S. Petri ut supra.*

"Nous, Gabriel Rey, général divisionaire, commissaire des relationes commerciales de France, à New York, certifione que Monsieur Guillaume V. O'Brien, dont la signature est apposé à l'extrait de mariage en l'autre part, est prêtre et curé de l'Eglise Catholique de Ste. Pierre, en cetté ville de New York, et qu'en cette qualité foi doit être ajouter à sa dite signature tant en jugement que hors.

"En témoin de quoi nous avons signé le présente et scellé fait apposer le timbre du commissariat, à New York, [L. S.] le 13 Septembre, 1806. REY."

Indorsed: "Admitted by defendants as proved, reserving all legal objections to its admissibility as evidence.

"J. W. GURLEY, *Commissioner.*"

*In order to fortify this certificate, the depositions of Ellen Guinan, John Power, and Charles E. Benson were taken in 1846.

Ellen Guinan was the niece of William V. O'Brien, and resided with him from the time that she was nine years old until he died, being about twenty years. O'Brien was pastor of the church for thirty years, viz., from 1784 to 1814, when he died. She had been accustomed to see him write several times a day, and testified that the whole of the above certificate was in his handwriting. She also deposed as follows:

13. Question. Do you know the persons named in the body of this exhibit, Joannes O'Connel, Carolus Bernardi, and Victoria Bernardi?

Answer. I have heard of them, and think they are dead, but never knew or saw them that I know of.

14. Question. Did you know Jacobum Desgrange and Barbara M. Orci, named in the body of the exhibit?

Answer. I did not—never have known them.

15. Question. Do you know whether the books or records of St. Peter's church were at any time destroyed?

Answer. I heard they were.

16. Question. When did you hear they were, and on what occasion?

Answer. A gentleman from Ireland, Mr. Cruise, who married the sister of Sir John Johnston, of Johnstown, and Warrenstown, in Ireland, came to inquire about the marriage of one of his family, whom he had understood was married by my uncle. I told him to go to the church, as we had given up uncle's books after his death to Bishop Connelly, catholic bishop of this city. He came back and told us that he had found that the books had been destroyed by fire.

17. Question. About how long ago was it that you thus heard that the books were destroyed?

Answer. To the best of my recollection, about thirteen or fourteen years ago.

18. Question. What did you hear of Joannes O'Connell, Carolus Bernardi, and Victoria Bernardi, named in the exhibit shown you, and mentioned in a previous question?

Answer. I heard from my aunt, Louisa Jane O'Brien, that they were all attached to the Spanish ambassador's suite. I think O'Connell was his chaplain.

John Power, the vicar-general of the diocese of New York, and pastor of St. Peter's church, deposed as follows:

2. Question. How long have you been pastor of St. Peter's church?

Answer. I have been officiating as clergyman in that church *twenty-six years, (taken in 1846) and pastor of it about twenty years. [*477

3. Question. Have records been kept in said St. Peter's church of the marriages solemnized by the clergymen officiating there?

Answer. There have been, with more or less regularity; there have been frequent omissions arising either from neglect or accident.

4. Question. Is there any written record now existing of the marriages solemnized by the clergymen of the said church previous to the year 1800?

Answer. I don't know that such a record exists; I have heard that it was missing, but have made no particular personal search for it; I don't know that I ever saw it.

5. Question. Have you known, personally or by reputation, William V. O'Brien, now deceased?

Answer. I have no personal knowledge of him; he was dead when I came to this country, but his memory was then fresh in the minds of people, and he was held in high repute.

6. Question. What was his profession, and what place or office did he hold here?

Answer. He was pastor of St. Peter's church.

7. Question. How long had he been pastor of St. Peter's church?

Answer. Many years; I cannot say the precise time.

8. Question. Do there appear to be any records in said church kept by him of the baptisms which he solemnized whilst pastor of said church?

Answer. There do.

9. Question. Have they been universally and at all times received as genuine and authentic?

Answer. They have been always received as genuine and authentic, and I have no doubt that they are so.

10. Question. Have you any knowledge of the handwriting of said William V. O'Brien; and if so whence have you derived it?

Answer. I have a knowledge of his handwriting, which I derived from the register of baptisms in St. Peter's church, which have always been received as —— handwriting.

11. Question. From the knowledge which you have thus derived of his handwriting, do you believe the signature Guli elmus V. O'Brien, in the exhibit marked A, now shown you, to be in the handwriting of said William V. O'Brien?

Answer. I believe it to be his handwriting; it is identi-

cally the same handwriting with that of the records now in the church of which I have spoken.

*478] *12. Question. In whose handwriting do you believe the writing in said exhibit preceding said signature, that is, the body of the marriage certificate, to which said signature is affixed, to be?

Answer. In the handwriting of said Rev. William V. O'Brien.

13. Question. In what language did said Rev. Mr. O'Brien keep his records before spoken of?

Answer. In the Latin language.

14. Question. How did he sign his name when writing in the Latin language?

Answer. In the same manner as it is signed in the exhibit marked A, which you have shown me—Gulielmus V. O'Brien.

15. Question. Had said Rev. Mr. O'Brien full and legal power to solemnize and perform the ceremonies of marriage while he was pastor of St. Peter's church?

Answer. He had.

16. Question. Have you a knowledge of, and are you versed in, the Latin language?

Answer. I am versed in the Latin language.

17. Question. Please to read said certificate of marriage marked exhibit A, now shown you, and state whether the marriage of Desgrange, therein certified to, was performed according to the usages and formalities of the said church at the time of the date of the said certificate, so far as the same appears in, and by virtue of, the said certificate.

Answer. The certificate is absolutely in due form, and it is to be presumed that the marriage was solemnized according to the rights and ceremonies of the Catholic church. Previous to giving this my answer, I have, as requested, read the said certificate, and understand its contents.

18. Question. Do you know any thing of the witnesses to the said marriage mentioned in said certificate, or any of them?

Answer. I do not.

Charles E. Benson, the clerk of St. Peter's church, deposed as follows:

2. Question. Have you the custody of the records of marriages and baptisms solemnized by the pastors and clergymen of said St. Peter's church?

Answer. I have.

3. Question. Is there existing now among those records any record or written memorandums of marriages solemnized

by the pastors and clergymen of the said church previous to the year 1800?

Answer. There is now none existing of any date previous to the year 1802.

4. Question. Have you any knowledge of the handwriting of William V. O'Brien, catholic priest, formerly pastor of said St. Peter's church?

*Answer. No other knowledge than such as I derive from the records of the church which were kept by him. [*479 Those records have been always received as authentic and genuine, and as being in his handwriting.

5. Question. From the knowledge which you have thus derived of his handwriting, do you believe the certificate of marriage, marked exhibit A, now shown to you, to be in his handwriting, including the signature, Gulielmus V. O'Brien?

Answer. I do; I have not the slightest doubt about it.

6. Question. Are there any records of baptisms solemnized by the pastors of St. Peter's church?

Answer. There are.

7. Question. Are there any such records of baptisms belonging to said church kept by William V. O'Brien?

Answer. There are; from the year 1787 to the year 1808 in one register, and from 1808 to 1816 in another. There are in each of these registers other entries by other clergymen attached to the church.

8. Question. In whose handwriting are the first entries in the oldest register spoken of by you?

Answer. In the handwriting of said Mr. O'Brien.

The witness also deposed that he had made diligent search for the register of marriages previous to the year 1802, but was not able to find it.

Another piece of evidence relied upon by the complainants was what is sometimes spoken of as a divorce record, and sometimes as a mutilated record. It was as follows:

"*State of Louisiana, third District Court of New Orleans.*

"ZULIME CARRIERE }
v. }
JEROME DESGRANGE. }

"No. 256 of the docket of the late county court of New Orleans.

"*Citation.* Mr. Ellery, (curator of Desgrange:)

"You are hereby summoned to comply with the prayer of the annexed petition, or to file your answer thereto in writing,

with the clerk of the county of New Orleans, at his office, in New Orleans, in eight days after the service hereof, and if you fail herein, judgment will be given against you by default.

"Witness, James Workman, judge of the said court, this 24th day of June, in the year of our Lord 1806.

(Signed) "THOS. S. KENNEDY, *Clerk.*

"Return on citation served on Ellery, 30th June, 1806.

(Signed) "GEO. T. ROSS, *Sheriff.*

"Plea filed July 1st, 1806."

*"ZULIME CARRIERE
v.
JEROME DESGRANGE. } No. 556.

"*County Court of New Orleans.*

"The plea of Jerome Desgrange, defendant, to the petition of Zulime Carrière, plaintiff.

"This defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in the plaintiff's said petition contained to be true, in such manner and form as the same are therein and thereby alleged, for plea unto the said petition saith, that this court ought not to have cognizance of the same, because the laws by which this court was created, and the jurisdiction thereof established, do not extend the same to cases of divorce, or give to this court any authority to pronounce therein, and because the damages in the said petition prayed for against this defendant cannot be inquired into or assessed, until after the judgment of this court, in touching the validity of the marriage between the petitioner and the defendant, shall be first declared.

"Wherefore, this defendant doth not suppose that this court will or ought to have or hold further cognizance of the petition aforesaid; and therefore this defendant doth plead the premises in bar to the said petition, and humbly demands judgment of this honorable court, whether he shall be put to make further answer thereto, and prays to be hence dismissed, with his reasonable costs and charges in this behalf wrongfully sustained.

(Signed) "A. R. ELLERY, *for Def't.*"

"And the said plaintiff saith, that for any thing by the defendant above, in pleading, alleged, she ought not to be barred or precluded from having and maintaining her action aforesaid against the said defendant.

"Wherefore, for want of a sufficient answer in this behalf, the plaintiff prays judgment, &c.

(Signed) "BROWN & FROMENTIN, *for Pltff.*"

Answer filed July 24th, 1806.

"ZULIME CARRIERE
v. } No. 356.
JEROME DESGRANGE.

"*County Court of* [*New*] *Orleans.*

"Answer of Jerome Desgrange to the petition of Zulime Carrière.

"This defendant, saving and reserving to himself all manner of *benefit of exception to the many errors, untruths, and imperfections in the said petition contained, for answer thereunto saith, that the facts in the said petition set forth are untrue, and prays that he may be hence dismissed with his costs and charges in this behalf most wrongfully sustained. [*481

(Signed) "A. R. ELLERY, *for Def't.*"

(Then followed in the record a long certificate of marriage between Geronimo Desgrange and Maria Julia Carriére, performed by a Catholic priest on the 2d of December, 1794, which it is not necessary to transcribe).

"ZULIME CARRIERE } Brown & Fromentin, for plaintiff.
v. } No. 356.
DESGRANGE. } Ellery, for defendant.

"Petition filed June 24th, 1806. Debt or damages, $100. nds 600. Plea filed July 1st, 1806. Answer filed July 24th, 1806. Set for trial on Thursday, 24th July.

"Summons issued for M. Coudrain, Chovot, Mary Marr, Rose Carrière, Christopher Joseph Le Prevost, Trouque, Le Breton d'Orgenoy, and Joseph Villar, senior.

"Attorneys . . $10 00 } Mr. Fourke, sworn
Clerk . . . 7 87½ } Mr. d'Orgenoy,
Madam Marr.

"Judgment for plaintiff. Damages, $100. July 24th, 1846."

"*State of Louisiana, Third District Court of New Orleans.*

"I, Charles Weysham, deputy clerk of the third District Court of New Orleans, do hereby certify, that the above and

foregoing five pages do contain a full and complete transcript of the case, wherein Mrs. Zulime Carrière is plaintiff, and Jerome Desgrange is defendant, instituted in the late county court of Orleans, under the No. 356, excepting the petition, that cannot be found. And that by operation of law, the records of the said county court of Orleans have been transferred to this court, and are now in the custody of the clerk thereof.

"In testimony whereof I have hereunto set my hand, and affixed the seal of the said court, at New Orleans, on this 14th *fourteenth* day of June, in the year of our Lord eighteen hundred and forty-nine, and the seventy-third year of the independence of the United States.

(Signed) "CHAS. WEYSHAM,
Deputy Clerk."

*482] *In addition to these evidences of the bigamy of Desgrange, the complainant introduced the testimony of various persons to prove the fact of the public reputation at the time, and that of a great number of witnesses, to sustain the character of Madame Despau.

The above comprehends the principal evidence offered by the complainant and appellant, in addition to that which is set forth in the opinion of the court.

Evidence offered by the respondents.

1. The ecclesiastical record is transcribed in the opinion of court, and need not be repeated.

2. A record which is spoken of as the Alimony Record.

"*State of Louisiana, Third District Court of New Orleans.*

"ZULIME C. DESGRANGE
v.
JEROME DESGRANGE. } No. 178, of the docket of the late County Court of Orleans.

"Petition filed November 30th, 1805.

"*To the honorable James Workman, judge of the County Court of Orleans.*

"The petition of Zulime Carrière Desgrange, an inhabitant of the City of New Orleans, humbly showeth—

"That whereas it is provided by the first section of an act, entitled an act concerning alimony, and for other purposes, that the County Court shall have jurisdiction on application

from wives against their husbands, for alimony, on the husband deserting his wife, for one year successively, and in cases of cruel, inhuman, and barbarous treatment; and whereas your petitioner may adduce proofs before this honorable court that she has been cruelly and barbarously treated by Jerome Desgrange, her husband, and likewise that she has been deserted by him, for three years past, to wit, from the second day of September, one thousand eight hundred and two, ever unto this day, although she has been told that the said Jerome Desgrange returned from France to New Orleans some time in the course of last month, and is now in the city of New Orleans.

"Wherefore, these are to pray that it may please your honor to order that the said Jerome Desgrange, your petitioners's husband, be condemned to pay to your petitioner a sum of five hundred dollars per annum, and that your petitioner be likewise entitled to all the other benefits and advantages belonging to her, in virtue *of the law of this territory [*483
in that case made and provided; and your petitioner, as in duty bound, shall ever pray.

(Signed) ELIGIUR FROMENTIN,
"*Attorney for Plaintiff.*

"*Citation*

"Mr. Jerome Desgrange—

"You are hereby summoned to comply with the prayer of the annexed petition, or to file your answer thereto, in writing, with the clerk of the county of Orleans, at his office at New Orleans, in eight days after the service hereof; and if you fail herein, judgment will be given against you by default.

"ZULIME C. DESGRANGE,
v.
JEROME DESGRANGE. } No. 178.

"Witness, James Workman, judge of the said court, this 30th day of November, in the year of our Lord 1805.

(Signed) "THOS. S. KENNEDY, *Clerk.*

"*Return on Citation.*

"6th December, 1805, served on the defendant.

(Signé) "JOHN T. PROUILLARD, *D. S.*

"FROMENTIN, *Att'y.*

"ZULIMA CARRIERE DESGRANGE
v.
JEROME DESGRANGE. } No. 178.

"Petition filed 30th November, 1805, for alimony. Served December 6th, 1805. Judgment by default, December 19th, 1805. The court doth award final judgment for the plaintiff, December 24th, 1805.

(Signed) "JAMES WORKMAN.

"Attorney's fees, $19 62½
"Clerk's fees, 10 87½

"Execution issued December 24th, 1805."

"*State of Louisiana. Third District Court of New Orleans.*

"I, Chas. Weysham, deputy-clerk of the third District Court of New Orleans, do hereby certify, that the above and foregoing four pages do contain a full and complete transcript of the record of the case, wherein Mrs. Zulime Carrière Desgrange is plaintiff, and Jerome Desgrange is defendant, instituted in the late County Court of Orleans, under the No. 178; and that by *operation of law the records of the said late County Court of Orleans have been transferred to this court, and are now in the custody of the clerk thereof."

*484]

3. In order to impeach the character of Madame Despau, three records were filed in evidence, the contents of which will be briefly stated under the letters A, B, C.

A. On the 10th of June, 1805, William Despau filed a petition in the Superior Court in and for the Territory of Orleans, praying for a separation from Marie Sophia Carrière, his wife. It alleged "incompatibility of humor and several other reasons, the recital of which would be too afflicting."

On the 8th of July, 1805, she answered the petition, admitting the material facts alleged.

On 11th of January, 1806, a separation from bed and board was decreed, by consent, and the plaintiff was ordered to hand in an inventory of his estate.

B. Sophia filed her petition, on the 1st of September, 1806, alleging that her husband was about to sell two plantations or tracts of land, and praying an injunction, which was granted. On the 2d of October, 1806, Despau filed his answer, consenting that one half of the proceeds of sale should be placed in bond and security; and the injunction was dissolved.

C. On the 8th of February, 1808, Despau filed his supplemental petition, with his affidavit dated 11th of November, 1807, stating that on the preceding June his wife had left

New Orleans clandestinely, being the second time that she had done so, for the purpose of going to the United States. Another witness made affidavit that she had set sail for North America.

Whereupon, in May, 1808, the court passed the following order:

"Ordered by the court, that the bond referred to in the petition on file in the office of the clerk of this court be cancelled, and the security discharged; and that, as the defendant hath forfeited her right to the property acquired in the community, that the same vest in and belong to the petitioner.

May 24th, 1808. (Signed) JOSHUA LEWIS.

(Countersigned) J. W. SMITH, *Clerk*."

4. The respondents also gave in evidence two powers of attorney; one executed by the sisters of Zulime to Desgrange, dated March 26th, 1801, authorizing him to settle certain affairs in Bordeaux, in France, and the other from Desgrange to his wife, authorizing her to act for him in his absence. Also, a letter written by Desgrange to Clark from Bordeaux, and dated July, 1801. These papers are referred to or recited in the opinion of the court.

*The respondents also gave in evidence the deposition of Daniel W. Coxe, of Philadelphia. To this [*485 were annexed a number of letters addressed to the deponent by Clark, and numbered from 9 to 80. In addition to these a great number of letters to and from Clark were introduced into the case. These were used indiscriminately by the counsel for the appellants and appellees in their arguments, to sustain the views which they respectively took of the facts in the case. These letters showed Clark to have been twice in Philadelphia during the year 1802, once in April, and again in the latter part of July and beginning of August.

The deposition of Coxe was twice taken, and both of them were inserted in this record. It was taken once in 1841 in a suit between John Barnes and wife against Edmund P. Gaines and wife, in the First Judicial District Court, and again in 1849 in this suit. In his answer to the 17th interrogatory, in his deposition of 1841, he says:

"I repeat that the said Daniel Clark was in Philadelphia in the spring of the year 1802. The said Zulime was then there; she arrived there before the said Daniel Clark, and, as I have already stated, brought to me a letter of introduction from him. Daniel Clark was not in Philadelphia at the birth of Caroline."

And in his answer to the 7th interrogatory, he said:

"The first time Daniel Clark visited Philadelphia after the birth of Caroline was in the year 1802 and soon after her birth. I am enabled to fix the time by referring to a power of attorney left by him with me," &c., &c.

A copy of that power is annexed to his deposition, and its date is 22d April, 1802.

In the deposition taken in 1849, he thus replied to the 14th interrogatory in chief:

"Daniel Clark did both write and speak to me about his (the said Clark's) relationship or connection with Madame Desgrange, the reputed mother of the complainant Myra. In the early part of the year 1802, the said Madame Desgrange presented herself to me, with a letter from Daniel Clark, introducing her to me, and informing me in confidence that the bearer of that letter, Madame Desgrange, was pregnant with a child by him, and requesting me, as his friend, to make suitable provision for her, and to place her under the care of a respectable physician; requesting me at the same time to furnish her with whatever money she might want and stand in need of, during her stay in Philadelphia. As the friend of Mr. Clark, I undertook to attend to his request, and did attend to it. I employed the late William Shippen, M. D., to attend to her during her confinement, and procured for her a
*486] nurse. Soon after the birth *of the child, it was taken to the residence of its nurse. That child was called Caroline Clark, and, at the request of Mr. Clark, the child was left under my general charge and exclusive care until the year 1811. After that period, she was not so exclusively under my charge, but I had a general charge over her, which continued up to the period of her marriage with Dr. John Barnes, formerly of this city. She is now dead, as is also Dr. Shippen, before spoken of. Daniel Clark arrived in this city within a very short period after the birth of said Caroline, which was, I believe, in April, 1802, when I received from him the expression of his wishes in reference to this child. He left here shortly afterwards, as before stated by me. During Daniel Clark's subsequent visits to Philadelphia, he always visited that child, acknowledged and caressed it as his own, and continued to give me the expression of his wishes in reference to her. On the occasion of Mr. Clark's visit to Philadelphia, immediately after the birth of Caroline, in conversation with me in reference to Madame Desgrange, he confirmed what he had stated in his letter of introduction, stating to me that he was the father of this illegitimate child, Caroline, and that he wished me to take care of her, and to let the woman

have what money she stood in need of until she returned to New Orleans."

6. The respondents gave in evidence the depositions of a number of witnesses for the purpose of assailing the character of Zulime for chastity.

7. The respondents also gave in evidence the deposition of Patterson, to show the collusive manner in which the case of *Patterson* v. *Gaines* was brought up to this court, as reported in 6 How., 550. The substance of this deposition is recited in the opinion of the court, and need not be repeated.

The above is a brief summary of the most important parts of the evidence in this cause, omitting what was published in 2 and 6 Howard, and what is now inserted in the opinion of the court.

On the 21st of February, 1850, the Circuit Court dismissed the complainant's bill, with costs; and thereupon the complainant appealed to this court.

It was argued by *Mr. Johnson* and *Mr. Campbell*, with whom was *Mr. Lawrence*, for the appellant, and by *Mr. Webster* and *Mr. Duncan*, for the appellees.

The arguments of counsel upon points raised in the cause, but not decided by the court, will be wholly omitted; and it is extremely difficult to compress those which appertain to the only question which was decided, within reasonable limits.

*The counsel for the complainant contended that the letters which were filed in the cause, conclusively proved [*487 that Clark left New Orleans for the north in November, 1801; that he was in Philadelphia in January, February, March, and April, 1802, up to the 22d of April, when his intended departure on the next day for New Orleans, in the schooner Eliza, was mentioned. They also contended that certain papers in the cause showed that Zulime was raising money in New Orleans in November, 1801, and that she was absent in January, 1802.

Leaving these questions of dates, which go to sustain the positive declarations of Madame Despau, does the plaintiff prove in any other manner that she is the legitimate child of Daniel Clark? Filiation is proven in reference to the father by presumptions. On the continent of Europe, these presumptions are generally authenticated by inquiries at the date of the birth, and entered upon public registers. These acts furnish full proof of birth and filiation. In the absence of these, the facts themselves, which raise the presumption, are resorted to. The inquiries are, who was it that prepared for

the advent of the child into life, and provided nurture and care during the period of its helplessness and infancy; who maintained it, extended its relations through the family, friends, and acquaintances; who gave it education and control in youth; who sought for it advancement, repute, and station, in early manhood; who assisted its gradual expansion and growth, the enlargement of its circle of friends and connections, the additions to its fame and fortune; who provided for it by the last will and testament; who acknowledged and guarded the child from infancy to youth, and from youth to manhood; for whose did the world accept it? These characteristics will serve to determine the father of the child. Code Louisiana, 1825, tit. 7, ch. 2, sect. 2; 8 Denisart Questions, d'etat, 8; 3 D'Aguesseau, 181; Nougarede Lois des Familles, 213; Merlin, Reper., tit. Légitimité, sects. 2, 4; 1 Stark. Ev., 47; 2 Id., tit. Pedigree, 8 Ves., 428; 8 Causes Céleb., 358.

The canon law and the canonists accept these proofs as sufficient. In the chapter "*tuis de probationibus*" of the canon law, it is said: "*Satis esse ad ejus modi de natalibus quæstiones ut quis nominetur filius et publice, agnoscatur passimque habeatur et credatur apud omnes.*"

"*Præter fidem instrumentorum et asseverationem parentum tria recensentur, tractatus, testes, fama et suppleret, deficientibus probationibus certioribus, filiationem omnem tam probari, quam præsumi, si is de cujus statu agitur pro filio habitus sit, si testes et vicini idem deponent, si popularis fama idem asseveret.*" Covarruvios de Mat., part 2, ch. 2, sect. 3; Cujac., tit. 16, book C, 7 de lib.

What are the facts established in this record? 1st. Daniel
*488] *Clark cohabited with the mother of the plaintiff prior to the birth of the plaintiff. 2d. Before the birth of the plaintiff, he provided a house, in which the mother's confinement took place. 3d. Several days after the plaintiff's birth, she was placed in the family of Colonel Davis, as the child of Daniel Clark, and was received as such. 4th. She bore the surname of Clark till his death. 5th. He provided money, and servants, and playthings for the infant. 6th. He openly cherished her as his child in the presence of his friends. 7th. He spent much time with her, and manifested much anxiety and ambition for her. 8th. No other paternity was spoken of in New Orleans for her. 9th. He provided, in 1811, upon his leaving New Orleans upon a distant journey, munificently for her. 10th. In his last will, he recognized and affirmed her legitimacy, and his last thoughts and anxieties upon his death-bed were concerning her.

The mother of the plaintiff declared her to be the child of

Clark. The family of Boisfontaine and wife, in whose house she was born, Mesdames Despau and Caillavet, her mother's sisters, received her into life as Clark's child.

Davis and wife, with whom she lived, Mrs. Harper, who nursed and cherished her, did so as Clark's child; De la Croix, who consented to be her tutor, Bellechasse, to hold property in trust for her, did so at the instance of Clark, and as the child of Clark.

This possession of the *status* and condition of filiation, was accompanied with declarations of legitimacy. The father spoke of her as the heiress of his fortune. He bequeathed to her his fortune. She was spoken of as his heiress in the community at large.

The mother represented her as the child of a legitimate marriage.

Merlin, reporting a case of legitimacy to the French court, says: 1. "That the commencement of proof, that Henrietta derives from her act of birth, from the letters written by her father, from the treatment received in the family, from the paternal testament, dated in 1801, to establish her quality of legitimate daughter and the *quasi* possession of this quality, completes full proof. If, however, the existence of a former husband, joined to the defect of proof of the putative marriage, could radically vitiate the title derived from her possession of *status*, the proof furnished of the reality of that marriage, and the common opinion relative to its effects, should authenticate the source. 2. That the title of the possession of the *status* of legitimacy being established, the proof of the vices with which this title may be infected, as to the interests of the child Henrietta, is entirely upon the opposers, for *qui dolo dicit factum aliquid licet in exceptione *docere* [*489 *dolum admissione debet.*" 10 Merlin, Questions, de droit, 49, 50.

"Always favorable to innocence," says D'Aguesseau, "when the same effect can be traced to two causes, the one illegal and unjust, and the other just and legitimate—the law rejects the first to adhere exclusively to the last." 3 D'Aguesseau, 180.

Cochin, pleading for Borguelat, says: "We should weaken the foundations of public tranquillity if, after a long possession and enjoyment of his *status*, we could displant a man from the family in which he has, as it were, taken root by acts and wide-spread recognitions." 1 Cochin, 590; 2 Menoche's Prac., 839, sects. 14, 15, 17, 18.

Starkie, speaking of such proof, says: "These are not to be considered mere wanton assertions, upon which no reliance can be placed; on the contrary, in the absence of any motive

for committing a fraud on society, it is in the highest degree improbable that the parties should have been guilty of practising a continued system of imposition upon the rest of the world, involving a conspiracy in its nature very difficult to be executed." 3 Stark., 1101; W. Bl., 877; 3 Mod., 182.

Finally, as a higher authority, and a better testimony of what the law is, we refer to the case reported in 6 How., 550.

The question then recurs, is the plaintiff the legitimate child of Daniel Clark? The defendants say no; for, at the time of the putative marriage of her mother and father, the mother was the wife of another person, and that there was, in that fact, an insurmountable barrier to a legal marriage. To prove this, they plead and prove the *factum* of an earlier marriage between Desgrange and Zulime, the plaintiff's mother. They produce a deposition alleged to have been made upon a criminal prosecution of Desgrange before an ecclesiastical court, in the province of Louisiana, in 1802; they plead and prove a record of a suit for alimony, in 1805, in one of the civil courts of New Orleans, in which Zulime alleged that she was the deserted wife of Desgrange; and, finally, they plead and prove a record for divorce, in 1806, from the same courts. These facts, they affirm, establish a valid and subsisting bar to a marriage between Clark and Zulime, at any time before the birth of the plaintiff.

The *factum* of the celebration of a marriage, and cohabitation under it, between Zulime and Desgrange, is not denied. The existence of a record, containing a charge against him for bigamy, is not denied. The fact of a record for an application for alimony is not denied; nor of the record of an application for, and judgment of, the court, declaring the marriage of Zulime with Desgrange originally invalid in 1806. We affirm, that the last record furnishes conclusive proof of *490] the invalidity *of that first marriage, and that the others do not qualify the force of that proof, or impair the case of the plaintiff.

The ecclesiastical record evidently cannot be pleaded as containing a *res judicata*. The ecclesiastical court undertakes an inquiry concerning reports of polygamous connections on the part of Desgrange, which had brought scandal upon the church; and, after taking some testimony, which does not establish their truth, suspends the proceedings until further proof could be had, and charges the defendant with the costs. The court reserves in its judgment the power to make further inquiries. 1 Phil. Ev., 340; 3 Wheat., 317; 13 Wend. (N. Y.), 592; Mitf. Pl., 194; 1 Jac. & W., 20.

The acquittal of a party for bigamy, on a criminal prosecu-

tion, is not evidence in a civil cause involving the truth of the charge. 1 Stark. Ev., 277, 280, 281; 1 Phil. Ev., 338.

The depositions taken in the case are not evidence as such. The parties are not shown to be dead. Greenleaf Ev., § 130; 13 Pet., 209. It is not admissible on account of the depositions of Zulime, or as a source of declarations, because the party is in life able to testify, and the transaction was one in which neither Clark nor his daughter were parties. Had the parties been the same, and the subject-matter the same, such a deposition would be incompetent. 1 Phil. Ev., 363.

The alimony record is produced for the benefit of an allegation in the petition, that Zulime was the wife of Desgrange. But averments in such papers are treated as the suggestions of counsel, and are not evidence. 1 Stark., 337; Gres. Eq. Ev., 424, 425. The judgment is not evidence, because marriage, in such a case, is only collaterally in question. Gres. Eq. Ev., 424; 1 Stark. Ev., 387. It could have been put in issue, but it was not necessarily so. In the Spanish jurisprudence, a marriage *de facto*, in favor of the party dealing in good faith, produces civil effects; and hence the only issue might be, whether there had been a marriage *de facto*. 4 Part. tit. 15, l, 2; Gregorio Lopez, 1 Motifs et Dis., 113, art., 201, 222; 1 La. Ann., 98; 10 Merlin Questions de Droit, 32; Ricord des Donations, part 1, 374.

The record in 1806, pleaded and produced by the defendants, the petition, and the formal judgment, which, by the practice of the court, was written upon it, has been lost. The docket-entry was kept, however, by law, and according to law (2 Martin Dig., 164), and that furnishes an account of the judgment. The plea of the defendant (Desgrange) shows us it was a suit in which Desgrange was charged with having contracted a marriage with the plaintiff which was invalid, and that damages were claimed in consequence of the wrong. The issues then were, whether the marriage of the plaintiff and defendant *was invalid, and the defendant was liable for damages. The judgment is an adjudication [*491 of the law and fact of nullity. 1 Stark. Ev., 289; 8 Mod., 182; 1 Phil. Ev., 341; 2 How. St. T., 538; 2 Atk., 388; 2 Bligh, N. S., 446; 7 Co., 42.

The inquiry then comes, what were the relations between Desgrange and Zulime, from the time of the ascertainment of his bigamy till the birth of the plaintiff? The witnesses concur in the statement, that cohabitation between them had ceased. No one witness pretends that, from the time of its publication, whenever made, was there any intercourse between them. The evidence further shows, that the mother of the

plaintiff did not assume the name of Clark, nor did she obtain from the public the repute of being the wife of Clark. This, we contend, would not overbear the proofs of legitimacy we have adduced, even if not explained. 2 Hagg., 63. There is, however, an explanation of that fact. Both Clark and Zulime acted on the presumption that judicial proof of the invalidity of the marriage between Desgrange and herself was important; perhaps they were advised it was necessary to the legality of their case. The district judge, in the case before this court, ruled that, without such judicial proofs of nullity, there could be no legality in the marriage. There is a statement in the record, coming from an eminent lawyer, formerly living in Louisiana, to the same effect. That such an opinion should have been entertained by these parties, would, therefore, not be strange.

They might have considered this only as a rule of propriety and security from ecclesiastical censure in the province of Louisiana. Supposing the opinion to have been honestly entertained, it resolves many of the difficulties that arise in viewing the conduct of the parties during the course of their subsequent history. The evidence is, that Zulime and Madame Despau, her sister, went to the north of the United States, in 1801, to get authentic evidence of the first marriage of Desgrange. Failing in that, and having no legal declaration of the fact, but satisfied of its truth, she consented to the private marriage with Clark. That the opinion had a favorable cause, but no foundation, is shown. Pothier, du Mariage (part 3, ch. 2, art. 4), 172; 9 Causes Célèbres, 158; Nougarde Jurisprudence du Mariage, 294; 2 Phill. R., 19, 20; Von Leenmen's Dutch Law, 78; Herricourt Ecc. L., 107, § 36; Shelf. Mar. & Div., 275.

Before investigating the subsequent conduct of Clark and wife, let us consider the records pleaded by the defendants and see how far they sustain the conclusions of the plaintiff. It is clear that the suit for alimony, under the Louisiana statute, did not correspond with that which Zulime ordered. Desgrange, before that time, was gone, and alimony was not
*492] expected. The *effect, however, of such a suit, under the statute, was a divorce from bed and board, and counsel might have mistaken the object, and instituted it as a divorce suit. The subsequent suit shows that the purpose of getting full judicial proof of the nullity of the marriage, and the marriage certificate, dated in 1806, showing a marriage between a Desgrange and the woman on whose account Desgrange was arrested, testify a purpose not satisfied by the

first suit, on the part of Zulime, to comply with the demands of Clark, or with the provisions of the law.

These records, so far from showing any discredit upon the explanations of the parties, when fairly considered, afford a confirmation to them.

They show that to remove the alleged impediment to the declaration of the marriage, a judicial inquiry and sentence were supposed necessary, and that the party interested persevered in measures to secure them.

One other argument remains, and that consists in the evidence of Coxe. He undertakes to establish the fact of an illicit intercourse, and to negate the fact of marriage by proving that Clark was never in Philadelphia, with Zulime, under such circumstances as to allow a marriage to take place. He says, that in about 1802, Zulime came to Philadelphia with a letter from Clark, confessing an illegitimate connection with her, and requesting him to provide for the mother during her confinement, and the child after its birth. That the mother left Philadelphia shortly after the birth of the child, and as soon as possible after her recovery from the sickness. That Clark arrived in Philadelphia after the child was born, and remained but a short time. The proof shows that Clark left New Orleans for Philadelphia before the 7th November, 1801; that he was unexpectedly detained in Havana, by an embargo, twenty-three days, but he is found in Philadelphia in January, and remained there until the latter end of April, 1802. Zulime is found in New Orleans in 1801, after Clark had left there for the north.

Is there any probability of the accuracy of the statement that Clark sent Zulime with a letter of introduction to Coxe, and requested him to superintend her accouchment?

Coxe was a married man, overbearing in his intercourse, staid in his manners. He reprimands Clark continually in their intercourse. As might have been expected, Clark, on some subjects, was reserved. At this moment he had his secrets carefully hidden from him.

Coxe, in his deposition taken in 1835, says nothing of the letter of introduction, speaks doubtfully of the age of Caroline Barnes, and professes to know nothing of the manner in which Zulime arrived in Philadelphia in 1807, and how she continued there.

*The account Coxe gives of Caroline Barnes is equally the subject of remark. [*493

Clark, from 1802 till 1806, was not in Philadelphia. In his testimony, he says, Clark's letters contained no allusions to Caroline Barnes. In his testimony, 1185 (10 and 11), he says

that Caroline Barnes went to Trenton to school in 1805. On page 998 he speaks of Clark's personal observation of her health, and personal directions for her removal; of his affectionate interest and tenderness. What knowledge could he have of these transactions? Clark, from 1808 till 1813, only visited Philadelphia a single time, and then to settle and dissolve his transactions with Coxe. The letters in the record show that Clark spent the vacation between the sessions of Congress in Louisiana. Additional observations are to be made upon Coxe himself. The letters, from Coxe, seem strongly to indicate that he is not deserving of implicit credit. This witness needs to be sustained himself; he cannot contribute to destroy the credit of another.

The testimony of the sisters, (Despau and Caillevet) has been assailed. Against the character of the latter nothing has been said. Her husband testifies in his last will to her excellence, and none have appeared to dispute her title to the commendation.

Madame Despau has been assailed. The testimony consists of the loose statements of a rout of witnesses who say that she was reputed to be a *galante femme;* that nothing good was said of her; that she was spoken of in the same terms as her sister. And the record of a proceeding had by her husband against her when she accompanied Zulime to the United States in 1807. This proceeding was *ex parte.* The evidence impugns Mad. Despau only for having abandoned Despau. I hardly need to state that none of this testimony is admissible to impeach her credit. Phil. Ev., 291, 292; 13 Johns. (N. Y.), 504; 3 Serg. & R. (Pa.), 337; Hill & Cowen's Notes, 768.

The life of Mad. Despau from 1808 till the present time answers the calumnies upon her. She returned from the north in 1808; with her children she went to the parish of St. Landry, and there conducted a small school. The esteem and confidence of her neighbors attached to her. Her daughters were eligibly established in marriage, and under their kindness she is now sustained and supported.

Had she been Clark's mistress would she have been left penniless? Has not the exemplary life of forty years been sufficient to vindicate her fame? Has not the fact that her husband made no contribution to his family, but left his children to her, proven the falsehood of his charges upon her?

We have considered the parties up to 1808. Let us consider *the effect of the conduct in 1808. Both parties, Clark and Zulime, we have said, may have considered particular evidence needful for the validity of their marriage.

*494]

Their opinion does not affect the case. Lord Eldon has

said on such facts: "I am exceedingly anxious to press upon your lordships' attention this is what I take to be an indisputable proposition of law, namely, that if you find there was a marriage duly celebrated, actually had, that marriage cannot be got rid of by evidence of facts and circumstances done or observed by persons afterwards thinking it proper to disentangle themselves from the connection of marriage, actuated by caprice, dislike of each other, or a base motive of inducing other persons to think that they may form matrimonial connections with the parties. When once you have got clearly to the conclusion that a marriage has been had, let the consequences be what they may with respect to third persons, that marriage must be sustained." 2 Bligh, N. S., 489.

The French jurists are equally explicit. In a court where the solemn admissions and oath of the first wife were produced to establish that she was not a wife, the advocate-general declares: "It is pretended that Margaret Dorus has renounced her *status;* but without examining if it is her, or a fictitious representative who has spoken in these acts, whether they were prepared or fabricated by her husband, or whether she consented freely, or executed them under a surprise, menace, or through fear of violence, it is sufficient to say the renunciation is vicious, and produces no effect. The *status* of a wife is such that she cannot dispose of it. All the efforts to impair or to destroy it are nugatory."

Clark's conduct to his child after the marriage of Zulime to Gardette seems to have been more anxious. "He passed much time with her," says Mrs. Davis. He expressed intense anxiety and ambition for her. He felt that he could make no public delaration without compromising himself and compromising Mrs. Gardette. We may well understand that he was beset with difficulties and vexations on the subject. We can understand that when he resolved, by an open and palpable acknowledgment, furnishing to her a charter of her rights, that it would afford him infinite relief. Such is the testimony in the record.

The will would have been a simple nullity if the plaintiff was a bastard. The father was prohibited from executing such an instrument. There was no occasion to steal it or to suppress it. The law had already pronounced on it a sentence of condemnation. The person who abstracted such a will must have believed in the legitimacy of Myra. De la Croix, who desired to find the will, Pitot and Bellechasse, whose indignation was awakened by its loss, must have known its legal effect.

*The absence of that will and the cause of its absence; the absence of all papers, letters, memoranda of [*495

Clark determining the legitimacy of his daughter; the nature of his long connection with her mother, speak trumpet-tongued. These defendants, Chew and Relf, were early put upon their guard. They could not have failed to hear of the contents of that lost will. Relf sets himself to work to conciliate De la Croix, and succeeds. He winds himself about Bellechasse, and seeks first through Coxe and then by an artful letter of his own, to induce him to betray the trust he had assumed for the plaintiff.

Suppose the act of sale spoken of had been annulled under the "pure and simple" authority that Relf sought for from Bellechasse, what would have been the condition of Bellechasse in reference to this transaction? How much would his testimony have been impaired?

All of Clark's correspondence came to the possession of Chew and Relf after the death of Clark. Whatever he wrote; whatever he received, fell under their inspection. They knew his acquaintances, his intimates. They could have afforded full information to this court of all the obscure and doubtful circumstances in this case. Give to us the contents of the black case, about which Clark was so anxious in his last sickness, and we will undertake to do so. On whom does the *odium spoliatoris* in this case rest? Who is it that has concealed a part of the testimony, and attempted to adulterate the remainder?

Another fact in the case is noticeable. Coxe affects even to the last to doubt the plaintiff's connection to Clark. At the date of the mother's (Mrs. Clark's) will, she was living with Colonel Davis as his daughter. Why was it necessary to proclaim her illegitimacy in the will of Mary Clark, her grandmother, accompanied as it was with no substantial benefit?

If the conduct of Relf and Coxe had been deliberately directed to the suppression or the alteration of the evidences of the plaintiff's legitimacy, it would hardly have been different from what it appears on this record.

This review of the testimony of the case is surely sufficient to exhibit the truth of the plaintiff's claim. We have not forgotten the opinion heretofore given by this court upon much of the evidence in this record, nor do we diminish or undervalue the importance of that opinion by discussing anew what has been so well considered.

The counsel for the appellees made twenty-seven points. Only two parts of the argument will be given at any length, those two being connected more especially with the points upon which the decision of the court turned. The general

features of the case dwelt upon were, the depositions and character of Madame *Despau; the alimony, ecclesiastical and divorce records and the conduct of Zulime in [*496 declaring herself to be the wife of Desgrange; her conduct afterwards in going in search of the certificate of her marriage when she had a living witness of it by her side, and the inconsistency of her marrying Gardette with a belief that she was the wife of Clark; the utter improbability that Clark would have offered marriage to several ladies of high character and connections if he knew that he was already married; and the testimony to depreciate the character of Zulime for chastity.

With respect to the different depositions of Madame Despau, whose evidence was taken three times, viz., in 1839, 1845, and 1849, the counsel (*Mr. Duncan*,) remarked as follows:

Having thus declared the field for a fair, full, and impartial investigation, I proceed to the examination of the case.

First. Was Daniel Clark ever married to Zulime *née* Carrière, the mother of the complainant, Myra? We hold the negative of this question. Then, 1st, We say that the complainant, holding the affirmative, must make it perfectly manifest beyond all reasonable doubt. This is the more incumbent on them as it is not pretended that Daniel Clark and this woman ever gave to the public any of the usual manifestations of such a connection. Indeed, strange as it may appear, the parties here aver that there were none of those usual ordinary and appropriate evidences given by the persons whom she claims to have been her father and mother, which all individuals in all Christian lands hold out to the world as the appropriate evidence of the existence of a marital relation.

Let us now take up this first point, as a question of evidence, and see how it stands. Was Daniel Clark ever married to Zulime *née* Carrière, the mother of Myra? The affirmative of this proposition is sworn to in the most unqualified manner by Madame Sophia Despau, as a fact which took place in her own presence. This is stating her testimony as fully and broadly as I can possibly do it. It is here to be remarked that it is a strange and singular thing, which can but attract attention, that but one witness can be found to testify to a marriage of such a man as was Daniel Clark! That he lived twelve years after this supposed interesting fact, and yet amidst his family and friendly letters, which are as abundant as the leaves of the forest, there can be found not the most distant reference to this most important fact.

As Madame Despau is the only witness who swears that she was present and saw the marriage, I will at once review the case as based upon her testimony.

The answer of the defendants is under oath, and this meets her testimony, unless she is sustained by other strong corresponding *facts and circumstances. Whether she is so sustained will be seen in the progress of this inquiry.

*497]

In equity the answer of the defendant is conclusive in his favor, unless it is overcome by satisfactory testimony of two opposing witnesses, or of one witness swearing positively, and such other facts as are equal to the unqualified testimony of another witness. 2 Story Eq., 743, 744; 2 Atk., 19; Id., 140; 1 Ves., 97; 6 Id., 40; 9 Id., 275, 283; 12 Id., 78; 18 Id., 12–335; 9 Cranch, 160; 1 Johns. (N. Y.) Ch., 459, 462; 2 Fonbl. B., 6, ch. 2, sect. 2, note g; 2 Ves., 243; 2 Johns. (N. Y.) Ch., 88, 89, 90.

The witness Despau was examined under oath in June, 1839. Then, in answer to the second question put to her, without hesitation or equivocation she swears as follows: "Daniel Clark was married in Philadelphia, in 1803, by a Catholic priest. I was present at this marriage." She subsequently, in rather an awkward manner, says that this marriage of Daniel Clark was with her sister Zulime, and that of this marriage Myra was the only issue. On the 16th day of October, 1845, this same witness Despau is again examined. The mind will naturally pause here to inquire whether accounts, given at two periods of more than six years apart, and before different magistrates, agree in all essential particulars. One of the most powerful instruments in the investigation of truth is where several witnesses, at different times and places, without possible collusion, agree in all material particulars in their account of the same transaction. The best of writers on this part of the system of laws agree that it is a high evidence of the integrity of the witnesses where there are small differences in their account of the same transaction, and for the sensible reason that it shows an entire absence of collusion. On the other hand, where there is a striking similitude in the very language of different witnesses, it raises a suspicion at once of collusion, and demands an explanation and further circumstantial support. By the same process of reasoning let us look at these two statements of Madame Despau. They are six years separated in point of time, they are taken before different magistrates, and yet we find the witness not only agreeing with herself in the general account—which ought to be expected of all honest witnesses —but the very language is used by the magistrates in taking down her several statements on the two occasions, and in precisely the same language, as far as it goes. Now, then, I say that one of two things happened—there was either collusion

or a miracle on this last occasion. No witness can recount a transaction thus, under such circumstances, in the fading period of life to which she had arrived. The thing is impossible.

There was no miracle in the business. There was but one *way of accounting for this thing. The greatest power [*498
which a court of chancery has in preventing collusion had been broken down. Publication of her first statement had been made. The seals had been broken; a copy of her first testimony was in her hand when she made her second statement, or what is worse, and more probable from her simple inspection of the face of the deposition, it was prepared for her, and she signed what had been previously prepared. The magistrate disobeyed the very letter of the commission addressed to him by the court,—that commission is very comprehensive, direct, and simple. But the "trust and confidence" of the court, in the integrity and ability of the magistrate, have been abused. The whole was a concocted affair, got up, no doubt, out of the presence of the magistrate. And this is the precious testimony upon which the court is asked to base a judgment decreeing on earth—what was never registered in heaven—that Daniel Clark had married Zulime *née* Carrière.

There is in this statement, or rather statements of the witness Despau, this feature to be remembered, that the facts above referred to show deliberation, purpose, care, design, as well as preparation. She belongs to the household of this suit; it is not doing her injustice, therefore, to suppose that her testimony has been the subject of repeated and deliberate consultations before it was delivered. Its force and effect have been well considered. This very citadel of the case has been duly and thoroughly examined, with a critic's eye. It has doubtless been considered not only in its relations and bearings upon the complainant's case, but all possible guards have been thrown around it against the approach of the adversary. There is, then, no room left for mistake. The time, the place, and the circumstances have all been detailed. The story is told; and so true is it (God save the mark!) that six years afterwards, in relating it for the second time, no words can be found so very appropriate as the exact words used before to convey this important fact. Then she is ready to stand or fall by it.

Before going into the interesting comparison of the testimony of the witness Despau, with other measures of truth, I beg leave for a moment to revert to the issue on this point as tendered by the complainant's bill, and accepted by the defendants in their answer. The original bill was filed in this

court on the 28th day of July, 1836. On the 11th day of December, 1848, the last amended bill was filed. Thus the parties have themselves had twelve years and over four months to conform their averments to their facts, and after all this time and consideration, we find that on the day last mentioned an amended bill is filed, and in it we meet with the following averment on the behalf of the complainant:

*499] * "That the said Daniel Clark was lawfully married with Zulime *née* Carrière, at the city of Philadelphia, in the State of Pennsylvania, in or about the latter part of the year 1802, or the early part of the year 1803, with the observance of the necessary requisitions of the laws of Pennsylvania for the solemnization of the marriage contract, and that your oratrix is the sole offspring or issue of said lawful marriage." Page 86 of the original record, restored by stipulation on file.

Now, then, we have fairly before us the averment upon the turning point of complainant's case. It is clear and distinct, though there is a considerable margin reserved in the expressions "the latter part of 1802, and the early part of 1803." Yet we shall not complain, and I propose to allow them the grace of three months in each of those years, making a field of inquiry of six months, or from the 1st of October, 1802, to the 1st of April, 1803. I believe that the court will think with me that this is a sufficient allowance to one who has taken so long a time in adjusting the time to her facts, with the aid of her mother at her side. The day of a woman's marriage is one of the most important in her life, which no time or circumstances can obliterate from her mind. She can always tell the very day, with all its attendant circumstances, and it would have been no more than right if I had exacted a positive averment of the very day and the very place of this great event: great to the mother of Myra if it had been true, because it would have changed the whole current of events in her eventful and romantic career.

The defendants take issue upon the foregoing quotation from the amended bill of the complainants, and aver that it is not true. They aver that Daniel Clark was not married to Zulime *née* Carrière, in Philadelphia, in the latter part of the year 1802, or the early part of the year 1803.

I will proceed now with our examination of the testimony of complainants on this point, and then show by that of the defendants that the whole pretension is an utter fabrication.

What is the testimony of the complainant on this point? They have one witness who swears most positively that she saw the marriage, and that it took place in Philadelphia.

This is the only witness (Mrs. Despau) who thus testifies. Her testimony, which I have before referred to, it must be observed, is not the testimony of the same witness now relied upon by the complainant. Far from it. They, on the contrary, began to penetrate into the storehouse of the defendants' muniments of war. They began to see, to comprehend, and to feel, the force of the evidence which was soon to overwhelm that witness and to sink her, and with her the complainant's case, into "the receptacle *of things lost on earth." The case and the witness must stand together; [*500 if one falls the other sinks,—if one is blasted the other is ruined; and a gallant struggle must now be made to rescue both one and the other. Accordingly, and for the first time, with any regard to the proprieties of any of the rules of chancery practice, in the month of February, 1849, the complainant propounds her interrogatories, and the defendants again propound their cross-interrogatories. To these questions do we hear the same old song sung again, set to the same old tune? Ah! by no means. She now swears as positively as she did before to the marriage, and to her presence at the place; but when she comes to speak of the time,—ah! there is the rub,—she begins to falter, hesitate, and doubt. We look here in vain for that bold, open, and unqualified declaration she had twice before made under oath, and in this case. She now, on the 19th of March, 1849, swears, "I was present at this marriage. This, to the best of my recollection, was in the year 1803; although there are some associations in my memory, which make me think it not improbable that the marriage may have taken place in the year 1802. My impression, however, is that the marriage took place in the year 1803. It was, I remember, a short while previous to Clark's going to Europe." R., 359.

Who ever saw a more cunningly-devised effort to save a witness than this? Her testimony is here in the record twice told, and doubly sworn to, declaring, in unqualified language, that Daniel Clark was married to her sister, in Philadelphia, in the year 1803! Who gave her the alarm? Who cried out to her that she was standing over a volcano? Who prepared the bridge for her escape, if escape she has made? Then she swore positively,—now she has it to the best of her recollection. Then she swore it was in 1803,—now she believes it to have been in 1803, "although there are some associations in my memory, which makes me think it not improbable that the marriage may have taken place in the year 1802." I think if this witness should ever happily read the testimony in this case, she will have other "associations in her memory" which

will make her think that she was entirely mistaken in the whole business, and that there was no marriage whatever! If she does not, I imagine that her conceptions are formed of far different materials from that which form the minds of your Honors. Why was it that she imagined it possible that she could now be mistaken? In 1839 and in 1845 she had no such idea. She was then much nearer the scene than she was in 1849, and much more likely to have a correct recollection of the event. But why the expression now for the first time found in her testimony, in order to fix the period of Daniel Clark's marriage, that "it was, *I remember, a short while previous to Mr. Clark's going to Europe"? Who put this notion into her head? Was there any thing in the interrogatory to suggest the idea? I might as well tell the court plainly and at once that, at the time this last testimony was taken, it had been found out that Daniel Clark had been in Philadelphia in the year 1802, but not in the latter part. It was known, or ought to have been known, that we could prove by the testimony left behind him, by Daniel Clark himself, that he was not in Philadelphia at any period of the latter part of 1802, or in any part of 1803. Hence the necessity for this witness to retreat from her former position, and at the same time to do it in such a delicate manner, and with such consummate tact, as to appear to glide naturally towards the truth—to strike upon a circumstance which would appear to elucidate the truth of her statement. Poor short-sighted mortals we are; she had far better been left upon her original position, because her advisers knew not what an *ignis fatuus* was leading them into a morass from whence there could be no escape.

*501]

The parties here are to be held to their pleadings. The *onus probandi* in this case is with the complainant, according to the maxim of the civil law, "*Ei incumbet probatio qui dicit, non qui negat.*" Phillips on Ev., 194. This rule is as strict in equity courts as in courts of law. 2 Daniels, 990.

Mr. Duncan then went on to show from letters that Clark was not in Philadelphia during the latter part of 1802 or during any part of the year 1803.

Second Point.—I maintain that Daniel Clark could not have married Zulime *née* Carrière in 1802 or 1803, because of the legal impediment then existing, and well known to both parties, that she was then a married woman. That she was married to Jerome Desgrange, with strict compliance with every requisition of law, both ecclesiastical and civil, then in force in Louisiana. See record, pp. 748–751. Indeed, this fact is admitted. It is proved and admitted, that, at the time of the alleged marriage of Daniel Clark, Jerome Desgrange was

living. We interpose this impediment. We are met by the allegation that this is no impediment, because, at the time Desgrange married Zulime, he had himself a living wife. I now say that there is no proof upon this point which should be regarded for a moment. Let us examine it. First, we have a certificate of one Jacob Desgrange's marriage having taken place in New York. The name excludes the idea of its being Jerome Desgrange, unless the plaintiff had followed it up by proof of identity, and that the very person married in New York, under the name of Jacob, had married Zulime under the name of Jerome. There is not in the record even an attempt to prove it. Again, if the certificate *even [*502
contained the name of Jerome Desgrange, it would have been equally obligatory upon plaintiff to have followed up the certificate by proof of identity; *non constat*, but there may have been a dozen Jerome Desgranges in New York; and we are asked to believe that the one mentioned in the certificate was the same who married Zulime, contrary to every principle of law, and in manifest violation of the best rules of justice; that his marriage with Zulime is to be taken as fair, honest, and legal. Any other rule would be the grossest injustice to the name of Desgrange, and cover his grave with dishonor, without his ever having had an opportunity to be heard, and manifesting his innocence and his integrity. This court has seen that in the only case where Desgrange was ever cited, and in which he was put to the proof of the validity of his marriage with Zulime, how triumphantly he sustained himself, and in a case, too, where, if there had been any truth in the accusation, the very witnesses produced were the very ones who would have been most likely to have stated the case most strongly, and in a vindictive spirit, against him—the pretended victims of his crimes. It should be enough that the home of that man was entered by a seducer, without now having his memory covered with infamy, without a trial or a hearing.

But there are other circumstances about this New York certificate which should degrade it. It has been argued as a singular thing, going a great way towards sustaining the genuineness of that paper, that it has on it the names of the persons, as witnesses, who had been named by Madame Soumeylliatt, as the witnesses of her marriage! Sirs, the argument is a feeble one, and gives rise to the suggestion that the very reverse is the truth. That lady's testimony was taken on the 6th of September, 1802. See Record, 711. That miserable certificate is dated on the 11th September, 1806. See Record, 382. Now the inference which I draw from it is this: that her having given the names of the witnesses to her marriage

with Mr. Soumeylliatt, suggested the idea to the person who made that certificate of putting these names there as witnesses. Why was not the testimony of some one of those witnesses taken? Their death is nowhere shown or pretended. You have the oath of both Desgrange and Madame Soumeylliatt, two of the most important parties in that certificate, testifying directly against it. That certificate, too, it will be seen, is dated but a few weeks after the date of Zulime's suit for divorce in 1806. pp. 382, 758.

Now, then, this attempt to impose this certificate develops another fact which strongly militates against Madame Despau's story. She says that when they reached New York, in 1802 *503] or *1803, to obtain proofs of Desgrange's marriage, they could find none—the registry was destroyed. But if this certificate was given in 1806, then the priest who married Desgrange was alive and there when Zulime and Madame Despau were in New York, and could easily have given his testimony or certificate to them. The certificate professes to be taken from a particular page of the record. Then there was no such thing as a burnt record in 1802, as sworn to by this witness. It will be remembered, too, that we find this certificate coming to light through the hands of Zulime in 1840. Record, 597.

But the certificate, and all of the testimony connected with it, must be suppressed on a question of law; and this puts an end to the question at once and forever. This is not a record, or a copy of a record. It does not profess to be. Then it is a statement, not under oath, of a person who may perhaps be dead. This statement was not even in the shape of a deposition. If this paper had even been in the shape of a deposition taken in a suit, it would be no testimony against these parties, they having been no parties in that proceeding. The parties are not to be condemned by the testimony of witnesses they never saw or heard of, and whom they had no opportunity to cross-examine. 1 Stark. Ev., 260, § 99.

In connection with this certificate we have moved to suppress the whole testimony taken in reference to it. See motion to suppress, under 12th head. A deposition taken without notice will be suppressed. 1 J. J. Marsh. (Ky.), 525; 2 Dan., 1140. The deposition proving this certificate was taken before issue joined. The deposition was taken in 1846. The issue was joined by plaintiff filing replications to the answer, and pleas of Chew and Relf, were filed on the 5th of March, 1849. See Record, 203. The replication to Devereaux's answer was filed 26th March, 1849. See Record, 204. The replication to the answer of Municipality, No. 1, was filed

May 21, 1849. The replication to Rodriguez's answer was filed about the same time, though the date is not given in the record. The court will perceive that the answers and pleas of Chew and Relf were filed on the 14th of January, 1845. There was no necessity, therefore, for taking the depositions *de bene esse* in 1846, for plaintiffs, if they had been disposed, could have taken issue when it was tendered by Chew and Relf, and taken the testimony contradictorily with them. The fact that this was not done raises a strong presumption that it was taken in the manner it was for some wrongful purpose. Be this as it may, it must be suppressed, because no effort has been made since issue joined, to take the testimony in chief. See 2 Dan., 1111. The only instances in which testimony can be taken in chancery in a *United States Circuit Court, is provided for in the 70th rule of the Supreme Court. It is to be [*504 done after the bill is filed, and before the defendant has answered, on affidavit, &c., and even then the rule requires the party to give the adverse party due notice of the time and place of taking the testimony. Nothing of the sort was done here. It is perfectly clear that depositions taken *de bene esse* cannot be read, and must be suppressed; the party has forfeited all right to read them. 2 Dan., 1119. All the grounds mentioned in our 12th point for suppressing testimony are fully sustained; and this deposition should be laid aside. The testimony being stricken out, the plaintiff has nothing left to prove any such thing as a previous marriage by any testimony entitled to belief.

But let us go on with the legal discussion. Suppose that it has been established that Desgrange had a former wife, did that fact authorize Mrs. Desgrange to contract a marriage with Clark before the former one was dissolved by competent authority. It must not be forgotten that plaintiff's own witnesses swear that the agreement to marry—the contract—was made in Louisiana, the domicile of both parties. The mere ceremony to consummate it is another subject, which I shall examine. Did this state of things authorize Zulime to contract marriage? I answer, certainly and clearly not. If she did marry Clark after marrying Desgrange, by the laws then in force, it was adultery on her part, and the fruits of the connection would be an adulterous bastard. The 8th Book, title 20, Law 4, Nueva Recopilacion, being translated, reads thus: "Should a woman, either married, or even only publicly betrothed, before Our Holy Mother the Church, commit adultery, although she should allege and show that her marriage is null and void, either on account of near relationship by consanguinity or affinity within the 4th degree,

or because one of the spouses was previously bound by another marriage, or had made a vow of chastity, or was about entering a religious community, or had some other reason—yet for all this she is not to be allowed to do what is forbidden; and she cannot prevent her husband from bringing a suit for adultery both against her and the adulterer, as if the marriage was not a true one. We decree against such persons—whom we consider as having committed adultery, (*que habemos por adulteros*,) the law of the fuero be strictly followed, which treats about adulterers, and is the first law of this title." See Nueva Rec. Book 8, tit. 20, Law 4.

What can be more clear and conclusive than this? And be it remembered that this is not an opinion of an elementary writer, but the positive provisions of the law as they were in force at the domicil of all these parties. A previous marriage, *505] though *it is proved to exist, cannot be treated as a nullity. The wife that ventures to do it, says the law, is guilty of adultery, and the man who intermarries with her, is an adulterer.

Again, when the law treats of who may marry a second time, enacts as follows: "Men and women may marry a second time, or oftener, after the first marriage is dissolved, either on account of some legal impediment, or by death." 4 Partida, title 11, Law 1. This could not be done in Louisiana, until the lapse of ten months after the dissolution of the previous marriage. Old Code, p. 28, art. 31. Before the code of 1808, it was one year. 4 Partida, title 11, Law 3.

Now, the first law under the same title, and same book, provides, among other things, that if the husband of the woman, thus acting, should kill both guilty pair, he shall stand justified; and that if he causes them to be put to death, by authority of justice, that the whole of the property belonging to the guilty pair should vest in the injured man. So that if Desgrange had gone in and killed Clark and Zulime, he would have stood justified. and if he had had them arrested and capital punishment inflicted upon them both, by due course of law, he would have been entitled to the property of both of them.

Mr. Justice CATRON delivered the opinion of the court.

This cause comes here by appeal from the decree of the Circuit Court of the Eastern District of Louisiana, where the bill was dismissed.

The complainant sues as the only legitimate child of the late Daniel Clark, who died in the city of New Orleans the 13th of August, 1813. No account is prayed against Daniel

Clark's executors; but the complainant seeks to recover the property sold by them, consisting of lands and slaves, on the ground that her father could not deprive her, as his legitimate child, of more than one fifth part of his estate by a last will, according to the laws of Louisiana as they stood in 1813. And she maintains that the sales made by Chew and Relf, were made without any orders of court to authorize them, and that therefore they are void; the laws of Louisiana requiring such orders before a valid sale could be made.

The respondents claim under a will made by Daniel Clark in 1811, by which he devised all his property, real and personal, to his mother, Mary Clark, and appointed Richard Relf and Beverly Chew, his executors; and to whom Mary Clark made a power to sell Daniel Clark's estate for the purpose of raising money to pay his debts. Chew and Relf, acting as executors of Daniel Clark and also as attorneys of Mary Clark, did sell the property in controversy for the purpose of paying the debts of the testator. *To meet this claim of title, [*506
the complainant insists, 1st, That the sales made by Chew and Relf, as executors, were made without orders from the court of probate to authorize them, and are void. 2nd, That Mary Clark had not accepted in legal form the bequest of her son when she conveyed by her attorney; and that therefore, her conveyances cannot be relied on by her vendees to support the plea of innocent purchaser.

On the 10th day of June, 1844, the mother of the complainant, styling herself Madame Marie Zulime Carrière, and widow of the late Daniel Clark, by her notarial act, made in the city of New Orleans, accepted, without benefit of inventory, the community of acquests and gains of one moiety, which it is alleged existed between her and her late husband Daniel Clark, according to the laws in such cases provided. And on the 2d of July, 1844, the then complainants, Gaines and wife, among other amendments to their bill, filed the following: "Your oratrix alleges that she is entitled to the one moiety of the estate of which the said Daniel Clark died possessed, by reason of a conveyance thereof made to her by M. Z. Gardette, the widow of the said Clark, and the mother of your oratrix, on the 7th day of May, 1836, and which is hereunto annexed, marked A. B. and prayed to be taken as part hereof; and the mother of your oratrix did thereafter, on the 20th June, 1844, further convey to her all her interest in said estate, as appears by her act, a copy of which is herewith exhibited, marked C.; the whole of said estate having been acquired during the coverture of said Clark and wife."

The exhibits in these particulars correspond to the allega-

tions. It follows, therefore, that the complainant claims one half of Daniel Clark's estate by a conveyance from her mother.

The first and most important of the issues presented is that of the legitimacy of the complainant. It is raised, by the following pleadings:

She alleges that her father, Daniel Clark, was married to Zulime *née* Carrière, in the city of Philadelphia, in the year 1802 or 1803; and that she is the legitimate, and the only legitimate offspring of that marriage.

The defendants deny that Daniel Clark was married to said Zulime at the time and place alleged, or at any other time or place. And they further aver, that at the time said marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome Desgrange.

If the mother of the complainant was the lawful wife of Jerome Desgrange at the time said Zulime is alleged to have intermarried with Daniel Clark, then the marriage with Clark is merely void; and it is immaterial whether it did or did not take *place. And the first question we propose to examine is, as to the fact, whether said Zulime was Desgrange's lawful wife in 1802 or 1803.

*507]

A formal record of the marriage between Desgrange and Marie Julia Carrière, obtained from the cathedral catholic church at New Orleans, is before us. That it is a true record of said marriage is not controverted. Marie Julia is designated Zulime, by a soubriquet or nickname, which is proved to have been a common custom in Louisiana at that time. The marriage was solemnized in due form on the 2d day of December, 1794. This is admitted on part of the complainant. The parties cohabited together as man and wife for seven or eight years. This is also conceded by both sides. To rebut and overcome the established fact of this marriage, it is alleged that previous to Desgrange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still his wife; and that therefore, the second marriage was void. And this issue we are called on to try.

The marriage with Desgrange having been proved, it was established as *primâ facie* true, that Zulime was not the lawful wife of Clark, and the *onus* of proving that Desgrange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Desgrange committed bigamy. To establish such previous marriage and the consequent bigamy by marrying a second time, much evidence was introduced and relied on by the complainant. The first witness whose testimony will be

referred to was Madame Despau, sister of Zulime. Her testimony has been taken three times; first in 1839, then in 1845, and again in 1849.

In 1839 she says, "I was well acquainted with the late Daniel Clark, of New Orleans. He 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. 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, that 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 Desgrange, she heard he had a living wife; our family charged him with the crime of bigamy in marrying said Zulime; 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 Desgrange having a living wife at the time he married my sister; to obtain which, from the [*508 records of the catholic church in New York, (where Mr. Desgrange'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 to Mr. Desgrange's prior marriage. We proceeded to that city, and found Mr. Gardette. He answered, that he was present at said prior marriage of Desgrange, and that he afterwards knew Desgrange and his wife by this marriage; that his 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 Desgrange's marriage.' They, the said Clark and the said Zulime, were then married. Soon afterwards, our sister, Madame Caillavet, wrote to us from New Orleans that Desgrange's wife, whom he had married prior to marrying said Zulime, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy; father Antoine, of the catholic church, taking part in the proceedings against Desgrange. Mr. Desgrange was condemned for bigamy in marrying the said Zulime, and was cast into prison; from which he secretly escaped by connivance, and was taken down the Mississippi River by Mr. LeBreton D'Orgenois, where he

got into 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 Desgrange. The anticipated change of government created delay; but at length, in 1806, Mr. James Brown and Eligius Fromentin, as the counsel of my sister, brought suit against the name of Desgrange, in the city court, I think, of New Orleans. The grounds of said suit were, that Desgrange had imposed himself upon her at a time when he had a living lawful wife. Judgment in said suit was rendered against said Desgrange. 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. Whilst he was in Congress my sister heard he was courting Miss C., of Baltimore. She was much 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 proof of his marriage with my sister. We could find no record, and were told that the priest who married her and Mr. Clark had gone to Ireland. My sister then sent for Daniel W. Coxe; mentioned to him the rumor; he answered that he knew it to be true that he (Clark,) was engaged to her, (Miss C.) My sister replied that it could not be so. He then told her that she would not be able to establish her marriage with Clark if he were disposed to contest it. He advised her to take counsel, and said he would send one. A Mr. Smyth came and told my sister that she could not legally establish her marriage with 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 he was about to marry Miss C. In consequence of this information, my sister Zulime came to the resolution of having no further connection or intercourse with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia. The witness further states that she became acquainted with Desgrange in 1793. He was a nobleman by birth, and married Zulime when she was thirteen years old. Zulime had two children by him, a boy and a girl; the boy died, the girl is living, (1839;) her name is Caroline, and married to Dr. Barnes. Witness was present at the birth of these children. The marriage of Zulime was a private one. Besides the witness, Mr. Dorsier, of New Orleans, and an Irish

*509]

gentleman, a friend of Mr. Clark, from New York, were present at the marriage. A catholic priest performed the ceremony.

In regard to the children, born of the marriage of Zulime and Desgrange, this witness further states in another deposition, that before the detection of Desgrange's bigamy, said Zulime 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 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.

Her other depositions substantially correspond with the foregoing statement so far as they bear on the question of Desgrange's bigamy.

The next most important witness is Madame Caillavet, another sister of Zulime. She was also three times examined. Her first deposition was taken at New Orleans, in May, 1835, in which she states: That sometime after the marriage of her sister *with Mr. Desgrange, her sister discovered that [*510
Mr. Desgrange had been previously married; that in order to ascertain this fact she went to Philadelphia, in the absence of her husband who was in France; that whilst at Philadelphia, Desgrange returned from France to New Orleans, and at the same time, or a very short time after, his first wife made her appearance in New Orleans. Upon this, witness immediately apprised her sister of this fact and she returned immediately to New Orleans. On the arrival of the said first wife of Desgrange, she complained to the governor, who caused Desgrange to be arrested; (it was under the Spanish government;) after some time, he obtained his release and left the country. Before his departure, he confessed that he had been previously married. Witness understood afterwards from her sister by letters which she received from her secretly, that she was married with Mr. Daniel Clark; the preliminaries of the contemplated marriage were settled by the husband of witness, at his house in the year 1802 or 1803, in the presence of witness.

In the next deposition she states:

"I have already stated all I knew about Mr. Clark's marriage with Zulime, and of her marriage with Desgrange. 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 is married to Dr. Barnes.

The second and third depositions of Madame Caillevet correspond, but as the third one is more full, it is given. In this one she states as follows:

"I did reside in the city of New Orleans, about the year 1800, and for many years previous; my residence continued there until I went to France, about the year 1807.

"I was acquainted with Daniel Clark, late of the city of New Orleans, deceased; my acquaintance with him commenced about the year seventeen hundred and ninety-seven; my intimacy with him, growing out of his marriage with my sister, continued during my residence in New Orleans.

"I was not present at the marriage of Zulime *née* Carrière (who is my sister,) with Mr. Clark; but it is within my knowledge, both from information derived from my sisters at the time, and from the statements of Mr. Clark, made to me during his lifetime, that a marriage was solemnized between them. It is to my personal knowledge that Mr. Clark, about the year eighteen hundred and two, or three, made proposals of marriage with my sister Zulime, with the knowledge of all our family. These proposals were discussed, and the preliminaries of the marriage arranged by my husband, at his house, in my presence. But my *sister, having been previously married to one Jerome Desgrange, who was found to have had a lawful wife living, at the time of his (Desgrange's) marriage with her, the marriage with Mr. Clark could not take place until proofs of the invalidity of her marriage with Desgrange were obtained. To procure these proofs from public records, my sisters Zulime, and Madame Despau, went to the north of the United States, where Desgrange's prior marriage was said to have taken place. While there, my sister Zulime wrote to me that she and Mr. Clark were married. There was born of this marriage, one, and only one child, a female, named Myra, who was put by Mr. Clark, while an infant, under the charge of Mrs. Samuel B. Davis, in whose family she was brought up and educated. Having suffered from hired nurses, she was nursed, through kindness, for some time after her birth, by Mrs. Harriet Harper, wife of William Harper, the nephew of Col. Samuel B. Davis. Mr. Clark stated to me, frequently, that Myra was his lawful and only child. This child is the same person who was married to William Wallace Whitney; and who is now, the wife of General Edmund P. Gaines, of the United States army. I have always understood that the marriage between my sister and Mr. Clark was a private one, and that it was not promulgated

*511]

by Mr. Clark, in his lifetime, unless he did so in a last will, made a short time previous to his death. I have heard that such a last will was made, but it was believed to have been suppressed or destroyed after his death.

"I was acquainted with Mr. Jerome Desgrange, for the first time, in New Orleans, about the year seventeen hundred and ninety-five. He passed for an unmarried man, and as such imposed himself on my sister Zulime. Some years after this marriage, it became known in New Orleans, that he had a prior lawful wife living. My sister immediately separated from him, and came to reside with her family. At a later period, Mr. Desgrange was prosecuted, found guilty of bigamy, in having married my sister Zulime, and cast into prison. He escaped from prison, as it was reported at the time, by the Spanish governor's connivance. I understood that Mr. LeBreton D'Orgenois aided him to escape from the country. This happened some time before the transfer of the government of Louisiana to the Americans. The flight of Desgrange from New Orleans is the last I know of him. I did not myself know the first wife of Desgrange, but it is within my knowledge that she came to New Orleans, and while there, fully established her pretensions as his lawful wife."

Another deposition of this witness is found in the record, taken October 16, 1849; but as it does not differ from the foregoing depositions on the question of bigamy, it is not further noticed.

*Objections were made on the argument, that the [*512 different depositions of these witnesses are contradictory in several respects: but we have not found them to be so in any material degree. Madame Despau's, so far as they relate to the question under examination, are very nearly literal copies of each other; and Madame Caillavet's are nearly similar to each other.

Joseph D. D. Bellechasse, in his deposition, taken in 1834, states:

"I think it my duty now to declare, what I know to be a fact, that said Desgrange was condemned for bigamy in marrying Miss Carrière (subsequently the mother of Myra), several years prior to the birth of said Myra. The prosecution and condemnation of said Desgrange for said crime of bigamy, took place at New Orleans towards the close of the Spanish domination in Louisiana; his first and lawful wife, whom he had married previous to his coming to Louisiana, (as it was proved), coming to New Orleans in pursuit of him. When said Desgrange practised the infamous deception of

marrying Miss Carrière, it was the current opinion in New Orleans, that he was a bachelor, or a single man."

Madame Bengueril, in her deposition taken in 1836, makes the following statement:

"Mr. Jerome Desgrange married the said Zulime, which proved on his part bigamy, for, after his marriage with the said Zulime, the lawful wife of said Desgrange, whom he had married previous to his marrying the said Zulime, came to New Orleans, and he was thrown into prison, from which he escaped, and fled from Louisiana; this was in the year 1802 or 1803; since that period I have never seen the said Desgrange, and do not believe that he ever returned to Louisiana.

"The said lawful wife of the said Desgrange brought with her to New Orleans proofs of her marriage with the said Desgrange. The exposure, at that time, of the said Desgrange's bigamy in marrying the said Zulime, was notoriously known in New Orleans.

"My husband and myself were very intimate with the said Desgrange, and when we reproached him for his baseness in imposing upon the said Zulime, he endeavored to excuse himself by saying that, at the time of his marrying the said Zulime, he had abandoned his said lawful wife, and never intended to see her again."

This is the material evidence on which the complainant relies to prove Desgrange's bigamy, when he married Zulime *née* Carrière. What other evidence we may incidentally refer to, will be stated by the reporter.

To meet and rebut this evidence, the defendants introduced *513] *from the records of the cathedral church of the diocese, to which the city of New Orleans belonged at that period, an ecclesiastical proceeding against Desgrange for bigamy; and which proceeding, as respondents insist, is the same to which complainant's witnesses refer. The following are the material parts of that proceeding:

"THE YEAR 1802.

"T. M. T.

"No. 141.

"Criminal proceedings instituted against Geronimo Desgrange for bigamy.

"The vicar-general and governor of the bishopric, judge.

"Fran'co Bermudez, *Notary*."

"DECREE. In the city of New Orleans, the 4th day of September, 1802, Thomas Hasset, canonical presbytary of this

holy cathedral church, provisor, vicar-general, and governor of the bishopric of this province:

"Says, that it has been publicly stated in this city, that Geronimo Desgrange, who was married in the year 1794, to Maria Julia Carrière, was at that time married, and is so even now, before the church, to Barbara Jeanbelle, who has just arrived; and also that the said Desgrange, having arrived from France a few months since, he caused another woman to come here, whose name will be obtained. It is reported in all the city, publicly and notoriously, that the said Geronimo Desgrange has three wives, and not being able to keep secret such an act, as scandalous as it is opposed to the precepts of our holy mother church, his excellency has ordered, that in order to proceed in the investigation, and to the corresponding penalty, testimony be produced to substantiate his being a single man, which the said Desgrange presented, in order to consummate his marriage with said Carrière; that all persons shall appear who can give any information in this matter, and also Desgrange, with Celestin Lavergne and Antonio Fromantin, interpreters; they, the interpreters, first accepting the nomination, and swearing to act as such faithfully. And also, as it has been ascertained that the said Desgrange is about to leave with the last of these three wives, let him be placed in the public prison, during these proceedings, with the aid of one of the alcades; this decree serving as an order, which his excellency has approved, and as such it is signed by me, notary.

"Signed, Thomas Hassett. Before me,
"Fran'co Bermudez."

"New Orleans, in the same day it was passed to the Capitular *House, and audience hall of Don Fran'co Caisergues, alcade of this city, and in his jurisdiction, and [*514
I notified to his worship the preceding decree, and of which I have taken note. Signed, Fran'co Bermudez."

"*New Orleans, 4th September*, 1802.

"Let the request of the governor of the bishopric be complied with. Signed, Fran'co Caisergues. Before me,
"Signed, Fran'co Bermudez.

"In New Orleans on the same day, I, the notary, notified Celestin Lavergne of his appointment as interpreter, and he said that he accepted it; and swore by God and the Cross, that he would act well and faithfully in the premises, and he herewith signs his name.

"Signed, C'tino Lavergne. Fran'co Bermudez.

"On the same day I notified Antonio Fromantin of his appointment as interpreter, who accepted of it, and who swore by God and the Cross, that he would act well and faithfully in the premises, and he herewith signs his name.

"Signed, Antonio Fromantin. Fran'co Bermudez."

Next comes the church record filed as evidence in the cause establishing the marriage of Desgrange to Maria Julia *née* Carrière, which need not be further stated.

The material parts of the subsequent proceeding, are the following:

"CITATION. In New Orleans, on the same day, I, the undersigned notary, inquired at sundry places for the residence of Dona Barbara Jeanbelle, and I was informed she lived in Mr. Bernard Marigny's house, where I then went, and there gave notice that, on Monday, the 6th instant, at seven o'clock in the morning, she must present herself before the tribunal, as per order of his excellency.

"Signed, Bermudez.

"On the same day, I notified the minister of justice, Jose Campos, of the preceding decree. Signed, Bermudez."

"TESTIMONY. Testimony of Dona Barbara Jeanbelle. In the city of New Orleans, on the 6th of September, 1802, appeared before Mr. Thomas Hassett, presbytary canon of this holy cathedral church, provisor, vicar-general, and governor of the bishopric of this province and the Floridas, Dona Barbara Margarita Jeanbelle de Orsy, who was sworn to tell the truth, and the following questions were then propounded to her:

*515] * 1st. If she knows Geronimo Desgrange; how long, and where did she know him?

Answers: That she has known him for sixteen years, and that she was acquainted with him in New York.

2d. Being asked whether it is true that she was married to the aforesaid Desgrange, in what place, in what church, how long ago, in what parish, by what clergyman, and who were the witnesses?

Answers: No, although it was her intention to marry the aforesaid Desgrange; but as the latter was going away, she changed her mind; nevertheless, she obtained the permission of her father to go to Philadelphia for that purpose, and that while there Desgrange begged of her to come to this city to consummate the marriage, to which she did not consent; this took place about eleven years and a half ago.

Being asked whether she was acquainted with Desgrange in France, after the period above stated, and if she has ever spoken to him on the subject?

Answers: That last year she saw him in Bordeaux, and that she did not again speak to him of the marriage, because they were both of them married.

Being asked that, if she says she is married, with whom is she married, how long since, in what place, by what clergyman, and who were the witnesses?

Answers: That she is married to Don Juan Santiago Soumeylliat, about ten years ago, in the city of Philadelphia, by a catholic priest, and that Mr. Bernardy and his wife were witnesses.

Being asked if she has any document to prove it?

Answers: That she has no document to prove it.

Being asked if she has not heard it said that Desgrange is married to three wives, say to whom, and if it is not public and notorious?

Answers: That she never heard any thing of what is asked her until last night, when she was told that it was said she was one of his wives, and she says that what she has declared is the truth; and the testimony having been read to her, which was interpreted by Don Celestino Lavergne, and Don Antonio Fromantin, she declared it was what she had said, and she now ratifies it; that she is thirty-four years old.

"Signed, B. M. Zambell De Orsi, Hasset,
"C'tino Lavergne, Antonio Fromentin.
"Before me, Fran'co Bermudez."

"TESTIMONY OF MARIA YLLAR. In the city of New Orleans, on the same day, month, and year, appeared before his excellency, *Maria Yllar, who, being sworn to tell the truth, the following questions were propounded [*516 to her:

Being asked whether she is married or not, how long it is since she arrived in this city, and with what object:

Answers: That she is the widow of Juan Dupor, alias Poulé, who died two years ago, to whom she was married about —— years; that she has never had any other husband, neither before nor since; that she arrived here two days ago, and that her object was to gain a livelihood, having been informed it was a good country for seamstresses.

Being asked if she knows Geronimo Desgrange, how long, and if she was invited or told by him to come to this city, and with what object:

Answers: That she knew Geronimo Desgrange in France

about eight months ago, and it was he who told her to come to this city, where she could gain a better livelihood than in her own country.

Being asked whether she was promised marriage to the said Geronimo Desgrange, or if she has entered into any private contract with reference to matrimony, or any other contract with him:

Answers: That she has not had any contract of the kind with the said Desgrange, because she knew before her departure from France, that he was married in Louisiana; and that her coming here was only with the object that she has already stated.

Being asked [if] she had promised the said Desgrange to accompany him in the voyage he is going to make to France:

Answers: That far from accompanying Desgrange during his voyage, she thinks of remaining in the house of Cornelius Ploy, alias Flamand, to whom she has been recommended by the said Desgrange, for the purpose of gaining her livelihood by sewing, as the said Flamand is a tailor by trade.

Being asked if she has heard it publicly said that Desgrange has been married to two women before or since her arrival in this city.

Answers: That before her arrival she had heard nothing of the matter; but since she has been here she has heard it said publicly that Desgrange has been married three times; she swears that what she has said is the truth, and that she is twenty-five years old; she does not sign, not knowing how to write.

"Signed, Hasset, Antonio Fromentin, C'tino Lavergne.

"Before me, Franco. Bermudez."

"TESTIMONY OF MARIA JULIA CARRIERE. Then appeared before *his excellency Maria Julia Carrière, who, through the interpreters, was duly sworn to tell the truth, and the following questions were propounded to her.

*517]

Being asked whether she was married or single:

Answers: That she is married to Geronimo Desgrange, since the 4th of December, 1794.

Being asked whether she heard, before or since her marriage, that her said husband was married to another woman:

Answers: That about a year since she heard it stated, in this city, that her husband was married in the north, and, in consequence, she wished to ascertain whether it was true or not, and she left this city for Philadelphia and New York, where she used every exertion to ascertain the truth of the report, and she learned only that he had courted a woman,

whose father not consenting to the match, it did not take place, and she married another man shortly afterwards.

Being asked whether she had recently heard that her husband was married to three women, if she believed it, or does believe it, or has any doubt about the matter which renders her unquiet or unhappy:

Answers: That although she has heard so in public, she has not believed it, and the report has caused her no uneasiness, as she is satisfied that it is not true; she also swears that she is twenty-two years old.

Signed, Marie Zulime Carrière Desgrange, Hasset, his mark, C'tino Lavergne, Antonio Fromentin.

Before me, Franco. Bermudez."

"TESTIMONY OF GERONIMO DESGRANGE. In the city of New Orleans, on the 7th day of September, 1802, Thomas Hasset, presbyter canon of this holy cathedral church, provisor vicar-general, and governor of this bishoprick of this province, caused to come before him and in presence of the interpreters, Geronimo Desgrange, who was duly sworn to tell the truth, replied to the following interrogatories:

Being asked whether he knows Barbara Tanbel de Orsi, how long, and in what place:

Answers: That he first knew her in New York, about eleven years ago, and afterwards in Philadelphia.

Being asked that, if he was married to her, to state in what place, before what clergyman, how long ago, and who were the witnesses:

Answers: That he never was married to her, although he wished to do so, and had asked the consent of her father, but he refused it, as deponent was poor.

*Being asked whether, after leaving her in Philadelphia, he has known her in any other place, and with what intentions: [*518

Answers: That he has seen the said Dona Barbara in Bordeaux by mere accident; for deponent being sick, Mr. Soumeyllatt, her husband, was sent for, and after he got well the said Soumeyllatt invited him to dine with him at his house, where he saw her, and was much astonished; and he afterwards continued visiting the house, with no other feeling than that of friendship, and with the knowledge of her husband.

Being asked if he knows Maria Yllar, to state how long he has known her, in what place, and with what motives:

Answers: That in the month of December, of last year, he knew her when she was in a boarding-house where she was

employed as a servant, in Bordeaux, where the respondent lived.

Being asked if he made any arrangements with the aforesaid to accompany him to this city, to state what that arrangement was, and what object she had in coming here:

Answers: That he made no arrangement nor agreement with the aforesaid; and the reason she is here is, that having asked him whether this country held out better inducements than Bordeaux, in order to gain a livelihood by sewing, he advised her to come, as it would prove more advantageous to her.

Being asked whether his intention is to take her with him on the voyage he intends making, and if he has asked her to do so:

Answers: That he has not thought of it, as she came here to gain her livelihood, and for no other purpose.

Being asked why Maria Julia Carrière, his wife, went to the north last year:

Answers: That the principal reason was, that a report had circulated in this city that he was married to another woman; she wished to ascertain whether it was true, and she went.

Being asked if he has ever been examined by any ecclesiastical judge in relation to this affair:

Answers: No.

Being asked whether it is true, that in order to satisfy his wife and the public, he offered to bring with him or to procure documents to prove his innocence in this matter, and that it he have them, to show them:

Answers: That taking it for granted that this charge would naturally fall, his wife being satisfied of his innocence, and no judge having required the showing of such documents, he has used no exertions to obtain them; and that he is forty-two years old.

Signed, J. Desgrange, Hasset, his mark, Antonio Fromentin, C'tnio Lavergne.

Before me, Francisco Bermudez."

*519] * "DECREE. Not being able to prove the public report, which is contained in the original decree of these proceedings, and having no more proofs for the present, let all proceedings be suspended, with power to prosecute them hereafter, if necessary, and let the person of Geronimo Desgrange be set at liberty, he paying the costs.

Signed, Thomas Hasset.

Don Thomas Hasset, presbyter canon of this holy cathedral

church, vicar-general and governor of the bishopric of this province of Louisiana and the two Floridas, has approved and signed the preceding decree, in New Orleans, this 7th September, 1802.

Signed, Francisco Bermudez.

In New Orleans, on the same day, notified Geronimo Des grange of the preceding decree, and visited him in prison for that purpose.

Signed, Bermudez.

On the same day, notified said decree to Joseph Puche, the keeper of the prison.

Signed, Bermudez."

Bishop Blanc proves that the records of the catholic bishopric of Louisiana are in his charge; that he searched for the record of prosecution against Desgrange for bigamy, and found it; that it is a complete record of the whole proceeding; and that, Thomas Hasset, being first canon of the diocese, represented the bishop, and acted as vicar-general, the see being vacant at that time. Isodore A. Quemper also proves that he is the official keeper of the records of the cathedral church of St. Louis, at New Orleans, and the paper is an exact and literal copy of the original.

The signatures of Lavergne and Fromentin, who took the depositions, and that of Bermudez, the notary, are proved by witnesses who had seen them write; and the signature of Desgrange and Zulime were proved by experts, on comparison of hands with authentic signatures of theirs. Such proof is allowable in Louisiana, according to the civil code and the code of practice; and this mode of proof has not been objected to in this case.

Respondents also introduced the following evidence:

On the 26th of March, 1801, Madame Caillavet, Madame Lasabe, and Madame Despau joined in a power of attorney, authorizing Jerome Desgrange, their brother in law, to proceed *to Bordeaux, in France, and there recover any [*520
estate or property belonging to them, as co-heiresses of their father and mother.

And, at the same time, Desgrange made a general power of attorney to his wife, Donna Maria Zulime, to act for him in all his affairs in his absence. She acted under the power, and sold several slaves, and did other acts, which appear in notarial records. In each of these acts she styles herself "the

legitimate wife and general attorney of Don Geronimo Desgrange."

In July, 1801, Desgrange wrote to Clark the following letter:

"*Bordeaux*, *July*, 1801.

"MY DEAR SIR AND FRIEND, — Although uncertain whether you are at New Orleans, I hasten to seize the opportunity of the sailing of the Natchez to furnish you with some news. I hope my letter will find you in good health. When one has such a friend as you, we cannot feel too deep an interest in him.

"I have received here a great deal of politeness from Mr. John Bernard, merchant, a friend of Mr. Chew, who is doing a very great business now. He spoke a great deal of Mr. Chew to me, and his politeness to him while at Bordeaux. He was introduced to me by Mr. Cox.

"There has been many arrivals of American vessels in this port since I was here last. Colonial goods are selling very well. I think if your friend from Philadelphia were to make a visit here he could make a profitable speculation on his return voyage.

"Do me the kindness, my dear sir, to write to me. It will afford me much pleasure to hear from you. Several American vessels are about to leave, to come directly here.

"Present my compliments to Mr. Chew, and beg him, whenever he writes to Mr. Bernard, to speak of me. I have taken the liberty to inclose under your cover a package for my wife, which I beg you to remit to her. Permit me, my dear friend to reiterate my acceptance of the kind offer you made me before I left, and should my wife find herself embarrassed in any respect, you will truly oblige me by aiding her with your kind advice. I expect to leave in a few days, to join my family. I hope to return to Bordeaux in two or three months, to terminate my affairs here, and to make preparations to meet you. I have been some days engaged in a lawsuit, for the purpose of recovering an estate belonging to my wife's family. I shall place this affair in Mr. Chicou St. Brie's care during my absence. I fear that I shall have to expend a great deal
*521] in this affair. I *have charged Mr. Bernard with the care of other business. I have not yet heard from my wife, which renders me very uneasy as to going to Provence before I hear from her. It is said that peace will be declared by the end of the year; but I have my fears whether we shall enjoy that happiness. Hoping to have the pleasure of hearing from you soon,—"I am, most truly, your friend,

"DESGRANGE.

"Write me to the care of Mr. Jean Bernard, merchant, at Chartron, Bordeaux."

The respondents introduced the deposition of Daniel W. Coxe, of Philadelphia. He had been the partner in trade of Daniel Clark, in their New Orleans house, from the time Clark set out as a commission and shipping merchant. They were nearly of the same age; both proud, intelligent, and ambitious of success; equals in rank, and intimate in their social relations, as a common interest and constant intercourse could make them. This abundantly appears by their correspondence, introduced in the record before us. Coxe states that, in 1802, Madame Desgrange presented herself to him in Philadelphia, with a confidential letter of introduction to him from Daniel Clark, which stated that the bearer was pregnant, and would soon be delivered of a child; and that he, Clark, was the father of it; and the letter requested Coxe to put her under the care of a respectable physician, and to furnish her with money during her confinement and stay in Philadelphia. That Coxe, accordingly, employed the late Doctor William Shippen to attend her at her accouchement. That he, Coxe, procured a nurse for her; and removed the child, on the day of its birth, to the residence of the nurse; that this child was Caroline Barnes, who, before her marriage, always went by the name of Caroline Clark. The first nurse was Mrs. Stevens; afterwards, the child was placed, at Clark's request, with Mr. and Mrs. James Alexander, of Trenton, New Jersey, and continued there until 1814 or 1815. After this, (her father being dead,) she was placed at Mrs. Baisley's school in Philadelphia. She remained with Mrs. Baisley several years, and acted during part of the time as a teacher, and, Coxe thinks, continued there until she was married. She was under Coxe's supervision all the time, from her birth until her marriage; and was supported at the expense of Clark until his death. She was at all times, during his life, recognized by Clark as his child, and caressed as such when he was at Philadelphia.

Coxe further states that Madame Desgrange left Philadelphia for New Orleans as soon as it was prudent for her to travel, *after her confinement; and that this happened, [*522
he thinks, in April of 1802: he says in another deposition that it was some time in 1802. Coxe was three times examined. Dates of letters from Clark to Coxe, and other evidence, show that the child was born as late as July, 1802: to wit, Clark reached Philadelphia about the 27th July, 1802, as from his letter to Coxe appears; he hurried his business at Philadelphia and went to New York, where he wrote to Coxe,

Aug. 13, 1802, that he would sail for Europe on the next Tuesday; and he did sail, and returned early in 1803 to New Orleans, and was not at Philadelphia in 1803. Madame Despau and Coxe both prove that Clark was on his way to Europe, when Madame Desgrange and Madame Despau met him. Coxe deposes that the child had been lately born when Clark reached Philadelphia, and when he went to New York the two women very shortly after left for New Orleans,—that is to say, so soon as Madame Desgrange was able to travel.

A record of a suit brought by Zulime C. Desgrange against her husband, Jerome Desgrange, in November, 1805, for alimony, was also introduced by respondents. It will be further noticed hereafter.

This is substantially the evidence on both sides, on which the question depends, whether Desgrange was, or was not, guilty of bigamy in marrying Maria Julia *née* Carrière, in 1794.

Objections are taken to several portions of this evidence; and especially as respects the record of the suit against Desgrange for bigamy in the ecclesiastical court.

First, it is objected that the record is not duly proved, the signatures of the witnesses not being established as having been signed to their depositions.

The answer to this objection rests on well-settled principles. All that is required in cases of this kind, is to produce a sworn copy of the record, the witnesses also proving that it was taken at the proper office, and produced by the lawful keeper of the records. In Phillips on Ev. by Cowen (vol. 1, 432, vol. 2, 133, 134) will be found the cases in support of this mode of proof.

Here the official keeper of the records and the bishop of the diocese under whose charge they were, produced both the original and the copy; the copy was filed in this cause by stipulation of the parties; and each of the witnesses proved all the law requires to make it *primâ facie* evidence.

On the argument at the bar, and especially in the printed one presented to us as coming from New Orleans, it is earnestly insisted that the origin of this record is recent, and that it had been fabricated for the purposes of this cause. We do not perceive any ground for entertaining such an apprehension.

*523] *1st. The complainant's witnesses refer to such a proceeding. 2d. The record of it was searched for by the complainant, and not found; and for this reason its substantial contents, as it was supposed, were proved in Patterson's case. 3d. The signatures of the officers of the court are proved as being genuine. 4th. Bishop Blanc deposes that he

had charge of the records of the bishopric, among which he found this one.

If the allegation of fraud and forgery insisted on had any foundation, Bishop Blanc must of necessity be directly involved in that charge; and, furthermore, of swearing to that which he must have known to be false. This assumption is not only gratuitous, but the witness is fully supported by the facts above stated; and the further fact, that, neither in his cross-examination, nor by any other evidence, is his integrity assailed by the complainant.

The next objection is, that the record decided nothing, there being no sentence concluding any one; and if there had been such sentence, it would be of no value, as it was a proceeding against Desgrange, to which neither Clark nor Zulime was a party, and therefore the record was incompetent to affect the rights of those claiming under them.

The competency of this evidence depends on other considerations.

For the purpose of establishing the bigamy of Desgrange, the complainant proved by her witnesses that he was arrested on a charge of bigamy, at the instance of his first wife; "that the said lawful wife of the said Desgrange brought with her to New Orleans proofs of her marriage with said Desgrange;" that the first wife appeared as a witness, and proved the bigamy; that Desgrange had confessed it; that he was convicted on his trial; and that he was imprisoned, and in execution, under sentence of the court; that this occurred in 1802 or 1803; that Desgrange escaped from prison by connivance of the public officers, or some of them, and fled the country, and never returned.

On this evidence, standing unopposed and uncontradicted, the complainant had a decree in her favor in the Circuit Court at New Orleans, establishing the bigamy of Desgrange; and in this court in the case of *Patterson* v. *Gaines*, decided in 1848.

For the purpose of letting in this secondary evidence, the complainant introduced the deposition of C. W. Dreschler, made April 24, 1840, which is as follows:

"That at the request of General Edmund P. Gaines, I have been engaged for several days, assisted by a gentleman who understands the Spanish and French languages well, in making very extensive and most diligent search at all offices, &c., in the different parts of the city, where records are kept and could be *looked for, for the purpose of obtaining a copy of a prosecution against one Jerome Desgrange, convicted for the crime of bigamy, in the year 1802 or 1803, when Louisiana was under the Spanish government, and Cas [*524

saacalvo, the governor, by whose order the said Desgrange was arrested, imprisoned, &c., in this city; but that I have not been able to find the Spanish records of the aforesaid criminal proceedings, because almost all the Spanish documents, up to the 20th December, 1803, when Governor Claiborne issued his first proclamation, were taken away by the Spanish authorities, sent to Spain, and to the island of Cuba; and the few papers left in this city are in a loose or bad condition; as also, because many books and papers having been destroyed by fire, and lost by removing them on account of fire, during two occurrences of that kind.

"I am informed that Governor Claiborne made several ineffectual applications to the Spanish government to return the papers taken away, to New Orleans; that persons have had to go to Havana for documents, titles to land, &c."

On this, and other proof that no record of the proceeding could be found, parol evidence of what occurred on the trial against Desgrange was let in, and the bigamy found on the secondary evidence in Patterson's case.

Here the same proof that the record of the proceedings was lost, was introduced; and what took place on that trial of Desgrange was again proved by depositions, which were filed in the Circuit Court before the record of Desgrange's trial was filed by the respondents. The object of its introduction by the respondents was, to rebut, contradict, and overthrow the evidence of the complainant's witnesses, by showing,

1st. That no previous wife appeared against Desgrange on his prosecution.

2d. That no documents of a former marriage were produced against him.

3d. That his wife Zulime did not then charge him with being guilty of bigamy, denied all belief in the charge, and gave her reasons for it; which corresponded with the statement made by the supposed first wife, Barbara Jeanbelle, and with Desgrange's own statement made on oath.

4th. That Desgrange was not convicted, but discharged by order of the court.

5th. That he did not flee the country, nor had any occasion to do so. And,

6th. That so far from admitting his bigamy, he denied it on oath, lawfully administered; thus solemnly declaring that he never had been married previous to his marriage with said Zulime. Whereas, complainant's witnesses swear he made such confessions.

*525] *The complainant's principal witnesses are Madame Despau and Madame Caillavet. Madame Despau

swears that in 1802 or in 1803, Madame Desgrange and herself went to New York for the purpose of ascertaining whether Jerome Desgrange had been previously married, where Clark overtook them; that no church record of the marriage could be found in the Catholic chapel at New York; but hearing that Mr. Gardette, of Philadelphia, knew something of the matter, they went there, and Gardette informed them that he was present at the first marriage; and that Clark and Zulime were then married. And that soon afterwards, they received a letter from Mademe Caillavet, informing them that Desgrange's first wife had come to New Orleans, and they immediately returned there; where Desgrange was prosecuted by his first wife, convicted and imprisoned; and that he fled the country, and never returned to it.

Madame Caillavet says Desgrange and Barbara Jeanbelle came together, or that Jeanbelle came immediately after him; and that she immediately wrote to her sisters to return.

It appears that in the spring of 1801, Desgrange went to France, to recover property coming by succession to his wife Zulime, and her sisters, from their parents, and lying at Bordeaux, or in that neighborhood; and that he had not returned when Zulime and Madame Despau left New Orleans for New York.

The ecclesiastical record states that he had been at home about two months before he was arrested; which was September 4, 1802. He was therefore absent from his wife Zulime about fifteen months.

Daniel W. Coxe proves, that Madame Desgrange brought him a letter of introduction from Clark, stating, that she was then far gone in pregnancy, and requesting Coxe's attention to her wants; that he furnished a house and money, and employed a nurse, and Dr. Shippen to attend her accouchement; that Clark's letter stated the child was his; and we must assume that the mother by delivering the letter, impliedly admitted the fact. She was delivered; and Coxe had the child, on the same day, put with Mrs. Stevens to nurse. All this time, Madame Despau was with Madame Desgrange. Coxe superintended the child's nurture and education, in and near to Philadelphia, until Clark's death in 1813, and afterwards. This was Caroline, who when grown up married Dr. Barnes; and who these witnesses swear without hesitation was the child of Desgrange; and who, Madame Despau swears, was born in 1801. Nor does either witness intimate that she was born in Philadelphia; or that their sister went there to conceal her adultery, and hide its offspring.

*They left Philadelphia for New Orleans, as soon as Madame Desgrange was able to travel; and reported to the deluded husband on their return, that they had been north, seeking proof against him for bigamy, but had found none. This is the substance of what Desgrange himself stated on his examination in the criminal proceeding as derived from others. Zulime swore on the trial, that she had heard the report of Desgrange having another wife about a year before; that is about the first of September, 1801. Then, Desgrange was in France.

It is true beyond question that these witnesses did know that their sister Desgrange went north to hide her adultery; that she did delude her absent husband, that she did impose on him the mendacious tale that her sole business north was to clear up doubts that disturbed her mind, about his having another wife. These facts they carefully conceal in their depositions; and on the contrary swear that she went north to get evidence of her husband's bigamy and imposition on her.

When they swore positively that Caroline was the child of Desgrange, they did know that he had been in France, and his wife in New Orleans, and they had not seen each other for more than a year before the child was born; and Madame Despau could not be ignorant that Clark claimed it as his, and that the mother admitted the fact to Coxe.

These witnesses swear that Zulime had separated from Desgrange on discovering his bigamy, and gone to her own family. That this occurred before the family arrangement was made that Clark should marry her, and before Madame Desgrange and Madame Despau went north to ascertain the bigamy. They also swear that Zulime returned to New Orleans about the time Desgrange was arrested and imprisoned in September, 1802, and was then the wife of Clark. There is no proof in this record tending to show that before Desgrange went to France he was suspected of bigamy, nor that his wife had separated from him; but there is evidence to the contrary.

When Desgrange went to France in the spring of 1801, he appointed his wife attorney in fact by notarial act, with full power to transact all his business in his absence. Under this power she acted and sold his property, paid debts, &c., and declared herself his lawful wife in every transaction.

Desgrange went to France with a full power to transact business for his wife and her three sisters, in which the latter style him their brother-in-law. This was his sole business in France so far as this record shows; and when there, he wrote to Clark, in July, 1801, to assist his, Desgrange's wife; ex-

pressing his sympathies, forwarding a package for her, and regretting that he had not heard from her. He also expressed the sincerest gratitude *for Clark's proffered kindness [*527 in providing for and aiding Zulime in his absence. From these facts it is clear, as we think, that at the time Desgrange left for Europe, he and his wife were on terms of intercourse and ordinary affection, and certainly not separated; and that the cause of their separation is found in the connection formed by Clark and Zulime in Desgrange's absence.

In support of the consistency of these witnesses, stress is laid on the fact that so strong was the rumor of Desgrange's having two other wives besides Zulime, that he was arrested, imprisoned, and tried on the rumor. This is certainly true; the record of his prosecution establishes the fact: But what circumstances are brought forth to show that there was any plausible ground for such rumor and such prosecution? Desgrange was a man somewhat advanced in life; he kept an humble shop for selling liquors and confectionery; this seems to have been his sole business. His wife Zulime, was about twenty-two years old, and uncommonly handsome. He seems to have been a lone man in New Orleans, and his friends were his wife and her relations. In the face of these facts it is assumed that he brought from France with him an additional wife, and that another followed him; with both of whom, and his third wife, Zulime, he was confronted before the authorities of the church.

The early times, and the unintelligent condition of much of the population of New Orleans at that day, must account for this absurd public opinion, and the proceedings founded on it.

It is palpable that the witnesses Despau and Caillavet, swear to a plausible tale of fiction, leaving out the circumstances of gross reality. These originated, beyond question, in profligacy of a highly dangerous and criminal character; that of a wife having committed adultery, and been delivered of an illegitimate child, in the absence of her husband; not only on his lawful business, but on hers, and at her instance.

This child, with the knowledge of both of these witnesses, and certainly with the aid of one of them, if not both, was concealed in a foreign country, where the mother went and was delivered; and then she returned home to New Orleans and presented herself to society as an innocent and injured woman, and public indignation was turned on her husband for a supposed crime committed against her. This is the reality

these witnesses conceal; roundly swearing that they knew this child to be Desgrange's.

They also swear that Clark arranged with Zulime's family before he went to Philadelphia, and had the assent of her family to marry her; they having previously discovered Desgrange's bigamy. But, according to their account, so scrupulous and delicate was this injured woman, that she *528] refused to marry *Clark until she went to New York and there ascertained for herself the fact that Desgrange had another wife: that Clark soon followed Madame Desgrange and Madame Despau, as previously agreed on; and even then, Madame Despau swears, when Gardette had informed them that he was present, and witnessed Desgrange's first marriage, her sister's sense of propriety and delicacy was so great, that earnest persuasions had to be used by Clark to overcome her scruples. We cannot shut our eyes on the truth, and accord our belief to this fiction.

We have thus far spoken of the witnesses Despau and Caillavet in connection, because they acted in concert with their sister Desgrange and Clark, in secreting their intercourse, and in hiding the child that came of that intercourse; all the secrets involved were obviously known to the three sisters, whose confidential relation in the matter could hardly have been more close, as appears by their statements throughout.

Madame Despau is further discredited by Daniel W. Coxe's evidence. She swears as follows:

"Mr. Clark became a member of the United States Congress in eighteen hundred and six. While he was in Congress, my sister heard that he was courting a Miss C., 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, and she and I sailed to Philadelphia to get the proof of his marriage with my sister. We could find no record of the marriage, 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 above stated. He answered that he knew it to be true that Mr. Clark was engaged to the lady in question. My sister replied that 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 the advice of legal counsel, and said he would send one. A Mr. Smith came, and, after telling my sister that she could not legally establish her marriage with Mr. Clark, 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 C. And afterwards, she married Mr. Gardette."

The following is Coxe's account of the interview:

"I also think it proper to state, that in the year 1808, after Madame Desgrange had returned to Philadelphia from New Orleans, and when lodging in Walnut street, she sent for me, and during a private interview with her, at Mrs. Rowan's, where she lodged, she stated that she had heard Mr. Clark was going to be *married to Miss C., of Baltimore, [*529 which, she said, was a violation of his promise to marry her, and added that she now considered herself at liberty to connect herself in marriage with another person; alluding, doubtless, to Dr. Gardette, who, at the moment of this disclosure, entered the room, when after a few words of general conversation I withdrew, and her marriage to Mr. Gardette was announced a few days after."

These contradictory statements raise a question of integrity between the witnesses. If they were equally entitled to credit, still Coxe's statement has several advantages. First: Madame Desgrange disavowed in the strongest terms that she was the wife of Clark by marrying Gardette. Secondly: so important a communication as Madame Despau declares her sister made to Mr. Coxe; so ruinous to Clark's matrimonial prospects, and so deeply disgraceful to him, must have been remembered by Coxe if such communication had been made.

Thirdly: Madame Despau swears that she and her sister Desgrange went to Philadelphia to obtain evidence of Clark's marriage with Zulime; that they could find no record of the marriage, and were told the priest who performed the ceremony had gone to Ireland. What occasion could there be for further proof? Madame Despau swears that Clark had proposed, and family arrangements had been made with him at New Orleans, to marry Zulime; that these proposals were made with the full knowlege of all Zulime's family; that Clark followed the witness and Zulime north to fulfil the engagement; that he met them, and the marriage took place; that she, Madame Despau, was present; that Mr. Dozier, a wealthy planter of New Orleans, and an Irish gentleman of New York, were also present.

Zulime's family consisted of three sisters and their husbands. Madame Cavaillet swears that Clark conversed with her as his sister-in-law, and admitted the marriage openly to her. Than this, no further proof of it could be required, if true.

The next evidence bearing on the question of Desgrange's

bigamy is the record of a suit, brought by Madame Desgrange against her husband in 1805, for alimony, already referred to; and the deposition of Zulime found in the record of the ecclesiastical proceeding, taken in connection with the first named record. In her deposition Zulime spoke of Desgrange in language admitting of no doubt that she then recognized him as her husband; and that no evidence of his bigamy existed so far as she knew or believed.

The deposition is objected to as not being evidence against the complainant. We have already declared that what appeared of record in the proceeding against Desgrange, was competent to rebut evidence introduced by the complainant tending to *show what occurred on the prosecution; this being in effect and fact proof of what the record contained. The deposition is now relied on as evidence in itself, tending to show that Desgrange was Zulime's lawful husband, according to her own confessions and showing at the time she deposed.

*530]

The competency of this deposition, taken as a confession, is objected to, on the ground that her signature to it was not legally proved, as this was done by comparison of hands, according to the statute law of Louisiana. The steps taken in the Circuit Court are conclusive of the objection.

On the 16th of January, 1850, the complainant's counsel gave notice to those of the respondents, that on Monday, the 21st, a motion would be made to suppress certain pieces of evidence; and among them the exhibit, obtained at the cathedral church of St. Louis, known as the "Ecclesiastical Record." The cause came on for hearing January 22d, and was heard on that and the seventeen succeeding days; but no motion to suppress evidence was made; and if there had been, this exhibit could have been proved at the hearing, by Zulime herself, if no one else had been found to do so; as the record shows that complainant's counsel admitted that Zulime was within the jurisdiction of the court, on the day the trial commenced. No objection having been made on the hearing below to this deposition, none can be raised here. To what extent it can be used, will appear from the following facts.

By an amendment to her bill, July 2d, 1844, the complainant states:

"Your oratrix alleges that she is entitled to the one moiety of the estate, of which the said Daniel Clark died possessed, by reason of a conveyance thereof, made to her by M. Z. Gardette, the widow of the said Clark, and the mother of your oratrix, on the 7th day of May, 1836, and which is here-

unto annexed, marked A. B., and prayed to be taken as part hereof; and the mother of your oratrix did thereafter, on the 20th June, 1844, further convey to her all her interest in said estate, as appears by her act, a copy of which is herewith exhibited, marked C.; the whole of said estate having been acquired during the coverture of said Clark and wife.

The evidence corresponds with this allegation, and on it the complainant asks to have a decree for one half of the estate of Daniel Clark, as derived from her mother. Madame Despau and Madame Caillavet depose, that Clark married Zulime shortly before her return to New Orleans, from Philadelphia, and before the trial of Desgrange took place, and when she must have been the wife of Clark, if ever she was. If Zulime was now before the court claiming her marital interest in Clark's estate, her declarations *made during the alleged coverture tending to show that she was not the [*531 wife of Clark, but of Desgrange, would be admissible against her, and if so, they are also admissible against any one who asserts the same title derived from her, after these declarations were made. Such a case is an established exception to the rule of evidence, excluding declarations of third persons not parties to the record. A declaration emanating from the claimant of any right or estate, which afterwards comes to the parties on the record by descent or purchase, affecting adversely the estate acquired, may be given in evidence against the party to the record who claims the estate. The authorities are numerous to this effect, and will be found in 1 Phillips on Ev., 301, and in the notes by Cowen, 265. And the same rule applies to the record of the suit for alimony. That record would be evidence against the complainant's mother if she were a party to this suit; and it is equally evidence against the complainant as purchaser or donee from her mother; it shows the acts and conduct of the mother, on the question bearing on Desgrange's bigamy.

In the suit of 1805, the petitioner alleges that the County Court of Orleans has jurisdiction on application of wives against their husbands, to grant alimony on the husband deserting his wife for one year, and in cases of cruel treatment; and the petitioner declares that her husband, Jerome Desgrange, had cruelly treated her; and likewise, that she had been deserted by him from the 2d day of September, 1802, until that time; that he had returned to New Orleans, from France, in the previous month of October, and was then in the city; and she prays, "that said Jerome Desgrange, your petitioner's husband, be condemned to pay her a sum of five hundred dollars per annum," &c. Desgrange was served with

notice December 6, 1805, and final judgment entered against him, as prayed for by his wife, December 24, 1805.

We are called on here to try an issue on facts, as a jury would be bound to do, and find on them the issue between Clark's devisee and executors, and the purchasers claiming under them, on the one side; and the complainant claiming under her mother on the other, whether that mother was the lawful widow of Daniel Clark when she conveyed to the complainant.

This alleged widow swore before the authorities of the church in September, 1802, that she was the wife of Desgrange, and there spoke of him as her lawful husband; nothing to the contrary was then pretended. The presence before which she deposed, and the solemn manner in which it was done, give additional weight, in our judgment, to what she so deliberately declared on that occasion.

*532] *In 1805, she again alleged in a legal proceeding, deeply affecting her and Desgrange, that she was his lawful wife, and that he was her husband. The court sanctioned her statement by founding its judgment on it; and as a wife, she recovered the amount claimed as alimony.

With the full knowledge this woman had of all the circumstances connected with the charge of bigamy against Desgrange, our judgment is convinced that she stated what was true, and that she was Desgrange's lawful wife at the time it is alleged she married Clark.

The claim, therefore, of the complainant, derived from her mother, must be rejected, as it stands condemned by the statements and acts of that mother herself.

The complicated and curious circumstances that surrounded this charge of bigamy against Desgrange in the Patterson case, and which were then so difficult to deal with, are easily enough understood now. A clew is furnished to unravel the mystery, why it was that an humble shopkeeper should be of sufficient consequence to excite public indignation, be the object of general and gross reproach, and for his name afterwards to appear in the columns of the only newspaper then published in New Orleans, an extract from which the complainant has given in evidence. There an account was given of Desgrange's alleged crime of bigamy, and the enormity of his conduct in marrying Zulime *née* Carrière, whose artless innocence he so basely imposed upon. The mystery is explained by the fact now presented, that in Desgrange's absence to France, his wife formed a connection with Clark, and the child Caroline came of that illicit connection. On Desgrange's return home, Madame Caillavet notified her sisters to return in

haste, as Desgrange's first wife was at New Orleans. Mesdames Despau and Desgrange forthwith returned, and at this time it was that Desgrange was so fiercely assailed by public opinion, and very soon after arrested on general rumor and tried for bigamy. The reports, to which these witnesses swear, obviously originated with, and were relied on by Madame Desgrange, her sisters and friends, to harass and drive Desgrange from the country, so that his wife might indulge herself in the society of Clark, unincumbered and unannoyed by the presence of an humble and deserted husband. And this was in fact accomplished, for Desgrange did leave the country soon after he was tried for bigamy, and Clark did set up Desgrange's wife in a handsome establishment, where their intercourse was unrestrained.

In 1805, when Desgrange again came to New Orleans, his wife immediately sued him for alimony as above stated; speedily got judgment against him for five hundred dollars per *annum; on the same day, issued execution, and again drove him away. [*533

Bellechasse and Madame Benguerel swear that Desgrange married Zulime, and that he was afterwards condemned for the crime of bigamy; his first and lawful wife coming in pursuit of him to Louisiana, and appearing against him, and producing the documents of her marriage. That this happened in 1802 or 1803, and that Desgrange fled. Their statements are substantially the same in this respect.

They are so obviously founded on common report, as to be of no value in themselves; certainly no decree could be founded on them. But when contrasted with the record of Desgrange's prosecution, they turn out to be entirely contrary to the truth; as no first wife appeared against Desgrange; no documents of a former marriage were produced; and no conviction took place; nor did he flee from the country. These aged persons swore as to what common rumor and public clamor were forty years before, and nothing more.

Madame Benguerel also swears, that she and her husband were intimate with Desgrange, and when they reproached him for his baseness in marrying Zulime, he endeavored to excuse himself by saying "that, at the time of his marrying said Zulime, he had abandoned his said lawful wife, and never intended to see her again." As already stated, this must have happened after Desgrange returned from France, for there is no evidence that before he went there any such report existed. Zulime proved, on the prosecution for bigamy, that she had first heard the report about a year before she was examined.

We deem it extremely improbable, that a man should openly

confess to the friends of Zulime, who reproached him with having committed a foul and high crime, that he was guilty; and this, too, on the eve of his apprehension and examination, on which he was compelled to give evidence against himself, when he swore that there was no truth whatever in the charge, and in which he was supported by this supposed first wife, who was then examined, and also by Zulime herself.

On the admissibility of Desgrange's confession, that he committed bigamy when he married Zulime, the question arises whether this confession (if made) could be given in evidence against the defendants. They do not claim under Desgrange; he was not interested in this controversy when it originated, and was competent to give evidence in this cause at any time, if living, to prove, or disprove, that a previous marriage took place, and was in full force, when he married Zulime. Phillips, in his Treatise on Evidence, (vol. 3, 287, Cowen's ed.) lays down the rule with accuracy, and cites the authorities in its *support; which rule is, that "either of the married parties, provided they are not interested in the suit, will be competent to prove the marriage; and either of them will also be competent to disprove the supposed marriage; and they may give evidence as to the fact whether their child was born before or after marriage."

*534]

If Desgrange could overthrow his marriage with Zulime by confessions, at one time, so he could at any other time; and on this assumption, his confession of a previous marriage could have been admitted at any time before the trial, or at the trial, when he stood by, and might be examined as a witness.

The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and to hold that either of the parties could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine.

This admission was not one tending to establish pedigree, where hearsay of parents and others is admissible; it went to the specific fact of bigamy; and, according to the language of the Supreme Court of Louisiana, in *Harmar* v. *McLeland*, (16 La., 28,) "in such serious matters, the law requires more than the simple confession of one of the parties to dissolve forever the bonds of matrimony between them." That was a case seeking a divorce on a written confession of the husband, who had married a second wife; but the principle declared in that case, and the one governing the present, is the same. It upholds a great policy, on which society is founded.

The letter of Desgrange to Clark, of July, 1801, from Bordeaux, is objected to, as incompetent. We think it is com-

petent to prove the state of feeling, affection, and sympathy of Desgrange towards his wife, when he wrote the letter; and also, the date is evidence to prove where the writer was, and the time when he wrote. There is no ground to suppose that the letter was written collusively. It appears to have been ingenuous, and honestly intended. The doctrine, why such a letter is admitted, is laid down accurately in 1 Phillips's Ev. by Cowen, 189, 190.

In addition to the foregoing evidence to prove the bigamy of Desgrange, a certificate in the Latin language was introduced, on part of the complainant, purporting to be that of William V. O'Brien, dated September 11, 1806, declaring that he had, (July 6, 1790,) as pastor of St. Peter's church, in the city of New York, married, in that church, Jacobus Desgrange, to Barbara M. Orsi.

It is proved that this priest had charge of St. Peter's church in 1790, and in 1806; that the certificate was in his handwriting, *and in due and ordinary form; that the priest died about 1814, then still being in charge of the same church; [*535 and that no record of the marriage was found in the records of the church in 1849, when the witnesses deposed to the handwriting of the priest. It is also proved that this certificate was found among the papers of Gardette, who married the complainant's mother in 1808; that the paper was found after the suit against Patterson was decided, and delivered to the complainant by her mother.

The true name of Desgrange is not in the certificate. It was Geronimo, not Jacobus. Nor was the woman's name given so as to correspond with that of the alleged first wife of Desgrange. Her name was Barbara Jeanbelle. De Orsi is an affix, describing a place to which the party belongs, or has belonged. The woman's name is given as Barbara M. Orsi, and we suppose no catholic priest thus describes a person he has married, in his marriage register. No identity of person is proved. No cohabitation as man and wife, between Desgrange and Barbara Jeanbelle, is proved.

But waiving all these objections, and still we think this certificate mere hearsay evidence, and that of a very dangerous character, and this for several reasons. It was given sixteen years after the marriage purports to have taken place, and might just as well have been given, had the priest been alive, forty years after the marriage, and on the eve of the trial.

In England, by the statute law, copies from parish registers are received to prove marriages; but the paper produced must be a sworn copy of the parish register, and not a certificate of

the officiating clergyman; nor will a copy of a foreign register be received in evidence, on proof that it is a true copy.

If it were allowable in this country to give such certificate in evidence, where every clergyman of all denominations can perform the ceremony of marriage, and where it is performed by justices of the peace in many of the states, it would open a door to frauds that could not be guarded against.

And then again, certificates of marriage might be produced by those coming to this country from Europe; for no reason exists why a priest in any part of the world should not have accorded to his certificate all the credence that ought to be given to the one here produced, as Louisiana and New York were foreign to each other in 1790.

The respondents introduced the copy of a mutilated record, to which objection was made on behalf of complainant, but which comes up in this record, and is now relied on, for the complainant, to prove the bigamy of Desgrange. It purports to be a suit of Zulime Carrière against Jerome Desgrange, *536] commenced in 1806, *in the former County Court of Orleans. A curator was appointed for Desgrange, who was absent; and the curator, Ellery, was summoned to answer the petition; but no petition is produced. Ellery demurred, and stated, as cause of demurrer, that the County Court had no jurisdiction of cases of divorce, nor the court power to pronounce therein; and that the damages, prayed for in said petition, cannot be inquired into or assessed until after judgment of the court touching the validity of the marriage shall be first declared; and he therefore demurred. The demurrer was joined. Afterwards the curator filed the general issue.

All we find further, is a copy of the docket entries which the clerk was bound to keep by the act of April 10, 1805, § 11, for the inspection of the public. The docket entry is as follows: "Petition filed June 24, 1806. Debt or damages, $100. Plea filed July 1, 1806. Answer filed July 24, 1806. Set for trial 24th July." The witnesses are stated and the costs given; and then follows: "Judgment for plaintiff, damages $100, July 24, 1806."

This proceeding is relied on as in itself establishing the fact, that the marriage between Jerome Desgrange and Marie Julia *née* Carrière, was thereby declared null.

To give the record this effect, it must appear that the plaintiff did set out in her petition the fact that said marriage was null by reason of the bigamy of Desgrange, and that she prayed to have its nullity adjudged by a judicial decree, and that such decree was made on the issue. Nothing of the kind appears here. We have no evidence what the cause of action

was, nor can any inference be drawn from the memoranda made by the clerk that the suit was to establish the bigamy. All that appears from these memoranda is, that debt or damages to the amount of $100 was claimed by the plaintiff, and that $100 in damages was recovered. Nor does the demurrer contradict this assumption. This mutilated record, therefore, proves nothing in this cause.

In regard to this record, the answer of Beverly Chew and Richard Relf avers, "that on or about the 24th of June, 1806, the aforesaid Zulime *née* Carrière, wife of the said Jerome Desgrange, did present another petition to the competent judicial tribunal of the city of New Orleans, therein representing herself as the lawful wife of, and having intermarried with the said Jerome Desgrange, and praying for a divorce and a dissolution of the bonds of matrimony existing between her and the said Jerome Desgrange, and which was subsequently decreed: to wit, subsequent to the birth of said Myra." If it was true, that as lawful wife, Zulime *née* Carrière sued, and did admit by this proceeding that she was the lawful wife of Desgrange; yet it could *only affect the interest the [*537
complainant sets up under her mother. But as the record does not show what the cause of action was, it is of no value for either side.

On the 20th January, 1849, Gaines and wife filed their supplemental bill against all of the defendants, and among other matters set forth the decree made in their behalf by this court, in the case of *C. Patterson* v. *Gaines and wife*, at December term, 1847; and complainants set up that decree as having adjudged and decided against all the defendants to this suit, that Myra Clark Gaines was the legitimate child and forced heiress of Daniel Clark, and that she was legally and equitably entitled to receive of Relf and Chew, and all persons holding under them, all and singular the estates and property claimed by the original bill; and that although neither of them were nominal parties to said decree, yet each of them is bound and concluded thereby; they and each of them holding the same relation to your oratrix as the said Charles Patterson did, and they and each of them having joined in the interrogatories propounded to the witnesses upon whose testimony said decree was rendered, and propounded cross-interrogatories to said witnesses.

The defendants admit that such a decree was rendered, but deny that it is conclusive on them, or that it ought to affect their right; and that if the decree could do so, yet it ought not to have this effect in the present instance, because they aver and set forth and plead the same as a matter of defence;

that said decree was brought about, and procured by imposition, combination, and fraud, between said complainants and Charles Patterson, and that therefore it should not be regarded in a court of justice for any purpose whatever; that said decree was designed as no honest exposition of the merits of the case; but was brought about, allowed and consented to, for the purpose of pleading the same as *res judicata* upon points in litigation not honestly contested.

Charles Patterson was called on by respondents to give evidence on their behalf, to establish the fact that his suit with Gaines and wife was not honestly defended by him; and he was required by interrogatories to depose whether he had lost anything by the decree against him. He answered that he caused the proofs from the court of probate in New Orleans to be given in evidence in the cause; that this was done by consent of General and Mrs. Gaines, who told him to get all the evidence possible, the stronger the better; that it would be more glorious to have it as strong as possible.

He furthermore deposed that General Gaines and his wife gave him a writing under their hands that they would not take any property from him, and that they would make his title *good. He also stated that General and Mrs Gaines were to pay the costs if the suit was decided against him, Patterson; that he paid most of them, and that General and Mrs. Gaines refunded the money to him; that he also paid the counsel who appeared for him at Washington, but the money was refunded by General and Mrs. Gaines.

*538]

He further stated that he was particularly requested by General and Mrs. Gaines to use his best exertions, with the aid of the best counsel he could employ to make every defence in his power to the suit, and of which it was susceptible, and that he did so.

The suit was for Patterson's residence in New Orleans, and he admits that he has never been disturbed in his possession, by the decree against him, nor does he expect that he ever will be.

That this proceeding on the part of Patterson and General and Mrs. Gaines was amicable, and that no earnest litigation was had is too manifest for controversy. They agreed to go to trial at once on the depositions found in the probate court; and as Patterson was to lose nothing by the event, he was of course indifferent as to what evidence might be introduced on the hearing.

It also appears by his evidence that when a decree was obtained in the Circuit Court against him, his name was used to carry up an appeal to this court; but it was in fact brought

up by General and Mrs. Gaines. Patterson employed counsel here, who of course had to take the record as they found it, and make the best of it they could; and it is conceded on all hands they did so; and made the best exertions for Patterson they could do on the record brought up by him, as they supposed. Nevertheless, an affirmance of the decree was had in this court. It could hardly be otherwise in a case managed as this was; the object of the complainants below being to obtain a favorable opinion and decree, on the law and facts of a case made up at their own discretion.

But the cause before us presents an aspect altogether different; the proceeding against Desgrange before the vicar-general, introduced here by the respondents, from the archives of the cathedral church of St. Louis, at New Orleans, is in our opinion sufficient in itself to produce a different decree from that given in Patterson's case.

That record; the power of attorney from Desgrange to his wife; and the one from his wife and her sisters to him, to pursue and recover their property in France; his letter to Clark of July, 1801; the proof of his absence from his wife for more than a year, before Caroline was born; the record of the suit for alimony, *prosecuted in 1805, by his wife against Desgrange, together with Daniel W. Coxe's [*539 evidence, as it now stands, fortified as it is, by letters showing dates, consistency, and accuracy, are all new; and make up a defence altogether conclusive.

The following is the result of our conclusions:

1st. That the complainant's two principal witnesses, Madame Despau and Madame Caillavet, are not worthy of credit.

2d. That the depositions of Bellechasse and Madame Benguerel obviously state hearsay and rumor, and are worth nothing, in so far as mere hearsay and rumor is detailed by them.

3d. That the naked confession of Desgrange, that he had been guilty of bigamy, made to Madame Benguerel and her husband, is incompetent evidence, and inadmissible as against these respondents; even admitting that such confession had been made, as stated by the witness.

4th. That the certificate of William V. O'Brien is inadmissible, and must be disregarded.

5th. That the record of the suit of Zūlime Carrière against Jerome Desgrange, prosecuted in 1806 in the County Court of Orleans, proves nothing, and is incompetent.

6th. That the decree of this court in Charles Patterson's case does not affect these defendants for two reasons: 1st.

Because they were no parties to it; and 2d. Because it was no earnest controversy; and

7th. That the record of Desgrange's prosecution for bigamy overthrows the feeble, and the discredited evidence, introduced by complainant to prove the bigamy of Desgrange, by marrying Marie Julia *née* Carrière in 1794; and establishes the fact that Desgrange was her lawful husband, in 1802 or 1803, when complainant alleges Daniel Clark married her mother; and that therefore, complainant is not the lawful heir of Daniel Clark, and can inherit nothing from him: and consequently that the complainant can take no interest under her mother, by the conveyance set forth in the amended bill, she not being the widow of Daniel Clark.

The question decided, concludes this controversy; nor shall we go further into it.

The harshness of judicial duty requires that we should deal with witnesses and evidences, and with men's rights, as we find them; and it is done so here. But we sincerely regret that it could not be satisfactorily done, without making exposures that would most willingly have been avoided.

It is ordered that the decree of the Circuit Court be affirmed, and the bill dismissed.

No. 150 of *Myra Clark Gaines* v. *F. D. de la Croix*, *Richard Relf* and *Beverly Chew;* and No. 151 of *the same complainant* *v. *D. F. Kermer*, *J. S. Minor*, *Relf*, *Chew et al.*, depend on the same facts as the foregoing case. In these also the decrees below will be affirmed, and the bills dismissed.

*540]

Mr. Justice WAYNE and Mr. Justice DANIEL dissented.

Mr. Justice WAYNE delivered the following dissenting opinion.

I dissent from the judgment just given, and will give my reasons for doing so as briefly as I can. But it will necessarily occupy some time.

I believe that the case of the complainant has been proved beyond a reasonable doubt, as the law requires it to be done; I say as the law requires it to be done, without meaning to imply any doubt of the fact, but that the fact has been proved according to those rules which experience has shown to be necessary and sufficient, to guard conjugal and other domestic relations from capricious and unregulated judgments. Those rules are to be found in adjudicated cases of our own and of the English courts, and in the conclusions of the civil and canon law applicable to cases of this kind.

I think it has been proved, that Myra Clark Gaines is the

only child of her father, Daniel Clark, by his marriage with her mother, Zulime Carrière. That when the marriage took place, the parties were willing to contract, able to contract, and that they did contract marriage in Pennsylvania according to the laws of that state, in the year eighteen hundred and two. I also think that there was nothing then or now in the laws of Louisiana which lessens in any way the validity of that marriage. The proofs of these declarations shall hereafter be pointed out, with the law in support of them.

My first object is to state the evidence relied upon by the parties to this suit, and in what way it should have been examined and appreciated by this court, before its judgment was given. In other words, I mean to say, that a judgment has been given against the complainant upon testimony introduced into the record of the case against the protest of her counsel, which is altogether inadmissible under the rules for the admission of testimony in courts of justice, and which have hitherto been observed and enjoined by this court in its judgments. And further, that admissions and averments in the answer of the defendants in respect to certain portions of testimony offered by them, have been overlooked, by which the complainant has been deprived of proofs, which time out of mind in chancery have been considered conclusive of the fact affirmed in an answer, whether or not the same makes against a defendant or for a complainant.

*Secondly, I will show that all of the testimony of a documentary kind introduced by the defendants, except [*541 one of them, ought not to have been received by this court as evidence, on account of some of them not being properly authenticated as records of a judicial character, and because others being *res inter alios acta, aliis nec prodest nec nocet.* And that such documents or papers for the causes just stated have always been rejected by the courts of common law and by courts of chancery, and further that they would not have been received in the courts of Louisiana if this case had been in one of its tribunals.

The defendants deny the marriage between the complainant's father and mother; and if there was a marriage, they contest its validity on account of her mother having then another husband alive. It is admitted that a marriage had been solemnized between her and Jerome Desgrange, but the complainant shows by competent testimony sufficient to establish the fact that Desgrange was a married man, with a wife alive when he married her mother. That such being the fact, their marriage was void *ab initio*, and that she was at liberty to marry with another as if no such connection had ever existed

between Desgrange and herself. In other words, that such a connection, though entered into according to the forms of marriage, makes no impediment by the civil, the canon, or common law, in the way of a second marriage by the party imposed upon. The defendants rejoin, saying, even though the marriage with Desgrange was void on account of his bigamy, that she could not contract marriage again, before she had obtained a sentence of nullity of her marriage with Desgrange. It is also urged by the defendants, if there was a marriage between the father and mother of the complainant, that it was void on account of what the canon law terms its *clandestinity*. That according to that law, as it then prevailed in Louisiana, the issue of such a marriage was illegitimate, and that it has no civil effect to give rights of property or inheritance to the issue of such a marriage. To this the complainant replies that the marriage of her father and mother was solemnized in the state of Pennsylvania according to the law of that state. That the *lex loci contractus* gives to the issue the status of legitimacy for all purposes in Louisiana and elsewhere, whether the issue was born there or out of its jurisdiction, and further, that marriages which have been clandestinely solemnized, that is, by not observing the solemnities of the church, though they are condemned by the canon law, as it existed in Louisiana, are not made void—cap. *quod nobes. tit, que filii sunt legis.* To the objection that there had not been a sentence of the nullity of the marriage with Desgrange, the complainant answers, that when a marriage by the canon law
*542] and *as it then was in Louisiana, is *ipso facto*, null and void, that no declaratory sentence of nullity is absolutely necessary, though it may be expedient to have one, to reinstate the parties in their original unconnected condition. That this is especially so, when one of the parties at the time of marriage had been previously married and that marriage had not been dissolved by death or by operation of law. That a sentence of nullity is only absolutely necessary to restore the ability of persons to marry, when it is sought to have a marriage declared *de facto* void on account of non-compliance with the law directing the mode for solemnizing marriage, or when one of the parties seeks a dissolution on account of fear,—such as the fear of death or imprisonment having been used to compel a party to marry,—or where the marriage is voidable for incest or impotence, or if the woman is *nimis arcta*, for which an ecclesiastical court will pronounce it null and void in the lifetime of the parties, which when done restores the parties, except in the third case mentioned, to their former ability to

contract espousals and marriage with others as if they had not been in that connection with each other.

The defendants, to maintain their denial of the marriage between the father and mother of the complainant, attempt to discredit her witnesses who were examined to prove it. For that purpose they examined persons as to the character of the witnesses. They attempt to show contradictions in the testimony of two of them taken at different times, and allege concealment of facts which it is said they were bound to disclose in their examination; and they were also permitted to put in evidence certain papers relating to the marriage with Desgrange, and its continuance after the alleged marriage of Zulime with Clark. Those papers are, 1st, One termed an ecclesiastical prosecution of Desgrange for bigamy in 1802; 2d, The proceedings of a court in Louisiana in 1805 at the instance of Zulime against Desgrange for alimony; 3d, Another for a like purpose at the instance of Mr. Davis, to whose care the complainant was confided by her father in her infancy, in which she is called a natural child of her father; 4th, An imperfect record of a suit brought by the complainant's mother in 1806 in her maiden name against the name of Desgrange, for a divorce or a sentence of nullity of their marriage, in which there was a judgment against him, or in her favor.

The last record stands in this suit upon a different footing from the ecclesiastical proceedings, inasmuch as it is properly authenticated to make it evidence as a judicial record, and the other is not so. Also, because the defendants introduce it and declare it in their answers to be a petition by the complainant's *mother, Zulime *née* Carrière, wife of the said Desgrange, to a competent judicial tribunal in New [*543 Orleans, therein representing herself as the wife of Desgrange, and praying for a divorce and dissolution of the bonds of matrimony existing between her and Desgrange, which was subsequently decreed, after the birth of the complainant. And they further aver in their answers, that, having obtained a divorce and having resumed her maiden name, she afterwards, in 1808, intermarried with one James Gardette. The defendants also rely upon the conduct of Clark and Zulime, before and after it is said they were married, to disprove their marriage and to establish that they were illicitly connected, before and until after the birth of the complainant. She resists this by proofs which will hereafter be more particularly noticed, and further urges that the defendants having alleged in their answers a divorce between Desgrange and her mother by a competent tribunal, they cannot now be permitted to disclaim it, for, though the petition in that case has not

been returned with the rest of the record, on account of its loss, that its object and purpose are made out both by external and internal proofs in what remains, as the law requires the loss of the whole or of a part of a judicial record to be supplied, and in that way it is shown to have been a petition for a sentence of nullity of her marriage with Desgrange on account of its original invalidity.

Having stated the positions taken by the parties in respect to the marriage between Clark and Zulime, between her and Desgrange, and her subsequent connection with Gardette without a divorce from Clark, when he had abandoned her, and the legal points raised and replied to by both parties, I will now proceed to state the kind of testimony upon which they respectively rely, the use which has been made of it, indicating at the same time what I believe to be the law upon each point of the complainant's case, and also upon all of those made by the defendants.

1st. As to the marriage between the father and mother of Mrs. Gaines: It is proved by one witness, Madame Despau, her aunt, who was present at the marriage when it took place in Philadelphia. By another witness, Madame Caillavet, also her aunt, who swears that Clark made proposals of marriage for Zulime to her family, after her withdrawal from Desgrange, which was caused by her having heard that he was the husband of another woman then alive. She also swears that Clark, after his marriage with Zulime, admitted it to her, and that so did Zulime. They also rely upon Clark's acknowledgment of his marriage to three other witnesses, Mrs. Harper, Bellechasse, and Boisfontaine, to each of whom he repeatedly
*544] said that Myra *was his legitimate child, also upon his treatment of her and declarations concerning her, from her birth to within two hours of his death, when he declared that Myra was his legitimate child. One of these witnesses, Mrs. Harper, is the lady who suckled Myra with her own child; not as a hireling for that office, but as the friend of Clark. To this witness he made at different times frequent declarations of the child's legitimacy, and of his marriage with her mother; and to another of the witnesses, Boisfontaine, Clark said that he would have avowed the marriage, but for her subsequent connection with Gardette. In proof also of the marriage and of the child's legitimacy, they rely upon the facts that Clark made large provisions of fortune for her in trust to others, to whom he declared her to be his legitimate child when the trusts were made, and that a short time before his death, he made a will in her favor as his universal legatee, in which she was declared to be his lawful

child, about which will he spoke with anxiety and penitential affection within an hour before his death, as having by that act repaired the wrong he had done her.

The witness, Madame Despau, says she was at the marriage of Zulime and Mr. Clark, in 1803 or 1802, that it took place in Philadelphia, and the ceremony was performed by a Catholic priest, in the presence of other witnesses as well as herself. She states that she was present when her sister gave birth to Mrs. Gaines, that Clark claimed and acknowledged her to be his child, that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Desgrange she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied, 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 of our family. It was considered essential, first, to obtain record proof that Desgrange had a living wife at the time he married my sister, to obtain which from the Catholic church in New York, where Mr. Desgrange'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. Desgrange's prior marriage. We proceeded to that city and found Mr. Gardette. He answered that he had been present at the prior marriage of Desgrange, and he afterwards knew Desgrange and his wife by that marriage. That this wife had sailed for France. Mr. Clark then said, "You have reason no longer to refuse being married to me. It will be necessary, however, to keep our marriage *secret till I have obtained judicial proof of the nullity of your marriage with Desgrange." "They [*545 were then married. Soon afterward our sister, Madame Caillavet, wrote to us from New Orleans, that Desgrange's wife whom he had married prior to marrying Zulime 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 part in the proceedings against Desgrange. Mr. Desgrange was condemned for bigamy in marrying Zulime, and was cast into prison, from which he secretly escaped by connivance, and was taken down the Mississippi river by Mr. Le Breton D'Orgenois, where he got to a vessel, 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 Span-

ish government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister, it would be necessary that there should he brought by her an action against the name of Desgrange. The anticipated change of government created delay, but at length, in 1806, Messrs. James Brown and Elizaer Fromentin, as the counsel of my sister, brought suit against the name of Desgrange in the city court, I think, of New Orleans. The grounds of said suit were, that said Desgrange had imposed himself in marriage upon her at a time when he had a living lawful wife. Judgment in said suit was rendered against Desgrange. 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 Caton, 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, mentioned to him the rumor; he answered that he heard it to be true that 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 was 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 Caton. In consequence of this in-
*546] formation, my sister Zulime came to the conclusion *of having no further communication or intercourse with Mr. Clark, and soon after married Mr. Gardette, of Philadelphia."

The testimony of this witness has been given in her own words, in her answers to questions put on both sides. The cross-interrogatories were filed by distinguished counsel, having before them at the time the direct interrogatories to be put to the witness. It often happens, in the investigation of causes, that the capacity of the advocate has an influence upon our conclusions in respect to testimony. It is right, also, in this remarkable suit, that those who have been professionally connected with it, for or against the complainant,

should be mentioned. In this instance it will show that the cause was conducted by lawyers of ability and experience, and that they made a searching scrutiny into the veracity of the witness, by all those ingenious and pressing inquiries which the rules of evidence permit to be asked, and which the case itself and the testimony of the witness suggested. The cross-interrogatories answered by Madame Despau were filed by L. C. Duncan, J. J. Mercier, Z. M. Shepard, John Slidell, Julien Seghers, P. A. Zost, H. Lockett, and Isaac T. Preston, Esquires.

It is worthy of notice, too, that the testimony of Madame Despau was taken three times, at long intervals. It is admitted that she does not contradict herself in anything she said in her first examination, and that she did not afterward testify to more or less than she did at first. It was urged, however, against her credit, that the subsequent examinations were so frequently in the language of the first, that she must have had copies of the latter and merely repeated them, from which it might be inferred that she had been tampered with. But it was not intimated by whom, as a better discretion, in the absence of all proof of it, restrained counsel from giving personality to the insinuation, either as to the counsel of the complainant or herself. I have carefully compared the depositions in connection with the interrogatories, and cross-interrogatories put to the witness, without having been able to find such an identity in her answers, as might not very well have occurred from the sameness of the interrogatories, in each instance to a witness who is asked for a narrative of the same facts. Besides, her testimony was not orally given in court. It was taken by commission each time, long enough before the trial in the court below, for the considerate examination of counsel, who could have obviated what is now complained of, by a motion to the court for an oral examination of the witness in court, which the judges would have granted if they had seen in the depositions any foundation for the charge; or from anything in them, the slightest indication that the witness had been corrupted, or that the commissioners, *in taking her testimony, had done so irregularly, by permitting her to use a copy of her first deposition. [*547
But the conclusive answer to the objection is, that the witness is sustained by other witnesses in all respects, except as to the fact of the marriage, of which she was a witness, and of which they were not, but which they swear was admitted to them by Mr. Clark. The next objection to the credit of the witness, and that most relied upon by the court for discrediting her testimony, and also that of her sister, Madame Cailla-

vet, is, that neither of them, in giving the account of the purpose for which Madame Despau and Zulime left New Orleans for New York, in 1801, tell that Zulime was then *enciente* by Clark, and went there to be confined. There is no doubt that Zulime gave birth, in Philadelphia, during that absence from New Orleans, to the child known in the record maidenly as Caroline Clark, and afterwards as Mrs. Barnes. But as to the time of the birth of that child, there is nothing in the record conflicting with any probability against the declaration of Madame Despau, that it took place in 1801, notwithstanding the uncertain statement made by Mr. Coxe, of her birth having been in 1802, which last date has been used to show that Caroline was the child of Mr. Clark, and could not have been the child of Desgrange, on account of the latter's absence in France.

Before, however, a witness (as Madame Despau), will be discredited by an omission to state a fact of the kind mentioned, it is necessary to took at the interrogatories put to her by counsel on both sides of a cause, to determine if they called for such an answer either directly or indirectly and that it had been purposely withheld. Or that the fact was in issue between the parties, and that a question to elicit it had been reluctantly answered by the witness. I have more than carefully examined the interrogatories, which both Madame Despau and Madame Caillavet were asked to answer, without finding in any one of them any thing relating to the point, that Zulime left New Orleans to be confined at the north. And if there had been such a question, it would have been suppressed by the court on account of its irrelevancy to the issues between the parties as they are made by the bill and answers of the defendants. The fact of Zulime's confinement in Philadelphia is not in any way alluded to in either the bill or the answers, and though disclosed in the testimony of Mr. Coxe in the way it is, it cannot be used to discredit the witness, or to bear upon the subsequent marriage between Clark and Zulime, which is the point at issue, or have any other effect, if it should have any at all, than to show that Clark, according to the religious faith in which he was born, and according to the new laws of
*548] Louisiana, encouraged *by the canon law, and frequently done under like circumstances, had determined to legitimate the child Caroline, *per subsequens matrimonium*, believing her to be his child. But there is nothing in the evidence of either of the aunts of the complainants, showing that either had wilfully suppressed Zulime's confinement, to the injury of the defendants or with an intention to conceal it; or that they knew Caroline was the child of Clark, and

not the child of Desgrange. Indeed if the then law of Louisiana is to be decisive of the paternity of a child born during the marriage of parties, Caroline would be considered the child of Desgrange, for as the time of her birth is not established, (notwithstanding what is said to the contrary), on account of the differences between witnesses in respect to it, and the absence of Desgrange in its beginning being equally uncertain according to the proofs in the case, no inference can be drawn of such a time of absence, as precludes the possibility of access between husband and wife. Besides, as there is no proof in this case, when Desgrange sailed for France upon his mission to settle the Carrière estate, the first heard from him there being as late as the—July, 1801; in his letter to Mr. Clark, even allowing Mr. Coxe's conjecture to be certain, that Caroline was born in the spring of 1802, and not in 1801, as the other witnesses say she was, she would by the law of Louisiana at that time, be adjudged to be the child of Desgrange, as that declares a child born in ten months in wedlock to be legitimate. L. 4, tit. 33, p. 4; and there could be no legal foundation to exclude her from that paternity, on account of the absence of Desgrange. In this point of view, the witnesses cannot be charged with the suppression of the fact of the confinement of Zulime in Philadelphia, and that was done to conceal from Desgrange that she had conceived and borne a child in his absence. They could neither have known the fact if it was so, nor had they any right to assert it contrary to the conclusion which is made by the law in such a case. They therefore are not liable to be discredited in that way, by connecting it with the ecclesiastical paper which the defendants offered as evidence in the case, of which I shall speak hereafter both as to its inadmissibility as testimony, and its worthlessness to establish the validity of marriage between Desgrange and Zulime. In an inquiry to deprive a child born in wedlock of its legitimacy, on account of the non-access of the husband, the law requires certainty as to the time of absence, and without it, a child's filiation and its inheritance cannot be taken from it, by any comparison of witnesses or inferences from evidence. In such a case there must be dates, not as to a day or a month, but that time enough has passed from the absence of the husband and birth of a child, to make it certain that he *could not have been the father of it. [*549
I will here in this connection give the testimony of Mr. Coxe, as that is principally relied upon to establish that Madame Despau had wilfully suppressed the fact of her sister's confinement in Philadelphia, and that upon that account she should be discredited. The 14th interrogatory, rec. 605, put

to Mr. Coxe, is: Did Daniel Clark ever speak to you or write to you about his relationship with Madame Desgrange, the reputed mother of the complainant Myra. If any, state what that conversation was, the circumstances connected with it and all about it. The answer will be found on the 615th page of the record. "Daniel Clark did both write and speak to me about his relationship or connection with Madame Desgrange, the reputed mother of the complainant Myra. In the early part of the year 1802, Madame Desgrange presented herself to me, with a letter from Daniel Clark, introducing her to me and informing me in confidence, that the bearer of that letter, Madame Desgrange, was pregnant with a child by him, and requesting me as his friend, to make suitable provision for her, and to place her under the care of a suitable physician; requesting me at the same time to furnish her with whatever money she might want and stand in need of, during her stay in Philadelphia. As the friend of Clark, I undertook to attend to his request and did attend to it. I employed the late William Shippen, M. D., to attend to her during her confinement, and procured for her a nurse. Soon after the birth of the child, it was taken to the residence of its nurse. That child was called Caroline Clark, and at the request of Mr. Clark, the child was left under my general charge and exclusive care until the year 1811. After that period she was not so exclusively under my charge, but I had a general charge of her, which continued up to the period of her marriage with Dr. Barnes, formerly of this city. She is now dead, as is also Dr. Shippen, before spoken of. Daniel Clark arrived in this city within a very short time after the birth of Caroline, which was, I believe, in April, 1802, when I received from him the expression of his wishes in reference to the child. He left here shortly afterwards, as before stated by me. During Daniel Clark's subsequent visits to Philadelphia, he always visited that child, acknowledged and caressed it as his own, and continued to give me the expression of his wishes in reference to her. On the occasion of Mr. Clark's visit to Philadelphia, immediately after the birth of Caroline, in conversation with me in reference to Madame Desgrange, he confirmed what he stated in his letter of introduction, stating to me that he was the father of this illegitimate child, Caroline, and that he wished me to take care of her, and to let the woman have what money she stood in need of until she returned to
*550] New Orleans." In Mr. *Coxe's answers to subsequent interrogatories, he substantially repeats parts of the foregoing without addition or any thing material besides. In his answers to the 20th, 21st, and 22d interrogatories, he

recites the marriage of Zulime *née* Carrière with Dr. Gardette, in August, 1808, she having arrived, from New Orleans, in Philadelphia, in the autumn of 1807. In his answer to the 27th interrogatory, he says: "I also think it proper to state, that in the year 1808, after Madame Desgrange had returned to Philadelphia from New Orleans, and when lodging in Walnut street, she sent for me, and during a private interview with her, at Mrs. Rowan's, where she lodged, she stated that she had heard Mr. Clark was going to be married to Miss Caton, of Baltimore, which she said was in violation of his promise to marry her, and added that she now considered herself at liberty to connect herself in marriage with another person, alluding doubtless to Dr. Gardette, who at the moment of the disclosure, entered the room, when after a few words of general conversation I withdrew, and her marriage to Mr. Gardette was announced in a few days after." Now, let it be remembered that the point under discussion is not whether Caroline is the child of Clark or Desgrange, but whether Madame Despau committed perjury in saying that she was one of the children of Desgrange, and that she purposely and corruptly concealed and withheld the fact of Zulime's confinement with Caroline in Philadelphia, from her apprehension of its influence upon the interest of the complainant whose witness she was. Nor is it at all a dispute or doubt of Mr. Coxe's veracity. It is merely a question, and a very important one too, of evidence, and the legal use which can be judicially made of it, altogether unconnected with the immorality of the persons disclosed in the record, with whom the complainant is unfortunately associated only as to the legitimacy of her birth, and of whom personally she knew nothing in her bringing up, nor any thing since, beside those voluntary communications to her after her marriage, concerning her birth and paternity, made to enable her to receive her just rights in her father's estate.

By what principle, then, is it, I ask, or by what cases for authority to do so, is it, that the unsworn declarations of Clark, now repeated by Mr. Coxe, have been used to discredit Madame Despau's sworn evidence concerning a transaction in which Coxe discloses Clark to have been the criminal transgressor, and Madame Despau at most, only as the attendant of a frail sister to aid her in her travail, and to shelter her and her family from disgrace. There are those whom the weak, the unfortunate, and the wicked have natural claims upon, not disallowed by the law, and the discharge of which, without a violation of law, it does not even reproach. This is putting the narrative of Mr. *Coxe in the strongest light against [*551
Madame Despau, upon a presumption only, however,

that she knew Caroline to be the child of Clark, and that she was not the child of Desgrange. I say knew,—apart from that intuitive perception, which is not evidence, which women have in other matters, and especially concerning such as we are speaking of, bringing them to a conclusion with the quickness of instinct, and which are only uncertainly reached by men, after a comparison of facts with the instincts of their own nature, without that of women to aid them. The distinguished Sherlock says, without any satirical intention or meaning to say that women are inferior to men, "Whilst she trusts her instinct she is scarcely ever deceived, and she is generally lost when she begins to reason." And I need not tell my brethren, as evidence rests upon our faith in human testimony, as sanctioned by experience, that the conclusion of the great divine, is that of the law, and that the testimony of women is weighed with caution and allowances for them differently from that of men, but never with the slightest suspicion that they are not as truthful. Here then we have from Mr. Coxe, Clark's confession of an offence, subjecting him to stripes and the galleys, used to discredit a sworn witness guiltless of any offence against the law in relation to other facts, subsequently occurring as related by her, and who as to the fact related by Mr. Coxe may have been as much the victim of Clark's contrivance, as Zulime had been of his seduction. I make no theory, except in the sense of a theory resting upon facts; but may it not be probable, enough to relieve this witness from the imputation of having wilfully concealed the fact of Zulime's confinement, and her knowledge that Caroline was the child of Clark, that Clark in the absence of Desgrange in France, arranged matters for her confinement in Philadelphia, with the purpose also of having inquiries made concerning the validity of her marriage with Desgrange, or only pretendingly so, without communicating to the witness that he was the father of her sister's child, conceived, and to be born in Desgrange's absence, with the view of protecting both herself and its mother from disgrace, and both of them from prosecutions for their offence upon the return of the deluded husband. Concealment of its birth by the child having been left in Philadelphia, was obviously the motive of Clark and Zulime. When that was determined upon after the birth of Caroline, her filiation might have been obvious enough to the witness, but as there is no proof that it had been previously communicated to her by Clark or Zulime, it does not conflict at all with her declaration that the object of her going to the north with her sister was to procure proofs of the previous

marriage of Desgrange. And if it be as it is said by those who *discredit her that Caroline was not born until June, 1802, there had been at the time of her departure [*552 from New Orleans no such development of Zulime's pregnancy as necessarily to disclose it to her or any one else. It is in proof in the record, that the witness and Zulime left New Orleans in 1801, that Clark followed them and was in Philadelphia before the expiration of that year and for three months of 1802, or until some time in April. It is not unreasonable then, when the credit of a witness depends upon the supposed concealment of a single fact, that under such circumstances her ignorance of it should be implied until nature pregnantly disclosed it. Further from Mr. Coxe's narrative it does not appear that Madame Despau was ever present at his interviews with her sister, or that he ever had an interview with her. And it does appear that when Zulime delivered to him the letter of which he speaks that Madame Despau was not present. It cannot, then, be assumed, as it has been, without further testimony to bring the knowledge of it home to her, that she knew anything about that letter, or that Mr. Clark had said he was the father of Caroline, or of any of those arrangements made by Mr. Coxe for Zulime's confinement. Her purpose, then, for accompanying her sister to the north, as it is told by herself, ought to have been relied upon, because it is unaffected by any statement made by Mr. Coxe, of Clark's declarations to him. Madame Despau says she was at the birth of Caroline, and that it took place in 1801. This is all that she does say, which can connect her in any way with her sister's confinement with that child. Mr. Coxe is the only witness who says that the child was born in 1802, shortly after Mr. Clark's departure from Philadelphia. This is said with the qualification, to the best of his belief. Such an immaterial difference between two aged persons concerning a fact which took place more than forty years before they were testifying, cannot be used to discredit either, especially when both are before the court, in legal position equally entitled to credit. I will speak of the equality hereafter. Upon the testimony of Mr. Coxe, I make here a remark to show how little reliance can be put in his memory as to the time when Zulime presented to him the letter of which he speaks, or the time of Caroline's birth, or as to Clark's visits to Philadelphia, except that immediately preceding his departure for Europe. In his first examination, he did not state, I suppose he did not remember what he did state in his second, subsequently disclosed by his correspondence with Clark, that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which

time Zulime was there, that it was in April that Clark returned to New Orleans and afterwards revisited Philadelphia in July, *553] 1802, Zulime being *still there, on his way to Europe. When he speaks, too, of the time of Caroline's birth, he does not do so with certainty, but only as he believes. There is then no cause for using any part of his testimony to discredit Madame Despau.

The next objection to Madame Despau's credit is made on account of her alleged want of character. It is said she was unchaste, and the defendants were allowed to put in proof a paper or record of a separation between herself and her husband upon his prosecution for a divorce upon which a judgment was given in his favor, which cut her off on account of his charges of her infidelity, from any interest in the property which he had, to a part of which she would otherwise have been entitled. I confess my inability to see, even supposing it to have been altogether regular, as an adjudication in a competent tribunal, which it is not, how this paper was received as evidence in this case, either against the witness or against the complainant. I have expressed myself too moderately with respect to the character of this paper, but in vindicating what I believe to be the rule of evidence, I am anxious not to offend any one, and to keep myself within the strictest limits of judicial forbearance. I will not say one word by way of inference concerning it, but will appeal to the paper itself for the correctness of what I shall say. It cannot be used as evidence in this suit because it is *res inter alios acta*. It does not in any way affect the truthfulness of Madame Despau, and cannot be used to affect her character, except so far as every wife may be degraded in the public estimation, when she is charged by her husband, truly or not, with infidelity to her marriage vow. This paper itself discloses in terms, and not inferentially, every fact which I am about to state. It seems that Madame Despau and her husband lived unhappily and had agreed to a divorce. Whilst the proceedings for it were pending, for the distribution of property, but after a decree had been made, her husband advertised the property for sale. She, by an application to the court, enjoined the sale, claiming that community in it to which she was entitled by the laws of Louisiana. The husband's answer asks the court to permit the property to be sold and that he may be allowed to give bond to deposit the proceeds with a responsible person. The court allowed him to do so. In a year after this, the husband filed a petition in which Madame Despau is charged with having left Louisiana for "some place in North America," without the consent of

her husband, and that she is living in adultery. Supplemental affidavits were filed, declaring that Madame Despau had left the territory, and an affidavit in which it is said "her conduct had not been regular, and that her husband had reason to complain of her." In what respect is not stated. *Upon these *ex parte* affidavits, made without the service of any process upon Madame Despau, or any appearance by her or for her by any person, to the last petition of her husband, the court decreed that she had forfeited her community in the property, divorcing them *a mensâ et thoro*. The grounds of the decree were not stated. It certainly could not have been for proved adultery, there being no such evidence either general or particular against her. It does not become me to utter a word of reproach against the judge by whom that decree was given, but I may say the decree itself and the use of it in this case, show, whatever care may be taken to prevent irregularities in the trials of causes, that they sometimes occur to the great injury of parties, and to a want of confidence in the uniform correctness of judicial action. [*554

But besides this paper, the defendants called witnesses to impeach the character of Madame Despau. I regret too, that there was in this particular a disregard of all those rules in respect to the impeachment of the credit or character of a witness. I do not remember a more marked departure from them. Before being more particular in this matter, I will state my judicial convictions of the manner of impeaching the character of a witness for veracity or for want of moral character, annexing judicial decisions, that it may be seen how far my views are sustained by authorities, and how much they were violated in this instance.

I understand that the credit of a witness may be impeached, 1st. By the results of a cross-examination. 2d, By witnesses called to disprove such of the facts stated by the witness whether in his direct or cross examination, as are material to the issue. 3d, By evidence reflecting upon the character of the witness for veracity. Under this the evidence must be confined to general reputation, and particular facts will not be permitted, for the law presumes every one to be capable of supporting the one, and that it is not likely that a witness, without notice, will be prepared to answer the other. Bull., N. P., 296, 297; *Rex* v. *Lookwood*, 13 How. St. Tr., 210, Sir Thomas Trevor, Att. Gen. argu.; *Rex* v. *Layer*, 16 How. St. Tr., 285, per Pratt, C. J.; *Rex* v. *Lookwood*, 13 How. St. Tr., 211, per Lord Holt, who says the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule. The regular mode of examining into the character

of the person in question, is to ask the witness whether he knows his general reputation among his neighbors—what that reputation is, and whether from such knowledge he would believe him upon his oath. *Rex* v. *Watson*, 32 How. St. Tr., 495, 496; *Rex* v. *Delamotte*, 21 How. St. Tr., 811, per Buller, J.; *Mawson* v. *Hartsink*, 4 Esp., 103, 104, *per Lord Ellenborough; *The People* v. *Mather*, 4 Wend. (N. Y.), 257, 258; *The State* v. *Boswell*, 2 Dall., 209, 211. Anon. 1 Hill (S. C.), 258. These cases are cited from Taylor on Evidence, &c., &c. I do not think that the inquiry into the general character of a witness is restricted to his reputation for veracity, but that it may be made in general terms, involving entire moral character. On the other hand, notwithstanding the bad character of the witness in other respects, the witness deposing to that may be asked if the former has not preserved his reputation for truth. *Rex* v. *Lookwood*, 13 How. St. Tr., 211; *Carpenter* v. *Wall*, 11 Ad. & E., 803; *Lord Stafford's case*, 7 How. St. Tr., 1459, 1478; *Sharp* v. *Scoging*, Holt, N. P. 2, 541, Gibbs, C. J.; 1 Hill (S. C.), 251, 258, 259; *State* v. *Boswell*, 3 Dev. (N. C.) L., 209, 210; *Hume* v. *Scott*, 3 A. K. Marsh. (Ky.), 261, 262. But when it is attempted to impeach a witness on account of a want of moral character, it cannot be done by the impeaching witness "merely stating what he has heard others say, for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells or with whom he is chiefly conversant, for it is this only which constitutes his general character." The impeaching witness, too, should be from the neighborhood of the individual whose character is in question. *Boynton* v. *Kellogg*, 3 Mass., 192, Parsons, C. J.; *Wike* v. *Lightner*, 11 Serg. & R. (Pa.), 198, 200; *Kimmel* v. *Kimmel*, 3 Id., 337, 338; *Douglas* v. *Toucey*, 2 Wend. (N. Y.), 352; *Mawson* v. *Hartsink*, 4 Esp., 103, Lord Ellenborough.

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It is scarcely necessary for me to say that when the general reputation of a witness has been impeached, that his credit may be established by cross-examining the witnesses who have spoken against him, as to their means of knowledge and the grounds of their opinion, or as to their own character and conduct, or by calling other witnesses to support the character of the first witness, or to attack in their turn the general reputation of the impeaching witnesses. 4 Esp., 103, 104; 2 Phil. Ev., 433. But no further witnesses can be called to attack the character of the last. In other words, a discrediting witness may himself be discredited by other witnesses, but there the recrimination must end. *Lord Stafford's trial*,

7 How. St. Tr., 1484. In this instance the character of Madame Despau was most signally supported. I only now mention that another mode of impeaching a witness is by proof that other statements were made out of court contrary to what has been testified in court. No such attempt was made in respect to Madame Despau's statements. It will be seen directly that my particular statement of the rules for discrediting a witness is appropriate to the case. I now proceed to state what was said by those who were called to impeach *the character of Madame Despau. Carraby says nothing good was said of her; another witness, [*556 that her reputation was on the same footing as that of Madame Desgrange. Two others, the daughters of Gardette, place her on a footing with her sister Zulime; Courcelle says the same, and all say reports were unfavorable to Zulime. I have given the testimony of all of them who were introduced to impeach the character of Madame Despau. There was no attempt to impeach her credit except by assailing her for a want of character forty years before. Thirty-two witnesses were called to support it. They knew her all of that time, several of them in her three different residences—to the hour when they deposed. All of them swear to her exemplary life and conduct in every place she had resided, and no one of them had found any thing with which to reproach her character or veracity. There is, perhaps, not another instance in our law cases, of a witness whose character has been so triumphantly lifted above every imputation of offence, and especially above the slanders of her husband, too readily received by the public, when he contrived, in her absence, judicially to rob her of her portion of his estate, and that, too, more than a year after they had been divorced *a mensâ et thoro*, which released her in every other particular as well as to residence, from all marital control. There has then been a signal failure in the attempt to discredit this witness on account of a want of character or veracity. The marked difference between the witnesses upon that point, is that the few who impeach do not swear positively as to what was generally said of her by those where she dwelt, and those who were called to sustain her general reputation do so, every one of them, without any qualification. Nay, more, they swear that in forty years' knowledge of her, that they had not heard her reproached by any, and that her life had been exemplary, particularly in the care she had taken of those children whom her husband had falsely said she had abandoned. Under such circumstances the defendants were precluded from insinuating, much less

from insisting upon her want of character, and the weight of testimony excludes a different judicial conclusion.

In the different examinations of this witness, there were long intervals between them, without any variation in any particular but one. That is, that in her last examination she stated that there were circumstances which made her think the marriage between Clark and Zulime had taken place in 1802; and that she had previously said it took place in 1803. Such a difference might have been decisive against her veracity, had it been connected with anything else in her testimony which made it probable that it was an alteration with an untruthful intention. *It was not pretended that *557] such was the case, but for the purpose of raising a suspicion against her, it was intimated that she had learned from an interested source that the defendants could or had proved that Clark had not been in Philadelphia in 1803. Before such an insinuation can be regarded by the court as entitled to its notice, it must be shown that it has some foundation. It has been already said that her evidence did not furnish it. It is disclaimed that the complainant's counsel furnished the information, and was only so feebly suggested that it might have been done by the complainant, that both the ethics of professional practice and the law discountenance such an attempt to prejudice a court or jury against a party in a cause upon its trial. But the difference in the depositions of the witness may be satisfactorily accounted for. She is speaking of the time of an occurrence which took place more than forty years before, in connection with its locality, the presence of the parties there, their return to New Orleans after it, the cause of their return in connection with transactions, the larger portion of which she relates correctly, which the defendants have proved happened in 1802. In respect to Clark's being in Philadelphia, and of his having followed the departure of herself and Zulime from New Orleans in 1801, she is confirmed by the proofs furnished by the defendants, which show that he was in Philadelphia when they were there for several months beginning in 1801 and extending to April, 1802, and also again in July, 1802, until he sailed for Europe in August of that year. In all of this the testimony of Mr. Coxe concurs and that witness also speaks uncertainly as to time in several particulars, relating to Clark and Zulime, with the reserve and caution of old age concerning events happening in the middle time of life when it is engrossed in the cares and perplexities of business.

Hitherto my object has been to show that Madame Despau cannot be discredited by anything contradictory in her evi-

dence, or by anything offered exterior from it, or by any contradiction of her by any other witness. It is admitted by all of my brethren that there is no contradiction of herself in all of her examinations. No witness disproves any fact stated by her, her character for veracity rose above the attempt to assail her general reputation. It is not shown that she ever made statements out of court contrary to her testimony at the trial, and it is shown that the scandals against her, as they are reported by the witnesses of the defendant, are made more than improbable, by an exemplary life sustained there, and carried by her through forty years into a respected old age. I think that her testimony, corroborated as it is, in its most material particular, by four other witnesses, who are not impeached at all by circumstances in the *case, or by any attempt to discredit them, and two of whom the defendant's wit- [*558 nesses declare were men of standing and high character, prove the marriage between the complainant's mother and father as fully as such a transaction can be ascertained by proofs, and in the way which has always hitherto been adjudicated by courts, to be sufficient to establish marriage in cases of this kind. The corroborating evidence are the statements of Madame Caillavet, that Clark made proposals of marriage for Zulime to her family, after her voluntary withdrawal from Desgrange, upon her hearing that he had then a previous wife alive. That Clark acknowledged to her the marriage afterwards, and that Zulime did the same. The oath of Mrs. Harper, who nursed the complainant as the friend of her father, that Clark repeatedly acknowledged to her that Myra was his lawful child. The will which he made in her favor a short time before his death, which Mrs. Harper saw and read, in which he made Myra his universal legatee, terming her in it his lawful child. The proof by several witnesses that such a will was made by him, which no one can doubt whose mind is open to the proper bearing of testimony in ascertaining truth. His solicitude about that will and the object of it, when conscious that he was within the grasp of death without a hope of a reprieve, in that last moment of life here, when that which presses most upon the parting spirit, is revealed in its naked truth; Clark then said, that Myra was his legitimate child, that he had made her the successor of his whole estate. With dying words pointed out where the will would be found, and directed with all the earnestness of his condition, that it might be delivered as soon as he died, to him who had promised to be her tutor and guardian, to whose hands she was confided to be brought up in the rank and condition of her legitimate paternity, as the dearest and last object of

her father's affection. Mrs. Smyth says that Clark always spoke of Myra to her as his legitimate daughter, before he made the will of 1813, then so describing her in the will, and afterwards in their conversation about her. This witness, in her answer to the tenth cross-interrogatory, gives the cause of the final separation between Clark and Zulime. It is, that when Mr. Clark was absent in Washington, individuals had, or supposed they had, a great interest in dissolving his connection with the mother of his child, commenced a plan of breaking it up, by writing to Mr. Clark imputations against her, and by filling her mind with unfavorable impressions against him, till at length his mind was so poisoned, that when he arrived in New Orleans she and he had a severe quarrel, and separated. She immediately after this left New Orleans. Madame Caillavet swears that she was not present at the
*559] marriage of Clark and Zulime, *but says, "I do know that Clark made proposals of marriage for my sister, and subsequently Zulime wrote to me that she and Clark were married. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. Desgrange 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 Desgrange's previous marriage could be obtained, and Zulime and Madame Despau sailed for the north of the United States, to obtain the record proof. Mr. Clark acknowledged her to me as his lawful child." Pierre Baron Boisfontaine, after reciting with much minuteness, circumstances connected with the will of 1813, says, Clark spoke to him of Myra as his legitimate child, and in speaking to him of her mother, he says, "he spoke of her 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 this barrier had been made, but that she was blameless." Col. Bellechasse also says, that Clark repeatedly acknowledged to him that Myra was his legitimate child, and styled her in his will of 1813, his legitimate daughter. This witness also gives a very full account of the will of 1813. I have cited only so much of the testimony of these witnesses, as is confirmatory of the testimony of Madame Despau, in respect to the marriage of Clark with her sister, and of Clark's acknowledgment to others of his marriage with Zulime, and of their child's legitimacy.

And now it may well be asked, upon what rule of evidence it is that the testimony of Mr. Coxe, standing as he does in this case in the same legal relation as a witness with Madame

Despau, can be used to discredit both her and her sister Madame Caillavet. There is no contradiction by him of any fact stated by them or either of them. No conflict between them in any one point, unless it be the differences between himself and Madame Despau, as to the time of the birth of Caroline, and the time of Mr. Clark's being in Philadelphia in the last of 1801, until April, 1802, in which Madame Despau is confirmed by Mr. Clark's correspondence with Mr. Coxe, furnished by the latter for the defence in this case. Indeed, the witnesses, though speaking of the same persons, are testifying to different transactions in their history—Mr. Coxe to a connection between Mr. Clark and Zulime, founded upon Mr. Clark's declarations of it to him, and Zulime's acknowledgment by her delivery to him of Mr. Clark's letter, his assistance to her in consequence of it, his preparations for her delivery and the birth of Caroline, and Clark's subsequent recognition of that child as his; and Madame Despau, of a fact of marriage happening afterwards, Madame *Despau being present at it; and Madame Caillavet stating [*560 that before it took place Mr. Clark had made proposals of marriage to all of her family for Zulime, after her separation from Desgrange. Certainly Mr. Coxe's opinions concerning the marriage, and his recital of Mr. Clark's courtships of another lady, years after it, when his relation to society had become changed, and there had been added to the notoriety of his commercial enterprise something of political consequence, ought not to be permitted to preponderate against witnesses who swear to the fact of marriage, Clark's subsequent acknowledgment of it when time and trouble had obscured his fancied greatness, and his repeated declarations to disinterested witnesses that Myra was his lawful child. But we shall see how this testimony of Mr. Coxe has been associated with a paper in this case, to give to it a bearing upon the evidence of Madame Despau and Madame Caillavet, without which they would not have been assailed, and with which it is according to the rules of evidence worthless.

Having concluded in my own mind that the evidence establishes the marriage between the father and mother of Mrs. Gaines and that she is the child of their union, I proceed to the next most interesting point in the cause.

It is that neither their marriage nor her birth will be available to establish the claim of Mrs. Gaines, because at the time when Clark married her mother she had then another husband alive. That marriage being admitted, and that Desgrange was alive when the marriage with Clark was solemnized, the objection will be sufficient, unless it can be removed. Upon

the part of Mrs. Gaines, it is said, and I think is proved as the law requires it to be done, that her mother's marriage with Desgrange is as void on account of his having been a married man when he married her, as if there never had been such a relation between them.

The attitude of the parties in the cause is then this, that each charges a bigamy in support of their respective rights—with this difference, that the defendants do so for the twofold purpose of establishing the fact upon the mother of Mrs. Gaines, and from the nature of the testimony upon which they rely, to show that it also disproves the marriage between her and Clark. I will examine both, and fearing that I may omit something, I will state the proofs upon which each party relies, after having stated the kind of proof which the law permits to be given in a civil suit, where bigamy is the point to be determined.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage; there must be proof of actual marriage before the accused can be convicted. But in a civil suit the confession of the bigamist will be sufficient *561] when *made under circumstances from which no objection to it as a confession can be implied. The proofs relied upon by Mrs. Gaines to establish the bigamy of Desgrange when he married her mother, are his confessions of it to witnesses contemporary with the fact of their separation, more than a year before he was prosecuted for bigamy, when it does not appear by any proof in the cause that he was menaced with a prosecution. To such confession is added his flight from New Orleans during the pendency of an inquiry against him for bigamy and an adjudication afterwards upon his return to New Orleans, by a competent tribunal, in an inquiry into the validity of that marriage, at the suit of Zulime in her maiden name, in which judgment was given in her favor, and against him. In respect to the marriage of her father and mother, the complainant relies upon the proof of it by Madame Despau, who was present when it took place, upon the declaration of Madame Caillavet as to Clark's previous proposals of marriage to her family for her, their and her acceptance of them conditionally upon proof being obtained of Desgrange's previous marriage; Clark's admission of that marriage to several witnesses, as I have already shown, her father's conduct towards her from her birth to his death, his frequent acknowledgment of her legitimacy, the provisions of fortune which he made for her at different times, and the will which he made in her behalf, declaring her to be his legitimate child, and making her as

such his universal legatee. On the other hand, the defendants rely upon the validity of Desgrange's marriage to Zulime, upon the secrecy of her intercourse with Clark, or of their alleged marriage; upon their not having lived in open cohabitation as man and wife; upon Clark's subsequent courtship of other females with offers of marriage; upon Zulime's marriage with Gardette in 1808, without any attempt to prove her marriage with Clark, or any application by her to dissolve it by legal means or to enforce it with the proofs which she had of it, when she discovered his infidelity to her. They also rely upon certain papers to be found in the record.

The first of them is what they term an ecclesiastical record of a prosecution of Desgrange for bigamy, and a declaration in it imputed to the complainant's mother. The second paper is her suit against Desgrange for alimony as late as the year 1805. The third is a suit brought by her guardian, Mr. Davis, in her infancy, against the executors of her father for aliment, and the fourth is a record of a court, properly authenticated, of a suit brought by Zulime in her maiden name against the name of Desgrange. This last was introduced by the defendants to show, as late as 1806, that the marriage with Desgrange had not been legally dissolved. And until it was, it is urged that there was *such an impediment in the way [*562
of her marriage with Clark as to make that marriage null and void, the offspring of it illegitimate, especially so for the purposes of inheritance, even admitting that her filiation as the child of Clark had been established.

It has been said that the invalidity of a marriage in a civil suit, on account of those causes which make it void *ab initio*, particularly in the case of one void on account of the bigamy of one of the parties, may be proved by the admission of the fact by that party. It so happens in this case that Desgrange's admission of his bigamy, excluding his admission of it to Zulime's family for the present, is proved by a witness whose testimony has not been assailed and cannot be. Madame Benguerel has no connection with the family of the complainant, and her standing and character are such that the defendants could not impeach her credit on account of the want of either. She was subjected, too, to their cross-interrogation, and it brought out neither difference or contradiction of herself, nor any thing in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant or of any want of memory or uncertainty of her narrative. Madame Benguerel says, "My husband and myself were very intimate with Desgrange, and when we reproached him for his baseness in imposing upon Zulime, he endeavored

to excuse himself by saying that at the time he married her, he had abandoned his lawful wife and never intended to see her again." In her answer to a cross-interrogatory put upon this point, she answers, I am not related to the defendants nor with either of them, nor with the mother of Myra, nor am I at all interested in this suit. It was in New Orleans where I obtained my information. It will be seen by my answers how I know the facts—I was well acquainted with Desgrange, and I knew the lawful wife of Desgrange whom he had married before imposing himself in marriage upon Zulime. Now let this evidence be taken in connection with the arrival of Barbara D'Orci in New Orleans from France, contemporary with the return of Desgrange and at his instance, and the antecedent connection between them as that is represented by both, and that there is in the record a certificate of a marriage between one Jacobus Desgrange and one Barbara *née* D'Orci, in every other particular corresponding with the relation which these persons had been in, to each other in the year 1790, excepting in this that Desgrange was afterwards known as Jerome and not as Jacobus, and it will be admitted that the facts just recited, with Madame Benguerel's evidence, are sufficient to establish the bigamy of Desgrange when he married the complainant's mother. Against this confession, what is urged? Nothing but the misapplication of the case of *Harman* v. *McClelland*, 16 *La.*, 26, *in which it was rightly ruled
*563] that in an application for a divorce, it would not be granted upon the confession of a husband and wife of adultery. The proof in the case also shows that Desgrange disappeared from New Orleans in 1802, on account of the current charge that he was a bigamist and whilst a prosecution of him was pending for that offence. There is also proof that he did not return to New Orleans until 1805, when Louisiana having become a portion of the United States, he could do so without liability to a renewal of an ecclesiastical criminal prosecution for bigamy or to the punishment inflicted by the provincial law for that offence.

But sufficient as such proof is to establish bigamy in a civil suit, the complainant adds it to record evidence of the fact of Desgrange having been a married man when he imposed himself upon her mother in marriage. The record and judgment of a court, of competent jurisdiction, was introduced by the defendants as a part of their proofs to show that there was a legal impediment in the way of Clark's marriage with Zulime when it occurred, and that continued up to 1806, when they alleged that they were divorced. It was used for that purpose and much relied upon, and it was not until it was shown that

the judgment in that case had relation back to the marriage making it absolutely void *ab initio*, that it was urged that the record was of no account because a part of it was wanting. Here it is necessary to be particular. I cite from their answers their averments concerning that record. Upon page 58 of the record the defendants introduce it in the following terms, "That afterwards, on or about the 24th of June, 1806, Zulime *née* Carrière, wife of the said Desgrange, did present another petition to the competent judicial tribunal of the city of New Orleans, therein representing herself as the wife and of having intermarried with Jerome Desgrange, and praying for a divorce and a dissolution of the bond of matrimony existing between her and the said Jerome Desgrange, and which was subsequently decreed, subsequent to the birth of the complainant, Myra; and for further answer, say that in the city of Philadelphia, on or about the 2d day of August, 1808, Mrs. Desgrange having obtained a divorce from her husband, Jerome Desgrange, and having resumed her maiden name, did enter into a contract of matrimony with and did intermarry with James Gardette." The preceding extract shows that the defendants not only use it to establish the fact of a divorce, but for the purpose of sustaining the rightfulness of Zulime's marriage with Gardette. Now if the record, imperfect though it may be, shows that the divorce could only have been decreed on account of the legal invalidity of the marriage with Desgrange, at the time of its occurrence, then unless it can be shown that the law interposed an impediment *to marriage in the way of the party imposed upon, until [*564
a sentence of nullity had been obtained, Zulime's marriage with Clark was a good and valid marriage, though for marrying without such a sentence, she may have subjected herself to the discipline of the church. It will be seen, before this opinion is closed, what the law is upon that point.

The deficiency in the record of divorce is the want of the petition. In every other particular it is perfect. So much so that it discloses the object of the petition, or the cause for which the suit was brought, and for which the judgment of the court was given.

It was introduced by the defendants, who allege that it was a decree of divorce, annulling the bonds of matrimony between Desgrange and Zulime, by a competent tribunal in New Orleans; record 58, 59, 216; and was so pleaded in their answers. When so introduced by them and admitted by the court as admissible evidence, the complainants proved the loss of the petition, and the short manner of entering judgments in the court of which it was a record. 1206. I must here

remark, though so brought forward by the defendants, that the majority of this court has rejected it from having any such effect.

At this point, then, my inquiries begin in opposition to the court's conclusion, as it has been announced by my learned brother. The points are, can we learn what is the effect of judgment without the petition? Can we ascertain the cause for which the judgment was rendered without the petition?

What is the effect of the judgment? It is one of a court of record having jurisdiction of the subject and over the parties to the suit. It annuls the bonds of matrimony—as the act of a competent tribunal the judgment must be presumed to have been rightfully rendered, until the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of a cause, from initiation of a suit to the final adjudication, affirming that the plaintiff either has or has not a right of action; 10 Pet., 472. The decree then had a legitimate cause until the contrary shall be shown. Now as the defendants plead this record to be true, averring it to be so upon their oaths, it cannot be further inquired into by the court, with a view to take from either party in the suit what it discloses. Its rejection by the court places its judgment in the remarkable and unexampled condition of denying to the complainant the benefit of the defendant's answer, as to a fact which they plead to be true. Further, it decides against the complainant, not upon the deficiency of her proofs, but by a denial of a fact, sworn to by the defendants to defeat the complainant's suit.

What but divorce, as contradistinguished from separation *565] *a *mensâ et thoro*, could have been the cause of the suit? The witnesses, one and all of them say, that the bigamy of Desgrange, or his having been charged with it, induced Zulime to separate herself from him, and to return to her family.

But the cause assigned in the petition for the divorce may be satisfactorily made out, from the law of Louisiana as it then was, and from the rest of the record. Between 1803 and 1807, the United States Territorial Government of New Orleans passed no law upon the subject of marriage and divorce. This judgment then in Zulime's suit could not have been founded upon any statutory enactment after the transfer of Louisiana to the United States. In the discussion of this point, in order that I may be better understood, that must be kept in mind. Then I say, that the laws of Spain as they were in the provincial condition of Louisiana, concerning marriage and divorce, and in every other respect, by the laws of nations,

and by the act of Congress of 1804, organizing a government for New Orleans, remained in force there until legislatively repealed. Now, we learn from those laws, that they provided for sentences of the nullity of marriages and for divorces. From the same law, we learn that marriage could not take place, if there existed any canonical or civil impediment. 1 White, Recop., 44; Johnson's Civil Laws of Spain, 50. There are fourteen canonical impediments for which divorces were granted *a vinculo matrimonii*. In 1 M. & C. S. Partidas, 460, it is said there are fifteen, but upon the examination of the recital of them, it will be found there are substantially only fourteen, the last mentioned being only a prohibition subjecting the party to the discipline of the church, not extending to the dissolution of the marriage.

Canonical doctors express the fourteen impediments as I shall state them, which for all the purposes of this case, and for understanding them, will be found explained, though not in their order, in the Partidas.

> Error, conditio, votum, cognatio, crimen,
> Cultus, disparitas, vis, ordo, ligamen, honestas
> Si sis affinis, si forte coire nequibus
> Si parochi et duplicis desit, presentia testis
> Raptare sit mulier, nec parti reddita tutæ.

The civil impediments are those which proceed from want of understanding, &c., &c., and from previous marriage, the wife or husband of the party contracting a second marriage being alive. For such causes as have just been stated, divorces could be granted *a vinculo matrimonii*. Such was the law of marriage and divorce of the Catholic church, so it is still, and it was the law of Louisiana before its transfer to the United States, and afterward until it was legislatively repealed, and by it the judgment *was given which divorced Zulime from Desgrange. For its continuance after the transfer [*566 of the territory to the United States, see 2 Story's Laws, 907, and the act of the 3d March, 1805, 2 Story, 972, expressly providing for "the continuance of the former laws of Louisiana, until repealed or modified by the territorial legislature."

With then the law in view, we are prepared to ask for what cause was the divorce sought by Zulime in her petition? We see, from the statement which has been made of the law, that it could not have been for a supervenient cause, and that it must have been for one antecedent to the marriage, which made it absolutely void from its beginning, notwithstanding all the forms of marriage had been observed. And what this cause alleged in the petition must have been, cannot be more conclusively shown than it is by the evidence in this case,

and by the record of divorce, excluding all other enumerated causes of divorce *a vinculo*, excepting that of the bigamy of Desgrange. I shall state the evidence hereafter, keeping myself now to the point of the jurisdiction of the court in rendering a judgment of divorce. It having been shown that the provincial law of Louisiana was in force when the judgment upon Zulime's petition was given, it follows, as the County Court of New Orleans was constituted with a civil jurisdiction, comprehending also what had been before exclusively ecclesiastical, that the court could only grant divorces *a vinculo*, for the same causes for which they could have been given by the ecclesiastical courts. Fortunately, the position just stated is that of the highest tribunals of this country, and in those of Louisiana expressly, when they have been called upon to decide what portion of the jurisdiction of the consistory courts for enforcing the canon law, appertained to our tribunals organized with civil jurisdiction. It follows then that the judgment of the County Court upon Zulime's petition, defectively as that judgment is expressed, could only have been given upon a petition for a sentence of the nullity of the marriage between the petitioner and Desgrange. Thus with the guide of a settled principle in respect to the law of a country transferred from one dominion to another, until that law has been repealed, the purpose and object of the lost petition in Zulime's application for a sentence of the nullity of her marriage with Desgrange, is made out with as much certainty as if the petition had not been lost.

I think these results have been shown in respect to the judgment of the County Court upon Zulime's petition for a sentence of the nullity of her marriage with Desgrange.

1. That the territorial government had not, when the County Court gave the judgment, any statutes concerning
*567] marriage and *divorce. 2. That the laws of Spain upon those subjects were then in force. 3. That by such law a marriage between persons, either or both of whom had a lawful wife or husband alive, was void *ab initio*. 4. That the County Court of New Orleans had a general civil jurisdiction, including the power to divorce, but that it could not divorce for a supervenient cause, and could only divorce *a vinculo*, for an impediment existing before the marriage, which made it dissoluble. 5. That having given such a judgment upon Zulime's petition against Desgrange, it relates back to its origin, and is *res adjudicata* controlling all other testimony in this cause, which has been given with a view of showing that Desgrange, when he married Zulime, did not commit bigamy.

I consider, then, that the complainant has established by such proof as the law requires, that Desgrange committed the offence of bigamy when he married her mother; that she could legally disregard the connection and marry another person; that she did marry Clark, that the complainant is the only offspring of their union, and is entitled to her legitime in her father's estate.

I will here take another view of the record to show that there is in it, complete and satisfactory secondary evidence of of the object and purpose of the lost petition. The plea put in by the counsel of Desgrange affords a clew, not of itself entirely sufficient, but which, united with the other proceedings, make up what the law terms good secondary evidence the contents of the petition. It is admitted or cannot be denied, that secondary evidence may be given to supply the loss. The plea denies the jurisdiction of the court over divorce cases, and then urges that the court could not consider the question of damages, until the validity of the marriage between the defendant and Zulime had been ascertained and declared,—validity of the marriage, it must be remembered. Can anything show more plainly that its invalidity was the cause assigned in the petition? Again, the evidence in the record of the County Court shows that Desgrange's bigamy in marrying the complainant's mother was the subject of her petition and of the court's inquiry. I take from the record of the County Court a part of what, upon the trial of the case, the defendant introduces as his testimony, which the defendants in this suit have made theirs by the introduction of it. The witnesses speak of imputed bigamy to Desgrange, his flight on account of it, and his confession. In the County Court, not one of them answers to anything else than to the inquiry, whether or not Desgrange had been married, and whether or not that wife was not alive when he married Zulime. One of the witnesses, and the most conclusive that could be in such a case, *tells the cause of the suits [*568
and no one disputed it. Besides, the suit is in the maiden name of the plaintiff against the name of Desgrange, and the cause is so entitled. Certainly nothing more in the nature of secondary evidence can be wanting to establish the cause for which the divorce from Desgrange was sought. Yet there is more; for two witnesses swear that her suit was brought to get a sentence of the nullity of her marriage with Desgrange on account of his bigamy. I cannot but regard it as singular and unexampled, too, that any objection should have been made to the character and force of this paper on account of the deficiency of the petition after its introduction

by the defendants to maintain an averment in their answers to the complainant's bill. It was introduced and used by the defendants to show that there had been a divorce between Zulime and Desgrange. The complainant could not object to its introduction as proof of an averment in the answer to her bill. It was good for what it was worth or for what it might disclose for or against either party in this suit. The complainant relied upon it, as her counsel may very well do, to establish the original invalidity of the marriage with Desgrange. The defendants relied upon it to show the lawfulness of Zulime's marriage with Gardette, and the improbability from that fact that Clark had ever married her. We have then, the defendant's admission that the judgment of the County Court was rendered for a cause which made the marriage with Desgrange void *ab initio*. To put, then, this record aside as nothing in the case, is a denial to the complainant of the benefit resulting from the action of the defendants, which in my view is a surprise entitling her to a rehearing of the cause by this court. It matters not whether the surprise has been caused by the action of the court and not by that of a party to the suit. The same right follows. In cases at common law a new trial would be granted, and in cases in chancery a rehearing will be given. If such secondary evidence shall not be deemed sufficient to make up for a lost paper, one, too, in this case, which the complainant had every motive to produce, which she sought for in the office where it was, without success, but which the defendants subsequently obtained and made evidence as they thought exclusively for themselves. Without regard to the want of the petition then, I cannot suppose that anything less than a literal copy would satisfy those who have taken a different view of it from myself.

My views having been given upon the credit of Madame Despau and upon the testimony relating to the bigamy of Desgrange, I turn to that upon which the defendants rely to disprove it. Their first paper is termed the ecclesiastical proceedings in a prosecution against Desgrange, in 1802, for bigamy. *It will be found at length in the opinion read by Mr. Justice Catron for the majority of the judges who sat in the trial of the cause.

*569]

It is not used to show that he was not a bigamist, for the paper contains only an interlocutory order, suspensive of further action, until the inquiry shall be resumed. But it is used, because it is said there is in this paper a declaration by Zulime of her disbelief of the charge against Desgrange, and that she was then his wife.

It is the misfortune of the complainant, that her case has

been considered by the court with the rejection of the judicial proof of the bigamy of Desgrange, which is admitted to be admissible in evidence, and with the allowance against her of another paper, to which her counsel objected in the court below and here also, which in the way it was offered is not admissible. Two questions arise upon this paper: Is it an official register or record of a court, authenticated as it should be to make it testimony? What is its effect as testimony?

It has no other authentication of its genuineness than the declarations of Bishop Blanc and Father Kemper. The latter says, he is the keeper of the records of the Catholic church at New Orleans, and that the copy in the record is an exact copy of a paper found there, Rec. 577. The bishop says, he has the charge of such records of the bishopric as exists, and he finds among them a paper which is truly copied, Rec. 694.

Under these certificates this paper has been used by the court to rebut the parol proofs of the bigamy of Desgrange. The intention cannot be objected to, but rebutting testimony must have legal admissibility before it can be received in evidence. In this instance it is altogether wanting.

Public writings consist of the acts of public functionaries in the executive, legislative, and judicial departments of government, including under such general head the transactions which official persons are required to enter into books or registers, or to file, where books are not kept, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To this class may be referred the acts of foreign states and the judgments of foreign courts.

Now this ecclesiastical record, as it is called, is either a transaction which official persons are required to keep, or it is the judgment of a foreign court. Whether one or the other, the certificates of the bishop and Father Kemper are not sufficient to make it testimony.

If it shall be said to be the first, before it can be received as an official register, it must be shown by the party offering it, to be one which the law required to be kept for the public benefit.

*Such writings are admissible in evidence on account [*570
of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an

oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses. The same rule prevails with respect to foreign and colonial registers. That is, copies of such foreign registers will only be admissible as proof where they are required to be kept by the law of the country to which they belong. Tayl. on Ev., 2, 1050. In *Huet* v. *Le Messurier*, 1 Cox, 275, a copy of a baptismal register in Guernsey was rejected, because it did not appear by what authority it was kept. In *Leader* v. *Barry*, 1 Esp., 353, and in the Athlone Peerage, 8 Cl. & F., 262, copies of the marriage register in the Swedish ambassador's chapel, at Paris, and a copy of the book kept at the British ambassador's hotel, in Paris, in which the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him, were rejected upon the same principle. The rule in its application is made more certain, for we find, contemporary with some of the cases mentioned, that an examined copy of a marriage register in Barbadoes was admitted, it expressly appearing that such a register was kept by the law of that colony. So a Jewish record of circumcision, kept at the Great Synagogue, in London, was rejected, though it was proved that the entries in it were in the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the books. *Davies* v. *Lloyd*, 1 Cl. & F., 295, per Lord Denman & Patteson, JJ. When this last decision was made, its correctness was questioned by some members of the profession as not being reconcilable with the principles regulating the admission of the declaration of persons in the course of office or business. But it has not been judicially questioned, and is judicially considered to be a decision within the rule as to official registers, though there have been careless departures from it. The reasons for the rejection of the copy in that case, were, that the law did not require such a record to be kept. That it did not appear how those entries were kept in the synagogue to secure them from false entries, or to whose custody they were exclusively officially confided. So also the
*571] birth, marriage, or *burial register, of any dissenting chapel in England was rejected, until the act of 3 & 4 Vict., c. 92, provided for them to be received as evidence, when they have been deposited in the office of the Registrar-General and entered in his list, pursuant to that act.

I have thus shown what the rule of evidence is in respect to public or official writings, from adjudicated cases. The same

rule prevails in the courts of all of the states of this Union, and has hitherto done so in the courts of the United States. In England we have just seen, that the statute of 3 & 4 Vict. confirms it, by the provision which it makes in respect to the registers of dissenting chapels. In Louisiana the rule is substantially the same as it is in the courts of the other states—the only difference being that it is better guarded and has been put, in its application to cases there, upon a broader or more precise comprehension of the philosophy of evidence. This paper, under the decisions of the courts of that state, would not have been permitted to be evidence in the cause. Each state may regulate for itself the admission of such writings in evidence. Until it shall be done, the general rule must be in all of them as it has been, and it is binding in the courts of the United States.

It matters not that this paper is termed an ecclesiastical record. Such a designation gives it no authority over any other official register. It has the same force and no more than any other paper of the same kind would have from any other church or sect of Christians in our country. It stands upon the same footing as such a paper would, coming from the bishop and rector of an Episcopal church, or from any other denomination of Christians. All of them under our constitutions—state and national—being separately, according to the faith of each, upon an equality and having the same legal protection from all tortious interference and disturbance. The rule for which I have been contending, induced me, in the consideration of this case, to reject the certificate of the marriage of Desgrange with Barbara D'Orci, introduced by the complainant. It is not sufficiently authenticated to make it evidence any more than the ecclesiastical paper is—but it is as much so. And I should not have mentioned it at all, had it not been that this court, in making its decision, has used her declarations in that paper to show that Barbara and Desgrange were not married, though both admit they were engaged to be married, and that she left her father's house with that intention.

But I have not yet done with this paper. Fatiguing as it is to me to state all of the legal objections to its admissibility in evidence, I yield my own convenience to the importance of the rule for which I am contending, in some hope that what I write may attract professional attention, and prevent the disregard of it again.

*Before this paper with such certificates could be made evidence as an entry or file in the course of business or of office, it should have been shown that it was filed or entered contemporaneously with the act to which it [*572

relates. So strict is this rule to guard against impositions of papers as official registers, that it requires, either where the original or a copy is offered, that it shall appear to have been made or entered contemporaneously with the transaction. Where several days had passed before the file or entry was made the paper has always been rejected. I give the cases, comprehending, from the first to the last of them, a long time. *Price* v. *Torrington*, 1 Salk., 285; *Vance* v. *Fairis*, 2 Dall., 217; *Curren* v. *Crawford*, 4 Serg. & R. (Pa.), 3, 5; *Ingraham* v. *Bockins*, 9 Id., 285; *Forsythe* v. *Norcross*, 5 Watts (Pa.), 432. And in *Waller* v. *Bowman*, 8 Id., 544, the interval of a day between the transaction and the entry was held to be a sufficient objection.

Indeed, I do not know a rule of evidence which has been more uniformly adhered to than this has been. I regret that it should have been overlooked in this case, for I know it will be mischievously used, though I may not be able to anticipate the extent of mischief it may do. I take the rule to be this: that such registers must be promptly made, at least without such delay as to impair their credibility, and that they must be made by the person whose duty it is to make them, and in the mode required by law, if any has been prescribed. *Doe* v. *Bray*, 8 B. C., 813; *Walter* v. *Wingfield*, 18 Ves., 443. This ecclesiastical paper, now so much relied upon and so fatally used against the complainant, has no one of the requisites to make it evidence. It has a date, but how it got among the records of the church, or when, or by whom it was put there, no one knows. I remember a case where the record of a baptism made by a minister before he had any connection with the parish, with the private memorandum of the clerk who was present at the ceremony, was rejected. It was not contemporaneous with the occurrence; but the clerk's memorandum was not enough. How far short this ecclesiastical paper is from having such proof to sustain it! I will now proceed to apply the rules of evidence as they have been stated, because it will show that more formidable objections exist to the use of this ecclesiastical paper than merely legal insufficiency of its authenticity.

It purports to contain the action of public authorities having a criminal jurisdiction, before Louisiana was ceded to the United States. The presumption is that it and other documents like it had a regular official depository. The defendants invoke it as such. It should then have been placed upon the transfer of the public papers of Louisiana, with the
*573] authorities of the *United States who were appointed to receive them. That, it seems, was not done. This

paper, then, was retained by the civil or ecclesiastical authorities of Spain as one not included in such as were to be delivered up to the United States, but as one which might be left in the cathedral at New Orleans, although it was a public document. The latter being the fact, it is not unreasonable to ask, before it shall be used as an authentic document, upon the certificates of those who had no political connection then with the cathedral of New Orleans, for some proof that this paper had been regularly derived from the authorities by whom it had been provincially kept, and that it had been faithfully and honestly preserved.

The Catholic church in Spain, and the Spanish ecclesiastical authorities in New Orleans, had a political character, and did exercise an undefined jurisdiction in criminal matters of a certain description. And records may have been kept of its transactions.

But, since the cession of Louisiana to the United States, the Catholic society in New Orleans has not had any political connection with that institution. There has not been any regular association or hierarchy of Catholic Christians there since the change of government. The cathedral church, formerly a part of that institution, became private upon the transfer of the Province to the United States, whatever may be its voluntary ecclesiastical subordination to the church of which it was once a political part. This separation suggests at once the inquiry, what portion of the records and papers of the original Spanish hierarchy were transferred to the private and unrecognized body of American Catholics in New Orleans? Also what measures were taken by them in their new relation to our government to preserve them from mutilation or from additions? Have there been in the cathedral of New Orleans regular keepers of these papers from the beginning of the political change in the condition of that church? None of these inquiries can be judicially assumed. Courts cannot recognize any private association of persons or sect of Christians as legitimately the successors of the political authorities of Spain for the custody of documents of a public nature. If these records had been handed over by the bishop to his successor, or were considered as any part of those public archives which were to be transferred to the United States, proofs of such connection should have been made before the paper in question could be received as evidence. There is no proof of any such connection, or that anything of the kind was done. All that is proved about it is that the present bishop has the charge of such papers as are to be found in the

cathedral, without any proof that they were regularly transmitted to *him by his predecessors or to any one of them who succeeded to the diocese after its separation from the authorities of Spain. Nothing, for the purpose of making this paper evidence, can be inferred from the fact that there is still in New Orleans a congregation of the same name and faith worshiping in the same building. The inquiries suggested cannot be taken upon trust. The pertinency of them must be obvious when it is remembered that this paper has found its way into this case upon the oaths of the present incumbent of the cathedral, who is only thirty-two years of age and of a prelate of recent accession to that dignity; neither of whom have spoken or can speak of the integrity of the papers of which they say they have the care, or of the manner they have been kept by their predecessors, or how they were derived from the ecclesiastical authorities of Spain.

*574]

I speak with a proper sense of the sacred characters which they fill, but I cannot judicially recognize them to be the successors of the public authorities of Spain in Louisiana for the custody of papers forming a part of its provincial judicial documents.

If the paper in question had been handed over officially to the predecessors of the bishop, or had been allowed inadvertently to continue among the archives of the cathedral, the bishop should have been called upon to prove all that he knew about it, before this paper was made evidence in this case. And so of any other that may be in the archives of the cathedral, and which may be hereafter offered as evidence in any other case. For all that appears this paper may have found its way irregularly and fraudulently into the archives of the church. No one proves that it formed a part of them at any time preceding the commencement of this suit. It had been repeatedly sought for without success. When found by the defendants—or for them—it was under circumstances which show that the papers of the cathedral have not been kept with care or regularity, or with any knowledge of what they were. What they now are as a whole is not known. They have neither been collated nor catalogued. What they were when the ecclesiastical authorities of Spain ceased to have a political existence in Louisiana no one knows. The bishop speaks of them as being only a part of what once existed.

In this deficient condition of the archives of the cathedral, without knowing how it has happened, I cannot say that any paper has been abstracted or fraudulently added, to serve such a purpose as this paper has done. But I can say, from the proofs in this cause, that the archives of the cathedral have

been too negligently kept, for any paper in them of provincial date, to be received as evidence, without the most cautious scrutiny into its authenticity. The rules for the admission of puplic papers as *evidence must be rigidly complied with in respect to them, or consequences may follow in Louisiana, which have not hitherto been anticipated. Comprehending, as they must do, notices of marriages, births, and deaths, they may be invoked to guide or disturb the descents of property or to fix and unfix a relationship between persons differently from that which has been generally recognized. My object in what I have hitherto said concerning this ecclesiastical paper, has been to show that it was not admissible in evidence either as an official register or a judicial proceeding. [*575

I proceed now to show the misuse which has been made of it and its worthlessness as testimony.

It does not disprove Desgrange's admission that he was a married man when he married Zulime. It positively leaves him under a criminal prosecution for bigamy. The order given in it is not an acquittal. It suspends proceedings only for further investigation, and releases Desgrange from jail, because, up to that time, his guilt had not been proved. In other words, the evidence was thought sufficient to subject him to another trial, and not enough for a final judgment against or for him. Such is the paper. It cannot, then, be used for any other or larger purpose. The depositions which it contains cannot be made evidence in any case between other parties. The whole of the paper is an unfinished suit in which nothing was determined. It stands upon the same footing as other unconcluded prosecutions, where there has been a judgment of discontinuance, non-suit, *nolle prosequi*, or the *ignoramus* of a bill by a grand jury. All of us know that the proofs taken in either of these cases cannot be used as evidence in another inquiry into the truth of facts at issue. They are excluded, as well by the practice in Louisiana, as they are by the other state courts, and by those of England. Indeed, the rule excluding such proofs includes the exclusion of such as are annexed to judgments in a criminal prosecution. Such a judgment cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered, any more than a judgment in a civil action could be given for the same purpose in a criminal prosecution. I cite the cases, *Smith* v. *Rummens*, 1 Campb., 9; *Hathaway* v. *Barrow*, Id., 151; 2 Cromp. M. & R., 139; *Jones* v. *White*, 1 Str., 68, Bull. N. P., 233; *Hillyard* v. *Grantham*, cited by Lord Hardwicke in *Brownsword* v. *Edwards*, 2 Ves. Sr., 246; *Gibson* v. *McCarthy*, Cas. t. Hardw., 311; *Wilkinson* v. *Gordon*, 2

Addams, 152; *Jamieson* v. *Leitch*, Milu. Ecc. Tr. t. Radcl., 690. These cases establish, without a doubt, that this ecclesiastical paper ought not to have been admitted as evidence to affect in any way the right of the complainant.

*576] * I will now notice another departure from the rules of evidence, in the use which has been made of one of the depositions in it, said to be Zulime's.

The rule is, that depositions taken in one cause may be used in another trial between the same parties, involving the same issues, if the witnesses are dead or absent. They have never been permitted, when the witness was alive and within the jurisdiction of the court. No case can be found in which it has been done before it was allowed in this, and this will never be cited as an authority for a different rule. The rule is the same everywhere. In no courts has it been more clearly affirmed than it has been in the courts of Louisiana. In *Hennen* v. *Munro*, 4 Mart. (La.) N. S., 449, it is said that a deposition of a witness taken in a former suit is admissible if he be dead or absent.

Here the fact in dispute was the bigamy of Desgrange. For that he was arraigned, and in fact tried. Among other depositions found in the proceedings, is one which it is said was made by Zulime. The object of the defendants was to use it, to show that she had admitted herself to be the wife of Desgrange, and had expressed her disbelief of his bigamy, after it is said she had married Clark. They were permitted to do so, though it was known to the court and to the parties, that Zulime was alive, and then within the jurisdiction of the court. Indeed, the defendants had joined in a commission to take her testimony. Why it was not executed does not satisfactorily appear. But that she was within the court's jurisdiction when this case was tried, and that it was known to the court and to the defendants, the record proves. The defendants then had no legal right to use a deposition which they ascribed to her, as having been made in a criminal proceeding more than forty years before. If her testimony was wanted for their defense, they ought to have made her a witness. They could have done so. There was nothing in her relation to the parties in this suit to prevent it. Had she been made a witness, and in her examination had made a different representation of facts from those attributed to her in the deposition, then would have occurred the question, whether the latter could be used to contradict and impeach her. The use of such depositions, is what is termed secondary evidence. In order to make them substitutes for the *viva voce* testimony of the deponents, it is essential that they be regu-

larly taken under legal proceedings duly pending, on an occasion sanctioned by law; and unless the case be provided for by statute, or by a rule of court, it must further appear that the witness cannot be personally produced. I give the rule as it is, without meaning that the courts of the United States could make any such exception by a rule of court. But the rule, as I *have given it, is substantially admitted by the defendants, for they did not attempt to avail themselves of the deposition as evidence in their favor, until they had sought to make an apparent foundation for doing so, by an attempt to prove, by a comparison of handwriting, that the signature to the deposition was Zulime's. It will attract the notice of the profession with some surprise, that experts should have been called to prove, by comparison, Zulime's signature to this deposition, when the proof concerning it could have been made by herself, with an explanation of all the attending circumstances. [*577

But I pass on, as hastily as I can, to another objection to the use of this deposition, and one more interesting than those which have been already stated.

It is, that by the law of Louisiana, as it then was and still is, Zulime could not be a witness in the criminal prosecution against Desgrange, supposing her to be his wife, as the defendants assert her to have been. A husband may not be a witness for his wife, or the wife for the husband, in a criminal proceeding. A wife may impeach marriage to obtain a sentence of nullity; she may be a witness to certain facts in relation to those impediments deemed by law sufficient to annul the marriage. But neither by the civil nor canon law, or by the common law, can she be a witness for or against her husband, when he is prosecuted for any offense which the law punishes in his person. Nor can she be a witness in a prosecution of him for bigamy with herself, until after the relation of husband and wife has been proved not to be legal, on account of direct and positive proof of the husband's first marriage; then she may be a witness to prove the second marriage. I read from 1 Greenl., § 339, p. 409, this sentence: "Upon a trial for bigamy, the first marriage being proved and not controverted, the woman with whom the second marriage was had, is a competent witness, for the second marriage is void. But if the proof of the first marriage were doubtful, and the fact is controverted, it is conceded she would not be admitted. It is said in Cowen's Phillips, vol. 1, p. 79, ed. of 1849: on an indictment for a second marriage, though the first wife cannot be a witness, yet the second wife may, after proof of the first marriage; after such proof she would be

competent to give evidence for as well as against the prisoner. Such was the law of Louisiana when Desgrange was prosecuted for bigamy, and when Zulime was forced into it as a witness. I know of but three exceptions to the incompetency of a wife to testify against a husband in a criminal case; they give to her ample security against his abuse. She is a competent witness in an inquiry against her husband, upon a charge which affects her liberty or person. Such, for
*578] * instance, as a prosecution for a forcible marriage, though she may have cohabited with him. 2 Russ., 206; *Wakefield's case*, 4 How. St. Tr., 575; Hawkins, P. C., B., 1; C. 41, § 13: or she may be a witness for any gross injury committed on her person. *Lord Audley's case*, 1 St. Tr., 393; 3 How. St., Tr., 413: She may be a witness if he beats her, to protect herself from his future brutality. Such being the law, the deposition ascribed to Zulime in the prosecution against Desgrange was illegally taken, and it cannot be used for any purpose relative, certainly not to affect the rights of third parties. What was the state of the prosecution when she was summoned to give testimony? There had been no proof of Desgrange's former marriage. There was proof of his having married her. She then stood, as far as that prosecution had been carried, as the wife of Desgrange. The Vicar-General presiding in it, says, not being able to prove the report of Desgrange's bigamy, and having no more proofs for the present, let all proceedings be suspended. Under such circumstances, the mother of the complainant, then twenty-two years of age, was called upon to give testimony against Desgrange. He had imposed upon her it is true. She had parted herself from him on account of it. But is it remarkable, being the father of two of her children then alive, that she should refuse, when forced to testify, to convict him of an offense, the punishment of which was stripes and the galleys? I represent the paper precisely as it is. The deposition of Zulime was illegally taken there; it is so here, and this court, in making up its opinion in this case, should not have considered it as admissible in evidence.

But in another view this deposition is good for nothing. It places Zulime in an inconsistent position with herself, and it is opposed by all the other proofs in this cause. Its utmost weight, in respect to her, is to diminish the force of her declaration, in respect to the filiation and legitimacy of her child, and that very remotely. Her acts and conduct are at variance with the deposition; the last was taken when she had been for some time separated from Desgrange, avowedly for his bigamy in marrying her. She had not lived with him

for more than a year, and did not at any time afterwards live with him. When the prosecution of Desgrange began she was living with her family. When Desgrange was released from prison no steps were taken by either for a reunion. He left New Orleans immediately upon his release from jail, and did not return to it until after the Vicar-General's power to resume the prosecution against him had ceased, by the transfer of Louisiana to the United States. He is charged in the prosecution with an intention to leave New Orleans to avoid it. He did so instantly upon his release from *prison. [*579 He returned in three years; then the relations of man and wife between them were not resumed, nor sought to be by either. On the contrary, as soon as it could be done, she prosecutes him in her maiden name, to be released from his name, and for a divorce. A judgment was given in her favor. The deposition ascribed to her neither proves nor disproves his bigamy. It means, and cannot be made to mean any thing else, than that Desgrange and herself had been married, that she had left him on account of reports of his bigamy, that she had not then been able to get proofs of it; that it then gave her no uneasiness and that she had not heard, and did not believe, that he had three wives. In the condition in which she stood in that tribunal, shall what she there was induced to say to save Desgrange from disgraceful punishment, be relied upon to overturn and outweigh all the other evidence in the cause, of her marriage with Clark; his and her repeated confessions of it to witnesses, and his recognition of their offspring as his legitimate child? It is remarkable, too, that this deposition, as well as others in this ecclesiastical record, confirms all the facts related by Madame Despau. Her voyage from New Orleans to the north—the object of it—the time when it was made; the arrest and imprisonment of Desgrange for bigamy, his flight from New Orleans, though not in the way stated by her; the subsequent cohabition of Clark and Zulime; that Clark and Zulime were in Philadelphia for several months in the fall of 1801, and spring of 1802, under circumstances involving familiar relations and intercourse; that they thought there was a sufficient cause for them to keep the marriage secret, Clark having been told by counsel that a sentence of the nullity of Zulime's marriage with Desgrange must be obtained, before her marriage with him could be safely proclaimed. Both parties have repeatedly declared that they were secretly married. Clark, from the birth of the complainant until he died, in all of his conduct to her, acted consistently with such a declaration. He frequently declared her to be his lawful child. No one doubts that he made a will,

in which he proclaimed her to be so, making her his universal legatee, whatever may have become of that will after his death. Against all of this evidence, there is nothing but the deposition in the ecclesiastical record, which has been forced in evidence in this cause, contrary to law.

I will now briefly notice two other papers which the defendants were permitted to use as evidence in this cause in violation of every rule for its admission. One of them is the record of a suit for alimony, which, it is said, was brought by the mother of the complainant, against Desgrange, in 1805. The other is a proceeding by Mr. Davis, the guardian of the com-
*580] plainant, *against the executors of Clark, for maintenance during her infancy, in which she is termed the natural child of Clark.

The petition in the first is in the usual formula to get such a case before the court, but the facts averred in it are not sworn to. It is signed by counsel in behalf of the petitioner, but without more to show that she had directed it, or that she was in any way informed of its contents. It is dated about the time of the complainant's birth. The object of the defendants in introducing this paper is to show that the mother of the complainant admitted herself in the petition to be the wife of Desgrange, three years after her alleged marriage with Clark. This cannot be done. Such a paper would not be admissible in a suit against Zulime herself. It cannot, then, be so in any other suit between other parties. The petition, in such a case, is not admissible in another suit against the petitioner, because, not being sworn to, its language is regarded as merely the suggestion of counsel, made for the purpose of bringing in a defendant to answer. An answer in chancery, put in under oath, is receivable against the party who swears to it; but that the narrative part of a bill in equity, or a declaration at common law can be used in another suit against the plaintiff in the first, has never been decided. The reverse has repeatedly been. It would certainly not do in the artificial and technical modes, in which rights are prosecuted in courts of justice to make us answerable for the manner in which they are described or averred by counsel. If, then, the mother of Zulime would not be bound in another suit by what is stated in the petition of the paper in question, it must be admitted that the paper was erroneously used as evidence, to affect the rights of her child in this suit.

It is only necessary to say concerning the statement in the proceeding brought by Davis, that he denies upon oath that he authorized his counsel to say that the complainant was the natural child of Clark.

I have now noticed every paper which has been brought into this suit as evidence. My views of each of them are sustained by cited authorities. They show that the ecclesiastical record, and every paper in connection with it, and the records for alimony, have been forced into this case as evidence for the defendants contrary to law.

Besides these papers, the defendants have no other evidence to gainsay the proofs which the complainant has given of her father's marriage with her mother, her right to marry him when she did so, on account of the bigamy of Desgrange. There is nothing in the record making it doubtful that her father and mother repeatedly acknowledged that she was their legitimate child. One witness, and one only, was called by the defendants *to prove that on one occasion Clark spoke of her to him as a natural child. That was [*581 De la Croix. He says that Clark spoke of her as such to him. His testimony cannot be allowed to outweigh Clark's declarations to Bellechasse, Boisfontaine, and Mrs. Harper, that she was the lawful child of his marriage with her mother, especially when this was said to those witnesses, contemporarily with what De la Croix says Clark said to him, and to all of them for the same purpose. De la Croix says Clark told him so when he asked him to become her tutor, and to be one of his executors to that will in which she was called his legitimate child and universal legatee. The other witnesses speak of the same time in connection with that will. De la Croix says he saw that will in its envelope; Mrs. Harper saw and read it. She swears that Clark spoke of her in it as his legitimate child and universal legatee. Clark spoke again of that will to his friends at his bedside in the last hour of his life. Their testimony is on the record. It is full, positive, direct, and particular, without any difference between them. The credit and character of those witnesses are unimpeached. The defendants attempted to assail them, but these witnesses examined for that purpose, one and all of them, declare that Bellechasse and Boisfontaine were persons of truth, honor, and standing. No one has attempted to assail the veracity of Mrs. Harper. De la Croix's statement must have been a misunderstanding of Clark's language. If not so, still it must yield to the testimony of three witnesses, to each of whom Clark said at different times in connection with his will that Myra was his legitimate child, and to two of whom he admitted his marriage with her mother.

There was but one way to get rid of the force of the complainant's evidence in support of her legitimacy. It was to assail the integrity of her witnesses. The way in which that

was attempted I have shown in respect to Mesdames Despau and Caillavet. It has succeeded with the majority of the judges who have tried this cause with me. But I feel authorized to say, that in all of my experience in the profession I have never heard of witnesses so assailed before and upon such illegal testimony; not insufficient, but inadmissibly introduced into this cause for that purpose. My brother Daniel thinks as I do, and will express himself accordingly. Besides, these witnesses have been said to be unworthy of credit, when in the most important particulars of their testimony, concerning Clark's marriage with the mother of the complainant, and of her legitimacy, they are confirmed by other disinterested witnesses to whom Clark admitted both; not once, but several times on different occasions. These *582] persons are strangers to the parties in this suit, *in all of those relations of life which might be supposed to incline them to favor either. They have not any connection with each other, except in those social relations which made them companions and the intimate friends of Clark. They have lived apart at remote distances for many years since the death of Clark, knowing nothing of his child, except as she was seen by them in her infancy, receiving publicly the caresses of her father and hearing from him his acknowledgments that she was his legitimate child. Boisfontaine tells us that Clark frequently told him, after Zulime's marriage with Gardette, that he would have made his marriage with her public if that barrier had not been made, and frequently lamented to him that it had been made, but that she was blameless. But this witness shall speak for himself. His testimony is taken from the record without the change of a word.

"*Court of Probate.*

WILLIAM WALLACE WHITNEY, and MYRA, his wife, *v.* E. O'BEARNE, and others.

Interrogatories to be propounded to witnesses on behalf of the complainants in this cause:

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, state the name of such child; whether said child is still living; and, if living,

what name it now bears; as also state when and where and at 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?

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 the 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. [*583

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. W. 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.

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 aye, 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 witnesses hearsay declarations.

(Signed) L. C. DUNCAN,
For Defendants.

In pursuance of the annexed commission, directed to me, the undersigned, justice of the peace, personally appeared Pierre Baron Boisfontaine, 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.

*584] *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 proposed to my sister and brother-in-law, Mr. S. B. Davis, that they should take 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 to me about 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 he was making his last will. He said this in conversations to 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 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 Bellechasse, 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 Bellechasse, 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 Bellechasse, 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 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

[*585

carry his little black case to Chevalier De la Croix. After this, and in 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 him then, 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 *586] *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 was finished; was dated and signed by Mr. Clark; was an holographic 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 Delacroix was tutor of said Myra, his daughter; Chevalier Delacroix, Colonel Bellechasse, Judge Pitot, were executors. Judge Pitot and John Lynd are dead. The wife of William Harper told me she read it. Colonel Bellechasse told me that Mr. Clark showed it to him not many days before his last sickness; that it was then finished. Colonel Bellechasse and the lady, who was Madame Harper, are living.

In reply to the first cross-interrogatory, he answers:

My name is Pierre Baron Boisfontaine; 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 have been engaged in various objects; I now possess 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 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 Carrière 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. Desgrange in good faith; but it was found out some time afterwards that he already had a living wife, when lady *née* Carrière, 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, [*587 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 that 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 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 never would 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. 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 his affairs generally.

In reply to the fourth cross-interrogatory:

I have stated what I knew 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 easily be impaired.

(Signed) P. Baron Boisfontaine.

Which answers being reduced to writing were sworn to and signed by the said witness in my presence; in testimony
*588] whereof * I have hereunto affixed my hand and private seal, at the parish of St. Tammany, in the State of Louisiana, this twenty-seventh day of May, eighteen hundred and thirty-five.

(Signed) David B. Morgan,
Justice of the Peace. [L. S.]

A true copy of the commission for interrogatories, (and answers thereto,) propounded to Pierre Baron Boisfontaine, on file in court of probates, in and for the parish and city of New Orleans.

W. F. C. Duplessis,
New Orleans, 20th April, 1840. *Register of Wills.*"

Bellechasse's testimony confirms that of Boisfontaine, as to Clark's frequent acknowledgments that Myra was his legitimate daughter. Mrs. Smyth, formerly Mrs. Harper, who nursed her, does the same. Each of them also speak with positiveness concerning the will of 1813. With three such witnesses to sustain them, I believe that Mesdames Despau and Caillavet have spoken the truth concerning Clark's marriage with Zulime. If they did not, the testimony of Belle-

chasse, Boisfontaine, and Mrs. Smyth, is the most remarkable coincidence of truth with falsehood that has ever happened, and it can only be resisted by imputing to all of them, a combination to perjure themselves for the same purpose. That no one has said or can believe. Bellechasse and Boisfontaine were brought into this case as witnesses, with characters of their own to command belief and respect. Neither of them can be doubted, for the defendant's witnesses who were brought to assail them, could only answer that both had always been honorable men. Mrs. Smyth's veracity has not been questioned in any way. I cannot then but believe, that the paternity and legitimacy of Myra Clark Gaines has been fully established, as the law requires it to be done. There is nothing in the case opposed to it, but those doubts and suspicions which will sometimes bear down truth, in its relation to the extraordinary realities of life. The history of Mrs. Gaines is one of them. It has been made more so by the result of her case in this court.

I will now notice two other points which were urged in the argument of this case.

It was said, the complainant could not recover, even if it had been proved or was admitted that her father and mother were married, because there had not been, before that marriage took place, a sentence of the nullity of the marriage with Desgrange.

The other was, supposing Zulime to have been then free to marry and that she did marry Clark, it was a clandestine *marriage, which has no civil effects according to the law of Louisiana, to give to the issue a right of inheritance. [*589

An inaccurate translation of the 4th Law, of the 20th Tit., of the 8th Book, of the Nueva Recopilacion, was cited in support of the first. It shall be given at length, followed by the original, and with what I believe to be a correct translation. Without doing so, the inapplication of the law to this case, would not be seen.

The 8th Book, Tit., 20, Law 4, Nueva Recopilacion, as translated, and cited reads thus: "Should a woman, *either married*, or even only publicly *betrothed*, before Our Holy Mother the Church, commit adultery, although she should ALLEGE AND SHOW that her marriage is NULL AND VOID, either on account of near relationship by consanguinity, or affinity within the 4th degree, OR BECAUSE ONE OF THE SPOUSES WAS PREVIOUSLY BOUND BY ANOTHER MARRIAGE, or had made a vow of chastity, or was about entering a religious community, or had some other reason—YET FOR ALL

THIS she is not to be allowed to do what is forbidden; and she cannot prevent her husband from bringing a suit for *adultery*, both against HER and the ADULTERER, as if THE MARRIAGE WAS NOT A TRUE ONE. We decree against such persons— WHOM WE CONSIDER AS HAVING COMMITTED ADULTERY, (*que habemos por adulteros*,) the law of the fuero be strictly followed, which treats about *adulterers*, and is the first law of this title." See Nueva Rec., Book 8, Tit. 20, Law 4.

The original is as follows:

Ley IIII. Que la desposada que comete adulterio, no se escusa por dezir que el matrimonio fue ninguno y no valio.

Si alguno muger estando con alguno casada, o desposada por palabras de presente en haz de la sancto madre Iglesia cometiere adulterio, que aungue se diga y prueue por algunas causas y razones q' el dicho matrimonio fue ninguno, hora por ser parientes en cõsanguinidad, o afinidad, dentro del quarto grado, hora porque qualquiera dellos sea obligado antes a otro matrimonio, o aya facho voto de estidad o de entrar en religion, o por otra cosa alguna, pues ya por ellos no q' do de fazer lo q' no deuia, q' por esto no se escusen a que el marido pueda acusar de adulterio, asi ala muger como al adultero, como si el matrimonio fuesse verdadero. Y mandamos, q' enestas tales q' assi auemos por adulteros, y en sus bienes, se execute lo contenido en la ley del fuero de las leyes, que fabla de los que cometen delicto de adulterior, que es la primera deste titulo.

[Don Fernando, y dona Juana en las diehas ley es de toto. Cap. 31.]

[590] *[Correct Translation.]

Law IV. *That the married woman who commits adultery cannot excuse herself by saying that the matrimony was null and void.*

If any woman being married to a man, or engaged by word *de præsenti*, in the face of the holy mother church, shall commit adultery, and shall say and prove by certain causes and reasons, that the said matrimony was null either because the contracting parties were related by consanguinity or affinity within the fourth degree, or *because either of them may have before contracted the obligation to marry another person*, or may have made vow of chastity, or to enter into any religious order, or for some other reason, on which account they were not willing to do what they ought not to do, nevertheless these reasons are not such as to prevent the husband from *accusing as well the wife* as the adulterous man, the same as if

the marriage had been valid. And we order that, with regard to these persons, whom we hold to be adulterers, and likewise with regard to their goods, there shall be executed what is prescribed in the law *fuero de las leyes;* which relates to those who commit the crime of adultery.

Recopilacion de las leyes; Libro VIII., Titulo XX., de las adulterios incestos y esturpros.

I write diffidently upon such subjects, but not without due care. The result of my examination is, that the law just given has no bearing upon this case.

It has not so, in the first place, because the penalties to be imposed by it can only be applied to one who has been charged and convicted of adultery, upon an authorized accusation. By that is meant, such as the laws of Spain permit to be made against an adulterer or adulteress, only by certain persons, and within fixed times. The Spanish law for such a purpose is as fixed as is the punishment of the offence. It does not permit the charge to be made by any or every one. Certain persons are named who may make it, and another can only do so when the scandal has become notoriously offensive to public purity and morals.

I shall cite from the Institutes of Asa Y. Maniel, illustrated by Palaccos, having the original work and Johnson's translation before me. And I do so because I find the translation introduced into White's Recopilacion is frequently cited in Louisiana, and is so by one of the learned judges who sat in this case in the Circuit Court.

"While the marriage is not dissolved by the sentence of the church, the father, the adulteress, her brother, paternal and maternal uncles were legitimate accusers of the adulterer, and for sixty days after a dissolution, either of them may accuse.

*Whilst the marriage continued, if the adultery is publicly scandalous, any one belonging to the town may accuse, and for four months afterward. [*591

If the husband dies, the accusation may be made in six months after, computing from the day when the crime was committed.

So, whilst the married persons were united, five months were allowed for an accusation, unless force was used, and then the ravisher might be charged at any time within thirty years.

An accusation made after the times stated might be avoided by the accused by such an exception. It was another available exception if the wife could prove she had committed the offence with the consent of her husband: so if knowing the adultery he continues to cohabit with his wife. Nor could he

accuse after having said before the judge that he did not wish to accuse his wife. After accusation and an acquittal for want of proofs, the prosecution could not be renewed. A husband of bad habits and dissolute character could not accuse." I do not notice the note by Palacios to the text, from which the citation has just been made, because it does not particularly bear upon the point in question. *Palacios mo recula ilus lix da*; *Tomo Segundo;* Sep. Ed., 150.

I have, however, been more particular in citing the law for such accusations, that it may be seen, as the mother of the complainant was never accused of adultery according to law, that she cannot be charged now with being an adulteress, to bring upon herself or her child any of the consequences which might have resulted to both, if she had been convicted under the 4th Law, in Title 20, of the 8th Book, of *Nueva Recopilacion.* But had she been so, the law *fuero de las leyes*, by which she would have been punished, does not declare a child that she may have had, illegitimate. That can only be done in another proceeding, in which it shall be proved that such child was the conception of an adulterous connection.

Further, a brief analysis of the law will show that it has no relation to the purpose for which it was cited.

It provides for five specific causes of canonical impediments for which a marriage may be invalidated or pronounced null, with a general provision for others of a like kind, without mentioning any civil disability for which a marriage is null and void, and declares that a married woman, for such causes of canonical impediment, even though her marriage on account of them was not valid, should not prevent the husband of that invalid marriage from accusing her of adultery, and the person also with whom she may have offended. And pronounces them adulterers "upon whom shall be executed what is prescribed *592] in the *law *fuero de las leyes*, which relates to those who commit the crime of adultery."

I mention the impediments in the order that they are in the case. Consanguinity or affinity within the 4th degree, a contract to marry another person, a vow of chastity, or one to enter into any religious order.

The error of the first translation is a misapprehension of the original in respect to the contract to marry another person. The words in the original are, "*Hora porque qualquiera dellos sea obligado antes a otro matrimonio.*" They are rendered, "or because one of the spouses was previously bound by another marriage." They should have been, "or because either of them may have before contracted the obligation to marry another person."

The difference between the two is, that the mistranslation substitutes for a contract or obligation to marry, which does not excuse the woman from the charge of adultery, though it may make her marriage invalid, an actual marriage disregarded by her from her marriage with another, which is bigamy, and which being imputed to the complainant's mother, is said to make her illegitimate, because, when she married, Clark, there had not been a sentence of the nullity of the marriage with Desgrange.

The law of which we are speaking is one which declares that certain criminal impediments to marriage, mentioning only some of them, shall not excuse a woman from being an adulteress, when she has been either "married or betrothed before the holy mother, the church." But bigamy is not an impediment in the sense in which that word is used canonically in respect to marriage. It is a civil objection, because one already married, and that marriage not being dissolved by death or the operation of law, neither of the parties to it can contract marriage with another without being guilty of the offense of bigamy, which is punished by the Spanish law as an offense, differently from what adultery is, and with the severest penalties. Had it been intended that a marriage with a bigamist should make a woman an adulteress, if, upon finding out the imposition upon her, she shall abandon the imposter and marry another, it would have been so declared. But that is not done, and therefore the 4th law of the 20th title of the 8th book of the *Nueva Recopilacion* cannot be applied in this case.

But there was in the argument a further misapprehension of the ecclesiastical law of Spain in respect to the cases of marriage for which sentence of nullity was necessary, before the marriage was considered as legally dissolved or only partially so for separation *a mensâ et thoro*. Such sentences were so, only in cases of canonical impediments, whether they were such as * made the marriage void or voidable. But in [*593
the case of an objection to the validity of a marriage on account of a civil disability, and not a canonical impediment, no declaratory sentence of nullity is absolutely necessary. The most familiar instances of the last found in the books, is, when, at the time of a second marriage, one of the parties had been previously legally married, and that marriage not dissolved by death or the operation of law. Such was the marriage of the complainant's mother with Desgrange.

In such cases, the marriage being void from its beginning, on account of the bigamy, it is not necessary that there should be a declaratory sentence of nullity to reinstate the party

imposed upon in all the rights of a single person, or unmarried condition. Where there is bigamy there is never a complete marriage, it being only an abuse of the forms of marriage in violation of the ecclesiastical and civil law, which declares "that marriage is null where either of the parties stand already married to another person, for as one cannot be married to two persons at once, the marriage to the first being valid, the other must be void."

It is true, in such cases, the ecclesiastical court may be resorted to by the party imposed upon, to get a declaration from it that the marriage is void, but not on account of its being a matrimonial cause exclusively of ecclesiastical cognizance, because, as Palacios says, that the causes or trials of those who contract a second marriage during the life of the first wife are by a royal circular of the 5th February, 1770, L. 10, tit. 28, lib. 12, Neu. Recop., declared exclusively of royal or lay and military jurisdictions, according to the persons who may offend; but that by the royal decree of the 10th December, 1781, (which, however, does not appear in the Neu. Rec.), the ecclesiastical jurisdiction may also take cognizance of the mode, and for the reason expressed by the same decree. White, Rec. 1, 46, note 28. But it is optional to the party to make such an application to the ecclesiastial court, and if it be done, the question of the validity of the marriage will be raised, and whatever sentence the court may give will be binding. But if convinced of the bigamy, the victim of it may voluntarily withdraw from cohabitation with the bigamist. For doing so, no penalty, ecclesiastical or otherwise, is incurred, nor any for marrying again without a sentence of the nullity of such vicious marriage.

It has, however, been suggested if in a marriage void for bigamy, a party shall be allowed to withdraw from it, without a sentence of nullity being obtained, that the obligation of marriage will be impaired. The answer is, that experience shows the contrary, as the suit which is allowed in such cases for the restitution of conjugal rights, at the instance of the *594] party who has * been left, is sufficient to prevent such abuse, and to preserve the integrity of marriage. In such a suit, the husband or wife, as the case may be, alleges that the party proceeded against, has withdrawn from cohabitation, and asks that the defendant may be compelled to return to it. The process to compel an answer is vindicatory if the defendant is contumacious. When, however, the party answers, the marriage can be denied; or if there had been a valid marriage, other causes being sufficient to justify a separation *a mensâ et thoro*, can be pleaded in bar of the suit.

If, in such a suit, the validity of the marriage is affirmed, the defendant is compelled to return to cohabitation. Again, the law for punishing bigamy prevents parties from marrying in such cases, unless the proof that it was committed against them is certain and conclusive.

In conclusion upon this point, the law declares that bigamy makes a marriage void as if it never had been, replaces the parties as they personally were before such a connection, and though it may be expedient to have a sentence of its nullity declared for the purpose of restoring rights of property, it is not necessary to enable the party imposed upon to marry again. Every thing concerning property or marital rights, when such a sentence has been given, returns *hinc inde* to its former condition. But the sentence in such cases is not a divorce or dissolution of the marriage, for that cannot be dissolved which was never contracted, but it is a declaration that it was null and void from the beginning, and that the party is free from any bond of marriage, and had and hath the liberty and freedom of marrying with another person. Not that as a consequence of the sentence the party has a right to marry another person, but had a right before the sentence of nullity was announced, on account of the marriage having been void from the beginning. Duchess of Cleveland's case against Fielding, in the Arches Court of Canterbury.

Such is the fixed form in ecclesiastical proceeding for a sentence of the nullity of a marriage on account of bigamy.

It now only remains for me to notice the other objection against the right of the complainant to recover. It is that as the marriage of Clark with her mother was clandestine, that it illegitimates her for the purposes of inheritance. I shall not speak of the general or particular consequences of clandestine marriages under the Spanish law, as the facts of the case do not seem to me to make it pertinent. All that may have been said upon this point as to the effect of such a marriage in Louisiana, upon the parties and upon children can have no influence upon the children of marriages validly contracted in another political sovereignty.

The objection assumes that the marriage of Clark and Zulime *in Philadelphia in some way or other, but not definitely stated, was subject on account of the domicil [*595 of the parties in Louisiana, to its laws prohibiting clandestine marriages. In other words, that a secret marriage lawfully contracted by persons *in transitu* in a sovereignty in which such a marriage is not prohibited, will not give legitimacy to the offspring within the jurisdiction of the domicil of the parents, if it be kept secret there.

The right of persons to marry in every country where they may happen to be, is not denied, if there be no impediment there or in the condition of the parties in respect to the law of their domicil to prevent them from contracting marriage. Before, then, the validity of the marriage of the complainant's father with her mother in Philadelphia, can be denied, it must be shown that they could not contract it on account of a legal disability either there or in Louisiana. The first is not pretended. The only objection to it is that she was previously married to Desgrange. That cannot prevail, for I think it has been shown that Zulime's marriage was void on account of his bigamy in marrying her, and that she had the right, without any sentence of its nullity, to marry another, either in Louisiana or elsewhere. It is certain that in such a case of bigamy, she could marry again in Pennsylvania. Their offspring there would be legitimate. It cannot be made otherwise, because their child happened to be born in Louisiana. Legitimacy is the lawful consequence of lawful marriage and it cannot be taken away by any subsequent misconduct of parents in respect to the marriage itself. Heirship, or the right of legitimate children to inherit from deceased parents, depends upon the law of the place where the property may be. Parents cannot change it except as they may do so according to law. This being so, their misconduct cannot affect the right of a child to inherit or its legitimacy for such a purpose, though it may, in many particulars, affect their own rights as to each other and as to their property. Concealment, in Louisiana, of a marriage elsewhere by persons domiciled there, might very well affect such rights, or the parties to it as relate to property parted with by either whilst they mutually concealed their marriage. But it would not do so because there was no marriage between them, but from their not holding themselves out to the community as man and wife. It is their duty to do that by the ordinary *indicia* of the relation. If they do not, they must bear the consequences in respect to property and other matters which may concern them, from their misconduct. But as regards their children, as they are legitimate according to the *lex loci* of the marriage for all purposes and to inherit that portion which
*596] the law gives them of the *estate of deceased parents, they cannot be affected in any way by their parents' concealment of their marriage, if it shall be proved to have been valid where it was contracted. The rule in such cases is, that where the marriage is valid by the *lex loci*, it will generally be held (not universally) valid everywhere for the purposes of inheritance. If invalid there, it will generally

(not universally) be held invalid everywhere. But in either case, the exceptions grow out of law. They must be shown to exist as such, before the right of heirship can be excluded.

The case of *Le Breton* v. *Nouges*, 3 Mart. (La.), 60, cited for a contrary purpose, is absolutely decisive of the reverse. It sustains, inferentially, the view of the right of the inheritance of children under a valid marriage contracted out of Louisiana, and directly, the right of the husband to a marital portion, though he violated the laws of Louisiana in running away with an heiress in her infancy to marry her in another sovereignty. The mother, too, of his wife was declared to be her forced heir after the daughter's death, only because the latter left no child of her own. That case only decides this, that conjugal rights of property in cases of marriages out of the state of Louisiana, the parties being domiciled there, depend upon the laws of the domicil. That is strictly the case everywhere. But the filial right is not the conjugal. The law gives both, and both are protected and measured according to law.

Until it can be shown that there is a law of Louisiana excepting the child of a lawful marriage in Pennsylvania from the rights of heirship in the first, on account of the domicil of the parents at the time of such marriage, the child's right of inheritance cannot be denied.

I have searched in vain all of the codes of Spain and of Louisiana for such a law. I have earnestly sought in judgments of the courts both of Spain and Louisiana for such an one. Nothing can be found in either concerning such a proposition. I think, then, that I run no judicial risk in saying that there is nothing in the way of law to be found interfering with the right of Myra Clark Gaines to the heirship of such portion of her father's estate as the law of Louisiana gives to an only legitimate child.

Something was said that her right to recover was barred by the statutes of prescription of Louisiana. If her right under them shall be measured by the proofs of the time of her birth, she is not barred. If from the time of the illegal disposition or sale of her father's estate by his executors, she is not so. If from the character in which she sues to establish a right of inheritance, there is no statute of prescription to bar her rights.

Those of us who have borne our part in the case will pass *away. The case will live. Years hence, as well as now, the profession will look to it for what has been [*597
ruled upon its merits, and also for the kind of testimony upon which these merits were decided. The majority of my

brothers who give the judgment stand, as they well may do, upon their responsibility. I have placed myself alongside of them, humbly submitting to have any error into which I may have fallen corrected by our contemporaries and by our professional posterity.

The case itself presents thought for our philosophy, in its contemplation of all the business and domestic relations of life.

It shows the hollowness of those friendships formed between persons in the greediness of gain, seeking its gratification in a disregard of all those laws by which commerce can only be honestly and respectably pursued.

It shows how carelessness in business and secret partnerships to conduct it with others who are willing to run the risk of unlawful adventures, may give to the latter its spoils and impoverish those whose capital alone gave consequence to the concern.

It shows how a mistaken confidence given to others by a man who dies rich, may be the cause of diverting his estate into an imputed insolvency, depriving every member of his family of any part of their inheritance.

We learn from it that long-continued favors may not be followed by any sympathy from those who receive them, for those who are dearest to our affections.

It shows if the ruffian takes life for the purse which he robs, that a dying man's agonies soothed only by tears and prayers for the happiness of a child, may not arrest a fraudulent attempt to filch from her, her name and fortune.

We can learn from it, too, that there is a kindred between virtue and lasting respectability in life, and that transgressions of its proprieties or irregular yieldings to our passions in forming the most interesting relation between human creatures, are most likely to make them miserable and to bring ruin upon children.

I do not know from my own reasoning that the sins of parents are visited upon children, but my reason does not tell me that it may not be so. But I do know, from one of those rays shot from Sinai, that it is said for the offence of idolatry, "I, the Lord God, am a jealous God, and visit the sins of the fathers upon the children unto the third and fourth generation of them that hate me, and show mercy unto thousands of those who love me and keep my commandments." It may be so for other offences. If it be, let the victim submissively recognize Him who inflicts the chastisement, and it may be the beginning of a communion with our Maker, to raise the hope of a richer inheritance than this world can give or take away.

*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.

633

INDEX

TO THE

MATTERS CONTAINED IN THIS VOLUME.

[The references are to the STAR (*) pages.]

ADMIRALTY.

1. The act of Congress, passed on the 26th of February, 1845, (5 Stat. at L., 726,) extending the jurisdiction of the district courts to certain cases upon the lakes, and navigable waters connecting the same, is consistent with the Constitution of the United States. *Propeller Genesee Chief* v. *Fitzhugh et al.*, 443.
2. It does not rest upon the power granted to Congress to regulate commerce. But it rests upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States, when the Constitution was adopted. *Ib.*
3. The admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different states, or with a foreign nation. *Ib.*
4. In the present case of collision between a vessel navigated by steam and a sailing vessel, the evidence shows that the former was in fault. *Ib.*
5. It is the duty of every steamboat to keep a trustworthy person employed as a look-out; and if there be none such, additional to the helmsman, or if he was not stationed in a proper place, or not vigilantly employed in his duty, it must be regarded as *primâ facie* evidence that the collision was the fault of the steamboat. *Ib.*
6. The extent of the admiralty and maritime jurisdiction of the courts of the United States, as explained in the preceding case, again affirmed. *Fretz et al.* v. *Bull et al.*, 466.
7. In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases. But all persons entitled, on the same state of facts, to participate in the same relief, may join as libellants, whether the suit be *in personam* or *in rem*. *Ib.*
8. Hence, where the cargo of a boat was partly insured, but not the boat itself, and the insurance company paid for that part of the cargo which was insured, it was competent for the owners of the boat to file a libel for the use of the insurance company. *Ib.*
9. In this case, where a collision took place between a steamboat and a flatboat, both descending the Mississippi River, the steamboat was in fault. *Ib.*
10. The flatboat was in an eddy of the river, and impelled by it towards the steamboat, and the latter should have kept further away. *Ib.*

AGREEMENT.

See CONTRACT.

APPEAL AND WRIT OF ERROR.
See JURISDICTION; PRACTICE.
APPEAL BONDS.
See COSTS.
BANKRUPTCY.
1. Where the highest court of a state decided in favor of a defendant who pleaded his discharge under the bankrupt law of the United States, and the case was brought to this court under the 25th section of the Judiciary Act, this court has no jurisdiction. *Linton* v. *Stanton*, 423.
2. It would have been otherwise if the decision had been adverse to the exemption claimed under the law of Congress. *Ib.*
3. Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section. The decision of a state court upon their effect cannot be reviewed by this court. *Ib.*
BILLS OF LADING.
See COMMERCIAL LAW.
BOND OF CONVEYANCE.
When evidence. See EVIDENCE.
CHANCERY.
1. Where a settler upon the public lands had a pre-emption right to them and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase-money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law. *Thredgill* v. *Pintard*, 24.
2. The principles of law decided in this case are so dependent upon the facts, that a succinct statement of the latter becomes necessary. *Ib.*
3. Collier was in possession of two drafts drawn by King upon Groves and accepted by him for the accommodation of King. Collier pledged these drafts to the Farmers' Bank of Virginia, as collateral security for a debt which he owed the bank. *Farmers' Bank of Virginia* v. *Groves*, 51.
4. The drafts not being paid at maturity, the bank sued both Groves and King, and recovered judgments against them, which were liens upon their property. *Ib.*
5. Collier and King then agreed, that if Collier were to purchase King's property at a certain sum, he would return his drafts to him and free him from the bank. To this agreement Groves was a witness, and the purchase was accordingly made. *Ib.*
6. Collier and the bank then agreed that the bank should give him time and he should give additional collateral security to the bank and mortgage his property; first reducing the liens of prior mortgages down to a certain sum. The bank was moreover to surrender the collateral securities previously received. The mortgage was made by Collier and the collateral security surrendered to him by the bank. *Ib.*
7. After this, the bank had no right to prosecute the judgment which it had obtained against Groves. *Ib.*
8. By the first agreement made between King and Collier, to which Groves was privy, Collier exonerated Groves, as far as it was in his power; and in consequence of the second agreement between Collier and the bank, Collier became re-invested with the whole control of the matter and his previous exoneration of Groves became immediately operative. Groves was, therefore, entirely discharged from all responsibility. *Ib.*
9. The failure of Collier to comply with his contract with the bank, did not prevent this exoneration of Groves from being effectual. *Ib.*
10. An agreement, whereby the purchaser of a plantation "bound himself to transfer to his son-in-law one half of the plantation, slaves, cattle, and stock, as soon as the son-in-law should pay for one half of the cost of said property, either with his own private means, or with one half of the profits of the plantation," was deficient in mutuality. The son-in-law was not bound to render any services nor pay any money. It was a *nude pact*. *Dorsey* v. *Packwood*, 126.
11. It was not an alternative obligation upon the son-in-law, because the election to pay his half out of the profits would have been merely paying with another man's money. *Ib.*

CHANCERY—(*Continued*).
12. Even if the agreement possessed mutuality, there was no performance, or offer of performance by the son-in-law for twenty-seven years. *Ib.*
13. Moreover, fifteen years after the agreement, when the plantation was likely to prove a ruinous purchase, the son-in-law abandoned and released all his claim. *Ib.*
14. When the question before a court of equity is, whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage. *Russell* v. *Southard*, 139.
15. Upon such a question as this, depending upon the general principles of equity jurisprudence, this court does not hold itself bound by the decisions of the highest court of the state in which the land in question was, but will be governed by its own view of those principles. *Ib.*
16. The decisions of the courts of Kentucky examined. *Ib.*
17. Such evidence is admissible when it is alleged and proved that a loan on security was really intended and the defendant sets up the loan as a payment of purchase-money and the conveyance as a sale. *Ib.*
18. In examining the question whether the transaction was a sale or mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale. *Ib.*
19. In the present case, the court decides, from the evidence, that the consideration was grossly inadequate; that he was a stranger, without friends or other resources there than the land in question; that it is true he offered to sell, but there is no evidence to show that he offered to sell for the amount of money which he actually received. *Ib.*
20. The papers executed between the parties show a conditional sale; but in doubtful cases the court leans to the conclusion that the reality was a mortgage or a conditional sale. *Ib.*
21. The absence of a personal obligation by the grantor to repay the money furnishes no conclusive test to determine whether the conveyance was a mortgage or a conditional sale. *Ib.*
22. Nor do the facts that the grantor endeavored to obtain the relinquishment of his wife's dower, and actually surrendered the paper under which he had the right to reclaim his land, amount to a bar of his claim, under the circumstances of this case. *Ib.*
23. Three years after the transaction the grantor received one hundred dollars from the grantee upon the ground of an arithmetical error, and signed a release of all further demands. But apart from other considerations bearing upon the purchase of an equity of redemption, in the present case it was the duty of the grantee to correct errors, and consequently he paid nothing for this equity of redemption. *Ib.*
24. Where there was a long lapse of time and the original mortgagee had been dead for many years, an account of rents and profits and of interest upon the money loaned, will be decreed to commence from the filing of the bill. *Ib.*
25. Where there were purchasers during the intermediate time, and the record did not enable this court to determine upon their rights, the case will be remanded to the Circuit Court for its adjudication thereon. *Ib.*
26. A motion made in this court after the decision of the case here, to set aside the decree and remand the case to the Circuit Court for further preparation and proof, upon the ground that new and material evidence has been discovered since the trial of the case in that court,—cannot be sustained. *Ib.*
27. Affidavits of newly-discovered testimony cannot be received. This court must affirm or reverse upon the case as it appears upon the record. *Ib.*
28. The established chancery practice is so, and if it were not, the act of Congress, passed on March 3, 1803, would be decisive of the question. *Ib.*
29. The proper condition of an injunction-bond is "to answer all damages which the defendant may sustain in consequence of the injunction being granted." *Bein* v. *Heath*, 168.
30. Where a bond was given in order to obtain an injunction to suspend proceedings, under an order of seizure and sale, and the condition was that

CHANCERY—(*Continued*).
the principal and sureties "would pay to the plaintiff, in the case of seizure and sale, all such damages as he may recover against us, in case it should be decided that the said injunction was wrongfully obtained," this bond was irregular. *Ib.*

31. It conformed to the Louisiana practice, by which, if an injunction be dissolved judgment is at once given for the debt, interest, and damages, against the principal and sureties in the injunction-bond. *Ib.*
32. But the equity practice in the courts of the United States is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress; and one of those rules is, that, when not otherwise directed, the practice in the High Court of Chancery, in England, shall be followed. *Ib.*
33. According to these rules, a court of equity cannot, when it dissolves an injunction, give judgment, at the same time, against the obligors. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. *Ib.*
34. Where there were two trustees of the property of insolvents, and one of them made an assignment, but the other neither joined in it nor assented to it afterwards, the assignment was void. *Wilbur* v. *Almy*, 180.
35. And in the present case, also, the assignee appears to have received an assignment of the property only as security, until its profits should pay a debt due to him by the insolvents. That debt being extinguished, he has no right, as owner, to claim an account of further profits from the holder of the property. *Ib.*
36. Where a bill in chancery states that, at an execution sale, which was alleged to have been open and fair, the complainant purchased, for the sum of $600, certain promissory notes secured by mortgage, amounting in the whole to $260,000, and the bill was demurred to, and the demurrer sustained by the Circuit Court, this judgment must be reversed. *Erwin* v. *Parham*, 197.
37. Mere inadequacy of price does not, of itself, furnish a sufficient reason for dismissing the bill, or deciding that the complainant was entitled to no relief whatever. *Ib.*
38. Where a mortgage was executed by a husband, his own name only being used in the body of the instrument, but it was signed by his wife also, who relinquished her right of dower, and made her acknowledgment in an after part of the instrument; and there is sufficient evidence, from an inspection of the whole instrument, to believe that the intention of the parties was to consider the whole paper as forming one assurance, the wife will be barred of her dower, as far as the mortgage is concerned. *Dundas* v. *Hitchcock*, 257.
39. Where a statute requires a private examination of the wife, to ascertain that she acts freely, and not by compulsion of her husband, but prescribes no precise form of words to be used in the certificate, it is sufficient if the words of the acknowledgment have the same meaning, and are in substance the same, with those used in the statute. *Ib.*
40. Where a widow was allowed one year, after probate of her husband's will, to elect whether to take under it or not, and by the will she was sole devisee for herself and children, and before the expiration of the year she released to the mortgagee all her estate, right and claim to the mortgaged premises, styling herself widow and sole devisee, she cannot afterwards avail herself of her right of election and set up a claim to dower, outside of the will; she is estopped by her deed. *Ib.*
41. The 25th section of the law of Louisiana incorporating the Union Bank of Louisiana declares that in all hypothecary contracts and obligations entered into by any married individual with the bank, it shall be lawful for the wife to unite with him; and in such case the property of the wife, whether dotal or of any other description, shall be affected by the contract. *Union Bank of Louisiana* v. *Stafford*, 328.
42. Where a wife united with her husband in mortgaging property to the bank, the mortgage was good under this clause. *Ib.*
43. A sale of the mortgaged property for a twelve months' bond under an

CHANCERY—(*Continued*).
order of seizure and sale was not a novation of extinguishment of the original mortgage. *Ib.*
44. Where the mortgage is payable by instalments, some of which were not due at the filing of the bill, the statute of limitations will not apply. The possession of the mortgagor was not adverse to the mortgagee. *Ib.*
45. Where other parties had a nominal interest as defendants, and resided beyond the jurisdiction of the court, it was error in the Circuit Court to dismiss the bill because they were not made parties. Under the act of Congress of 1839, the court should have gone on to decree against the actual defendants; and in this case all who have a beneficial interest are in court. *Ib.*
46. Prior to the Revised Code of Virginia in 1819 the lien created upon land by a judgment was the same as in England. In both countries the following rules prevailed:
1. That the lien of the judgment resulted entirely from the right of the plaintiff to sue out an *elegit*, and charge the goods and the moiety of the lands of the debtor.
2. That the election so to charge them by an *elegit* executed, discharges from liability the body of the defendant and the remaining moiety of the lands.
3. That the *capias ad satisfaciendum* executed is, *pro tanto*, a satisfaction of the judgment which releases *proprio vigore* any previous lien upon the lands, and inhibits all recourse against the goods and chattels or lands of the debtor, with the exceptions of the instances of death whilst charged in execution, or of an escape from prison, or a rescue. *Snead* v. *McCoull*, 40.
47. A discharge under the act of Congress for the relief of persons imprisoned for debt (2 Stat. at L., 4, sec. 2,) did not restore the lien originally created by the judgment, and waived by issuing a *ca. sa.* *Ib.*
48. In 1819 the state of Virginia revised her code. By a part which went into operation on the 1st January, 1820. it was enacted that, thereafter, the issuance of a *ca. sa.* should constitute a lien upon lands. *Ib.*
49. But as it did not relate to past liens, the purchaser of a lien created under the Revised Code had a good title when compared with a claimant under the lien which existed in 1817, but which had been waived by issuing a *capias ad satisfaciendum.* *Ib.*
50. After a case had been argued and was under advisement, a motion to permit the complainant to file a further bill by way of supplement and amendment, which would have made an essential change in the character and objects of the cause, was properly overruled in the Circuit Court. *Ib.*
51. Myra Clark Gaines filed a bill in chancery, alleging her claim to certain property upon the ground that Clark, who died seized of the property, had been married to Zulime, the mother of the complainant. *Gaines* v. *Relf et al.*, 472.
52. The claim was resisted upon two grounds. 1st, That no such alleged marriage took place; 2d, That Zulime was, at the date of the alleged marriage, the wife of a man named Desgrange. The marriage with Desgrange was admitted by the complainant, but it was contended that the marriage was void *ab initio*, because Desgrange, at the time of contracting it, had another wife living, and therefore was guilty of bigamy. *Ib.*
53. In this case, it is decided that the two principal witnesses for the complainant, to establish the fact of the marriage between Zulime and Clark, (the parents of the complainant), are unworthy of credit. *Ib.*
54. That the charge of bigamy against Desgrange is not substantial, because,
1. The depositions of persons who testify to it only state hearsay and rumor.
2. That the naked confessions of bigamy which Desgrange was alleged to have made are incompetent evidence and inadmissible as against the executors of Clark and purchasers holding by sales from them. To hold that either party could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine.
3. A certificate of a priest, given sixteen years after the marriage, that he

CHANCERY—(*Continued*).
had married Desgrange to his alleged first wife, was inadmissible as evidence. There was no register of the marriage in the records of the church.
4. A mutilated record of a suit brought by Zulime against Desgrange, and alleged to have been for the purpose of having her marriage with him declared null and void, does not prove the bigamy of Desgrange. The cause of action is not stated, the petition having been lost. *Ib.*
55. A sworn copy of an ecclesiastical record, taken at the proper office and produced by the lawful keeper of the records, may be admitted as evidence, the original being produced by the bishop who had charge of the records of the bishopric. *Ib.*
56. This purported to be a trial of Desgrange for bigamy, and his acquittal. It was competent evidence as rebutting testimony inasmuch as proof of the loss of the record and secondary proof of its contents had been given on the other side. *Ib.*
57. The depositions of Zulime in this ecclesiastical case, and also in a suit brought by her against Desgrange for alimony, are received by this court as competent evidence, because there was notice of a motion in the Circuit Court to suppress the evidence, but in the course of a long trial no such motion was made. If it had been made, the deponent herself was at hand to testify. No objection having been made to it in the court below, none can be made here. Moreover, the complainant claims under a deed of gift from the deponent, and is estopped by her declarations. *Ib.*
58. The decree of this court in the case of *Patterson* v. *Gaines*, (6 How., 550,) cannot affect other persons, because these persons were not parties to it, and because that case was not a controversy carried on in earnest. *Ib.*
59. Where slaves are in the possession of a mortgagee, who renders an account of the profits of their labor and the expenses which he has incurred on their behalf, he must be held bound to exercise a reasonable diligence in keeping them engaged in useful employments. *Bennett* v. *Butterworth*, 367.
60. It is not a sufficient excuse for allowing them to remain idle, to say that he managed them as they had been managed by their former master, the mortgagor. *Ib.*
61. If the mortgagee is charged with their hire from a period commencing three months after the death of the mortgagor, he is not charged too much. *Ib.*
62. Where the account of the master charged the mortgagee with a certain sum for their hire, exclusive of clothing, medical treatment, or other expenses, it was a correct mode of stating the account. *Ib.*

COMMERCIAL LAW.
1. Where goods are shipped and the usual bill of lading given, "promising to deliver them in good order, the dangers of the seas excepted," and they are found to be damaged, the *onus probandi* is upon the owners of the vessel, to show that the injury was occasioned by one of the excepted causes. *Clark* v. *Barnwall*. 273.
2. But, although the injury may have been occasioned by one of the excepted causes, yet still the owners of the vessel are responsible if the injury might have been avoided, by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper, to show the negligence. *Ib.*
3. Where spools of cotton thread, put up in boxes, were shipped at Liverpool for Charleston, and the vessel had a voyage of sixty-one days going far south into a warm climate, and the thread was an article peculiarly subject to the effect of dampness, some of the inside boxes being stained, whilst the outside ones were not, the cargo also being well stowed and dunnaged, the injury must be attributed to the dangers of the seas. *Ib.*
4. The usage of trade is to bring sacks of salt in the same vessel with dry goods; and the evidence in this case is that, if the salt be well stowed

COMMERCIAL LAW—(*Continued*).
it does not increase the humidity of the vessel, but rather acts the other way. *Ib.*
5. In this case, also, there was no evidence that the shipmaster was guilty of any negligence in omitting to provide proper precautionary measures. He was not responsible for the effect of boisterous weather or adverse winds. *Ib.*
6. The words "contents unknown" being annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the cases, as to their external condition. He might justify himself by showing that the contents were not in good order, but the evidence in this case shows that they were so; and the injury must be attributed to the dangers of the seas. *Ib.*
7. Where several owners of a cargo filed libels *in rem* against the vessel for damages done to the goods, and these libels were consolidated by order of the court, which afterwards decreed damages in favor of the libellants, in some cases to more and in some to less than $2,000, those cases where the damages are less than that sum must be dismissed, on an appeal to this court, for want of jurisdiction. *Rich* v. *Lambert*, 347.
8. Where further evidence was taken after the appeal to this court was entered, under the authority of an act of Congress passed in 1803, (2 Stat. at L., 244,) the issuing of the commission by the clerk of the Circuit Court, and the uniting by both parties in its execution, furnish a presumption that the proper order was given. If not, the parties have waived all objection. *Ib.*
9. Where goods on board a ship received a damage which must necessarily have accrued during the voyage, the *onus probandi* is upon the master and owners to show that it was occasioned by one of the perils of navigation within the exception of the bill of lading. *Ib.*
10. The master is not to blame for bringing sacks of salt between decks, if it be well stowed and packed, and secured with proper dunnage. The usage of trade is to carry salt in that way. *Ib.*
11. The evidence in the present case shows that the damage was caused by the perils of navigation. *Ib.*

CONSTITUTIONAL LAW.
1. Under an act passed by the State of Maryland, and an assent given to it by Congress, no toll could be levied, for passing over the Cumberland Road, upon coaches which carried the United States mail. *Achison* v. *Huddleson*, 293.
2. In 1843, the Legislature of Maryland passed an act imposing a toll upon all passengers in mail-coaches, and if it were not paid, a toll of one dollar for each coach for every time that it passed over the road. *Ib.*
3. The toll upon passengers in mail-coaches was inconsistent with the compact made between Maryland and Congress, and therefore void. *Ib.*
4. And the toll per coach, of one dollar, is more properly a commutation of tolls than a penalty, and therefore void also. *Ib.*
5. A law of the state of Pennsylvania, that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the relief of Distressed and Decayed Pilots, their widows and children, one half the regular amount of pilotage, is an appropriate part of a general system of regulations on the subject of pilotage, and cannot be considered as a covert attempt to legislate upon another subject, under the appearance of legislating on this one. *Cooley* v. *Board of Wardens*, 299.
6. Nor can the exemption of American vessels engaged in the Pennsylvania coal-trade from the necessity of paying half pilotage, be declared to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of the port of Philadelphia. *Ib.*
7. The law of Pennsylvania is, therefore, not inconsistent with the second and third clauses of the tenth section of the first article of the Constitution of the United States. Imposts, and duties on imports, exports, and tonnage, were understood, when the Constitution was formed, to mean totally distinct things from fees of pilotage. *Ib.*
8. Nor is the law repugnant to the first clause of the eighth section of the first article of the Constitution, because, as the charge is not a duty,

CONSTITUTIONAL LAW—(*Continued*).
import, or excise, there is no necessity for its being uniform throughout the United States. *Ib.*
9. Neither is the law repugnant to the fifth clause of the ninth section of the first article of the Constitution; because it neither gives a preference of one port over another, nor does it require a vessel to pay duties. *Ib.*
10. Upon this point, the act of Congress, passed in 1789, (1 Stat. at L., 54,) recognizing the pilot-laws of the states, is entitled to great weight, as showing that these laws neither levied duties nor gave a preference of one port over another. *Ib.*
11. Moreover, the law is not inconsistent with the third clause of the eighth section of the first article of the Constitution. *Ib.*
12. It is true that the power to regulate commerce includes the regulation of navigation, and that pilot-laws are regulations of navigation, and, therefore, of commerce, within the grant to Congress of the commercial power. *Ib.*
13. But the mere grant of the commercial power to Congress, does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusively in Congress in the former, but not so in the latter class. *Ib.*
14. Although Congress may legislate upon the subject of pilotage throughout the United States, yet they have manifested an intention not to overrule the state laws, except in one instance. The law of Pennsylvania, not being overruled, is not repugnant to the Constitution of the United States. *Ib.*
15. The act of Congress, passed on the 26th of February, 1845, (5 Stat. at L., 726,) extending the jurisdiction of the district courts to certain cases upon the lakes, and navigable waters connecting the same, is consistent with the Constitution of the United States. *Propeller Genesee Chief* v. *Fitzhugh et al.*, 443.
16. It does not rest upon the power granted to Congress to regulate commerce. *Ib.*
17. But it rests upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States, when the Constitution was adopted. *Ib.*
18. The admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different states or with a foreign nation. *Ib.*
19. In the present case of collision between a vessel navigated by steam and a sailing vessel, the evidence shows that the former was in fault. *Ib.*
20. It is the duty of every steamboat to keep a trustworthy person employed as a look-out; and if there be none such, additional to the helmsman, or if he was not stationed in a proper place, or not vigilantly employed in his duty, it must be regarded as *primâ facie* evidence that the collision was the fault of the steamboat. *Ib.*
21. The 34th section of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, meant only to include civil cases at common law, and not criminal offences against the United States. *United States* v. *Reid et al.*, 361.
22. Therefore, the law by which the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the judiciary Act of 1789. *Ib.*

CONTRACTS.
1. Where a defendant, when sued upon a note, set up, as a defense, that the note was given for an illegal consideration, the whole statute must be examined in order to discover whether or not the legislature intended to prevent courts of justice from enforcing contracts relating to the act prohibited. *Harris* v. *Runnels*, 80.
2. Where a statute prohibits an act or annexes a penalty to its commission,

CONTRACTS—(*Continued*).

it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. *Ib.*

3. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain any thing "from which the contrary can be properly inferred." *Ib.*
4. Thus, where a statute of Mississippi declared that slaves should not be brought into the state without a previous certificate signed by two freeholders, with a certificate of the clerk of the county from which they came, certifying that the singers were respectable freeholders; and slaves were brought in without such certificate and sold, the contract is not void, but the purchaser must pay his note given for the purchase-money. *Ib.*
5. Other parts of the statute indicate that the legislature did not intend to declare the contract void; as, for example, a part in which a fine is imposed upon the buyer and also upon the seller. *Ib.*
6. An agreement, whereby the purchaser of a plantation "bound himself to transfer to his son-in-law one half of the plantation, slaves, cattle, and stock, as soon as the son-in-law should pay for one half of the cost of said property, either with his own private means, or with half of the profits of the plantation," was deficient in mutuality. The son-in-law was not bound to render any services nor pay any money. It was a *nude pact*. *Dorsey* v. *Packwood*, 126.
7. It was not an alternative obligation upon the son-in-law, because the election to pay his half out of the profits would have been merely paying with another man's money. *Ib.*
8. Even if the agreement possessed mutuality, there was no performance, or offer of performance by the son-in-law for twenty-seven years. *Ib.*
9. Moreover, fifteen years after the agreement, when the plantation was likely to prove a ruinous purchase, the son-in-law abandoned and released all his claim. *Ib.*
10. Where persons were indebted to a bank and gave their promissory notes for the amount of debt, the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were questions for the jury. *Lyman* v. *Bank of United States*, 225.
11. All the notes having been paid except the last, and the action not being brought upon the note but upon the original consideration, the bank was not bound to bring the prior notes into court: the presumption of law was, they had been given up by the holder at the time of payment. If the fact was not so, the burden lay upon the defendants to show it. *Ib.*
12. So also, a part of the consideration being the purchase of real estate, the bank was not bound to prove the execution and delivery of proper conveyances to the defendants. Having given their notes for the purchase-money, the court was bound to presume that they were satisfied with the conveyances. If not, it was their duty to show it. *Ib.*
13. Where the bank had become insolvent and had made an assignment of its effects to trustees for the benefit of its creditors, the bank was allowed to sue in its own name at the instance, and for the benefit of creditors, and the case was the same as if the law permitted the suit to be brought, and the same had been brought, in the name of such trustees. *Ib.*
14. Although the bank had indorsed a note amongst its other assets to its trustees, yet under the circumstances it could maintain a suit upon the note, because.

Where a party who is the holder of a note has transferred it for purposes of collection, and it is not paid but is found in the possession of the original holder, he can recover, as he is remitted to his original rights, notwithstanding the indorsement; and if the note is not paid, the plaintiff may give it up and recover upon the original consideration. *Ib*

15. Before the defendants became indebted to the bank, the bank had made a compromise of certain claims, which, amongst others, were the sub-

CONTRACTS—(*Continued*).
ject of the sale by the bank and purchase by the defendants. Two of the defendants had knowledge of the conditions of this compromise, and their knowledge must be considered as extending to the other defendants. It was a question for the jury to determine what the defendants purchased. *Ib.*

COSTS.
1. The surety for the appellants from a decree in admiralty gave bond to pay all costs and damages which might be adjudged by this court. *Ives* v. *Merchants Bank of Boston*, 159.
2. This court having affirmed the decree of the Circuit Court with costs and six per cent. damages, judgment was entered upon the receipt of the mandate by the Circuit Court, for the amount of the original judgment together with the amount of costs and damages calculated up to that day; and execution was awarded. *Ib.*
3. Under this execution, the vessel, which had been attached under the libel, was sold for less than this aggregate amount. *Ib.*
4. The surety is not entitled to have a relative proportion of the proceeds of sale applied to the reduction of his bond, but is responsible upon it to the entire amount. *Ib.*
5. By the 26th section of the Judiciary Act, the courts have power to assess damages upon bonds, &c., and to render judgment for so much as is due according to equity, in cases of default or confession or demurrer. This section does not apply to a case heard on agreed facts. *Ib.*
6. But then when the case heard on agreed facts was the case of an appeal-bond, it was proper for the court to give judgment for the penalty of the bond (being less than the judgment under the mandate) and allow interest from the date of the institution of the suit, although the amount to be paid in this way would exceed the penalty of the bond. *Ib.*

CRIMINAL CASES.
See EVIDENCE.

CUMBERLAND ROAD.
1. Under an act passed by the State of Maryland, and an assent given to it by Congress, no toll could be levied for passing over the Cumberland Road, upon coaches which carried the United States mail. *Achison* v. *Huddleson*, 293.
2. In 1843, the legislature of Maryland passed an act imposing a toll upon all passengers in mail-coaches, and if it were not paid, a toll of one dollar for each coach for every time that it passed over the road. *Ib.*
3. The toll upon passengers in mail-coaches was inconsistent with the compact made between Maryland and Congress, and therefore void. *Ib.*
4. And the toll per coach, of one dollar, is more properly a commutation of tolls than a penalty, and therefore void also. *Ib.*

DEED.
1. A deed to trustees and their successors in trust to sell and convey a fee-simple absolute, vested such an estate in them without the insertion of the word "heirs" in the deed. *Neilson* v. *Lagow*, 98.
2. Where a mortgage was executed by a husband, his own name only being used in the body of the instrument, but it was signed by his wife also, who relinquished her right of dower, and made her acknowledgment in an after part of the instrument; and there is sufficient evidence, from an inspection of the whole instrument, to believe that the intention of the parties was to consider the whole paper as forming one assurance, the wife will be barred of her dower, as far as the mortgage is concerned. *Dundas* v. *Hitchcock*, 257.
3. Where a statute requires a private examination of the wife, to ascertain that she acts freely, and not by compulsion of her husband, but prescribes no precise form of words to be used in the certificate, it is sufficient if the words of the acknowledgment have the same meaning, and are in substance the same, with those used in the statute. *Ib.*
4. Where a widow was allowed one year, after probate of her husband's will, to elect whether to take under it or not, and by the will she was sole devisee for herself and children, and before the expiration of the year she released to the mortgagee all her estate, right, and claim to the mortgaged premises, styling herself widow and sole devisee, she cannot

DEED—(*Continued*).
afterwards avail herself of her right of election, and set up a claim to dower, outside of the will; she is estopped by her deed. *Ib.*
DEMURRER.
See PRACTICE.
DUTIES.
1. The Tariff Act, passed in 1846, (9 Stat. at Large, p. 44,) enacted duties on glass, as follows, viz.: "Schedule B. Forty per centum ad valorem, Glass cut. Schedule C. Thirty per centum ad valorem, Glass tumblers, plain, moulded, or pressed; not cut or punted." *Binns* v. *Lawrence*, 9.
2. The following classes of tumblers fall within Schedule B, and are chargeable with a duty of forty per centum, viz.:
3. Glass tumblers, the entire surface of the bottom of which had been smoothed by the glass-cutter or grinder, previous to their importation into the United States. *Ib.*
4. Glass tumblers, on the sides of which ornamental figures had been engraved by the glass-cutter or engraver, previous to their importation into the United States. *Ib.*
EVIDENCE.
1. When the question before a court of equity is, whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage. *Russell* v. *Southard*, 139.
2. Upon such a question as this, depending upon the general principles of equity jurisprudence, this court does not hold itself bound by the decisions of the highest court of the State in which the land in question was, but will be governed by its own view of those principles. *Ib.*
3. The decisions of the courts of Kentucky examined. *Ib.*
4. Such evidence is admissible when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale. *Ib.*
5. All the notes having been paid except the last, and the action not being brought upon the note but upon the original consideration, the bank was not bound to bring the prior notes into court; the presumption of law was, they had been given up by the holder at the time of payment. If the fact was not so, the burden lay upon the defendants to show it. *Lyman* v. *Bank of United States*, 225.
6. So also, a part of the consideration being the purchase of real estate, the bank was not bound to prove the execution and delivery of proper conveyances to the defendants. Having given their notes for the purchase-money, the court was bound to presume that they were satisfied with the conveyances. If not, it was their duty to show it. *Ib.*
7. Where goods on board of a ship received a damage which must necessarily have accrued during the voyage, the *onus probandi* is upon the master and owners to show that it was occasioned by one of the perils of navigation within the exception of the bill of lading. *Rich* v. *Lambert*, 347.
8. For evidence of marriage and bigamy, see *Gaines* v. *Relf et al.*, 472.
9. Where two persons were jointly indicted for an offence committed against the United States, viz., a murder committed upon the high seas, and were tried separately, it was not competent for the person first tried to call the other as a witness in his behalf. *United States* v. *Reid et al.*, 361.
10. The trial took place in Virginia, and the evidence would have been competent under a law of Virginia passed in 1849. *Ib.*
11. By the 34th section of the Judiciary Act of 1789, declaring that the laws of the several States shall be regarded as rules of decision in trial at common law in the courts of the United States, meant only to include civil cases at common law and not criminal offenses against the United States. *Ib.*
12. The law by which the admissibility of testimony in criminal cases must be determined is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789. *Ib.*
13. By the strict rules of the common law, a bond of conveyance might be

EVIDENCE—(*Continued*).
adduced in support of a possession of twenty years, held in pursuance of the bond to corroborate such possession against an action founded upon the mere right of entry in the obligor or his heirs. *Sargeant* v. *State Bank of Indiana*, 371.

14. But when the bond was given to carry out the policy of a state in establishing the seat of justice for a new county, it was proper to allow it to be given to the jury as competent evidence to be weighed by them in expounding the provisions of the statute. *Ib.*

15. Where a court, acting under a state law, appointed a commissioner to convey the legal title, after the death of the obligor of the bond, and the record of that court said that proper and legal notices had been given, it was not competent to offer evidence in another court for the purpose of showing that legal notice had not been given. *Ib.*

16. For what was proper evidence to go to the jury in a case where a marine brought a suit against an officer of the navy for improper punishment, see "NAVY OF THE UNITED STATES."

EXCEPTIONS.
See PRACTICE.

EXECUTION.
See JUDGMENT.

HUSBAND AND WIFE.
See DEED.

INJUNCTION BOND.
See CHANCERY.

JUDGMENT.

1. In Louisiana, the Supreme Court of the State reviews the questions of fact as well as of law which are brought up from the courts below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given. *Parke* v. *Turner, et al.*, 39.

2. But when a case is brought before this court by a writ of error, it can only review questions of law; and, therefore, where the validity of a verdict of a jury is brought into question, the practice which prevails in the state courts of Louisiana is inapplicable in the courts of the United States. *Ib.*

3. Hence, where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and, the court then gave judgment for the amount of the note, this would have been adjudged to be a cause of reversal of the judgment by the Supreme Court of the state, but cannot be so held by this court. *Ib.*

4. The sufficiency of the verdict must be judged by the rules of the common law and the statutes of the United States, and not by the laws and practice of Louisiana. The act of 1824 (4 Stat. at L., 62) does not include such a case. *Ib.*

5. By the common law, although a judgment in such a case might not have been strictly proper, yet under a power of amending the verdict, the judgment can stand, because the plea having been that no consideration was given for the note and the verdict being for the plaintiff, it necessarily found that the whole amount was due. *Ib.*

6. The 32d section of the Judiciary Act provides for this case by enjoining upon this court to disregard niceties of form, and so it was decided in 16 Pet., 321. *Ib.*

7. The Constitution of Louisiana requires the state judges to give reasons for their decisions; but this is not operative upon the judges of the Circuit Court of the United States. On the contrary, their reasons form no part of the record when the case is brought up to this court. *Ib.*

8. Prior to the revised code of Virginia in 1819, the lien created upon land by a judgment was the same as in England. In both countries the following rules prevailed:

1. That the lien of the judgment resulted entirely from the right of the plaintiff to sue out an *elegit*, and charge the goods and the moiety of the lands of the debtor.

JUDGMENT—(*Continued*).

2. That the election so to charge them by an *elegit* executed, discharges from liability the body of the defendant and the remaining moiety of the lands.
3. That the *capias ad satisfaciendum* executed, is, *pro tanto*, a satisfaction of the judgment which releases *proprio vigore* any previous lien upon the lands and inhibits all recourse against the goods and chattels or lands of the debtor, with the exceptions of the instances of death whilst charged in execution, or of an escape from prison, or a rescue. *Snead* v. *McCoull*, 407.

9. A discharge under the act of Congress for the relief of persons imprisoned for debt (2 Stat. at L., 4, § 2,) did not restore the lien originally created by the judgment, and waived by issuing a *ca. sa.* *Ib.*
10. In 1819, the state of Virginia revised her code. By a part which went into operation on the 1st of January, 1820, it was enacted that, thereafter, the issuance of a *ca. sa.* should constitute a lien upon lands. *Ib.*
11. But as it did not relate to past liens, the purchaser of a lien created under the Revised Code had a good title when compared with a claimant under the lien which existed in 1817, but which had been waived by issuing a *capias ad satisfaciendum.* *Ib.*
12. Where an appeal was taken in a common-law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error to bring the case up to this court, it was error in the court below to quash the execution and supersede the judgment. *Saltmarsh* v. *Tuthill*, 387.
13. The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party or the court. *Ib.*
14. The question reserved is whether this court has the power to issue a mandamus to the judge below, commanding him to set aside the supersedeas and order the clerk to issue an execution. *Ib.*

JURISDICTION.

1. Where a bank was chartered and its charter repealed by the legislature of a territory, the question of the validity of the repealing act cannot be brought before this court under the twenty-fifth section of the Judiciary Act. *Miners Bank* v. *State of Iowa*, 1.
2. The power of review is confined by that section to certain laws passed by states, and does not extend to those passed by Territorial Legislatures. *Ib.*
3. Where the highest court of a state affirmed the judgment of the court below, in consequence of an equal division between the judges thereof, such judgment of affirmance is considered, when the case is brought here under the twenty-fifth section of the Judiciary Act, as an affirmance of the rulings of the court below. *Lessieur* v. *Price*, 60.
4. The act of Congress passed on the 3d of March, 1845, (5 Stat. at L., 736,) forbids the transportation of letters, packages, or other mailable matter, except such as may have relation to some part of the cargo or some article at the same time conveyed in a stage or other vehicle, when such transportation is over a mail route. *United States* v. *Bromley*, 88.
5. A letter or order, although unsealed, directing tobacco to be sent by the return boat as a commercial transaction, was within the prohibition of the statute. *Ib.*
6. Under the act of Congress passed on the 31st of May, 1844, (5 Stat. at L., 658,) directing that final judgments in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws may be reviewed in this court without regard to the sum or value in controversy, this court can exercise jurisdiction. The revenue of the Post-Office Department is a part of the revenue of the government. *Ib.*
7. The act of Congress, passed on 1st May, 1820, (3 Stat. at L., 568,) enacts, "That no land shall be purchased on account of the United States, except under a law authorizing such purchase." *Neilson* v. *Lagow*, 98.
8. Where land was conveyed to trustees, for the purpose of paying a debt due to the United States, and the highest court of a state decided against a title set up under that deed, upon the ground that the deed

JURISDICTION—(*Continued*).
was in violation of the act of Congress, this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review that decision. *Ib.*

9. Where the grounds of the decision of the Supreme Court of the state are not stated in the record, this court will look into the bill of exceptions taken in the court of original jurisdiction. to see what points were carried up to the Supreme Court, and whether they were necessarily involved in the judgment of the Supreme Court. *Ib.*
10. In 1839, a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic." *Williams's Trustee* v. *Oliver*, 111.
11. Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico, under General Mina, in 1816. See the case of *Gill* v. *Oliver's Executors*, 11 How., 529. *Ib.*
12. The proceeds of one of the shares of this company were claimed by two parties; one as being the second permanent trustee of the insolvent owner of the share, and the other as being the assignee of the first permanent trustee. *Ib.*
13. The Court of Appeals of Maryland decided that the plaintiff, viz., the second permanent trustee, did not take the claim under the insolvent laws of Maryland. *Ib.*
14. This decision is not reviewable by this court, under the 25th section of the Judiciary Act; and the case is similar to that of *Gill* v. *Oliver's Executors*, 11 How., 529. *Ib.*
15. Nor does jurisdiction accrue in this case in consequence of the additional fact that the legislature of Maryland passed a law curing certain defects in the assignment to Oliver, the validity of which law was drawn into question, as impairing the obligation of a contract; because, if there had been no such law, the decision of the state court would have been the same. *Ib.*
16. The former decisions of this court respecting its jurisdiction under the 25th section of the Judiciary Act, examined and explained. *Ib.*
17. In order to bring a case within the reviewing power of this court, as prescribed by the 25th section of the Judiciary Act, it is necessary that the record should show that the point giving jurisdiction to this court, was raised and decided in the state court. *Grand Gulf Railroad and Banking Co.* v. *Marshall*, 165.
18. The preceding decisions upon this subject referred to.
Hence, where it appears from the record that the decision of the state court turned upon the construction and not the validity of a state law, and that the question of its validity was not raised, this court has no jurisdiction. *Ib.*
19. The 13th and 30th section of the act of Congress, passed in 1825, (4 Stat. at L., 105–111), forbid a writing or memorandum from being written on a newspaper, or other printed paper, pamphlet, or magazine, and transmitted by mail. *Teal* v. *Felton*, 284.
20. The Postmaster-General directed that if the wrappers of newspapers, pamphlets, or magazines, should be found to contain any manuscript or memorandum of any kind, either written or stamped, or marks or signs made in any way, by which information shall be asked or communicated, it should be charged with letter-postage. *Ib.*
21. The part of the order relating to marks or signs was not justified by the law. *Ib.*
22. Hence, where a postmaster refused to deliver a newspaper upon which there was an "initial," unless the person to whom it was addressed would pay letter postage, he was properly held liable in an action for trover. It was not a case calling for discretion in the discharge of his duties. The law, and not the instructions of a department, furnishes the guide to officers. *Ib.*
23. The state court has jurisdiction to try the case. State courts had jurisdiction over all cases of trover, and the Constitution of the United States did not abrogate their jurisdiction in such cases as the present. *Ib.*

JURISDICTION—(*Continued*).

24. Where several owners of a cargo filed libels *in rem* against the vessel for damages done to the goods, and these libels were consolidated by order of the court, which afterwards decreed damages in favor of the libellants, in some cases to more and in some to less than $2.000, those cases where the damages are less than that sum must be dismissed, on an appeal to this court, for want of jurisdiction. *Rich* v. *Lambert*, 347.
25. Where the highest court of a state decided in favor of a defendant who pleaded his discharge under the bankrupt law of the United States, and the case was brought to this court under the 25th section of the Judiciary Act, this court has no jurisdiction. *Linton* v. *Stanton*, 423.
26. It would have been otherwise if the decision had been adverse to the exemption claimed under the law of Congress. *Ib.*
27. Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section. The decision of a state court upon their effect cannot be reviewed by this court. *Ib.*

For Jurisdiction in Admiralty, see ADMIRALTY.

JURY.

1. Where persons were indebted to a bank, and gave their promissory note for the amount of the debt, the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were questions for the jury. *Lyman* v. *United States Bank*, 225.
2. Before the defendants became indebted to the bank, the bank had made a compromise of certain claims, which, amongst others, were the subject of the sale by the bank and purchase by the defendants. Two of the defendants had knowledge of the conditions of this compromise, and their knowledge must be considered as extending to the other defendants. It was a question for the jury to determine what the defendants purchased. *Ib.*
3. Without laying down any general rule, how far the affidavits of jurors impeaching their verdict ought to be received, it is decided that the affidavits of two jurors, stating that, while impanneiled, they read a newspaper report of the preceding evidence, but which had no influence upon their verdict, were not sufficient ground for a new trial. *United States* v. *Reid*, 361.
4. For what was proper evidence to go to the jury, in a suit brought by a marine against an officer of the navy for improper punishment, see NAVY OF THE UNITED STATES.

LANDS—PUBLIC.

1. Where a settler upon the public lands had a pre-emption right to them and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase-money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law. *Thredgill* v. *Pintard*, 24.
2. This court again decides, as in 9 How., 127, 280, and 10 How., 609, that, with respect to the tract of country between the Mississippi and Perdido rivers, south of the thirty-first degree of north latitude, the authorities of Louisiana had no right to make grants of land after the time of signing the treaty, by which it was ceded to Great Britain. *Montault* v. *The United States*, 47.
3. That treaty having been signed on the 10th of February, 1763, a grant of the land in the above tract of country, issued by the French Governor of Louisiana, on the 11th March, 1763, was void. *Ib.*
4. Under the act of the 10th of February, 1815, (3 Stat. at L., 211,) for the relief of the inhabitants of New Madrid County, who suffered by earthquakes, a notice of location given to the Surveyor-General was not sufficient to vest the title in the applicant; the title was not complete until the plat and certificate of survey were filed and recorded in the Recorder's office. An exchange of titles then at once took place. The

LANDS—PUBLIC—(*Continued*).

applicant became entitled to his new location, and the land which he abandoned reverted to the United States. *Lessieur* v. *Price*, 30.

5. But if the claim, under a New Madrid certificate, be prosecuted by an agent without the knowledge of the principal, the title to the new land cannot vest in the principal until he assents to and adopts the proceedings of his agent; because, by such assent, he relinquishes the title to the land which he first owned. *Ib.*
6. In 1820, Congress granted to the state of Missouri, (3 Stat. at L., 547,) four sections of land, which should, "under the direction of the legislature, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature may select, on any of the public lands of the United States: Provided, that such locations shall be made prior to the public sale of the lands of the United States surrounding such location." *Ib.*
7. This grant did not need an application to an officer of the United States for permission to locate it. When the legislature selected the land, and gave notice thereof to the Surveyor-General and Recorder of the Land-District, the land became identified, and the title complete. *Ib.*
8. In making the selection, the legislature had a right to include fractional parts of sections, until the entire amount of four sections was made up. *Ib.*
9. The time at which the title of the State became complete, was the day on which the Governor notified the Surveyor-General of the selection of the land by commissioners who had been appointed for that purpose. *Ib.*
10. An historical account given as to what officer in Louisiana possessed the power to grant part of the king's domain. *The United States* v. *Moore*, 209.
11. In September, 1797, Morales, who was intendant, had not the power. And a receipt of that date, given by him for the purchase-money of lands sold, could convey no title. *Ib.*
12. By the regulations of O'Rielly, made in 1770, the front proprietors of land upon the Mississippi were bound to make mounds or levees, and also to clear and ditch the whole front of the depth of two arpents, within three years from the date of their purchases. In default thereof, the land reverted to the king. *Ib.*
13. This condition not having been complied with in the present case, and the alleged proprietor not having asserted any claim from 1797 to 1835, the presumption is that he surrendered his purchase and had his money refunded. *Ib.*
14. The claim is also barred by lapse of time. *Ib.*
15. The District Court decreed that "in case any of the lands claimed by the petitioner should have been sold by the United States, he, the petitioner, should be authorized to enter, in any land-office in the state of Louisiana, a like quantity of public lands." *Ib.*
16. This decree was erroneous. The act of 1844 revived the act of 1824, but did not revive the act of 1828; and the act of 1824 required the grantees of the United States to be made parties in order that they might come in and defend their title. It also intended that these grantees should produce their titles, so that the court might ascertain their boundaries and quantities, and decree accordingly. But in the decree in question, this was not done. *Ib.*
17. The act of Congress passed on 26th May, 1824, enabling claimants to land in Missouri and Arkansas, to try their titles, was revived by the act of 17th June, 1844, and extended to Louisiana. *The United States* v. *Porche*, 426.
18. By the fifth section of the act of 1824, the claimants were required to present their claims within two years from the passage of the law. *Ib.*
19. This section being revived by the act of 1844, claimants were required by the latter act to present their claims before the 17th of June, 1846. *Ib.*
20. Acts supplementary to that of 1824 were not revived by the act of 1844. Nothing was revived except the original act. *Ib.*

LANDS—PUBLIC—(*Continued*).
21. The District Court of Louisiana had no jurisdiction, therefore, over a case where the petition was not presented until the 8th March, 1848. *Ib.*
22. The ninth section of the act of 1824 does not prevent the United States from appealing, where a claim is for less than one thousand acres. *Ib.*
23. In 1791 Miro granted an order of survey for some land in Louisiana. *The United States* v. *Simon*, 433.
24. During the ten years that the province remained in the hands of Spain, the grantee neither had a survey, nor took possession, nor did any other act showing an intention of fulfilling the conditions upon which the grant was made. *Ib.*
25. The regulations of Morales required parties so situated to have their titles made out. In case of neglect the Spanish government was under no obligation to grant the land, and therefore the claim is not good against the United States. *Ib.*
26. A paper, offered as a grant from the Spanish authorities for some land in Louisiana, decided to be incomplete, and nothing more than the preamble to Spanish grants. *The United States* v. *Le Blanc*, 435.
27. Moreover, there is no evidence that the claimants are the heirs of the grantee, nor that any one claiming under him ever took possession or exercised any act of ownership from 1777 to 1846. *Ib.*
28. This court again decides, as in 9 How., 127, and 10 How., 609, that by the act of 1824, a claimant of land in Louisiana must aver and prove his residence in that Province at the date of the grant, or on or before the 10th of March, 1804. *United States* v. *Castant*, 437.
29. Also, that the act was not intended to provide for perfect grants. Over such, the District Court has no jurisdiction. *Ib.*
30. A decree of the court was erroneous, authorizing the claimants to enter public land, upon the ground that the United States had sold what was covered by the claim, when there was no evidence that the United States had made any such sales. *Ib.*

LAND, PURCHASED FOR THE UNITED STATES.
1. The act of Congress, passed on 1st May, 1820, (3 Stat. at L., 568,) enacts, "That no land shall be purchased on account of the United States, except under a law authorizing such purchase." *Neilson* v. *Lagow*, 98.
2. Where land was conveyed to trustees, for the purpose of paying a debt due to the United States, and the highest court of a state decided against a title set up under that deed, upon the ground that the deed was in violation of the act of Congress, this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review that decision. *Ib.*
3. The deed to the trustees being an authority to sell so much of the land as might be necessary to pay the debt, this was not such a purchase as is forbidden by the statute. Nor does the act of Congress prohibit the acquisition, directly, by the United States, of the legal title to land, when it is taken by way of security for a debt. *Ib.*
4. Where the trustees purchased, and paid for out of money belonging to the United States, the equitable title, where the legal title to the land had been previously conveyed to them, the acquisition of this equitable title was nothing more than relieving the land of an incumbrance, and was not such a purchase as was forbidden by the statute. *Ib.*

LIEN OF A JUDGMENT.
See JUDGMENT.

LIMITATIONS, STATUTE OF.
Where a mortgage is payable by instalments, some of which were not due at the time of filing the bill, the statute of limitations will not apply. *Union Bank of Louisiana* v. *Stafford*, 328.

LOUISIANA.
1. The practice of the Louisiana courts does not govern the courts of the United States in cases where the state court exercises its appellate power in reviewing matters of fact upon a writ of error. *Parks* v. *Turner et al.*, 39.
2. By the Louisiana practice, if neither party claims a trial by jury, the whole case is decided by the court; matters of fact as well as of law. *Bond* v. *Brown*, 254.

LOUISIANA—(*Continued*).
3. Where, upon such a trial, no testimony is objected to, and it does not appear that any question of law arose or was decided, and the case is brought to this court by writ of error, the judgment of the court below must be affirmed. *Ib.*
4. The decision of the court below, upon questions of fact, is as conclusive upon this court as the verdict of a jury would be. *Ib.*
5. The 25th section of the law of Louisiana incorporating the Union Bank of Louisiana, declares that in all hypothecary contracts and obligations entered into by any married individual, with the bank, it shall be lawful for the wife to unite with him; and in such case the property of the wife, whether dotal or of any other description, shall be affected by the contract. *Union Bank of Louisiana* v. *Stafford*, 328.
6 Where a wife united with her husband in mortgaging property to the bank, the mortgage was good under this clause. *Ib.*
7. A sale of the mortgaged property for a twelve months' bond under an order of seizure and sale was not an ovation or extinguishment of the original mortgage. *Ib.*

MARRIAGE.
Evidence of MARRIAGE AND BIGAMY, see *Gaines* v. *Relf et al.*, 472.

MISSISSIPPI.
1. Where a defendant, when sued upon a note, set up, as a defense, that the note was given for an illegal consideration, the whole statute must be examined, in order to discover whether or not the legislature intended to prevent courts of justice from enforcing contracts relating to the act prohibited. *Harris* v. *Runnels*, 80.
2. Where a statute prohibits an act, or annexes a penalty to its commission, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. *Ib.*
3. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything "from which the contrary can be properly inferred." *Ib.*
4. Thus, where a statute of Mississippi declared that slaves should not be brought into the state without a previous certificate signed by two freeholders, with a certificate of the clerk of the county from which they came, certifying that the signers were respectable freeholders; and slaves were brought in without such certificate and sold, the contract is not void, but the purchaser must pay his note given for the purchase-money. *Ib.*
5. Other parts of the statute indicate that the legislature did not intend to declare the contract void; as for example, a part in which a fine is imposed upon the buyer and also upon the seller. *Ib.*

MISSOURI.
See LANDS, PUBLIC.

MORTGAGE.
1. Whether a deed was a mortgage or a conditional sale, see *Russell* v. *Southard*, 139.
2. See also for other principles, title CHANCERY.
3. Where slaves were mortgaged, see CHANCERY.
4. Acknowledgment by wife, see DEED.

NAVY OF THE UNITED STATES.
1. Under the Act of Congress, passed on the 2d of March, 1837, (5 Stat. at L., 153,) the commander of a squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it. See 7 How., 89. *Dinsman* v. *Wilkes*, 390.
2. The decision of this question, by the commander, was final and conclusive; and if the marine did not conform to it, he was liable to punishment. *Ib.*
3. So, too, the commander was the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination; and he is

NAVY OF THE UNITED STATES—(*Continued*).
not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object. *Ib.*
4. But at the same time he is bound never to inflict any severer punishment than he conscientiously believes to be necessary to maintain discipline, and due subordination in his ships. *Ib.*
5. The question being one of motives, the jury are to judge whether he was actuated alone by an upright intention to maintain the discipline of his command, or whether punishment was in any manner or degree increased or aggravated by malice or vindictive feeling. *Ib.*
6. In deciding this question, the jury are to take into consideration all the circumstances of the case. *Ib.*
7. A letter from one of the officers of the squadron to the commander, upon the temper and disposition of the marines in one of the ships, was proper evidence for the jury. *Ib.*
8. But the proceedings of a court-martial, for the trial of men for offenses committed long before, was not evidence, because it did not show the spirit existing at that time. *Ib.*
9. Nor was evidence admissible, of the flogging of two other persons merely by the authority of the commander without a court-martial. *Ib.*
10. Nor was evidence admissible, that the commander refused to give to the marine a certificate, under the act of Congress before referred to; because the commander claimed to hold him by voluntary enlistment. *Ib.*
11. In order to show the motive by which the commander was actuated in confining the marine in a fort, on shore, it was admissible for the commander to offer evidence that merchant seamen from American ships were confined there, and also for the marine to offer evidence to rebut it. *Ib.*

NEGROES AND SLAVES.
When mortgaged, see CHANCERY.

NEW MADRID CERTIFICATE.
See LANDS, PUBLIC.

NEW TRIALS.
Without laying down any general rule, how far the affidavits of jurors impeaching their verdict ought to be received, it is decided that the affidavits of two jurors, stating that, whilst impanneled, they read a newspaper report of the preceding evidence, but which had no influence upon their verdict, were not sufficient ground for a new trial. *United States* v. *Reid et al.*, 361.

PILOTAGE.
1. A law of the State of Pennsylvania, that a vessel which neglects or refuses to take a pilot, shall forfeit and pay to the master-warden of the pilots, for the use of the society for the relief of distressed and decayed pilots, their widows and children, one half the regular amount of pilotage, is an appropriate part of a general system of regulations on the subject of pilotage, and cannot be considered as a covert attempt to legislate upon another subject, under the appearance of legislation on this one. *Cooley* v. *Board of Wardens, &c.*, 299.
2. Nor can the exemption of American vessels, engaged in the Pennsylvania coal trade, from the necessity of paying half pilotage, be declared to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of the port of Philadelphia. *Ib.*
3. The law of Pennsylvania is, therefore, not inconsistent with the second and third clauses of the tenth section of the first article of the Constitution of the United States. Imposts, and duties on imports, exports and tonnage, were understood, when the Constitution was formed, to mean totally distinct things from fees of pilotage. *Ib.*
4. Nor is the law repugnant to the first clause of the eighth section of the first article of the Constitution, because, as the charge is not a duty, import, or excise, there is no necessity for its being uniform throughout the United States. *Ib.*
5. Neither is the law repugnant to the fifth clause of the ninth section of the first article of the Constitution; because it neither gives a preference of one port over another, nor does it require a vessel to pay duties. *Ib.*

PILOTAGE—(*Continued*).

6. Upon this point, the act of Congress, passed in 1789, (1 Stat. at L., 54,) recognizing the pilot laws of the States, is entitled to great weight, as showing that these laws neither levied duties, nor gave a preference of one port over another. *Ib.*
7. Moreover, the law is not inconsistent with the third clause of the eighth section of the first article of the Constitution. *Ib.*
8. It is true that the power to regulate commerce includes the regulation of navigation, and that pilot laws are regulations of navigation, and, therefore, of commerce, within the grant to Congress of the commercial power. *Ib.*
9. But the mere grant of the commercial power to Congress does not forbid the States from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in Congress, in the former, but not so in the latter class. *Ib.*
10. Although Congress may legislate upon the subject of pilotage, throughout the United States, yet they have manifested an intention not to overrule the State laws, except in one instance. The law of Pennsylvania, not being overruled, is not repugnant to the Constitution of the United States. *Ib.*

POSTAGE AND POST-OFFICE.

1. The act of congress passed on the 3d of March, 1845, (5 Stat. at L., 736,) forbids the transportation of letters, packages, or other mailable matter, except such as may have relation to some part of the cargo, or some article at the same time conveyed in a stage or other vehicle, when such transportation is over a mail route. *United States* v. *Bromley*, 88.
2. A letter or order, although unsealed, directing tobacco to be sent by the return boat, as a commercial transaction, was within the prohibition of the statute. *Ib.*
3. Under the act of Congress, passed on the 31st of May, 1844, (5 Stat. at L., 658,) directing that final judgments in a Circuit Court in any civil action brought by the United States, for the enforcement of the revenue laws, may be reviewed in this court, without regard to the sum or value in controversy, this court can exercise jurisdiction. The revenue of the Post-Office Department is a part of the revenue of the government. *Ib.*
4. Where the suit was upon a postmaster's bond, and the district-attorney offered to read in evidence an authentic copy thereof, which the court refused to receive, this refusal was erroneous. *United States* v. *Wilkinson*, 246.
5. Although the presumption of law is in favor of the correctness of the court below, where no reasons appear, yet, in this case, the record itself shows the error. If there was any fact which made the copy of the bond inadmissible, it ought to have been shown by the defendants, and set forth in the exception. *Ib.*
6. The 13th and 30th sections of the act of Congress, passed in 1825, (4 Stat. at L., 105–111,) forbid a writing or memorandum from being written on a newspaper, or other printed paper, pamphlet, or magazine, and transmitted by mail. *Teal* v. *Felton*, 284.
7. The Postmaster-General directed that if the wrappers of newspapers, pamphlets, or magazines, should be found to contain any manuscript or memorandum of any kind, either written or stamped, or marks or signs made in any way, by which information shall be asked or communicated, it should be charged with letter postage. *Ib.*
8. The part of the order relating to marks and signs was not justified by law. *Ib.*
9. Hence, where a postmaster refused to deliver a newspaper upon which there was an "initial," unless the person to whom it was addressed would pay letter postage, he was properly held liable in an action for trover. It was not a case, calling for discretion in the discharge of his duties. The law, and not the instructions of a department, furnishes the guide to officers. *Ib.*
10. The State court had jurisdiction to try the case. State courts had juris-

POSTAGE AND POST-OFFICE—(*Continued*).
diction over all cases of trover, and the Constitution of the United States did not abrogate their jurisdiction in such cases as the present. *Ib.*

PRACTICE.

1. Where a motion is made to docket and dismiss a case under the 43d rule of this court, the certificate of the clerk of the court below, upon which the motion is founded, must state the names of the parties to the suit. It is not enough to say, Joseph W. Clark and others. The names of the "others" ought to be set forth. *Smith* v. *Clark et al.*, 21.
2. The practice of the Louisiana courts does not govern the courts of the United States in cases where the state court exercises its appellate power in reviewing matters of fact upon a writ of error. *Parks* v. *Turner et al.*, 39.
3. A motion in this court after the decision of the case here, to set aside the decree and remand the case to the Circuit Court for further preparation and proof, upon the ground that new and material evidence has been discovered since the trial of the case in that court, cannot be sustained. *Russell* v. *Southard*, 139.
4. Affidavits of newly-discovered testimony cannot be received. This court must affirm or reverse upon the case as it appears in the testimony. *Ib.*
5. The established chancery practice is so, and if it were not, the act of Congress, passed on March 3, 1803, would be decisive of the question. *Ib.*
6. The surety for the appellants from a decree in admiralty, gave bond to pay all costs and damages which might be adjudged by this court. *Ives* v. *Merchants Bank of Boston*, 159.
7. This court having affirmed the decree of the Circuit Court with costs and six per cent. damages, judgment was entered upon the receipt of the mandate by the Circuit Court, for the amount of the original judgment together with the amount of costs and damages calculated up to that day; and execution was awarded. *Ib.*
8. Under this execution, the vessel, which had been attached under the libel was sold for less than this aggregate amount. *Ib.*
9. The surety is not entitled to have a relative proportion of the proceeds of sale applied to the reduction of his bond, but is responsible upon it to the entire amount. *Ib.*
10. By the 26th section of the Judiciary Act, the courts have power to assess damages upon bonds, &c., and to render judgment for so much as is due according to equity, in cases of default or confession or demurrer. This section does not apply to a case heard on agreed facts. *Ib.*
11. But then when the case heard on agreed facts was the case of an appeal-bond, it was proper for the court to give judgment for the penalty of the bond (being less than the judgment under the mandate) and allow interest from the date of the institution of the suit, although the amount to be paid in this way would exceed the penalty of the bond. *Ib.*
12. The proper condition of an injunction-bond is "to answer all damages which the defendant may sustain in consequence of the injunction being granted." *Bein* v. *Heath*, 168.
13. Where a bond was given in order to obtain an injunction to suspend proceedings, under an order of seizure and sale, and the condition was that the principal and sureties "would pay to the plaintiff in the case of seizure and sale, all such damages as he may recover against us, in case it should be decided that the said injunction was wrongfully obtained," this bond was irregular. *Ib.*
14. It conformed to the Louisiana practice, by which, if an injunction be dissolved, judgment is at once given for the debt, interest, and damages, against the principal and sureties in the injunction-bond. *Ib.*
15. But the equity practice in the courts of the United States is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress; and one of those rules is, that, when not otherwise directed, the practice in the High Court of Chancery, in England, shall be followed. *Ib.*
16. According to these rules, a court of equity cannot, when it dissolves an injunction, give judgment, at the same time, against the obligors. It merely orders the dissolution, leaving the obligee to proceed at law

PRACTICE—(*Continued*).
against the sureties, if he sustains damage from the delay occasioned by the injunction. *Ib.*

17. Where a bill in chancery states that, at an execution sale, which was alleged to have been open and fair, the complainant purchased, for the sum of $600, certain promissory notes secured by mortgage, amounting in the whole to $260,000, and the bill was demurred to, and the demurrer sustained by the Circuit Court, this judgment must be reversed. *Erwin* v. *Parham*, 197.
18. Mere inadequacy of price does not, of itself, furnish a sufficient reason for dismissing the bill, or deciding that the complaint was entitled to no relief whatever. *Ib.*
19. Where the bill of exceptions purported to have been taken at April term, 1848, but the record showed that, at that time, no suit between the parties was pending, and that the trial took place in April, 1849, the date of 1848 must be considered as a clerical error. The certificate from the Circuit Court showed that the bill of exceptions was regularly allowed upon the trial, and this must be conclusive upon this court. *United States* v. *Wilkinson*, 246.
20. Where the suit was upon a postmaster's bond and the district-attorney offered to read in evidence an authentic copy thereof, which the court refused to receive, this refusal was erroneous. *Ib.*
21. Although the presumption of law is in favor of the correctness of the court below where no reasons appear, yet, in this case, the record itself shows the error. If there was any fact which made the copy of the bond inadmissible, it ought to have been shown by the defendants, and set forth in the exception. *Ib.*
22. By the Louisiana practice, if neither party claims a trial by jury, the whole case is decided by the court; matters of fact as well as of law. *Bond* v. *Brown*, 254.
23. Where, upon such a trial, no testimony is objected to, and it does not appear that any question of law arose or was decided, and the case is brought to this court by writ of error, the judgment of the court below must be affirmed. *Ib.*
24. The decision of the court below, upon questions of fact, is as conclusive upon this court as the verdict of a jury would be. *Ib.*
25. If a writ of error does not set out the names of all the parties to the judgment of the Circuit Court, the case will be dismissed. *Smyth* v. *Strader*, *Perrine & Co.*, 327.
26. Where other parties had a nominal interest as defendants, and resided beyond the jurisdiction of the court, it was error in the Circuit Court to dismiss the bill because they were not made parties. Under the act of Congress of 1839, the court should have gone on to decree against the actual defendants; and in this case all who have a beneficial interest are in court. *Union Bank of Louisiana* v. *Stafford*, 328.
27. Where further evidence was taken after the appeal to this court was entered, under the authority of an act of Congress passed in 1803, (2 Stat. at L., 244,) the issuing of the commission by the clerk of the Circuit Court, and the uniting by both parties in its execution, furnish a presumption that the proper order was given. If not, the parties have waived all objection. *Rich* v. *Lambert*, 347.
28. After a case had been argued and was under advisement, a motion to permit the complainant to file a further bill by way of supplement and amendment, which would have made an essential change in the character and objects of the cause, was properly overruled in the Circuit Court. *Snead* v. *McCoull*, 407.
29. Where an appeal was taken in a common-law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error to bring the case up to this court, it was error in the court below to quash the execution and supersede the judgment. *Saltmarsh* v. *Tuthill*, 387.
30. The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party or the court. *Ib.*

PRACTICE—(*Continued*).
31. The question reserved is whether this court has the power to issue a mandamus to the judge below, commanding him to set aside the supersedeas and order the clerk to issue an execution. *Ib.*

For Practice in Admiralty, see ADMIRALTY.

SHIPS OR VESSELS.
See COMMERCIAL LAW.

STATUTES, CONSTRUCTION OF.
See CONTRACTS.
1. The act of Congress, passed on 1st May, 1820, (3 Stat. at L., 568,) enacts, that no land shall be purchased on account of the United States, except under a law authorizing such purchases. *Neilson* v. *Lagow*, 98.
2. But this does not prohibit the acquisition of land by the United States, either directly, or through trustees, when taken as security for a debt. *Ib.*
3. Where the trustees purchased, and paid for out of money belonging to the United States, the equitable title, where the legal title to the land had been previously conveyed to them, the acquisition of this equitable title was nothing more than relieving the land of an incumbrance, and was not such a purchase as was forbidden by the statute. *Ib.*

TARIFF OF 1846.
1. The Tariff Act, passed in 1846, (9 Stat. at L., 44,) enacted duties on glass, as follows, viz.:
"Schedule B. Forty per centum *ad valorem*, Glass cut.
"Schedule C. Thirty per centum, *ad valorem*, Glass tumblers, plain, moulded, pressed; not cut or punted." *Binns et al.* v. *Lawrence*, 9.
2. The following classes of tumblers fall within Schedule B, and are chargeable with a duty of forty per centum, viz.:
1. Glass tumblers, the entire surface of the bottom of which had been smoothed by the glass-cutter or grinder, previous to their importation into the United States. *Ib.*
2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glass-cutter or engraver, previous to their importation into the United States. *Ib.*

TERRITORY.
1. Where a bank was chartered and its charter repealed by the legislature of a Territory, the question of the validity of the repealing act cannot be brought before the court under the twenty-fifth section of the Judiciary Act. *Miners Bank* v. *State of Iowa*, 1.
2. The power of review is confined by that section to certain laws passed by states and does not extend to those passed by territorial legislatures. *Ib.*

TREATY.
1. This court again decides, as in 9 How., 127, 280, and 10 How., 609, that, with respect to the tract of country between the Mississippi and Perdido rivers, south of the thirty-first degree of north latitude, the authorities of Louisiana had no right to make grants of land after the time of signing the treaty, by which it was ceded to Great Britain. *Montault* v. *United States*, 47.
2. That treaty having been signed on the 10th of February, 1763, a grant of land in the above tract of country, issued by the French Governor of Louisiana, on the 11th March, 1763, was void. *Ib.*

TRUSTEES.
1. Where there were two trustees of the property of insolvents, and one of them made an assignment, but the other neither joined in it nor assented to it afterwards, the assignment was void. *Wilbur* v. *Almy*, 180.
2. And in the present case, also, the assignee appears to have received an assignment of the property only as security, until its profits should pay a debt due to him by the insolvents. That debt being extinguished, he has no right, as owner, to claim an account of further profits from the holder of the property. *Ib.*
3. Where the bank had become insolvent and had made an assignment of its effects to trustees for the benefit of its creditors, the bank was allowed to sue in its own name at the instance, and for the benefit of creditors, and the case was the same as if the law permitted the suit to be brought, and the same had been brought, in the name of such trustees. *Lyman* v. *Bank of the United States*, 225.

TRUSTEES—(*Continued*).
4. Although the bank had indorsed a note amongst its other assets to its trustees, yet under the circumstances it could maintain a suit upon the note, because,
5. Where a party who is the holder of a note transferred it for purposes of collection, and it is not paid but is found in the possession of the original holder, he can recover, as he is remitted to his original rights, notwithstanding the indorsement; and if the note is not paid, the plaintiff may give it up and recover upon the original consideration. *Ib.*

VERDICT.
1. In Louisiana, the Supreme Court of the State reviews the questions of fact as well as of law which are brought up from the courts below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given. *Parke* v. *Turner, et al.*, 39.
2. But when a case is brought before this court by a writ of error, it can only review questions of law; and, therefore, where the validity of a verdict of a jury is brought into question, the practice which prevails in the state courts of Louisiana is inapplicable in the courts of the United States.
3. Hence, where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and the court then gave judgment for the amount of the note, this would have been adjudged to be a cause of reversal of the judgment by the Supreme Court of the state, but cannot be so held by this court. *Ib.*
4. The sufficiency of the verdict must be judged by the rules of the common law and the statutes of the United States, and not by the laws and practice of Louisiana. The act of 1824 (4 Stat. at L., 62) does not include such a case. *Ib.*
5. By the common law, although a judgment in such a case might not have been strictly proper, yet under a power of amending the verdict, the judgment can stand, because the plea having been that no consideration was given for the note and the verdict being for the plaintiff, it necessarily found that the whole amount was due. *Ib.*
6. The 32d section of the Judiciary Act provides for this case by enjoining upon this court to disregard niceties of form, and so it was decided in 16 Pet., 321. *Ib.*
7. The Constitution of Louisiana requires the state judges to give reasons for their decisions; but this is not operative upon the judges of the Circuit Court of the United States. On the contrary, their reasons form no part of the record when the case is brought up to this court. *Ib.*

WITNESS.
1. Where two persons were jointly indicted for an offense committed against the United States, viz., a murder committed upon the high seas, and were tried separately, it was not competent for the person first tried to call the other as a witness in his behalf. *United States* v. *Reid*, 361.
2. The trial took place in Virginia, and the evidence would have been competent under a law of Virginia passed in 1849. *Ib.*
3. But the 34th section of the Judiciary Act of 1789, declaring that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States, meant only to include civil cases at common law, and not criminal offenses against the United States. *Ib.*
4. The law by which the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789. *Ib.*
5. Without laying down any general rule, how far the affidavits of jurors impeaching their verdict ought to be received, it is decided that the affidavits of two jurors, stating that, whilst impanneled, they read a newspaper report of the preceding evidence, but which had no influence upon their verdict, were not sufficient ground for a new trial. *Ib.*

WRIT OF ERROR.
If a writ of error does not set out the names of all the parties to the judgment of the Circuit Court, the case will be dismissed. *Smyth* v. *Strader, Perrine & Co.*, 327.

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