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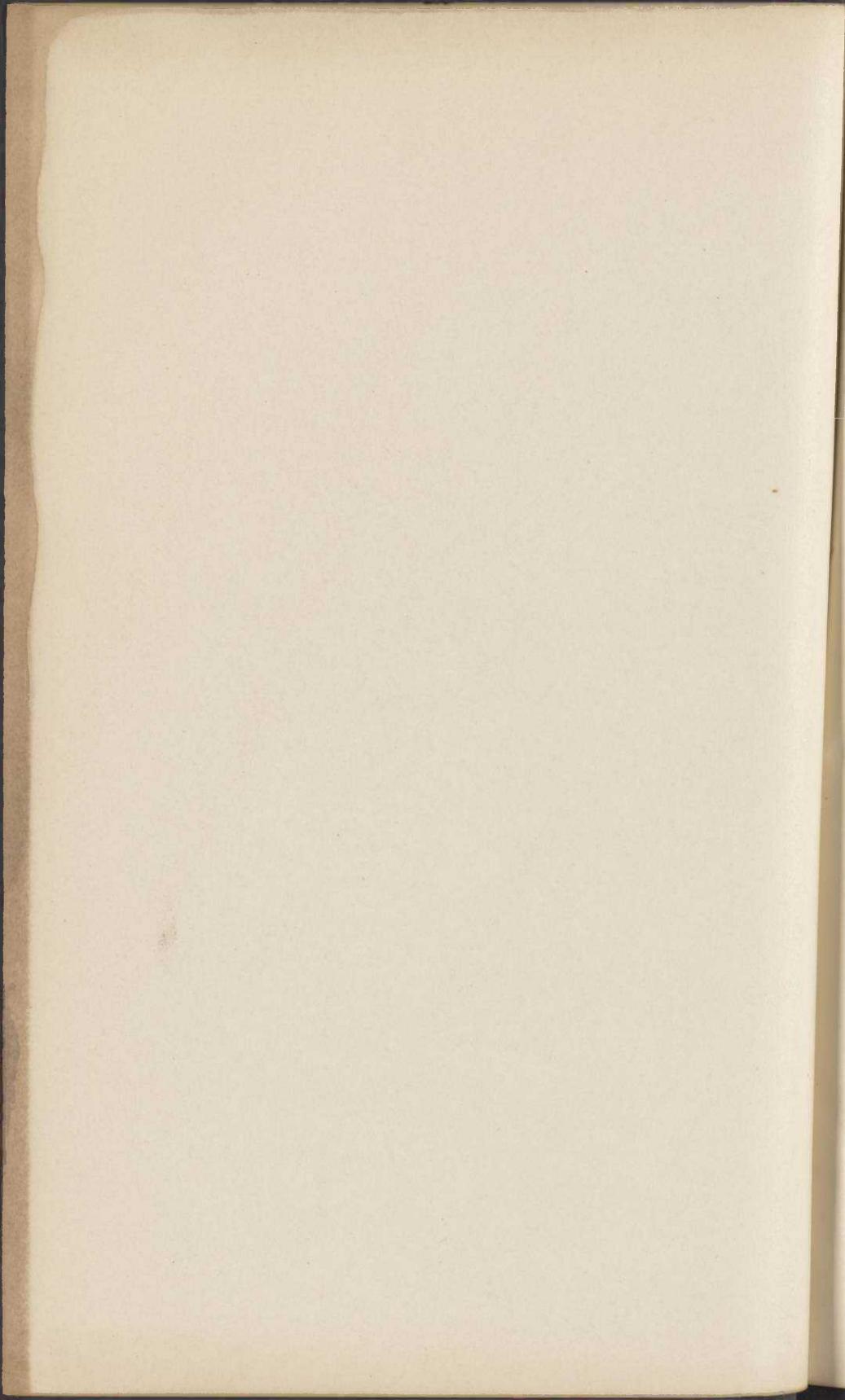
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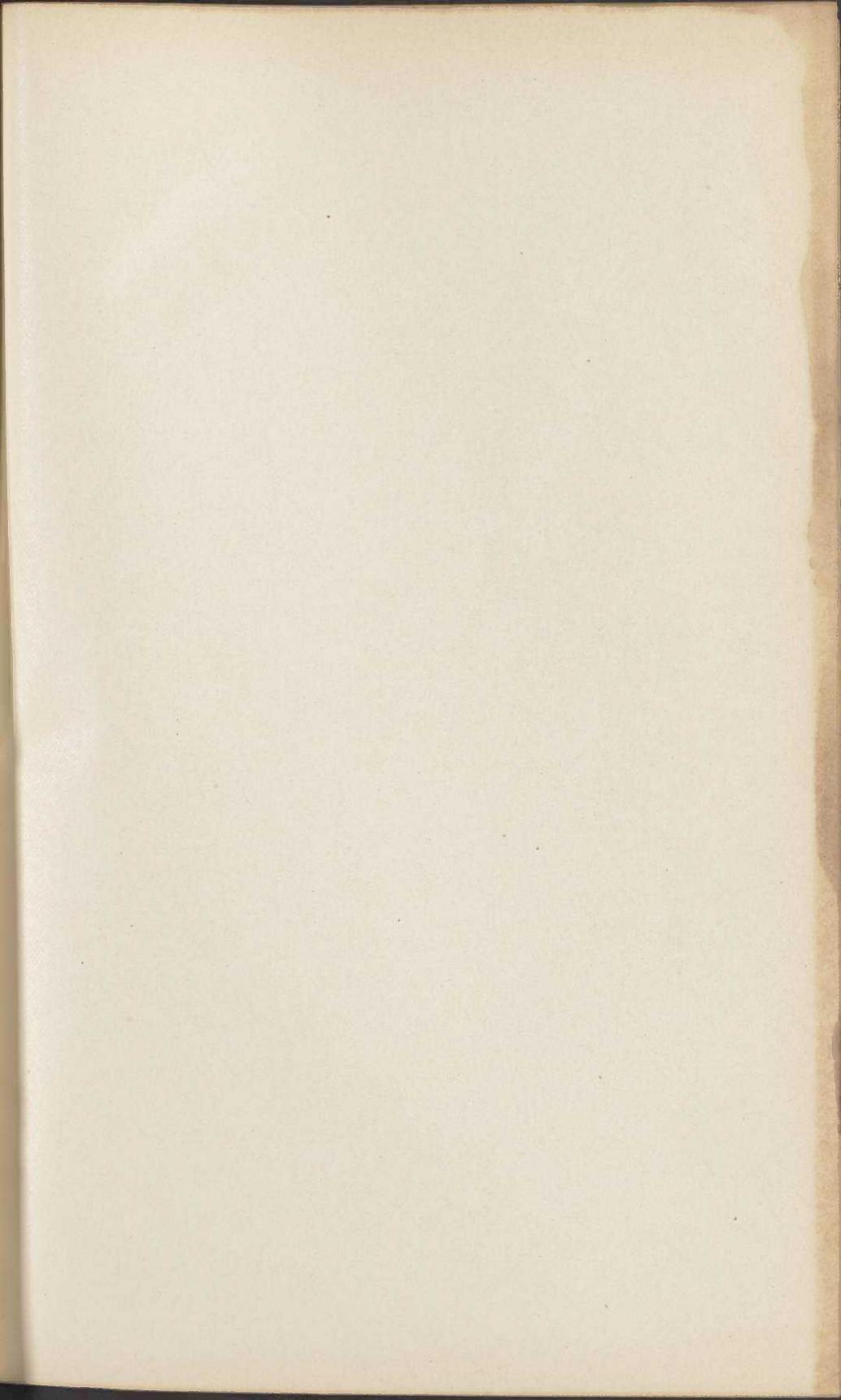
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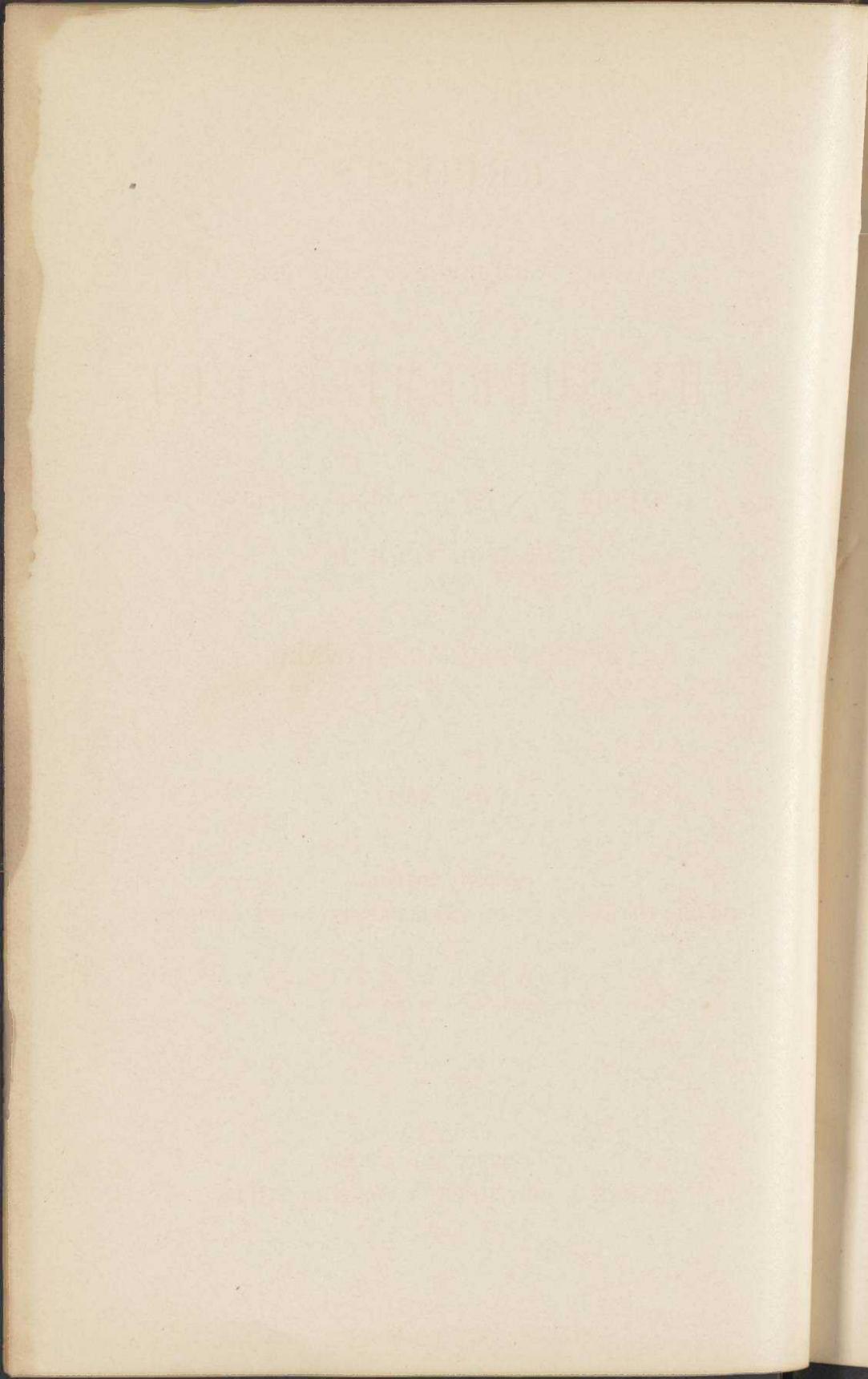
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REPORTS  
OF  
CASES ARGUED AND ADJUDGED  
IN  
THE SUPREME COURT  
OF  
THE UNITED STATES,  
DECEMBER TERM, 1854.

BY BENJAMIN C. HOWARD,

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

VOL. XVII.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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1895

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SUPREME COURT OF THE UNITED STATES.

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HON. JOHN CATRON, Associate Justice.

HON. PETER V. DANIEL, Associate Justice.

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R. H. WEIGHTMAN,	<i>New Mexico.</i>

## ORDER OF COURT.

---

ORDERED, That the following supplemental rules be added to the rules heretofore adopted by this court, for regulating proceedings in admiralty.

### RULE No. 52.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his bill, so as to confess and avoid, or explain or add to the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments.

### RULE No. 53.

The clerks of the district courts shall make up the records to be transmitted to the circuit courts, on appeals, so that the same shall contain the following:—

1. The style of the court.
2. The names of the parties, setting forth the original parties, and those who have become parties, before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of arrest or attachment, and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.
4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal and the action of the district court thereon, and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted.

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where, and the date when, the deposition was sworn to. And in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto; and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up, pursuant to this rule; and no other certificate of the record shall be needful or inserted.

It is further ordered, that these rules be published in the next volume of the reports of the decisions of this court, and that the

clerk cause them to be forthwith printed and transmitted to the several district courts.

*January 22, 1856.*

#### AMENDMENT OF THE 67TH CHANCERY RULE.

Ordered, that the sixty-seventh rule, governing equity practice, be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term-time or vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

#### APPOINTMENT OF CRIER.

It is now here ordered by the court, that George W. Phillips, Esq., of the city of Washington, and District of Columbia, be, and he is hereby appointed the crier of this court, with all the rights, privileges, and emoluments thereunto by law belonging.

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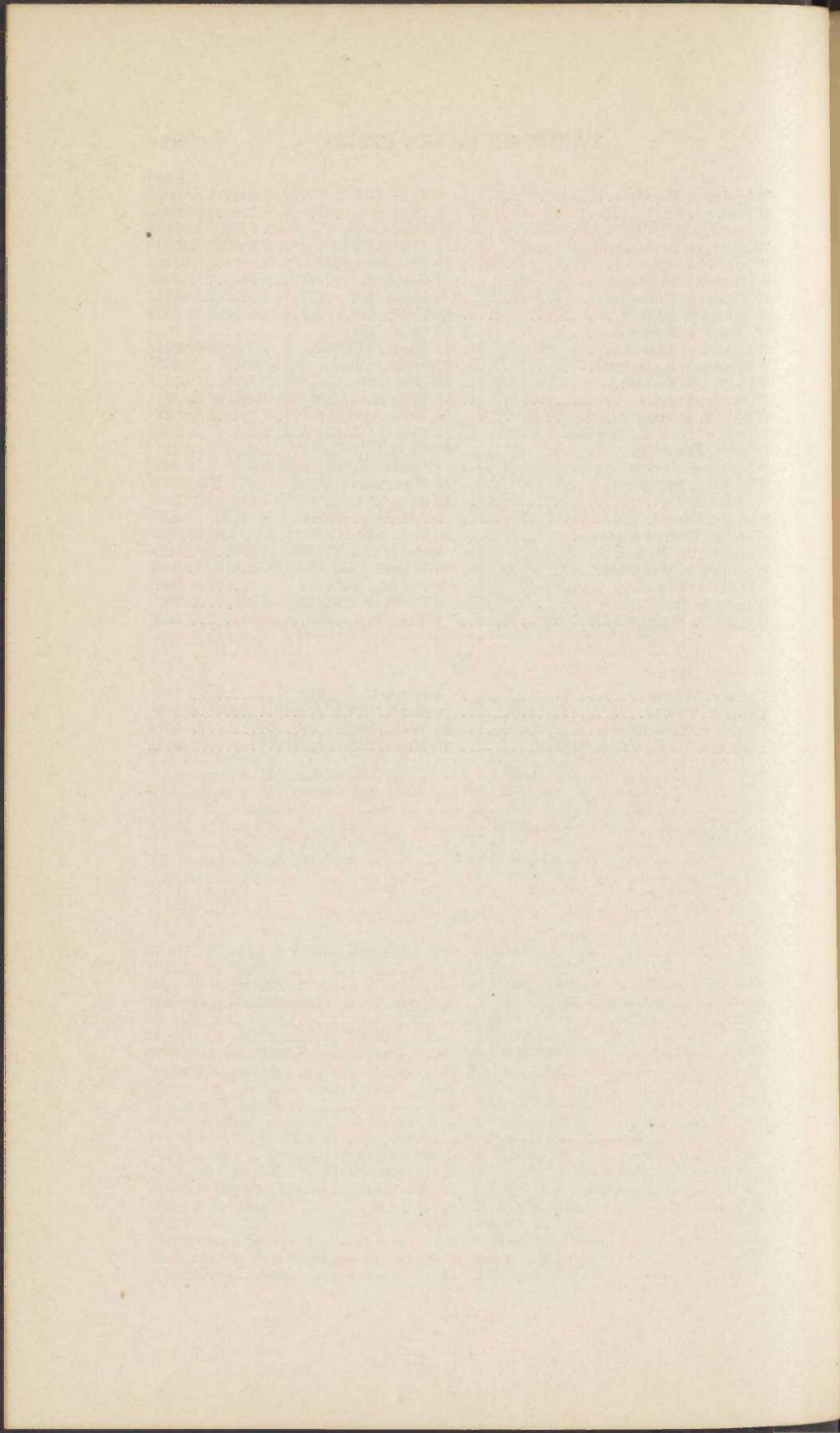
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THE DECISIONS  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
AT  
DECEMBER TERM, 1854.

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THE WIDOW AND HEIRS OF BENJAMIN POYDRAS DE LA  
LANDE, PLAINTIFFS IN ERROR, *v.* THE TREASURER OF  
THE STATE OF LOUISIANA.

Where a proceeding was instituted in Louisiana, in the name of the treasurer of the state, to recover a tax imposed upon property inherited by aliens, a citation served upon that officer was sufficient. He was the "adverse party," under the judiciary act.

The tenth rule of this court, directing process to be served upon the chief executive magistrate and attorney-general, applies to those cases only in which the state is a party on the record. When an officer of the state is the party prosecuting the suit for the state, the citation must be served on him.

THIS case was brought up from the supreme court of the state of Louisiana, by a writ of error, issued under the 25th section of the judiciary act.<sup>1</sup>

*Mr. Dunbar* moved the court to allow him to strike out his appearance for the state of Louisiana; and further moved the court to dismiss the case, on the ground that no process had been issued against, or served on, the chief executive magistrate and attorney-general of the state of Louisiana, under the 10th rule of this court.

*Mr. Janin* opposed the motion.

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

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<sup>1</sup> Further decision, 18 How., 192.  
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Poydras de la Lande v. The Treasurer of Louisiana.

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This case is brought here by writ of error directed to the supreme court of the state of Louisiana, under the 25th section of the act of 1789.

\*2] \*It appears that a proceeding was instituted in the state court by the treasurer of the state to recover certain taxes alleged to be due from the plaintiffs in error, under a law of Louisiana, which imposes a tax of ten per cent. upon the amount of property inherited by aliens in that state.

The payment of the tax was resisted by the plaintiffs in error; but the case was finally decided against them in the supreme court of Louisiana; and they thereupon brought this writ of error, upon the ground that the authority exercised under the state law was contrary to the constitution and treaties of the United States.

The citation required by the act of 1789, was served on the treasurer, by whom and in whose name, as treasurer, the proceedings had been instituted and conducted, and in whose favor the judgment was entered.

A motion is now made to dismiss this writ of error, upon the ground that the state is the real party to the suit, in the name of the treasurer; and that the citation ought, therefore, to have been served on the chief executive magistrate and attorney-general of the state, according to the provisions of the 10th rule of this court.

But that rule applies to those cases only in which the state is a party on the record. It is intended to point out the officers who shall be held to represent the state when process is issued against it, so far as the service of the process is concerned. The only mode in which a state can be cited to appear, is by serving the process on some one or more of its officers; and those above named in the rule were considered by the court to be its appropriate representatives, in a summons or citation to appear in this court.

But the citation must be directed to the party on the record, and served on him. And when an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. In this case, a notice or citation on the chief executive officer or attorney-general would not be sufficient; for the treasurer is the person who has obtained the judgment, and has the right to receive the money. He is the actor—the plaintiff in the suit. And the chief executive officer and attorney-general do not represent him, and may or may not support his proceedings.

This rule of practice has been uniformly followed in this court. There have been many cases in which an officer of the state, acting in behalf of the state, has been one of the par-

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ties. And the 10th rule has never been applied to a case of that kind; and the citation has always been served on the officer, whether conducting the proceedings in his own name, or that <sup>of</sup> his office. The practice is founded upon the language of the act of 1789, c. 20, which directs the [\*3] “adverse party” to be cited, on a writ of error or appeal. The “adverse party” is the one which appeared in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff in the writ of error seeks to reverse.

The motion to dismiss this writ of error must, therefore, be overruled.

*Order.*

On consideration of the motion made by *Mr. Dunbar*, to dismiss this cause on a prior day of the present term, to wit, on Friday, the 19th instant, and of the arguments of counsel thereupon, had as well against as in support thereof, it is now here ordered by the court that the said motion be, and the same is, hereby overruled.

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JOHN G. SHIELDS, APPELLANT, *v.* ISAAC THOMAS AND OTHERS.

Where a bill was filed by several distributees of an estate, to compel the payment of money alleged to be due to them, and a decree was rendered in their favor, this court has jurisdiction over an appeal, although the amount payable to each individual claimant was less than two thousand dollars. The aggregate amount which the defendant was decreed to pay, was more than two thousand dollars; and as to him, this is the matter in dispute. The complainants all claimed under the same title; and it was of no consequence to the defendant in what proportions they shared the money amongst them.

The cases upon this point examined.<sup>1</sup>

THIS was an appeal from the district court of the United States for the northern district of Iowa.

*Mr. Platt Smith* moved to dismiss the appeal for want of jurisdiction, as the amount of none of the several decrees was for \$2,000, and referred to the case of *Oliver et al. v. Alexander et al.*, 6 Pet., 143.

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<sup>1</sup> See notes to cases cited from How ard's Reports in the opinion of the court. APPLIED. *The Connemara*, 13 Otto, 756; s. c., 1 Morr. Tr., 461. DISTINGUISHED. *Ex parte B. & O. R. R. Co.*, 16 Otto, 6. Further decision, 18 How., 261.

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The motion was opposed by *Mr. Gillett.*

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

This is an appeal from the decree of the district court of the United States, exercising the powers of a circuit court for the district of Iowa. A motion has been made on behalf of <sup>\*41</sup> Isaac Thomas, one of the appellees, to dismiss it upon the ground that the sum in controversy with him is less than two thousand dollars.

The facts in the case may be stated in a few words, so far as they are material to the decision of the motion.

John Goldsberry, of Kentucky, died intestate, leaving a large personal estate, to which the present appellees, together with other persons named in the proceedings, were entitled as his legal representatives, in the proportions set out in the proceedings. The widow of Goldsberry obtained letters of administration on his estate, and afterwards intermarried with Shields, the appellant, who thereby obtained possession of the property of the deceased.

The representatives of John Goldsberry, (of whom Isaac Thomas, in right of his wife, is one,) filed a bill in the chancery court of Kentucky, against Shields, charging that he had converted to his own use a large amount of the property, to which these representatives were entitled. And in that proceeding they obtained a decree against him for a large sum of money, the shares of the respective complainants being apportioned to them in the decree; and the appellant was directed to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated by Shields.

The appellant (Shields) lived in Iowa when this decree was made; and the present appellees, who are a portion of the representatives of John Goldsberry, united in the bill in equity now before us, to enforce the decree of the Kentucky court, and praying that Shields might be compelled to pay to them respectively the several sums decreed in their favor in the proceedings in Kentucky; and they obtained the decree in question, according to the prayer of their bill.

The whole amount recovered against Shields, in the proceeding in Iowa, exceeds two thousand dollars. But the sum allotted to each representative, who joined in the bill, was less. And the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed, is the sum in controversy between each representa-

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tive and the appellant, and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed.

But the court think the matter in controversy, in the Kentucky court, was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, \*according to the laws of the state. They all claimed under one and the same title. They had a [\*5] common and undivided interest in the claim; and it was perfectly immaterial to the appellant, how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.

This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds two thousand dollars. We think the court, therefore, has jurisdiction on the appeal.

The cases referred to stand on different principles. The case of *Oliver and others v. Alexander and others*, 6 Pet., 143, was a suit for seamen's wages. And although the crew are allowed by law, (for the sake of convenience and to save costs,) to join in a suit for wages, yet the right of each seaman is separate and distinct from his associates. His contract is separate; and his recovery does not depend upon the recovery of others, but rests altogether on his own evidence and merits. And he does not recover a portion of a common fund to be distributed among the claimants, but the amount due to himself on his own separate contract.

The case of *Rich and others v. Lambert and others*, 12

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How., 352, was decided on the same ground. The several shippers who owned the goods which had been damaged, had no common interest in the goods. The interest of each was separate; and his contract of affreightment separate. And the libel of each was upon his own contract with the ship-owner, and for his own individual and separate property.

The cases of *Stratton v. Jarvis and Brown*, 8 Pet., 8, and of *Spear v. Place*, 11 How., 525, were both salvage cases, where the property of each owner is chargeable with its own \*6] amount \*of salvage. The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable.

The cases relied on are therefore distinguishable from the one before us; and the motion to dismiss for want of jurisdiction must be overruled.

*Order.*

On consideration of the motion made in this cause by *Mr. Smith*, on a prior day of the present term of this court, to wit, on Friday, the 19th instant, and of the arguments of counsel thereupon, had as well against as in support thereof, it is now here ordered by the court, that the said motion be, and the same is, hereby overruled.

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JOHN ARTHURS, JOHN NICHOLSON, JONAS R. MCCLINTOCK,  
AND WILLIAM STEWART, CARRYING ON BUSINESS UNDER  
THE FIRM AND NAME OF ARTHURS, NICHOLSON, AND CO.,  
PLAINTIFFS IN ERROR, v. JESSE HART.

Where a jury is waived, and questions of law and fact decided by the court in Louisiana, the rules of the state appellate court require that the whole evidence should be put into the record. But where a case is brought up to this court, by writ of error from the circuit court of the United States for Louisiana, the rules of this court only require that so much of the evidence should be inserted as is necessary to explain the legal questions decided by the court.

Consequently, the mere fact, that some of the evidence given below is omitted from the record, is not of itself sufficient to prevent this court from examining the questions of law presented by the record.<sup>1</sup>

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<sup>1</sup> See note to *Phillips v. Preston*, 5 How., 278.

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Where the court decides questions both of law and fact, the admission of improper testimony is not the subject of a bill of exception, although the exclusion of proper testimony is so.

The rule stated, according to which the appellate court should review the legal questions involved in the final judgment of the court below, which has decided both law and fact; and the mode pointed out by which counsel should separate the two classes of questions.<sup>2</sup>

In an action upon a bill of exchange by a *bona fide* assignee against the acceptor, it is no good defense that the bill was accepted in order to pay for a sugar-mill which was defective; that the drawers of the bill had promised to put it in order, and that the assignee of the bill knew these facts. The acceptor of the bill relied upon this promise to protect his rights, and not upon a refusal to pay the bill when due.

THIS case was brought up, by writ of error, from the circuit \*court of the United States for the eastern district [\*7 of Louisiana.

In 1847, Hart, who was a citizen of Louisiana, employed Nicholson and Armstrong, of Pittsburg, Pennsylvania, to build and put up a sugar-mill and engine upon his plantation. The mill and engine were put up, and a part of the purchase-money paid. For the balance a bill of exchange was drawn on March 1, 1848, by Nicholson and Armstrong upon, and accepted by Hart, to the order of James Arthurs and Brothers, and by them indorsed to Arthurs, Nicholson and Co. The bill was payable twelve months after date, and was for the sum of \$2540.65. At maturity, the bill was presented for payment, and, payment being refused, was protested. Hart alleged that when the bill was accepted, it was with the understanding that the builders would remedy certain defects in the sugar-mill and engine, and that the holders of the bill knew of this arrangement.

In May, 1849, the plaintiffs in error, the holders of the bill, brought suit by way of petition, according to the Louisiana practice, in the circuit court of the United States.

The cause was tried by the court without the intervention of a jury.

The following bill of exceptions states the point of evidence upon which the case came up to this court.

Be it remembered, that, on the trial of this cause, the defendant offered to prove, by the testimony of Francis Armstrong, that Mr. Arthur, Mr. Nicholson, and witness, went to the levee, on board the steamboat Luna, to see Captain Hart, in reference to the second payment; that he (Captain Hart)

<sup>2</sup> CITED. *Graham v. Bayne*, 18 How., 61; *Suydam v. Williamson*, 20 Id., 434; *Burr v. Des Moines Co.*, 1 Wall., 103; *Flanders v. Tweed*, 9 Id., 431; *Estate of Toomes*, 54 Cal., 517. If the whole of the evidence be sent up, the case will be remanded with directions to award a *venire de novo*. *Graham v. Bayne*, *supra*. S. P.; *Guild v. Frontin*, 18 How., 135.

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complained that the machinery had not worked well, that it was not then running; that he complained, that, from the bad working of the sugar-mill and engine, he had lost juice, and he required us to deduct the interest then due; that Messrs. Arthur and Nicholson suggested that Captain Hart should accept a bill of exchange for the balance then due, after deducting the interest; that it was understood that the sugar-mill and engine were to be put in first-rate order, and that Captain Hart then agreed to accept a bill; to the introduction of said evidence, or of any conversation, or of any agreement and understanding of the parties, previous to and at the time of accepting the bill sued upon, the plaintiff objected, for the reason that such evidence, or conversation, or agreement, or understanding, would tend to convert an absolute into a conditional acceptance; that it would either vary or contradict the written agreement entered into by the parties; and plaintiffs also objected to the competency of the witness Francis Armstrong, to testify in this case, for the reason that he was <sup>\*8]</sup> one of the drawers of the bill of exchange sued <sup>\*upon.</sup> All of which objections were overruled by the court; to which ruling plaintiffs excepted, and tendered this their bill of exceptions, which is filed and signed by the court.

THEO. H. McCaleb, [SEAL,  
U. S. Judge.

Judgment was rendered for the plaintiffs for the sum of \$1,743.50, with interest.

The plaintiffs, thinking that the judgment ought to have been for the whole amount of the bill, brought the case up to this court.

It was argued by *Mr. Wylie*, for the plaintiffs in error, and by *Mr. Lawrence*, for the defendants.

*Mr. Wylie*, for plaintiffs in error.

There are two principal points which present themselves upon the record in this case.

First, whether the court below ought not to have entered a judgment in favor of plaintiffs, for the whole sum expressed upon the face of the bill, with interest, &c.

And second, whether this court, under its decisions, will reverse the judgment of the court below in this case, if erroneous in law.

First question. That the decision of the court was erroneous on this point would seem to be clear. In *Townsend v. Sumrall*, 2 Pet., 170-183, it was held by this court, that "if

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the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer; the promise of the drawee to accept the bill constitutes a valid contract between the parties, notwithstanding the failure of the drawer to place funds in his hands. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance." And in *Grant and Casey v. Elliott*, 7 Wend. (N. Y.), 227, it was held, "in an action by the payee against the acceptor, it is no defense that the bill was accepted without consideration, and that fact known to the payee. See also *United States v. Bank of Metropolis*, 15 Pet., 377; 7 Johns. (N. Y.), 361; 7 Sm. & M., (Miss.), 244; Byles on Bills, 150; 2 Wheat., 385; Civil Code, 2256; *D'Aquir v. Barbour*, 4 La. Ann., 441; *Henderson v. Stone*, 1 Mart. (La.), N. S., 641.

Second point. This case having been submitted to and tried by the court without a jury, a question arises, whether, under the recent decisions of this court, the erroneous judgment of the court below can be corrected. *Weems v. George et al.*, 13 How., 190-197; *Bond v. Brown*, 12 How., 254.

\* In *Weems v. George et al.*, Mr. Justice Grier, in delivering the opinion of the court, says: "When the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment of the law."

Although this principle, thus stated, goes much beyond the doctrine laid down in *Bond v. Brown*, and is, indeed, considerably modified by the subsequent context of the opinion of Mr. Justice Grier itself, yet we must take it to be the law for the present case.

But the meaning of the court could not have been, that, in such a case, where there was no jury, no judgment of the court, however given and however erroneous, could be reviewed by this tribunal. If there be a simple issue of law between the parties, and the court below should make an erroneous decision, this court would undoubtedly reverse it. It is, therefore, only where facts and law are both referred for the decision of the court below, that such decision is conclusive upon the parties as to the matter of fact in question. So far, then, as the admissibility and competency of the witness in this case, were questions raised by the bill of exceptions, the

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plaintiffs must be content to submit to the law as settled in *Weems v. George*.

They, therefore, do not rely upon the bill of exceptions to the admission of Francis Armstrong as a witness, but contend that, upon the face of the pleadings and the whole record, the judgment of the court below was erroneous, and may be reversed by this court. In *Field v. The United States*, 9 Pet., 202, as cited by Justice Grier, in *Weems v. George*, Marshall, C. J., in delivering the opinion of the court, says: "As the case was not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself, constitute any ground for the reversal of the judgment. If the record, therefore, is found to disclose other grounds than an exception to the admission of evidence, for the reversal of the judgment below, this court may reverse a judgment even in a cause submitted to the court below, under the Louisiana practice. The court will look into the whole record." In *Garland v. Davis*, 4 How., 131, it was decided, "this court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the pleadings to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here."

\*10] \*The defendant's answer in this case was materially and incurably defective on its face. Let it be presumed, therefore, that the evidence objected to in the bill of exceptions was strong enough to sustain all and every allegation stated in the answer, still, the plaintiffs were entitled to a verdict for the whole amount of their bill of exchange; for, admitting that the proof did sustain the allegations of the answer, the defense was utterly unsound in law.

Although the bill of exceptions to the evidence in this case may not, for the reasons already stated, be available to the plaintiffs to the full extent of a bill of exceptions to a cause tried with a jury, according to the common law practice; yet, being part of the record, it discloses the fact that the question as to the sufficiency of the defendant's answer, as a defense in this suit, was fully argued, and after argument, decided in the court below. The plaintiffs contend that this decision was erroneous.

*Mr. Lawrence*, for the defendant in error, maintained:

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1. That the judge having determined both the facts and the law, this writ of error cannot be sustained upon the ground that improper testimony has been admitted. There was other testimony in the case, and upon that alone the judgment of the court may have been founded. *Field v. United States*, 9 Pet., 202; *United States v. King*, 7 How., 833; *Weems v. George*, 13 How., 195, 196.

2. The testimony was admissible for the purpose of showing downright fraud on the part of the plaintiffs in error, in procuring the acceptance. *Bayley on Bills*, 528; *Ledger v. Ewen, Peake*, 216.

3. The evidence was admissible for the purpose of showing the consideration on which the bill was accepted, in order to prove a failure of consideration. *Coupy's Heirs v. Dufau*, 13 Mart. (La.), 90; *Le Blanc v. Sanglier*, 12 Id., 402; *Russell v. Hall*, 20 Id., 558; 13 Johns. (N. Y.), 54; 2 Stark, 166, 204.

4. The evidence was admissible under the plea in reconvention. This is a Louisiana contract. The bill was drawn, indorsed, and accepted in Louisiana. Both the *lex loci contractus* and the *lex fori* are to be regarded in any action upon it.

By the law of Louisiana, the defendant may plead in reconvention any damages, even unliquidated damages, if they are necessarily connected with the same transaction. Here, the bill was accepted in payment of the mill and engine; and the damages arose from the defects in this very mill and engine. *Code of Practice*, 374-377; *Boyd v. Warfield*, 6 Mart. N. S., 671; *Orleans Navigation Co. v. Bingay*, Id., 688; 2 Id., 73, 122; 6 Id., 145.

\* Mr. Justice NELSON delivered the opinion of the [\*11 court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Louisiana. The plaintiffs seek to recover the amount of a bill of exchange, drawn by the firm of Nicholson and Armstrong, upon the defendant, for \$2,540.65, and accepted by him, in favor of James Arthurs and Brothers, dated March 1, 1848, and payable twelve months from date, and indorsed by the payees to the plaintiffs. The bill of exchange is set forth in the petition, according to the practice in the state of Louisiana, with a prayer that the defendant be condemned to pay the amount due.

The defendant, in his answer, denies the allegations in the petition; and also sets up, that the bill was accepted for the balance of the price of a sugar-mill constructed by the drawers, for his plantation in West Baton Rouge; that the mill was

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badly constructed, and defective both in the workmanship and materials, and had failed in its operation to do the work intended; that on making known the defects to the drawers, they promised to send competent workmen, before the next ensuing season for grinding sugar, to make the necessary repairs, and put the mill in complete working order, at their own expense; that, confiding in this promise, the defendant accepted, unconditionally, the bill in question. The answer also sets forth, that the drawers had failed to send hands to repair the mill, as agreed, whereby the defendant has suffered damages to the amount of \$1,835.65, which sum he demands in reconvention, and asks judgment against the plaintiffs.

The defendant further sets forth, that the payees and indorsees had notice of the defects in the mill, and of the undertaking of the drawers at the time of the acceptance, before the negotiation or transfer of the same.

The cause was tried without a jury; and, on the trial, the defendant admitted the signatures to the bill; and also gave evidence, which was admitted but excepted to, of the facts set up in the answer.

The court gave judgment for the plaintiffs, for \$1,743.50. The case is now before us on a writ of error, brought by the plaintiffs, claiming that they were entitled to judgment for the full amount of the bill.

Two preliminary objections have been taken by the counsel for the defendant in error: 1. That, inasmuch as other evidence was given on the trial in the court below than that which has been brought on the record, or is found in the bill of exceptions, for aught that appears, the judgment may have been founded upon that evidence; and, 2. That the cause having been tried without a jury, and the judge having determined the <sup>\*12]</sup> case upon both the facts and the law, error will not lie for the admission of improper testimony.

It was decided in *Phillips v. Preston*, 5 How., 278, in the case of a writ of error to the circuit court of the United States in Louisiana, and where the trial by jury had been waived, that the state practice regulating appeals for reviewing the decisions of the inferior courts, which required the return of all the evidence to the appellate court, did not apply; and that only so much of it need be returned, and, indeed, no more should be returned, than was necessary to present the legal questions decided by the court, and which were sought to be reviewed. Evidence bearing exclusively upon questions of fact involved in the case, only incumber the record and embarrass the hearing in this court, as these questions are not the subject of review on error. The mere fact,

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therefore, that other evidence was given on the trial besides that which is found in the bill of exceptions, furnishes no objection to an examination of the questions of law presented by it.

If that evidence bore upon these questions, and might influence our decision upon them, the defendant in error should have brought it upon the record, or incorporated it in the bill of exceptions. His neglect to do so implies that it could properly have no such effect, if returned.

As to the other objection. It was held, in *Field and others v. The United States*, 9 Pet., 182, and recognized in several subsequent cases, that in a cause where the trial by jury had been waived, the objection to the admission of evidence was not properly the subject of a bill of exceptions; and the reason given is, that if the evidence was improperly admitted this court would reject it, and proceed to decide the cause as if it were not in the record. This, perhaps, is unobjectionable; it certainly is so, as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision cannot be reviewed on a writ of error. The error, in this aspect, would be unimportant, because not the subject of an exception, the question involved being one of fact.

If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error.

The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence \*had been admitted; nor can we [\*13] assume that the testimony offered and rejected would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption; because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court, instead of rejecting, had allowed the evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion.

We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury.

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There is one qualification applicable to this peculiar mode of trial, that should be noticed. If the testimony rejected is but cumulative, and relates exclusively to a question of fact involved in the case, the rejection may be immaterial, as the decision of that question upon the evidence already in, by the judge, may be regarded as well-warranted.

This principle is sometimes applied in cases of writs of error, where the trial below has been before a jury, if it be seen that the admission of the testimony could not have properly influenced the jury to a different conclusion on the question of fact. The cases will be found collected in Cowen and Hill's notes, vol. 4, pp. 775, 776 (3d ed.); see, also, 1 Duer, (N. Y.), pp. 431-434. It must be admitted that the courts which have adopted this principle apply it with great caution where the trial has been had before a jury, and require a clear case to be made out that the rejection has worked no prejudice to the party. Other courts have denied its application altogether, and refused to look into the record to see whether the evidence might or might not have influenced the jury.

In cases where the trial by jury has been waived, and the facts as well as the law submitted to the judgment of the court, a more liberal application may be safely indulged; though, if the determination of the question of fact be against the party offering the evidence, we do not perceive why the rejection should not be regarded as error reviewable on a bill of exceptions.

A more difficult question arises in these cases, where the facts as well as the law are submitted to the court, in reviewing on exceptions the correctness of the ruling of the law involved in rendering the judgment.

In trials before a jury, these come up on the instructions prayed for, or by exceptions to the charge. The questions of law are thus separated from the questions of fact,—the former to be determined by the court, the latter by the jury. But, where both questions are submitted to the court, and both <sup>\*14]</sup> determined <sup>\*at the same time, and by the same</sup> tribunal, the separation is more difficult. The principles of law applicable to the case are so dependent upon the facts, and the finding of these in the case supposed exclusively within the province of the judge, who is substituted for the jury, it would seem, as a general proposition, nearly impracticable for the appellate court to ascertain from the case the principles of law that had governed the decision; especially in the absence of his opinion in the case.

But these principles must be ascertained, to enable the court

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to review them on a writ of error, as the bill of exceptions lies only upon some point arising either upon the admission or refusal of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. 4 How., 297; 8 Johns. (N. Y.), 495; 2 Cai. (N. Y.), 168.

As an illustration of the difficulty, and to aid us in the solution of it, we may refer to a late act in England, and the decision of the common bench under it. It is the act of 13 and 14 Victoria, c. 61, which conferred upon the county courts a limited jurisdiction in civil cases, and gave an appeal from their determination "in a point of law, or upon the admission or rejection of evidence," "to any of the superior courts of common law at Westminster."

It will be seen that an appeal is given here upon the same ground that a bill of exceptions was given by the statute of Edward I. c. 31. The parties were at liberty to waive a trial by jury, and submit the facts, as well as the law, to the judge of the county court. A case came up before the common bench, that had been thus submitted, involving a question upon the statute of limitations, and which presented the difficulty we are now considering.

Maule, J., who delivered the opinion of the court, in endeavoring to overcome it, observed: "It may be, that, if, upon the case stated by the parties or by the judge, it appears to the court of appeal, that the decision which has been come to can be sustained by a particular view of the facts, which does not render it necessary to arrive at the conclusion that he has erroneously decided the point of law before him, this court may have no power to review the judgment; yet, that where it is manifest from the facts stated, that in order to arrive at the conclusion he has arrived at, the judge must have decided a matter of law in a certain way, that will be a determination in point of law, with respect to which an appeal will lie. So, that, supposing there be a judgment which can be sustained, consistently with the law, by any view that can be taken of the facts stated, such a judgment probably cannot be reversed; yet, still, where the judge states the facts which were before him, and these facts will sustain <sup>\*his</sup> judgment upon one view of the law only, and that an incorrect one, this court may have jurisdiction to entertain the appeal."

This view is directly applicable to the case of a bill of exceptions, where the jury has been dispensed with, and the judge substituted in its place, to pass upon the facts as well as

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the law, and furnishes the rule by which the point of law may be ascertained that was decided in rendering the judgments intended to be reviewed.

In order, however, to disembarass the proceedings, as far as practicable, in this peculiar mode of the trial of a common law case, and to enable the appellate court to re-examine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination. And, in the return to the writ of error, so much of the evidence, and no more, should be incorporated in the bill of exceptions, as was deemed necessary to present the points of law determined against the party bringing the writ. No technical exception need be stated, except in the case of the rejection or admission of evidence. As the rulings in the final determination do not take place upon the trial, or need not, the exception would be impracticable.

We have stated more at large the proper practice in bringing up for review cases of this peculiar character, than was necessary to the disposition of the one before us, as they are frequently occurring, and the practice governing them not very well settled.

As it respects the case in hand, we have already shown that the state practice of Louisiana, in appeals, does not apply to the case of writs of error from this court to the circuit courts; and, hence, the circumstance that other evidence had been given and was before the court, than what appeared in the bill of exceptions, furnished no objection to the re-examination of the point of law there presented; and that if the other evidence was deemed material, it should have been brought upon the record by the defendant in error.<sup>1</sup> We must assume, therefore, that the bill of exceptions contains all the testimony deemed material to raise the point of law involved.

That shows the admission of the proof of a state of facts, as a special defense to the bill of exchange, which had been set up, and the only one set up, in the answer, namely, that the bill had been accepted for the balance of the price of a sugar-mill constructed and sold to the defendant by the drawers; that the mill was badly constructed, and defective in workmanship and materials; that, at the time of the acceptance, [16] the drawers promised \*at some future day to make the necessary repairs; that they had failed to make them, by which the defendant had suffered damage to the amount of

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<sup>1</sup> CITED. *Newell v. Nixon*, 4 Wall., 581.

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\$1,835.60, which he claimed in abatement of the face of the acceptance, and that the plaintiffs had notice of these facts before the transfer of the paper to them.

The court below reduced the recovery to \$1,743.50, which must have been on the ground of this special defense, as no other appears in the record.

Now, we agree, that if this suit had been between the original parties, the defense would have been unobjectionable. 9 How., 213; Code of Practice, 374-377; 6 Mart. (La.), L. S., 671; Id., 688. But, the plaintiffs are *bona fide* holders of the paper, for value, and, therefore, not subject to this defense, or to any abatement of the face of the bill, arising out of the transaction between the original parties.

It is true, the plaintiffs knew, at the time they took the paper, that it was given as part of the price for the sugar-mill, and that the mill had been defectively constructed; but, they also knew, that the defendant, upon the promise of the builders to make the necessary repairs, had agreed to accept the bill unconditionally, and had accepted it accordingly. They knew, therefore, that he looked to this undertaking for indemnity, and not to any conditional liability upon the acceptance.

The transaction, therefore, which is brought home to the plaintiffs, lays no foundation in law or equity, to impeach the paper in their hands.

The ruling of the court below, in this respect, was consequently erroneous, and the judgment 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, 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 law and justice, and the opinion of this court.

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Udall *v.* Steamship Ohio.

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\*JAMES UDALL, LIBELLANT AND APPELLANT, *vs.* THE STEAMSHIP OHIO, HER TACKLE, &c., MARSHALL O. ROBERTS AND OTHERS, CLAIMANTS.

Where a libel was dismissed by the district court, which decree was affirmed by the circuit court, and it appeared that the claim in the libel amounted only to sixteen hundred dollars, an appeal to this court must, upon motion, be dismissed for the want of jurisdiction.

In order to give jurisdiction, the damages must appear on the face of the pleading on which the claim is made. Interest cannot be added, in computing the amount, unless it is specially claimed in the libel.<sup>1</sup>

It is too late, when the cause has reached this court, to amend the libel by inserting a special claim for interest. The 24th admiralty rule ought not to be construed to extend to cases where an amendment would give jurisdiction, which would not exist without such amendment.<sup>2</sup>

THIS was an appeal from the circuit court of the United States for the southern district of New York.

It was a libel filed in the district court, for furnishing articles for the steamship Ohio.

A motion was made by *Mr. Cutting*, and opposed by *Mr. Bradley*, with whom was *Mr. Benedict*, to dismiss the appeal, for the want of jurisdiction.

The points made were the same as those in the succeeding case, and there was an affidavit of value made by *Mr. Benedict*. The affidavit also set forth "that the rules of the district court required libels to be sworn to, so that it is necessary, in stating the amount claimed, to state the same as it actually and in truth exists at the time the libel is sworn to, and on such libels the court, in its final decree, gives such amount as the libellant shall be entitled to recover on his case, whether the same be more or less than the amount in the libel."

The amount of the claim and the history of the case are stated in the opinion of the court.

*Mr. Justice McLEAN* delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the southern district of New York, in admiralty.

The libel was filed in the district court, which stated that in the years 1847 and 1848, the steamship Ohio, then being in process of construction by Bishop and Simonson, the libellant furnished, at the city of New York, for the building of said

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<sup>1</sup>S. P. *Olney v. Steamship Falcon*, <sup>2</sup>CITED. *Merrill v. Petty*, 16 Wall., post \*19; and see note to *Knapp v. Banks*, 2 How., 73.

## Udall v. Steamship Ohio.

vessel, a large quantity of materials, timber, and tree-nails. That said articles, at a fair price, amounted in the whole to the sum of \$2,973.57, of which sum there is still due \$1,259.28, less tree-nails, which not having been used were to be received back by the libellant, amounting to the sum of \$468. That \*the balance of \$1,691.28, the owners, or those in charge [\*18 of said vessel, have refused to pay, &c.

The appeal states the claim to be, at the time of the trial in the circuit court, interest included, \$2,164.86.

The libel was dismissed in the district court, and the case was appealed to the circuit court. In that court, the decree of the district court was affirmed, from which an appeal was taken to this court.

A motion is now made to dismiss the appeal, for want of jurisdiction.

It is stated by the counsel opposed to the motion, that it is the uniform practice in the southern district of New York, to establish, on the hearing, only the liability of the defendant, and to have the amount of the damages ascertained on a reference to a commissioner, as the proofs in the record are not the full proof, as to the amount of the damages.

It is not perceived how the practice in the circuit court can affect the question of jurisdiction. The decree of the district court, which dismissed the libel, having been affirmed by the circuit court, we must look to the claim of the appellant, in his libel, whether it exceeds the sum of two thousand dollars. The balance of the account claimed, only amounts to the sum of \$1,691.86. But it is insisted that if the interest on this sum be computed, up to the time of trial in the circuit court, the sum would exceed the amount required to give jurisdiction.

Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear, to give jurisdiction, on the face of the pleading on which the claim is made. No computation of interest will be made to give jurisdiction, unless it be specially claimed in the libel. If not intended to be included in the claim of damages, it should be specially stated. This would certainly be the case in an action at law, and no reason is perceived why the rule should be relaxed in a case of libel.

Under the 24th admiralty rule of this court, it is suggested, the libel may be amended at any time, as of course, on application to the court. And if this be necessary, the counsel now moves to amend the libel by inserting, "together with the interest to the time of the final decree in this court, or any appellate court."

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Olney v. Steamship Falcon et al.

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It has not been the practice of this court to allow amendments, except by the consent of parties; though, in the case of *Kennedy et al. v. Georgia State Bank*, 8 How., 610, this court say, "there is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, &c., but the practice has been to remand the cause to the lower court for amendment.

\*19] \*If amendments be allowed, so as to give jurisdiction to this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise, and litigation would be encouraged. The plaintiff, under such circumstances, would never fail to sustain the jurisdiction of this court, on his appeal.

On the ground that the matter in dispute does not appear, on the face of the libel, to exceed two thousand dollars, the appeal is dismissed.

*Order.*

This cause came on to be heard, on the transcript of the record, from the circuit court of the United States for the southern district of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that this cause be and the same is hereby dismissed, for want of jurisdiction.

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JAMES N. OLNEY, LIBELLANT AND APPELLANT, v. THE STEAMSHIP FALCON, HER TACKLE, &c., AND GEORGE LAW AND MARSHALL O. ROBERTS, CLAIMANTS.

Where it was alleged in a libel, that the libellant was "entitled to recover from the vessel the damages by him sustained, which amount to the sum of eighteen hundred dollars and upwards," the sum was not sufficient to bring the case within the jurisdiction of this court.

Interest, not being specially claimed, cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item.<sup>1</sup>

THIS was an appeal from the circuit court of the United States for the southern district of New York.

A libel was filed in the district court, by Olney, alleging the shipment and non-delivery of a box of merchandise, in consequence of which he was entitled to recover the damages

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<sup>1</sup> CITED. *Merrill v. Petty*, 16 Wall., 345.

## Olney v. Steamship Falcon et al.

by him sustained, which amounted to the sum of eighteen hundred dollars and upwards.

The district court dismissed the libel, and the circuit court affirmed the decree. The libellant appealed to this court.

*Mr. Cutting* moved to dismiss the appeal, upon the ground that the amount in controversy appeared, by the record, to be less than two thousand dollars, exclusive of costs.

The motion was argued by *Mr. Cutting*, in support thereof, \* and by *Mr. Bradley*, with whom was *Mr. Benedict*, in [\*20 opposition thereto.

The reporter has no notes of *Mr. Cutting's* argument.

*Mr. Bradley* filed the following affidavit of value, and then made the following points:—

*Affidavit of value.*

Charles L. Benedict, of the city of New York, counsellor at law, being sworn, says that he is the proctor for the libellant in this cause.

That the libellant resides out of the city of New York, and deponent has not been able to communicate with him since the notice of the motion to dismiss the appeal in this cause was received. That the amount actually claimed, in good faith, in the original libel in this cause, is one thousand eight hundred dollars, over and above the interest thereafter to accrue, and that, with the interest, the same actually amounted to exclusive of costs, at the time when the appeal in this cause was taken to the decree of the circuit court. And deponent further says, that it is the usual practice, in the southern district of New York, under the 44th rule of this court, in admiralty, to refer questions of damages to a commissioner, to ascertain and compute the amount, after the court shall have given its decree for the plaintiff, so that the full testimony of the amount of damages is not given on the principal hearing.

And deponent further says, that the rules of the district court require libels to be sworn to; so that it is necessary, in stating the amount claimed, to state the same as it actually and in truth exists at the time the libel is sworn to, and on such libels the court, in its final decree, gives such amount as the libellant shall be entitled to recover on his case, whether the same be more or less than the amount in the libel.

CHAS. L. BENEDICT.

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Subscribed and sworn to by Charles L. Benedict, this 20th day of December, A. D. 1854, before me,

CHAS. ELIOT SCOVILLE, U. S. Com'r.

*Points.*

I. It is the matter in dispute in this court, at the time of the appeal, and not the amount in the original libel, which controls the jurisdiction.

In *Gordon v. Ogden*, 3 Pet., 34, the court says: "Upon the true construction of the judicial act, the jurisdiction of the court depends upon the sum in dispute between the parties, as the case stands upon the writ of error." The appeal states [21] that the \*original claim was for eighteen hundred dollars and upwards, besides the interest; that, on the hearing, the libellant claimed the said principal and the interest, amounting to two thousand two hundred and fifty dollars, and that the libellant was entitled to recover, on his proofs and allegations, two thousand two hundred and fifty dollars, October 14, 1853.

That was our claim at the time of the appeal; another year's interest has since been added.

The libel was sworn to on February 27, 1850, and the amount sworn to, at that time, was eighteen hundred dollars and upwards,—a sliding sum, to cover interest as it should accumulate by delay.

II. If the computation of interest will make the amount large enough, then the court has jurisdiction.

In *Scott v. Lunt's Administrator*, 6 Pet., 351, the court says: "The court cannot judicially take notice that, by computation, it may possibly be made out, as matter of inference, from the declaration, that plaintiff's claim in reality must be less than one thousand dollars, (the case was from the district); much less can it take such notice in a case where the plaintiff might be allowed interest on his claim by the jury, so as to swell his claim beyond one thousand dollars, (the limit in the district.)"

III. Where the decree is against the plaintiff, then the "matter in dispute" is the largest amount which he may recover.

In *Gordon v. Ogden*, 3 Pet., 34, the court say, "If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due, may be still recovered, should the judgment be reversed. And, consequently, the whole sum claimed is still in dispute. It is the uniform practice, in the southern district of New York, to establish, on the hearing only, the liability, and to have the amount of the damages ascer-

## Olney v. Steamship Falcon et al.

tained on a reference to a commissioner; so that the proofs in the record are not the full proofs as to the amount.

IV. Where the matter in dispute is not fixed by the record, it may be shown by affidavits. 4 Dall., 22; 3 Id., 401; 4 Cranch, 216.

V. Under the 24th admiralty rule of the supreme court, the libel may be amended at any time, as of course, on application to the court. If this be necessary, we now move to amend the libel, by inserting, "together with the interest to the time of the final decree in this court, or any appellate court."

Mr. Justice MCLEAN delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the southern district of New York, in admiralty.

A motion is made by defendants' counsel to dismiss the appeal, for want of jurisdiction.

\*In the libel, the shipment of a box of merchandise, [\*22] which was not delivered to the consignee, &c., is alleged, and that the libellant is entitled to recover of said vessel the damages by him sustained, which amount to the sum of eighteen hundred dollars and upwards," &c.

The district court dismissed the libel, from which decision an appeal was taken to the circuit court, and that court affirmed the decision of the district court. From this last decision, an appeal has been taken to this court.

On the part of the appellant it is stated, that the claim was for eighteen hundred dollars and upwards, besides the interest; that on the hearing, the libellant claimed the said principal and interest, amounting to two thousand two hundred and fifty dollars, and that he was entitled to recover, on his proofs and allegations, that sum. That this was the claim at the time of the appeal, and that another year's interest has since accrued. And it is contended that the sum sworn to, being eighteen hundred dollars and upwards, was intended to cover the accruing interest.

The right of appeal from the circuit to the supreme court is given, "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." The defendant can appeal, where the judgment or decree against him exceeds the sum or value of two thousand dollars; but an appeal may be taken by the plaintiff where his claim of damages, in the declaration or libel, exceeds the above sum, or where the value of the thing claimed exceeds it, as this is held to be the matter in dispute.

The appellant, in this case, claims in his libel, which is

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sworn to, eighteen hundred dollars and upwards. The words, "and upwards," it is said, were intended to embrace the interest, and that, if this be calculated from the time of filing the libel up to the time of the trial, the sum would exceed two thousand dollars.

The interest, in an action of this kind, if taken into view, is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. The claim of more than eighteen hundred dollars, is too indefinite to give jurisdiction under the act of Congress; and the interest not being specially claimed, for the reason stated, cannot be computed. The appeal is, therefore, dismissed, for want of jurisdiction. *Gordon v. Ogden*, 3 Pet., 34; *Scott v. Lunt's Administrator*, 6 Pet., 349.

*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 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.

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\*23] \*MARCELIN HAYDEL, PLAINTIFF IN ERROR, v. FRANCOIS DUFRESNE.\*

In 1811, congress passed an act (2 Stat. at L., 663) giving to the owners of land in Louisiana bordering on any river, creek, &c., the preference in purchasing back land; and where, by reason of bends in the river, each claimant could not obtain a tract equal in quantity to the adjacent tract already held by him, the surveyor of the district, under the superintendance of the surveyor of the public lands, south of the state of Tennessee, was directed to divide the vacant land between the several claimants in such a manner as to him might seem most equitable.

These officers decided, as judges, upon the equities of the claimants; and their allotments are not liable to be overthrown by courts of justice, upon any other ground than that of fraud, which is not imputed in this case.

THIS case was brought up from the supreme court of the state of Louisiana, by a writ of error issued under the 25th section of the judiciary act.

The widow Francois Dufresne filed her petition in the fourth judicial district court of the state of Louisiana, in the

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\* Mr. Justice Wayne, having been indisposed, did not sit in this cause.

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parish of St. John the Baptist, complaining that the United States deputy surveyor had allotted to her  $79\frac{28}{100}$  acres of back land, instead of  $121\frac{13}{100}$ , and had given to Mrs. widow Marcellin Haydel  $243\frac{2}{100}$  acres, instead of  $201\frac{35}{100}$ , which was her fair proportion.

It is not necessary to trace the progress of the dispute, or to refer to the surveys. The fourth judicial district court decided that, inasmuch as the deputy surveyor had apportioned the back lands in the manner now complained of, and there was not to be found on the face of the survey such gross preference and unwarrantable proceeding, which alone, in some cases, would require the interposition of a court of justice, the defendant should be quieted in her possession. Other points were raised and decided, which it is not necessary to notice.

It was carried to the supreme court, which reversed the judgment of the court below, holding that the act of the deputy surveyor was merely ministerial, and that he was bound to make an equitable division of the back land between the front owners, in proportion to the respective quantities held by the latter.

The widow Marcellin Haydel brought the case up to this court.

It was argued by *Mr. Janin*, for the plaintiff in error, and submitted upon a printed argument by *Mr. Grailhe*, for the defendant in error. Only those parts of the arguments will be noticed which related to the point upon which the decision of their court turned.

*Mr. Janin*, for plaintiff in error.

I. The power of congress over the public lands is unlimited. *Bragnell v. Broderick*, 13 Pet., 439; *Wilcox v. Jackson*, Id., 498; *Foley v. Harrison*, 15 How., 433. Congress had the undoubtedly \*right to prescribe the extent to which, and [ \*24 the boundaries within which, portions of the domain might be purchased as back concessions. By the 5th section of the act of March 3, 1811, congress prescribed that this extent and these boundaries should be determined in certain cases, such as this, by the deputy surveyor of the district and the surveyor of the district south of Tennessee River. These officers are, therefore, the exclusive judges of the matters now brought before this court, by the plaintiff, subject only to the supervision of the general land-office. In the case of *Wilcox v. Jackson*, 13 Pet., 511, the supreme court of the United States held the following language:

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“ Before we proceed to inquire whether the land in question falls within the scope of any of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing. It is this: that the acts of congress have given to the registers and receivers of the land-offices the power of deciding upon claims to the right of pre-emption—that upon these questions they act judicially—that, no appeal having been given from their decisions, it follows, as a consequence, that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created; and even where there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court, in the case of *Elliot et al. v. Peirsol et al.*, 1 Pet., 340, in these words: ‘Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.’”

The case of *Jourdan v. Barrett*, 4 How., 169, is very analogous to this, and conclusive on the authority of the surveyors. See pp. 182-184.

That the surveyors acted within the scope of their authority, is not questioned; and, from the authorities just quoted, it appears that the propriety or correctness of their decision is beyond the reach of courts of law. But were the question open, it would be easy to show that their decision is unassailable, and that a court of justice would decide as the surveyors did. The object of the enactment of congress was to \*25 ] provide for the apportionment \*of back lands in certain localities, where every front proprietor could not obtain a quantity equal to his front tracts—that is, on points of land. The precise limits of the point, the lands of which are thus to be made to contribute and participate, cannot be determined by legislative language; each point begins in a bend; while one man may suppose it to begin in the middle of the bend, another may be of opinion that it really begins only at its extremity. Under these circumstances, the surveyor followed the most prudent course.

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*Mr. Grailhe*, in reply to the above.

We candidly confess there is some "simplicity," if not in the point at issue, at least in the arguments brought forward to mislead the judgment of this court.

They are, in substance, the following: That the 5th section of the act of congress, approved March 3, 1811, takes from the judiciary power the right to determine upon conflicting claims arising under this law, and transfers it over to the ministerial, or executive department.

A more forced conclusion cannot be drawn from the plain language of the section quoted, which, in full, reads as follows:

"And the principal deputy surveyor is hereby authorized to cause to be surveyed the tracts claimed by virtue of this section; and in all cases where by reason of bends in the river, lake, creek, &c., each party cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants, in such manner as to him may appear most equitable."

Now are these words exclusive of the concurrent jurisdiction of the judiciary? No; and we repeat that an attempt to impose on them such a construction, is a stretch of imagination and credulity not to be admitted.

And, in fact, in whatever manner the subject may be viewed, can congress derogate from the great principles of the constitution? It is urged that congress, having the primordial possession of the soil, may fix such restrictions as it pleases to its disposal. But congress is only invested with the delegated powers of the original sovereign states, and all powers not expressly granted are admitted to be withheld.

The first section of article 3d of the federal constitution, says that the judiciary power of the United States shall be vested in one supreme court, and in such inferior courts as congress may from time to time ordain and establish; and the following article adds that said power shall extend to all cases arising under the constitution and laws of the United States.

By the 3d section of article 4th, congress is empowered to \*dispose of, and make all needful regulations relative to, [\*26 the territory or other property of the United States.

But can these regulations, which in fact are laws of the land as well as land laws, differ from the general principles adopted in the social compact?

The answer is obvious, and though it had been unnecessary to point it out, yet, congress has, on different occasions, answered the query, more especially in the act of March 3,

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1831, already quoted, where, referring to similar conflicting claims, it says [sect. 6]: "That in relation to all confirmed claims as may conflict, the register of the land-office and receiver of public moneys are hereby authorized to decide between the parties, and shall be, in their decision, governed by such lines or boundaries as may be agreed upon between the parties, either verbally or in writing: and in case no boundaries be agreed upon between the parties, said register and receiver are authorized to decide between the parties in such manner as may be consistent with the principles of justice; and it shall be the duty of the surveyor-general of said state to have those claims surveyed and plated in accordance with the decision of the receiver and register. Provided, that said decisions and surveys and the patents that may issue thereon, shall not, in anywise, be considered as precluding a legal investigation and decision by the proper judicial tribunal."

Does it not now appear that a "patent" may be inquired into, in any case, where it has improvidently issued?

But one of the boldest attempts to mislead a court of justice is certainly found in the assumption that the case of *Jourdan v. Barrett*, 4 How., 169, supports the position of defendant, when in fact it upsets every principle by her invoked. This decision merely establishes that a survey made after the act of May 1, 1831, providing for a surveyor-general of Louisiana, could not be binding if made by the surveyor of lands south of Tennessee, with whom was by former laws vested the right of survey in Louisiana and the adjacent states; but, as to a word relative to the *exclusive jurisdiction* of executive or ministerial authority, we dare the opposite counsel to quote from that case.

Yet, it is confidently asserted, and we must say that we were struck with astonishment to hear it mentioned, that this exclusive power to decide between conflicting claims could not be questioned, and was universally admitted.

Nothing is so far remote from the real state of things, and we challenge the issue. We here proclaim, and this for the honor of our federal courts, that such a heresy has never been dreamed of by them, and that every misquotation from their decisions to that effect, is made with a view to "give so much of truth as will suggest an untruth."

\*Take, for instance, the leading case of *Wilcox v. Jackson*, 13 Pet., quoted by our adversary.

It would, from the fragment chosen, appear, that the court in that case maintained an entry and survey against any other equity of antecedent date; but not so, however.

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Jackson was an officer of the United States army, stationed at a certain place, set aside by congress as a military post. Wilcox had settled himself, as a squatter, on part of the tract, and, after various frustrated attempts, had succeeded in obtaining from the register a certificate of pre-emptioner, a located warrant and a "survey" from the proper officers. Then he sued Jackson, the party in possession.

What did the court decide? That congress was at liberty to dispose of their public lands as they pleased; that having set the land aside for certain purposes, it could not be treated as belonging to the mass of public property, and when, as quoted in defendant's brief, they speak of the power given to registers and receivers to decide upon questions of location, they say that so long as they remain within their duties, their acts are legal; but not so, when transgressing them. And they then set aside the decision which had been rendered in favor of Wilcox, by the land officers.

How could any one be so bold as to give the foregoing case such a misinterpretation as that sought to be forced on the court in the present instance?

We repeat again, that such a heresy is not sanctioned, and we hope never will be sanctioned, by an American tribunal; for it would not only be tainted with illegality and unconstitutionality, but submit, in a free country, the rights of citizens to the whims, caprices, or corruption of the irresponsible recipients of executive favor.

Mr. Justice CATRON delivered the opinion of the court.

The plaintiff and defendant are respectively owners of tracts of land forty arpens deep, situate in a concave bend of the Mississippi River, in Louisiana; their tracts front on different sides of the deepest point of land, and when the side lines of each tract are extended perpendicular to a base line corresponding with the bank of the river, the two tracts interfere before the second depth of forty arpens is obtained.

By the 5th section of an act approved the 15th of February, 1811, congress provided "that every person who either by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the territory of Orleans, owns a tract bordering \*on any river, creek, bayou, or watercourse, [\*28 in the said territory, and not exceeding in depth forty arpens French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of his own tract, at the same price and on the

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same terms and conditions as is or may be provided by law for the public lands in said territory. And the principal deputy surveyor of each district, respectively, shall be, and he is hereby authorized, under the superintendence of the surveyor of the public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section. And in all cases where, by reason of bends in the river, lake, creek, bayou, or watercourse bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants in such a manner as to him may appear most equitable."

Those under whom the plaintiff and defendant hold their lands, respectively, availed themselves of the pre-emption accorded by this law. The husband of the plaintiff, having  $155\frac{8}{100}$  acres in his front tract, paid into the hands of the receiver of public moneys, \$148.75, for a certificate of the entry of 119 acres of the lands in his rear. Nicholas Haydel, under whom the defendant holds, owned a front tract containing  $249\frac{54}{100}$  acres, and paid into the hands of the receiver of public moneys the price of 248 acres, for his entry of the back lands, under the law.

The whole quantity of land in the rear, subject to their entries, was  $322\frac{48}{100}$  acres, as to which there was no conflict between them and any other proprietors. Of this quantity the principal deputy surveyor of the United States allotted to Haydel  $243\frac{20}{100}$  acres, and Dufresne  $79\frac{28}{100}$ . His survey dividing the land in dispute was part of a township survey, and was approved in March, 1831, by the surveyor of public lands south of the State of Tennessee, and a patent was issued to Haydel for  $243\frac{20}{100}$  acres of the land in 1845.

The petition charges error in the division, but nothing more, and asks a redivision of the land by the district court, on the sole ground of a vested equity in the plaintiff to forty acres of the land granted to Haydel. It is not alleged that Haydel controlled the surveyor, or had any connection with, or even knowledge of, the alleged error when the survey was made.

On this state of pleading and fact, the district court decided for the defendant, and dismissed the petition; and an appeal was prosecuted to the supreme court of Louisiana, which reversed the judgment of the district court, and ordered that \*29] \*court to cause the land in dispute to be divided by a re-survey, so as to give Dufresne forty acres of the land for which Haydel had obtained a patent. This judgment was given on the assumption that, by their respective entries in the

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district land-office, each party took an equity in the back land in proportion to the quantity of his front tract, when compared with the contending tract; and that thus the respective equities stood before and at the time when the lands were officially surveyed; and that the principal deputy who laid off the lands, under the supervision of his principal, acted in a merely ministerial capacity, and had no discretion to divide them so as to give Dufresne less than a full proportion of the whole. If it be true, that irregular entries of unsurveyed back lands, which entries were allowed by courtesy of the general land-office, vested an equity in the enterer, and divested the United States of title, as the state court held, then it must follow, that after the entries were generally made in this loose form, throughout the coast of the Mississippi River, in Louisiana, that the courts of justice might have decreed partitions among front proprietors, in all instances, and have had the lands surveyed by judicial authority, and superseded the action of the United States altogether, as required by the act of 1811.

These anomalous entries were conditional, and made subject to a future public survey; to this effect the receipt for the money was given by the receiver, and the register was instructed not to transmit the certificate of purchase until the survey was completed.

The constitution vested congress with power to dispose of the public lands, and to make all needful regulations for this purpose; and as respects the class of lands under consideration, the proper department ordered, as a rule having few exceptions, that they should be laid down as part of a general plan of township surveys, and in connection with the public lands and private claims adjoining; and that this general survey should settle the quantity and form of each tract of back land to which a front owner had a preference of entry.

In this instance the survey was made by the principal deputy of the proper district, under the superintendence of the surveyor of public lands south of the state of Tennessee, as required by law; by this survey, it was ascertained that neither of the claimants here litigating could obtain a tract equal in quantity to his front tract; and therefore it became necessary for the surveyor, assisted by his immediate superior, to divide the vacant land between these two front owners, "in such manner as might seem to him most equitable." When the survey was approved, if the party here suing supposed himself aggrieved, \* he was authorized to appeal [\*30 from the decision of the principal deputy, and the surveyor-general south of Tennessee, to the Commissioner of

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the general land-office: and from his decision, if unfavorable, to the secretary of the treasury.

Congress contemplated that these lands should be divided among front proprietors, by a surveyor on the ground, aided by his principal; these officers were bound to act according to their best judgment, and decide as judges on the equities of these claimants; nor could the courts of justice interfere to control their acts, if they were honestly performed; the contrary of which is not alleged in this case.

This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do.

It is ordered that the judgment of the supreme court of Louisiana be reversed.

*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, adjudged, and decreed by this court, that the decree of the said supreme court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said supreme court, with directions for further proceedings to be had therein, in conformity to the opinion of this court, as to law and justice shall appertain.

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THE NEW YORK AND MARYLAND LINE RAILROAD COMPANY  
PLAINTIFF IN ERROR, *v.* ROSS WINANS.

A railroad company, organized under a charter from Pennsylvania, is responsible for the infraction of a patent right respecting cars, although the entire capital stock of the company was held by a connecting railroad company in Maryland, which latter company also worked the road by the instrumentality of its agents, and motive power, and cars.<sup>1</sup>

The obligations to the community which the Pennsylvania company is placed under by its charter, cannot be evaded by any transfer of its rights and powers to another company; and in this case, the Pennsylvania company contributes to the expense of working the road, and of paying the officers and agents who are employed.

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<sup>1</sup> See further as to the liability of a patent. 3 Blatchf., 91; 2 Fish. Pat. corporation for the infringement of a Cas., 62; 4 Wash. C. C., 9.

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Courts will not allow corporations to escape from their proper responsibility, by means of any disguise.<sup>1</sup>

\* Where the patent was signed by an acting commissioner of patents, it was not necessary to aver or prove that he was legally entitled to act in that capacity. The court will judicially take notice of the persons who preside over the patent-office, whether they do so permanently or transiently. [§31]

THIS case was brought up, by writ of error, from the circuit court of the United States for the eastern district of Pennsylvania.

The case is stated in the opinion of the court.

It was argued by *Mr. J. Mason Campbell*, and *Mr. Johnson*, for the plaintiff in error, and by *Mr. St. George T. Campbell*, and *Mr. Latrobe*, for the defendant.

The points made by the counsel for the plaintiff in error, were the following:—

The court below (Judge Kane) charged the jury, in substance, that, as the infraction complained of was committed on the road of the plaintiff in error, though the cars were owned by the Baltimore and Susquehanna Railroad Company, the plaintiff in error was responsible in this action, because the profits accruing from the use of the cars were divided between the two companies.

He also charged the jury, that in estimating the amount of damages, they were to be guided by the sum which had been fixed by the witnesses as the fair compensation for an annual license for each car, and were to allow such sum annually, for each car, for a period of six years antecedently to the institution of the suit.

The plaintiff in error will contend that the learned judge below erred in both parts of his charge:—

1. As to the liability of the plaintiff in error. The cars, which were assumed to be made in violation of the patent of the defendant in error, were not built by, and did not belong to, the plaintiff in error. It is not liable, therefore, for their construction, nor is it pretended that it has sold any. If liable at all, it is for a use of the cars.

Now, in point of fact, it did not run the cars in question over its road.

The whole transportation was done by the Baltimore and Susquehanna Railroad Company; and if there has been any

<sup>1</sup> ADOPTED. *Thomas v. Railroad Co.*, 1 McCrary, 197; *Railroad Co. v. Co.*, 11 Otto, 84. See also *Amer. Furnace Co.*, 37 Ohio St., 323. *Union Tel. Co. v. Union Pacific Ry.*

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user by the plaintiff in error of cars, in violation of the patent of the defendant in error, it is a constructive user, growing out of the agreement between it and the Baltimore and Susquehanna Railroad Company, by which one third of the net revenue from transportation is credited to it, and a user in fact, under that agreement, by the Baltimore and Susquehanna Railroad Company.

\*32] \*This agreement is supposed, by the learned judge below, to do one of two things; either to constitute the relation of principal and agent between the two corporations, or to make them partners.

As to the first view, it may be observed, that the subject of the agency being the running of the cars, and the plaintiff in error having nothing to do with the running, it can hardly be deemed an agent, in the face of the fact that it does nothing in the agency. With still less plausibility can it be regarded as a principal; its supposed agent in that case, the Baltimore and Susquehanna Railroad Company, not only owning and running the obnoxious cars itself, but doing so by force of its own power in the premises.

As to the other view, to wit, that of a partnership between the plaintiff in error and the Baltimore and Susquehanna Railroad Company, a more extended examination is necessary.

In the first place, it seems impossible to establish this hypothesis, without conceding that these two corporations would have had a right to form a partnership expressly. Whether the partnership be express or implied, only relates to the nature of the evidence by which it is shown. The thing is the same, however proved. Now, the power to form a partnership is one which corporations do not possess, unless it be given in express terms, or by necessary implication. *Sharon Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.), 412; *Canal Bridge v. Gordon*, 1 Pick. (Mass.), 305.

There are neither such words nor implication in the present instance, and, of consequence, no partnership can be deduced where the power to create that relation is wanting.

If, however, the power be conceded, and no partnership has been in terms formed, it is only to be implied, in law, from the division of the net profits of transportation between the two corporations, provided for by their agreement.

But the reception of a part of the profits is not always attended with this consequence. Seamen and clerks may receive their pay in this form without becoming partners thereby, either *inter se* or as to third persons. So a landlord may get his rent in the shape of profits, and not be made a partner by such receipt. The test seems to be in the *animus*

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of the parties as to the reservation of profits, and not in the reservation itself. If their purpose be compensation, merely, to one furnishing something necessary to the business, a partnership is not held to be created. Such is the present case, where it is plain that the object was merely to compensate the plaintiff in error for the use of its road, and to make the rent therefor commensurate with the use. Story on Part., §§ 36, 38; 3 Kent Com., 33; *Perrine v. Hankenson*, 6 Halst. (N. J.), 181; *Heimstreet v. Howland*, 5 Den. (N. Y.), 68; \*<sup>[33]</sup> *Heckert v. Fegely*, 6 Watts & S. (Pa.), 143; *Boyer v. Anderson*, 2 Leigh (Va.), 550; *Loomis v. Marshall*, 12 Conn., 69; Collyer on Part., § 44, and note.

Conceding, however, *argumenti gratiâ*, that the relation of principal and agent, or of partners, existed between the two corporations, it cannot be denied that the infringements complained of were not committed by the plaintiff in error, but by the Baltimore and Susquehanna Railroad Company.

Now, the tortious acts of the company last named cannot be considered as acts done in the ordinary course of the business between it and the plaintiff in error, whatever be the relation between these parties; and to make the plaintiff in error responsible, it must be shown to be privy to their commission, before or after. Story on Agency, § 455; Collyer on Part., § 457; *Keplinger v. Young*, 10 Wheat., 358, 363.

But the learned judge below excludes altogether this element of accountability, and makes the plaintiff in error liable, without putting the fact of privity to the jury.

2. The charge below is also erroneous as to the amount of damages recoverable.

It gave the jury to understand, that they could find against the plaintiff in error for a user of the patent of the defendant in error, for six years preceding the commencement of the suit.

But the declaration only charged (Record 4) a user during the term of seven years, for which the extension of the patent had been granted.

Now, the seven years' extension began only on the 1st October, 1848, and all, therefore, that was recoverable under the declaration, was for a user from the 1st October, 1848, to the time of suit brought, (April, 1851,) a period of less than three years, instead of six, as charged.

3. The suit being only for infringements committed during the extension of the patent, it is further submitted, that the extension being by the acting commissioner of patents, is unavailing to give the defendant in error any rights.

If this court, in 4 How., 646, meant to affirm the validity of the acts of such a functionary, as is supposed by Mr. Justice

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Woodbury, in 1 Woodb. & M., 248, this point is not now open: but if it be open, the plaintiff in error relies on the first and second sections of the patent act of 1846, as governing the patent-office, to the exclusion of the acts of 1792 and 1795. 1 Stat. at L., 281, 415.

The counsel for the defendant in error made the following points:—

1. The extension of the patent by the acting commissioner, &c. (The argument upon this head is omitted.)

\*34] \*The remaining exceptions to the charge of the judge, were:—

1. “That the York and Maryland Line Railroad Company, and the Baltimore and Susquehanna Railroad Company, were two distinct companies as to third persons.” The force of this exception is not clearly apprehended. If it is meant to convey the idea, that the judge should have charged, that the two companies were the same, and not “two distinct companies as to third persons,” it is difficult to perceive, first, how it could have been sustained in point of law; or, second, how it would serve the defendants below. They were two corporations, had two charters, from different sovereignties, and had never been united by law. How could the judge say, then, that they were not two distinct companies?

But if they were the same company as to third persons, the judge should (as this exception supposes) have so charged; and then the main point of defense, that the use by one was not the use by the other, would have utterly failed.

In fact, however, upon this point, all the judge said was, that if there were two tort feasors, a suit could be maintained against either,—for which proposition no authority is needed.

2. The second exception to the charge is:—

In charging, further, that, whether the relation between them was that of agency or partnership, the liabilities of defendants was the same.

As a legal proposition, standing singly, this can hardly be questioned.

One of two partners is liable to an action for an infringement, as for any other tort committed by his authority, or participated in by him. This was all the judge said. He was not asked to charge.

1. That two corporations cannot form a contract of copartnership.

2. Or, that, under the evidence in this cause, there was no proof of partnership.

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3. Or that there was no evidence of agency by which the defendants could be held liable.

Not being asked, he expressed no opinion on the point, but simply said, whether the relations were those of partners, or principal and agent, neither would affect the plaintiff's right. In this, there was, it is admitted, no error. If the defendant desired specific instructions, they should have been prayed.

The judge, by limiting his illustration to partnership or agency, actually favored the defendants; for he might have charged, that, under the facts, no matter by what name the relation of the companies was called, the defendants were liable, participating, as they did, in the tort. Grant that no copartnership contract can lawfully be made between two corporations; yet, if they <sup>\*35</sup>did make it, shall they be allowed to allege its unlawfulness against a third party, whose property is tortiously used for their profit?

If they do make such a bargain, whether lawful or otherwise, and it result in a use by them of the patented improvement, the unlawfulness of the contract by which the use was accomplished can be no defense.

They are complained of for one unlawful act, and this would be to defend it by showing another.

If they participated in the use of the patented thing, no matter how, whether under a lawful or unlawful contract, they are liable. It is the doing of the thing, and not the mode in which it is done, that is complained of.

Without defining the relations of the parties, the defendants, upon this view are clearly liable.

Whether the contract was lawful or unlawful, its effect was to make the act of one the act of the other; the use by one the use by the other.

If, however, the relation of the two companies is here to be considered, and its character, not made the subject of an express point in the court below, is to be argued, it will be contended, that such a use of the thing patented was proved as made the defendants liable, in any view that can be taken of the case.

1. Whether the use proved was to be regarded as a direct and independent use by the defendants below.

2. Or, as a use through their agents, (the Maryland company,) with their knowledge, by their authority, upon their property, and of which use they directly received a portion of the profits.

3. Or, as a use, as a partner, with the Maryland company,—paying a proportion of losses by, and receiving a proportion of the profits, as such, from the use.

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4. Or, whether contributing, as they did, their road, which was essential to the availability of the cars of the Susquehanna company, the defendants below were to be looked upon, as suggested by the judge's charge, as the agents of the former company.

1. There was evidence of a direct and independent use by the defendants below, to the prejudice of the patentee.

The defendants were a Pennsylvania company, fully organized, and having possession of their road.

The uses made of their road, were their own uses. The road and the cars upon it are a single machine, the use of a part of which involves the use of all other parts. The cars are useless without the road. The road is useless without the cars. The terms upon which the cars are permitted to be used are immaterial. The injury complained of is the use.

It is this which distinguishes this case from the case of *\*36] Keplinger v. Young*, in 10 Wheat., 358. There Young was held not to be liable, because he only purchased the product of a machine; but it would have been different, had he taken the machine into his own keeping, and used it.

Indeed, in that case, the court intimate, that had the facts, from which it might fairly have been inferred that Young used the machine, been before them, the result might have been different.

2. Even if the fact of the ownership of the cars by the Maryland company is inconsistent with this view, yet the Maryland company using the defendant's road, only through their consent, can occupy no other position than that of agents, for whose acts, done in the course of their business, the principals must be responsible, especially as they are directly benefited by them.

The Pennsylvania company may, by law, run cars on their own road. The Maryland company has no right to do so, by law, within Pennsylvania. Their charter gives and can give no such authority, and such running would be a nuisance, if done by them in Pennsylvania, and could not be justified under their own charter. The Pennsylvania company, duly chartered, build a road; they need rolling stock, and the patented cars are used as such, and they receive one third of the net profits of the earnings thereof. Without this, the Maryland company could not use the Pennsylvania road; by it, they become, for a fluctuating compensation, the agents of the Pennsylvania company, to stock and run their road. If there can be no partnership, they enter Pennsylvania by virtue of this agency alone. A portion of the things done by

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them in the fulfilment of that agency, by the authority, with the sanction, and upon the property of the defendants, is to use the patented improvement. A proportion of the repairs upon it are charged to the principal; a portion of the profits from its use is paid to the principal. No authorities are needed to show, that, for an injury by an agent, the principal or the agent may be sued. The ownership of the infringing machine is immaterial; its use alone is in controversy; and it will be submitted, that such an use, by an agent, as is here proved, will render the principal liable.

3. Or, regarding the use as the result of a partnership, with the Maryland company, the defendants paying a proportion of losses and receiving a proportion of the profits, as such, from the use, the latter must be liable to the patentee.

Under this head, the second of the exceptions to the charge of the judge will be properly considered.

There was some relation between the companies, surely. What was it? If in fact, it be, that the Maryland company were simply using a Pennsylvania charter to carry on their business—\*a change of name merely—the stock, property, and every thing being owned by the same parties, then, in Pennsylvania, the Maryland company's use was the Pennsylvania company's use.

The judge does not, however, define the character of this relation; he was not called upon to do so.

If it were needful, it might be well contended that the relation of the companies was that of partnership. Corporations may form partnerships under circumstances, so far, at least, as to preclude them from setting up separate rights to the prejudice of third persons.

In the case of *Canal Bridge v. Gordon*, 1 Pick. (Mass.), 297, which was a case where a bridge and an embankment leading to it were owned by different corporations, Parker, C. J., after referring to the technical difficulties of considering several corporations as copartners, goes on to say, what covers precisely the present controversy, "and yet, if they are all composed of the same individuals using several corporate powers for the same end and purpose, with nothing but the form of a record to distinguish them, equity would seem to require that they should not be allowed to sever to the prejudice of any person with whom either might contract."

And, for the same reason, where both are benefited by the wrong done by one of them, they should not be allowed to sever.

That contracts of the same nature are looked upon and

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treated as partnerships, will further appear by reference to the following authorities: 4 Law & Eq., 171; 2 Id., 319.

In the present case, there was every element required to form a partnership contract.

It is not the case where a portion of the gross receipts was used as a mode of calculating rent, as in 5 Den. (N. Y.), 68, cited by plaintiff in error, but a right to a share of the net profits, as such, which that case decides to be a criterion of partnership. Nor is it the case in 17 Wend. (N. Y.), 412, where it was held that two corporations cannot sue jointly, as corporations, in contract; but where it was not held that if, in fact, such copartnership existed, either could escape liability for a tort arising in that relation, by alleging its unlawfulness.

The law of New York, upon this question of partnership liability to third persons, is clearly settled in *Bostwick v. Champion*, 11 Wend. (N. Y.), 571, where it was held that where A, B, and C run a line of coaches, the route being divided between them into sections, each furnishing his own horses and coaches, and hiring drivers, and paying the expenses of his own section, the fare, less the tolls, being \*38] divided in proportion to the number of miles \*run, that a passenger injured by negligence of the drivers of A's coach, might sue them all.

The court is referred to the opinion of Judge Nelson, at page 584, and to same case, Chancellor Walworth's opinion, 18 Wend. (N. Y.), 175.

A division of profits, as profits, and a right to file a bill for an account, may be regarded as conclusive evidence of a copartnership contract.

Both, it is submitted, concur here.

The distinction, which it is believed will reconcile all the cases, is between a stipulation for a compensation proportioned to the profits, and one for an interest in such profits.

To this effect the cases are numerous. See Carey on Part., 9; Story on Part., 36; Bissett on Part., 4; Collyer on Part., 44; and the cases here cited.

Every element referred to by these authorities exists here.

If they may so contract as partners, it will be contended, that the evidence exhibits every feature required by law for that relation.

If not liable as joint tort feasors, or partners, from want of legal authority to make such a contract, or if the contract as made does not by law create this relation, still, the defendants are liable by reason of the use made of this road by the Susquehanna company.

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Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff is a corporation existing under a charter from the state of Pennsylvania, and authorized to construct a railroad from the town of York to the Maryland line. Its stock was subscribed for by the Baltimore and Susquehanna railroad company, a Maryland corporation, and their joint capital is vested in a continuous railroad from the city of Baltimore to York. The management of the road is committed to the Maryland company, which appoints the officers and agents upon it, and furnishes the rolling stock necessary for its operation. The president and secretary of the two companies are the same. The directors of the Pennsylvania corporation (plaintiff) are selected by the Maryland company, and are qualified by a transfer of one or more shares of its stock to them, shortly before an election, and which they return on vacating their office. This nominal organization is made necessary by the charter, which requires that the majority of the officers shall be citizens of Pennsylvania, and that annual reports of the condition and business of the company shall be rendered to the legislature. To preserve appearances with the legislature, an annual statement is made.

\*In this, the gross receipts of the entire road for the [\*39] year are ascertained, and the expenses deducted; the balance is then divided, one third being assigned to the plaintiff; but no money passes between the corporations. In these expense accounts, the salaries of officers, conductors, and engineers, the cost of locomotives and fuel, of the repairs and insurance of cars, and the losses of business, enter as constituent items. It was admitted upon the trial of the cause, that a number of cars made according to the specification of the patent of the defendant, had been used upon the road without his license, and for which he brought this suit. A verdict was rendered in his favor, and the judgment thereon is brought to this court, upon exceptions to the instructions of the circuit court, to the jury.

The court charged the jury, that the road on which the infraction was committed was held under a Pennsylvania charter to the defendant in that court; that the transportation on the road was carried on by the Maryland corporation; and that the profits accruing from the use of the cars upon the road, that is, the profits of the infraction, are nominally divided between the two companies. That, upon these facts, the plaintiff is entitled to recover against the present defend-

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ants, whether they are to be regarded as partners, or as principal, or agent of the Maryland corporation.

The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Sim., N. S., 550; *Winch v. B. and L. Railway Company*, 13 Eng. L. & Eq., 506.

If, then, the case had terminated with the facts that the infringement of the defendant's patent had taken place, by the \*acts of persons using the corporate name of the plaintiff, with the assent of the corporate authorities, their liability would have been fixed.

But the case before us is, that the motive power on the road partly belongs to the plaintiff; that the agents and officers employed are in its service and are paid by it; and that the cars are fitted and repaired at the common expense of the two corporations. It follows, therefore, that the plaintiff is a principal, co-operating with another corporation, in the infliction of a wrong, and is directly responsible for the resulting damage.

Nor will the plea that the corporation has no independent nor responsible existence, as regards the Maryland company, and that its display of a president and directors, of conductors, engineers, and agents, of annual elections and annual statements, import only a formal and illusive representation before the legislature of Pennsylvania, or their constituents, of a compliance with the conditions of the charter, avail the plaintiff. It is certainly true that the law will strip a corporation or individual of every disguise, and enforce a respon-

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sibility according to the very right, in despite of their artifices. And it is equally certain that, in favor of the right, it will hold them to maintain the truth of the representations to which the public has trusted, and estop them from using their simulation as a covering or defense. *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.), 480.

The supreme court of Pennsylvania, in *Peters v. Ryland*, 20 Pa. St., 497, has announced principles decisive of this case.

The court held that the owner of a passenger car employed on a railroad belonging to the state, and the motive power and superintendence of which is furnished by the state, is responsible for the misconduct of the public agents. It says: "The case before them is *sui generis*; but it comes much nearer to that class of decisions in which it has been held, that several parties engaged in carrying over different portions of the same line of conveyance, each sharing in the profits of the whole route, and of course of each section of it, are all responsible for the faithful discharge of their duty, and liable to respond in damages for any injury which results from the negligence or unskillfulness of any of the proprietors and servants." 11 Wend. (N. Y.), 571; 18 Id., 175; 19 Id., 534.

"The state, as well as the carrier, is paid for every passenger transported on this railroad, which shows their community of interest; and if there be a common liability, that of the state cannot be enforced by action; and this circumstance does not diminish that of the carrier; because they have a common interest, however, and share the business of transportation, it is apparent that in holding the party before us to answer for the \*negligence of the state's agents, we do not punish one man for the misfeasance of [\*41 another's servants.]

The objection taken to the patent, that it is signed by "an acting commissioner of patent," and that the record contains no averment nor proof of his title to the office, is not tenable. The court will take notice judicially of the persons who from time to time preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts. *Wilson v. Rousseau*, 4 How., 686.

The judgment of the circuit court is affirmed.

*Order.*

This cause came on to be heard, on the transcript of the record, from the circuit court of the United States for the

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The United States *v.* Daniel W. Coxe.

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eastern district of Pennsylvania, 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 interest until paid, at the same rate per annum that similar judgments bear in the state of Pennsylvania.

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THE UNITED STATES APPELLANTS, *v.* DANIEL W. COXE  
AND OTHERS.

The principles affirmed in the cases of the *United States v. King and others*, 7 How., 833, and of the *United States v. Turner's Heirs*, 11 How., 663, again established.

THIS was an appeal from the district court of the United States for the eastern district of Louisiana.

In June, 1846, Coxe and thirteen others filed a petition in the district court, under the acts of Congress passed in 1824 and 1844, the purport of which acts has been so often explained in the preceding volumes of these reports, that it is unnecessary now to recapitulate it.

The United States pleaded the general issue; and the cause was tried, without the intervention of a jury, and judgment rendered in favor of the petitioners, on the 30th of May, 1849.

The United States prayed an appeal in open court, which was allowed on the 6th of June, 1849.

It was argued by *Mr. Cushing*, (attorney-general,) for the United States, who made only the following points, viz.:—

Without any more particular statement of the law or the <sup>\*42]</sup> evidence of these cases, it is supposed that it will be sufficient to state, that the claim alleged by the petitioners was derived solely from the same "Maison Rouge grant," which has heretofore been fully considered and decided by this court, in the case of the *United States v. King, &c.*, reported in 3 How., 773, and 7 Id., 833.

This court having finally adjudged and determined in that case, that the "Maison Rouge grant," as it was called, conveyed no private right or property to the said Maison Rouge, and the petitioners claiming from him as the proprietors, in virtue of said grant, it must follow that the decrees in favor of the petitioners are erroneous, and ought to be reversed.

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*Mr. Coxe*, for the appellees, filed an elaborate argument, in which he contended that the record was imperfect, and did not contain sufficient grounds for a reversal; that this imperfection was owing to the fault of the United States; that documents, which were necessary for the verification of the appellee's title, ought to be in the record, and were not there; that the rules of this court prescribe that no cause shall be heard until a complete record is filed; that, under the acts of 1824 and 1844, the proceedings in this case were to be conducted according to the rules of a court of equity, which require the entire case to be presented here as it was exhibited to the court below; that the presumption must be, where no error can be assigned on the face of the record, that the judgment of the court below was right; and that looking to evidence *dehors* the record, if such course is allowable, the facts and circumstances of the case require an affirmance of the decree.

In commenting upon the preceding decisions of this court, *Mr. Coxe* contended that they were pronounced upon a case at law, and made the following points:—

1. That we are now in a court of equity, and not of strict common law—a system unknown in Louisiana.
2. We are now entitled to the right, of showing that if by such a document as that bearing date in June, 1797, a title did not pass to the Marquis de Maison Rouge, as his private property, according to the laws of Spain; yet that, in conformity with the established usages of the Spanish government, it did.
3. That if the preceding position is denied, we have still the right to show that, under the circumstances now brought to the notice of this court, sitting as a court of equity, we are warranted in making it the foundation of an argument in favor of the present title of the appellees, wholly unaffected by any previous decision or even *dictum* of this court, of an adverse character.

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

\*This case cannot be distinguished from the case of *United States v. King et al.*, 7 How., 833, and of *United States v. Turner's Heirs*, 11 How., 663. [\*43

The decree of the district court must therefore be reversed, and a mandate issued to the court below to dismiss the petition.

*Order.*

This cause came on to be heard on the transcript of the

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record from the district court of the United States for the eastern district of Louisiana; and it appearing to the court that this case cannot be distinguished from the case of the *United States v. King, et al.*, 7 How., 833, and of the *United States v. Turner's Heirs*, 11 How., 663, it is thereupon 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.

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PIERRE BARRIBEAU AND EUPHRASIE T. PERRY, APPELLANTS, *v.* JOSHUA B. BRANT.

Where the death of a party complainant was suggested at December term, 1851, of this court, and his legal representatives did not appear by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court.

As to the other complainant, the allegation that a deed which she executed ought to be set aside, upon the ground of fraud and misrepresentation, and inadequacy of price, is not sustained by the evidence; nor is the allegation that she was a joint-tenant, and not a tenant in common, sustained by a construction of the deed.

Where the complainant, after filing his bill, conveyed all his interest to a trustee, and died pending an appeal which he took to this court, the trustee cannot be permitted to be made a party to the proceedings in this court. The only persons who can appear in the stead of the complainant, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves.

THIS was an appeal from the circuit court of the United States for the district of Missouri.

The case is stated in the opinion of the court.

It was argued by *Mr. Bradley*, for the appellants, and by *Mr. Lawrence*, for the appellees.

The argument consisted, upon both sides, in the application of well-established principles of law to the facts in the case, as disclosed by the evidence. There being no principle of law disputed, it is not necessary to state the contradictory testimony which furnished the basis of the respective arguments.

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

## Barrièreau et al. v. Brant.

\*This is an appeal from the decree of the circuit court of the United States for the district of Missouri, sitting as a court of Equity.

The case is this: Pierre Barrièreau was seised in fee-simple of a lot of ground in the town of St. Louis; and, by deed dated May 8, 1829, conveyed it to Joseph White, in trust for the grantor, during his life, and after his death for his two sons, Adrian and Pierre, and his adopted daughter, Euphrasie, who had grown up in his family.

After the death of the grantor, his sons, Adrian and Pierre, and White, the trustee, joined in a deed to Brant, the appellee, for all the interest of the two sons in the lot. But at the time this deed was made, Pierre had not attained the age of twenty-one years. Subsequently, however, he executed a deed of confirmation, and in that deed professed to convey two undivided third parts of the premises.

Euphrasie, the adopted daughter, executed a deed to Amaranth Loiselle, purporting to convey the whole of this lot. And, afterwards, she and Amaranth made separate deeds, on the same day, to Samuel Merry, for her third part of the premises; and Merry afterwards conveyed to Brant. If, therefore, the several deeds above mentioned are valid, Brant is entitled to the whole lot.

Adrian died intestate, and without issue. And, after his death, Pierre and Euphrasie filed this bill, charging that all of the deeds made by them respectively, and by Adrian in his lifetime, were obtained by misrepresentation and fraud; that they were illiterate, and did not understand the object and effect of these instruments when they were executed; and that the consideration paid was far below the real value of the property. The bill further charged that Pierre was still under the age of twenty-one when he made the deed of confirmation.

The answer of Brant denies all fraud and misrepresentation, and avers that the parties were perfectly aware of the contents of the several instruments when they were executed, and that the price was a fair one, according to the value of the property at that time; and that Pierre was of full age when he made the deed of confirmation.

Many witnesses were examined by the parties in support of their respective allegations, and at the final hearing, the bill of the complainants was dismissed by the circuit court. And from this decree the complainants have brought this appeal.

It would be tedious and useless, in this opinion, to go into an examination of the testimony given by the different witnesses. Much of it has very little if any bearing upon the question in

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dispute. It is very evident, indeed, that the complainants were <sup>\*45]</sup> illiterate and weak-minded. But there is abundant proof that they were perfectly aware of the contents of the several instruments, and of the object and purpose for which they were executed. And, although the prices paid for the different interests were undoubtedly very moderate; yet they were not so inadequate as to authorize the court to declare the deeds void on that ground. The inadequacy must be tested by the value of the property at the time of the sales, and not by its present value. The first deed from the two Barribeaus and White to the respondents, was made September 3, 1833.

The deed of confirmation from Pierre, August 7, 1836; and the deeds from Euphrasie, and Amaranth Loiselle to Merry, February 1, 1836. The complainants did not seek to disturb these conveyances, or take any measures to impeach them, until March 20, 1849, when this bill was filed, and when property in St. Louis was greatly enhanced in value, as compared with its value in 1833 and 1836. It is, perhaps, the great increase in the value of this property between the time of the several sales and the time of filing this bill, that has led to this controversy. But upon the evidence in the record, we think the charge of fraud and misrepresentation is not sustained; and that there is sufficient proof, that Pierre was of full age at the time the deed of confirmation was executed.

It has been contended, on the part of the complainants, that under the deed from Pierre Barribeau, the elder, to White, the three *cestuis que trust* took a joint interest, and that, upon the death of one or more of them without lawful issue, the share of the deceased was limited over to the survivors or survivor. And as Adrian died before the filing of the bill, and Pierre has died pending this appeal, and both of them without lawful issue, Euphrasie, the surviving complainant, claims the entire lot, by virtue of the limitations over in the deed of trust. And if this be the construction of the deed, she is entitled to a decree for the shares of the two sons, although she has sold and conveyed her own one third, as above stated.

But this construction cannot be maintained. The trust deed, it is true, is unskillfully drawn. But it is very clear, upon the whole instrument, that an equitable interest, as tenants in common in fee-simple, was secured to them by the deed; and that their conveyances, together with that of the trustee, passed the whole interest, legal and equitable, to the respective purchasers.

It appears that shortly after this bill was filed, Pierre, the complainant, conveyed all his interest in the property to Benjamin A. Massey, in trust for a natural daughter, born of

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an Indian mother, and living in the Indian country; and a motion has been made to make him a party in this court, as the representative of Pierre.

\*The decision of this motion, either way, could have [\*46] no influence upon the rights of the parties. For as the court is of opinion that the deed of confirmation made by Pierre was valid, and conveyed his one third to the appellee, the decree in the court below dismissing the bill, must be affirmed, even if Massey was permitted to appear.

But in this stage of the proceedings he cannot be permitted to become a party, as the representative of Pierre. The bill was filed by Pierre, and this appeal taken by him. He has died pending this appeal; and the only persons who, upon principles of law and the rules of this court, can be permitted to appear in his stead, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves.

But the interest of Massey was acquired in the lifetime of Pierre, and no new interest accrued to him upon Pierre's death; and if he desired to become a party, in order to maintain his rights as trustee, he should have applied for leave to become a complainant while the case was pending in the circuit court. The estate has not devolved upon him by the death of Pierre, and he has the same interest now which he had upon the execution of the deed; and has no greater right to become a party here, after Pierre's death, than he had before.

In the opinion of the court, therefore, as Pierre's death was suggested at December term, 1851, and his legal representatives have not appeared by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court. And, as regards Euphrasie, the other complainant, it must be 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 Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and decreed, by this court, that this appeal, as to Pierre Barribeau be, and the same is hereby, abated, pursuant to the 61st rule of this court; and it is further ordered and decreed that this appeal, as to Euphrasie T. Perry, be, and the same is hereby dismissed, with costs.

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Wickliffe v. Owings.

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\*ROBERT WICKLIFFE, APPELLANT, *v.* THOMAS D. OWINGS.

Where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court. The answer is not the proper place for it, under the 33d rule of equity practice established by this court.<sup>1</sup>

The plea of the defendant, that he had instituted a suit against the complainant in a state court, in the same controversy, prior to the institution of this one in the circuit court of the United States, is not sustained by the evidence; nor is the allegation that the title of the complainant is invalid. Upon a bill filed, under a statute of Kentucky, by a person having both the legal title to, and the possession of, land, against a person setting up a claim thereto, for the purpose of quieting the title, this court decides that the complainant is entitled to relief, and proceeds to render such decree as the circuit court ought to have rendered.<sup>2</sup>

THIS was an appeal from the circuit court of the United States for the district of Kentucky, sitting as a court of equity.

It was a bill filed by Wickliffe, under a statute of Kentucky, to quiet the title to sundry tracts of land of which the complainant was in possession, and to which he alleged that he had the legal title. Owings, it was averred, had removed to Texas, and become a citizen of that state; but had visited Kentucky, and set up a claim to the lands, threatening to institute suits against the complainant.

Owings, in his answer, denied the jurisdiction of the court, upon the ground that he was not a citizen of Texas; denied that the complainant had any title to the land, or, that if he had one, asserted that it was obtained by fraud; and alleged, that prior to the institution of this suit, he, himself, had filed a bill against Wickliffe, in the Bath circuit court of Kentucky, and relied on the priority of his bill in bar of Wickliffe's suit.

The district judge, who tried the cause in the court below, dismissed the bill, from which decree Wickliffe appealed to this court.

It was argued for the appellant by *Mr. Preston*, and a brief was also filed upon the same side by *Mr. Charles A. Wickliffe*. No counsel appeared for the appellee.

<sup>1</sup> FOLLOWED. *Dred Scott v. Sandford*, 19 How., 590. CITED. *Philadelphia, &c. R. R. Co. v. Quigley*, 21 How., 214. Citizenship of a party can only be questioned by plea in abatement. *Jones v. League*, 18 How., 76; *Rateau v. Bernard*, 3 Blatchf., 244; *Hilliard v. Brevoort*, 4 McLean, 24. By pleading to the merits the jurisdic-

tion is admitted. *Sheppard v. Graves*, 14 How., 505, and cases cited in the note. *S. P. DeSobry v. Nicholson*, 3 Wall., 420.

<sup>2</sup> See also *Holmes v. Oregon, &c. R. R. Co.*, 9 Fed. Rep., 238; s. c. 7 Sawy., 392; *Blackburn v. S. M. & M. R. R. Co.*, 2 Flipp., 533.

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The arguments consisted chiefly in examinations of the testimony respecting the citizenship of Owings, in Texas, and of the various muniments of the title of Wickliffe to the lands; and also of a comparison of the dates of the institution of the respective suits in the state court and in the circuit court of the United States. As these involved no general principles of law, it is unnecessary to introduce them into the report of the case.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff filed his bill in the circuit court of the United \*States for Kentucky, against Thomas Deye Owings, by which he assumes to be the owner, and in the lawful possession, of a number of tracts of land, lying in different counties of that state, which had at one time been the property of the defendant, but of which he had been legally divested, and notwithstanding claims, by the instigation and advice of other persons, to the prejudice and vexation of the plaintiff. The object of the bill is to establish the title and to quiet the possession of the plaintiff.

The facts disclosed by the record are: that in the years 1817 and 1818, the defendant was possessed of a very large estate in lands, but was indebted beyond his means of payment. During those years, two of his creditors (Luke Tiernan and Samuel Smith) respectively recovered, in the circuit court of the United States for Kentucky, judgments for the aggregate sum of twenty-five thousand dollars and upwards; the one by default, the other by confession. Immediately thereafter, the defendant adopted a system of legal proceedings, to postpone the day of payment of those judgments, which terminated in the augmentation of the debt, and the introduction of other persons, in the character of sureties, to share in the entanglements of the debtor. By the interposition of injunctions, replevin, and stay bonds, and for the want of bidders at execution sales, the defendant withstood his creditors until 1824.

In November, 1824, Tiernan purchased a number of the tracts in dispute, and others in 1827 and 1834, under the executions, and for which he has the deeds of the marshal.

In 1820, Samuel Smith assigned his judgment to Ellicott and Meredith, in trust for creditors, and these persons, between 1826 and 1829, purchased nearly, if not all, of the tracts for which Tiernan had acquired a title.

In 1824, before any of these sales, Owings had conveyed the lands to the sureties whom he had involved upon the

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bonds before referred to in these and other cases, for their indemnity, and delivered to them the possession of the property, and ceased to have any control of it. He gave to them authority to "sell, dispose of, and convey any of the estate, whenever it might be necessary for their protection," and in such cases as a majority of them might consider as most beneficial to all concerned, in case their principal was in default. Tiernan, and Meredith and Ellicott, in 1827, commenced suits for various parcels of the lands they had purchased at the marshal's sales, in the circuit court of the United States, and recovered judgments. The questions involved in the issues, appear to be the regularity of the sales by which they acquired title. In 1829, after a portion of these trials, the sureties and assignees of Owings executed a deed to Ellicott and Meredith, for the tracts of land described in \*the bill, upon "a general compromise" with them, by which the debt to Samuel Smith, with the various bonds taken to secure it, were surrendered to be cancelled. The record shows that Owings was advised of this settlement, and expressed approbation of it. Some time after this settlement with the assignees of Owings, an arrangement was concluded between Tiernan, Ellicott, and Meredith, and the Bank of the United States, by which the bank agreed to reimburse Tiernan for his debt and advances, and to cancel an indebtedness of Smith, and to take the title to the property they had acquired by these proceedings. This arrangement was carried into effect by a suit in the circuit court of the United States, in which a sale was ordered, at which, in 1834 and 1835, the bank became the purchaser.

In 1836, the bank sold its title to the plaintiff in this suit. In order to free the title from any imperfections, a bill was filed in the circuit court of Bath county, Kentucky; and in that suit, the titles of Tiernan, Ellicott, and Meredith, and the bank, were, in 1848, conveyed to him.

In the course of these proceedings, a number of confirmatory deeds were taken from purchasers of portions of the property at the marshal's sales, which it is unimportant to describe. To appreciate fully the case of the plaintiff, it is proper to notice a transaction between him and Mr. Bascom, the son-in-law and attorney in fact of Owings, in 1837. The plaintiff, after the acquisition of his titles from the bank, instituted suits for the recovery of the family residence and other lands of the defendant, in the courts of Kentucky. At the trial term of these suits, a proposal for an adjustment was submitted to the plaintiff, by Mr. Bascom, (under the advice of counsel,) which was accepted by him. He agreed to convey

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to Mrs. Bascom the family residence and other lots, a balance due on the judgment of Tiernan, to release the claim for *mesne* profits, and to dismiss the suits pending, each party to pay costs. Owings and Bascom were to confirm the title acquired by the plaintiff, to the lands described in the bill. This settlement was executed by the delivery of the proper evidences of title. Those in the name of Owings were executed by Bascom, as his attorney in fact.

The land conveyed to Mrs. Bascom has remained in the family till this time, and in 1847 was divided among the children of Owings, in a suit to which he was a party. The validity of the conveyance of Wickliffe to her, was asserted in that suit, and admitted in the decree of the court, as the basis upon which it was founded. Owings, in 1836 or 1837, left the United States for Texas; during the interval, from 1837 to 1849, the plaintiff was in the open possession of the property. Before the departure of Owings, the plaintiff had offered to reconvey to him the \*whole of his purchases, upon an [\*50] extended credit and a reduced rate of interest, for the consideration of the debts and costs they represented; which proposal Owings acknowledged his inability to accept, and fulfil the obligations he would thus incur. In 1849 he was induced to return to the United States, and to renew the controversy which had been so long pending, by the assertion of pretensions hostile to the title of the plaintiff, and prejudicial to his useful and peaceful enjoyment.

The evidence shows that the lands are in the possession of the plaintiff, occupied by a numerous body of tenantry; that sales have been obstructed and rents diminished by the assertion of these claims.

The right of the plaintiff to relief is rested upon the general principles of equity, as well as a statute of Kentucky, to the effect "that any person having both the legal title to, and the possession of land, may institute a suit against any other person setting up a claim thereto, and if the complainant shall establish his title the defendant shall be decreed to release his claim." 1 Bro. and More, Stat. 294.

The jurisdiction of a court of chancery to grant perpetual injunctions for quieting inheritances, after the right and matter in question has been fairly settled by concurring verdicts, has been long established; and, in addition to this general ground for equitable interference, this case presents a strong claim for the interposition of the court, arising from the settlement between Bascom, as the attorney in fact of the defendant, and the plaintiff. The consideration of that settlement has been enjoyed for many years, by the family of

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Owings. We conclude that this arrangement, embracing the fact that a confirmatory deed to the plaintiff had been executed in his name, under the letter of attorney to Bascom, was communicated to him, and that it received his approbation. If additional assurances were, therefore, required to perfect the title of the plaintiff, and to maintain his quiet enjoyment, it is the duty of the court to exact them.

But if a question might arise upon the facts of this case, upon this branch of it, there will be none when we connect it with the statute of Kentucky :

“When the nature of our conflicting titles,” says the supreme court of that state, “whether derived from the laws of Virginia or of this state, are considered, there is an apparent necessity of permitting the holder of the legal estate to call his adversary to the test when it cannot be otherwise reached. This act ought to be liberally expounded as a remedial statute.” *Cates v. Loftus*, 4 Mon. (Ky.), 439.

And in accordance with this view, that court decreed a release to one, having the legal title and possession from one [51] who “pretended \*a claim under a vague and void entry without equity.” 1 Mon. (Ky.), 97.

And in another case, where the party in possession with title averred “that the defendants pretended to have a claim upon it, and thereby disparaged his title, and obstructed him in the full enjoyment of his property.” *Armitage v. Wickcliffe*, 12 B. Mon. (Ky.), 488.

This statute is too important a portion of the law of property in Kentucky, to be disregarded in the exercise of the equitable powers of the courts of the United States in that state; and without affirming that it can be so fully applied under the constitution of those courts as by the state tribunals, we are satisfied that its protection may be properly invoked in cases like the present. *Clark v. Smith*, 13 Pet., 195. The statement of the plaintiff’s title shows that the lands described in his bill were sold as the property of the defendant, by a public officer, with legal process, issued upon valid judgments, and that the title of the purchasers have vested in him; that this title has been submitted to a court of law, and maintained in a succession of trials; that besides, the sureties who were bound for these judgments, and to whom the lands were delivered by the defendants for their indemnity, with powers to use them for that purpose, have transferred them, to relieve themselves and their principal, to the grantors of the plaintiff; that, in addition, the son-in-law, agent, and attorney of the defendant, to preserve a portion of his estate for his family,

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has confirmed in his name the title of the plaintiff, as we are bound to believe, with the knowledge and acquiescence of his principal, and that family still retains the consideration of this deed; finally, that the plaintiff, and those whose title he has, has been in possession since 1824.

The defendant resists the suit of the plaintiff for relief, by a denial, in his answer, of the averment that he is a citizen of Texas, and consequently the jurisdiction of the court. 2. By the plea that before this suit was commenced he had instituted one in the circuit court at Bath, Kentucky, contesting the plaintiff's title and provoking a full investigation into its validity, and that he could not be restrained from its prosecution there. 3. That the sales by the marshal were invalid, and that the conveyance executed by Bascom in his name to the plaintiff is void, for misrepresentation, fraud, and the want of consideration.

The doctrine of this court is settled, that when the jurisdiction of the circuit court appears, by proper averments, on the record, the defendant can only impugn it in a special plea. The 39th rule of practice for courts of equity in the United States, adopted by this court, excludes "matters of abatement, objections to the character of parties and to matters of form," from the answer, \*and confines its operation to "matters in bar, or to the merits of the bill." It is proper to say, [\*52] that if the fact of citizenship was open to inquiry, the evidence sustains the allegation of the bill.

2. Whether we consider the commencement of the suit as dependent upon the filing of the bill with the clerk of the court, or the issue, service, or return of process upon it, there is no sanction in the evidence for the plea by the defendant of a prior suit pending in the circuit court of Bath county. The plaintiff's bill was filed and process issued before that of the defendant was entered, and the process from the court of the United States was executed more than a year before the service of a subpoena to answer, on the plaintiff. Nor are the imputations of fraud, oppression, and injustice, upon the conduct of the plaintiff, nor the charges that he acquired his titles by corrupt and champertous contracts, better supported. No evidence has been taken which authorizes the crimination of the plaintiff by such allegations, in any part of the complicated and involved controversies which he seeks by this bill to close.

Our conclusion is, that the plaintiff is entitled to the relief he asks for, and that the decree of the circuit court must be reversed, and a decree entered here conformable to this opinion.

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*Order.*

This cause came on to be heard, on the transcript of the record, from the circuit court of the United States for the district of Kentucky, 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 and annulled.

And this court, proceeding to render such decree as the said circuit court ought to have rendered, doth order, adjudge, and decree, that the complainant has shown a legal title to all those tracts or parcels of land which are described and set forth in the two deeds in the record, executed by Owings and Bascom, dated 6th April, 1837, and marked No. 54, and by A. Trombo, commissioner, dated 25th day of September, 1848, and marked No. 58, in both of which the said complainant is the grantee, but excepting from this decree the lands which were conveyed to Mary N. Bascomb, by the said complainant, the 6th April, 1837, and as to which this decree has no application.

And it is further ordered, adjudged, and decreed by this court, that the said complainant has shown sufficient matter of equity to entitle him to a release, by Thomas D. Owings, or his heirs at law or devisees, or other legal representatives, of all their claim, and to be quieted in the possession and enjoyment of the said parcels of land.

\*53] \*And it is further ordered, adjudged, and decreed, that the said complainant do recover his costs in this cause in this court, of and from the said defendant.

It is therefore further ordered, adjudged, and decreed, by this court, that this cause be, and the same is hereby, remanded to the said circuit court, with instructions to cause an appropriate deed of release and quitclaim to be prepared and executed by the said defendant, or his heirs at law or devisees, or other legal representatives of their rights, as aforesaid, and also that the said court issue an injunction to them commanding their agents, and attorneys, aiders and abettors, to refrain perpetually, from any molestation or disturbance of the right and possession of the said complainant, under any title of the said Thomas D. Owings, and that the said circuit court do execute and carry into effect all the provisions of the aforesaid decree of this court.

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Raymond v. Tyson.

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ISRAEL W. RAYMOND, OWNER AND CLAIMANT OF THE CARGO OF THE SHIP ORPHAN, CONSISTING OF 844 TONS OF COAL, APPELLANT, *v.* WILLIAM TYSON, LIBELLANT.

A charter-party is an informal instrument, often having inaccurate clauses, which ought to have a liberal construction, in furtherance of the real intention of the parties and usage of trade.

Cases cited to illustrate and explain this rule.

Though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer.

The American and English cases upon this subject examined.<sup>1</sup>

Where a ship was chartered for a voyage from London direct, or from thence to Cardiff, in Wales (if required), to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect, thence to be returned back, either to New York or Great Britain, at their option; the time for her employment being to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months; the charterers paying two thousand dollars per month, payable in New York semi-annually; the circumstances of the case indicate that the owner meant to waive his lien upon the cargo for freight, and trust to the personal responsibility of the charterer.

The ship having arrived at San Francisco, with a cargo of coal, a libel filed to hold the cargo responsible for the freight, ought to have been dismissed.

THIS was an appeal from the district court of the United States for the northern district of California. The libel was filed in the district court, held by Mr. Ogden Hoffman, Jr., who decreed that the libellant, Tyson, had a lien upon the cargo of coal, for the sum of twelve thousand dollars. The libellant was \*part owner, and agent, and ship's husband, of the ship Orphan, and resided in New York. [ \*54 The claimant appealed to the circuit court, which was also held by Mr. Ogden Hoffman, Jr., where the decree of the district court was affirmed. The claimant then appealed to this court.

The nature of the case is fully stated in the opinion of the court.

It was argued by *Mr. Lord*, for the appellant, and *Mr. Cutting*, for the appellee.

The points made by the respective counsel were the following:—

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<sup>1</sup> APPLIED. *The Bird of Paradise, Horses*, 10 Ben., 363; *Gronstadt v. 5 Wall.*, 558. See also *Fourteen Witthoff*, 15 Fed. Rep., 271, 272.

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*Mr. Lord*, for appellant.

The appellant and claimant conceives the decree to be erroneous, and that it should be reversed, on the following grounds:

1. That by the general character of the charter, the ship was hired to J. Howard and Son, to be employed in voyages, to and fro, in the Pacific Ocean. That the deliveries of cargoes there, were to be at ports there; while the payments of the monthly charter money were to be made in New York. And it could not be contemplated, that the deliveries of cargoes should be delayed to wait intelligence from the Atlantic ports, whether the payment of the monthly charter, at the end of each half year, had been made at the day it was due, or afterwards.

2. That the coasting voyages, from port to port in the Pacific, which might be seeking voyages, could not be expected to be carried on, if the cargoes were to be subjected to the lien of six months' charter money, without the possibility of knowing, in the Pacific ports, whether that freight had not been paid at New York.

3. A lien or detention of cargo, under such uncertainty of facts, to transpire at a distant place, would be dangerous both to ship-owner and charterer and freighter. The ship-owner and master might be exposed to heavy damages for withholding the property, when the charter money may have been paid at New York without his knowledge. The owners of cargoes, and especially their consignees, could not know whether they were entitled to them or not.

4. The provision as to payment of freight, up to the time of news of the loss of the ship, rendered the amount of freight payable at New York always uncertain, at the day it was reserved, or at any time, until news at New York of the ship being in safety at the end of each six months.

5. No express terms of hypothecating the cargoes, or subjecting them to lien, are found in the charter-party; the omission

\*55] of which usual provision in charters of American ships, confirms the inference from the general character of the instrument, that it was made on the credit of the charterers, without the exaction of any lien. *The Volunteer*, 1 Sumn., 551; 3 Kent Com., \*220.

6. The charter-party binding the ship-owner to deliver the cargoes, without any reference to payment of charter money, supports the same construction. P. 6.

7. The reservation of payment, in such mode and under such circumstances as are above referred to, is inconsistent with the implication of any lien; and the absence of any

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express creation of any lien, excludes its existence in this case. 2 Kent Com., \*635, \*636, 639; *Chase v. Westmore*, 5 Man. & Sel., 180; *Crawshay v. Homfray*, 4 Barn. & Ald., 50; *Pickman v. Woods*, 6 Pick. (Mass.), 248; *Alsager v. St. Catharine Dock Co.*, 14 Mees. & W., 799; *Belcher v. Capper*, 4 Man. & Gr., 502.

8. The sentence of the court below should be reversed, and a decree directed for the damages of the claimants, to be ascertained by a proper reference.

*Mr. Cutting*, for the appellee, made the following points:—

1. Under the terms of the charter-party, the libellant continued to be owner, and in possession of the ship, during the voyages contemplated by the parties.

He was to employ the master, victual and man her, and keep her in repair, during the whole term, at his own expense. He agreed to freight the whole ship, or sufficient room for the cargo specified, expressly reserving the deck, cabin and necessary room for the crew; the charterers contracted for the privilege of putting in coal to ballast the ship from London to Cardiff, in case they desired so to do. The owner stipulated to receive and deliver such merchandise as the charterers should provide.

There are no words of demise, or any clear letting of the ship; and, taking all the stipulations together, the result is, that the contract is a mere covenant for the transportation of merchandise, and the performance of the service stipulated for. Possession of the ship continued in the owner, and he was to manage, control, and navigate her. The master was his agent, and not the agent of the charterer. The libellant remained subject to all the responsibilities and obligations of ownership, and was answerable to the charterers for the acts and conduct of the master and mariners. Certain *Logs of Mahogany*, 2 Sumn., 589; *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 49; *Palmer v. Gracie*, 4 Wash. C. C., 110-123; S. C. 8 Wheat., 605; *McIntyre v. Bowne*, 1 Johns. (N. Y.), 229; *Clarkson v. Edes*, 4 Cow. (N. Y.), 470; *Holmes v. Pavenstedt*, 5 Sandf. (N. Y.), 97; 3 Kent Com., 138; 1 Parsons on Cont., 657.

\*If, upon the whole instrument, it be doubtful what [\*56] was intended, the general owner continues such during the term; his rights can only be displaced by a clear and determinate transfer of them. *Logs of Mahogany*, 2 Sumn., 589.

2. The ship-owner has a lien upon the cargo, for the freight of its transportation, unless it has been waived or abandoned

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by agreement. *Gracie v. Palmer*, 8 Wheat., 605, 635; S. C. 4 Wash. C. C., 110-123; 4 Cow. (N. Y.), 481, *per* Savage, C. J.; *The Volunteer*, 1 Sumn., 551; *Ruggles v. Bucknor*, 1 Paine, 358; *Drinkwater v. Brig Spartan*, 1 Ware, 156; *Holmes v. Pavenstadt*, 5 Sandf. (N. Y.), 97; *Small v. Moates*, 9 Bing., 574; *Gladstones v. Allen*, 12 Com. B., 202; 22 Eng. L & Eq., 382; Angel on Car., §§ 385, 386; Abbott on Ship., 287, 288-299.

3. The right of lien upon the cargo of the charterers, for charter money due and in arrears, has not been waived or abandoned by the respondent.

The stipulation that the charter money should be paid in New York semi-annually, is not a waiver of, nor is it incompatible with, the right of lien for freight money due and unpaid. *Saville v. Campion*, 2 Barn. & Ald., 503; *The Volunteer*, 1 Sumn., 371; *Logs of Mahogany*, 2 Id., 589; *Saville v. Campion*, 3 Bing. N. C., 17.

It was not even an agreement to give credit for the earnings of the ship. According to the ordinary length of a voyage from London or Cardiff to Panama or California, the time for the payment of the first six months' service, would have matured before the ship had reached her port of delivery. The actual time was eight months and over. (Page 20.)

The charterers agreed to furnish the master, from time to time, with any funds he might require for the ship's ordinary expenses, which were to be deducted out of the semi-annual instalments, if advices thereof were received. Upon the return of the vessel to New York or Great Britain, all moneys due at that time were to be paid forthwith, on demand.

It had no other effect than to fix the periods of payment, and to suspend the right to enforce a lien upon the cargo, until default of payment. *New v. Swain*, 1 Dan. & L., 193.

The length of the term of employment, which was to be at least fifteen months, with the privilege to the charterers of extending it nine months, and the large amount at risk, preclude the idea of an agreement to waive or abandon the right of lien, in the event of default in payment.

Default was made in the payment of the freight money due at the end of the six months; and the ship-owner was thereupon at liberty to proceed and enforce his lien. *New v. Swain*, 1 \*Dans. & L., Merc. Cas., 193; *Dixon v. Yates*, 2 Nev. \*57; 177; *Saville v. Campion*, 2 Barn. & Ald., 503, 513; Abbott on Ship., 289.

There are no other provisions in the charter-party that operate as a waiver or release of the right of lien.

The covenant, by the charterers, that they will provide a

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full cargo, strongly implies that the security of a lien upon it was contemplated and reserved.

The bill of lading delivered by the master, and accepted by the charterers, shows that both the parties understood that the delivery of the cargo was upon the condition of payment of freight, as per charter-party; if it were unpaid in New York, delivery could not be compelled by the consignee, without satisfying the amount due. *Small v. Moates*, 9 Bing., 574. *Gladstones v. Allen*, 12 Com. B., 202.

4. A lien for freight is favored in the law, and ought not to be displaced without a clear and determinate abandonment of it.

It is not excluded in the present case by any express or absolute terms, or by unavoidable implication, or by any provisions repugnant to, or inconsistent with, the right to enforce it.

The burden is on the appellant to establish a waiver or extinguishment of the right.

5. The decree of the court below ought to be affirmed, with costs.

Mr. Justice WAYNE delivered the opinion of the court.

This is an appeal from the district court for the northern district of California.

The suit was brought, by a libel in the admiralty, against 844 tons of coal (of which Raymond was the claimant) on board the ship *Orphan* of which Tyson, the libellant, was a part owner. Its object was to enforce an alleged lien on the coal claimed under a charter-party between Tyson and J. Howard and Son, of New York, charterers. The charter-party was made at New York, on the 1st February, 1850, the ship at that time being on her voyage to London. The whole ship, with the exception of the deck, cabin, and necessary room for the crew, and stowage of provisions, sails, and cables, was chartered by the owner to J. Howard and Son, for a voyage from London direct, or from thence to Cardiff, in Wales, (if required,) to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect; thence to be returned back, either to New York or Great Britain, at their option. The time for her employment was to extend to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months. The charterers engaged to \*furnish the ship [\*\*58 with a full cargo—bills of lading to be signed for it without prejudice to the charter—and they contracted to pay to the owner of the ship or his agent, for the use of the vessel,

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at the rate of two thousand dollars per month, commencing in London, if she proceeds thence direct to the Pacific, when ready to load, and notice of the same was given to the charterers or their agent. But if the vessel shall be ordered to Cardiff to load, then the charter was to commence from the time she might be ballasted, and be ready for sea, in London. In that case the ship is to be allowed ten days from the time she is ready to sail from London, until her arrival at Cardiff, and only that time, for which the charterers were to pay, should the ship be a longer or shorter time in making the passage to Cardiff. It is agreed between the owner and the charterers that the charter should be payable in New York semi-annually: the first payment to be made six months from the commencement of the same, and so every six months during the continuance of the charter, before the arrival of the ship and her being delivered back to the owner, in New York or Great Britain; or upon satisfactory proof of total loss of the ship, all moneys in arrears, and due, up to the time of the loss, were to be paid on demand. Should the vessel be ordered to California, the charterers agree to pay the expense of victualling and manning her, attendant upon the California voyage, and the charter money for any detention caused by desertion of the crew. The charterers agreed also to pay all port charges of the ship incident to her employment, except victualling, manning, and repairs, and to advance funds for the ordinary expenses of the ship after she left Europe, which were to be deducted from the charter payments, on vouchers from the captain.

The ship sailed for Cardiff on the 1st April 1850, and arrived there on the 14th April. She there took on board from Branson, Sands, and Co., the agents of the charterers, a cargo of 844 tons of coal, the property of the charterers. For this cargo a bill of lading was signed, May 4, 1850, at Cardiff, expressing that the ship was bound to Panama, for orders, to be delivered to order or assigns, he or they paying freight, as per charter-party. The bill of lading is as follows:

*Bill of lading.*—Shipped in good order and condition, by Branson, Sands, and Co., of Liverpool, in and upon the good ship or vessel called The Orphan, whereof R. C. Williams is master for this present voyage, and now lying in the port of Cardiff, and bound for Panama for orders, <sup>844 tons of "Nixon's Merthyr and Cardiff steam coal."</sup> eight hundred and forty-four tons of "Nixon's Merthyr and Cardiff steam coal, being marked and numbered as per margin, and are to be delivered in the like <sup>\*59]</sup> "good order and condition, at the port, according to orders, (all and every the dangers and accidents of

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the seas, and navigation, of whatsoever nature or kind, excepted,) unto "order," or to assigns; he or they paying freight for the said goods, as per charter-party, with average accustomed.

The ship proceeded to Panama, with her cargo, and thence, by orders of the charterers, to San Francisco. She arrived at San Francisco, December 2, 1850, and the cargo was retained on board by her captain, to preserve an alleged lien upon it for freight. The libellant avers that \$12,000 was due for charter money, on the 1st of October, and that it had not been paid by the charterers; and that they had not furnished funds for the ship's expenses after she left Europe; and for the money due he claims a lien upon the coal.

Raymond, the claimant, answers, that the bill of lading of the coal had been transferred to him at the time of its shipment by J. Howard and Son, for a valuable consideration paid; and this is not denied in the case. That he thereby became owner of the coal, and has ever since continued to be so, free from any lien or claim in favor of the owners of the ship, or any other persons; that he had demanded the coal, but that the master refused to deliver it. After the libel was issued and the answer had been put in, the master of the ship petitioned for an order for the sale of the coal, as a perishable commodity. The order was granted, the coal was sold, and the proceeds were adjudged to be liable to a lien for the sum due upon the charter-party, on the 1st October.

We shall give our judgment upon the foregoing statement, without considering in detail the general principles governing contracts of affreightment. But we will state two of them, because they have a decisive bearing upon the charter-party, under which this controversy has arisen.

First, it must be remembered, that a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade. So Lord Mansfield said a long time since. Abbott, in his treatise relative to merchant ships and seamen, Story's edition, 188, gives the rule of construction very much in the same words: but perhaps with more precision. "The general rule which our courts of law have adopted, in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates."

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Chancellor Kent, in his 47th chapter, \*on the contract of Affreightment, cites the rule approvingly. The late Mr. Justice Thompson, of this court, asserts it in *Ruggles v. Bucknor*, 1 Paine, 358. Judge Story acted upon it ten years afterwards, in the case of *The Volunteer*, 1 Sumn., 551; and again in another case, 2 Id., 589. The first says: "It was pressed upon me by the defendant's counsel, that I should decide this abstract question, and lay down some general rules as to the lien on the cargo for the freight, when the voyage is performed under a charter-party. This I do not feel disposed to do, especially as it would and ought to be considered as a mere *obiter* opinion, if not required by the facts of the case. And, indeed, it is impracticable to lay down any general rules to meet the great variety of cases that must necessarily arise in commercial transactions. Each case must depend, in a great measure, upon its own circumstances. Parties are not bound to any fixed and precise stipulations, to be embraced in a charter-party." In the case of *The Volunteer* and cargo, the most difficult question was, whether there was, under the charter-party, a lien on the homeward cargo for the freight. Judge Story says: "In general, it is well known that by the common law there is a lien on the goods shipped for the freight thereon; whether it arise under a common bill of lading, or under a charter-party. But then this lien may be waived by consent; and in cases of charter-parties, it often becomes a question whether the stipulations are or are not inconsistent with the lien." The other case mentioned in 2 Sumn., 589, (certain *Logs of Mahogany v. Richardson*,) was one which was decided upon the inaccurate and inconsistent stipulations of a charter-party, by a liberal construction of them, in furtherance of the real intention of the parties and the usage of trade. In *Gracie v. Palmer*, 8 Wheat., 605, 634, this court has said: "That the contract of affreightment, like any other contract, is the creature of the will of the parties. It may be varied to infinity, and easily adapted to the exigencies of either party or of any trade. It is only where the express contract is silent, that the implied contract can arise." These authorities are sufficient, without citing others, to establish the general rule for the construction of charter-parties.

The next rule for the construction of charter-parties, deduced by us from an examination of all of the leading cases in the English and American reports, including those cited in the argument of the counsel of the appellee, is this: that though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight,

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properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect, if there are stipulations in the charter-party \*inconsistent [\*61 with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. In *Ruggles v. Bucknor*, 1 Paine, 363, Mr. Justice Thompson said: "There can be no doubt that a ship-owner may, by express stipulations as to payment of freight, incompatible with a claim upon the cargo for the same, be deemed to have waived his lien, as if he should, by the charter-party or otherwise, agree to receive his freight at a time and place having no reference to the delivery of the cargo, or at variance with such time and place. But, as by the general rules of law, the cargo is liable for the freight, it should be satisfactorily shown that the claim has been relinquished before the ship-owner can be required to part with the cargo without payment of the freight." As early as the year 1820, Chief Justice Spencer had ruled the same in the case of *Chandler v. Belden*, 18 Johns. (N. Y.), 157, 162. His language is: "The right to retain the cargo for the freight has grown out of the usage of trade; and it does not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying the freight, by stipulations in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment. Such an agreement is an express renunciation of the right to insist on freight before the cargo is delivered."

Judge Story says, in the case of *The Volunteer*: "But then this lien may be waived by consent, and in charter-parties it often becomes a question whether the stipulations are or are not inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it, and incompatible with it." Judge Story had occasion to consider this point five years before he gave his opinion in the case of *The Volunteer*. We find in his note to his edition of Abbott on Shipping, printed by Hilliard, Gray, Little and Wilkins, at Boston, in 1829, page 178, a citation of the case of *Chandler and Belden*, 18 Johns. (N. Y.), 157, with this commentary: "That part of the language which seems to deny the right to retain, where there is an express stipulation of the time and manner of paying the freight, if it means that that fact alone overturns the lien, whether the stipulation be or be not inconsistent with such

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lien, admits of much question, and seems inconsistent with the doctrine of the cases cited in the text, as well as with that in *Chase v. Westmore*, 5 Mau. & Sel., 180, and *Craushay v. Homfray*, 4 Barn. & Ald., 50."

In *Lucas v. Nockell*, 4 Bing., 729, it was said: "It may distinctly appear from the charter-party, that the owner has been \*62] \*content to trust to the personal responsibility of the merchant, and fixing a specific time of payment, before or after delivery, has waived his right to a lien. In *Lowell v. Simpson*, 16 Ves., 275; *Chase v. Westmore*, 5 Mau. & Sel., 180; and in *Craushay v. Homfray*, 4 Barn. & Ald. 52, it was ruled, if there be a specific contract for a particular time and mode of payment, and that contract is inconsistent with the right to retain, it will of course defeat a claim to exercise it."

Nothing can be found in the cases cited by the counsel for the appellee, in conflict with the extracts just given; on the contrary, most of them admit the principles expressed in those extracts.

*Gracie v. Palmer*, in 8 Wheat., the same case upon appeal to this court, decided by Mr. Justice Washington, in 4 Wash. C. C., affirms what no one will deny: if the ship-owner retains the possession of the ship, and the charterer is merely the freighter, that the former has a lien upon the cargo for freight. Other points were ruled in that case, but they have no bearing upon this, and especially none upon what shall be considered a waiver of a lien for freight. *Clarkson and Edes*, in 4 Cow. (N. Y.), is to the same point; but both Chief Justice Savage and Mr. Justice Woodworth decided that case from the intention of the parties, as that could be inferred from the charter-party.

*Small and Moates*, in 9 Bing., 574, decided by Chief Justice Tindal, was a case in which it was expressly agreed that the ship, during the continuance of the voyage, should remain firmly and fully vested in the owner, and that he should at all times during the voyage and service, have a complete lien upon the lading of the ship. It was ruled that he had a lien upon the goods of the charterer, and against his indorsee of the bill of lading. The grounds upon which the indorsee contended against the lien need not be stated here, as they have no relation to any controversy in this case.

*Saville v. Campion*, much relied upon in 2 Barn. & Ald., 503, 512, decided by Chief Justice Abbott, does not interfere in any way with the rules of construction which we have stated to be applicable to charter-parties. The point ruled in that case was, that as there were no express words of demise of the ship itself, in the charter-party, the freighter did not

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thereby become the owner for the voyage, and that the possession continued in the owner, and that he had therefore a lien upon the cargo for freight. But the lien on the goods, for the stipulated hire of the ship, is expressly put upon the ground "that there was nothing to show that the delivery of the goods was to precede the payment of that hire, in cash and bills, as provided \* for by the deed. The case of *Campion v. Colvin*, 3 Bing. N. C., 17, involved, first, [\*63] the inquiry whether or not the owner of the ship did not retain the possession of her, and that the charterer was only freighter. It was ruled that the owner was left in possession, the charter-party being the same on which the court of king's bench decided, in *Saville v. Campion*. Next, whether it was the intention of the parties that the ship-owner meant to insist on the delivery of the bills which were to be given on London before the delivery of the cargo; it was decided that he did; but that the decision was given upon the ground of the special agreement, and not on the general right of lien, is obvious from the language of the chief justice. "Looking to the intent of the parties, it is clear the ship-owner meant to insist upon the delivery of the bills before the delivery of the cargo, so that, with respect to the time at which the freight was payable, there was no difference between that and the preceding cases." And, lastly, whether or not the assignees of the charterer stood in a different relation to the owner from that of the charterer; it was ruled that he did not. The opinion given by Chief Justice Tindal, in this case, is manifestly not reported with accuracy as to the statement, and is apt to mislead in respect to the second ruling of that learned judge. It appears, then, that neither the case of *Saville v. Campion*, nor that of *Campion v. Colvin*, 3 Bing. N. C., 17, contains any thing against the second rule of construction which we have stated. There was not, in either of the charter-parties of those cases, though London had been fixed upon for the place of payment any thing incompatible with a lien upon the cargo, or at a variance with the time and place which had been agreed upon for its delivery. Upon the authorities cited, we consider the rule to be, that though the owner of a ship who retains possession of her has a lien for freight upon the cargo of the freighter, the lien may be adjudged to have been waived without an express agreement, or words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of such lien, or when it can be fairly inferred, from the language of the instrument, that the owner meant to trust to the personal responsibility of the charterer for the freight or hire of the ship.

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The limitation upon such construction and inference, is as well expressed as it can be, in the language of Judge Story, in the case of certain *Logs of Mahogany*, 2 Sumn., 597. It is: "Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion that it is doubtful whether the charterer was intended to have the sole possession and control \*of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such, for his rights and authorities over the voyage must continue, unless displaced by some clear and determined transfer of them." So we now say, if it be only doubtful in the construction of a charter-party whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt; his lien being given by the force of the common law, which cannot be taken from him, "though there is a special contract, unless there is something in that contract inconsistent with that lien, or unless it is waived by fair implication." Williams, Justice; *Pinney v. Wells*, 10 Conn., 104, 115.

We will now turn to the charter-party in this case, and form our judgment accordingly, as the two rules of construction which have been stated shall bear upon it. In the first place, it is not for the carriage of a single cargo or for a voyage, but for a voyage from London direct, or from Cardiff, in Wales, to load for a port or ports in the Pacific, where the ship is to be employed between such ports as the charterers may elect; the time of employment in that way being for fifteen months certain, with the right of the charterers to extend it to twenty-four months. For such employment the charterers agreed to pay to the owner or his agent, at the rate of two thousand dollars per month, payable in New York semi-annually, and so on every six months during the continuance of the charter. Now, if there be not something else in the charter to control the meaning of the words designating time and place for payment, it cannot be doubted that it was the intention of the owner and the charterers to make time and place substantial parts of their contract. This is not an inference of intention, but a declaration of it in words too intelligible for the use of interpretation. They have a fixed meaning, and cannot, of themselves, have any other meaning. That meaning, then, is the contract between the parties; precisely with the same obligation upon them as another stipulation would have, for the payment of money at a given time and place, in any other analogous mercantile

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contract. There are no qualifying words of those used to make them doubtful; nothing in the charter which can be applied to make them so. No fact could happen, from any stipulation in it, to make the time and place agreed upon for payment uncertain. Place for the payment of money is a substantial part of any contract to pay it there. It can be insisted upon by him who is to receive it, and cannot be rightfully refused or omitted by him who has it to pay. A broken promise of that kind gives to the creditor a right of action against the debtor for its recovery. Why, upon principle, should a promise to pay freight at a particular time, and at a place other \*than that where the owner of the ship has undertaken to deliver the cargo, be required to be paid [\*65 elsewhere? It is the payer's privilege to pay it there. And, should it not be paid, why should the owner have more than a right of action for its recovery, or larger remedies, by suit, than are given in any other contract? We confess we do not see why. Place for the payment of freight, other than that for which the cargo is shipped and discharged, amounts to a stipulation that freight will not be demanded at the last, as a condition for the cargo's delivery. All of the authorities concur in this, that place for the payment of freight is a waiver of a lien upon the cargo, unless there are already circumstances or stipulations to show that it could not have been meant. It is so, because it is at variance with the enforcement of such a lien, according to the usage of trade; and it is so, because, when parties to a charter-party depart from that usage, by agreeing to pay and receive freight at another place than that where the common law gives to an owner of a ship a lien to enforce payment, it must be regarded that the owner had some sufficient reason for not insisting upon his right, according to the common law.

But it was urged by the counsel for the appellee, with earnestness and ingenious ability, that it might be shown that the time and place fixed for the payment, under the charter, was not meant by the owner to be a waiving of a lien. That it had no other effect than to fix the periods of payment, and to suspend the right to enforce a lien upon the cargo until default of payment. Time only might do that, but place connected with time for payment does not.

It was said that the cargo which the charterers agreed to furnish the ship, and which was put on board of her, to be carried from Cardiff to the Pacific, and, that the clause in the charter, that bills of lading were to be signed without prejudice to it, in connection with the fact, that, according to the ordinary length of such a passage, the ship could not have made it

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before the first payment would have become due, indicated the owners' intention to retain a lien upon the cargo, as an additional security for the first payment. It may have been that the owners had such a purpose in view, apart from the changed condition of the charterers, when payment was not made in New York; but we are sure, from its inconsistency with the chartered employment of the ship, that the charterers never contemplated it. The ship was to load with a full cargo, at London or Cardiff, for a port or ports in the Pacific, to be employed between such ports as the charterers might elect. She was not loaded for a specific voyage to any particular port, where the cargo was to be discharged, but it was to be discharged at one or more ports, as it \*might have been \*66] their interest to direct. The ship sailed from Cardiff to Panama, for orders, with a cargo to be delivered "according to orders." Such is the language of the bill of lading (exactly in conformity with the charter-party,) signed at Cardiff, on the 4th May, 1850, thirty-four days after the ship's hire is said to have commenced. When she arrived at Panama is not shown, but when she arrived at San Francisco, the first payment had become due; and when it was learned there that it had not been paid in New York, her captain refused to discharge the cargo, according to orders, unless payment was made, or security had been given for the freight; in that way, demanding money at San Francisco, which was only payable in New York, or that security should be given for it; neither of which has been provided for in the charter-party, in the event of a default of the first payment. By doing so, he took the ship out of her employment, which had then seven months to run, and disabled the charterers from using her in the only way for which she was chartered. It is no answer to say that his act and its consequences were occasioned by the default of the charterers to make the first semi-annual payment. They had at that time rights for a longer service of the ship, and it had not been agreed that their default should either interrupt or terminate them. The lien, as claimed and enforced, raised uncertainties in the relations of the parties not anticipated by either, and at variance with the rights of both. If it had been meant that such a lien should be enforced, it certainly had not been provided upon which of them the loss should fall for the time that the ship would be withheld from her employment; whether or not the owner should make an allowance for it out of the monthly hire of the ship, or that the charterers should continue to pay it whilst she was not in their use or under their control. Such uncertainties, changes of relations between the parties, and consequences, are stronger against the lien claimed than

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any inferences can be in its favor, which are made from the engagement of the charterers to furnish a cargo, or from the clause in the charter that bills of lading were to be signed without prejudice to it, or from the fact asserted that the ship could not arrive until after the first payment had become due.

Whether or not the delay in her arrival would have been, as it is said the owner anticipated it would be, we do not know; but we do know that the bill of lading was signed on the 4th of May, 1850; that there were then one hundred and forty-six days before the first payment would become due, for her to make the passage, and it is not so certain that it might not have been done, as that the contrary can be assumed to give any force to the suggestion that the cargo had been stipulated for and furnished, \*to give additional security to the owner by a lien, should there be a failure to make the first semi-annual payment. There is too much of indirectness and covert intention in such an anticipation, for us to countenance it. The cargo was obviously put on board as an adventure for profit. Without it, the time it would have taken to make the passage to the locality of the ship's principal employment, for which the charterer was paying at the rate of two thousand dollars per month, would have been a dead loss at least of five months of the time of her charter, or of ten thousand dollars. It cannot be supposed that the charterers were so blind to their interest as to permit that, or that it was not their interest which prompted them to furnish the cargo without any intention of giving to the owner an opportunity to assert a lien for securing money which they had promised to pay in New York.

Further, the declaration that the time and place fixed for payment was a suspension of the lien, is an admission, if the ship had arrived from Cardiff in time for the discharge of the cargo before the first payment became due, that the owner meant it should be done without being subject to a lien for freight. It was certainly meant that the cargoes which the ship might have carried from port to port in the Pacific, between the intervals when payments were to be made, were to be discharged and delivered without being subject to a lien for freight. It must have been then the owner's intention that all of the cargoes which the ship might carry were to be exempt from a lien, except that which she might have on board when the payment occurred. There is not in the charter any such distinction between them, or any thing looking like the reservation of such a right. Unless that can be made to appear, the engagement of the owner to release a lien upon all other cargoes, and that they were to be dis-

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charged before the payment of freight, does not permit the exception of any one of them from that engagement. All of the authorities declare that the owner's consent to receive freight before the cargo is delivered, whether it shall be paid or not, is a waiver of a lien upon the cargo; and that such a waiver may be inferred from a time and place having been agreed upon for the payment of freight, which has no reference to the place where the cargo is to be discharged.

But we will take the case as it was; that the ship did not arrive until after the time fixed for the first payment, that it was not paid, and that on such account the lien was claimed. It does not make the claim stronger. Had it been meant that non-payment should give the lien, it should have been so stipulated. The non-arrival of the ship cannot give to the default any additional support for a lien. The lien here was asserted, \*68] not \*in virtue of the law giving a lien upon cargo, but upon incidents out of the charter, which it is said gave to the owner a lien upon the contingency of their happening. Such a contingent or conditional lien may be agreed for by the owner and the charterer of a ship; but it must be done in terms leaving no doubt about it; or it must be a clear case of inference, to prevail against time fixed for the payment of freight at a place where the cargo is not to be discharged. The charter-party is to be construed liberally, for the purpose of preserving a lien given by the law, if the manner of it shall be only a matter of doubt. But that doubt cannot be helped by contingencies outside of the charter-party not plainly anticipated or growing out of one of its stipulations. Charter-parties are so frequently inaptly and incautiously drawn, that they may be said almost to have the indefiniteness of commercial guaranties. The language of this court upon the trial of one of the last is applicable here.

"Letters of guaranty are written by merchants, rarely with caution and scarcely ever with precision. They refer, in most cases, as they do in the present, to various circumstances and extensive commercial dealings in the briefest and most casual manner, without regard to form." The same may be said of charter-parties. "Though they have usually a printed form for a basis, they are often filled up by ship-brokers and merchants, with little caution and without much attention to a perception of the fitness or unfitness of that form to the special circumstances of particular cases." It is to be expected, then, that there will be in them unprecise and inconsistent stipulations, which must have, as other mercantile contracts usually receive, a liberal construction in furtherance of the intentions of the parties and the usage of trade. But we do not know

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a point in commercial law upon which the reported cases are more in conflict. It is said by the last English editor of Lord Tenterden's Treatise, that on a review of the decisions respecting the ship-owner's lien for freight, it is impossible not to regret the uncertainty introduced by their almost irreconcilable conflict with the construction of contracts of charter-parties. The courts of America, in the adoption of our refinements, have reaped for their mercantile communities all the uncertainties attending them; and there and here, as the law now stands, it will be useful for the ship-owner to remember that although the exercise of his lien may be upheld in cases of doubtful construction, an express contract is the surest and strongest ground upon which that right can rest; and that, by inserting an agreement respecting it in the charter-party, the parties to it may, between themselves, obviate all difficulty upon the subject.

It is certainly to be regretted that such should have been the \*uncertainty, in both countries, upon so important a point of commercial law. One of our objects in this [ \*69 opinion has been to produce more uniformity of construction hereafter. We thought it would be best done by establishing, from adjudicated cases, and only from such, those rules for the construction of charter-parties, and other contracts of affreightment, which are most frequently needed in trials upon them in courts. One of them we will repeat, in the language of Lord Tenterden. The general rule which our courts of law have adopted in the construction of charter-parties, as well as other mercantile instruments, is, that the construction shall be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Another rule drawn from the cases cited in this opinion is, if the owner of a ship stipulates to receive her freight at a time and place having no reference to the place for the delivery of the cargo, or at variance with such time and place, he is to be considered as having waived his lien.

Both of these rules of construction are applicable to this case. The owner's agreement to receive the hire of the ship at intervals of six months, and in the city of New York, during the continuance of the charter-party, has no reference to the place at which the cargo was to be delivered, and is at variance with the right which the charterer had to fix the time and place for such delivery. The owner, then, is considered by us as having waived his lien upon the cargo for freight. We shall, therefore, reverse the judgment of the court below, and decree a dismissal of the libel, with direc-

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tions that further proceedings in the case shall be in conformity with this opinion.

Mr. Justice CAMPBELL and Mr. Justice GRIER dissented.

Mr. Justice CAMPBELL.

I dissent from the opinion of the court; and, as the question is one of importance, I think it proper to record the reasons for the dissent.

The parties agree that the contract of affreightment, between the libellant and Howard and Son, did not displace the owner from the control and possession of the ship for any portion of the term of its duration.

When the master arrived at San Francisco, with the vessel, he found the first instalment of the freight money due and unpaid, and that he was in the lawful possession of a cargo, shipped according to the charter-party, for the voyage which was then completed. The co-existence of such a debt, with the lawful possession of such property, form the conditions <sup>\*701</sup> upon which a *lien* depends; and the owners claim to detain the property as a security for the debt, and which must be allowed, unless he has defeated it by some obligation indicative of its "determinate abandonment." The claimant supposes that the evidence of such a contract exists in the charter-party.

Holt, in his work on shipping, (part 3, ch. 6, § 63,) upon a review of the cases, concludes, "that the language of a charter-party must be very strong, indeed, to exclude, under any circumstances, the *lien* of the owner. This right, being both legal and equitable, the courts are naturally disposed to favor it, and not to impair or diminish its exercise, except under circumstances where it would be unreasonable to enforce it, and contrary to the intention of the parties." And further, "that the owner's right of *lien* is so far favored in law, that whilst he keeps possession, by his master and crew, it can only be excluded by the most express and absolute terms, or by a necessary implication from the contract." And so are adjudged cases. *Saville v. Campion*, 3 Bing. N. C., 17; *Gladstones v. Allen*, 12 Com. B., 202; 1 Sumn., 551; 2 How., 597. There is no express stipulation in this contract to defeat the *lien* of the libellant, and the case of the claimant, therefore, depends upon the discovery of an article wholly incompatible with its existence.

Lord Tenterden, discussing clauses of a charter-party that affect a *lien*, says. "the right may exist, if it appear from the

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instrument in any way that the payment is to be made in cash or bills before, or at, the delivery of the cargo, or even if it does not appear that the delivery of the cargo is to precede such payment;" and "that when the payment is to be made by bills, the right of retention continues till they are given, and would, it is conceived, revive, in case of their dishonor, before the ship-owner has parted with the goods." And so are adjudged cases. Abb. Ship., 299; 1 Dan. & L., 193; 1 Mau. & Sel., 535; Cross on Lien, and cases cited, 311. The circumstances that appear on the record seem to bring this case fully within the operation of these principles. It is not shown that the voyage from Cardiff to Panama "for orders," and the voyage from Panama to San Francisco pursuant to orders, were otherwise than in strict accordance with the calculations of the parties. The cargo taken at Cardiff, by contract, did not reach San Francisco until after the first instalment for the use of the vessel, upon these voyages, became due, and advices from New York had been received at San Francisco of the default of the shipper.

That a right should arise for the detention of the cargo, until the freight was paid, would seem to follow, from the principles before stated.

But it is said, that, there having been no express reservation \*of a lien, and the owner having consented to receive his money in New York, by instalments, present conditions inconsistent with the existence of a lien. [\*71]

The reply is, that the commercial law does not exact a stipulation to support the lien of the ship-owner, but requires circumstances expressive of "a determinate abandonment," as the condition of its removal; no deduction can, therefore, be legitimately drawn from the silence of the contract. And the requisitions for payment in New York, by instalments, show that the owner had some confidence in the personal responsibility of Howard and Son, and did not rely exclusively upon the profits of the adventure, or the security of the cargo; but they cannot fairly be held to establish any renunciation or determinate abandonment of the remedies the law affords, in case of their default. And this evidence of a waiver of the lien, imperfect as it is, is still more impaired by the facts, that though the amount of the freight did not depend upon the lading of the vessel, but was payable in any event; and though a full cargo for so long a voyage could not fail to injure the vessel, nevertheless the owners stipulated that a "full cargo of lawful merchandise" should "be provided," and bills of lading signed, without prejudice to the charter.

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I admit that, after the completion of her first voyage, and after the arrival of the vessel at San Francisco, and she had then entered upon the coasting trade between ports on the Pacific, cases may be put where a cargo might not be subject to a lien; and others, where the libellant would find embarrassment in enforcing one. But this case involves no difficulty. And to allow the lien, will be, in my opinion, a consistent application of familiar and well-settled principles of commercial law.

I am authorized to say, Mr. Justice GRIER concurs in this opinion.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, 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, affirming the decree of the 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 circuit court, with directions to dismiss the libel filed in this cause in the said district court, with costs.

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\*72] \*THE TROY IRON AND NAIL FACTORY, APPELLANT,  
*v.* GEORGE ODIORNE, JR., AND FRANCIS ODIORNE.\*

A machine for making hook-headed spikes was constructed in Boston, prior to the 18th of April, 1839, and therefore not within a patent for a machine for a similar purpose which Burden applied for on that day.

THIS was an appeal from the circuit court of the United States for the district of Massachusetts, sitting as a court of equity.

It was a bill filed by the Troy Iron and Nail Factory, a manufacturing corporation established in the state of New York, to restrain the Odiornes from infringing certain letters-patent granted to Henry Burden, on the 2d of September, 1840, and by him assigned to the complainant.

The respondents filed an answer, taking various grounds of

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\* Mr. JUSTICE CURTIS, having been of counsel, did not sit in this cause.

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defense, which it is not necessary, under the circumstances of the case, to particularize. At October term, 1851, the following stipulation was signed by the parties, and filed in the cause:—

The defendants agree not to deny the validity of the complainants' patent, provided they make out their title to the said letters-patent to be good.

They also agree not to deny that the machine complained of in the complainants' bill, is an infringement on the patent granted to H. Burden, on August 4, 1840. [Sept. 2.]

If the complainants shall establish their title to the letters-patent aforesaid, the proper decree may be entered for the complainants, unless the defendants shall prove that the spike machine used by them, and complained of in the bill aforesaid, was constructed prior to the alleged application of H. Burden, made April 18, 1839, for letters-patent therefor, according to the provisions of the statute of the United States, 1839, ch. 88, sec. 7; or was the result of an independent, original invention, prior in time to the invention of the said Burden; in either of which cases the proper decree shall be entered for defendants.

C. P. CURTIS, JR., *Plaintiff's Attorney.*

J. A. ANDREW, *for Defendants.*

Much testimony was taken upon the subjects involved, and in December, 1852, the circuit court dismissed the bill.

From this decree, the complainant appealed to this court.

The case was argued by *Mr. George T. Curtis*, for the appellants; no counsel appearing for the appellee.

The argument upon the point upon which the court rested its decision, consisted of an examination of the evidence bearing upon it, which it is not necessary to state.

\*Mr. Justice CATRON delivered the opinion of the court. [\*73]

Henry Burden obtained a patent, in 1840, for a machine to make hook-headed spikes. He applied for the patent on the 18th of April, 1839. It was assigned to the Troy Iron and Nail Company, who filed a bill against the Odiorne, to enjoin them, and for an account for using a machine to make similar spikes; and which machine, it is alleged, infringed the monopoly secured to Burden, by his patent of 1840. The case was brought to a hearing on the following stipulation:—

“The defendants agree not to deny the validity of the com-

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plainant's patent, provided they make out their title to the said letters-patent to be good.

"They also agree not to deny that the machine complained of in the complainant's bill, is an infringement on the patent granted to H. Burden, on August 4, 1840.

"If the complainants shall establish their title to the letters-patent aforesaid, the proper decree may be entered for the complainants, unless the defendants shall prove that the spike machine used by them, and complained of in the bill aforesaid, was constructed prior to the alleged application of H. Burden, made April 18, 1839, for letters-patent therefor, according to the provisions of the statute of the United States, 1839, ch. 88, sec. 7; or was the result of an independent, original invention, prior in time to the invention of the said Burden; in either of which cases the proper decree shall be entered for defendants."

The only question presented for our consideration on the stipulation, is, whether the machine employed by the appellees was constructed prior to the 18th of April, 1839, when Burden made application at the patent office, for his patent.

The machine complained of was built by Richard Savary, for the Boston Iron Company, in the spring of 1839, and obtained, by the appellees, by assignment. Savary was the patentee of a machine to make ship and boat-spikes, and, at the suggestion of the agents of the Boston Iron Company, added an attachment of an apparatus to make a hook-head to spikes; the process for making which, Savary deposes, he discovered in August, 1838. The time at which this apparatus was attached to the machine (substantially complete in its operative parts), is the time when the machine complained of was "constructed," in the sense of the stipulation; it not being necessary that the machine should be geared and doing work. We are satisfied that it was set up, and substantially finished, before the 18th of April, 1839, and, therefore, order the decree below to be affirmed.

\*74]

\*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 Massachusetts, 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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Battin et al. v. Taggart et al.

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JOSEPH BATTIN, PATENTEE, AND SAMUEL BATTIN, ASSIGNEE, PLAINTIFFS IN ERROR, *v.* JAMES TAGGERT, DEFENDANT IN ERROR. JOSEPH BATTIN, PATENTEE, AND SAMUEL BATTIN, ASSIGNEE, PLAINTIFFS IN ERROR, *v.* ROBERT RADCLIFFE AND JOHN JOHNSON, DEFENDANTS IN ERROR. JOSEPH BATTIN, PATENTEE, AND SAMUEL BATTIN, ASSIGNEE, PLAINTIFFS IN ERROR, *v.* JOHN G. HEWES, DEFENDANT IN ERROR.

Whether the defect be in the specifications or in the claim of a patent, the patentee may surrender it, and, by an amended specification or claim, cure the defect.

When this is done, and a reissued and corrected patent is taken out, the omissions and defects are cured; and nothing within the scope of the patentee's original invention can be considered as having been dedicated to the public, by the lapse of time between the original and reissued patent.

Hence, where a patent was taken out for a new and useful improvement in the machine for breaking and screening coal, and the claim was for the manner in which the party had arranged and combined with each other the breaking rollers and the screen; and the amended specification of the reissued patent described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only, a dedication to the public did not accrue in the interval between the one patent and the other.<sup>1</sup>

It was for the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described; also, to judge of the novelty of the invention, and whether the renewed patent was for the same invention as the original patent; also, whether the invention had been abandoned to the public. The jury were also to judge of the identity of the machine used by the defendant, with that of the plaintiffs, or whether they have been constructed and act on the same principle.<sup>2</sup>

THESE three cases were argued and decided together. They were brought up, by writ of error, from the circuit court of the United States for the eastern district of Pennsylvania.<sup>3</sup>

On the 6th of October, 1843, Joseph Battin obtained a patent for a new and useful improvement in the machine for breaking and screening coal, which he defined, in his specification, as one in which the breaking and screening were effected simultaneously, by a set of breaking rollers, of a certain form, operating in connection with an assorting screen.

<sup>1</sup> APPLIED. *Rubber Co. v. Good-year*, 9 Wall., 795; *Wilson v. Coon*, 6 Fed. Rep., 617; s. c. 18 Blatchf., 537.

<sup>2</sup> Consult also, *Heald v. Rice*, 14 Otto, 749; *Milligan, &c. Glue Co. v. Upton*, 1 Bann. & A., 500; *Calkins v. Bertrand*, 2 Id., 217; *Miller v. Du Brul*, Id., 619; *Herring v. Nelson*, 3

Id., 63; *Atwood v. Portland Co.*, 5 Id., 538; s. c. 10 Fed. Rep., 287; *Edgar-ton v. Furst, &c. Manufacturing Co.*, 10 Biss., 416 n; *Smith v. Merriam*, 6 Fed. Rep., 719; *Kells v. M'Kenzie*, 9 Id., 286.

<sup>3</sup> Reported below, 2 Wall. Jr., 101.

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After describing the machine, the claim was made as follows, namely:—

\*75] \*Having thus fully described the nature and operation of my machine for breaking and screening coal, what I claim as new therein, and desire to secure, by letters-patent, is the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed, and operating substantially, as herein set forth and made known.

JOSEPH BATTIN.

On the 20th of January, 1844, he took out another patent, for the addition of a third, or auxiliary roller, of smaller diameter than the two at first used, and placed above them, and claimed as follows:—

Having thus fully described the nature of my improvement, in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, what I claim therein as new, and desire to secure by letters-patent, is the so forming and gearing of such rollers as that the teeth of one of them shall always be opposite to a space between the teeth in the other, whenever they are operating upon the article to be broken; the same being effected, substantially, in the manner herein set forth.

JOSEPH BATTIN.

A suit was brought by Battin against Clayton, in the circuit court for the eastern district of Pennsylvania, to recover damages for the infringement of the patent of October 6, 1843, when the court held that "the patent being merely for the combination of machinery, it could neither be supported nor assailed by proof of the novelty of the parts." The plaintiff thereupon submitted to a nonsuit; surrendered the patents of 1843 and 1844, and obtained a reissue of the patent of 1843, upon an amended specification. The patent of 1844 was not reissued.

The description of the machine and claim, in the reissued patent, concluded as follows, namely:—

By the construction and arrangement of the breaking rollers, it will be perceived that, as they rotate, the teeth constitute a series of progressive levers, which act on opposite sides of the lumps, and being placed so as not to coincide, snap or break the lumps between the points of pressure; this pressure gradually increasing until the separation is effected, that is, during the rotation, until the teeth reach a plane passing through the axis of the two rollers, and then the effect

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having been produced, the teeth recede to liberate the lumps, and thus avoid the further reduction of the material. This mechanical action of the rotary teeth is thus adapted to the frangible or brittle nature of coal, which is readily pulverized when subjected to a continued percussion or pressing action.

It will be obvious from the foregoing that the form and size of \*the teeth may be greatly varied, as well as the [\*76] space between the periphery of the two rollers, without changing the principle or mode of operation of my invention, so long as the two rollers are geared together, and the teeth of one are in the rotation made to come opposite to, or in the space between the teeth of the other, and *vice versa*; space sufficient to hold the required size of lumps of coal, being left between the teeth of the two rollers when passing a plane which coincides with the axis of the two rollers.

What I claim, therefore, as my invention, and desire to secure by letters-patent, is the arrangement of the teeth on the two rollers, substantially as herein described, so that in their rotation the teeth of one shall come opposite the spaces between the teeth of the other, with sufficient space between to hold lumps of the required size, the rollers being so combined, by gearing, as to make them rotate in opposite directions; and, with the required velocities, to retain the relative position of the teeth of the two rollers, as described.

JOSEPH BATTIN.

At April term, 1850, Joseph Battin, as patentee, and Samuel Battin, as assignee, of an undivided half part, brought suits against the three parties named as defendants in error, in the caption of this report. The defendants pleaded not guilty, and the cause came up for trial, when the jury found a verdict for the plaintiff, for \$800. Upon motion of the counsel for the defendants, a new trial was granted, the following reasons being filed:—

1. The court erred in deciding that the patent of September 4, 1849, was for the same invention as that claimed in the patent of October 6, 1843, and could be included in the reissued patent.

2. The court erred in deciding that the suits can be maintained in the name of Samuel Battin, as assignee under the assignment to him, of February, 1844.

3. The copy of the assignment from the patent-office, was illegally received in evidence for any purpose.

4. The court erred in permitting the plaintiff to amend his declaration, in a material matter of substance, without any

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condition, and without granting a continuance to the defendants, as requested.

5. Material evidence, on the part of the defendants, was excluded by the construction given to the defendants' notice of special matter, which, if received, would have produced a different result.

6. Important evidence was discovered when it was too late to give notice, and during the trial, which is set forth in the affidavit of John L. L. Morris, which was presented to the court.

\*7. The court erred, in the instruction given to the <sup>\*77]</sup> jury, as to the grounds upon which they should ascertain the actual damages.

8. The damages are excessive.

At October term, 1852, the cause came up again for trial, when the jury, under the instructions of the court, found a verdict for the defendants.

The bill of exceptions set forth the whole of the evidence, and the entire charge of Judge Kane to the jury.

The plaintiffs took exceptions to the charge, on the following grounds, namely:—

That the learned judge erred—

1. In the construction given by him to the patents and specifications of October, 1843, February, 1844, and September, 1849.

2. In ruling, as matter of law, that the patentee had given his invention to the public.

3. In construing the 13th section of the act of 1836, and the 7th section of the act of 1837.

4. In charging the jury that "Mr. Battin's invention, as he now defines it, was in use for nearly six years before he claimed that it was his property. He had made it known as an unprotected element of the combination he patented in 1843. It was not till 1849, that he asserted any other right in it for himself than he conceded to everybody else. He cannot reclaim what he has thus given to the public." And in not submitting to the jury the facts proved in regard to the origin and use of the invention.

5. In directing the jury that a description by the applicant for a patent of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as patentee, is a dedication of it to the public; and that such a dedication cannot be revoked after the machine has passed into public use, either by surrender and reissue, or otherwise.

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6. In holding that the facts of this case are embraced in the foregoing proposition.

7. In not deciding that the patent of 4th September, 1849, is good and valid in law.

8. In directing the jury to find a verdict for the defendant.

It is difficult to explain the nature of some of these objections without setting forth the entire charge, which cannot be done. The following extracts, however, from the charge, appear to contain the ruling upon those points on which the decision of this court turned. The charge said:—

“It is said that the present defendants are using the apparatus described in this reissued patent, and that they should be \*muled in damages, accordingly. But there are [\*78 two legal positions, of a general character, which appear to me to bar the plaintiff’s right of recovery. They are these:—

“1. That a description by the applicant, for a patent of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as patentee, is a dedication of it to the public.

“2. That such a dedication cannot be revoked after the machine has passed into public use, either by surrender and reissue, or otherwise.

“The first of these propositions will hardly be disputed. If an inventor has a right at all to give up his invention to the world, there is no more unequivocal way of doing so than by publishing it on the records of the patent-office, and at the same time making no claim to it as his exclusive property. There is no need of a formal disclaimer where no claim can be implied; and the implication is all the other way, when, of several things described, one is claimed without the rest.

“The second proposition, also, seems to be susceptible of easy demonstration. Protection is given to an inventor, under the patent laws, as the consideration for his disclosing what was not known before, not as a tribute of civic gratitude for ‘good deeds past.’ He loses his right, if he allows his invention to become known before he patents it; and when he does patent it, he is required so to describe it, at the very outset, that others may not only know how to use it profitably after his patent shall have expired, but be able to distinguish it from other things while his patent is in force.”

And again—

“Mr. Battin’s invention, as he now defines it, was in use for nearly six years before he claimed that it was his property. He had made it known, as an unprotected element of the

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combination he patented, in 1843. It was not till 1849, that he asserted any other right in it for himself than he conceded to everybody else. He cannot reclaim what he has thus given to the public.

"For these reasons, we instruct you that your verdict, in each case, must be for the defendants."

The cause was argued in this court by *Mr. Keller* and *Mr. Dallas*, for the plaintiffs in error, and by *Mr. Sheppard*, *Mr. Mallery*, and *Mr. St. George T. Campbell*, for the defendants in error.

The following were the points made by the counsel for the plaintiffs in error:—

1. That the court erred in charging, as will be found in the \*79] \*first and second propositions of the charge: "That a

description, by the applicant for a patent, of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as patentee, is a dedication of it to the public." And "that such a dedication cannot be revoked, after the machine has passed into public use, either by surrender, or reissue, or otherwise."

2. That the error, in the foregoing propositions of the charge, involves error in the construction of the 13th section of the act of July 4, 1836, and in the construction of, and the force given to, the several patents put in evidence.

3. That the court erred in determining judicially, by the construction of the surrendered and cancelled patents, that the reissued patent of September, 1849, is not for the same invention intended to have been patented by the patent of October, 1843, instead of submitting the question, as matter of fact, to be determined by the jury.

4. That the court erred in ruling, as matter of law, that the patentee had dedicated or abandoned his invention to the public, instead of submitting it, as a question of fact, to be determined by the jury.

The counsel for the defendants in error made the following points:—

1. The first patent (October 6, 1843,) was not for the breaking rollers, but for the combination of the breaking rollers and the screen.

2. If the patentee described the rollers and the screen, but did not claim them, it was a waiver of his rights (if any he had) therein, as inventor, and an abandonment of them, by operation of law, to public use.

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3. If the original patent of 1843 was for the combination of the breaking rollers and the screen, and if the patentee, by describing the rollers, without claiming them, allowed them to go into public use, with a waiver of his rights, if he had any, it is submitted that he cannot, in 1849, reclaim the rollers.

The different claims were thus set forth:—

The want of sameness is evident on the face of the patents, \*and the repugnancy is manifest upon inspection and [\*80 comparison.

*Claim in original patent of October 6, 1843.*

Having thus fully described the nature and operation of my machine for breaking and screening coal, what I claim as new therein, and desire to secure by letters-patent, is, the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed and operating substantially as herein set forth and made known.

*Claim in the patent of February, 12, 1844, which was subsequently surrendered, cancelled, and not reissued.*

Having thus fully described the nature of my improvement in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, what I claim therein as new, and desire to secure by letters-patent, is the so forming and gearing of such rollers as that the teeth of one of them shall always be opposite to a space between the teeth in the other, whenever they are operating upon the article to be broken, the same being effected substantially in the manner herein set forth.

*Claim in the reissued patent of Sept. 4, 1849.*

What I claim, therefore, as my invention, and desire to secure, by letters-patent, is the arrangement of the teeth of the rollers, substantially as herein described, so that in their rotation the teeth of one shall come opposite the space between the teeth of the others, with sufficient space between to hold lumps of the required size, the rollers being so combined by gearing as to make them rotate in opposite directions, and with the required velocities to retain the relative position of the teeth of the two rollers, as described.

Here the reissued patent, instead of being for the same invention as the original patent, was for an invention patented in letters-patent issued after the original patent, and which have been surrendered, cancelled, and not reissued. The patentee having surrendered that patent, cannot include its subject-matter in the reissue of a prior patent.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us, on a writ of error to the circuit court for the eastern district of Pennsylvania.

The action was brought for the infringement of a patent. The jury, under the instructions of the court, found a verdict for the defendant. Exceptions were taken to the rulings of the court, which present the points of law for consideration.

On the 6th of October, 1843, Joseph Battin obtained a patent for the invention of a new and useful improvement in the machine for breaking and screening coal.

After describing the different parts of the machine, he sums up by saying: having thus fully described the nature and operation of my machine for breaking and screening coal,

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what I claim as new therein, and desire to secure by letters-patent, is, the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed and operating substantially as herein set forth and made known.

An improvement to the above machine, by adding an auxiliary roller, was patented to Battin, 20th January, 1844. And on the 12th of February, 1844, another patent was \*81] granted to <sup>him</sup>, for a new and useful improvement in the machine for breaking coal.

In his specification, he says that he had made a new and useful improvement, in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, which rollers, as combined and arranged by me, are described as follows, in the specification attached to letters-patent, for a machine for the effecting simultaneously the breaking and screening of coal, granted to me under date of the 6th day of October, 1843: The breaking part of my machine consists of two rollers of cast-iron, the peripheries of which are provided with teeth so placed as that, in the revolution of the rollers, the teeth of each of them shall stand opposite to the spaces formed by two contiguous teeth on the opposite roller. These rollers are geared together, in order to preserve the same relative position.

In the above-named letters he says: the manner of arranging and combining the toothed rollers was not made the subject of a claim, the said patent having been obtained for the combining of a roller-breaking machine, with a screen for separating the coal into the different sizes required; but as the breaking rollers, so formed and arranged and combined, are applicable to the ordinary cylinder-breaking machine, when not used in combination with a screen; and as I have found, by continued experiment, that such rollers constitute a real improvement in any breaking machine, I have determined to secure to myself the benefit of such improvement, in a distinct and separate patent therefor. Rollers for the breaking of stone, of ores, of coal, of corn, and of other substances, have been frequently constructed, and are well known, &c.

And, he adds, having thus fully described the nature of my improvement, in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, what I claim therein as new, and desire to secure by letters-patent, is, the so forming and gearing of such rollers, as that the teeth of one of them shall always be opposite to a space between the teeth in the other, whenever they are operating upon the

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article to be broken; the same being effected substantially in the manner herein set forth.

And afterwards, on the 4th of September, 1849, the said Joseph Battin obtained a patent, in which it is stated that he had invented a new and useful machine for breaking coal, for which letters-patent were granted to him, dated October 6, 1843, to which was added an additional improvement, dated 20th January, 1844, and, said letters having been surrendered by him, the same have been cancelled, and new letters-patent have been ordered to issue to him, on an amended specification. \*He also surrendered the patent granted to him the 12th <sup>[\*82]</sup> of February, 1844, for an improved machine for breaking coal, which patent is hereby cancelled, but not reissued, &c.

After describing the invention, he sums up by saying: "What I claim, therefore, as my invention, and desire to secure by letters-patent, is the arrangement of the teeth on the two rollers, substantially as herein described, so that in their relation the teeth of one shall come opposite the spaces between the teeth of the other, with sufficient space between to hold lumps of the required size, the rollers being so combined in gearing as to make them rotate in opposite directions, and with the required velocities, to retain the relative position of the teeth of the two rollers, as described."

In the 6th section of the patent act of 1836, it is declared that "before any inventor shall receive a patent, he shall deliver a written description of his invention, in such full, clear and exact terms, as to enable any person skilled in the art or science to which it appertains, to make and construct the same; and, in case of any machine, he shall fully explain the principle, and the several modes of the application of the machine, so that it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery."

And, by the 13th section of the same act, it is provided, "that when a patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, &c., to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's cor-

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rected description and specification. And the patent so issued shall have the same effect and operation in law, on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

In his charge to the jury, the district judge said: "The case of *Battin v. Clayton*, which was before us some time ago, grew out of an alleged infringement of this patent, of 1843. We held, on the trial of that case, that the patent being merely for the combination of machinery, it could neither be supported nor <sup>\*88]</sup> assailed by proof of the novelty, or want of novelty, of the parts. The patent was thereupon surrendered, and a new one issued, on the 4th of September, 1849, under an amended specification, which described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only."

And he remarks: "It is said that the present defendants are using the apparatus described in this reissued patent, and that they should be mulcted in damages, accordingly." But there are two legal positions, of a general character, which appear to me to bar the plaintiff's right of recovery. They are these:—

1. That a description, by the applicant, for a patent of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as a patentee, is a dedication of it to the public.

2. That such a dedication cannot be revoked, after the machine has passed into public use, either by surrender and reissue, or otherwise.

The above instructions, we think, were erroneous.

Whether the defect be in the specifications or in the claim, under the 13th section above cited, the patentee may surrender his patent, and, by an amended specification or claim, cure the defect. The reissued patent must be for the same invention, substantially, though it be described in terms more precise and accurate than in the first patent. Under such circumstances, a new and different invention cannot be claimed. But where the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give to it validity, and protect the rights of the patentee against all subsequent infringements.<sup>1</sup>

So strongly was this remedy of the patentee recommended, by a sense of justice and of policy, that this court, in the case

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<sup>1</sup> CITED. *Seymour v. Osborne*, 11 Wall., 544.

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of *Grant v. Raymond*, 6 Pet., 218, sustained a reissued and corrected patent, before any legislative provision was made on the subject. In that case, the chief justice said: "It will not be pretended that this question is free from difficulty. But the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard the settled practice, in a case where we are not satisfied it is contrary to law, and where we are satisfied it is required by justice and good faith." The same principle was sanctioned in the case of *Shaw v. Cooper*, 7 Pet., 310.

How much stronger is a case under the statute, which secures the rights of the patentee by a surrender, and declares the effect \*of the reissued and corrected patent? By [\*84 the defects provided for in the statute, nothing passes to the public from the specifications or claims, within the scope of the patentee's invention. And this may be ascertained by the language he uses.

In the case of *Stimpson v. The West Chester Railroad Company*, 4 How., 380, it was held, that "where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the reissued patent, proof of the use of the thing patented, during the interval between the original and renewed patents, will not defeat the action." In the same case it was also held, that the proceeding before the commissioner, in the surrender and reissue of a patent, is not open for investigation, except on the ground of fraud.

The patent of 1843 was not surrendered on the obtainment of the patent of 1844. That was intended to be a new invention of arranging and combining the toothed rollers, which, the patentee says, was not made the subject of a claim in the patent of 1843. The patent of 1844 was cancelled, but not reissued, when the patent of 1849 was issued. At that time, the patent of 1843, and the improvement thereon, dated January 20, 1844, were surrendered and cancelled, and new letters-patent were issued on an amended specification.

The cause of the surrender of the patent of 1843, as stated in the charge to the jury, was the ruling of the court in the case of *Battin v. Clayton*, and that the amended patent of 1849 was consequently obtained. That ruling is not now before us, nor is it necessary to inquire whether the patent of 1843, on the specifications and claim, was sustainable. The plaintiff, by a surrender of that patent, and the procurement of the patent of 1849 with amended specifications, abandoned

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his first patent, and relied wholly on the one reissued. The claim and specifications in this patent, as amendatory of the first, were within the 13th section of the act of 1836. It is said, with entire accuracy, in the charge, in regard to the amended specification of the patent of 1849, that it "described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only." And this the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity, and to effectuate his invention.

In the argument, the counsel very properly considered the patent of 1844 as not in the case. It was designed to secure a new combination, not included in the first patent; and as the patent of 1844 was surrendered and cancelled, and not <sup>\*85]</sup> reissued, \*it being equally disconnected with the patent of 1843, and the reissued and corrected patent of 1849, it can have no effect on the claim of the plaintiff.

We think the court also erred in saying to the jury, "We instruct you that your verdict, in each case, must be for the defendants."

This, as well as the two instructions above noticed, took from the jury facts which it was their province to examine and determine. It was the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described. This the statute requires, and of this the jury are to judge.

The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury; such as the identity of the machine used by the defendant with that of the plaintiff's, or whether they have been constructed and act on the same principle.

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

*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 Pennsylvania, 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

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said circuit court, with directions to award a *venire facias de novo.*

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THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* SIXTY-SEVEN  
PACKAGES OF DRY GOODS. JULES LEVOIS, CLAIMANT.

The 66th section of the act of 1799, (1 Stat. at L., 677, ch. 22,) which declares that "if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the person making \*the entry, shall be forfeited," has not been repealed by any provision in the act of 1842, or in any of the <sup>[\*86]</sup> duty acts, but still exists in full force and effect.

THIS case was brought up, by writ of error, from the circuit court of the United States for the eastern district of Louisiana.

A libel of information was filed in the district court, by the collector of the port of New Orleans, on behalf of himself and the United States, for the condemnation and forfeiture of sixty-seven packages of goods, on account of an alleged fraud upon the revenue, charging, among other things, in the information, that the goods were entered at the custom-house, upon the production of an invoice, in which they were invoiced at a less sum than the actual cost thereof at the place of exportation, with a design to evade the duties.

Jules Levois, of New Orleans, filed a claim to the goods, and the cause came up for trial in March, 1850, when the jury, under the instructions of the court, found a verdict for the claimant.

A bill of exceptions was taken by *Mr. Hunton*, district attorney of the United States, which, being short, is here inserted as follows:—

Be it remembered, that on the trial of this cause the plaintiff offered in evidence the following documents, numbered as follows:

- No. 1. Warehouse entry of five packages with extract invoice.
- " 2. Import entry of sixty-two packages.
- " 3. Report of United States appraisers.
- " 4. United States appraiser's valuation.
- " 5. Merchants appraiser's do.
- " 6. Copy of interrogatories propounded by appraisers to P. D. Duval.

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No. 7. Call for letters.

“ 8. Call for reply to interrogatories.

“ 9. Letter from Mr. Duval to United States appraisers.

“ 10. Paper found by appraisers in case No. 81.

“ 11. Invoice in which the entries were made.

The following witnesses were introduced:—

R. J. Canfield, who stated that he was one of the appraisers in the custom-house of New Orleans, proved the several documents offered in evidence; that P. D. Duval, the partner or agent of claimant, made the entry at the custom-house; his refusal to answer the interrogatories propounded; stated that from his experience as appraiser, he was familiar with the valuation and cost of such goods as were contained in the invoice on which the entries were made; stated that the goods were invoiced at less than the actual cost, as he believed, and at less <sup>\*87]</sup> than their actual value in the foreign market from whence they were imported, to the extent shown by the valuation offered in evidence; that he had made a particular examination of the several packages seized. He proved that the paper marked No. 10 was found by the appraisers, in case No. 81, and that the same articles contained in that paper were invoiced at

Phillip Simms, A. Duthel, E. D. Hyde, Mr. Letchford, were also introduced as witnesses on the part of the United States, all of whom were importing merchants in the city of New Orleans, and had imported like goods as those seized, from Liverpool, about the same time; some had received importations by the same ship that brought out those in controversy; all of them confirmed the merchants' valuation, as shown in paper No. 5, and concurred in saying that the said goods were invoiced at least twenty-five per centum lower than actual cost or value in the foreign market. It was proven that cotton goods had advanced during the spring and summer of 1849. Mr. Riffard said, that all of the goods in the invoice were invoiced at less than the actual value; some of them, however, not more than ten or fifteen per centum, in his judgment. And thereupon, the court instructed the jury as follows, namely:—

1. That the 66th section of the act of congress of the 2d March, 1799, in so far as it imposes the penalty of forfeiture of any goods, wares, and merchandise, of which entry shall have been made in the office of a collector, and which shall not be invoiced according to the actual cost thereof, is inconsistent with, and repugnant to, the 13th and 15th sections of the act of 1st March, 1823, imposing a penalty of

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additional duties on goods entered under fraudulent invoice; and in so far as said inconsistency and repugnancy existed, the said act of 1799 was repealed by said act of 1823.

2. That the said 66th section of the act of congress of the 2d March, 1799, was, to the same extent as aforesaid, repugnant to, and inconsistent with, the 17th section of the act of 30th August, 1842, and is, to the same extent, repealed by said act of 1842.

3. That the proceedings directed and authorized by the 17th section of the act of 1842, having been proved by the United States to have taken place against the merchandise therein alleged to be forfeited to the government, it was the duty of the collector to have levied and collected the additional duty which, by said 17th section, is imposed as a penalty on goods which shall be appraised, estimated, and ascertained to exceed the invoice value; that said penalty is inconsistent with, and repugnant to, the penalty of forfeitures, as imposed by any preceding law of congress; that the said section of said act of 1842, \*and the other sections of said last-named [\*\_88 act, do, by implication, repeal all previous provisions of all acts of congress imposing the penalty of forfeiture of merchandise which is falsely valued in an invoice, or of which the actual cost has not been stated in the invoice under which their entry is made.

And also instructed the jury that there was at present no law in force authorizing the forfeiture of the said goods for the causes set forth in the libel. To which instructions and charge, the United States, by their attorney, except, and pray that this bill may be signed, sealed, and entered of record; which is done.

(Signed)

THEO. H. McCaleb, [Seal.]  
*United States Judge.*

In May, 1853, the cause came on for trial before the circuit court of the United States, when the judgment of the district court was affirmed.

A writ of error brought the case up to this court.

It was argued by *Mr. Cushing* (attorney-general) for the United States. No counsel appeared for the appellee.

*Mr. Cushing* reviewed the provisions of the act of March 1, 1823, 13th and 15th sections, (3 Stat. at L., 734, ch. 2,) and the 17th section of the act of 30th August, 1842, (5 Stat. at L., 564, ch. 270,) and then proceeded with the argument.

Such are the provisions of the statutes relied on as repealing, by implication, the 66th section of the act of 1799.

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It is to be noted that the said 66th section enacts the forfeiture of the goods, "or the value thereof," of which entry shall have been made in the collector's office, "with design to evade the duties thereupon, or any part thereof." But whether the collector shall or shall not seize and prosecute the goods as forfeited, or shall collect and receive the duties arising upon the valuation, when ascertained by two reputable merchants to be appointed for that purpose, as required in that 66th section, are matters left to the judgment and discretion of the collector. If he retains the goods, and prosecutes as for a forfeiture thereof, or the value thereof, he acts at his peril; it is his own act, for which he will be personally responsible in damages, if he misjudges and seizes, and prosecutes by wrong, and without probable cause, upon an allegation of "design to evade the duties thereupon." The *quo animo* with which the entry of the goods, not invoiced according to their actual cost, shall have been made, the design to evade the duties, constitute the offense for which the forfeiture of the goods or their value is declared in this 66th section. The hazard which a collector must incur <sup>\*89]</sup> personally, by prosecuting for a forfeiture, is not forefended by the appraisement made by two reputable merchants, because "such appraisement shall not be construed to exclude other proof upon the trial of the actual and real cost of the said goods at the place of exportation." Moreover the two merchants are not to inquire as to the "design to evade the duties."

By this 66th section, the duties are to be paid according to such valuation as shall be ascertained, not according to the invoiced value, if the collector does not deem it expedient to prosecute for a forfeiture. So, under the acts of 1823 and 1842, relied upon, the collector has an election to prosecute for a forfeiture or not, upon allegation of "design to evade the duties." If he elects not so to prosecute, then he must have collected under the act of 1823, or under the act of 1842, the additional duty of fifty per centum.

So the 9th section of the act of May 19, 1828, (4 Stat. at L., 274, ch. 55,) imposed an additional duty of fifty per centum, if the appraised value of the goods at the time purchased, and place from which they were imported into the United States, exceed the invoiced value by ten per centum. Yet this statute did not take away the election of the collector to prosecute for a forfeiture of the goods, or their value, under the 66th section of the act of 1799, if, in his opinion, the goods had been entered at the custom-house, upon an invoice undervaluing them, "with design to evade the duties thereupon, or any part thereof."

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In the act of 30th July, 1846, (9 Stat. at L., 43, ch. 74, sec. 8,) it is made the duty of the collector to cause the dutiable value of imports "to be appraised and estimated and ascertained in accordance with the provisions of existing laws; and if the appraised value thereof should exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value." This act does not take away the election of the collector to prosecute for a forfeiture of the goods, or their value, under the 66th section of the act of 1799, if in his judgment he can sustain the charge, that the goods were entered at an undervaluation, "with design to evade the duties thereupon, or any part thereof."

The statutes which impose an additional (or penal) duty, in case the estimated and ascertained value of the goods exceeds by a certain per centum their value, as declared in the entry with the collector, do not require, as a prerequisite to the collection of such additional (or penal) duty, that the entry shall have been made "with design to evade the duties thereupon."

\*The 66th section of the act of 1799, defines a [ \*90 higher offense against the revenue laws; it requires that the entry of the goods shall have been made "with design to evade the duties thereupon," and for such design inflicts the forfeiture of the goods, "or the value thereof," if the collector shall prosecute for and establish such design.

In the case of *Wood v. The United States*, January term, 1842, (16 Pet., 363-366,) the question of the repeal of the 66th section of the act of 1799, by implication, arising out of subsequent statutes, is fully discussed, and every position taken by the judge of the district court is, in effect, negatived. It is useless to say more in this case, than that the principles decided in *Wood v. The United States* are applicable to the acts of 1842 and 1846, although these have been passed subsequently to that decision of the supreme court.

There is no positive repugnancy between the provisions of the 66th section of the act of 1799, and those of the subsequent laws. These new laws are merely affirmative, cumulative, and auxiliary to the 66th section of the act of 1799; not inconsistent with a forfeiture of the goods or their value, where an entry shall have been made in the office of the collector "with design to evade the duties thereupon, or any part thereof." There is nothing in any of the statutes, subsequent to the act of 1799, to compel the collector to demand

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and receive the duties, with the additional or penal duties, in cases where goods are entered for duty at an undervalue, "with design to evade the duties thereupon, or any part thereof;" nor to inhibit the collector from prosecuting for the forfeiture of the goods, or their value.

"The provision in the 66th section is intended to suppress fraud upon the revenue. The other acts are designed to be auxiliary to the same purpose. There is no repugnance between the provisions; and to construe the latter, as repealing the former, would be to construe provisions to aid in the detection of fraud in such a manner as to promote fraud, by cutting down provisions of a far more general and important character, and essential to the security of the revenue."

*Wood v. The United States*, 16 Pet., 365, 366.

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 eastern district of Louisiana.

A libel of information was filed in the district court, by the collector of the port of New Orleans, on behalf of himself and the United States, for the condemnation and forfeiture of sixty-seven packages of goods, on account of an alleged fraud upon the revenue, charging, among other things, in the <sup>\*91]</sup> information, \*that the goods were entered at the custom-house upon the production of an invoice, in which they were invoiced at a less sum than the actual cost thereof at the place of exportation, with a design to evade the duties.

On the trial, after evidence was given on the part of the libellants tending to prove the facts charged in the information, the court charged the jury, that the 66th section of the duty act of 1799 was repealed by force of subsequent statutes, and that, at present, there was no law in existence providing for a forfeiture of the goods for the causes set forth in the libel. The jury found, accordingly, for the claimant.

This ruling was carried up on error to the circuit court, where the judgment was affirmed.

The 66th section of the act of 1799, so far as it is material in the case, is as follows:—

"That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the person making the entry, shall be forfeited."

It was held, in the case of *Wood* against the *United States*, 16 Pet., 342, which was an information founded upon this

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section, that it was then in force, and the property there seized was condemned under it. The goods in that case had been entered at the custom-house in 1839 and 1840. The duty act of 1842, which has since been passed, is supposed to operate a repeal of the section, by implication.

The 19th section of that act is mainly relied on, which is as follows:—

“That if any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States, any goods, &c., subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, *or shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice*, every such person, his, her, or their aiders and abettors, shall be deemed guilty of misdemeanor, &c., punishable by fine and imprisonment.”

The invoice mentioned in the two sections (the 66th and 19th) is a very important document in the entry and passing of goods at the custom-house.

The 36th section of the act of 1799 made it the duty of the person making the entry to produce to the collector the original invoice, in the same state in which it was received; and also, to make oath that it was the true, genuine, and only invoice \*received, and was in the actual state in which [ \*92 it was received, and that the deponent did not know of any other invoice or account of the goods different from that produced. And the 1st section of the duty act of 1818, further provided, that no goods subject to duty should be admitted to entry, unless the original invoice of the same was presented to the collector. The same provision is found in the 1st section of the act of 1823.

The 4th section of the last act also prescribes the oath substantially like the one in the act of 1799, above referred to, except somewhat enlarged.

The 4th section of the act of 1830, in the case of goods subject to duty, provided, that if any package should be found to contain an article not described in the invoice, the same should be forfeited. This provision is modified by the 21st section of the act of 1842, which saves the forfeiture, if the appraisers shall be of opinion that the omission in the invoice was not with a fraudulent design.

This brief reference to the several acts is sufficient to show the great importance attached to this document, in securing the collection of the proper duties upon foreign importations, and the great care that has been taken to insure the production to the collector of the true, genuine, original one, and

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that it should be in the actual state and condition in which it was received by the owner, consignee, or agent making the entry.

Now, the 66th section of the act of 1799, dealing with this document, forfeits the goods of the party entered at the custom-house, "if not invoiced according to the actual cost thereof at the place of exportation, with a design to evade the duties."

The 19th section of the act of 1842 subjects the party to a misdemeanor, and punishable as such, concerned in making an entry, who, with intent to defraud the revenue, "shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice."

The former section has reference to the invoice so far as material to determine the forfeiture, simply with a view to the actual cost of the article at the place of exportation, without regard to the question whether the document itself is the true and genuine one or not. If the goods described in the invoice are invoiced under the cost value, with the design stated, the forfeiture takes place. The object is to prevent frauds upon the revenue in passing goods through the custom-house, by means of this device, at an undervaluation.

The latter provision is different, and has reference to the frauds that may be committed in passing or attempting to pass the goods upon the production of invoices not genuine; not the true, original invoices, but those made out for the occasion with a design to impose upon the collector and other officers.

\*93] \*The acts of 1799 and 1823 sought to prevent this species of fraud, by requiring the production of the original invoice, with the oath of the party superadded, that it was the true, genuine, and the only one received, and in the actual state in which it was received. This, although the party was subjected to the penalty of perjury, in case of false swearing, seems not to have afforded the necessary protection; and the present provision, for the first time, has been enacted, subjecting the person to a misdemeanor who shall, with intent to defraud the revenue, "make out or pass, or attempt to pass through the custom-house any false, forged, or fraudulent invoice," manifestly directed against the production and use of simulated invoices, and those fraudulently made up for the purpose of imposing upon the officers in making the entry.

The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, secondly, the passing or attempt to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is

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an offense which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs.

In the interpretation of our system of revenue laws, which is very complicated, and contains numerous provisions to guard against frauds by the importers, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of congress; especially in cases where the new law may have been auxiliary to and in aid of the old, for the purpose of more effectually guarding against the fraud. This is the doctrine to be found in the case of *Wood v. The United States*, already referred to, and in several subsequent cases. 3 How., 197; 16 Id., 150.<sup>1</sup>

It has been supposed that the 8th section of the present act of 1846, which imposes an additional duty of twenty per centum for undervaluation, works a repeal of the 66th section of the act of 1799. But this provision has been part of the revenue system ever since the act of 1818, with the exception of a few years, and has never been understood to have the effect claimed. On the contrary, the section has been regarded as in force, and has been in practical operation during all this time, notwithstanding the imposition of other additional duty. It was so considered in the case of *Wood v. The United States*. This additional duty is imposed in case the appraised value exceeds \*the invoice price of the goods ten per centum, [\*94 irrespective of the question of fraudulent intent. Undoubtedly, if this additional duty has been levied upon the goods by the government, it cannot forfeit them under the 66th section; but, if the collector is satisfied that the undervaluation in the invoice has been made with intent to evade the duties, instead of levying the additional duty, a forfeiture may be declared. It will be observed, also, that the forfeiture may be declared in cases of undervaluation where it is less than ten per centum of the invoice price, provided the fraudulent design exists.

We are satisfied that there is no provision in the act of 1842, or in any of the duty acts, operating as a repeal of the 66th section of the act of 1799, but that it still exists in full force and effect. The judgment of the court below must therefore

<sup>1</sup> FOLLOWED. *United States v. Walker*, 22 How., 312.

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be reversed, and record remitted for further proceedings, in conformity to this opinion.

Mr. Justice CAMPBELL dissented.

This court, in a series of cases arising upon a succession of frauds perpetrated by a combination of persons in England and this country, determined, that the 66th section of the act of 1799, and the 4th section of the act of 1830, as modified by the 14th section of the act of 1832, were not repugnant, but formed a harmonious system for the prevention of frauds upon the revenue. 16 Pet., 342; 3 How., 211; 4 Id., 242, 251.

The system formed was: 1. By the act of 1799, if an invoice contains goods that are undervalued with design to evade duties, the goods so undervalued are forfeited. 2. By the acts of 1830 and 1832, if a package or invoice is made up with intent to defraud the United States, the package or invoice thus made up is forfeited.

The court in its opinions declared that the latter statutes apply only to the cases in which the fraudulent acts of the importer were discovered by the officers of the customs, in the opening and examination of the goods, in their transit through the custom-house; while the act of 1799 applies to the case of completed entries under false invoices, no matter when or where the detection took place, the suits were all for forfeitures where the goods had passed through the custom-house, with a regular entry and payment of duties, but upon false invoices, that is, importing on undervaluation.

In these entries, "a true and original invoice" was demanded by the collector, under the acts of congress then in force, and simulated and fraudulent invoices were punished, and upon which the assessment of duties was made. A true and original invoice, showing the first cost of the imports, formed the legal <sup>\*basis for the estimate of the duties under these acts,</sup> <sub>\*95]</sub> and the production of this was the end which these enactments were designed to secure.

The tariff act of 1842 (5 Stat. at L., 548,) was adopted after these decisions.

Its title signifies that its purpose, among other things "was to change and modify existing laws imposing duties on imports," and all conflicting acts and parts of acts were expressly repealed. The frauds referred to in the cases cited, were accomplished by false representations of the cost of the import, in the invoice, and the danger of a forfeiture for an undervaluation did not prevent them.

The act of 1842 abolishes the "cost price at the place of exportation," as the basis of the estimate of duties, but

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employs the "market value," or "wholesale price," and provides appraisers, who were to ascertain these without regard "to any invoice whatever." To perform this office they were armed with inquisitorial powers, might call for merchants' books, letters, invoices, and papers, and examine, as witnesses, the parties in interest. False swearing was punished with the forfeiture of the import, and as a perjury.

Here, then, is the substitute for the invoice in the old system, in the ascertainment of the basis of the estimate, and these were the sanctions employed to secure its integrity.

The "true and original invoice" would, nevertheless, afford important evidence to ascertain the "market value," for, in a majority of cases, this would be the "cost." The production of the true invoice was still required in every entry. If the invoiced value differed from the appraised or market value, ten per centum, an additional penal duty now amounting to twenty per centum was exacted. This was to compel a fair exhibition of a "true invoice." This duty is collected without suit, depends upon the single fact of a variation of ten per centum between the market and invoice price, and has proved a most efficient instrument to prevent fraud. Besides, the duty may be collected in goods at the invoice rate, and thus the undervaluation would be corrected.

Finally, "if any person shall, wilfully and with intent to defraud, make out, or pass or attempt to pass through the custom-house, a false, forged, or fraudulent invoice, every such person, his aiders and abettors, shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding five thousand dollars, or imprisoned for a term of time not exceeding two years, one or both, at the discretion of the court." (5 Stat. at L., 565, Sec. 19.)

The invoice spoken of in this section of the act, is one which does not represent truly the facts the importer is bound to disclose \*at the date of his entry, and which are exhibited by an original and true invoice, and where the [\*96 misrepresentation, whether by falsehood, forgery, or fraud, is with the design to evade the duties. It is admitted that this act provides for cases never before comprehended in any revenue law. For the attempt to defraud is punished as well as the consummate effort. The system of the act of 1842 is thus disclosed: It relies upon a home valuation made by public officers, upon evidence, instead of a representation of cost by the importer, as the basis of value in the assessment; and it provides, by forfeiture, and fine, and imprisonment, against the false testimony of the importer. It compels the production of the original and true invoice, by a penal duty, by fine

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and imprisonment, and the power to take payment of duties in undervalued goods.

There are, besides, provisions directed against smuggling. The act contains a selection from the various laws which had been passed by congress, whether in force or otherwise, and introduces new securities for the collection of the revenue.

Every case provided for by the system first considered, is distinctly and efficiently provided for in the act of 1842.

The principle applicable to such a state of facts is laid down by this court, in *Norris v. Crocker*, 13 How., 429. "That where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication, as the two provisions cannot stand together;" and that where "a recent statute covers every offense found in the former act," and prescribes a new and different penalty, recoverable by indictment, "it is plainly repugnant."

The statement of the systems adopted at the different periods, will show that the importance of the 66th section of the act of 1799 had ceased, and that the retention of it, as a cumulative penalty, would accomplish no good, and serve only to involve the government in litigation, that the revenue officers might claim the penalty.

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

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United States v. Nine Cases of Silk Hats.

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\*THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* NINE CASES OF SILK HATS. PAUL TRICON, CLAIMANT.

The decision in the preceding case again affirmed.

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 similar, in its circumstances, to the case of the *United States v. Sixty-seven Packages of Dry Goods*, and argued by *Mr. Cushing*, attorney-general, for the United States, at the same time.

Mr. Justice NELSON delivered the opinion of the court.

This was a libel of information, filed in the district court of the *United States v. Nine Cases of Silk Hats*, for condemnation and forfeiture, on the allegation that the entry of the goods at the custom-house, was made upon an invoice, in which they were invoiced at a less sum than the actual cost at the place of exportation, with a design to evade the duties.

After hearing the evidence, the court instructed the jury that the 66th section of the act of 1799, which imposed a forfeiture of the goods in question, had been repealed, and was not in force at the time of the entry at the customs; and gave judgment for the claimant. On a writ of error to the circuit court, this judgment was affirmed.

For the reasons given in the case of the *United States v. Sixty-seven Packages of Dry Goods*, the judgment must be reversed, and the record remitted to the court below for further proceedings, in conformity to the opinion of this court.

Mr. Justice CAMPBELL 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 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 for further proceedings to be had therein in conformity to the opinion of this court.

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United States *v.* One Package of Merchandise.

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\*THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* ONE PACKAGE OF MERCHANDISE. LION, PINSARD, AND CO., CLAIMANTS.

The decision in the two preceding cases again affirmed.

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 similar, in its circumstances, to the case of the *United States v. Sixty-seven Packages of Dry Goods*, and was argued by Mr. Cushing, attorney-general, at the same time.

Mr. Justice NELSON delivered the opinion of the court.

The libel of information was filed, in this case, in the district court of the United States for the eastern district of Louisiana, for the condemnation and forfeiture of one package of goods; the entry, as charged, having been made upon an invoice in which the goods were invoiced under their actual cost value at the place of exportation, with a design to defraud the duties. After the evidence was heard, the jury, under the instructions, found a verdict for the plaintiffs.

The court afterwards arrested the judgment for the plaintiffs, and directed a judgment for the claimants, on the ground that the 66th section of the act of 1799 had been repealed, which judgment was affirmed, on error, by the circuit court.

For the reason given in the case of the *United States v. Sixty-seven Packages of Dry Goods*, the judgment below must be reversed, and the record remitted to the court for further proceedings, in conformity to the opinion of this court.

Mr. Justice CAMPBELL 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 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 for further proceedings to be had therein in conformity to the opinion of this court.

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The United States *v.* One Case of Clocks.

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**\*THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* ONE CASE OF CLOCKS. LION, PINSARD, AND CO., CLAIMANTS.**

The decision in the three preceding cases again affirmed.

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 similar, in its circumstances, to the case of *The United States v. Sixty-seven Packages of Dry Goods*, and was argued by *Mr. Cushing*, attorney-general, at the same time.

Mr. Justice NELSON delivered the opinion of the court.

This is a libel of information, filed in the district court of the United States for the eastern district of Louisiana, for the condemnation and forfeiture of one case of clocks, for entry of goods upon an invoice, in which the goods were invoiced at a sum less than the actual cost value at the place of exportation, with a design to evade the duties.

The jury found a verdict for the plaintiff, upon which a judgment was rendered; but, afterwards, the court arrested and set aside the judgment, and gave judgment for the claimants, dismissing the libel, which was affirmed on error in the circuit court.

For the reasons given in the case of *The United States v. Sixty-seven Packages of Dry Goods*, the judgment of the court below must be reversed, and the record remitted for further proceedings, in conformity to the opinion of this court.

Mr. Justice CAMPBELL 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 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, 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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Lawrence et al. v. Minturn.

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\*ALEXANDER M. LAWRENCE AND OTHERS, CLAIMANTS OF THE SHIP HORNET, APPELLANTS, *v.* CHARLES MINTURN.

A consignee of goods has a right, in his own name, to libel a vessel for their non-delivery, unless there is something to show that he had no interest in them. The presumption is, that he had an interest, and to defeat the right to sue, in his own name, this presumption must be rebutted by proof.<sup>1</sup> In the present case, there is no such proof. The goods being thrown overboard, the facts in this case show that the jettison was justifiable, and the loss occasioned by the perils of the sea. The nature of the contract explained between the master and owner of a vessel and the shipper, where the latter knows that the articles shipped are to be carried upon the deck, and the cases upon this subject examined.<sup>2</sup> In this case, the evidence shows that there was no want of due diligence and skill, either in the construction of the vessel or the stowage of the cargo.

THIS was an appeal from a decree of the district court of the United States for the northern district of California, sitting in admiralty. Minturn libelled The Hornet, for the non-delivery of two steam-boilers and chimneys, shipped on board of that vessel in the port of New York, and consigned to the libellant.

Alexander M. Lawrence and seven others intervened, as claimants, and after a hearing upon the pleadings and proofs, the district judge decreed that the libellant should recover \$25,275, and costs. From this decree the claimants appealed to this court.

The case is stated in the opinion of the court.

It was argued by *Mr. Cutting*, for the appellants, and by *Mr. Lord*, for the appellees.

*Mr. Cutting*, before stating the points of law which arose in the case, examined the evidence, from which he contended that the following positions were established:—

1. That the ship Hornet was as good a ship as sailed out of the port of New York, at the time she commenced this voyage, and as well qualified as any vessel of her size to carry the boilers in the manner in which they were shipped.

2. That the contract of affreightment was, that the boilers should be carried on deck, in the manner in which they were carried.

3. That the boilers were stowed, and secured in that position, in the best and safest manner; and that the residue of

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<sup>1</sup>CITED. *The Sally Magee*, 3 Wall., 457; *The Bermuda*, *Id.*, 553; *The Thames*, 14 *Id.*, 109; *The Vaughan Telegraph*, *Id.*, 266. <sup>2</sup>CITED. *The Delaware*, 14 Wall., 599; *The Bark Carlotta*, 9 *Ben.*, 15; *The Sprague v. Hosmer*, 82 *N. Y.*, 468.

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the cargo was well stowed with regard to carrying the boilers on deck. She was in good sailing trim, and steered very well.

4. That in the judgment of all the experienced navigators who have testified on this subject, without a dissenting voice, the ship was, at the time of leaving the port of New York, capable of carrying the boilers, as a deck load, to San Francisco. That the shipper and his agents assented to, and acquiesced in, <sup>\*</sup>that judgment. And no evidence has [\*101 been furnished that any person entertained, much less expressed, a doubt of the success of the voyage.

5. That it would not have been possible to carry the boilers to San Francisco, or to have retained them longer on the ship, consistently with the safety of the lives of those on board.

The experience acquired in the first storm clearly established this.

6. That the boilers were thrown overboard as soon as it was practicable, after the ship encountered the gale.

7. That this jettison was with due deliberation, and an act of necessity.

8. That the ship-owners were not guilty of any negligence, even the slightest, either in undertaking to transport these goods on deck, or in the construction, equipment, or navigation of the ship, or in the stowage of these goods, or in the manner of stowage of the rest of the cargo in reference to these goods, or in the quantity of cargo taken in below deck.

#### Points of Law.

I. The libellant had no right, merely as consignee, to institute this action in his own name.

II. The boilers were lost by one of the excepted perils, even if the ship be held to its responsibility as a common carrier.

1. The carrier is not responsible for the loss by jettison of goods laden on deck with the assent of the shipper, when such jettison is necessary to save the vessel and the crew. *Gould v. Oliver*, 4 Bing. N. C., 142, per Tindal, C. J.; Case cited by Coke, in *Bird v. Astcock*, 2 Bulst., 280; Approved Sto. on Bail., § 531; *Mouse's Case*, 12 Co., 63; *Gillett v. Ellis*, 11 Ill., 579; *Johnston v. Crane*, 1 Kerr., 356 (New Brunswick Rep.); *Smith v. Wright*, 1 Cai. (N. Y.), 43, and note (a,) 45; *Crosby v. Fitch*, 12 Conn., 419, 420; *Da Costa v. Edmunds*, 4 Campb., 142.

2. The loss occurred by dangers of the seas, within the meaning of the bill of lading. The gale of the 26th and 27th of August, was a severe gale, accompanied by a very heavy cross sea, which strained the ship, opened her seams and

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caused her to leak badly; under these circumstances the weight of the boilers caused the decks to settle, and jeopardized the safety of the vessel. Although she was capable of withstanding ordinary weather, it was manifest that she could not outlive another gale.

3. The loss could not have been guarded against, or foreseen by any ordinary exertion of human prudence or skill. The \*102] \*shipper and the ship-owners, in this respect, concurred in the judgment that the ship was capable of carrying this extraordinary deck load, and all proper precautions were adopted, in order to insure its safety.

4. The circumstance that human agency intervened to cast the boilers into the sea, makes it none the less a loss by perils of the seas. *Hagedorn v. Whitmore*, 1 Stark., 157; *Barton v. Wolliford*, Comb., 56; *Gillett v. Ellis*, 11 Ill., 579; *Smith v. Scott*, 4 Taunt., 126.

III. The shipper having contracted for the shipment of the boilers on deck, cannot, in the absence of fault or negligence in the carrier, recover for a loss by perils incident to that mode of transportation. *Gould v. Oliver*, Tindal, C. J., 4 Bing. N. C., 142; *Baxter v. Leland*, Blatch., 526; *Clark v. Barndwell*, 12 How., 272, 281-2; *Shackleford v. Norton*, 9 La., 33, 39; *Angell Car.*, §§ 215, 217.

It was by one of that class of perils that the boilers were lost.

IV. The ship-owners were not common carriers as to these goods; they were special bailees under a particular contract, and in respect to this transaction, are to be treated as private carriers, who incur no responsibility beyond that of an ordinary bailee for hire. They are answerable only for misconduct or negligence, or the want of that diligence which prudent men commonly take of their own goods. Special Contract, 5, 66; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How., 344, 382; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, 34, 36; *Allen v. Sewall*, 6 Wend. (N. Y.), 335, 355, 364; *Wells v. The Steam Navigation Co.*, 2 C. (N. Y.), 208; *Edwards v. Sherratt*, 1 East., 504, 611; *Thomas v. Prov. and Bos. R. R. Co.*, 10 Metc. (Mass.), 472; *Angell on Car.*, §§ 45, 46, 54, 89; *Sto. on Bail.*, § 442.

V. The ship-owners did not warrant or insure that the ship should be competent to carry the boilers on her deck to San Francisco.

VI. The libel does not aver unseaworthiness, incapacity, or fault of the ship, or any improper stowage of cargo, or any overloading of the ship; and on the contrary it alleges the failure to deliver, to have been caused solely by the mere care-

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lessness, unskilfulness, and misconduct of the master and mariners. The proofs and the right to recover must be confined to the allegations. 1 Car. & P., 251; *Houseman v. Schooner North Carolina*, 15 Pet., 50.

This objection was taken at the trial, but the court ruled, that if the loss was occasioned by the overloading of the ship, proof might be given of that fact, and the libel sustained. Even if <sup>\*</sup>this ruling was correct, no proof of the vessel being overloaded was given; nor was she overloaded. <sup>[\*103]</sup> The lading of the boilers on deck made the ship uneasy; but it was the shipper, and not the master and mariners, who caused them to be placed there, and the latter cannot be charged with carelessness, unskilfulness, or misconduct, on that account.

## VII. The damages decreed to the libellant are excessive.

*Mr. Lord*, for the appellee, stated the libel, and then said, The ship, in answer, sets up two matters in defense:—

1. That the shipper, in making the freighting contract, deceived the agents of the ship, by representing the weight at about forty tons, when, in fact, it is alleged to have exceeded fifty tons, in the shipper's knowledge, on which representation the agents relied.

2. That the ship having sailed from New York, on the 23d August, 1851, experienced a storm at sea, near the edge of the Gulf Stream, on the 26th of August, in which the ship labored severely; the gale continued twenty-four hours; the ship was very uneasy under her deck load, and on the 29th August, considering the ship in danger, and she leaking badly, the master determined, after the gale was over, to throw over the deck load, to avoid the dangers which might arise in the next gale which might occur. And that, on the 6th of September, the preparations were begun for throwing over the steam machinery, which was accomplished by the 12th September. She afterwards experienced the Equinoctial gale, commencing September 17th, and continuing until the 26th, in which the ship, if she had not been relieved of her deck load, would, it is averred, have foundered at sea, or leaked so as to damage all the cargo.

### *Points.*

*First Point.* As to the pretended misrepresentation, no stress appears to have been laid on it in the court below. In fact, the freight contract was made on the 19th July, 1851, while the machinery in question was in the course of con-

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struction, and its weight unknown to the libellant. It was made by Cunningham, Belknap, and Co., and finished between the 1st and 19th August.

*Second Point.* The next question involved is, whether the jettison was owing to the perils excepted in the carrier's engagement, namely: dangers of the sea, fire, and collision. The two latter are to be laid out of view, as having no bearing on the case; and the only question is, whether the jettison was caused by dangers of the sea.

\*1. The contract of the carrier in its nature requires <sup>\*104]</sup> the utmost care and diligence on his part, and also a ship fit and capable of performing the engagement, unless defeated in so doing by *vis major*. Although perils of the sea be the immediate cause, still, they are not within the exception, unless they have been encountered after all the obligation of the carrier has been performed. Thus, if badly stowed, and thereby exposed to sea perils in a storm, or if the ship be unfit for the voyage, the occurrence of sea accident to cargo thus exposed to them, will not discharge the carrier.

As the obligation of the carrier is, by his own contract, he would be liable on the principles of law, notwithstanding all accidents, unless he had expressly excepted them. And the exception is not to be enlarged by implication. See *Spence v. Chodwick*, 10 Adol. & E., N. S., 517, where the law is reviewed.

2. Loading a ship beyond her capacity is a matter at the charge of the carrier. His contract warrants her ability to perform the voyage in safety, so far as that depends on the ship. Secret defects are at his risk, and not at that of the shipper. He is to determine the quantity of cargo she can safely carry. He alone can be presumed to know her capabilities, defects, and weaknesses. It is his instrument for performing his contract, and as he gains by its perfection, he must suffer by its imperfection.

3. Indeed, it seems scarcely reasonable to pretend, that where the subject is exposed to the sea, as a cause of danger, it can be said to suffer from that, when it was not prepared to meet it: and suffers only from the defective, unskillful, careless, or insufficient means adopted to guard against the danger.

4. It must therefore be judged, that overloading, or improperly loading a ship, takes away the exception of the bill of lading, especially if the damage to cargo arises from it.

Now, overloading and improperly loading have reference to the capabilities of the ship, whether old or new, well built or badly built, staunch or weak, in relation to the cargo which is engaged to be carried, and the place where it is to be placed.

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All these are matters within the engagement of the carrier, and are to be carried out by him.

5. And the burden lies on him to excuse himself, by showing that the damage arose without his fault and by the excepted peril. The shipper commits his goods to the carrier's care, he is not present during the voyage, he cannot detect secret faults or neglects, and is in no equality with the carrier, as to proving the cause of the loss. The law throws the burden of making out the whole excuse on the carrier.

\**Third Point.* Has the carrier, in this case, shown the jettison within the exception, as thus expounded? [\*105 Has the ship met the storms and gales to be expected on her voyage, with suitable fitness to meet them, so far as her own carrying qualities and a reasonable loading are involved?

The evidence may be classed into that which relates: 1. To the commencement of the voyage. 2. To the conduct of the ship before jettison. 3. To her conduct afterwards; from all which it will appear that the ship-owner loaded her too heavily. The evidence of the claimant's witnesses alone will be cited.

*Mr. Lord* then examined the evidence.

*Fourth Point.* The libel is properly brought in the name of Charles Minturn, the consignee, to whom the delivery was to be made, and by whom the freight was to be paid. The bill of lading was a sufficient contract and title paper to him.

*Mr. Justice CURTIS* delivered the opinion of the court.

This is an appeal from a decree of the district court of the United States for the northern district of California, sitting in admiralty. The appellee filed his libel in that court, against the ship *Hornet*, for the non-delivery of two steam boilers and chimneys, shipped on board that vessel in the port of New York, and consigned to the libellant.

The appellants intervened, as owners of the ship, and, upon the pleadings and proofs, the district court made a decree in favor of the libellant. The claimants appealed.

The first question to be determined on the appeal is, whether the libellant had a right to sue in his own name. The facts bearing on this question are, that on the nineteenth day of July, 1851, Edward Minturn, at New York, made a contract with the agent of the ship *Hornet*, which was reduced to writing, as follows:

Memorandum of agreement to ship on board the ship *Hornet*, by Edward Minturn, Esq., two boilers, two chimneys or

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steam-chests, smoke-pipes in sheets, and some grate bars, in all about forty tons weight, from this port to San Francisco, California, for the sum of forty-five hundred dollars, with five per cent. primage: the whole to go on deck, except the grate-bars and sheet-iron for smoke-pipe. It is understood that the shipper is to put them on the deck of the vessel at his expense, and the ship is to discharge them as soon as convenient, and they are to be received at Cunningham's wharf, in San Francisco, without other than the ordinary charge per day for discharging. It is further understood that the said boilers are \*106] to be ready to go on board the \*vessel on the ninth day of August, or as soon thereafter as the ship may require them, giving shipper two days' notice thereof.

(Signed)

EDWARD MINTURN.

E. B. SUTTON,

Agent for ship *Hornet*.

It appeared that the boilers and chimneys were manufactured in New York, upon an order given by James Cunningham; that they were intended for the steamer Senator, a boat then in California; that James Cunningham and Edward Minturn were part owners of The Senator, and that they paid the makers for these articles. The bill of lading was as follows:—

210. Shipped, in good order and well-conditioned, by Edward Minturn, on board the ship called The Hornet, whereof Lawrence is master, now lying in the port of New York, and bound for San Francisco, California, to say: two boilers, and two steam-chimneys for ditto, eight pieces sheet-iron work, three pieces pipe, one band, two hundred and four grate-bars, sixteen grate-bar bearers, eight boiler bearers, six man-hole plates, eight boiler doors, one bundle (four) bolts, two boxes; the whole to be discharged as soon as convenient, and to be received at Cunningham's wharf, in San Francisco, without other than the usual or ordinary charge for discharging per day; being marked and numbered as in the margin.

Freight - - - \$4,500 00  
5 per cent. primage 225 00

\$4,725 00

E. B. SUTTON,  
84 Wall street.  
Dispatch line California  
packets.  
of the seas, fire, and collision

Contents unknown.

Goods to be delivered at the vessel's tackles when ready to be delivered. Not accountable for breakage, leakage, or rust; freight payable before delivery, if required; and are to be delivered, in like order and condition, at the port of San Francisco, (the dangers only excepted,) unto Charles

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Minturn, or to his assigns, he or they paying freight for the said boilers, steam-chimneys, and other iron work, forty-five hundred dollars, with five per cent. prime, and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, the 19th day of August, 1851.

(Signed)

WILLIAM W. LAWRENCE.

Upon the proofs, we are of opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading; and, in the absence of evidence to control the effect of that document, the property is presumed to \*be in him. In *Evans v. Marlett*, 1 Ld. Raym., [\*107 271, it is laid down that "if goods, by bill of lading, are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A, to the use of B, B ought to bring the action."

Whether it be strictly correct to affirm that in the case first put, A shall have a right of action against the carrier, though in point of fact he be only an agent for the consignor, has been much controverted. In *Griffith v. Ingledew*, 6 Serg. & R. (Pa.), 429, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was a difference of opinion on the bench, Mr. Justice Gibson dissenting; but the majority of the court held, that by force of the bill of lading the legal title was in the consignee, and he could maintain the action.

Since that decision was made, the question has been much discussed, both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here; the case does not require it. For, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficial interest in the goods, it still remains true, that a presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns. This is admitted in the cases in which it has been held that the consignee had not the right of action or was not liable for the freight. *Coleman v. Lambert*, 5 Mees. & W., 502; *Wright v. Snell*, 5 Barn. & Ald., 350; *Chandler v. Sprague*, 5 Metc. (Mass.), 306.

In *Grove v. Brien et al.*, 8 How., 439, this court said: "The effect of a consignment of goods generally is to vest the prop-

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erty in the consignee;" and though it is also there declared that this effect may be controlled by special clauses in the bill of lading, or by evidence *aliunde*, yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded.

This is in accordance with the rule given in Abbott on Shipping, pages 415, 416.

Such being the presumption arising from the bill of lading, we do not find it to be controlled by any proof in this case. It does appear that Edward Minturn and James Cunningham were part owners of The Senator, for which boat these boilers and chimneys were intended, and that they contracted with the makers of the articles and paid for them, and that Edward Minturn shipped them in New York. But all this leaves open the question, whether the libellant was not the managing owner <sup>\*108]</sup> and ship's husband of The Senator, residing in California, where that boat was employed, attending to its repairs and supplies, for the joint account of himself and the other owners. Indeed, the testimony of Squire, an agent of the libellant, in the absence of all other evidence, tends to prove that such was the fact; for he speaks of himself as acting for the libellant in reference to the management of The Senator, and says that, her boilers being worn out, an order was sent out to obtain new ones, to replace the old. We understand this order to have been given by the libellant, for the boilers now in question.

Considering the burden of proof to have been on the respondents to displace the *prima facie* right of action of the consignee, arising from the bill of lading; that for aught he has shown, and upon the proof, we may conclude that the consignee ordered these articles as managing owner of The Senator; and that if so, he, as consignee and managing owner, might sustain the libel in his own name; this objection to the decree must be overruled.

The next inquiry is, whether the failure to deliver the boilers and chimneys is justified.

The Hornet sailed from New York, on the 23d of August, 1851, having these articles on deck. On the 5th of September the chimneys, and on the 12th of September the boilers, were thrown overboard.

Two questions arise:—

1. Was the jettison necessarily made for the common safety? and, if so,

2. Was the necessity attributable to any, and what, fault on the part of the master or the vessel?

The material facts upon which the first of these questions

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depends, are, that The Hornet was a clipper-ship of about sixteen hundred tons burden, built at New York, in the years 1850 and 1851, of the best materials in use for first-class ships at that port. She had a cargo under deck, and the weight of these boilers and chimneys on deck was somewhat over thirty-one tons. The height of each of the boilers, above the deck at the forward end, when stowed, was about twelve feet. The steam-chimneys were between five and six feet in diameter, and besides these there was a piece of steam-pipe weighing 667 pounds. The ship sailed on the 23d of August, and on entering the gulf stream encountered rather heavy weather and a cross-sea. The performance of the vessel in this sea was found to be bad. On the 26th a gale came on from the south, veering to the northwest, and lasted until the night of the 27th.

Though this gale was not of uncommon severity, it raised a heavy cross-sea. The effect of this sea was to cause the ship \*to roll down to leeward, so as to take in water over her rail; she rose very slowly and then rolled over to <sup>[\*109]</sup> windward, straining and laboring in a manner described by the witnesses as very unusual. She would not mind her helm, but would fall off; she would settle down aft and take in water over her stern, and plunged heavily forward. At sundown on the 27th, the wind lulled and the sea became more smooth. It was found during and immediately after the gale, that the ship was very severely strained, so as to open some wood-ends aft, one half to three quarters of an inch, and her water-way seam half an inch, and that other injuries, of an alarming character had been received. The master then held a consultation with his officers, and drew up the following protest:—

August 29, 1851, latitude  $31^{\circ} 0' N.$ , longitude  $61^{\circ} 5' W.$ .

At sea, on board ship Hornet, of New York, William W. Lawrence, master, bound from New York to San Francisco, California.

We, the undersigned, master, officers, and mariners of the ship Hornet, of New York, do, after mature and serious deliberation, enter this solemn protest: That on the 26th day of August, 1851, the ship Hornet being then in or about the longitude of  $40^{\circ} W.$ , latitude  $37^{\circ} N.$ , experienced a gale of wind from south, veering to N. W.; and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam-chimneys, (the whole supposed to be of the weight of forty tons, or thereabouts,) did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks,

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causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship, and cargo, in imminent peril for their safety. We, now, therefore, do most seriously and solemnly assert, that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces, and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting.

In testimony whereof to the above, we hereby subscribe our respective names.

This protest was signed by all the officers and by such of the crew as could write, and its substantial facts are testified to by the master and officers who were examined in the cause, in such a manner as to satisfy us of their truth.

Upon these facts, we have come to the conclusion that the jettison was necessary for the common safety.

The nature of the case imposes on the master the duty, and clothes him with the power to judge and determine upon the <sup>\*110]</sup> \*facts before him, whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment, and courage; and they are liable, if through his failure to possess or exert these qualities, in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.

If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority.<sup>1</sup>

Applying these principles to the case before us, we find no reason to doubt that this jettison was thus necessary. It is true, that when it was actually made, the sea was smooth, and the ship in no immediate danger. But it satisfactorily appears, that these boilers and chimneys could not be thrown overboard, without the greatest risk, when there was any consid-

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<sup>1</sup> FOLLOWED. *Nemours v. Vance*, 19 How., 166. CITED. *The Star of Hope*, 9 Wall., 231.

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erable sea. To require delay until a storm, would be, in effect, to prohibit the sacrifice. Precaution against dangers, which are certain to occur, is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so.

We find the conduct of the master and crew in making the jettison to have been lawful, and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners.

The libel alleges the loss of the goods to have been "through the mere carelessness, unskillfulness, and misconduct of the said master, his mariners, and servants."

We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libellants have at the hearing much relied on, and what we think is the main question in this part of the case; the sufficiency of the ship to carry this cargo. It is, no doubt, the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owners does not amount to negligence, or want of skill of the master or mariners.

\* There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let the libellant in to prove unseaworthiness of the vessel.<sup>1</sup> [\*111]

But it must be observed that this libellant relies not on general unseaworthiness, but upon the fact that a vessel, staunch and sufficient to carry a cargo, was overloaded by this burden on the deck; and as the quantity of lading and the consequent trim and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly, is negligence, for which the owner may be liable. While, therefore, we have some difficulty in respect to the sufficiency of this allegation, we think it is such as necessarily leads us into the inquiry, whether the loss by jettison was occasioned by negligence of the master in overloading the ship. And as we find it extremely difficult, if not impossible, to distinguish between the obligation of the owners and master, in these particulars, we shall proceed to consider the question whether

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<sup>1</sup> DISTINGUISHED. *McKinlay v. Morrish*, 21 How., 346.

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the case is one of culpable negligence, or is within the exception of perils of the seas contained in the bill of lading.

There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea. In that case the sea-peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea-peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance. *General Mut. Ins. Co. v. Sherwood*, 14 How., 365, and cases there cited.<sup>2</sup>

In this case, did the necessity for the jettison arise from any fault or breach of contract by the master or owners?

Two grounds are assumed by the libellant. The first is, that considering the great weight of these articles, resting upon a small part of the upper deck, sufficient means were not used to support the weight and stiffen the ship, so as to prevent the deck from being strained.

This was a new ship, built of such materials, and so fastened and braced, as to be uncommonly strong. The owners employed a ship-carpenter, who had worked on the vessel when built, to do what he deemed necessary to support this unusual weight on the deck. He describes what was done. The master superintended these alterations. He and the carpenter deemed them sufficient. They were both going to sea in the vessel, the one \*as commander, the other as carpenter, and can hardly be supposed to have omitted any thing which they thought necessary for safety. The owners do not appear to have restricted them, in point of expenditure. We cannot avoid the conclusion that every thing was done which these men thought necessary; and possessing, as they must be presumed to have done, competent skill in their respective occupations, they believed this part of the cargo was securely stowed, and fastened and stayed, to go safely on the voyage. In point of fact, however, after being subjected to the action of the sea in a storm, it was found the deck had settled.

The second ground taken by the libellants is, that the ship was so overloaded, by the great weight of these articles on deck, as to be unseaworthy; and as the jettison was made to relieve the vessel from this condition, the owners are responsible for the loss. In part, at least, the same principles of law

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<sup>2</sup> CITED. *The Portsmouth*, 9 Wall., 684.

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will be found applicable to both these grounds, and therefore we consider them together.

The principal question, and it is one of much importance, is, what is the extent and operation of the implied contract of the owner, respecting the ability of his ship to carry a particular deck load which he receives on board, under a contract that it shall be carried on deck, dangers of the seas excepted?

In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this, he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel.

But, in applying these rules to cargo on deck, some peculiar considerations must be borne in mind.

This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure, which the contract of affreightment shows was contemplated by the parties. Under this bill of lading the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo, like iron, is taken on board, and heavy weather met with, and a jettison made, it would not be a ground of claim against the owner, that the weather encountered would not have been sufficient to justify a jettison if the cargo had been cotton.

And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect \* might be to embarrass the sailing of the [\*113] ship in a gale of wind, and cause her to labor in a heavy sea. The grounds upon which the rights and obligations, as to contribution, of owners of cargo on deck, in case of jettison, have long rested, have an intimate connection with this question. Valin, lib. 3, tit. 8, art. 12, giving the reason of the rule, that goods jettisoned from the deck are not paid for in general average, but contribute if not thrown over, says: "The reason why articles on deck, thrown overboard or damaged, are not contributed for, is, that as they cannot but embarrass the working of the ship, the presumption is, that they have been jettisoned before a full necessity for a jettison of cargo arose, and only because they hindered and confused the manœuvring of the vessel."

This has been still more clearly expressed by Locré, in his Commentary on the Code du Commerce Maratime, lib. 2, tit.

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12, art. 421. He says: "Perhaps the common safety would not have made a jettison necessary if the lading had not been in contravention of rule, if it had not brought the dangers on the vessel, or contributed to enhance them." Similar views have been taken by the most approved writers on the law of insurance, in this country and in England, and they have been applied in many cases. Abbott on Shipping, 481, 490, and notes; 3 Kent's Comm., 240; 2 Phillips on Ins., 71; 2 Arnold on Ins., 890. It was remarked by Lord Denman, in *Milward v. Hibbert*, 3 Ad. & El., n. s., 120, that the reason assigned by Valin, that goods on deck embarrassed the navigation of the ship, is not sufficient to form the basis of a universal rule, excluding goods on deck from the benefit of contribution; because it may be that, in many cases, goods can best and most safely be stowed on deck; and that they may, in some cases, be so stowed as not to be in the way of the crew in their operations. This may be true; but the point here is, not whether there may be cases in which the deck load does not embarrass the navigation or increase the danger, but whether, in case it does so, the shipper who has consented to his goods being placed on deck, under a special contract, and not pursuant to any general custom, which might be evidence of the safety of the practice, must not be taken to have known that such might be its effects.

It was strongly urged, by the libellant's counsel, that the shipper could not be supposed to have, and should not suffer for not possessing a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument, by which he agreed to perform a particular service, was sufficient for that service; and that, as these carriers contracted to convey this deck load to San Francisco, they were \*114] obliged to \*ascertain whether placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

This reasoning would be quite unanswerable, if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea were not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.

There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship-owners. Consolato, par

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Pardessus, c. 186; Ord. de Mer, Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Loeré, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tom. 4, 566, 568.

So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship, in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com., 240; "Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss."

The cases of *Smith et al. v. Wright*, 1 Cai. (N. Y.), 43; *Dodge v. Bartol*, 5 Greenl. (Me.), 286; *Hampton v. The Brig Thaddeus*, 4 Mart. (La.), 582; Story on Bailments, 339, sec. 531; and *Gould v. Oliver*, 4 Bing. N. C., 142, support this statement. In the last mentioned case, Tindal, C. J., says: "Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion."

It must be admitted, that no one of the authorities referred to go so far as to maintain that the ship-owner contracts no obligation whatever to the merchant, respecting the sufficiency of the vessel to carry the deck load received on board. They should not be understood as supporting such a position. The extent to which we understand them to go, and the law which \*we intend to lay down, is this: that if the vessel is [\*115 seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden. It is not for him to say that, in the first storm the vessel encountered, though not of unusual severity, she proved to be unable to carry the deck load, and so was not of sufficient capacity to perform the contract into which the carrier entered.

The carrier does not contract that a deck load shall not

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embarrass the navigation of the vessel in a storm, or that it shall not cause her so to roll and labor in a heavy sea, as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise staunch and seaworthy, to withstand any extraordinary action of the sea when thus laden. If the vessel is in itself staunch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on the deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence, or breach of an implied contract respecting seaworthiness. His right to contribution is not involved in this case.

Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly staunch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, nor until heavy seas were encountered. Her inability to carry these boilers and chimneys arose solely from their particular position on deck.

The libellant, through the shipper in New York, consented to their being placed in this position. He took the risk of their rendering the ship unmanageable in a storm; and he, and not the ship-owners, must bear the loss occasioned by their being placed on the deck, so far as the liability for the loss rests upon any ground of negligence in the place of stowage, or breach of warranty respecting the seaworthiness of the vessel. As to the argument, that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall \*116] prove sufficient. We are of <sup>opinion</sup> that due diligence and skill were used. Besides, we do not find the necessity for the jettison attributable to any defects in these particulars. It may be, that additional supports of the lower deck would have assisted the vessel in bearing the weight, but we see no reason to believe they would have enabled it to carry this unusual burden through a storm; and, therefore, if we found negligence in this particular, we could not declare that the loss was to be attributed to it.

The decree of the district court is to be reversed, and the cause remanded, with directions to dismiss the libel with costs.

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Stewart *v.* The United States.

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*Order.*

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, 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 dismiss the libel with costs.

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**ADAM D. STEWART, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.**

Congress have directed by law that in certain cases the duties of collectors of the revenue should be united with those of naval officer or surveyor of the port, but never with those of inspector of the customs. Therefore, where a person held the two offices of collector of the revenue and inspector of the customs, and charged a salary for each office separately, it was irregular.

In May, 1822, congress passed an act, (3 Stat. at L., 693,) directing that "no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity." This act was intended to provide compensation to the collector, &c., for extraordinary services incident to their respective offices, and to them only; but did not include the union of the two offices of collector and inspector of the customs. A different mode and rate of compensation for inspectors was provided by law.

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.

There was an agreed statement of facts in the record, which is transcribed in the opinion of the court, and therefore it is unnecessary to recite it here.

Stewart was sued in 1835, and voluntarily appeared. From \*that time to 1850, the cause was regularly continued upon the docket. Under the instructions of the court, [\*117] the jury found a verdict of the plaintiffs, for \$638.81, with interest from the 13th of January, 1833.

Stewart brought the case up to this court by writ of error.

It was argued by *Mr. Walter S. Cox*, for the plaintiff in

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error, and by *Mr. Cushing*, (attorney-general,) for the United States.

*Mr. Cox*, for the plaintiff in error, made the following points:—

1. That the act of congress of May 7, 1822, does not apply to cases in which a collector holds at the same time the office of collector and any other distinct and independent office recognized by law, by distinct and independent appointment, but only to cases in which duties appertaining to other offices are, in occasional cases, annexed by law to the office of collector, or, by usage of the treasury department, he is called on to perform duties not strictly appertaining to his office.

If the literal meaning of a statute would extend to cases which the court are satisfied the legislature never contemplated, or which would lead to absurd consequences, the operation of the statute must be restrained to narrower limits than the words import. 2 Inst., 386; Bac. Abr. Stat. I., 5; 1 Bl. Com., 88; *Brewer's Lessee v. Blougher*, 14 Pet., 78; *United States v. Fisher*, 2 Cranch, 358; 1 Cond. R., 421.

In this case, the literal import of the language used in section 18th of the act of May, 1822, as understood by the accounting officers of the treasury, would embrace cases never contemplated by congress, and to which the application of the law would be absurd. It would require that every officer in the service of the United States should be satisfied with \$400 per annum, as the pay of his office, if he at the same time hold the office of collector, no matter how insignificant the emoluments of the latter, or how responsible the duties of the former office.

On the other hand, there is a subject-matter to which the language applies without any absurd or inconvenient consequences. The act entitled "An act to regulate the collection of duties," &c., of July 31, 1789, ch. 23, §§ 7, 8, (1 Stat. at L., 29,) devolves the duties of one or more of the three offices of collector, naval officer, and surveyor, upon one of them, in certain contingencies, and temporarily.

Again, by the practice of the treasury department, collectors and naval officers have acted as agents to disburse money for light-houses, receiving commissions for the same, and have \*118] <sup>\*issued certificates to accompany</sup> distilled spirits, wines, and teas, receiving fees for the same. In these cases, they do not act in any distinct office created by law, but perform mere agency service, these duties being annexed to their offices by the department. The law applies to such

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cases, and was so construed by the department. See Dr. Mayo's work on the Treasury Department, 69, 75.

The construction given by the United States to this law would have the effect of making a few words at the end of the law, exclusively intended for revenue officers, operate as a repeal, by implication, of all the laws fixing the compensation of officers of the United States, in cases where any other office is united in the same person with the office of collector, &c. Repeals by implication, whether general or partial, are not favored by the law; and there must be positive repugnancy between the old and the new law to make a repeal by implication. Dwarris on Statutes, 674; *Wood v. United States*, 16 Pet., 342.

In this case, the construction maintained by the plaintiff in error would reconcile the act of May 7, 1822, with the others, in all cases.

If fairly interpreted, the letter of the law in this case seems more appropriate for the class of cases to which we would limit it, than to convey the extended meaning claimed for it on the part of the United States. Had it been meant to apply to distinct offices, the language would have been as in the 14th section of the act: "No person who shall be a collector, &c., and shall at the same time hold any other office, &c., shall ever receive more than \$400 annually, &c., in his said office." Instead of which, the language is, "no collector," &c., that is, *qua* collector, &c., "shall ever receive, &c., for any services which he," that is, as collector, may perform, &c. If a collector has at the same time another distinct office, as that of inspector, it is not the collector who performs services in the latter office, but the inspector; it is not the collector who receives pay for these services, but the inspector. The prohibition, therefore, as to a collector's receipts, would seem not to apply, except to cases where the collector, as such, receives fees for incidental services performed by him as collector, but which do not strictly belong to his office.

This view is confirmed by the fact that, wherever the laws are clearly meant to apply to the case of union of distinct offices in the same person, the language used is entirely different.

There are two sets of phrases in the laws. The 15th section of the act of May 7, 1822, which limits the amount to be \* received by a deputy collector "for any services he may perform for the United States in any office or capacity," is supposed to indicate the same policy as the 18th section, and to apply only to services rendered by him as

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deputy collector, and not to cases where he is invested at the same time with another distinct office.

On the other hand, the 14th section employs a different language, to apply to distinct offices. So the civil and diplomatic appropriation act, of June 27, 1834, § 2, in speaking of other officers than collectors, naval officers, and surveyors, says, "nor shall the union of any two or more of these offices in the same person entitle him to more than," &c.; which is different from saying, "nor shall any such officer receive more than, &c., for any services he may render to the United States, in any other office or capacity." The language of the act of 1834 is followed in the other appropriation acts.

The difference between the two forms of language is shown, and the above views generally are sustained, in the case of *United States v. Morse*, 3 Story, 87. It may be added, that the meaning of this act is at least doubtful; and if so, it should be construed favorably to the plaintiff in error. *Ib.*

2. If our construction of the act of May 7, 1822, be correct, the plaintiff in error was entitled to the compensation claimed by him in his accounts for the 4th quarter of the year 1832.

By the act of March 2, 1799, ch. 22, § 21, (1 Stat. at L., 627,) collectors are to appoint inspectors, with the approbation of the principal officer of the treasury department.

By the act of March 3, 1815, ch. 94, § 3, (3 Stat. at L., 231,) continued in force by acts of April 27, 1817, and March 3, 1817, inspectors are declared to be officers of the customs, and required to take an oath of office.

The act to regulate the collection of duties, &c., of July 31, 1789, (1 Laws U. S., 45,) limits the compensation of inspectors to one dollar and twenty-five cents for every day of actual employment.

The act of March 2, 1799, § 2, (1 Stat. at L., 707,) increases the maximum to two dollars per day; and the act of April 26, 1816, (3 Stat. at L., 306,) adds fifty per centum to this maximum, making it three dollars per day.

Under these acts, the secretary of the treasury, in 1820, established the compensation of the plaintiff in error at three dollars per day. He continued in the office until January 15, 1833. Under the fixation of his salary by the proper officer, after the service was rendered, he acquired a vested right to the compensation established by the secretary, unless the act of May 7, 1822, § 18, reduced his compensation; and that, too, <sup>\*120]</sup> even if <sup>\*120]</sup> the secretary erred, either in the appointment to office or the fixation of salary. *United States v. McCall, Gilpin*, 563; *United States v. McDaniel*, 7 Pet., 15.

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3. No act of the secretary of the treasury, or of the plaintiff in error himself, affected his right to the compensation claimed.

The allowance made by the secretary of the treasury, at the end of the year 1824, was a decision upon the construction of the law. It could not be otherwise; for, if the plaintiff in error had acquired a vested right to the three dollars per day, it could not be taken away from him by the secretary, and the secretary is not to be presumed to have intended to exceed his powers. The act of the secretary related entirely to the past, and must therefore be construed to be a mere decision, which, if erroneous, cannot conclude the judgment of a court. *United States v. Dickson*, 15 Pet., 141.

Nor does the omission of the plaintiff in error to charge more than \$400 per annum, from the year 1824, preclude him from afterwards claiming the difference between that and the maximum compensation. If the law entitled him to it, nothing but a new contract or a release could deprive him of it, of which there is no evidence, and for which there would be no consideration. His omission to charge, construed as an admission of law, would not affect him. Construed as an admission of fact, it could not be treated as an estoppel or admission in law which would authorize a court, from the mere fact of omission to charge, to draw the legal conclusion that he is not entitled to charge now; but would, at most, be mere evidence for a jury, explainable on other grounds than intention to admit anything, such as constraint, or misapprehension of fact, &c. In point of fact, the whole conduct of the plaintiff in error would seem easily explainable. Situated at a point remote from Washington, he finds his allowance of three dollars per day, as inspector, struck out of his accounts, without, as far as appears, any explanation. Supposing that the secretary, in the exercise of his legal discretion, has revoked his last fixation of the pay of the office of inspector, he falls back upon the original allowance of \$40 per month, and charges that in his next accounts. This also is struck out without explanation. He is then left in the dark, and charges nothing for his services as inspector, for four quarters, but evidently meaning to claim what was due him in that capacity at some more convenient season. If this is to operate against him at all, it would bind him to render the services for nothing. At the end of the year 1824, he finds in the corrected account sent him from the department, a credit of \$1,000, for two years and a half of service, at the rate of \$400 per annum, without further explanation. He may have supposed \*from this that, as far back as May, 1822, the secretary had estab- [121]

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lished a new rate of compensation. Though the law of May 7, 1822, was sent to him, he may not have observed the provisions supposed to affect him, or have understood it as the accounting officers did; or if he did so understand it, he may have intended to reserve all questions until the final settlement of his accounts, knowing that a persistence in making charges already disallowed would exhibit a balance against him in his accounts, and subject him to dismissal from office.

At all events, the questions what the plaintiff in error meant, and what the secretary of the treasury meant to do, are questions for a jury. The refusal of his prayer, by the court below, precluded him from asking further instructions, and took his case from the jury. If, however, his construction of the law of May 7, 1822, be correct, he is entitled, if any questions of fact remain open, to have the case remanded to the court below for a new trial.

4. If the construction of the plaintiff in error, of the act of May 7, 1822, be correct, then, even were he concluded by any fact in the case from claiming the whole amount demanded by him, he would, at least, be entitled to the compensation claimed by him to the end of the year 1824, and the decision of the court below must be reversed, for this would entitle him to a credit of \$1,737<sup>50</sup><sub>100</sub>, which exceeds the balance claimed by the United States, and the judgment would have to be for the defendant.

*Mr. Cushing, for the United States.*

The statement of facts in the bill of exceptions by Stewart, is, that said Stewart was commissioned by the President, in March, 1818, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof; which office he held by successive commissions, until 15th January, 1833.

On 1st April, 1819, said Stewart was appointed by the secretary of the treasury, inspector of the customs for that port, which latter office he also continued to hold under this appointment, until the 15th January, 1833, and was allowed the per diem compensation, as inspector of the customs, up to 1st July, 1822, at the maximum of three dollars per day.

This "is the only case found of record of a collector holding, at the same time, the two offices of collector and of inspector of the customs."

The act of 7th May, 1822, (3 Stat. at L. by L. and B., 696, ch. 107, § 18,) which took effect 1st July, 1822, enacts: "No collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector.

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surveyor, or naval officer, and the fines and forfeitures allowed \*by law for any services he may perform for the United States in any other office or capacity. [\*122

The said Stewart has been allowed, in the adjustment of his accounts, the said sum of \$400 annually, since the 30th June, 1822, over and above his compensation as collector, and the fines and forfeitures allowed by law. But, notwithstanding the said act of 1822, Mr. Stewart claimed to be allowed the further compensation, at the rate of three dollars per day from the 1st July, 1822, during his continuance in office, until the 14th January, 1833, which the accounting officers of the treasury have uniformly rejected, as often as presented, since the said 1st July, 1822.

This rejected claim of three dollars per day as inspector of the customs, while he was also collector of the district, is the subject of the bill of exceptions, (pp. 8, 9,) and of this writ of error, by Mr. Stewart.

That the offices of collector of a district and of inspector of the customs are distinct and separate, is admitted; but that does not make an exception from the inhibition of the act of 1822, "that no collector \* \* \* shall ever receive more than \$400 annually, exclusive, &c., \* \* for any services he may perform for the United States in any other office or capacity."

The 21st section of the act of the 2d March, 1799, to regulate the collection of duties on imports and tonnage, (1 Stat. at Large, by L. and B., 642, chap. 22,) shows that the several offices of collector, naval officer, surveyor, and inspector, are distinct. Their several and respective duties are defined; and the same section requires, "at the ports to which a collector only is assigned, such collector shall solely execute all the duties in which the co-operation of the naval officer is requisite as aforesaid; and shall also, as far as may be, perform all the duties prescribed to the surveyors at ports where such officers are established."

The act of 1822 will not permit the collector, who executes solely the additional duties of naval officer and surveyor, to receive more than \$400 per year for the services which he so performs in the capacity of naval officer and surveyor, exclusive of his compensation as collector and the fines and forfeitures, although the several offices are distinct.

There is no reason why the collector, who performs also the business of inspector of the customs at the port, should receive the compensation of three dollars per day as inspector, seeing that it is the collector who employs the inspector; that is, the same officer acting in one capacity employs himself in another; for, by the 21st section of the act of 1799, before cited, it is en-

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acted that the collector shall, with the approbation of the principal \*officer of the treasury department, employ proper [123] persons as weighers, gaugers, measurers, and inspectors, at the several ports in his district.

It is true, the appointment, as a constitutional act, lies with the secretary of the treasury, the language of the statute being quite inexact, and running as if the secretary merely possessed a power of approving or disapproving. In fact, he, and he alone, appoints. *Murbury v. Madison*, 1 Cranch, 137, 155; *United States v. Batchelder*, 2 Gall., 15; *United States v. Wood*, 2 Id., 361; Mr. Legaré's Opinion, Opinions Att.-Gen., 1577, 1579.

But the inconvenience remains, of having the collector, as collector, employ himself as inspector. The collector himself is to pay to the inspector the sum allowed by law, "for every day he shall be actually employed in aid of the customs, a sum not exceeding two dollars; and for every other person that the collector may find it necessary and expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum while actually so employed, not exceeding two dollars for every day so employed; to be paid by the collector, out of the revenue, and charged to the United States." Act to establish the compensations of officers employed in the collection of imports and tonnage, 1 Stat. at L., by L. and B., 707, ch. 23, § 2.

The compensation to inspectors was increased by a subsequent act, so that the maximum of allowance is three dollars per day.

By the act to regulate the collection of duties on imports and tonnage, approved March 2, 1799 (1 Stat. at L., by L. and B., 642, ch. 22, § 21), "The surveyor shall superintend and direct all inspectors, weighers, measurers, and gaugers within his port; and shall, once every week, report to the collector the name or names of such inspectors, weighers, gaugers, or measurers, as may be absent from, or neglect to do, their duty. \* \* And at the ports to which a collector only is assigned, such collector shall solely execute all the duties in which the co-operation of the naval officer is required, as aforesaid, and shall also, as far as may be, perform all the duties prescribed to the surveyors, at the ports where such officers are established."

The mode of appointing the inspector, the mode of checking his absence or neglect, and the mode of payment, render this office improper to be held by the same person who is, at the same time, collector of the port. The two offices are

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incompatible ; and not to be held by one and the same person, at one and the same time.

This may account for the facts, that "the defendant's (now plaintiff in error) is the only case found on record, of a collector \*holding, at the same time, the office of inspector [\*124 of the customs ;" and that he was so appointed but once, on the 15th April, 1819, but was never afterwards reappointed as inspector of customs, although his appointment and commission as collector were renewed every four years, from the 12th March, 1818, until January, 1833.

The act of 1799 (1 Stat. at Large, 638, § 17) enacted that the district of Michilimackinac should consist of a port of entry (and, of course, of delivery also) for the district, and of three other ports of delivery only ; a collector to be appointed to reside at the port of entry, and surveyors to reside at the ports of delivery. So that the collector of the district had to perform the duties also assigned by law to a naval officer and surveyor, at ports where such officers were established.

The appointment of Mr. Stewart to be inspector of the customs, while he was collector of the district, was an unauthorized act, a mistake.

If the collector could lawfully nominate himself to be inspector also, and the head of the department could lawfully approve and confirm, then the collector of the port could be, also, inspector, weigher, gauger, measurer, and marker, and, according to the instruction moved, (pp. 8, 9,) might receive his compensation as collector, three dollars per day as inspector, and, also, the fees of weigher, gauger, measurer, and marker.

But the act of 1822 prohibits a collector from receiving more than \$400 annually, exclusive of his compensation as collector, and the fines and forfeitures allowed by law, "for any services he may perform for the United States in any other office or capacity."

The adjustment by the accounting officers of the treasury, in refusing to allow the collector more than \$400 annually, for any extra services, and in refusing to allow him three dollars per day as an inspector, or at the rate of forty dollars per month as inspector, was correct ; and the instruction moved on the part of the defendant, on the trial in the circuit court, was very properly refused by the court ; wherefore, it is alleged, on the part of the United States, that there is no error apparent in the record, to the prejudice of plaintiff in error, and the attorney-general prays that the judgment be affirmed, with damages and costs.

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Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us upon a writ of error to a judgment of the circuit court of the United States for Washington county, in the District of Columbia, in favor of the defendants in error, against the plaintiff, as collector of the revenue for the district of Michilimackinac. The jury, upon the trial <sup>\*125]</sup> in the circuit <sup>\*court</sup> rendered a verdict for the defendants in error, for the sum of \$638.81, with interest thereon from the 13th day of January, 1833; and for this amount the court, at its October term, 1852, gave judgment.

The questions of law passed upon and reserved by a bill of exceptions in the court below, and which this court are now called on to review, arise upon the following agreed statement of facts, namely:—

That on or about the 12th March, 1818, the defendant was appointed by the President of the United States, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof; which offices he continued to hold, by successive reappointments, and to receive the emoluments of, till the 15th day of January, 1833.

"That on or about the 1st April, 1819, the defendant was appointed, by the secretary of the treasury, inspector of the customs for the port of Michilimackinac; which office he continued to hold, under his original appointment, until January 15, 1833. The defendant's is the only case found on record of a collector holding at the same time the office of inspector of the customs. His allowance, in this capacity, was fixed by the secretary at forty dollars a month, and so continued until the second quarter of the year 1820, when it was increased by the secretary to three dollars per day, the maximum allowance permitted by law to a regular inspector of the customs. The defendant continued to be paid, as inspector of the customs, at this rate, till the 1st July, 1822, when the act of congress of the 7th May, 1822, went into effect, entitled, 'An act further to establish the compensation of officers of the customs, and to alter certain collection districts, and for other purposes.' 3 Stat. at L., 693. The 18th section of this act is as follows: 'No collector, surveyor, or naval officer shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States, in any other office or capacity.'"

"A copy of the foregoing law was duly transmitted by the treasury department to the defendant. In his accounts for the 3d and 4th quarters of the year 1822, the defendant charged compensation at the rate of \$3 a day, as inspector of

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customs, which charge was disallowed at the treasury; and in his accounts for the first three quarters of the year 1823, he charged compensation at the rate of \$40 a month, as inspector of the customs, which latter charge was also disallowed at the treasury. The defendant rendered several other accounts, containing no charge as inspector of the customs, till the end of the year 1824. In a treasury settlement, made at that date, the defendant is \*credited with \$1,000, 'the amount of [\*126 an allowance made by the secretary of the treasury, to the collector, for services as inspector, from 1st July, 1822, to 31st of December, 1824, at \$400 per annum.' In his account rendered for the 1st quarter of the year 1825, the defendant charged himself with the balance found due from him on the next preceding settlement, in which he had been allowed but \$400 per annum, as inspector of the customs; and in his several successive settlements, from that time to 31st December, 1831, continued to charge only \$400 per annum, as inspector of the customs."

"By the act of 2d March, 1831, 'to regulate the foreign and coasting trade on the northern, northwestern, and northeastern frontiers of the United States, and for other purposes,' 4 Stat. at L., 487, the compensation of every collector, on the northern and northeastern and northwestern lakes and rivers, 'was fixed at an amount equal to the entire compensation received by such officer during the past year.' The defendant was credited, in 1831, and subsequently, with the compensation allowed to him in 1830, being \$835 $\frac{85}{100}$ , which included \$400, allowed him as inspector of the customs. In 1832, he charged his compensation under this law; but in the 4th quarter of that year he claimed the difference between \$400 and \$1,095 a year, from the 30th of June, 1822, to the 31st of December, 1832, being \$7297 $\frac{50}{100}$ , for ten years and six months. This claim was, before the commencement of this suit, presented to the accounting officers of the treasury for their examination, and was disallowed. On the foregoing evidence the counsel for the defendant prayed the court to instruct the jury as follows: That the 18th section of the act of congress, passed on the 7th of May, 1822, further to establish the compensation of the officers of the customs, &c., was not intended to operate, and ought not to be construed as operating, so as to limit the salary or compensation of any district officer, which may by distinct and independent appointment be vested in the person of one holding at the same time the separate office of collector, surveyor, or naval officer; and that such limitation applies only to cases where the collector, surveyor, or naval officer is called to perform services in any other office

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or capacity, in virtue of, and as an incident to, his office; not to any case where either of those officers was appointed to and executed the duties of another separate office, whilst collector, surveyor or naval officer."

"If, therefore, the defendant was appointed to, and held and exercised, the office of inspector of customs, at the same time as that of collector of Michilimackinac, such office of inspector was not within the purview of the 18th section of the said act.

"Which instruction the court refused to give."

\*127] In the above statement of the claim of the plaintiff in error there is an apparent confusion in terms, which it may be proper here to mention, although its elucidation is not deemed essential to the decision of this case. Thus, it is said that the plaintiff in error was, in March, 1818, commissioned by the President, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof, which offices he held by successive commissions until the 15th of January, 1833. In the next place it is stated, that the plaintiff in error was, on the 1st of April, 1819, appointed by the secretary of the treasury inspector of the customs for that port, which latter office he also continued to hold under this appointment until the 15th of January, 1833.

If by these two statements a distinction is designed between the office of inspector of the revenue and that of inspector of the customs, this court can perceive no warrant for any such distinction, but must regard the terms used as properly applicable to those inspectors or agents who, by the 21st section of the revenue law of March 2, 1799, are authorized, together with weighers, gaugers, and measurers, to be employed by the collectors, with the approbation of the officer at the head of the treasury department.

Again, regarding as we do the place of inspector, alleged to have been conferred by each of the appointments spoken of by the plaintiff, to be the same in character and objects as provided in the statutes, there would be a manifest irregularity in an attempt to refer its origin and commencement to different sources of creation, and thus to cover the same duties and obligations, and for the same period of time, under the guise of distinct and separate commissions.

The foundation of the claim preferred by the plaintiff in error, rests on the position that the offices of collector and surveyor are separate and different in their character, and in the powers and duties allotted to each; and that under his separate commission, and in the discharge of his separate and

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appropriate duties, each officer is entitled to his separate and appropriate compensation.

Let us examine this proposition; nay, let it, as a general proposition, be conceded; the inquiry will still remain, how far the concession will sustain the claim of the plaintiff in the present instance.

It is undeniably true, that the act of Congress of March 2, 1799, Stat. at L., 642, creates and enumerates separately the different offices of collector, naval officer, surveyor of the port, inspector, weigher, gauger, and measurer, and defines and prescribes the functions and duties of each respectively. And it is clear that in ports or districts in which all these offices \*are called into actual existence, the functions and [\*128] duties assigned to any one of them are not appropriated in terms, nor by necessary implication, to any of the others; on the contrary, those duties and functions, as distributed by the law, appear to be different, and in some sense incompatible with their union in the same individual, being in some instances in their nature supervisory, and being designed to insure the fulfilment of a portion of those duties by others.

But whilst this is the case, there cannot be denied to congress the power, under circumstances satisfactory to themselves, to blend in the same person or office functions or duties which, under another aspect of facts, they have thought it proper to divide and distribute. This is clearly a question of legislative discretion, bearing upon views of public necessity or policy; and accordingly we find, that, in view of such policy or necessity, congress have, by the very same act of March 2, 1799, materially modified, and to a certain extent contravened, the previous organization prescribed for the collection of the revenue, adapting such modification to the facts or necessities, as they should really exist.

Notwithstanding, however, the power must be conceded to congress to combine in the same officer duties and powers in their nature seemingly incompatible, that power can be conceded to the legislative authority alone and expressly declared, and cannot be implied upon any sound principle of legal interpretation or of public policy. Congress have, it is true, ordained, in certain conjunctures, the union of the duties of collector, naval officer, and surveyor of the port, but under no circumstances have they transferred to either of the officers just enumerated the duties of inspector of the customs. This last-named agent, it is said by the statute, may, with the approbation of the officer at the head of the treasury department, be employed by the collector. Under this provision of the statute the question arises, whether the collector *qua col-*

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*lector*, can, under any circumstances, apart from express legislative direction, become inspector of the customs, or under the authority to employ such an agent can contract with himself to employ himself as such an agent? We are very sure that such a proceeding on the part of the collector is not authorized by the language of the statute, and we think it not warranted by any sound principle of policy, which on the contrary would inculcate a course tending rather to prevent than to invite to fraud and collusion. The collector, therefore, is not the inspector *virtute officii*, nor warranted in employing himself as inspector, nor in assuming the functions, nor in claiming the compensation, allowable to the latter officer.

In the case under consideration, the plaintiff in error has, \*129] by \*the accounting officers of the government, been allowed for compensation, as inspector, the sum of \$40 per month, until some time in the year 1820; and from the period last mentioned he was, for similar services, allowed the compensation of \$3 per diem, until the first of July, 1822, from which last period the compensation of the collector was limited by the government, for all extra services, to the sum of \$400 per annum, under the 18th section of the act of May 7, 1822, which declares: "That no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity.

The several allowances made by the government to the plaintiff in error, as inspector of the customs, and received by him in that character, and acquiesced in by both parties, may be regarded as no longer presenting subjects of controversy; but the facts of such allowances, and the acceptance of them, cannot be permitted to control the construction of a public law, nor to influence a claim now asserted under the provisions of that law; much less can they be regarded as affecting the power of congress to regulate, prospectively, the duties and emoluments of agents created by its authority. When, therefore, the plaintiff in error advances a claim in the character of inspector, he must establish a legal and competent appointment to the office of inspector, and an appropriation to him of the duties and emoluments incident thereto. For these he has appealed to the revenue law of March 2, 1799; but neither in that, nor in any other revenue law, do we perceive, as appertaining to him as collector, the authority and functions of inspector, nor any right to compensation for the services of the latter officer.

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With regard to the allowance of \$400 per annum, although accorded to him in settlement as inspector of the customs, it is plain from the language of the statute of May 7, 1822, § 18, that this was intended to provide compensation to the collector, naval officer, and surveyor of the port, for extraordinary services incident to their respective offices, and to them only; and did not embrace the subordinate position of inspector, as to which a different mode and rate of compensation, that is, one graduated by the month or by the day, had been provided. To entitle himself to this latter compensation, the claimant must show himself regularly and exactly in the situation to which the law has allotted it. Upon a consideration of the case, we regard the question properly before us to be this: whether the collector, as such, and in virtue of his office, can claim compensation for services not required by the language of the statute by which \*his duties are prescribed, nor [ \*130 inherently nor regularly appropriate to his office; services which the law has, upon obvious principles of policy, imposed on another and a different agent, subordinate to the collector, the performance of which services it is made the duty of the collector to supervise and enforce. We are of the opinion that the collector could have no such claim, and therefore decide that the judgment of 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 Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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**WILLIAM B. SHIELDS AND OTHERS, APPELLANTS, v. ROBERT R. BARROW.**

A vender sold an estate in Louisiana for a large sum of money, and received payment, from time to time, for nearly one half of the amount. Afterwards, he agreed to take back the property, upon the payment of an additional sum of money, which was secured to him by the promissory notes of six individuals, four of whom lived in Louisiana, and two in Mississippi.<sup>1</sup>

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<sup>1</sup> CITED. *Ober v. Gallagher*, 3 Otto, *man v. Niblack*, 12 Id., 563; s. c., 1 204; *Kendig v. Dean*, 7 Id., 425; *Good- Morr. Tr.*, 455.

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Becoming dissatisfied with this arrangement, the vendor filed a bill in the circuit court of the United States for Louisiana, against the two citizens of Mississippi, to set aside the agreement as having been improperly procured, and to restore him to his rights under the original sale.

All the six persons with whom the second arrangement was made, were indorsers upon the notes originally given by the vendee for the purchase-money, under the sale.

The four parties to the compromise, who resided in Louisiana, not being suable in the circuit court of that state, and their presence, as defendants, being necessary, the court could not rescind the contract as to two, and allow it to stand as to the other four. Consequently, it could not pass a decree, as prayed.

Neither the act of congress of 1839, (5 Stat. at L., 321, § 1,) nor the 47th rule for the equity practice of the circuit courts, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree.<sup>1</sup>

The cases upon this point, the statute, and the rule examined.

The bill should have been dismissed.<sup>2</sup>

The two Mississippi defendants answered.

The bill, insisted that the compromise was made in good faith, and one of them filed a cross-bill against the vendor to compel him to carry it out.

This cross-bill was also defective, as to parties, the other sureties and the vendee having an interest in the subject, so that, without their presence, no decree could be made.

The vendor then filed a petition, by way of amended bill, stating his willingness to carry out the compromise upon certain conditions, which he prayed the court to enforce.

This was irregular. The rules about amendments, examined.

\*131] \*The court then passed an order, that unless the two Mississippi defendants should, before a day named, file a cross-bill, and make all the Louisiana parties defendants, the vendor might proceed upon his prayer to rescind the compromise, as far as the two Mississippi parties were concerned.

This was entirely irregular. Parties cannot be forced into court in this way; nor can new parties be brought into a cause by a cross-bill.<sup>3</sup>

The mode considered of making new parties, when necessary.

The original and cross-bills must be ordered to be dismissed.<sup>4</sup>

THIS was an appeal from the circuit court of the United States for the eastern district of Louisiana.

The history of the case is given in the opinion of the court.

It was argued by *Mr. Benjamin*, for the appellants, and by *Mr. Janin*, for the appellee.

<sup>1</sup> FOLLOWED. *Ribon v. Railroad Co.*, 16 Wall., 450. CITED. *Coiron v. Millaudon*, 19 How., 115; *Horn v. Lockhart*, 17 Wall., 579; *Railroad Co. v. Orr*, 18 Id., 475.

<sup>2</sup> See *Fourth Nat. Bank v. Carrollton R. R.*, 11 Wall., 631.

<sup>3</sup> FOLLOWED. *Ayres v. Carver*, post \*502. RELIED ON. *Florida v. Georgia*, post \*508.

<sup>4</sup> For further decisions citing this case, see *Christmas v. Russell*, 14 Wall., 80; *Williams v. Jackson*, 17 Otto, 484; *Brandon Manuf. Co. v.*

*Prime*, 3 Bann. & A., 194; *Nat. Bank of Hannibal v. Smith*, 6 Fed. Rep., 216; *United States v. Central Pacific R. R.*, 11 Id., 458; s. c., 8 Sawy., 92; *The Ping-on v. Blethen*, Id., 612; *Taylor v. Holmes*, 14 Id., 515; *Judson v. The Carrier Co.*, 15 Id., 545; *Hay v. Railroad Co.*, 4 Hughes, 368; *Life Ins. Co. v. Grant*, 3 MacArth., 47; *Santa Clara Mining Assoc. v. Quicksilver Mining Co.*, 8 Sawy., 334; *Bell v. Donohoe*, Id., 437; *Lehman v. Meyer*, 67 Ala., 403; *Confort v. McTeer*, 7 La. (Tenn.), 662.

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*Mr. Benjamin* traced the case throughout all its complications, and then made the following points:—

1. The first question which will arrest the attention of the court, on the face of this record, is that of jurisdiction.

The complainant entered into a contract on the 9th of November, 1842, which in its opening clause is stated to be *tri-partite*. The parties are, 1st, the complainant, a citizen of Louisiana. 2d, Thomas R. Shields, a citizen of Louisiana. 3d, Six individuals, indorsers for Shields, four of whom are citizens of Louisiana, and two of Mississippi.

This contract was made to annul a sale of a plantation in Louisiana, made by the first party to the second.

In a few weeks after the date of the contract, the complainant abandoning the common domicile of himself, his purchaser, and two thirds of the indorsers, declining the aid of the state tribunals of his own state, appeals to the federal court in New Orleans, to set aside his contract, then changes his demand into a suit to enforce it, and ends by obtaining a decree against his fellow-citizens of Louisiana, for a large sum of money.

On what ground is the jurisdiction of the circuit court of the United States, to determine a controversy between citizens of Louisiana, to be maintained?

The only authority cited by complainant's counsel, is Story Eq. Pl., § 392, and authorities there cited.

This authority is not at all in point. It only refers to a question of pleading in equity, relating to cross-bills, but does not touch the question of jurisdiction. The cross-bill may unquestionably be filed to determine questions arising between the defendants, so as to enable the court to determine the whole matter in controversy. But in the present case, no relief was prayed by the cross-bill against co-defendants, but on the contrary a decree was prayed for against the original complainants; and in the decree itself, no notice whatever is taken of the cross-bill; but the court confines itself to deciding the claims of the \*original complainant against the [\*132 original defendants, and the defendants in the cross-bill.

The device used in this case is perfectly transparent, and if successful, converts the federal courts into courts of unlimited jurisdiction, regardless of the citizenship of parties.

It requires no argument to show that the original bill could not possibly be sustained for want of proper parties. A bill to set aside an agreement for cancelling the sale of property, could not be entertained without the presence of the two parties to the sale, and agreement to cancel. But the court was without jurisdiction between these two parties, who were

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both citizens of Louisiana, and the bill should have been dismissed on its face. Instead of this, the defendants, citizens of Mississippi, having a common interest with these citizens of Louisiana, were forced, in spite of their protest, and under duress of the process of the court, to file a bill against their co-defendants, not for their own benefit, but in order to help the complainant to get a judgment against themselves, and against the co-defendants.

This court has repeatedly had occasion to determine that, where necessary parties to bills could not be brought into the federal courts, by reason of the constitutional limitation on their jurisdiction, the suit must be dismissed. The jurisprudence on this point has never varied, and the decisions are numerous. Where parties are merely formal, the court will dispense with their presence, but will never assume jurisdiction over them. *Russell v. Clark's Executors*, 7 Cranch, 69; *Greenleaf v. Queen*, 1 Pet., 148; *Wormley v. Wormley*, 8 Wheat., 421; *Carneal v. Banks*, 10 Id., 181; *Harding v. Handy*, 11 Id., 126; *Mallon v. Hinde*, 12 Id., 193; *Vattier v. Hinde*, 7 Pet., 250; *Dunn v. Clark*, 8 Id., 3.

The act of congress of 28th February, 1839, so far from authorizing such proceedings as were had in this suit, expressly contemplates the case where parties in interest cannot properly be brought before the court; and provides, that "the judgment or decree shall not conclude or prejudice such parties."

The plea to the jurisdiction ought, therefore, to have been sustained, as filed by those defendants who were citizens of Louisiana.

2. The court, being without jurisdiction as to Thomas R. Shields, who purchased the land, cannot decree, as against him, either for the rescission or specific performance of the contract of November 9, 1842. The bill, therefore, must be dismissed, because he is an indispensable party to any cause brought for either of those purposes. This proposition is too clear to require argument or authority.

3. There was error in permitting the complainant to bring <sup>\*133]</sup> an entirely new and different suit against the defendant, under pretext of amending his bill. The original bill was, to set aside a contract. The amendment prayed a specific performance of the same contract. This was not an amendment, nor a supplemental bill, but a new suit.

The allegation in the original bill, brought on the 19th December, 1842, set forth that complainant feared that defendants would refuse to execute their contract of 9th November, 1842, and prayed to have it rescinded. The defendants, by

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their answer, in March, 1843, denied any intention to violate the contract, and expressed their intention of executing it. This judicial confession of their liability to perform its terms estopped them from any contestation of its validity, and should have sufficed to satisfy complainant; who, however, seemed determined to have a litigation. Although willing to abandon his claim for a rescission of the contract, instead of discontinuing his suit, he engrafted in it an inconsistent demand, by what he calls an amendment.

This is contrary to all the rules of pleading in chancery. Story Eq. Pl., 332, *et seq.*; Mitf. Ch. Pl., 385.

So where the original bill prayed that a bond might be delivered up to be cancelled, an amendment not allowed praying an account of what was due on the bond. *Cresy v. Beavan*, 13 Sim., 354.

4. The amended bill should have been dismissed, as disclosing no ground for equitable relief. The demurrer should have been sustained.

This amended bill sets forth no ground for the interposition of a court of equity; alleges no refusal, by defendants, to perform their contract; and prays for the payment of a sum of money due on promissory notes. This payment could have been obtained by a suit at law. In relation to the claim for a formal conveyance of the property, contained in the amended bill, it is clear that the defendants, Victoire Shields and William Bisland, could not be condemned to make a conveyance of title standing in the name of Thomas R. Shields. The amended bill was, therefore, nothing but a naked demand, in law, for the payment of a debt.

5. The only demands set up in the record against Elis, Guion, and Winder, are contained in the cross-bill, filed at page 54 of record. These defendants filed a plea to the jurisdiction of the court; and set up, in defense, the absence of any averment in the cross-bill showing any cause of action against them. A reference to the cross-bill will show that, in point of fact, no complaint was made against them; and in no part of the record is there any demand, by Barrow, for a decree against \*them. There is a judgment against [\*134] these parties, that they pay a large sum of money to Barrow; although the pleadings disclose no prayer for such a decree, in either the original or cross-bill.

It would be an idle task to pursue any further the examination of proceedings, so completely at war with all the rules of law, and all the principles which guide courts of justice in the discharge of their duties. The investigation is felt to be profitless; for the want of jurisdiction in the court below,

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over parties in whose absence no decree could be pronounced, must, of necessity, cause the reversal of the decree and dismissal of the suit.

*Mr. Janin* replied to these points, as follows :

The counsel for the appellants makes the following points of law :

1. That the original bill ought to have been dismissed, because Thomas R. Shields, the former proprietor of the plantation which was retroceded to the complainant, is a citizen of Louisiana, and could, therefore, not be made a party to that bill.

It is contended that, in the absence of Thomas R. Shields, the rescission of the retrocession to Barrow could not be decreed.

This is precisely the difficulty which is removed by the act of congress of February 28, 1839, the 1st section of which is in the following words :—

“That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, 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 the trial and adjudication 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 parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.”

All the authorities quoted by the appellants are anterior to that act.

If there was any thing in this point, it is too late to take advantage of it now. The defendants filed an answer to the bill, then a cross-bill, and afterwards only a demurrer, which does not even name the parties on whose behalf it was filed.

\*2. The court had no jurisdiction over those of the <sup>\*135]</sup> defendants who are citizens of Louisiana.

This point concedes, at last, the jurisdiction of the court over three of the defendants; namely, William Bisland, Victoire Shields, and William B. Shields, who are citizens of Mississippi.

But the court had, undoubtedly, jurisdiction to decide the cross-bill, filed by William Bisland and Victoire Shields, citizens of Mississippi, against Thomas R. Shields, George S.

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Guion, Van P. Winder, and Richard G. Ellis, citizens of Louisiana. These cross-bills demanded a specific performance of the contract of November 9, 1842; and that, and nothing else, was decreed by the court.

Can it be asserted that a court of equity, having that contract and all the parties to it once before it, would decree its specific performance so far only as it imposes obligations upon the complainant, and not in all its parts? A party to an indivisible contract must fulfil his contract, if he claim specific performance; 16 Pet., 169. The original and the cross-bill are one cause; 3 Dan. Ch. Pr., 1743.

Nor did the circuit court err, in making the order of April 24, 1844, directing the filing of a cross-bill by William Bisland and Mrs. Shields. In the *Mechanics' Bank of Alexandria v. Louisa and Maria Seton*, 1 Pet. 303, this court held, that "the general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree among all the parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions, and is more or less subject to the discretion of the court, and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. *Field v. Schieffelin*, 7 Johns. (N. Y.), Ch. 250; Story, Eq. Pl. § 393. .

3. It is finally said that the complainant should not have been permitted to amend his bill, by joining the plaintiff in his cross-bill, in his demand for the specific performance of the contract of November 9, 1842.

A cross-bill is a defense. How can it be pretended that a plaintiff should not be permitted to admit, in his answer to a cross-bill, that he consents to the claim of the defendant, and to pray that the specific performance, insisted on by the defendant, may be ordered by the court, with such directions as the true nature of the contract requires? This is what Barrow said, in his answer to the cross-bill. He stated the same thing in his \*petition. That petition may have been, and probably was, superfluous; but it was not that petition, [\*136 but Bisland's answer and cross-bill, which changed the issue, by averring his readiness to comply with the contract of November 9, 1842. Nay, if Barrow had been entirely silent, the specific performance of that contract would have been ordered under the cross-bill, in the absence of any evidence justifying its res-cission.

These proceedings were not only comfortable to practice,

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but imperiously dictated by circumstances, and the only ones which could be had. We shall prove this, and conclude this brief with some remarks showing the true position of the parties.

When the contract of November 9, 1842, was made, the complainant was the holder of the notes of Thomas R. Shields, to the amount of \$119,956.35, the whole of which were indorsed by William Bisland, the most responsible of the defendants. Of these notes \$64,000 were then overdue, and Barrow had brought suits on them against Bisland. By the act of November 9, 1842, these notes were to be given up by Barrow, and the two suits against Bisland discontinued. Thomas R. Shields was to return the property, and to be released from all further liability; and Barrow was to receive, besides, \$32,000, of which Bisland was to contribute \$10,000. Bisland was, moreover, Thomas R. Shields' judgment creditor, in the sum of \$47,374.35. Bisland, who might, perhaps, have been able to pay the \$10,000 without inconvenience, might have been ruined by a judgment of \$119,958.25, with ten per cent. interest, during the extraordinary depreciation of property and prostration of credit then existing in Louisiana. He was, therefore, greatly interested in securing the specific performance of the act of November 9, 1842, which afforded greater relief to him than to any other party.

And when, by his answer and cross-bill, Bisland avowed his willingness to abide by that act, Barrow took him by his word, and in compliance with Bisland's prayer, and without waiting for an order of court, at once dismissed the two suits against him, and deposited in court the notes of Shields, amounting to \$119,958.38. It must, also, be observed, that Bisland had obtained an injunction, restraining Barrow from the prosecution of those suits, and from parting with those notes. On the other hand, the notes amounting to \$32,000, at one and two years, which Barrow was to receive under the contract of November 9, 1842, were to remain deposited in the hands of Leufroy Barras, the parish judge and *ex officio* notary public, before whom that act was passed, until R. R. Barrow should have acquired a title to the property, given up the notes, and released the parties to the act. This title Thomas R. Shields \*137] \*perseveringly and perversely refused to execute, and the aid of the court had to be invoked for it. During the pendency of the suit, Barrow could do no better than to deposit the original notes in court, and discontinue the suits against Bisland. The defendants had flattered themselves that the notes for \$32,000 would remain in Terrebonne until after maturity, and without being presented for payment at

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the Bank of Louisiana, at New Orleans, where they were made payable; a danger which was averted only by the court ordering their removal to the clerk's office, by whose agency they were presented and protested. This was done in opposition to the unreasonable objections of the defendants. An application of the complainant, for the delivery of these notes, was refused by the court, at the instance of the defendants. If he had had possession of these notes, he could have instituted suits on them at law, against the parties thereto. From this he was prevented, by those parties themselves. He was hindered from suing on the original notes, by the injunction of Bisland. With what good grace, with what appearance of equity, do those parties now complain that he did not sue them at law, when they themselves industriously kept him tied up in chancery?

And what, after all, do the appellants contend for, in their elaborate brief? The judgment condemns them, in unequal portions, to pay \$32,000, with interest. Of this principal sum, \$26,500 are due by the three citizens of Mississippi, who are avowedly properly made parties to the suit: namely, by Mrs. Victoire Shields and William B. Shields, \$9,333.33 $\frac{1}{3}$ ; and by William Bisland, for himself, \$10,000, and as indorser for R. G. Ellis, \$6,966.66 $\frac{2}{3}$ . And here we find William Bisland making common cause with the other defendants, when it is clearly his interest that they should be made to abide by the contract, which relieves him from his indorsement of \$119,918.38, now more than doubled by interest.

Mr. Justice CURTIS delivered the opinion of the court.

To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the circuit court of the United States for the eastern district of Louisiana, on the 19th of December, 1842, by Robert R. Barrow, a citizen of the state of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the state of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisiana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum \*of \$227,000, payable by instalments, the last of which would fall due in March, 1844. [\*138]

That negotiable paper was given for the consideration money, and from time to time \$107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase-money, and

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proceedings instituted by attachment against Thomas R. Shields and William Bisland, one of his indorsers, for other parts of the purchase-money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant, of the first part, Thomas R. Shields, the purchaser, of the second part, and the six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants, were two. By this new contract the complainant was to receive back the property sold, retain the \$107,000 already paid, and the six indorsers executed their notes, payable to the complainant, amounting to thirty-two thousand dollars, in the manner and proportions following, as stated in the bill:—

“The said William Bisland pays ten thousand dollars, in two equal instalments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis \$6,966.66, on two notes indorsed by William Bisland. The said George S. Guion, \$2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, \$2,750, on two notes indorsed by George S. Guion. The said William B. Shields, \$4,766.66, on two notes indorsed by Mrs. Victoire Shields; and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank, in New Orleans.”

The complainant was to release the purchaser, Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer that the act of compromise may be declared to have been improperly procured, and may be annulled and set aside, \*and that the defendants may be decreed to pay such of the notes, bearing their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature

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could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the act of congress of February 28, 1839, (5 Stat. at L., 321, § 1,) nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree.

In *Russell v. Clarke's Executors*, 7 Cranch, 98, this court said: "The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray and Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties."

The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.<sup>1</sup>

\*A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the

<sup>1</sup> FOLLOWED. *Barney v. Baltimore City*, 6 Wall., 284; *Kendig v. Dean*, 7 Otto, 425, 426.

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contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now it will be perceived, that in *Russell v. Clarke's Executors*, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in *Russell v. Clarke's Executors*, concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see *Wormley v. Wormley*, 8 Wheat., 451; *Carneal v. Banks*, 10 Id., 188; *Vattier v. Hinde*, 7 Pet., 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see *Cameron v. McRoberts*, 3 Wheat., 591; *Osborn v. The Bank of the United States*, 9 Id., 738; *Harding v. Handy*, 11 Id., 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see *Cameron v. McRoberts*, 2 Id., 571; *Mallow v. Hinde*, 12 Id., 197.

In *Cameron v. McRoberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in *Mallow v. Hinde*, 12 Wheat., 196, 198.

Such was the state of the laws on this subject when the act of congress of February 28, 1839, (5 Stat. at L., 321,) was passed, and the 47th rule, for the equity practice of the circuit court of the United States, was made by this court.

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The first section of that statute enacts: That when, in any \*suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, [\*141 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 the trial and adjudication 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 non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established by the cases of *Cameron v. McRoberts*, 3 Wheat., 591; *Osborn v. The Bank of the United States*, 9 Id., 738; and *Harding v. Handy*, 11 Id., 132. For this court had already there decided, that the non-joinder of a party, who could not be served with process, would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in *Mallow v. Hinde*, 12 Wheat., 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan v. Walker*, 14 How., 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of

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an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without \*affecting [142] those rights. To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat., 167: "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another state,—ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the act of congress and of the 47th rule of this court, because they seem to have been misunderstood, and misapplied in this case: it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed.

But, unfortunately, this course was not taken. The two defendants, Mrs. Shields and Bisland, answered, denied the allegations of fraud, and insisted that, so far as they were concerned, the compromise was made in good faith, and they were ready to perform their parts of it, according to their respective stipulations.

On the same day that Bisland filed his answer, he filed also a cross-bill against Barrow, praying for a specific performance of the contract of compromise.

But this bill also was fatally defective, as respects parties. Thomas R. Shields, and his other five indorsers, had such a direct and immediate interest in the contract of compromise, and that interest was so entire and indivisible, that, without their presence, no decree on the subject could be made. In *Morgan's Heirs v. Morgan*, 2 Wheat., 290, a bill was brought by the heirs of a deceased vendor, to compel the specific performance of a contract to purchase lands. It was objected that the deceased had a child who was not made a party. Chief Justice Marshall said: "It is unquestionable that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant, and a specific performance ought not to be decreed until they shall be all before the court."

The next step in the pleadings was, that Barrow filed what he calls a petition, in which he recites summarily what had previously been done in the cause, and declares himself willing to have the agreement of compromise specifically per-

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formed, and prays for leave to amend his bill, by making Thomas R. Shields a party, alleging he had become a citizen of Mississippi, and by inserting the following words:—

“ But if this honorable court should be of opinion, that the \*said agreement of November 9, 1842, is valid, and [\*143] should not be set aside; and if the said defendant shall acknowledge its validity and binding force, then the orator prays that its specific performance may be decreed according to its true purport and tenor, as herein above explained; and he offers to do and perform on his part all the acts which, by said agreement, he is bound to perform; and he prays that said defendants may be decreed to pay to him the value of the mule, negro, clothing, and flatboats, which were taken away from the said plantation as aforesaid; that they be decreed to relieve the said Liza, and the other above-mentioned property from the judicial mortgages mentioned in this bill, and from the tacit mortgage of the minor children of the said Thomas R. Shields; that the said Thomas R. Shields, when made a party to this suit, both in his individual capacity and as tutor of his aforesaid minor children, may be ordered to execute a proper and legal reconveyance to your orator, of the above-described property, or that any other order may be made which, to this honorable court, may appear meet and fit, for the purpose of again vesting in the orator a good and valid title to the aforesaid property; that the notes described in said act of November 9, 1842, and amounting to \$32,000, may be surrendered to your orator; that the defendants may be decreed to pay to your orator the amount of such of the said last-mentioned notes as may have been drawn by them, and also such of said notes as may be indorsed by them, and which may have been protested, and of the protest of which they may have been duly notified before the final decree of this honorable court, the whole with-interest from the day of protest; and that said defendants may furthermore be decreed to pay the current expenses of the said plantation during the year anterior to said November 9, 1842, and to refund to your orator any amount and expenses which he may have been, or may yet be, compelled to pay on account of privileged claims incumbering said plantation on the day of said act.”

The court allowed the above amendment. So that the bill thereafter presented not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases; the one being that the court would declare the contract rescinded, for imposition and other causes, and the other, that the court would declare it so free from all exception as to be entitled to its aid by a decree for specific performance.

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Whether this amendment be considered as leaving the bill in this condition, or as amounting to an abandonment of the original bill for a rescission of the contract, and the substitution of a new bill for a specific performance, it was equally objectionable.

\*144] \*A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated must be the foundation for precisely the same relief; and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here. Story. Eq. Pl., 212, 213; Welf. Eq. Pl., 88; *Edwards v. Edwards*, Jac., 335.

Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice-chancellor, in *Verplanck v. The Mercantile Ins. Co.* 1 Edw. (N. Y.), 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See also the authorities there referred to, and Story Eq. Pl., 884.

We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this; though doubtless much liberality should be shown in acting within it, taking care always to protect the rights of the opposite party. See *Mavor v. Dry*, 2 Sim. & S., 113.

To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew.

To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject.

After this change had been made in the original bill, and Barrow had answered the cross-bill of Bisland, the next step taken in the cause, respecting the pleadings and parties, was the entry of the following order:—

“The motion of the complainant for the delivery of the notes of George S. Guion and Van P. Winder, which have been, by order of the court, delivered into the court, to abide its further

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order, came on to be heard; and having been fully argued, and it appearing to the court that all the parties to the second contract set up in the complainant's bill and in the cross-bill of the defendant, Bisland, are not before the court; and it also appearing to the court that the said defendants, Shields and Bisland, are citizens of the State of Mississippi, and that all the \*other parties interested in the execution of the said second contract, are citizens of the State of Louisiana, [\*145 it is therefore ordered, that unless the said Shields and Bisland do, on or before the first Monday in August next, file their cross-bill, setting up and praying a specific execution of said contract, and make all the parties to the second contract, set up in the complainant's bill and residing in Louisiana, defendants, that the complainant, Barrow, shall be at liberty to proceed upon his bill of complaint for a specific execution of the original contract between the parties, and for the rescission of the said second contract against such of the parties residing in the State of Mississippi as may fail to comply with this order."

The validity of this order cannot be maintained, and nothing done in consequence of it can be allowed any effect in this court.

It is apparent that, if it were in the power of a circuit court of the United States to make and enforce orders like this, both the article of the constitution respecting the judicial power, and the act of congress conferring jurisdiction on the circuit courts, would be practically disregarded in a most important particular. For in all suits in equity it would only be necessary that a citizen of one state should be found on one side, and a citizen of another state on the other, to enable the court to force into the cause all other persons, either citizens or aliens. No such power exists; and it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. "A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill." Story Eq. Pl., § 389; 3 Dan. Ch. Pr., 1742.<sup>1</sup>

New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispen-

<sup>1</sup> CITED. *The Dove*, 1 Otto, 385.

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sable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary.

When the defendants, Mrs. Shields and Bisland, had complied with this order of the court, and filed their cross-bill, as it was called, against the other indorsers and Thomas R. Shields, and they had come in, as they did, what was their relation to the cause? They surely were not plaintiffs in it. If they were defendants the court had not jurisdiction, for \*146] they, as well as \*the complainant, were citizens of Louisiana. In truth, they were not parties to the original bill; they were merely defendants to the cross-bill. They had no right to answer the original bill, or make defense against it, and of course no decree could be made against them upon that bill.

We do not find it necessary to pursue further an examination in detail, of the complicated maze of pleas, demurrers, answers, amendments, and interlocutory orders, which followed the filing of this, so-called, cross-bill. It is enough to say that the defendants to it were never lawfully before the court; that the court never obtained jurisdiction over those of the parties who were citizens of the state of Louisiana, and amongst them was Thomas R. Shields, who, though made a party to the original bill by amendment, as a citizen of Mississippi, pleaded that he was a citizen of Louisiana, and was thereupon stricken out of the original bill, and was only a defendant to the cross-bill; that it never had lawfully before it such parties as were indispensable to a decree for the specific performance of the contract of compromise, or for the rescission thereof; and lastly, that when it proceeded finally to make a decree condemning certain of the defendants, who were indorsers for Thomas R. Shields, to pay the notes given on the compromise, it gave relief, for which there was a plain, adequate, and complete remedy at law, and which was wholly aside from the prayer of the bill for a specific execution of the contract of compromise, which was fully executed in this particular when the notes were given and deposited in the hands of the notary.

This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the circuit court, ordering the cause to be remanded, and the original and cross-bills dismissed.

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*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the 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 that court to dismiss the original and cross-bills in this cause.

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\*ZEBEDEE RING, DAVID A. BOKEE, ROBERT S. HONE, [\*147 AND JOHN P. HONE, EXECUTORS OF PHILIP HONE, DECEASED, AND CORNELL S. FRANKLIN, COMPLAINANTS, v. HUGH MAXWELL.

The tariff act of 1842, (5 Stat. at L., 548,) provided that if the appraised value of merchandise should exceed, by ten per centum or more, the invoice value, an additional duty should be imposed of fifty per centum of the duty imposed on the same, where fairly invoiced.

The act of 1846, (9 Stat. at L., 42,) reduced this additional duty to twenty per centum.

Although this additional duty may have been considered as a penalty, and as such, a moiety given to the officers of the custom-house, under the act of 1842, and the same disposition of it would have been made under the act of 1846, if there had been no other legislation, yet the act of February, 1846, (9 Stat. at L., 3,) declares that it shall not be considered a penalty for the purpose of being distributed.

Therefore, the additional duty of twenty per centum, levied by the collector, under the 8th section of the act of July 30, 1846, is not to be considered as a penalty, one moiety whereof is to be distributed amongst the officers of the custom-house.

THIS case came up from the circuit court of the United States for the southern district of New York, upon a certificate of division of opinion between the judges thereof.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Ring*, for the complainants, and by *Mr. Cushing*, (attorney-general,) for the defendant.

There were five questions certified from the circuit court, and argued here. As the arguments covered the whole ground, and the court decided only one of the points, the reporter has concluded to omit the arguments of counsel altogether.

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Mr. Justice CURTIS delivered the opinion of the court.

This case comes before us, upon a certificate of division of opinion of the judges of the circuit court of the United States for the southern district of New York. The certificate shows that a suit in equity is pending in that court, wherein persons who were the naval officer and surveyor of the port of New York, are complainants, and Hugh Maxwell, who was the collector of that port, is respondent, and that the scope of the bill is to recover one moiety of a large sum of money levied and collected as additional duties, under the 8th section of the tariff act, of July 30, 1846, (9 Stat. at L., 43,) during the time while the complainants held the offices above mentioned. Upon the hearing of this cause, the judges were opposed in opinion upon the following questions:—

“Whether, upon a true construction of the revenue laws of the United States, the additional duties of 20 per centum, which have been levied and collected by and paid to the defendant, as collector of the port of New York, at the port <sup>\*148]</sup> of New York, as <sup>\*</sup>stated in his answer, under and by virtue of the 8th section of the act entitled ‘An act for reducing the duties on imports, and for other purposes,’ passed July 30, in the year 1846, were to be treated as penalties, and one moiety thereof divided between and paid in equal proportions to and among the collector, naval officer, and surveyor of the port of New York, holding said offices at the time of the levying, collection, and payment thereof, in the said port of New York, as claimed by the plaintiffs, in their bill in this cause.”

The 8th section of the act of July 30, 1846, after requiring the collector to cause the dutiable value of the imports therein referred to, to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws, goes on to enact, “and if the appraised value thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum, ad valorem, on such appraised value.” The question is, whether the sums levied, collected, and paid under this clause, were by law distributable as penalties, one moiety to the treasury of the United States, and the other moiety among the collector, naval officer, and surveyor.

To render any sum of money collected for the government, thus distributable, it is not doubted that some act of congress, directing that distribution, must be found; and the complainant’s counsel has sought for such a law, by arguing that these additional duties must be treated as penalties, levied for the

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offense of undervaluation, against the directions and in contravention of the requirements of the revenue laws; and that if they are penalties, they are required to be distributed by different collection laws to which he has referred, and which he urges have been made applicable by congress to the sums of money now in question. We do not find it necessary to determine whether these additional duties might have been deemed penalties, so as to come under the terms of either of the collection laws which have directed the distribution of penalties among certain officers of the customs; nor do we deem it important to examine in detail, the provisions of those collection laws, and the manner in which they have been, from time to time, rendered applicable, in part or in whole, to the different acts levying duties and penalties.

Because, we are all of opinion, that whatever may be the nature of the sums levied, as additional duties, under the 8th section of the tariff act of 1846, they are not distributable as penalties.

To exhibit the reasons on which this opinion is founded, it is necessary to refer first to the tariff act of August 30, 1842. The \*26th section of that act, provided that the laws [\*149 existing on the 1st day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this act, &c., and for the recovery, collection, distribution, and remission of all fines, penalties, and forfeitures, and for the allowance of the drawbacks by this act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, provision, clause, matter, and thing in the said laws contained, had been inserted in and re-enacted by this act.

The 16th and 17th sections of the same act, prescribe the manner in which merchandise, subject to ad valorem rates of duty, shall be appraised, and its dutiable value ascertained; and then the 17th section enacts: "That in all cases where the actual value to be appraised, estimated, and ascertained, as hereinbefore stated, of any goods, wares, and merchandise, imported into the United States, and subject to any ad valorem duty, or whereon the duty is regulated by or directed to be imposed or levied on the value of the square yard, or other parcel, or quantity thereof, shall exceed, by ten per centum or more, the invoice value, then in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares, and merchandise, fifty per centum of the duty imposed on the same where fairly invoiced."

These being provisions of the tariff act of 1842, the complainants' argument is, that the additional duties levied under its 17th section, were made distributable by its 26th section;

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that the 8th section of the act of 1846 only changed the amount of the penalty in the cases it reached; that, whereas, by the 17th section of the act of 1842, if the appraisement should exceed the invoice value ten per centum, fifty per centum of the duty was the penalty, by the act of 1846, twenty per centum of the appraised value was to be the penalty; that this was the only change made; although the 26th section of the act of 1842, which made penalties distributable under the then existing laws, applied, in terms, only to the penalties levied by that act, yet those laws of distribution are applicable to this penalty under the act of 1846, which must be considered as substituted in place of the penalty levied by the act of 1842, and to be governed by the same provisions of law as were applicable to the additional duty, by way of penalty, under that act of 1842.

There is great force in this argument. The tariff act of 1846 is an act fixing new rates of duty on imports. It does not contain any provisions for the collection of those duties, nor for the collection or distribution of any penalties. It does not, in terms, adopt the existing laws on those subjects, nor declare that they shall be deemed applicable to the duties and \*150] penalties which it \*levies; yet it is obvious that it must have been intended that those existing laws should be thus applied; and this can only be effected, by considering the duties and penalties levied by the act of 1846, as substitutes for, and to be governed by the same rules as, the corresponding duties and penalties levied by the act of 1842, which did, in terms, adopt and apply the existing laws for the recovery, collection, and distribution of duties and penalties.

We accede, therefore, to the positions that the additional duty levied by the act of 1846, is only a substitute for that levied under the act of 1842, and that whatever rule was in force when the act of 1846 was passed, concerning the distribution of the additional duty levied by the 17th section of the act of 1842, is also in force, and is to be applied to the additional duty under the 8th section of the act of 1846, which is here in question. So that the only remaining inquiry is, what was that rule?

We think this question is answered by the 3d section of the act of February 11, 1846, (9 Stat. at L., 3,) "that no portion of the additional duties provided for by the 17th section of the act of August 30, 1842, entitled, &c., shall be deemed a fine, penalty, or forfeiture, for the purpose of being distributed to any officer of the customs; but the whole amount thereof, when received, shall be paid directly into the treasury."

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This enacts a rule concerning the distribution of the additional duties under the act of 1842; and as the additional duties under the act of 1846 are substitutes for, and to be governed by the same rules as to distribution, as those levied under the former law, it necessarily follows that they are not distributable.

It has been argued that this 3d section of the act of February 11, 1846, is expressly limited to the additional duties levied under the 17th section of the act of 1842; and therefore cannot govern the distribution of those levied under the act of 1846. But so the 26th section of the act of 1842, which adopts former laws, applies them only to the duties and penalties levied under that act; and this is the only authority for applying any laws to the distribution of the penal duties now in question. The complainant is obliged to argue that, though limited in terms to that act, it applies to rates of penal duty afterwards substituted by the act of 1846, in place of those prescribed by the act of 1842. We have declared the argument sound; but it must be allowed its full and just effect. The implication is not that the laws for the collection and distribution of penalties, as they had existed at some prior period, or as they had been applicable to other penalties, were silently adopted by the act of 1846; but that the laws for the collection and distribution of additional duties by way of penalty, as those laws existed when the act \*of 1846 was passed, must be deemed applicable to the [\*151 new additional duty by way of penalty prescribed by that act; and when the act of 1846 was passed, the previous general law for the distribution of penalties had been modified, and the additional duty for which that in question is substituted, had been declared not distributable. The consequence is that though the act of 1846 may be considered as providing for both duties and penalties, subject, as to their collection and distribution, to existing laws, yet as there was no law in force by which additional duties, levied for under-valuation, were made distributable, there can be no adoption of any existing law on that particular subject, and no distribution can take place.

Perhaps this may be illustrated by supposing that the substance of the 3d section of the act of February 11, 1846, had been incorporated into the 26th section of the act of 1842, by way of proviso. So that at the same time when the act of 1842 adopted all existing laws concerning the distribution of penalties, it had declared that the additional duties to be levied under the 17th section, should not be distributable as penalties, but should be paid into the treasury. Certainly, it could

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not then have been argued that the act of 1846 had merely changed the rate of additional duty, and had silently adopted the existing laws concerning its distribution, and still that it was distributable. Yet the effect of this subsequent enactment, of February 11, 1846, when made, upon the act of 1842, is the same as if it had been incorporated therein. It is *in eadem materia*, and both are to be construed as one law, the last controlling and modifying the first, as if it made a part of it.

The fallacy of the argument, on the part of the complainants, consists in going back to former laws concerning the distribution of other penalties, and considering them to be applicable to this penalty, when the existing law, applicable in terms to a penalty *ejusdem generis*, and for which this penalty is a substitute, declares that it is not distributable.

Our opinion is, that the first question certified by the circuit court, must be answered in the negative.

There are other questions certified, but as the one above decided necessarily disposes of the case, we do not deem it needful to consider and respond to them.

*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 points or questions on which the judges of the said circuit court were divided in <sup>\*152]</sup> \*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 that the first question certified by the circuit court in this case must be answered in the negative, to wit: That upon a true construction of the revenue laws of the United States, the additional duties of 20 per centum, which have been levied and collected by and paid to the defendant, as collector of the port of New York, at the port of New York, as stated in his answer, under and by virtue of the 8th section of the act entitled "an act for reducing the duties on imports, and for other purposes," passed July 30, in the year 1846, were not to be treated as penalties, and one moiety thereof divided between and paid in equal proportions to and among the collector, naval officer, and surveyor of the port of New York, holding said officers at the time of the levying, collection, and payment thereof, in the said port of New York, as claimed by the plaintiffs in their bill in this cause.

And this court is further of opinion that, as the decision of

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the first question in the negative necessarily disposes of the case, it is unnecessary to consider and respond to the other questions certified; whereupon it is now here ordered and adjudged by this court, that it be so certified to the said circuit court.

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THE PROPELLER MONTICELLO, JOHN WILSON, MASTER AND CLAIMANT, APPELLANT, *v.* GILBERT MOLLISON.

In a case of collision upon Lake Huron, between a propeller and a schooner, the evidence shows that the propeller was in fault.

The fact that the libellants had received satisfaction from the insurers, for the vessel destroyed, furnished no good ground of defense for the respondent.<sup>1</sup>

But the insurer may, at all times, intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages.<sup>2</sup>

THIS was an appeal from the circuit court of the United States for the northern district of New York.

It was a case of collision, in September, 1850, upon Lake Huron, between a propeller called Monticello, and a schooner called The Northwestern, by which the schooner and her cargo were entirely lost.

In April, 1851, Mollison, the owner of the schooner, libelled the propeller, then lying in the port of Buffalo. Wilson, the master and claimant of the propeller, answered the libel, and much testimony was taken on both sides. In May, 1852, the \*district judge decreed that the libellant should receive [\*153 the sum of \$6,000, as the value of the schooner, and the further sum of \$150, as the value of the salt which constituted the cargo. The case being carried, by appeal, to the circuit court, the decree was affirmed in September, 1853. The master of the propeller appealed to this court.

It was argued by *Mr. Gillet*, for the appellant, and by *Mr. Grant*, for the appellee.

Almost all the arguments of counsel were founded upon their different versions of the evidence; and as the substance

<sup>1</sup> CITED. *The Commander-in-Chief*, 1 Wall., 53. 230; *The Frank G. Fowler*, 8 Id., 364; *The Grand Republic*, 10 Id., 400;

<sup>2</sup> CITED. *Garrison v. Memphis Ins. Co.*, 19 How., 317; *The Potomac*, 15 Otto, 634; *Liberty No. 4*, 7 Fed. Rep.,

*Amazon Ins. Co. v. The Iron Mountain*, 1 Flipp., 617, 618.

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of this is given in the opinion of the court, the reporter has concluded to omit the views taken of it by the respective counsel.

Mr. Justice GRIER delivered the opinion of the court.

The appellee in this case filed his libel in the district court for the northern district of New York, against the steam-propeller Monticello, in a cause of collision.

The libel sets forth that the libellant is owner of the schooner Northwestern; that on the 15th of September, 1850, the schooner, with a cargo of salt, was on her voyage from the port of Oswego, in New York, to the port of Chicago, in Illinois; that about half-past eight o'clock in the evening, being about ten or twelve miles from Presque Isle, on Lake Huron, and about six miles from land, sailing with a fair breeze, on the course of west-northwest, (the wind being south-southwest,) the sparks from the chimney of the propeller were seen some six miles off. In order to give a "wide-berth" to the approaching vessel, the schooner ported her helm and ran her course a point more to the north. That when from four to six miles apart, a bright light was placed in a conspicuous position on the schooner, and the vessel held steadily to her course, so that the approaching propeller might not mistake the course of the schooner. That the propeller exhibited no light, except that occasionally thrown out by the sparks from her chimney. That some time after, the master of the schooner, by close observation, discovered that the propeller was directly forward of the beam of the schooner, close upon her, and steering directly for her. He then hailed the steam-boat, and ordered his helm aport, but too late to avoid the collision, which caused the schooner to sink immediately.

The answer admits that the lights of the schooner were seen when five miles off, and states that the steamboat was on a course of east-southeast, and continued on that course for a short time after seeing the light of the schooner; but that, as the schooner appeared "far in shore," in order to give her lake room, <sup>\*154]</sup> the propeller bore away into the lake about three quarters of a point; and that the collision was occasioned by the fault of the schooner, in not keeping her course.

The answer also alleges, as a defense, that the schooner and cargo had been insured and abandoned to the insurers, who accepted the abandonment, and had paid the insurance to the libellant, prior to the filing of the libel.

1. On the first point, as to the party to whom the fault of

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this collision is to be imputed, we entirely concur with the judgment of the district and circuit courts. The testimony of libellant's witnesses is consistent, and, connected with the admissions of the answer and of respondent's witnesses, is conclusive to show that the fault was in the steamboat. The master of the steamboat was not on board on that occasion; and the testimony of the mate, who had command, and by whose obliquity of vision, or want of judgment, the steamboat was so dexterously brought into collision with the schooner, attempts to excuse his conduct by a statement of facts disproved by all the other witnesses, and demonstrably incorrect. He admits that he saw the bright light of the schooner five miles off. He asserts that the schooner's light appeared on the starboard bow of the steamer; this is clearly a mistake in his statement of facts, or, if true, was occasioned by the steamer turning out of her course.

The theory of mere negligence, or inattention, will hardly account for this collision. Defendant's witnesses admit that they at one time mistook the bright light of the schooner for the Presque Isle light-house; and it is evident that, laboring under this delusion, they must have steered directly for the schooner's light, not discovering their mistake till it was too late to remedy it.<sup>1</sup> The night, though dark, had some star-light, by which the land, some six miles off, showed itself above the horizon. With a channel and room to pass as wide as the lake, with the bright light of the schooner full in view for more than twenty minutes before the collision, it cannot be accounted for, except by the hypothesis of the active co-operation of the officers of the steamboat, caused by a delusion, under which they continued to labor in consequence of a reckless inattention to their duty.

It is contended, on behalf of respondent, that the fault of the collision is to be attributed to the schooner, because she did not keep on her course and leave the steamboat to pass as best she could, according to the rules laid down by this court in the case of *St. John v. Paine*, 10 How., 557. The answer to this argument is obvious. When the master of the schooner first observed that he was sailing on a line with the steamboat, and ordered his helm to be ported, so as to avoid being on the

<sup>1</sup> The act of congress of April 20th, 1864, article 5, requires sailing ships, "under way or being towed, to carry the same lights as steamships under way, with the exception of the white mast-head lights which they shall

never carry." This exception was inserted in the law, because of many collisions arising from mistaking the mast-head light for a light on shore. *The Hypodame*, 6 Wall., 225.

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track of the approaching vessel, they were seven or eight miles \*155] or more apart, \*not in the narrow channel, but in the wide lake. There was no immediate danger of a collision. The order was one of extreme caution; it did not tend to produce the collision, for when the light of the schooner was first seen, five miles off, the schooner was sailing steadily on her course of northwest by north, making an angle of one point with the course of the steamer, and continued on that course till she was run down and sunk.

The rules laid down by this court for avoiding collision, should be strictly adhered to, so that conflicting orders may not produce the collision instead of avoiding it. But in the present case, when the schooner changed her course, the vessels were in no danger of collision, being many miles apart in an open sea. They had not approached to that point of danger which brings the rules of the admiralty into exercise, and makes their observance necessary, in order to avoid a collision. When the steamer first discovered the light of the schooner, she was sailing steadily on the course adopted, and continued to do so, till the collision was produced by the perverse dexterity of the helmsman of the steamboat.

2. The defense set up in the answer, that the libellants have received satisfaction from the insurers, cannot avail the respondent. The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty. See *Yates v. Whyte*, 4 Bing. N. C., 272; *Phillips on Ins.*, 2163; *Abbott on Shipp.*, 318.

It is true, that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party: whereas, in admiralty, the person equitably entitled may sue in his own name. But the same reasons why the wrongdoer cannot be allowed to set up as a defense the equities between the insurer and insured, equally apply in both courts. The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant.<sup>1</sup> If notified

<sup>1</sup> QUOTED. *Newell v. Norton*, 3 Wall., 266.

The Propeller *Monticello v. Mollison.*

of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent.

\*The insurer may at all times intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages. Under the 34th rule in admiralty of this court, he may be allowed to intervene, and become the *dominus litis*, where he can show an abandonment, which divests the original claimant of all interest. See 1 Curtis, 340. Under the 43d rule also he may intervene after decree, and claim the damages recovered, by showing that he is equitably entitled to them. But with all this the respondent has no concern, nor can he defend himself by setting up these equities of others, unless he can show that he has made satisfaction to the party justly entitled to receive the damages.

The judgment of the circuit court is therefore affirmed, with costs.

Mr. Justice DANIEL dissented.

In the cases of *The Propeller Monticello v. Mollison*, in admiralty, and in those of *Clapp v. The City of Providence*, and of *The Bank of Tennessee v. Horn*, I dissent from the opinion and decision of this court; not upon the merits of those cases, but upon the ground of a want of jurisdiction in this court to adjudicate them. The reasons for my objection to the jurisdiction of this court, in cases like those above mentioned, have been so frequently assigned in preceding instances before this court, that a repetition of them, on the present occasion, is deemed superfluous. My purpose is simply to maintain my own consistency in adhering to convictions which are in nowise weakened.

*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 interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of New York.

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The Bank of Tennessee, &c., v. Horn.

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\*THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF TENNESSEE, PLAINTIFFS IN ERROR, v. LEWIS B. HORN.

By an act of the legislature of Louisiana, passed in 1826, all the property of an insolvent petitioner mentioned in his schedule, becomes vested in his creditors, from and after the cession and acceptance; and the syndic is directed to take possession of it, and to administer and sell it for the benefit of the creditors.

The courts of Louisiana have decided that all the property of the insolvent, whether included in his schedule or not, passes to his creditors by the cession. Therefore, it is of no consequence whether or not the description of a particular piece of property be imperfect in the schedule; and a purchaser of it under the syndic has a better title than one derived from a judicial sale, where the judgment had been obtained after the acceptance of the cession and appointment of the syndic.<sup>1</sup>

The validity of a state law of this description cannot now be considered as an open question.

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 stated in the opinion of the court.

Horn, who was the purchaser of the property under the syndic, instituted a petitory suit in the third judicial district court of the State of Louisiana, against Bernard and Hare, who were tenants under the Bank of Tennessee. The Bank appeared to the suit, and prayed for the removal of the case to the circuit court of the United States for the eastern district of Louisiana, which was ordered.

The bill of exceptions which was taken upon the trial, showed the prayers addressed to the court by the counsel for the Bank, and the rulings of the court thereon. The bill was as follows:—

Be it remembered, that on the trial of this cause, the defendant, the Bank of Tennessee, preferred to the court the following propositions of law arising on the agreed statement of facts, on which it was insisted that this case should be decided in favor of said Bank, and against the plaintiff, Lewis B. Horn, to wit:—

1. The surrender of property by Peter Corney, in the state court of Louisiana, did not transfer to his creditors the ownership of any part or portion thereof, whether it was described or referred to in the schedule or not, but the same remained the property of Corney notwithstanding the surrender.

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<sup>1</sup> FOLLOWED. *Yonley v. Lavender*, U. S., 498. See also *Black v. Scott*, 21 Wall., 282. CITED. *Green v. Creigh-* 9 Fed. Rep., 190; *Torrens v. Ham-*  
*ton*, 23 How., 107; *Ellis v. Davis*, 109 *mond*, 4 Hughes, 598.

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2. The words "all the property of such insolvent debtor, mentioned in said schedule, shall be fully vested in his creditors," used by the legislature of Louisiana, in the act of 1826, in regard to insolvent debtors, cannot and ought not to be construed to have reference to any property which is not mentioned in the schedule; but property not named in the schedule remains in the situation provided for by the laws of Louisiana in force prior to the passage of the act of 1826, and the rights of parties thereto were not altered by the passage of said act.

\*3. The only right which the creditors of Corney had [\*158 in the property which was surrendered, was one analogous to that of pledge; that is, a right to take possession of and sell the property, according to the forms of law, and apply the proceeds to the payment of their debts, and was not a right of ownership.

4. That the surrender of Corney did not transfer to the creditors possession of any property whatever, whether mentioned in the schedule or not; but only conferred on them the right to take possession thereof, and to sell it in due course of law to pay the debts due to them.

5. The right of the state court to cause to be sold such property as they had reduced into possession, did not oust the jurisdiction of the United States circuit court, in the case of the *Bank of Tennessee v. P. Corney*, but that court rightfully proceeded to render judgment against said Corney, and to execute the same, by seizing and selling the land in controversy.

6. Whatever may be the law in regard to the property described in the schedule, and reduced into the possession of the creditors or syndic, the circuit court had an undoubted right to execute its judgment, by causing the seizure and sale of property not reduced into the possession of the syndic, and not described on the schedule.

7. The act of the Louisiana legislature of 1826, in regard to insolvent debtors, was not intended to change the law in regard to the rights of any persons named therein, to the property of the insolvent, or to change in any manner the mode of proceeding in the state court to enforce those rights; the legislature having been extremely careful, by provisos, to retain exactly the old law in regard to the rights of property; but the said act was intended only to effect a change in the remedies or final process used in this court, by changing the names of rights; and therefore the court was bound altogether to disregard the said act of the Louisiana legislature, so far as that act affects the process of this court.

8. The syndic and auctioneer and Horn, as vendor and

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vendee, had no right to treat the marshal's sale as a nullity, or in any way to complain of it, after the sale by the marshal to the Bank of Tennessee had regularly been made, without any legal opposition on their part.

9. The acceptance of the surrender, by the second district court in New Orleans, and all orders made and all proceedings had in that court, have reference only to the property named in the inventory, unless some other property is expressly named in the proceeding itself; and therefore, they could have no effect whatever on the right of the marshal to execute process, by a seizure of property not named in the inventory, and not expressly referred to.

\*159] \*And prayed that the said propositions should be sustained, and the cause finally decided in favor of the Bank; but the court ruled all these propositions against the Bank of Tennessee, and held the following positions to be law applicable to the case:—

1. That the surrender, in the second district court of New Orleans, divested Corney of all his rights of property, and vested those rights in the creditors.

2. That because we had no lien and no right of payment in preference to others, therefore we had no right to execute our judgment in the circuit court, by a sale of Corney's property, although the fact of Corney's insolvency was not made known to the court, and no objection was made to our proceeding.

3. That the property was in *gremio legis*, by virtue of the constructive possession arising from the surrender in the second district court of New Orleans.

4. That it is but fair to assume that the property now in dispute was designed to be included by Corney in his schedule.

To all of which propositions as well as to the whole opinion of the court, which was reduced to writing, and copy of which is annexed to the bill of exceptions, the counsel of the Bank of Tennessee objected, on the ground that the said propositions made by the court, and its opinion, were contrary to law and justice, and tendered this, his bill of exceptions, to be signed by the court, which is accordingly done.

This bill is allowed so as to have the same construction as if the case had been submitted to a jury, and these exceptions had been taken on the trial.

J. A. CAMPBELL,  
Judge presiding.

Upon this bill of exceptions, the case came up to this court, and was submitted by *Mr. Dunbar*, upon a printed argument

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of Messrs. *Stockton* and *Steele*, for the plaintiffs in error, and argued by *Mr. Janin*, for the defendant.

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

The facts in this case, as they appear on the record, are as follows:—

Peter Corney, Jr., who resided in New Orleans, on the 7th of November, 1851, filed a petition under the insolvent law of Louisiana, in the second district court, declaring his inability to meet his engagements, and praying that a cession of his property might be accepted by the court, for the benefit of his creditors, and that in the mean time all proceedings against him should be stayed. To this petition, a schedule of his property \*was annexed, in which it is apparent that the [ \*160 lot in question was intended to be included, but which is so erroneously described that it can hardly be identified, by the schedule alone, as a part of his estate.

The district court, on the day the petition was presented, accepted the cession, and ordered a meeting of the creditors on the 13th of December following. The meeting was held accordingly, and a syndic appointed, and a report of the proceedings made to the court. On the 8th of March following the court authorized a sale of the property now in dispute, by the syndic; and at that sale, in May, 1852, the defendant in error became the purchaser.

The insolvent, at the time of his petition, was indebted to the Bank, the plaintiff in error, in a large sum of money, for which a suit was then pending in the circuit court of the United States for the eastern district of Louisiana. The Bank proceeded in its suit and obtained judgment; but the judgment was rendered after the cession had been accepted and the syndic appointed by the creditors. The Bank, however, issued an execution, under which this property was seized by the marshal, in February, 1852, and sold in the April following. The Bank was the purchaser at this sale, and obtained possession of the lot under it.

The defendant in error, after his purchase from the syndic, brought suit for the premises, and upon a trial in the circuit court of the United States for the eastern district of Louisiana, recovered a judgment; the court being of opinion that the property in question vested in the creditors, upon the cession and acceptance above mentioned, and was not liable to seizure under the execution which issued upon the judgment afterwards obtained by the plaintiff in error.

By an act of the legislature of Louisiana, passed on the

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29th of March, 1826, all the property of an insolvent petitioner mentioned in his schedule is fully vested in the creditors, from and after the cession and acceptance; and the syndic is directed to take possession of it, and to administer and sell it, for the benefit of the creditors. At the time, therefore, when the Bank obtained judgment against Corney, the insolvent, he had no interest in the lot in question upon which the judgment could be a lien, or which could be seized upon, on execution issuing on that judgment. The right and title to it had, by operation of the law of the state, vested in the creditors, to be administered by the syndic, as their trustee.

Nor can the imperfect or erroneous description in the schedule have any influence on the decision. For it is well settled, by decisions of the courts of Louisiana, that all the property of the insolvent, whether included in his schedule \*161] or not, passes to his *creditors* by the cession. 4 (La.) Ann., 492, 493; 11 La., 521; 8 Rob. (La.), 128; 9 Id., 223. Consequently, if, under the ambiguous or erroneous description in the schedule, this lot must be regarded as omitted, it still passed by the cession, and Corney had no remaining interest in it.

Neither can there be any constitutional objection to this law of the state. The validity of a state law of this description has been fully recognized in the case of *Peale v. Phipps and others*, 14 How., 368, and in the previous cases therein referred to, and cannot now be considered as an open question.

We see no error, therefore, in the judgment of the circuit court and it 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.

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THE CITY OF PROVIDENCE, PLAINTIFF IN ERROR, *v.* DANIEL R. CLAPP.

The statutes of Rhode Island require towns to keep the highways safe and convenient for travellers, at all seasons of the year; and, in case of neglect, "that they shall be liable to all persons, who may in anywise suffer injury to their persons or property, by reason of any such neglect."

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These statutes extend to cities as well as towns, (or townships), and also to side-walks, where they constitute a part of the public highways. The city of Providence was, therefore, bound to keep those side-walks convenient and safe, in a reasonable degree, for pedestrians; and, when a fall of snow took place, it was the duty of the city to use ordinary care and diligence to restore the side-walk to a reasonably safe and convenient state.<sup>1</sup>

It was for the jury to find whether or not this was accomplished, by treading down the snow; and, if not, whether the want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city. In considering whether due diligence required the city to remove the snow, the jury ought to take into consideration the ordinances enacted by the city, not as prescribing a rule binding on the city, but as evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary.

THIS case was brought up by writ of error, from the circuit court of the United States for the district of Rhode Island.

It was a suit brought by Clapp against the city of Providence, to recover damages for an injury occasioned by an obstruction on the side-walk in one of its principal streets. The \*obstruction consisted of a ridge of hard-trodden [ \*162 snow and ice, on the centre of the side-walk, along which the plaintiff was passing in the night time, and by means of which he fell across the ridge, breaking his thigh-bone in an oblique direction. The jury found a verdict for the plaintiff, and assessed his damages at \$3,379.50.

The circumstances of the case, and the rulings of the court which gave rise to the bills of exceptions upon which the case came up, are stated in the opinion of the court.

It was argued by *Mr. Ames*, for the plaintiff in error, and by *Mr. Jencks*, for the defendant.

The points made by *Mr. Ames* were the following:—

1. That the duty of the towns and cities of Rhode Island, in dealing with falls of snow in their highways and streets, is created and imposed solely by the statutes of Rhode Island, and must be measured by the standard appointed by those statutes.

<sup>1</sup> NOT IN CONFLICT. *Weightman v. Corp. of Washington*, 1 Black, 51.

No one can maintain an action against a city grounded solely on the defect and want of repair of the highway, but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway. Duty to repair, in such

cases, is a duty owed to the public, and consequently, if one person might sue for his proportion of the damages for the non-performance of the duty, then every member of the community would have the same right of action, which would be ruinous to the corporation; and, for that reason, it was held, at common law, that no action founded merely on the neglect of repair, would lie. *Weightman v. The Corporation of Washington*, 1 Black, 52.

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2. That the liability of said towns and cities, in civil actions, to individuals, for injuries sustained by them in their persons or property, through neglect of duty on the part of said towns or cities, in mending their highways and streets, and in removing therefrom permanent obstacles to passage, as well as temporary ones caused by the falls of snow, is created and imposed solely by said statutes, and cannot be extended beyond the statute measure thereof. *Russell v. Inhabitants of Devon*, 2 T. R., 667; *Mower v. Inhabitants of Leicester*, 9 Mass., 247; *Loker v. Inhabitants of Brookline*, 13 Pick. (Mass.), 346; *Tisdale v. Inhabitants of Boston*, 8 Metc. (Mass.), 388; *Holman v. Inhabitants of Townsend*, 13 Id., 297, 300; *Brailey v. Southborough*, 6 Cush. (Mass.), 141, 142; *Hull v. Richmond*, 2 Woodb. & M., 341, 342; *Reed v. Inhabitants of Belfast*, 20 Me., 246; *Chidsey v. Canton*, 17 Conn., 478-480; *Morey v. Town of Newfane*, 8 Barb. (N. Y.), 646, 648, 650-653; *Lumley v. Guy*, 20 Eng. L. & Eq., 189; *Sawyer v. Inhabitants of Northfield*, 7 Cush. (Mass.), 494-496; *Smith v. Inhabitants of Dedham*, 8 Id., 524; *Farnum v. Concord*, 2 N. H., 392.

3. That, by the statute of Rhode Island, entitled "An act for the mending of highways and bridges," the towns and cities of Rhode Island are bound only to keep their highways and streets open, in case of falls of snow, so as to be passable for travellers, and not to keep them from being slippery from ice or trodden-down snow; and that the requisition, in this statute, that the highways and streets be kept safe and convenient for travellers, at all seasons of the year, refers, so far as the incumbrance of snow is concerned, if it refer at all to \*163] such incumbrance, to \*safe and convenient passage through and over the same, in opposition to allowing the highways to remain, in case of falls of snow, blocked up and impeded thereby, so as to be unsafe and inconvenient of passage, and not to safety and convenience, in the sense of being kept free from ice or trodden-down snow, so that foot travellers or cattle may not slip or fall thereon.

That this appears, from the language used in the 1st section of said act, applied to its subject in the climate of New England, as well as by collating therewith the 14th and 15th sections of the same statute, and the 6th section of the act entitled "An act for mending highways," passed in 1798, and that the above construction of said statute is the accustomed, sensible—and, indeed, looking to the statute as a practical guide to duty—the necessary construction to be put thereon. Digest of Laws of R. I. of 1798, pp. 386, 387; Id. of 1844, pp. 323, 326.

4. That the acts of the State of Rhode Island, relating to

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the side-walks of the city of Providence, do not change, in any way, nor extend the duty or liability of said city, in relation to the incumbrance thereon of snow, but were procured to be passed by said city, merely to enable it to provide for the building and maintaining of side-walks in said city, in a mode and at a charge and through an instrumentality different from those applied by law to other portions of the streets.

5. That, still less do the ordinances of said city, requiring the owners and occupants of lots and buildings therein to remove all the snow from the side-walks in front of the same, within a specified time, under penalty for neglect in this respect, create or extend or change the character of the duty of the city, in regard to the incumbrance of snow, nor create nor extend nor change the character of the liability of said city, for injuries occasioned by the said incumbrance. *Levy v. Mayor, &c., of New York*, 1 Sandf. (N. Y.), 465.

6. That said side-walk acts and ordinances afford no test or standard of the degree or kind of care, or mode of dealing with falls of snow, required of the city of Providence by the statute of Rhode Island, entitled "An act for the mending of highways and bridges," which, notwithstanding said acts and ordinances, and the different condition of Providence, applies the same standard, in this respect, to the other towns of the State, as to said city; but are municipal regulations merely, extending the powers of the city of Providence, and by-laws passed by the legislative body of said city, imposing duties and liabilities upon her citizens, in respect to side-walks, and the removal of snow therefrom, without increasing or extending her own.

\*The points made by *Mr. Jencks*, for the defendant [\*164 in error, were the following:—

1. That the statute of Rhode Island entitled "An act for the mending of highways and bridges," imposes upon the towns and cities of that State, the duty of keeping highways in a safe and convenient condition for travellers, at all seasons of the year, and creates a liability on the part of such town or city, to any person using such highway with ordinary and proper care, who suffers injury in consequence of any defect in such highway, or obstruction thereon which the town or city might have removed by the use of ordinary care and diligence, and which while thus negligently suffered to remain, rendered such highway inconvenient and unsafe. *Cassedy v. Stockbridge*, 21 Vt., 391; *Frost v. Portland*, 11 Me., 271; *Bigelow v. Weston*, 3 Pick. (Mass.), 267; *Springer v. Bowdoin-*

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*ham*, 7 Greenl. (Me.), 442; *Raymond v. Lowell*, 6 Cush. (Mass.), 534.

2. That this duty and liability extends to side-walks when they constitute a part of the highway or public streets; and such side-walks are required to be kept in a safe and convenient condition for pedestrians, as the roadway is for horses and carriages. *Brady v. City of Lowell*, 3 Cush. (Mass.), 121; *Bacon v. City of Boston*, Id., 174; *Drake v. City of Lowell*, 13 Metc. (Mass.), 292.

3. That the degree of convenience and safety which is required by said statute, and the degree of care and diligence which the towns and cities must bestow upon the highways, in order to relieve themselves from liability under the statute requirement, have relation to the nature and uses of the highway, and the frequency of its uses. That the same standard is not to be applied to the principal thoroughfares of the city of Providence, as to a cross road in the country, but that the law as to the extent of repair, and what will constitute obstructions rendering a public way unsafe and inconvenient, must depend, in a good degree, on the locality of the road.

4. That the law is the same when applied to obstructions of highways or side-walks by snow, as to any other obstruction, and the duties and liabilities of towns and cities in reference to the want of safety and convenience in their highways, caused by snow, as when caused by other obstructions.

That the latter clause of the first section of the statute does not vary or limit the duty imposed by the first clause, but is directory to the surveyor of highways in the performance of his duty; and that the word "passable" means safely and conveniently passable, as well when applied to side-walks, as to the other portions of the travelled highway. *Loker v. Brookline*, 13 Pick. (Mass.), 343.

5. That the several statutes of Rhode Island, concerning side-walks \*in the city of Providence, authorize the <sup>\*165]</sup> construction of side-walks in said city, and such side-walks being constructed and accepted by the city, under the authority of said act, it becomes the duty of the said city to keep said side-walks in a safe and convenient condition for pedestrians, at all seasons of the year. That whenever a fall of snow shall render any such side-walk, not conveniently safe and passable, the city is bound to use ordinary care and diligence to restore said side-walk to a reasonably safe and convenient state. That the statute referring generally to all highways, and all parts of such highways, points out the two modes, one of removing the snow, and the other of treading it down, for the purpose of rendering such highways safe and

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convenient; and the city of Providence, by their ordinances, have prescribed the rule for themselves and their citizens, by directing a removal of the snow from the side-walks, and have provided for the enforcement of this rule by their officers, and by penalties on the owners and occupants of estates.

6. That the public statute contemplates a removal of the snow in some cases, and a treading down in others, is manifest from the nature of the obstruction itself; it being an obstruction to travellers with sleds and sleighs, only when drifted or lying light, and subject to drift; as when trod down it greatly facilitates all travelling with vehicles adapted to the altered condition of the roads. But snow, under all conditions, is an obstruction to the pedestrian, and his safety and convenience are best provided for by an entire removal of it from his path. Hence the obligation to make the pathway set apart for such travellers, safe and convenient, in a large city, and along one of its principal thoroughfares, is not satisfied by leaving the snow to be trod down as it fell in drifts, or to be thawed and frozen into ridges of several inches in height, in such a manner as to throw down pedestrians using ordinary care and caution, although the side-walk might be passable in the sense that the snow was to be waded through or climbed over, or otherwise avoided by such travellers.

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 Rhode Island.

The suit was brought in the court below against the city of Providence, to recover damages for an injury occasioned by an obstruction on the side-walk in one of its principal streets. The obstruction consisted of a ridge of hard-trodden snow and ice on the centre of the side-walk, along which the plaintiff was passing in the night time, and by means of which he fell across the ridge, breaking his thigh-bone in an oblique direction.

After the evidence closed, the counsel for the defendants \*prayed the court to charge the jury that the statutes of Rhode Island, requiring highways to be kept in repair, and amended from time to time, so that the same may be safe and convenient for travellers at all seasons of the year, as far as respected obstructions from falls of snow, merely required that the snow should be trodden down or removed, so that the highways should not be blocked up or incumbered with snow; but did not require that said highways should be free from snow or ice, so that the traveller should not be in danger of slipping thereon; and that the

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said snow being so trodden down and hardened into ice, and the side-walk not blocked up or incumbered therewith, but open and passable in the sense of the statute, in this case the defendants were not liable.

The counsel for the defendants, also, after referring to the statutes authorizing the city of Providence to build and repair side-walks, and also to the ordinances of the city passed in pursuance thereof, further prayed the court to charge, that neither the said statutes nor the ordinances defined or enlarged the duty or liability of the city as to the removal of snow from the side-walks, beyond that under the general statute of the state, nor were they evidence of the degree of care required of the city by the general statute; but that, notwithstanding the same, the city would not be liable under the general law, if the snow on the side-walk was trodden down so as to be open and passable.

The court refused so to charge; but charged, that, by the statute law of the state, the city was obliged to keep this street conveniently and safely passable at all seasons of the year; that, by a special act, the legislature having authorized the city to have side-walks designed for foot passengers, it was bound to keep those side-walks convenient and safe for pedestrians; that the law did not require absolute convenience or safety, but safety and convenience in a reasonable degree, having reference to the uses of the way and frequency of its uses; that, when a fall of snow takes place, so as to render a side-walk not conveniently and safely passable, it was the duty of the city to use ordinary care and diligence to restore it to a reasonably safe and convenient state. That the law does not prescribe how this shall be done, whether by treading down or removing the snow; and that it was for the jury to find, as matter of fact, whether the side-walk, at the time in question, was in a reasonably safe and convenient state, having reference to its uses; and if it was not so, whether its want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city; and in considering whether due diligence required the city to remove the snow, the jury ought to take into consideration the ordinances, not as prescribing a rule binding on the city, but as <sup>\*167]</sup> evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary.

The first section of the statute of Rhode Island concerning highways and bridges, provides, "that all highways, townways, and causeways, &c., lying and being within the bounds of any town, shall be kept in repair and amended, from time to time, so that the same may be safe and convenient for travellers,

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with their teams, &c., at all seasons of the year, at the proper charge and expense of such town, under the care and direction of the surveyor or surveyors of highways appointed by law. The surveyors are then authorized to remove all sorts of obstructions or things that shall in any way straiten, hinder, or incommodate any highway or town-way, and when blocked up or incumbered with snow, they shall cause so much thereof to be removed or trod down as will render the road passable.

Among other provisions conferring upon the towns power to repair and amend the public highways, the 4th section enacts that each town, at some public meeting of the electors, shall vote and raise such sum of money, to be expended in labor and materials on the highways, as they may deem necessary for that purpose; and either the assessors or the town council, as the town may direct, shall assess the same on the ratable estate of the inhabitants, and all others owning ratable property therein, as other town taxes are by law assessed.

And the 13th section provides that if the town shall neglect to keep in good repair its highways and bridges, she shall be liable to indictment, and "shall also be liable to all persons who may in anywise suffer injury to their persons or property by reason of any such neglect."

It is admitted that the defendants are not liable for the injury complained of at common law, but that the plaintiff must bring the case within the above statute to sustain the action. It must also be admitted, that the act applies to cities as well as towns, and also to side-walks where they constitute a part of the public highway. This has been repeatedly held by the state courts in several states, under statutes substantially like the one under consideration. 13 Pick. (Mass.), 343; 18 Metc. (Mass.), 297; 3 Cush. (Mass.), 121, 174; 4 Id., 247; 6 Id., 141, 524; 7 Greenl. (Me.), 442; 15 Vt., 708; 19 Id., 470; 21 Id., 391; 2 N. H., 392; 35 Me., 100; Id., 242.

The counsel for the defendants, conceding this view of the statute and of the liability of the city generally, contends that, as it respects obstructions or impediments occasioned by the fall of snow, and accumulations of ice, the liability is qualified and exists only in case of neglect to tread down or remove the snow, so that the track be not blocked up and incumbered thereby; and that, if the street or side-walk is passable by not being \*blocked up and incumbered with snow, as it respects this kind of obstruction, it is made safe and convenient within the meaning of the statute. And the latter clause of the 1st section of the act which directs that when

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the highways are blocked up or incumbered with snow, the surveyor shall cause so much thereof to be removed or trod down as will render the road passable; and also the 13th and 14th sections, which authorize the towns to impose penalties for the removal of snow from highways, and subjects the town to an indictment for neglect therein, are referred to as countenancing this modified liability.

But it will be found, on looking into the several decisions under a similar act in Massachusetts, that no distinction exists between obstructions of a public highway by falls of snow, and those of any other description. In the case of *Loker v. Brookline*, 13 Pick. (Mass.), 346, 347, Morton J., speaking of the 1st section of the statute, observes, that language so general and explicit cannot be misunderstood or restrained. It must extend to all kinds of defects, as well as to all seasons of the year; and an obstruction caused by snow is as clearly included as one caused by flood, or tempest, or any other source of injury. See also, 13 Metc. (Mass.), 297; 6 *Cush.* (Mass.), 141.

The foundation of the action rests mainly on the 1st and 13th sections of the statute. The 1st imposes upon the town the duty of keeping in repair and amending the highways within its limits, so that the same may be safe and convenient for travellers at all seasons of the year; and the 13th declares, that if the towns shall neglect to keep in good repair its highways and bridges, it shall be liable to indictment, and shall also "be liable to all persons who may in anywise suffer injury to their persons or property by reason of any such neglect."

The other provisions, and among them those referred to by the counsel, relate to the powers conferred upon the towns to enable them to fulfil the obligations enjoined, and to the powers and duties of the several officers having charge of the repairs of the highways. Ample means are furnished the several towns to discharge their obligations under the statute.

The act of 1821, amended by the act of 1841, confers powers upon the city of Providence, to build and keep in repair their side-walks, at the expense of the owners of the adjoining lots; and as may be seen from the several ordinances of the city, given in evidence, these powers have been liberally exercised for the purpose.

The powers of the towns and of the city are as ample for the purpose of removing obstructions from the highways, streets, and side-walks, arising from falls of snow and accumulations of ice, as those arising from any other cause; and the reason for

\*169] \*the removal, so that they may be safe and convenient for travellers, is the same in the one case as in the

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others. The 13th section of the act which gives the personal remedy, makes no distinction in the two cases; and, in the absence of some plain distinction pointed out by the statute, it would be exceedingly difficult, if not impossible, to state one. It is conceded that an obstruction from falls of snow or accumulations of ice must be removed by the towns and cities, so as to make the highways and streets passable; and that this is a duty expressly enjoined upon them. The question is, what sort of removal will satisfy the requirement of the statute? It is admitted that, as it respects every other species of obstruction, the repairs must be such that the highways and streets may be safe and convenient for travellers; and that this is a question of fact to be determined by the jury. Is an obstruction by snow or ice to be determined by any other rule, or by any other tribunal? The counsel for the defendants suggests, that as it respects such safety and convenience for travellers in case of falls of snow, the statute should be construed as meaning merely that the snow should be trodden down or removed, as that the highways and streets should not be so blocked up or incumbered as not to be safely and conveniently open and passable. But it is quite clear that this would be a very indefinite and uncertain rule to guide either the officers, whose duty it is to remove these obstructions, or the jury in passing upon them when the subject of legal proceedings. The suggestion may be very well as an argument to the jury, for the purpose of satisfying them that the repairs in the manner mentioned were such as to fulfil the requirement of the statute, but to lay it down as a rule of law in the terms stated, might in many cases, and under the circumstances, fall far short of it.

The treading down of snow when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or incumbered, may in some sense, and for the time being, have the effect to remove the obstruction; but as it respects the side-walks and their uses, this remedy would be, at best, temporary; and, in case of rains or extreme changes of weather, would have the effect to increase rather than remove it. It is but common observation, and knowledge of those familiar with the climate of our northern latitudes, that not unfrequently the most serious obstructions arise from the great depth of snow and changes in the temperature of the weather; and that simply treading down the snow, and leaving it in that condition without further attention, would have the effect to render the highways and side-walks utterly impassable.

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In the case also of obstructions from snow, the side-walks <sup>\*170]</sup> may \* frequently require its removal, so as to make a safe and convenient passage for the pedestrian, when, at the same time, the treading of it down in the street would answer the purpose for the traveller with his team. The nature and extent of the repairs must necessarily depend upon their location and uses; those thronged with travellers may require much greater attention than others less frequented.

The just rule of responsibility, and the one, we think, prescribed by the statute, whether the obstruction be by snow or by any other material, is the removal or abatement so as to render the highway, street, or side-walk, at all times safe and convenient, regard being had to its locality and uses.

We are satisfied the ruling of the court below was correct, and that the judgment should be affirmed.

Mr. Justice DANIEL 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 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 interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Rhode Island.

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THE SCHOONER CATHARINE, HER TACKLE, &c., STARKS W. LEWIS AND OTHERS, OWNERS AND CLAIMANTS, APPELANTS, v. NOAH DICKINSON AND OTHERS, LIBELLANTS.

In cases of collision, where the injured vessel has been abandoned, the measure of damages is the difference between her value in her crippled condition and her value before the collision; and this is to be ascertained by the testimony of experts, who can judge of the probable expense of raising and repairing the vessel.

But where the vessel has been actually raised and repaired, the actual cost incurred is the true measure of indemnity.<sup>1</sup> Where two sailing vessels were approaching each other in opposite directions, one closehauled to the wind, and the other with the wind free, the weight of evidence is, that the vessel which was closehauled, luffed just previous to the collision. This was wrong; she should have kept her course.

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<sup>1</sup> CITED. *The Baltimore*, 8 Wall., 386.

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The other vessel had not a sufficient look-out; the excuse given, namely, that all hands had, just previously, been called to reef the sails, is not sufficient.<sup>1</sup> Both vessels being thus in fault, the loss must be divided.<sup>2</sup>

THIS was an appeal in admiralty, from a decree of the circuit \*court of the United States for the southern district of New York. [\*171]

It was a case of collision which took place on the 21st of April, 1853, near Squam Beach, between the schooner San Louis, on a voyage from Jersey City to Philadelphia, and the schooner Catharine, bound to New York.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Cutting*, for the appellants, and submitted on a printed argument by *Mr. Field*, for the appellees.

The points made on behalf of the appellants were:—

1. No proper or sufficient look-out was kept on board of The San Louis; and she neither carried nor showed any light.

2. Although the witnesses on board of The San Louis contradict each other in the most material facts, the conclusion from all the evidence is, that the man at the wheel, instead of keeping his course, or keeping away, undertook to cross the bows of The Catharine; whatever may have been his object, he improperly luffed, and brought The San Louis into the wind, directly athwart the bows of The Catharine, and thus produced the collision.

3. The Catharine was in the act of reefing, and had the look-out usual in that trade when reducing sail.

4. The rule of damages is erroneous. The Catharine was liable, *in rem*, for the damage directly occasioned by the collision. Instead of being condemned for the expenses of getting The San Louis afloat, and the cost of repairs, she is charged with the full value of The San Louis, less only a trifling sum,

<sup>1</sup> CITED. *The Colorado*, 1 Otto, 23 How., 453]. " *The Colorado*, 1 Otto, 699.

"Look-outs are valueless unless they are properly stationed, and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation. [*Baker v. City of New York*, 1 Cliff., 84; *Whitridge v. Dill*, 23 How., 453]."

<sup>2</sup> FOLLOWED. *The James Gray v. The John Frazer*, 21 How., 195; *The Sunnyside*, 1 Otto, 215; *The Atlas*, 3 Id., 319; *The Potomac*, 15 Id., 631. CITED. *The Maria Martin*, 12 Wall., 43; *The Continental*, 14 Id., 361; *The America*, 2 Otto, 438. See also *The Ant*, 10 Fed. Rep., 297; *The Excelsior*, 12 Id., 201; *The Hudson*, 15 Id., 166; *Memphis, &c., Co. v. Yaeger Co.*, 3 McCrary, 260. S. P. *The Morning Light*, 2 Wall., 560; *The Pennsylvania*, 24 How., 313.

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for which her owners, without notice to the appellants, sold and transferred her.

*Mr. Field*, made the following points:—

I. It is established by the proofs, that The San Louis was sailing down the coast closehauled to the wind, having her starboard tacks on board, and that the Catharine was at the leeward, coming up the coast, with the wind free, having her larboard tacks on board; that The Catharine had no look-out; that her crew were engaged in reefing, and had been so engaged for twenty minutes or half an hour, during which time the look-out was not kept; that the captain took the wheel at eight o'clock, but left it alone once or twice; that the course of The San Louis was not changed until the collision was inevitable, when the mate put the wheel down, hoping to lessen the blow, but the time was too short for the vessel to feel the change; that the course of The Catharine was changed, so as to bring her head more towards the shore, and that she then ran into and destroyed the San Louis.

\*II. When one vessel runs into another, the presumption is that the colliding vessel is in fault.

\*172] III. In this case, not only is this presumption not repelled, but there are several other reasons positively shown, why The Catharine and her master should be held responsible for the collision.

1. She had the wind free, and her larboard tacks on board, and according to well settled rules, should have given way for The San Louis, which was closehauled, and had her starboard tacks on board. If The Catharine had then given way, the collision would not have happened. *St. John v. Paine*, 10 How., 581.

2. Even if The Catharine had kept on her course, the collision would not have happened; but her course being altered by heading more towards the shore, she struck The San Louis with full head on.

3. If The Catharine had had a look-out, The San Louis would have been seen, (for it is certain that vessels could be seen at least half a mile,) and the collision would not have happened. It is no excuse to say that The Catharine was reefing, and therefore had a right to call away her look-out, for the preponderance of testimony, as well as the dictates of prudence, show that the look-out must be kept even when reefing, especially in a place crowded with vessels; and besides, The Catharine had no sufficient cause for reefing. The wind did not require it, and she was reefing merely to avoid getting to Sandy Hook before morning.

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4. If the master of The Catharine had not left her helm, it is probable the collision would not have happened. To abandon the helm, as he is proved by his own witnesses to have done, once or twice, was an act of inexcusable carelessness.

5. The appellant case assumes certain facts which are entirely unfounded.

IV. Any of the foregoing reasons was sufficient to entitle the libellants to judgment in their favor.

1. The San Louis did not luff "across the Catharine's bows."

The helm of The San Louis was not put down until the moment before the collision, when it was inevitable that The Catharine would strike her. This is the positive testimony of the mate, Mr. Williams, who held the helm, and who, of course, knew. Messick was forward, and could not know the fact as accurately as the mate. Besides, Mr. Williams says, The San Louis had scarcely felt the movement of the wheel, when the Catharine struck her. Capt. Goodspeed's evidence refers only to the time when the two vessels were together so completely that they seemed to be but one.

2. The San Louis was not heading off the shore. She was \*pointing her bows in shore; though she constantly fell off bodily, her head was for the land. It was impossible, therefore, that The Catharine should get round to her starboard side. If The San Louis had pointed her bows off the shore, she would have had the wind abeam. All the testimony shows, that she was closehauled to the wind, and therefore moving on a line forming an acute angle with the line of The Catharine, the angle opening towards the shore.

3. The Catharine was not to "windward of The San Louis." The 4th allegation of the libel states that The San Louis was inside of The Catharine at the time of the collision. This is not denied by the answer. And according to the proofs, The San Louis, at 8 o'clock, must have been from half a mile to a mile to the windward of The Catharine.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of New York.

The libel charges, that on the night of the 21st April, 1852, the schooner San Louis, laden with a cargo of stone, was sailing down the coast below the bay of New York, bound for Philadelphia, and while off Squam Beach, on the Jersey shore, the schooner Catharine, coming up the coast, bound for the port of New York, then and there with great force and violence ran into and upon her, breaking through her side, so

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that she soon filled with water, and sunk. That The Catharine had a fair wind and ample sea-room, while The San Louis was beating against the wind, and was inside of The Catharine, and standing off the shore. That The Catharine had no watch or person on the look-out at the time of the collision; and that it was occasioned by the improper and unskilful management of the persons on board engaged in navigating her. That she luffed, and struck the San Louis about midships with head on.

The answer of the respondents, owners of The Catharine, admit The San Louis was sailing down the coast at the time and place mentioned; and that The Catharine was coming up the same, bound for the port of New York; but deny that she ran into The San Louis; but charge that she ran across and afoul of the bows of The Catharine, which occasioned the collision; that the wind was in a quarter that enabled The San Louis to keep her course full down the coast without keeping off shore; they insist that The Catharine had the usual watch set before and at the time of the collision; and they deny that it was occasioned by reason of the unskilfulness or mismanagement of those on board of her, but was the result of want of care and mismanagement in navigating The San Louis. \*174] They deny that \*The Catharine luffed, as charged in the libel; but charge that The San Louis luffed and came across the bows of The Catharine.

The district court rendered a decree for the libellants, and referred the question of damages to a commissioner. The decree was affirmed in the circuit court. The proofs before the commissioner to ascertain the amount of the damages, consisted principally of testimony as to the value of The San Louis previous to the collision; and as to her estimated value in her sunken and disabled condition in the water on the beach; the difference constituting the measure of damages allowed. She was sold by one of the owners a few days after the accident, while lying on the beach, for \$140; and which, upon the weight of the proofs as produced, was her then estimated worth. Her cargo of stone was afterwards taken out, and the vessel raised and brought to the port of New York and repaired. The expense of raising and repairing her seems not to have been a subject of inquiry.

The commissioners reported damages to the amount of \$6,200, which report was confirmed.

#### 1. As to the damages.

The principle that appears to have governed in the examination of the witness in respect to this branch of the case, as well as the commissioner in arriving at the amount of damages

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reported to the court, we think, upon consideration, is not maintainable. That principle seems to have been, to ascertain from the opinion of witnesses, experts as they are called, though it is not clear they were of that character, the value of the vessel in her sunken and disabled condition as she lay on the beach after the disaster, and to deduct that sum from the sound value before it occurred, the difference being the measure of the damage; in other words, that the inquiry must be confined to the condition of the vessel at the time of the collision, and in her then state; that the owner had a right to abandon her as a total loss, and look to the wrong-doer for compensation, as then estimated. Acting upon this view, the libellants sold the vessel in her disabled state for what they could get, and claimed, and have received, the sound value, less this amount.

It is true that where a vessel has been run down and abandoned, never having been raised and repaired, but left to decay upon the beach, evidence of the nature and character of that given in this case must necessarily be admissible. That is, the damage sustained must be ascertained by the testimony of witnesses experienced in matters of this kind, who are competent to speak as to the practicability of raising and repairing the vessel, and of the expense attendant thereupon, this expense constituting the principal ingredient of the damage proper to be allowed; but they should be witnesses whose occupations and experience enabled them to express opinions of the feasibility of raising the vessel, and to make estimates of the probable expense of the same; and, also, of the expense of the necessary repairs, upon which the court might rely with some confidence in making up its judgment. Loose general opinions on the subject, entitled to very little more respect in the ascertainment of facts than the conjectures of witnesses, are of themselves undeserving of consideration.

But where the vessel has been raised and repaired, or is undergoing repairs, as in the case of The San Louis, there is no necessity for resorting even to the opinion and estimates of experts, as to the probable expenses, for as to these the reasonable expenses incurred in raising and repairing her are matters of fact that may be ascertained from the parties concerned in the work. The libellants, instead of the examination of witnesses, as to their opinion of the amount of the damage from an inspection of the vessel as she lay upon the beach, should have inquired into the actual cost of raising and repairing her, so as to have made her equal to the value before the collision. This would have been the proper mode by which to have arrived at an in-

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demnity to the extent of the loss sustained, which is the true measure of damages in these cases. 13 How., 101, 110.

We think, therefore, that the rule adopted in ascertaining the measures of damages in this case was erroneous.

The next question in the case is more difficult.

The New Jersey coast below Sandy Hook bears southwesterly and northeasterly, along which these vessels were sailing. The wind was southwesterly, with a pretty strong breeze; The San Louis closehauled, passing down the coast, and The Catharine with the wind free passing up it, making for the Hook. There had been a fall of rain during the evening, but between eight and nine o'clock, when the collision happened, the weather had partially cleared up. The night was cloudy, but some stars were visible. The San Louis was sailing at the rate of six knots the hour; and as The Catharine had the wind free, her speed must at least have been equal if not greater.

The master of the schooner Goodspeed, which vessel was in company with The San Louis from Jersey City, states that a schooner, which it is admitted was The Catharine, passed him a little after eight o'clock, some quarter of a mile to the windward, heading to the westward of her course to the Hook, which was in shore; that at this time The San Louis was from three quarters to a mile astern of him, a little to windward. The Catharine had a light; The San Louis had not.

Messick, the look-out on The San Louis, states that he saw \*176] The Catharine half a mile ahead; he supposes about half a point on their lee bow. "I suppose," he says, "when I first saw The Catharine she was heading to the northward. I sung out to the mate at the helm to luff; he did so, and brought The San Louis into the wind; that The Catharine then luffed also, and ran into us abaft the chains."

Now, if the master of The Goodspeed is not mistaken, and he is an indifferent witness, it is difficult readily to assent to the statement of Messick as to the relative position of the two vessels; for if The Catharine passed The Goodspeed half a mile to the windward, and The San Louis was astern, nearly in the track of the latter, it is not very probable that, in the short distance she had to pass in her course before meeting The San Louis, she had so far diverged to the leeward as to overcome this half mile, and to have crossed her track. The vessels must have met at least within half a mile from the point where The Catharine passed The Goodspeed. The master of The Goodspeed says The Catharine was not only half a mile to the windward, but that she was heading to the west of her course to the Hook.

According to the settled rules of navigation, it was the duty

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of The San Louis, when she first saw The Catharine, which had the wind free, she being closehauled, to have kept on her course; the manœuvre of luffing into the wind, as soon as she saw that vessel, was improper, and subjects her to the charge of unskilful navigation, unless justified by special circumstances existing at the time. Here, the circumstances tend rather to aggravate than justify the error, as the improper manœuvre may have led to the collision, and probably did, if The Catharine at the time was to the windward.

Williams, the mate of The San Louis, who was at the wheel, differs materially in his testimony from Messick. He states, when he first saw The Catharine, "he spoke to the man at the bow; he said, keep your course, and you will go clear. I did keep my course; asked the man at the bow if he could see her; he said that he could; he told me to keep my course; I did not alter my course; steered as close to the wind as I could; did not see much more of The Catharine till she struck us." He further states, that when about three rods from The Catharine, she luffed and was coming into them; that he then put his wheel down.

If this account of the management of The San Louis could be confidently relied on, there would be no great difficulty in charging the other vessel with the fault of the collision. But it is admitted that Messick was the proper person, under the circumstances, to give the orders to the mate at the wheel. Williams himself assumes this in his testimony; and Messick is \*very particular as to the orders given. On his cross [ \*177 examination he says: "I saw The Catharine across one point of the bowsprit, inside the stays; right away then I gave the mate the order to luff; he did it right away. She minded her helm readily."

The difference is very material; for whether fault or not is to be imputed to The San Louis, depends upon the fact whether she is chargeable with the manœuvre testified to by the look-out. We think, under the circumstances in which he was placed, his account of the transaction is entitled to the most weight. Having given the order, and seen that it was obeyed, and being at the time in charge of the navigation of the vessel, he cannot well be mistaken. Even the contradiction between the two witnesses is calculated to cast a doubt over the proper management of the vessel in the emergency.

The order to luff, itself, was a clear violation of the duty of The San Louis; but, in this instance, if the master of The Goodspeed is not mistaken, it probably produced the disaster. As to The Catharine, we are not satisfied that she had a proper look-out on the vessel at the time of the collision. The excuse

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given is, that all hands, a short time previously, had been called to reef the sails, and some evidence is given to prove that this is customary on vessels of this description. However this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper look-out while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent look-out, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation.

Our opinion therefore is, that the decree below was erroneous, and should be reversed.

Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. 9 Law Rep., 30.

This seems now to be the well-settled rule in the English admiralty. *Petersfield v. The Judith*, Abbott on Sh., 231, 232; *The Celt*, 3 Hagg. Adm., 328, n.; *The Washington*, 5 Jur. 1067; *The Fiends*, 4 E. F. Moo., 314, 322; *The Seringapatam*, 5 Notes of Cas., 61, 66; *Vaux v. Salvador*, 4 Ad. & E., 431; *The Monarch*, 1 Wm. Rob., 21; *The De Cock*, 5 Mo. Law Mag., 303; *The Oratava*, Id., 45, 362.

Under the circumstances usually attending these disasters, \*178] we \*think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation.

*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 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, and as to law and justice shall appertain.<sup>1</sup>

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<sup>1</sup> REFERRED TO. *The Sapphire*, 18 Wall., 55.

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JAMES B. PECK, WILLIAM HEILMAN, AND EDWIN H. FRES-MUTH, OWNERS OF THE STEAM-SHIP COLUMBUS, APPEL-LANTS, v. JOHN SANDERSON, LIBELLANT.

In a collision which took place at sea between a steam-ship and a schooner, by means of which the schooner was sunk and all on board perished, except the man at the helm, the evidence shows that it was not the fault of the steamer.

Although the night was starlight, yet there was a haze upon the ocean, which prevented the schooner from being seen until she came within a distance of two or three hundred yards. She was approaching as closehauled to the wind as she could be. Under these circumstances, the order to stop the engine and back, was judicious.<sup>1</sup>

THIS was an appeal from the circuit court of the United States for the eastern district of Pennsylvania.

The circumstances of the case are particularly set forth in the opinion of the court.

It was argued by *Mr. Cutting*, for the appellants, and submitted, on a printed brief, by *Mr. J. Murray Rush*, for the appellee.

The arguments of the counsel turned entirely upon questions of fact, as deduced from the evidence in the case. There were no principles of law disputed, and under these circumstances the reporter has deemed it unadvisable to condense the arguments.

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

This case arises out of a collision between the schooner *Mission*, of Edenton, in North Carolina, and the steam-ship *Columbus*, of Philadelphia. The schooner sunk immediately, \*and all on board perished, with the exception of Wilson G. Burgess, a seaman, who succeeded in getting on board of *The Columbus*. The libel is filed by the owner of the schooner, and charges that the collision was occasioned by the fault of the steam-ship. The circuit court sustained the libel, and directed the respondents to pay the full value of *The Mission* and her cargo. And from that decree this appeal has been taken.

The only witness examined by the libellant is the seaman

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<sup>1</sup> CITED. *Propeller Niagara v. Grove*, 13 Fed. Rep., 698; *The West-Cordes*, 21 How., 6; *The Golden over*, 5 Hughes, 134.

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above mentioned. It appears from his testimony that the schooner was bound from Rum Key to Edenton, with a cargo of salt and some specie. The crew consisted of the captain, one mate, two able and one ordinary seamen, a cook, and a son of the captain, about twelve years old. About 12 o'clock, on the night of the collision, Burgess, and a seaman named Brown, and the master, came from below, it being their watch on deck. The master soon went below again, and remained there till after the collision, leaving no one on deck but the two seamen. Brown took the wheel and Burgess went forward; and at two o'clock in the morning, Burgess took the wheel and Brown went forward. Burgess states that it was a pretty clear night, with a moderate wind from northwest, the schooner heading north by east. The sails were trimmed flat aft; and the schooner was as closehauled to the wind as she could be. He could see nothing on the larboard side, because the sails intercepted his view. She carried no lights.

He had been at the wheel about half an hour when the collision took place. He heard a heavy crash; the wheel turned, flew out of his hands, and knocked him down. He ran forward, and saw a large vessel into them. Her bowsprit was between the schooner's jib and foremast, and extended over their forecastle deck. He got hold of her bowsprit shroud and got upon her deck. The schooner went down, and the rest of the crew perished.

Burgess states that he neither saw nor heard the steamer until the vessels came together. The Columbus was on the larboard side, and the sails of the schooner prevented him from seeing her. He never saw or heard Brown after he went forward, and he gave the witness no notice of the approach of the steam-ship.

On the part of the Columbus several witnesses were examined, and among them the mate, a seaman stationed on the look-out, and the engineer. There is no material discrepancy in their testimony, and the result of it is this:—

The steam-ship was a propeller, and a regular packet between Philadelphia and Charleston. She was on her voyage from the former place to the latter, with freight and passengers on board.

On the night of the collision, it was the mate's watch, from \*180] \*twelve o'clock to four o'clock in the morning. He came from below at twelve o'clock, and saw that his men were keeping a look-out forward, and was also on the look-out himself. The wind was west-northwest, varying one or two points, and the steamer was heading southwest, and going at the rate of about eight and a half knots an hour.

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There was a heavy head sea, and the night was starlight, but not very clear, somewhat hazy. The ship carried a signal-light, (a globe lamp,) such as they usually carried, which was burning, and all the state-rooms were lighted. These lights could be seen from a distance, variously estimated by the witnesses from one to five miles. Her usual watch were on deck; two of them stationed on the forecastle deck on the look-out, and the mate was standing on the top of the skylight looking out for Cape Lookout light, the ship being then about ten miles from Cape Lookout breakers, and on soundings.

The Mission was first seen by one of the look-out, who immediately ran aft two or three steps, and sang out, "vessel right ahead." She was then at a distance of two or three hundred yards. And on such a night, a vessel like The Mission, with her sails hauled flat aft, and coming towards The Columbus edge on, and without lights, could not be seen at a greater distance.

The mate, as soon as the look-out cried "sail right ahead," jumped from the skylight, ordered the engineer to stop the engine, and ran forward. He saw The Mission a point or a point and a half on the larboard bow, apparently standing west by north, distant, as he conjectured, about two hundred yards. He could not see her very plain, her sails being presented to them edgewise. She was rather to windward of the steamship, and closehauled. He judged that he could not clear her by shifting the helm, and he ordered the engineer to back. The orders were instantly obeyed, and The Columbus was backing when the collision took place. It took place in less than a minute from the time the schooner was first seen.

The witnesses testify, that when at night the look-out cries out, "sail ahead," it is the duty and practice of steam vessels, when they are uncertain of the way the sail is standing, to stop the engine and back; and it is not usual or proper to change her course, before the course which the other vessel is steering is first ascertained. And among the witnesses who thus testify is a seaman who had been a pilot in the Bay of Delaware many years, and who happened to be on board The Columbus as passenger when this disaster happened.

Upon this statement of facts, gathered from the testimony on both sides, we see no just ground for imputing this unfortunate collision to negligence or want of skill in the management of The \*Columbus. She was well lighted, and could be seen at a great distance. She had a sufficient [ \*181 look-out, properly stationed.

But it is said it was a starlight night, and if the look-out

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had been watchful, The Mission ought to have been seen at a greater distance. Undoubtedly there are nights in which such a vessel might be seen much further off; and in the night of which we are speaking, she might have been seen at a greater distance, if the whole breadth of her sails had been presented to the approaching vessel. But there are nights which may properly be called starlight, when there is a haze on the surface of the ocean which obstructs the vision. And the court cannot undertake to say, that in any night, whenever the stars are shining, a vessel like The Mission may be seen at a greater distance than two or three hundred yards, although she is approaching head on with her sails drawn flat, and without a light. The distance must depend on the state of the atmosphere, and vary with it. And no one can know or form a safe opinion as to the distance at which the schooner might have been seen, on the night of which we are speaking, unless he was at the place of collision at the time it happened, or derives his knowledge from persons who were there. And when the witnesses on board The Columbus testify that she could not be seen further off, there is no reasonable ground for doubting the truth of their testimony. It is a fact, proved by eye-witnesses, whose testimony is not impeached.

Neither can the order to stop the engine and back, instead of changing the course of the steam-ship, be regarded as a fault. It would evidently have been unwise to change her course, until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steam-ship, and a change in the course of the latter might produce a collision instead of preventing it. And stopping the engine lessened the rapidity with which the vessels were nearing each other, and gained time, while he was ascertaining the distance of the sail, and the direction in which it was steering. When he had done this, if there was sufficient distance between them to enable him to avoid her, it was unquestionably his duty to change the course of The Columbus, and allow the schooner to pass on, in the course in which she was steering. But, in his judgment, this could not be done.

The testimony shows that he was an experienced and trustworthy seaman. And there is no evidence to impeach the correctness of his opinion in this particular. And if it was impossible to avoid the schooner, by changing the course of his vessel, the order to back was evidently judicious, as it gave more space for the schooner to change her course, and thereby escape the impending danger. Her course could be

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changed in a much \*shorter space than that required for a steam-ship of the size of The Columbus.

It is, without doubt, the general rule, that a sailing vessel should keep her course when approaching a steamboat, and it is the duty of the latter to keep out of her way. But this rule presupposes that the steamer discovered, or ought to have discovered, the sailing vessel when at a sufficient distance to avoid her, by changing her own course. But where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object. Experienced seamen testify that the mode adopted on the part of The Columbus was the usual and best one; and we see no reason to doubt it. And if The Columbus had been seen from The Mission when the engine was stopped, she might, it appears, have passed her in safety. Not a moment appears to have been lost on board of the steamer, in giving or in executing the orders which the occasion called for; and we think she is not, in any degree, responsible for the disaster.

In this view of the case, it is unnecessary to inquire whether any blame can be attached to The Mission. For, whether she was or was not managed unskilfully, or negligently, The Columbus not being in fault, is not liable for any damage sustained by the schooner.

But yet it is evident that there was great negligence on her part. For it is impossible that a vessel, lighted up like the steamer, would not have been seen from the schooner before she actually came in collision, if there had been ordinary care and watchfulness on board. It may indeed have happened that Brown, who went forward as the look-out, fell overboard by some accident, without the knowledge of Burgess, before The Columbus was in sight; and so, the want of a look-out, might have been occasioned by misfortune, and not by carelessness. But the conduct of the captain, in going below during his watch, and not remaining on deck to see that the seamen were at their posts and attending to their duty, was hardly consistent with good seamanship. And it is difficult to believe that the approach of the steamer could be unknown to Burgess, who was at the helm, until the actual collision, unless he was asleep at his post. The sails of his vessel might have hid the lights, but it is hardly credible that a wakeful and watchful seaman at the wheel would not have heard the noise of her machinery before he felt the collision. We do not, however, pursue this inquiry, because it is not material

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to the decision. And as, in the opinion of the court, no fault \*183] is imputable to The Columbus, the \*decrees of the circuit court must be reversed, and the libel dismissed.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, 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 libel, with costs in that court.

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JOSEPH IASIGI AND THOMAS A. GODDARD, PLAINTIFFS IN ERROR, *v.* JAMES BROWN, AND THOMAS B. CURTIS, TRUSTEE OF SAID BROWN.\*

Where an action was brought against a person for making false representations of the pecuniary condition of a certain party, whereby the plaintiff had been induced to sell goods upon credit, and had incurred loss, evidence conducing to show that the statements of the defendant were false, ought to have been allowed to go to the jury.

The defendant having written to his own agent, and headed the letter confidential, it was for the jury to say whether or not it was intended for the exclusive perusal of the agent.

It was also for the jury to say, on a thorough examination of the letters and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the party, to which the writer knew he was not entitled.<sup>1</sup>

THIS case was brought up by writ of error from the circuit court of the United States for the district of Massachusetts.

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\* Mr. JUSTICE CATRON did not sit in this cause.

<sup>1</sup> APPLIED. *West v. Smith*, 11 Otto, 270. REVIEWED. *Barreda v. Silsbee*, 21 How., 168.

The general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury, or, in other words, where

the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation. [*Elting v. The Bank of the United States*, 11 Wheat., 59; *Barreda v. Silsbee*, 21 How., 146, 167.]

*West v. Smith*, supra.

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The entire history of the case is given in the opinion of the court.

It was argued by *Mr. Bartlett*, and there was also a printed brief by *Mr. Lawrence*, for the plaintiffs in error, and by *Mr. Lord* and *Mr. Merwin*, for the defendants in error.

The counsel for the plaintiffs in error, made the three following points, of which the reporter has only room to give the argument upon the first.

I. That the rejection of the proffered testimony by the district judge, "as immaterial, and as insufficient, when taken in connection with the other evidence, to authorize the jury to find a \*verdict for the plaintiffs," and his further [\*184] peremptory directions to the jury, without the consent of plaintiffs, to return their verdict for defendant, was unwarranted by law, and a departure from the practice and principles established by this court, and by the highest local tribunal, for the conducting of trials at *Nisi Prius*.

II. That if it could be deemed competent and lawful, in any case, to withdraw from the jury the determination of facts, where proofs legally admissible, and having a possible tendency to support the issue, have been introduced or offered, yet having regard to the character of the facts proved and offered for proof in this case, and the nature of the issue, the questions were purely questions for a jury.

III. That if in this case, resting, as it does, on charges of actual and not constructive fraud, involving, as it must, a question of intention, it be in the power of the judge, against the consent of plaintiffs, to determine the value of the testimony, and direct a verdict, (upon the ground that such course is equivalent to a demurrer to evidence,) even then the plaintiffs submit that, tried by the rules pertaining to a demurrer to evidence, the judge erred in directing a verdict for defendant.

1. The first proposition asks the judgment of this court upon a proceeding, not a mere indifferent matter of practice, but one that involves the substantial rights of parties; and that question is, whether in any case, after the introduction or offer of evidence legally competent, and having a bearing on the issue, it is the right of a judge at *Nisi Prius*, upon his view of the value of the proofs, peremptorily to direct, against plaintiff's consent, a verdict for defendant.

It assumes, what is apparent throughout the opinion of the district judge, that there was evidence to be weighed.

This question is to be determined, as well by the principles

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heretofore settled by this court, as by the "modes of proceeding" of the state of Massachusetts, which by the acts of congress of 1789 and 1792 have been adopted into the courts of the United States.

A peremptory direction to a jury to return a verdict for a defendant, after the introduction of evidence competent to sustain the issue, cannot be distinguished in principle, though it differs in form from an order of nonsuit, and so it has been held. *Morgan v. Ide*, 8 *Cush.* (Mass.), 420.

It has been repeatedly settled by this court that it is not in the power of the judge, without the plaintiff's consent, to order a nonsuit. *Elmore v. Grymes*, 1 *Pet.*, 469; *De Wolf v. Rabaud*, *Id.*, 476; *Crane v. Morris*, 6 *Id.*, 598; *Silsby v. Foote*, 14 *How.*, 218.

\*185] \*It has been settled in the same manner in Massachusetts by the latest case directly on the point, and so treated in the local books of practice. *Mitchell v. New England Insurance Co.*, 6 *Pick.* (Mass.), 117; *Colby's Pr.*, 225.

The ground assigned by this court is as follows: "The circuit court had no authority to order a peremptory nonsuit, against the will of the plaintiff; he had a right, by law, to a trial by jury, and to have had the case submitted to them."

The same principle prevails in England. "It also appears that the plaintiff is in nowise compellable to be nonsuited after he has appeared, and therefore if he insist upon the matter being left to the jury, they must give in their verdict, &c." 2 *Lee's Dict. of Practice in B. R. and C. B.*, 958.

Such being the principles settled by this court and the state court, as to nonsuits, it remains to inquire what is the doctrine of both as to peremptory instructions to juries to return verdicts as directed, and it is submitted that there are numerous decisions in this court, by which it is settled that where there is any legally competent evidence offered, the case must be submitted to the jury with appropriate instructions. Thus in *Greenleaf v. Birth*, 9 *Pet.*, 292, the court say, on p. 299: "Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested: but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence, and determining what effect it shall have." So in *United States v. Laub*, 12 *Pet.*, 1, the court say: "If the court erred in not giving the instructions asked on the part of the plaintiff, it must have been on the ground that no evidence, tending to prove the matter in dispute, had been given to the jury. For it is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence are for the consid-

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eration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial." *United States v. Laub*, 12 Pet., 1, 5.

Again: "The first prayer of defendants to instruct the jury that upon the whole evidence the plaintiffs ought not to recover, if it might properly have been granted in any case in which any testimony was offered, certainly ought not to have been granted if any possible construction of that testimony would support the action." *Bank of Washington v. Triplett et al.*, 1 Pet., 25, 31. See also *Chesapeake Ohio Can. Co. v. Knapp et al.*, 9 Id., 541, 568; *Scott v. Lloyd*, 9 Pet., 418, 445; *Roach v. Hullings*, 16 Id., 319, 323.

The doctrine of the supreme court of Massachusetts is well established, namely, that the court have merely the power to advise \*a verdict, even where a verdict, inconsistent with that advice, ought to be set aside. *Davis v. Maxwell*, 12 Metc. (Mass.), 286; *Morgan v. Ide*, 8 Cush. (Mass.), 420.

If the rule of this court and of the state court be as is contended, it would be decisive of the case, but it is submitted that it is founded on principles essential to the safety of suitors.

It does not exclude the power of the judge to determine the legal competency or admissibility of evidence; but merely of peremptorily deciding as to its weight.

If the verdict be against his advice to the jury, a motion for new trial, see 12 Pet., 1, brings with it an opportunity of careful review—it may be with the aid of his associate—which the rapidity of a trial has not offered.

At all events, peremptory directions to return verdicts, upon the ground that they are analogous to a demurrer to evidence, are fatal to the losing party in a court of error, to which court the appearance, demeanor, and credibility of witnesses can never be transferred, and demurrs to evidence are not encouraged in this court. *United States Bank v. Smith*, 11 Wheat., 171.

The first two points of the counsel for the defendant in error related to the statute of Massachusetts, which, they contended, was similar to 9 George IV., ch. 14, § 6, called Lord Tenterden's act, the English cases under which were *Lyde v. Barnard*, 1 Mees. & W., 101; *Haslop v. Fergusson*, 7 Ad. & E., 86; *Swann v. Phillips*, 8 Id., 457; *Devaux v. Steinkeller*, 6 Bing. N. C., 84.

III. The representation, being now, of necessity, a statutory document, the construction of it belongs to the court.

And this, whether the interpretation is to be made on the paper singly, or on previously existing facts, sometimes to be

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taken into view, to put the court in the place of the writer in understanding his language.

The question does not become a mixed question of fact and law, unless there be evidence that the language was used in a special or technical sense, or the auxiliary facts be proved by uncertain or conflicting evidence. In the present case there was no evidence of the use of words in any special or technical sense; nor was there any conflict of evidence as to any fact needed in the understanding of the letters. *Bell v. Bruen*, 1 How., 183; *Turner v. Yates*, 16 Id., 23.

IV. The plaintiffs are not entitled to recover, because of the terms of the letter of Mr. Curtis, to which it was a reply.

The letter of Curtis, of April 5, invites a reply, "to be discreetly used by myself."

1. It is widely without the statute, to allow the information to be used by another.

\*187] If, in Mr. Brown's letter, he had incorporated this phrase, "my opinion is to be used by yourself only," it would be no stronger in effect; and to allow a construction of such a letter to embrace all persons to whom it should be shown, could not be done without disregard to the statute, and to common fairness. This would not be to substitute a principal, but would introduce a multitude of strangers.

2. The letter of Mr. Curtis invites information to be "discreetly used by myself."

It cannot be that this commits the document to be used at the discretion of all to whom it shall be shown. Written to a discreet man, the reply, true or false, might be very harmless; to an indiscreet man, it might be the reverse. Written to one man, the utmost conceivable credit given on it might not exceed hundreds; to another, it might amount up to hundreds of thousands.

3. Written to Mr. Curtis, it would be limited, in Mr. Brown's understanding, to the use of it only in the business of his agency; operating only on the standing of the parties receiving credits from him, who might deal with the debtors inquired of, and thus be incapable of serious injury; but read by another, acting on his own eagerness or necessities to sell, it might prove ruinous.

4. Founding the action for false representation on the principle of holding a man to the consequences of his statements of credit, fairness requires that such facts should be made known to him as would enable him to see the consequences; and that he should not be held to unknown results which could not have been foreseen without a knowledge which might and ought to have been imparted.

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5. The plaintiffs cannot set up that they were unaware of this limitation in the communication to Mr. Brown; the two letters are but one communication, and if they claim it at all, it must be with the limit under which it was obtained.

V. The letter of April 7 was, by its terms, exclusively limited to Mr. Curtis alone, by its being inscribed "Confidential."

1. The plain meaning of this word, as applied to a letter, is, that the communication is confided to him to whom it is addressed, and to no other person: "to be kept in confidence, private; as, a confidential matter." Webster's Dic.

2. This signification is confirmed, by its being superadded to the words of Mr. Curtis's letter; notwithstanding the promise, that the desired opinion would be discreetly used, and by himself, (which warranted any action in his own dealings,) the additional caution was, that the communication itself should be kept wholly personal between the writer and the addressed party.

The word "confidential" is not capable of a sense that permits \*it not only to be shown to a stranger, or any [\*188 number of strangers, but to be used by him or them, and in his or their discretion, and acted on by him and them, at any future time, and to an unlimited amount. Such a sense of the word is not shown by any evidence, nor called for by any individual justice in this case, nor by any general principle of policy or justice.

3. The letter of 7th April was also "confidential," in consequence of its communications concerning the defendant's own involvements and connection with the parties inquired of.

4. The conduct of Mr. Curtis in submitting the letter to the plaintiff's inspection, on his urgent entreaties, has no bearing on the question. He, in strictness, violated the confidence placed in him; doubtless under the tacit obligation on the part of the plaintiffs to receive it, as he, Curtis, did, only in reference to the existing claims of Iasigi, and to quiet him.

VI. The subsequent letter of Brown, Brothers, and Co., of June 27 has no bearing on the construction of the letter of April 7.

1. It does not in terms, or by implication, refer to it. The phrase "we continue," &c., is fully warranted, as to all reference, by a public and general knowledge of the previous friendly relations and dealings of Brown, Brothers, and Co. with the parties referred to.

To introduce a paper by relation into instruments under the statute of frauds, express reference is necessary. Per Mr.

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Justice Nelson, *Salmon Falls Manufacturing Co. v. Goddard*, 14 How., 456, and cases cited there.

2. The letter referred to that of Curtis of 26th June, who said: "I replied, that I believed you thought favorably of the concern," (p. 7,) showing nothing as to having exhibited the previous letter to any one.

VII. The conversations in October and January following, cannot be used in the interpretation of the letter of 7th April.

1. The conversation of January, spoken of by Mr. Grant, (p. 13,) was in relation to his own sales, which he says were made on the faith of the letters (meaning both); whereas he states: "I never saw the letter till after the failure, but got its contents from Mr. Iasigi." P. 13.

Mr. Iasigi's statement of the contents cannot be the basis of any inferences within the statute. Nor does any thing appear to have been said in this conversation as to any right in Mr. Curtis to exhibit the first letter.

2. The conversation of October 15 is wholly inadmissible, under the statute of frauds of Massachusetts. It consists of very loose oral evidence, not distinguishing what was said by the two Messrs. Brown; it was given, in order to render a letter, \*which was in its terms confidential, in effect \*189] public, with the widest and most indefinite responsibility. This would defeat the statute in the most palpable manner.

3. Again: It seeks to involve the defendant in a responsibility for the first letter, because he or his partner declared that it was a "guarded" letter. This is not only giving oral evidence to vary the writing, but adds to it the remoteness of an insufficient inference from the oral evidence.

4. Again: Its being a guarded letter, had reference to its effect on Mr. Curtis himself, and by no necessity implied guarded as to others, who, by its being confidential, were not expected to see it.

5. Again: It is attempted to argue, from the silence by Messrs. Brown, in reference to the exhibition of the letter by Mr. Curtis, that he had originally intended it. But this is giving in evidence mere silence, in order to extend the effect of a statutory document.

6. But lastly: The purpose and object of this conversation was to press a supposed moral right in these gentlemen, Iasigi, Grant, and Kendall, to share in an attachment made by Messrs. Brown, and not at all to discuss their liability at law on the letters in question.

VIII. The offers of proof, tending to show the facts stated in the letter of April 7 false and suppressive, were wholly insufficient and inadmissible.

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1. Supposing such evidence given, it would have been no warrant to impute an intent, that the letter should be shown, much less would it tend to enlarge or contradict its language.

2. The evidence seeks to contradict the effect of a writing by oral evidence, that it would have effected frauds if its terms were disregarded.

3. The evidence offered seeks to reverse the policy of the statute. This policy was to shield all men from charges of fraud, without a writing to be falsified. The offers attempt first to try the man for fraud, and thence to imply a sufficient representation.

Last. It was the duty of the judge to have directed the jury to bring in a verdict for the defendants. *Parks v. Ross*, 11 How., 372.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before us by a writ of error to the circuit court of the United States for the district of Massachusetts.

The plaintiffs are merchants in Boston, and deal largely in wool, and, prior to the 4th of April, 1851, sold, occasionally, to \*two corporations in the State of Connecticut, called the Thompsonville Company and the Tariffville Company, and received therefor their notes, indorsed by Orrin Thompson. And, with the view of making further sales to them, having become doubtful of their pecuniary means and ability to make payment in future, the plaintiffs applied to Thomas B. Curtis, of Boston, the agent of defendant, to ascertain his opinion as to any possibility of loss, by selling largely on credit to said corporations or to Thompson; the plaintiffs knowing that the defendant was friendly to the companies, and intimately acquainted with their pecuniary condition.

A letter was written to defendant, by his agent, Curtis; and an answer was received, as alleged in the declaration of the plaintiffs, which induced them to give large credits to the two companies and Orrin Thompson, when, at the time, they were insolvent, which fact was known to the defendant.

The points in the case are stated in the bill of exceptions, and arise on the construction of the above letter and one of a subsequent date, and on facts proved and offered to be proved, which conducted to show, as plaintiffs insist, the fraudulent intent with which the letters were written.

The first letter, from Curtis to Brown, bears date the 5th of April, 1851, and reads as follows: "Dear Sir—I have your note of yesterday, but have scarcely had a moment to peruse it this morning. My object, at the moment, is to ask your opinion

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as to any possibility of loss, by selling largely to the Thompsonville Company or Orrin Thompson. Whatever that opinion may be, it will be discreetly used by myself."

The reply to this letter is marked "confidential," and dated "New York, 7th April, 1851. T. B. Curtis, Esquire. Dear Sir: With respect to Thompson and Co. and Orrin Thompson, I have to say, that our house done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austen and Spicer, they were unfortunately on their paper (received for sales of carpets) for \$183,000; this threw, suddenly, so heavy a burden on Thompson and Co., that Messrs. Hicks and Co. and ourselves looked into their affairs, and feeling that they had an abundance to pay every one and have a handsome sum left, if they continued their business, we jointly advanced the money to pay their endorsements as they came round, for which advances we have \*191] <sup>\*security.</sup> In order, however, to relieve them from the necessity of borrowing, and needing more cash capital to carry on the business comfortably, both the companies alluded to owing Messrs. Thompson and Co. each about \$375,000, making, together, \$750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for \$750,000, to secure the payment of those bonds, which are payable in six, eight, and ten years. A gentleman goes out to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiation of these bonds, and the securities held, would pay off all the advances made by ourselves, Messrs. Hicks and Co., and of W. S. Wetmore, who also made them some advances. From Thompson's statement of the business of the factory, they are doing a good, nay, a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run.

"If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother Willian to take from sixty to one hundred thousand dollars for himself and for me, whatever they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will also take some of them. Since the failure, Thompson & Co. have laid their

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hands on Austen and Spicer's property, to the extent of fifty thousand dollars, reducing the risk to one hundred and twenty-three thousand, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth four hundred thousand dollars, any loss that can now occur by Austen and Spicer does not hurt him much. All they want is the negotiation of the bonds, to make them move on with perfect comfort. (Signed) JAMES BROWN."

The next letter from Curtis to Brown is dated "Boston, 26th June, 1851. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool, and wish to continue to do so."

The answer to this letter was: "Dear Sir—We are in receipt of yours 26th instant; contents noted. We continue to have a favorable opinion of the concern you allude to.

(Signed) BROWN, BROTHERS AND CO."

Mr. Curtis being called as a witness, said he was agent for Brown, Brothers and Co., who carried on, in the city of New York, an extensive banking business. He wrote his <sup>[\*192]</sup> first letter at the request of Iasigi, and never showed the reply except to him and his friend, Mr. Skinner, until after the failure of the Thompsons. When he wrote to Brown, he did not let him know that the information requested was for any other person than himself. On the day his first letter was written, Iasigi said to him that he held a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson, of New York; that by the recent failure of Austen and Spicer they had lost money, and he was solicitous about the paper he held. Witness supposed it amounted to about the sum of \$40,000. He said Brown was the friend of Thompson, and witness was requested to ascertain his standing by writing to Brown.

As the answer was marked confidential, the witness, when Iasigi first read the letter, declined handing it to him to show to his partner, but on his calling, it was shown to him also. Witness expressed a favorable opinion as to Iasigi's getting his money. Mr. Brown never authorized the witness to show his letter to any one. After the failure of Thompson, Iasigi stated he had collected his debt, but that he again trusted them. The witness remarked, that on that letter you should not have trusted them. He asked to see the letter, and on

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reading it he said, if you had not stated this to be the same letter, I should not have believed it.

The witness stated, some of our clients prior to this had been in the habit of selling wool to Thompson and Co. There were five or six firms, importers of wool, who had credits with me. It was highly important to me and my principals that I should know the standing of this great concern, because large amounts of credits were being invested in wool, by houses which might or might not be jeopardized by selling to that concern; I mean invested by correspondents of Brown, Brothers and Co., who had credits for them.

Mr. Grant, a witness, stated that he, Iasigi, and several others who had sold wool to the two companies and Thompson, had an interview with the defendant at his office in the city of New York, where a conversation respecting the letters was had, principally between Iasigi and Brown, who replied that the letter of the 7th of April was a guarded one, and as to the second letter, it was only a statement that "we continue to have a favorable opinion of the concern." He proceeded to say that the connection of Brown, Brothers and Co. with Mr. Thompson had been of long date; that they had a great number of transactions together, and that at the time the April letter was written, they intended to carry Mr. Thompson through; but that Thompson had deceived them. \*193] He repeated several times that \*this was a guarded letter, and as it was written in entire good faith, and as they had lost much more than we had subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them.

As the company was about separating, Mr. Stewart Brown observed: "If you had called on us, gentlemen, and conversed with us, instead of writing, you would not have sold this wool. That the letter was a guarded one, was several times repeated. That they had great confidence in Thompson; that at the time the letter was written they had lost their confidence, but still meant to carry him through in good faith; but being unable to do so, and having lost their confidence, the letter was guarded." On being asked by witness, if, at the time the first letter was written, he had all the property of Orrin Thompson conveyed to him, he replied: "No, sir, not all his property, but his real estate." There was no objection at this time by any one, that the letter was confidential. The Browns refused to acknowledge any responsibility.

After this evidence had been given, the plaintiffs offered evidence, not objected to or excluded, except as hereinafter

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stated, tending to prove that certain statements in the letter of April 7, 1851, material to show the property and credit of the two companies, and of Orrin Thompson, and the safety and expediency of selling them goods on credit, and material to influence and determine the judgment of one who should read the letter, in regard to the safety and expediency of so selling goods on credit, were false at the time the letter was written, and were then known to the defendant to be false. And that the defendant, prior to the 7th of April, alone and jointly with one Hicks, had taken conveyances, in mortgage or absolutely, of all Orrin Thompson's property, real and personal, with some small exceptions, to the amount of one hundred and eighty-eight thousand dollars, as security for the debt and liabilities of the house of Thompson and Co. to defendant's house and said Hicks, amounting to over five hundred and nine thousand dollars. And also offered evidence to prove that defendant had an interest of a pecuniary kind to sustain the credit of said Thompsonville Company, said Tariffville Manufacturing Company, and Orrin Thompson, and to induce extensive sales of goods on credit to them.

And other evidence was offered conducing to show that the letter was written with a fraudulent intent, and that it was intended for other persons than Curtis. And the plaintiffs proved that they made the sales stated in the declaration, relying on and trusting to the statements in said letter.

But the evidence, as above offered, was rejected as immaterial and as insufficient, when taken in connection with the other \*evidence above set forth, to authorize the jury [\*194 to find a verdict for the plaintiffs.

And the court thereupon ruled and held, that the plaintiffs had not maintained their action, and directed a verdict for the defendant. And a verdict was accordingly so rendered. To which rulings and direction the counsel for the plaintiffs excepted.

The 3d section of the act of Massachusetts, to prevent frauds and perjuries in contracts and actions founded thereon, published in the Revised Statutes of 1836, provides that "No action shall be brought to charge any person, upon or by reason of any representation or assurance, made concerning the character, conduct, credit, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

As the letter was written in New York, a doubt has been suggested whether this statute can apply to the case. The letter was intended to operate in Massachusetts, and conse-

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quently the law of that State applies to it. But it is not perceived that the statute can have any other effect than to require the representation, on which the defendant is charged, to be in writing.

No one contends the power and duty of the court to construe all written agreements or papers which are given in evidence. This is not the question involved in this case. No individual can be held responsible for a statement of facts, however injurious they may be to an individual or company. But when there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and, especially, if this be done through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must, as in this case, be outside of the writing. And if these facts may not be established by parol evidence, there can be no remedy in such cases, however gross the fraud or ruinous the consequences may be.

It is contended that the letter of the 7th of April, being marked confidential, could have been intended only for Curtis, the agent, and that he was not authorized to show it to the plaintiffs. In his testimony Mr. Curtis says Brown never authorized him to show the letter. There may have been no express authority to show the letter, but the intention of the writer, in this respect, can be best ascertained by reference to the facts and circumstances under which it was written.

In his letter of April the 5th, Mr. Curtis requested to know "the opinion of the defendant as to any possibility of loss by selling largely to the Thompsonville Company or Orrin Thompson; \*and he remarks, whatever that opinion

<sup>\*195]</sup> may be, it will be discreetly used by myself."

Mr. Curtis states, when under examination as a witness, that he was then, and had been for several years, acting as the agent of the Browns, and that was his principal business. He said that he was not, at any time, a seller of wool to the factories of Orrin Thompson. This employment of the agent must have been known to his principal, and it appears in the proof that when the plaintiffs and others had an interview with the defendant, in New York, he spoke of the letter being guarded, but made no objection that it had been written to his agent in confidence, and ought not to have been shown to the plaintiffs.

In view of these and other facts, it might have been submitted to the jury whether the defendant, in marking his letter "confidential," intended it for the eye of his agent only. The terms of the letter, independently of the above facts, would

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scarcely authorize such an inference. The "opinion will be discreetly used by myself." This was notice to Brown that the opinion was to be used, and how could it be used by the agent, who made no sales of wool to Thompson on his own account, without imparting the opinion to others; but "the opinion will be discreetly used by myself." It shall not be made known by any other person than myself, and you may rely on my discretion. In view of the facts, the jury should consider whether the word "confidential" might be construed to mean, in confidence that you will use my opinion discreetly by yourself, as you propose, or whether it restricted the letter to the agent only.

This seems to have been the construction given to the letter by the agent. He suffered Iasigi to read it, but refused to give it into his hands to show to Skinner. Had the writer intended that no one should read the letter but Curtis, he would probably have said so. Such a restriction was not necessarily imposed by the terms of the letter, in view of the facts proved. Its detailed statement of facts in regard to the embarrassments of the two concerns and of Orrin Thompson, and how they had been relieved by himself and others, and enabled to do a good, nay "a profitable business," &c., would be a matter, in connection with other facts, for the jury to consider, and to determine whether the letter could have been written for the eye of the agent only, who at no time sold wool to Orrin Thompson.

In another letter written to the defendant by Curtis, he says: "A friend of ours desires me to inform him how far it would be satisfactory to me, (you,) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now, I wish to know what your present feelings are in respect to that concern, there being several among \*my friends who have heretofore sold them wool, and wish to continue to do so." To this, [\*196 Brown, Brothers, and Co. reply: "We continue to have a favorable opinion of the concern you allude to."

This letter sheds some light on the first letter of Brown. It was on the same subject, and was a reiteration of what had been stated more particularly and at large in the first letter. In fact, the words "we continue to have a favorable opinion of the concern you allude to," refers to an opinion before expressed.

As the court instructed the jury to find for the defendant, on the ground that the plaintiffs had not sustained their action, if the plaintiffs gave, or offered to give, any evidence which was fit to be considered by the jury, the judgment must be

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reversed. Any evidence conduced to prove that the statements of the defendant, in the letter of the 7th April, in regard to the condition of the Thompsonville Company and Orrin Thompson, and their ability to meet their engagements, and in regard to the value of Thompson's property, were false, was competent evidence as tending to prove the facts. And especially was the testimony of Grant admissible, who heard the defendant say, if the plaintiffs had called on them personally, they would not have sold their wool to the company; also the statement that before the letter was written, Brown admitted that he had lost confidence in Thompson, and therefore the letter of the 7th of April was guarded. These, and all other facts which conduced to show that the defendant acted in bad faith in writing that letter, are proper to be considered by the jury.

By whatever motives the defendant may have been actuated, he is not to be held responsible, unless his letters did mislead, and were intended to mislead the plaintiffs. And it will be for the jury to say, on a thorough examination of the letters, and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the Thompsonville Company and Orrin Thompson. If an impression, not only of their solvency but of their success in business, so that by selling largely to them no more than the ordinary risks of business were incurred, was made and authorized, by the letters, while, at the same time, their true condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. But of this the jury are to judge, they being the triers of the facts outside of the letters, and which should be submitted to them for their consideration and decision.

We have necessarily referred to the leading facts stated in the bill of exceptions, in order to show that the circuit court \*197] erred in \*withdrawing them from the jury; but we express no opinion on the merits of the case.

The judgment of the circuit court is reversed, and the cause is remanded for a *venire de novo*.

Mr. Justice NELSON, Mr. Justice CURTIS, and Mr. Justice CAMPBELL dissented.

Mr. Justice CURTIS.

I do not agree with the majority of my brethren in this case. But, as I may be required to preside at the trial which

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has now been ordered, I am not willing to enter into a discussion of the evidence heretofore given, and which will doubtless be repeated on another trial. Without doing so, it is not practicable to exhibit the legal principles which, in my opinion, should govern this case. I, therefore, merely say I do not concur in the judgment.

Mr. Justice CAMPBELL, dissenting.

The importance of this cause renders it proper that the reasons for a dissent from the judgment should be placed on the record. The charge of the plaintiffs is, that in anticipation of large sales of merchandise to two manufacturing corporations of Connecticut, on a credit, and distrustful of their condition to govern and direct their conduct, they sought of the defendant, through his agent, an opinion and information of them and their indorser, Orrin Thompson, as to the risk they would encounter. That the defendant was intimate with their affairs, and knew they were untrustworthy; but well knowing the motives of the plaintiffs' inquiry, they wrote to their agent a letter, for exhibition, containing false and fraudulent statements and representations, calculated and designed to increase the credit of the corporations and Thompson, and to induce the plaintiffs and others, who, like them, should see the letter, to sell their property to them. These averments, describing the circumstances under which the information was obtained, and the knowledge of the defendant of the aims of the plaintiffs, are, in my opinion, material, and should be substantially proved.

In *Pasley v. Freeman*, 3 T. R., 51, Justice Ashurst, reply ing to the argument that, should the principle of that suit be supported, actions might be brought against any one for telling a lie by the crediting of which another sustains damage, said "No; for, in order to make it actionable, it must be accompanied with the circumstances averred in the count, namely, that the defendant, intending to deceive and defraud the plaintiff, did deceitfully encourage and persuade them to do the act and for the purpose made the false affirmation, in consequence of which they did the act." And Lord Kenyon said two grounds of the action concur: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage."

The case of *Pilmore v. Hood*, 5 Bing. N. C., 97, was that of a  
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defendant about to sell a public house to one who had agreed to purchase. He fraudulently misrepresented to him its receipts. The bargain having failed, the sale was made to another, who had heard these representations and acted upon them with the knowledge of the defendant. Lord Chief Justice Tyndal said that notice to the defendant was "an important ingredient in the case," and adapting the terms of *Langridge v. Levy*, 2 Mees. & W., 532, he says: "We do not decide whether the action would have been maintainable if the plaintiff had not known of and acted upon the false representation. Nor whether the defendant would have been responsible to a person not within the defendants' contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

In *Gerhard v. Bates*, 2 El. & B., 476, the misrepresentation was contained in the prospectus of a bubble company, of which the defendant was a director. Lord Campbell said, "that had the plaintiff only averred that afterwards, having seen the prospectus, the plaintiff was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant, and the act of the plaintiff, from which the loss arose; but the second count goes on expressly to charge the defendant, that by means of the said false, fraudulent, and deceitful pretences and representations, he wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and holder of the shares, and alleges the loss sustained to have been the direct consequence of the defendant's act. Thus the wrong and the loss are clearly concatenated as cause and effect."

The allegations, therefore, being essential to the action, the \*199] \*question is, was there any evidence to go to the jury for their support?

I leave out of consideration, for the present, the statute law of Massachusetts. The charge of the declaration is that the letter was written for exhibition to the plaintiffs and among dealers like the plaintiffs, and to deceive those who should see it. The proof of the plaintiffs is that until after the failure of the corporations, only two persons were permitted to see it, or heard of its contents from Mr. Curtis. One of these was Skinner. The proof in regard to the exhibition to him

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is: "Iasigi asked me (Curtis) to let him take the letter to his friend Skinner, with whom he always advised. I (Curtis) again said the letter was confidential, and that I could not suffer it to go from my office. He then said, will you let Skinner see it here, repeating that he always advised with Skinner on matters of importance, and that he wanted him to see it. Upon this solicitation I consented, and Skinner came with Iasigi, and read the letter."

There is no evidence that Skinner ever had a transaction with the corporations of Connecticut, or conducted a business which could bring them into any contact or connection. And surely this evidence can afford no support to the averment of a purpose to defraud or injure him or others through him.

The charge in the declaration, by this evidence, loses its generality, and is reduced to the imputation of a mischievous and fraudulent design upon the plaintiffs alone. The only use, "the discreet use," of the opinion contained in the defendant's letter, consisted in communicating its contents to Iasigi himself, and to his confidential friend, at his solicitation, and that he might advise intelligently with him. It then becomes necessary to inquire of the circumstances under which that communication was made to him. It was not told to the defendant that the plaintiffs had asked for information of Mr. Curtis, nor that his letter was written at his request, nor was he advised until several months afterwards that any use had been made of the letter. I do not think it necessary to consider how much the power of the agent was limited by the mark "confidential," on the face of the letter, but I will suppose that it was nothing more than a repetition of the caution that it should be "discreetly used" by Mr. Curtis, and that the defendant is liable for the use he made.

The evidence on the record comes from the plaintiffs; and in reference to the circumstances of the exhibition, from a single witness. The agent of the defendant was the near neighbor and friend of the plaintiffs, but had never had any intercourse of business with them, either for himself or for his principal.

Such being their relations, Iasigi, on the 5th April, came to \*him as a friend and neighbor, and stated, that "he had a large amount of notes of certain factories in [\*200] Connecticut, indorsed by Orrin Thompson; that there had been a failure recently, in New York, (Austen and Spicer,) by which he thought the factories, or Orrin Thompson, or all of them, would lose money; and that he felt anxious as to the fate of the paper he held. He did not state the amount he held exactly, but Curtis was led to believe it was about

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\$40,000. He proceeded to say that Mr. James Brown was a friend of Orrin Thompson, and that he, Iasigi, had himself heavy dealings with him, and that he wished him (Curtis) to write to Mr. James Brown, and ask him about the standing of Thompson and his property. Curtis accordingly wrote, but did not state that he wrote at Iasigi's request." Upon this statement the particular form of the inquiry is open to, and will be the subject of remark hereafter. The question to Mr. Brown is: "What is your opinion as to any possibility of loss to the Thompsonville Company or Orrin Thompson?" The witness proceeds: "I was led to ask the information and to communicate the result to him in consequence of the friendly relations that had long existed between us, and further, because I thought it would tend to relieve Mr. Iasigi's mind, and not with a view to future sales." He says further: "at these interviews about my letter, and Brown's reply, there was nothing said about any anticipated or prospective operations by Iasigi. Mr. Iasigi said the credits were due to him." The witness "never knew that he had sold his notes," but was asked if he would guarantee them.

This statement of the circumstances of the exhibition of the letter to Iasigi contains the whole case. No other letter of the defendant was seen by him, no other communication was made to him, nor was this letter after this produced to any other person before the failure of the corporations. Now the proof of the plaintiffs is, that they held but a single note, of less than \$800, running on time, at this date; the others had been sold in the winter previously, in the New York market, without indorsement or guarantee. They had a book debt then due, upon which a large payment was made within ten days after, all of which has been collected, and about which no solicitude was expressed. It likewise appears that Iasigi did contemplate further operations, for in January Thompson had taken samples of wool to arrive, and which did arrive, and was sold about six weeks from this interview.

Before closing this statement of the evidence, it is proper to note the impression that the defendant's letter made upon those who read it, as an accrediting document.

Curtis reading it with the object of deciding whether the \*201] \*corporations and Thompson would meet their negotiable notes for two or three months, was willing to guarantee the debt for the usual commission; but when told that credits on sales were given afterwards, he "expressed his surprise that Iasigi should have sold after reading that letter." Skinner, who probably knew the secret purpose of Iasigi, and interpreted the letter accordingly, was not "favorably im-

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pressed." Iasigi, in reply to the expression of surprise by Curtis, quoted above, asked to see the letter again, and after reading it said: "If you did not say that this was the same letter I read in your office, I should say that I had never seen this letter before;" and the Browns, when interrogated upon it after the failure of these parties, said, that the letter was a guarded one and did not warrant credits on sales to them. Having collected the facts important to the issue, the question arises, do they constitute a case to go to the jury upon this declaration? The evidence is that the plaintiffs anticipating consignments of wool, and sales to these Connecticut corporations, and desiring the defendant's information and opinion of them, through Iasigi, approached his neighbor and friend, Mr. Curtis, the confidential agent of the defendant, to engage him to procure this opinion and information from his principal in New York. He approaches Curtis with a statement of anxieties for debts, existing in the form of negotiable notes running on time.

These statements were certainly not accurate, and are, apparently, insincere; and it will be noticed that the motive alleged in the declaration, as prompting the plaintiffs, was not revealed, and if it existed, was disguised under the apprehensions that were then expressed. The evidence shows the plaintiffs did not have notes of the amount spoken of, and that the book debt was then due. There is a discordance between this evidence and the inquiry proposed in the letter of Curtis. That inquiry discloses no apprehensions of loss upon existing debts, but refers to perils to arise on future transactions. If Iasigi suggested the form of the inquiry with a view to obtain information to guide his conduct, as the declaration avers, and concealed his aim, and by affecting an alarm he did not feel, covered that aim from Curtis, it has the appearance of circumvention. Curtis says he wrote his letter in consequence of his friendship for the plaintiffs, to calm their fears, and without an intimation of prospective operations. Curtis gave a pledge that he would use the letter of the defendant discreetly. Before the letter was placed in the hands of the plaintiffs, they were informed it was "confidential," and Iasigi read that upon the letter itself. Iasigi again confirms the impression of Curtis, that apprehensions of loss upon his notes were still moving him, by addressing queries as to the \*probabilities of his getting his money, and [\*202 importunes Curtis to exhibit the letter to his friend, that he might profit from his counsel. The declaration avers that this letter, exhibited under such circumstances, was written for exhibition to inquiring dealers, to encourage

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and persuade them to give credit to these corporations, and was shown to the plaintiffs with that design. That when it was written and exhibited, the anticipated transactions from which loss has followed, were known to the defendant, and the object of the exhibition was to induce the plaintiffs to make them.

I find no support for these averments, but a direct and palpable contradiction of them. This conclusion upon the evidence renders a discussion of the statute of Massachusetts, (Rev. Stat., ch. 74, § 3,) requiring that representations of the character, ability, and conduct of another person should be in writing to support an action, unnecessary. But the discussions upon a similar statute fortify the conclusions contained in this opinion. "The true construction of the statute," says Lord Abinger, "is, that the representation or assurance should concern or relate to the ability of the other person effectually to perform and satisfy the engagement, of a pecuniary nature, into which he has proposed to enter, and upon the faith of which he is to obtain money, credit, or goods." 1 Mees. & W., 101, 123. "He who has money to lend or goods to sell on credit, and doubts the ability of the borrower, or buyer," says Baron Gurney, "may exact his own terms; he may insist on having a representation or assurance in writing, of the ability, from a third person; and if that be refused, he may keep his money and goods. If he thinks fit to trust without that, he has no right to resort to the responsibility of the person of whom he inquires." S. C., 107. Baron Alderson says: "If we refer to the cases which had occurred before the legislative provision, I think it will be found that the decision in the class of cases commencing with *Pasley v. Freeman*, had raised a well-founded complaint in the profession of having virtually repealed the statute of frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view, was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle. He adds, "that fraud, in substance, amounts to an implied guarantee of the plaintiff's solvency."

Had Curtis given a guarantee to the plaintiffs of their debt, either for or without a commission, and accompanied the act with statements of the pecuniary condition of the debtors, and expressions of confidence in his solvency wholly unwarranted, it is clear that it would have imposed no responsibility for sales \*not then spoken of or alluded to, which were not made for several weeks afterwards, which were not contemplated by one of the parties, and if by the other, were con-

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cealed in all the intercourse that then took place. The statute was designed to reduce the liabilities, for the representations it describes, to some definite and appreciable limit; that the representations should be evinced in a written document, and that those who were to derive a benefit from it, as a security, should be ascertained from its contents; and that the liability on the document should not be extended beyond the engagements to which it had reference.

The questions embraced in this case, are exhibited in a short conversation detailed in the evidence of the plaintiffs. Curtis says: "After the failure of the corporations, in September, I had an interview with Mr. Iasigi. I met him in the street; he accosted me in a state of excitement; he said: 'Mr. Curtis, Thompson has failed, and the Thompsonville Company has failed.' I said: 'I am sorry, but you have got your money.' He said: 'Yes, I have got the money that was owing to me, but I have trusted them again.' I expressed surprise that he should have trusted them again."

It was not with a declared purpose of trusting them again that Iasigi sought information of Curtis; nor was the confidential letter of Mr. Brown to his agent read, with the avowal that future operations were to be affected by the impression it made; nor was the questionable act of its exhibition superinduced by any suggestions of the existence of pending negotiations.

The objects disclosed by Iasigi were wholly incompatible with, and exclusive of, the notion of any legal responsibility for the accuracy or sufficiency of the letter, or even for a wilful misrepresentation.

He did not ask for information, proposing action, even in regard to the notes of which he spoke, nor did any alteration of his debt take place in consequence. He simply inquired of Curtis, that anxieties might be relieved and his apprehensions quieted.

The liabilities incurred in cases like that described in the declaration, are for a fraud productive of damage; of damage directly consequential and in the contemplation of the parties, as a result of the act done, and not for consequences remote, contingent, and arising from acts unconnected with the objects disclosed or comprehended by them.

*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 \*Massachusetts, and was argued by counsel. On consideration whereof it is now here ordered and adjudged [\*204] by this court, that the judgment of the said circuit court in

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The United States *v.* Nickerson.

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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*.

Mr. Justice CAMPBELL, Mr. Justice NELSON, and Mr. Justice CURTIS dissented.

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THE UNITED STATES, PLAINTIFF, *v.* LINDSEY NICKERSON,  
JUNIOR.

The act of Congress passed on the 29th July, 1813, (3 Stat. at L., 49,) enacts that the owner of every fishing vessel shall, previous to receiving the allowance mentioned in the act, produce to the collector the original agreement which may have been made with the fishermen, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector.

These latter words include the first branch, as well as the second branch of the sentence; so that the owner must not only swear to the truth of the certificate, but also to the verity of the agreement with the fishermen.

A person was indicted, in the district court of Massachusetts, for perjury, in swearing falsely to the agreement with the fishermen, and in swearing falsely that three fourths of the crew were citizens of the United States. As the district judge held that the act of Congress only required the owner to swear to the certificate of sailing, and not to the agreement with the fishermen, the person was acquitted.

Afterwards, when indicted in the circuit court, this person pleaded his former acquittal. This was a good plea; because the evidence necessary to sustain the indictment, with respect to the fishermen's agreement, might have been given by the United States in the first trial.

With respect to the oath that three fourths of the crew were citizens of the United States, the act of 1813 did not require that oath; but then the indictment did not purport to bring the offense under that act, but referred to the statutes of the United States generally.

This case came up from the circuit court of the United States for the district of Massachusetts, upon a certificate of division in opinion between the judges thereof.

In March 1854, Nickerson was indicted for perjury, by the grand-jury of the district court of the United States for the district of Massachusetts, which indictment was framed under the act of July 29, 1813, ch. 35, §§ 7, 9; (3 Stat. at L., 49;) revived February 9, 1816, ch. 14, (3 Stat. at L., 254.)

By section 7: "The owner of every fishing vessel of twenty tons and upwards, his agent or lawful representative, shall, previous to receiving the allowance made by this act, produce to the collector, who is authorized to pay the same, the original agreement or agreements which may have been made with the \*fishermen employed on board such vessel, as is herein-  
[\*205] before required, and also a certificate, to be by him sub-

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scribed, therein mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he shall swear or affirm before the collector aforesaid."

Section 9 then provides: That "any person who shall make any false declaration, in any oath or affirmation required by this act, being duly convicted thereof, shall be deemed guilty of wilful and corrupt perjury, and shall be punished accordingly."

At the trial on the indictment, before the district court, the offense set forth was, making a false declaration, under oath, before the collector, that the paper produced and sworn to by the defendant was the original agreement.

The judge of the district court, who tried the case, held that this oath to the original agreement with the fishermen was not required by the act of July 29, 1813, § 7, (3 Stat. at L., 52). That the relative which, in that section, applied to and was satisfied by the oath to the certificate of the particular days on which such vessel sailed and returned, &c.; and, consequently, no false declaration, in any oath required by that act, was set forth in the indictment; the only oaths required by the act of 1813 being to the days of sailing and returning, the time employed at sea, and the size of the boat or vessel.

The United States attorney then offered to prove that this was a false swearing, touching the expenditure of public money, under the act of March 1, 1823, § 3, (3 Stat. at L., 770). *United States v. Bailey*, 9 Pet., 238.

But the judge held the evidence inadmissible, and the defendant was acquitted.

In May, 1854, Nickerson was again indicted by the grand-jurors of the circuit court, for the crime of perjury, in swearing that the fishermen's agreement produced was the original agreement, when, in fact, it was not; and also in swearing that three fourths of the crew employed were citizens of the United States, or persons not subject to any foreign prince or state, whereas five out of nine persons employed were subjects of Victoria, queen of Great Britain and Ireland.

Whereupon Nickerson put in a plea setting forth the former indictment and acquittal.

The district attorney of the United States demurred to the plea, and the judges differed in opinion whether the defendant's special plea aforesaid be good, in bar, to this indictment, and the question was certified to this court.

\*It was ordered by *Mr. Cushing*, (attorney-general,) for the United States, and by *Mr. Lothrop*, for the defendant. [206

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*Mr. Cushing* made the following points:—

1. The false swearing alleged in the two indictments, is not one and the same perjury, at common law; but there are two distinct statute offenses: one for making a false declaration in a certain prescribed form of an oath, required under the act of 1813; and the other for falsely swearing in order to effect a specific purpose, under an oath that may be required, but is not specified in the act of 1823.

2. The defendant could not have been tried under the first indictment, for the crime created by the act of 1823; because, to constitute the statute offense with which he was charged in the first indictment, under the act of 1813, there must be a false declaration made in an oath required by that statute. If the alleged false oath was not required by that act, no offense was set forth in the indictment.

3. So, also, to constitute the statute offense, under the act of 1823, touching the expenditure of public money, there must be a false swearing in an oath legally administered, and required or authorized by law. *United States v. Bailey, supra.*

4. The first indictment charged no false swearing, except in an oath required by the act of 1813. The second indictment, under the act of 1823, does set forth an oath necessary and required, impliedly by law, and expressly by the secretary of the treasury and by the collector, before the public money can be expended to pay the fishing bounty to the owner or agent of a fishing vessel.

5. The indictment, to which the plea of former acquittal is made, further sets forth a false swearing in the oath required by the collector, under the authority of the rules and regulations of the treasury department, in order to satisfy himself that two thirds of the crew of the fishing vessel were citizens of the United States.

This the act of March 1, 1817, makes a prerequisite to obtaining the fishing bounty, that the officers, and at least three fourths of the crew, shall be proved, to the satisfaction of the collector, to be citizens of the United States. 3 Stats. at L., 351, § 3.

This act does not prescribe an oath, but it constitutes the collector the judge of that fact, and prohibits the expenditure of the public money, by payment of the bounty, unless the collector is satisfied on that point; and hence such rules and modes of proof may be prescribed, including an oath, which are requisite and proper to establish that fact.

\*207] \*7. If the district judge erred in deciding that the oath set out in the first indictment was not required by the act of 1813, the defendant cannot avail himself of that error;

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because it was a ruling in his favor, and against the United States, which could not except, but were bound by it in that cause.

8. If the district judge was right in that ruling, the defendant, who thereupon objected to the admission of evidence, to show another offense of falsely swearing under the act of 1823, cannot avail himself of the plea of former acquittal; because he was acquitted of the offense only set forth in the first indictment, and not of the offense set forth in the second indictment, which is another and different offense.

9. The two statute crimes are different and distinct, and require different averments; because the offense created under the act of 1813 is declared to be wilful and corrupt perjury, whereas the offense created by the act of 1823 is the crime of swearing falsely, touching the expenditure of public money, &c.; and the form, nature, or import of the oath is not prescribed, as it is in the act of 1813; nor is it declared or deemed to be wilful and corrupt perjury, by the act of 1823; but upon conviction of swearing falsely, touching the expenditure of public money, the party so convicted "shall suffer as for wilful and corrupt perjury;" and this prescribes the punishment, and does not define the offense to be perjury, as defined at common law.

10. The courts of the United States, having no common-law jurisdiction of crimes, except statute offenses only, must be strictly governed by the statute creating the offense, and cannot go beyond the precise statute offense, which is specifically and formally set forth in the indictment.

11. It is desirable that, in the decision of this cause, the court should pass upon the questions incidentally raised, touching the legality of the oaths required by the treasury department and by collectors, as prerequisites to obtaining, by owners and agents, the bounty allowed to fishing vessels.

Authorities incidental may be referred to in *The Boat Swallow*, Ware, 21; *The Harriet*, Id., 343; s. c., 1 Story, 251.

*Mr. Lothrop*, for the defendant, made the following points:—

*First Point.* The evidence which is competent and essential to support the present indictment might have been offered in proof, and in support of the former indictment. *Regina v. Bird*, Parke, Baron, 6 Bro. Cr. Cas., 201; Act of 30th April, 1790, ch. 9, § 19, (1 Stat. at L., 117;) 1 Chitty Crim. L., 276, 281; 1 Stark. Crim. Pl., 301; Act of Congress, July 29, 1813, \*ch. 35, (3 Stat. at L., 49;) Act of Congress March 1, [\*208] 1817, ch. 31, § 3, (3 Stat. at L., 351;) Act of Congress March 1, 1823, ch. 37, § 3 (3 Stat. at L., 771;) Act of Con-

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gress March 3, 1825, 65, § 13, (4 Stat. at L., 118;) *United States v. Nickerson*, Law Reporter for September, 1854.

*Second Point.* The present indictment contains sundry allegations which do not constitute, if true, the crime of perjury. Coke, 3d Inst., 165; *United States v. Bailey*, 9 Pet., 238, Opinion of Mr. Justice McLean; *United States v. Taylor*, Law Rep., for September, 1854, p. 271; 1 Chitty Cr. L., 295, 396.

Mr. Justice CURTIS delivered the opinion of the court.

This case comes before us upon a certificate of division of opinion by the judges of the circuit court of the United States for the district of Massachusetts.

At the March term, 1854, of the district court of the United States for the district of Massachusetts, Nickerson was indicted for the crime of perjury. The indictment charged, that in order to obtain the allowance of bounty money, on account of the employment of a vessel in the cod fishery, of which vessel he was the agent, he made oath before the collector of the district of Barnstable, where the vessel was enrolled and licensed, that a certain paper, produced by him to the collector, was the original agreement made with the fishermen employed on board the vessel during the fishing season then last past; that three fourths of the crew so employed were citizens of the United States, or not subjects of any foreign prince or state; and that these statements were false, and known to the defendant to be so when he made the oath.

Upon this indictment Nickerson was tried and acquitted.

At the May term, 1854, of the circuit court for the district of Massachusetts, Nickerson was again indicted, and to this last indictment pleaded specially his former acquittal, and the plea was demurred to.

The question raised by this demurrer, and upon which the opinions of the judges were opposed, is, whether the same evidence, which is competent and essential to support the indictment in the circuit court, might have been admitted in support of the former indictment in the district court.

The demurrer admits that the defendant is the same person charged by the former indictment, and that the oath alleged in the former indictment to have been taken, is the same oath alleged in this indictment. It appears from a comparison of the two indictments that the same occasion of taking the oath is alleged in both; that occasion being to obtain an allowance of money from the United States, as bounty, on account of the \*209] \*employment of a vessel called The Silver Spring, in the cod fishery, during the season then last past.

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Each indictment contains, substantially, the same allegation respecting the authority of the collector to administer the oath; that allegation being that the collector had competent power and authority to administer the same. Under the 19th section of the crimes act of April 30, 1790, 1 Stat. at L., 116, this averment would let in any legal evidence of the lawful power of the collector to administer the oath.

The false swearing alleged in each indictment is the same, and the only question is, whether the indictment in the district court was so drawn as to preclude the United States from offering evidence to prove that the defendant knowingly and wilfully swore falsely that the paper produced was the original agreement, and that three fourths of the crew were citizens.

The argument is, that the former indictment, by its terms, limited the government to proof of false swearing in an oath required to be taken by the act of July 29, 1813, 3 Stat. at L., 49; that this act does not require either the verity of the agreement with the crew, or the citizenship of three fourths of the crew, to be sworn to; and consequently, that neither of the perjuries charged could be proved under the former indictment.

The 7th section of the act of 1813 is as follows: "That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall, previous to receiving the allowance made by this act, produce to the collector, who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel, as is herein-before required, and also a certificate to be by him or them subscribed, thereon mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid."

It is argued that this requires an oath to the truth of the certificate only, and not to the verity of the agreement.

This depends upon the meaning of the relative pronoun "which." Does it refer to and include both papers to be produced to the collector, or only one of them? It may refer only to the one last mentioned, or to both. Grammatically it is capable of either construction.

Considering the nature of the act, the objects which congress had in view, and the mischiefs to be guarded against, we are of opinion that it was intended to require an oath to the verity of both papers.

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This section of the law is not penal; it is directory merely. \*210] \*It requires certain acts to be done in order to obtain an allowance of public money. The nature of the act, therefore, does not require a strict interpretation, rigidly confined to what is so clearly expressed as to admit of no doubt. It calls for such an interpretation as will guard the public treasury from fraud, so far as the language employed by congress, when fairly construed, is capable of doing so.

The inducement to the payment of these bounties was, the public policy of training a body of native seamen, by an industrious pursuit of the cod fishery during a fixed portion of the year. To accomplish this, it was deemed important that the seamen should participate directly in the profits of the voyage, in the manner pointed out by the act of June 19, 1813, 3 Stat. at L., 2. And accordingly, the 8th section of the act in question provides that no vessel shall be entitled to bounty, unless an agreement should be made with the fishermen in conformity with that act. The production of the agreement was therefore the production of a paper, as essential to the claim as the certificate of the times of the departure and return of the vessel; and the verity of the agreement is as essential to the justice and legality of the claim, and to the accomplishment of the ends designed by congress, as the verity of the certificate. It is apparent, also, that the former, as well as the latter, may be false, and that the collector has no better means of knowledge of the truth or falsehood of the paper purporting to be the agreement, than he has of the truth or falsehood of the certificate. The mischiefs to be guarded against were therefore the same.

The case, therefore, is one where the law requires two documents to be produced to a public officer, to constitute a title to an allowance of public money. The verity of both is essential to the justice and legality of the claim. The officer has no means of testing the verity of either, except what is given by this law. Congress has considered it proper that an oath should be taken by the applicant. The question is, whether this security of an oath was intended to be confined to one of the documents. The language employed is capable of such a construction, but it is also capable of meaning that the security of an oath was to extend to both. In our judgment, the latter is to be deemed to have been intended by congress; and we therefore hold that so much of the first indictment as charged that an oath as to the agreement was required by the act of 1813, was correct in point of law. But this does not dispose of the whole question; because there can be no pretence that the act of 1813 required an oath to

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the fact that three fourths of the crew were citizens. In point of fact, there was no requirement on the subject [\*211 \* of the citizenship of the crew when the act of 1813 was passed, nor until the act of March 1, 1817, (3 Stat. at L., 351;) and the argument on the part of the United States is, that as the former indictment was limited to an oath required to be taken by the act of 1813, the defendant could not be tried thereon for false swearing as to the citizenship of the crew. But we are of opinion that the former indictment was not thus limited. The particular allegation supposed to have that effect, is as follows:—

“ Which said oath so taken by the said Nickerson, jr., was required to be taken by the owner or agent of said fishing vessel, under and by virtue of an act of congress of the United States of America, approved July 29, 1813, and re-enacted February 9, 1816, and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel, it being then and there material and required by the act aforesaid, and by force of the statutes of the said United States therein provided, in order to obtain said allowance of money, that the owner of said fishing vessel, or his agent or representative, previous to receiving such allowance, should swear as aforesaid to the truth of the aforesaid declarations.”

The pleader here not only refers to the act of 1813, but also avers that the oath was taken, “ and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel.” It is true, the whole allegation, if it is correctly copied in the record, is somewhat confused, but, according to any construction which we have been able to put upon it, it does not confine the requirement of the oath to the act of 1813 only.

It was not necessary to aver in the indictment what act or acts of congress required the oath to be taken. The averment that it was taken by the owner or agent to obtain an allowance of bounty, and the description of the oath which was taken, and of its occasion, were the only matters of fact necessary to be alleged to show the materiality of the oath, and that it was an oath required by law. The court was bound to take judicial notice of the requirements of all acts of congress respecting it. It was competent for the government, under these averments of facts, to rely on any act of congress which required the oath to be taken, without referring to it.

This was not a question respecting the authority of the collector to administer the oath. That, as has already been

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observed, was correctly averred in both indictments, pursuant to the act of 1790. And under that general averment of competent authority, any laws and any fact constituting that authority might have been shown. The question here was, [212] whether such *\*an oath as is described in the indictment*, being taken before a collector who had competent authority to administer it, for the purpose of obtaining an allowance of bounty money, was an oath which, if wilfully false, would subject the defendant to be punished as for perjury. And we do not think this question was so narrowed, by the passage above extracted from the former indictment, that evidence of an oath required or authorized by any other act besides that of 1813 could not be given under that indictment; and we order it to be certified accordingly.

*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 Massachusetts, 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 the special plea pleaded by the defendant is a good plea in bar to the indictment; whereupon, it is now here ordered and adjudged by this court that it be so certified to the said circuit court.

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JOHN HENSHAW, PLAINTIFF, *v.* JOHN R. MILLER, EXECUTOR  
OF CHARLES E. MILLER, DECEASED.

Where an action on the case was brought in Virginia, against a person to recover damages for fraudulently recommending a third party as worthy of credit, whereby loss was incurred; and after issue joined upon the plea of not guilty, the defendant died, the action did not survive against the executor, but abated.<sup>1</sup>

The Virginia laws and cases examined.

THIS case came up from the circuit court of the United States for the eastern district of Virginia, on a certificate of division in opinion between the judges thereof.

Henshaw was a citizen of Massachusetts, and brought an

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<sup>1</sup>CITED. *Tufts v. Matthews*, 10 Fed. Rep., 610, 611.  
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action on the case against Charles E. Miller, in his lifetime, for fraudulently recommending one Robinson as worthy of credit, in consequence of which the plaintiff had incurred considerable loss. After issue joined upon the plea of not guilty, Miller died, and on motion of the plaintiff a *scire facias* was issued for the purpose of reviving the suit against John R. Miller, his executor.

Upon the return of the *scire facias*, the executor moved to quash it, when the judges were divided in opinion whether the \*action survived against the executor, or abated; [\*213 and the question was certified to this court.

It was submitted, upon printed arguments by *Mr. Heath*, for the plaintiff, and *Mr. Lyons* and *Mr. Stannard*, for the defendant.

*Mr. Heath*, for the plaintiff, made the following points:—

For the plaintiff, Henshaw, it is insisted: That, under the law of Virginia, an action upon the case founded upon a tort by which the estate of the plaintiff was diminished or damaged, may be revived against the defendant's personal representative. That in Virginia, if the form of the action be trespass, or trespass upon the case, and if the loss or damage be merely pecuniary in its nature, and the remedy sought, being pecuniary, is entirely adequate, then the cause of action survives for or against the personal representative.

For the common-law doctrine, as modified by the statute 4 Edward III. ch. 7; *Hambly v. Trott*, 1 Cow. (N. Y.), 375; *Wheatley v. Lane*, 1 Saund., 216, a; 1 Wms. Ex., 668.

For the state of the law in Virginia on this point: See 1st vol. Rev. Code, 1819, 390, § 64; Supplement to Rev. Code, 1819, 258, ch. 196; *Monroe v. Webb's Ex'ors*, 4 Mumf., 73; *Lee v. Cooke's Ex'or*, Gilm., 331; Code of 1850, 544, § 20.

The common-law maxim, *actio personalis moritur cum persona*, unmodified by any statute, would undoubtedly apply to this case. But that rule was so manifestly unjust and unreasonable in its general application, that its operation has been constantly narrowed by statutory regulation, aided by liberal judicial construction in favor of right, until it is at this day almost reduced within bounds where reason and convenience would sustain it.

It was first confined by judicial interpretation to actions *ex delicto*, where the action sounded merely in damages. It was afterwards still further restricted by the statute 4 Edward III. ch. 7, *de bonis asportatis*, which was extended by a wise and liberal construction to all cases supposed to come within the reason, though not within the words of the rule. So that this

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statute has been construed to extend to "any injury to personal property, whereby it has been rendered less beneficial to the executor, whatever the form of the action may be." Note (1) *Wheatley v. Lane*, 1 Saund., 217; 1 Wms. Ex., 668.

Under this construction of that statute, in England, the case under consideration would survive to the executor. That statute is not in force in Virginia, but the enactment contained 1 Rev. Code, 1819, § 64, 390, is founded upon it, and \*214] has been construed \*in the same equitable manner, to effect justice, by the courts of Virginia. The case of *Monroe v. Webb's Ex'ors*, 4 Munf. (Va.), 73, was an action upon the case against the clerk of a court, for indorsing credits on an execution, to the injury of the plaintiff. It is true that case went off on other grounds, but it was not questioned by the court that the action would lie against the executor; and the conclusion is irresistible, that it was admitted on all hands that the cause of action survived. So, pursuing the same equitable construction, in *Lee v. Cooke's Ex'or*, Gilm. (Va.), 331, it was held, that § 64, ch. 104, 1 Rev. Code, 1819, is an extension of 4th Edw. III. ch. 7, *de bonis asportatis*, and that trespass for the mesne profits of land, recovered in ejectment against A, lies against his executor.

These authorities show the spirit in which the court of Appeals of Virginia are disposed to construe that remedial statute: that it has been decided to give it an equitable construction, so as to extend it to cases coming within the mischief intended to be prevented. Such is the case at bar. And it is insisted, that as the law was before the Code of 1850, which rules this case, the case at bar would have survived against the executor of the defendant. But the course of legislation, as well as of judicial construction, has been constantly to narrow the application of this technical maxim, *Actio personalis*, &c., and the act of the Virginia Assembly, ch. 131, § 20, 544, Code 1850, cuts it up by the roots, in all actions in respect of property or estate, real and personal, wherever the action is for a pecuniary or property injury, as contradistinguished from a personal injury, which can never be adequately compensated in damages. That enactment is as follows: "An action of trespass, or trespass on the case, may be maintained by or against a personal representative, for the taking or carrying away any goods, or for the waste or destruction of, or damage to, any estate of, by his decedent." Code, 1850, 544, § 20. This act is founded upon, and is an extension of the English statute, 3 and 4 Wm. IV. ch. 42, § 2, which among other things, enacts: "That an action of trespass, or trespass on the case, as the case may be, may be maintained against the executor or administrator of any person

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deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal."

The case at bar is one where, by the wrongful act of the defendant, the plaintiff was damaged in his personal estate to the amount of \$3,000. If he was entitled to compensation out of the estate of the defendant when alive, why is he not entitled to compensation out of the same estate in the hands of the defendant's executor? What principle of reason, convenience, \*or justice would be violated by affording such a [\*215 remedy? The statute of Virginia just cited, plainly intended to afford such a remedy. The case at bar comes within the very letter of the statute. But even if the construction were doubtful, surely the court would adopt that view which so manifestly is essential to enable the court to do justice between these parties. The case of *United States v. Daniel*, 6 How., 11, has no direct application; that being a question under the laws of North Carolina. But the reasoning of that decision is in furtherance of the view here taken.

The following note of the argument for the defendant is taken from the brief of *Mr. Stannard*.

On behalf of the defendant, the court is referred to 1 Wm. Saund., 217 (a), note (1), to show that in England, not only at common law, but even under the liberal construction given by their courts to statute 4 Edw. 3, ch. 7, such a case as the present would fall fully within the influence of the maxim *Actio personalis moritur cum persona*; for it is there expressly laid down "that the statute of Edw. 3 does not extend to injuries done to the person or to the freehold of the testator, therefore an executor or administrator shall not have an action of assault and battery, false imprisonment, slander, deceit, diverting a watercourse, obstructing lights, cutting trees, and other actions of the like kind, for such causes of action shall die with the person." And in *The United States v. Daniel*, 6 How., 13, this court expressly holds, that: "No action where the plea must be that the testator was not guilty, can lie at common law against the executor. Upon the face of the record the action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." It will, it is supposed, scarcely be contended, in the face of these authorities, that this action survived against the executor at common law.

Neither, it is submitted, is there any thing in the statute law of Virginia changing the rule of the common law in this respect. The only statutes in force, relating to this subject, at the institution of this suit, will be found in the Revised Code of 1819, vol. 1, 390, § 64, and the Supplement to Revised

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Code, 258, ch. 196; and these statutes continued in force till the revisal of 1849, when they were substituted in the present Code of Virginia, (which took effect on the 1st July, 1850,) by the 20th section of chapter 130. See Code of Va., 544, § 20.

The first of the above-cited statutes provides, that actions of trespass for goods taken or carried away in the lifetime of the testator or intestate, may be maintained against, as well as by executors, &c.; and in that respect it extends the provisions <sup>\*216]</sup> of the \*statute of 4 Edw. III. which gives a remedy only to executors, and not against them. But, in other respects, its language is much less comprehensive than that of the English statute, as was remarked by Judge Green, in the case of *Thweatt v. Jones*, 1 Rand (Va.), 331, where he says that: "Our statute, without any such title or general words as are found in the title and in the enacting clause of the English statute, gives the action of trespass for goods taken or carried away, and provides for that case only substantively, and not by way of example." And therefore that eminent jurist doubted whether the statute in question was susceptible of the broad and liberal construction which had been given by the English courts to the statute of 4 Edw. III. It was probably to remove the doubt thus expressed by such high authority, that shortly after the report of the case *Thweatt v. Jones*, decided in 1823, namely, on 9th March, 1827, the second of the above-cited acts was passed. Supp't R. C., 258, ch. 196. That statute provides: "That if any person shall commit a trespass, either by injuring or destroying the slaves or other personal property of another, &c., the action shall survive," and thus establishes by legislative enactment the same rule which prevailed in England, by judicial construction, under the common law, as modified the statute of 4 Edw. III. ch. 7. It certainly did not establish a more liberal rule, unless some distinction can be drawn between the words "personal property" and "personal estate." Under the statute law of Virginia, then, as it stood at the institution of this suit, it is submitted that the case at bar falls fully within the influence of Lord Mansfield's judgment, in *Hambley v. Trott*, Cow., 372, recognized and acted on by this court in *United States v. Daniel*, above cited.

It only remains then to inquire whether the 20th section of the 130th chapter of the Code of Virginia, 544, § 20, which took effect pending this suit, has made any change in the law affecting the question under consideration, supposing for the present, for the sake of the argument, that that 20th section rules this case. A very slight examination of that section

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will, it is submitted, be sufficient to show it was designed to have, and can have, no such effect, even in a case to which it is clearly applicable. It was compiled from the Virginia acts of 1819 and 1827, above cited; and the English statute of 3 and 4 Will. IV., ch. 42, § 2, (see Eng. Statutes at L., vol. 13, p. 141,) and was designed to extend the remedies given to and against executors to cases of injury or damage to real as well as to personal estate, which former were not embraced either by 4 Edw. III. in England, or by the Virginia statute, as will appear from *Harris v. Crenshaw*, 3 Rand., 14, in which it was held that "An action \*of trespass *quare clausum fregit*, [\*217 is not converted into an action *de bonis asportatis*, by an allegation in the declaration that the trees cut were carried away, and therefore the rule *actio personalis moritur cum persona* applies to such an action." But it was never designed by the 20th section of Code of 1850, to abolish all distinction between personal torts and injuries and damage to property or estate, whether real or personal, between actions *ex delicto* and actions *ex contractu*, or to provide that because, in some sense, a man may be said to be injured or damaged in his estate or means of livelihood by an assault and battery or by slanderous words spoken, therefore actions of assault and battery, or actions of slander, shall survive for or against an executor or administrator. Upon this point, also, it is submitted the case of *The United States v. Daniel* is a direct authority for the statute of North Carolina, relied upon to sustain the action in that case, 1 Rev. Stat. N. C., ch. 2, § 10, expressly provided, among other things, that "no action of trespass in the case, &c., brought to recover damages done to property, real or personal, should abate by death," &c.; and yet this court held that the statute above cited did not affect the question presented and passed upon in that case. Neither, it is submitted, does the 20th section of 130th chapter of the Code of Virginia affect the question arising in this case, unless the term "estate," used in the one statute, can be distinguished from the terms "property, real or personal," employed in the other.

It will be insisted, therefore, on behalf of the defendant, that this court should certify to the circuit court that this action, in the form in which it is prosecuted, does not survive against the executor of the defendant.

Mr. Justice DANIEL delivered the opinion of the court.

This case is brought before this court upon a certificate of division in opinion between the judges of the circuit court of the United States for the eastern district of Virginia.

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The facts of this case, and the question of law arising thereon, upon which the judges were divided, are shown in the following statement:—

John Henshaw, the plaintiff in the circuit court, instituted in that court an action on the case against Charles E. Miller, to recover of him damages for fraudulently recommending to the plaintiff by letter, one Porter Robinson as a person worthy of confidence, and thereby inducing the plaintiff to make sale on credit to the said Robinson of a considerable amount of merchandise, when the defendant knew that Robinson was unworthy of credit, and intended fraudulently to deceive the plaintiff, \*who, in fact, had been deceived \*218] by the recommendation given by the defendant to Robinson, and upon the faith thereof had made sales to him, the whole amount whereof had been lost. In this case, after issue joined upon the plea of not guilty, and after several attempts at a trial of the cause, rendered fruitless by disagreement amongst the jury, the defendant departed this life, and on the motion of the plaintiff a writ of *scire facias* was awarded him to revive the suit against John R. Miller, the executor of the original defendant.

Upon the return of the *scire facias* executed, the executor moved the court to quash the process. This motion was continued until the May term of the court, 1853, when, upon the argument of the motion to quash the *scire facias*, the question occurred whether the action survived against the executor of the original defendant, or abated by the death of the latter; and opinions of the judges being opposed on this question, at the request of the counsel for the defendant it was ordered, that the division be certified to the supreme court at its next session.

In considering the question presented by the certificate of division in the circuit court, we must adopt for our guidance the following principle, namely, that this question is to be determined by the rule of the common law with respect to the revival of suits, except so far as that rule has been modified, either by restriction or enlargement, by the statutory provisions of the Virginia laws.

To the principle just mentioned we are bound to adhere, for the following causes:—

By an ordinance of the Virginia convention, passed on the 3d of July, 1776, it was declared: "That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of James I., and which are of a general nature and not local to that kingdom, together with the several acts of the general assembly of

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this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be in full force until the same shall be altered by the legislative power of this colony."

At a subsequent period, namely, on the 27th of December, 1792, the legislature of Virginia, by an act of that date, after reciting the ordinance above mentioned, declared and enacted as follows, namely: "Sec. 2. That whereas the good people of this commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the general assembly during their present session specially to enact \*such of the said statutes as to them appear worthy of [\*219 adoption, and do not already make a part of the public code of the laws of Virginia." "Sec. 3. Be it therefore enacted by the general assembly of Virginia, that so much of the above-recited ordinance as relates to any statute or act of parliament shall be and the same is hereby repealed; and that no such statute or act of parliament shall have any force or authority within this commonwealth." These provisions are followed by savings with respect to rights arising under any of the above-mentioned statutes, and as to any crimes committed against them before this repeal, and also of the benefit of all writs, remedial or judicial, which might have been legally obtained or sued out of any court, or the clerk's office of any court, of the commonwealth, prior to the commencement of the statute.

These two enactments have been continued in force, and will be found to be re-enacted in the revisal of 1819, vol. 1, chapters 38 and 40.

The statutes, therefore of 4 Edw. III., ch. 7, or of 3 and 4 Will. IV., or any other English statute as such, cannot govern this case, nor in anywise influence its decision, except so far as by parity the courts of Virginia may have applied the interpretation of those statutes by the English courts to similar provisions, if such there be, in the laws of Virginia.

The maxim of the common law is "*actio personalis moritur cum persona*," and as this maxim is recognized both in England and in Virginia, the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all *torts* when the action is in form *ex delicto*, for the recovery of damages, and the plea not guilty. That in case of injury to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed

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the injury die, no action can be supported either by or against the executors or other personal representatives. 1 Saund., 217, *n.* 1; 2 Mau. & Sel., 408. And so express and strict have been the applications of this maxim of the common law by the English judges, as to have established the rule, that for the breach of a promise to marry, although the action is in form *ex contractu*, yet the cause of action being in its nature personal, the executor of the party to whom the promise was made cannot sue.

And again, that for the breach of the implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator had sustained some actual damage. *Vide* 4 Moore, 532; 2 B. & B., 102, and 2 Mau. & Sel., before mentioned. This has been ruled even under the alleged relaxation of the common law maxim in virtue of the statutes of 4 Edw. III., cap. 7, and 3 and 4 Will. IV., cap. 42. By the English courts it has been also ruled, that although the statutes which have conferred upon executors the right to maintain actions in certain cases arising *ex delicto*, do not limit that right to instances of a literal asportation of the goods or assets, yet they confer the right of action upon the executor in instances solely of actual injury to personal property, whereby that property has been rendered less beneficial to the executor. 2 Mau. and Sel., 416.

Let us see how far the common-law maxim has been modified in Virginia, either by express statutory language or by judicial construction.

By the 38th section of chapter 128, vol. 1 of the Revised Code of 1819, it is provided: "That where any personal action or suit in equity is now or shall be depending in any court of this Commonwealth, and either of the parties shall die before verdict rendered or final decree be had, such action or suit shall not abate, if the same were originally maintainable by or against an executor or administrator, but the plaintiff; or if he be dead, his executor or administrator, or the sheriff, sergeant, or other curator of the decedent's estate, shall have a *scire facias* against the defendant; or if he be dead, against his executor, administrator, sheriff, sergeant, or other curator of his estate, to show cause generally, why such action or suit shall not be proceeded in to a final judgment or decree."

This section of the statute provides merely against the abatement of actions at law or of suits in equity by the death of parties, as a matter of course, but it gives no further description of actions or suits than by reference to such designa-

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tion of them and their capacity for revival as may be deducible either from the common law or by some statutory regulation.

By the 64th section of chapter 104, vol. 1, 390, of the same code, it is declared: "That actions of trespass may be maintained by or against executors or administrators, for any goods taken or carried away in the lifetime of the testator or intestate, and that the damages recovered shall be in the one case for the benefit of the estate, and in the other out of the assets."

This provision of the Virginia statute, in so far as it authorizes an action against the personal representative as well as in his favor, is unquestionably an extension of the statute of Edward III., which confers the right of action upon the executor or administrator, but does not authorize an action against him. But, although the former statute is certainly an extension of the latter, with respect to the parties for or against whom the right of action is given, it has been doubted, and upon very high authority upon the point, whether with respect to the class of \*subjects to which the right of action is authorized, the statute of Virginia does not operate a [\*221 material restriction upon the provision of the English statute. The statute of Edward III. is thus entitled: "Executors shall have an action of trespass for a wrong done to the testator," and reciting "that in times past executors have not had actions for a trespass done to their testators, as of goods and chattels carried away in their life, and so such trespasses have hitherto remained unpunished." It is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life."

In the interpretation of this statute, the courts in England have ruled, that the right conferred on the executor to maintain trespass for a wrong done to the testator, must, with reference to the language of the times when the statute was passed, signify any wrong; and that the instance put, namely: "as of the goods and chattels of the same testators carried away in their life," was put in the statute only as an instance or illustration, and by way of limiting the right to injuries to personal property, and not as restrictive to the single or particular form of injury; and that the statute must be construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor, so that the executor may support trespass or trover, case for a false return to final process, and case or debt for an escape. *Ld. Raym.*, 973.

The provision of the statute of Virginia by which the right of action by or against the personal representative as to torts

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is conferred, is introduced by no preamble or declaration by which any object or purpose beyond its literal terms may be implied. It is a simple section of the statute concerning wills, intestacy, and distribution, and clearly defines the single instance in which trespass may be maintained by the personal representative; the instance of "goods taken or carried away in the lifetime of the testator or intestate;" no other species of trespass or wrong is enumerated or alluded to. *Vide 1 Rev. Co. of 1819, § 64, 390.*

In reference to this section, and in comparing it with the statute 4 Edw. III., it has been remarked by Green, Justice, in the supreme court of Virginia, that in the construction of the latter statute, "it has been decided that the word trespass, as it was then understood, embraced all cases of tort; that the word wrong in the title is general, and that the words 'as of the goods,' &c., were inserted only by way of example, so as to confine the remedy to cases in which the wrong affected the goods and chattels. But our statute, without any such title or general words as are found in the title and in the \*222] enacting clause of \*the English statute, gives the action of trespass for goods taken and carried away, and provides for that case only substantively, and not by way of example. See *Thweatt's Administrator v. Jones's Administrator*, 1 Rand. (Va.), 331."

But this 64th section would seem to have received a more explicit and definitive interpretation by the decision of the supreme court of Virginia in the case of *Harris v. Crenshaw*, reported in the 3d of Rand. (Va.), 14. That was an action of trespass *quare clausum fregit*, in which there was a verdict and judgment in favor of the defendant who died, and whose representative was made a party by consent. The case was carried by appeal as is the practice in Virginia, at law as well as in equity, to the supreme court by the plaintiff, upon exceptions taken to instructions from the judge at *nisi prius*. In delivering the opinion of the court, Tucker, President, says: "This is nothing more than an ordinary action of trespass *quare clausum fregit*. The allegation that the trees were cut and carried away, is always inserted in the declaration when it is intended to be proved. It did not convert the action into an action of trespass *de bonis asportatis*, and take it out of the rule *actio personalis*, &c. If the defendant had died before verdict, the writ would have abated, and the plaintiff would have been deprived of damages if he had sustained any. But there being a verdict and judgment against him, by which he may be hereafter affected in some other controversy respecting the premises, he has a right to reverse that

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judgment if he can, and was entitled to a *scire facias* against the personal representative of the appellee." Then in commenting upon the exceptions to the instructions from the judge at *nisi prius*, the court proceeds thus: "The second instruction of the judge was therefore erroneous, and the judgment is to be reversed and the verdict set aside; and as by the death of the appellee the appeal abated here, and there can be no prosecution of the suit in the court below, it coming within the rule before stated, that is to say, the rule of the common law, *actio personalis, &c.*, it is to be abated here, and the proceedings certified to the court below."

By this decision of the supreme court of Virginia, the following positions must be taken as having been affirmed:—

1. That by the rule of the common law the right of action founded upon torts of any and every description terminated with the life of either participant in such tort. That this maxim or rule of the common law governed all causes of action arising *ex delicto* in Virginia, except so far as it may have been modified by statute.

2. That the provision of the statute of Virginia, authorizing actions for or against executors and administrators, for torts \*done or suffered by those whom they represent, [\*223] limits those actions to instances which are essentially or rather directly cases of trespass *de bonis asportatis*, and cannot be made to embrace ordinary cases of trespass *quare clausum fregit*, or cases of tort generally, by attempting to connect with them as an incident the asportation of goods and chattels; much less can it be made to cover an indirect or consequential injury to the welfare or prosperity of a testator or intestate resulting from a fraud practiced upon him.

There is one case from the supreme court of Virginia, cited by plaintiff, and relied on to sustain the right of action in the executor. It is the case of *Lee v. Cooke's Executor*, reported in Gilmer, 331. This was an action for mesne profits of land which had been recovered in ejectment. After issue made up in the cause, the defendant died. At a subsequent term of the court the executors appeared by attorney, and the cause was continued. At the term next ensuing, the cause was directed to be struck off the docket, the court thinking that the action abated by the death of the defendant.

This decision was reversed by the supreme court, the latter tribunal being of the opinion that the case was within the equity of the 64th section of the Virginia statute, cap. 104, 1 Rev. Co., 390, and that the action, so far at least as regarded the mesne profits, did not die with the testator. The case is very succinctly given in the report, and is accompanied with

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no argument showing explicitly the grounds on which it was contested. It may have been regarded by the supreme court as resting upon an implied obligation or assumption to pay or account for profits ascertained by the judgment in ejectment to belong to the plaintiff, and therefore, as partaking essentially of the character of a contract. Or, if in any sense the right of action could be understood as arising from the asportation by the defendant, it must be by such an acception of the phrase as will apply it to the mesne profits specifically, as being personal property belonging to the plaintiff, and actually injured by the testator of the defendant in his lifetime. If more than this is sought to be deduced from the case of *Lee v. Cooke's Executor*, the attempt would bring the case in conflict with that of *Harris v. Crenshaw*, and with the opinion of Green, Justice, in the case of *Thweatt's Administrator v. Jones's Administrator*, both more recent in point of time, as well as more explicit in their interpretation alike of the English statute and that of Virginia.

In cases analogous to the one before us, or which rather must be viewed as identical in their essential features, the principles hereinbefore deduced from the laws and decisions of Virginia have been directly affirmed. Thus, in the case of *Coker v. \*Crozier*, in the 5th vol. of Ala., 369, it was <sup>\*224]</sup> ruled, that in an action on the case for a fraud committed in the exchange of horses, upon the death of the defendant the suit could not be revived against his personal representative, the rule of the common law forbidding such revival, and there being no statute of the state to authorize it.

The case of *Read et al. v. Hatch*, from the 19th vol. of Pick. (Mass.), 47, bears a still stronger resemblance to the case before us than does that just cited from the supreme court of Alabama. So exact, indeed, is this resemblance, that it might with justice be said, of the case of *Read v. Hatch*, in comparison with this under our consideration, *mutato nomine historia narratur de te*. The former was an action for fraudulently recommending a trader as in good credit, by means whereof the plaintiff was induced to sell him goods on credit, and thereby sustained damage. This action was founded on the 7th section of the 93d chapter of the Revised Statutes of Massachusetts, which provides that actions of trespass and trespass on the case for damage done to real or personal estate shall survive. Pending the suit the defendant died, and the plaintiff moved to cite in his administrator. Shaw, Chief Justice, said, in pronouncing the judgment of the court: "The question whether the plaintiffs can cite in an administrator, and proceed with their action, depends on Revised Stats.,

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ch. 93, § 7. It is contended that a false representation, by which one is induced to part with his property by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction. If this were the true construction, then every injury by which one should be subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage done to some specific personal estate of which one may be the owner. A mere fraud or cheat by which one sustains a pecuniary loss, cannot be regarded as a damage to personal estate. The action is abated at common law, and, not surviving by force of the statute, must be deemed to stand abated."

Upon full consideration of the statutes of Virginia, and of the interpretation placed by the courts of that state upon those statutes, and of every analogy which can be applied from similar provisions elsewhere, we are of the opinion, that in the circuit court this action did not survive the death of the defendant, but abated upon the occurrence of that event; and we order it to be certified accordingly to the circuit court, in reply to the certificate of division.

## \*Order.

[\*225]

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 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 this action did not survive against the executor of the defendant, and that it did abate by the defendant's death. Whereupon, it is now here ordered and adjudged by this court that it be so certified to the said circuit court.



THE UNITED STATES, *ex relatione* BEVERLY TUCKER, PLAINTIFF IN ERROR, *v.* A. G. SEAMAN, SUPERINTENDENT OF PUBLIC PRINTING.

By the act of congress passed on the 26th of August, 1852, ch. 91, it was made the duty of the superintendent of public printing to receive all mat-

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ter ordered by congress to be printed, and to deliver it to the public printer or printers.

In 1854, Beverly Tucker was printer to the senate, and O. A. P. Nicholson, printer to the house of representatives.

The act further provided, that when any document should be ordered to be printed by both houses of congress, the entire printing of such document should be done by the printer of that house which first ordered the printing.

In January, 1854, the commissioner of patents communicated to the senate that portion of his Annual Report for 1853, which related to arts and manufactures; and on the ensuing day the same communication was made to the house of representatives. Each house having ordered it to be printed, the printing was assigned to Mr. Tucker.

In March, 1854, the agricultural portion of the report was sent to both houses, and both of them, on the same day, ordered it to be printed. In actual priority of time, the order of the house was passed first. The printing of it was given to Mr. Nicholson.

A writ of mandamus will not lie from the circuit court of the United States, commanding the superintendent to deliver the printing to Mr. Tucker.

Whether the two portions of the report constituted one document, and which house passed the order first, were questions requiring the exercise of judgment and discretion in the public officer, who had something more than a mere ministerial duty to perform.

The cases upon this point examined.<sup>1</sup>

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 Washington county.

The question was, whether the Report of the Commissioner of Patents relating to arts and manufactures and also to agriculture, which was divided into the two branches, and made to congress at different times, was, or was not, one document, and \*226] \*whether the delivery of it to the public printer of one or the other house of congress was, or was not, a mere ministerial duty.

The facts are stated in the opinion of the court.

It was argued by *Mr. Chilton* and *Mr. Johnson*, for the plaintiff in error, and by *Mr. Cushing*, (attorney-general,) for the defendant.

The counsel for the plaintiff in error made the following points:—

The judgment of the court below, refusing the relief asked, found on pages seven to eight of the record, shows the grounds upon which said court rested its judgment in the premises.

The existence or non-existence of the facts upon which, when applied to an act of congress, the petitioner insisted he was

<sup>1</sup> S. P. *United States v. Guthrie*, *Gaines v. Thompson*, 7 Wall., 352; *post* 304; *Commissioner of Patents v. The Secretary v. McGarrahan*, 9 Id., *Whiteley*, 4 Wall., 522; *United States v. Commissioner*, 5 Id., 563. See also *United States v. Boutwell*, 3 Mc-Arth., 183.

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entitled to the relief he prayed for, the court below, it will be seen by their judgment, declined to consider or decide. For the purposes of this case, we insist that the facts alleged in the petition must be held to have existed.

The sole question, then, for this court to decide is, whether or not the court below erred in refusing the relief asked, upon the ground that said court had no jurisdiction of the case stated in the petition, or, in other words, that said petition was demurrable. We suppose that if any well-founded objection to the grant of the relief prayed for was to be found upon the face of the petition, although different from those stated in the judgment, which seem, one of them, to have governed the judgment of both judges, and the other to have weighed only with one of them, still, the judgment of the court below would be held valid.

In this view, the whole business of this court, we submit, will be to interpret the act of the 26th August, 1852, ch. 91, referred to in the judgment, and ascertain whether or not, by that act, the appellee, as superintendent of public printing, was or was not, in the matter complained of, a ministerial executive officer, within the meaning of the definition of such officer to be found in the opinion of the court, at the present term, in Goodrich's case.

We treat Goodrich's case as having definitively settled the law, so far as the facts of any case shall be found to bring it within the scope of the principles therein declared. And if, in the judgment of this court, the present case shows the appellee to have been invested with official discretion in the matter complained of, then the appellant is not entitled to relief.

We insist that the seventh section of the act of congress aforesaid gives to the printer of that house of congress in which \*a document is first ordered to be printed, the absolute title to print all the copies ordered by both houses, with-  
out reservation, or subject in any manner to the decision or discretion of any one.

Next, that such absolute and unreserved right is not restrained, modified, or affected, by any other section of that act, or of any act of congress.

Next, that there is nothing to be found in the portion of said act creating the office held by appellee, nor in any portion or portions of said act conferring and defining the powers, duties, liabilities, or responsibilities of said officer, any language qualifying, restraining, or subjecting to the judgment of said officer, directly or indirectly, to any extent, the right secured to the printer by the said 7th section.

Next, that there is no word in the portion of said act pro-

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viding for a joint-committee of printing and subjecting said superintendent to the duty of reporting to said committee or to the control of said committee, as specified in the act, which, by any fair construction, can affect, limit, restrain, or submit to the judgment of said superintendent, or to that of the said committee, the right secured to the printer by the said 7th section.

We submit, finally, that the question, which of two houses of congress first orders a document to be printed, is a question of fact which could not by possibility require judicial discretion in its determination. It is a question of fact to be determined only by an inspection of the journals (records) of the houses of congress; and we submit, the question of identity of documents is susceptible of as little difficulty in determining it as the question of the time of the order to print; that congress, so considering, failed wholly by said act to vest any such discretion in any one.

The first point made by *Mr. Cushing*, for the defendant, was, that the circuit court had not the power to grant the mandamus asked for, either by statute or the common law.

2. The duties devolved upon Seaman are not those of a mere ministerial character: and, therefore, the circuit court had no authority to direct in relation to them.

If we concede that the circuit court can order the performance of a mere ministerial duty, the omission complained of in this case was not of a ministerial character. Seaman was appointed superintendent of public printing under the 2d section of the act of August, 1852, (ch. 91,) and his duties are prescribed by the 3d.

(Then followed a recital of the act.)

\*228] \*By the 7th section, it will be seen that, when a document is ordered to be printed by both houses, the entire printing is to be done by the printer of that house which first ordered it. By the 3d, he is to keep an account of the orders received from each house, to deliver out the printing, in conformity therewith, to the proper public printer, and to issue his certificate for the amount due for such printing. These provisions devolve upon him the duty of determining: 1. Which house actually first ordered the printing of a particular document; and, 2. What was included in the document itself, by the terms of the order for printing. These duties involved considering and determining facts, and the construction of written orders. In the discharge of these functions, Seaman determined that the printing of the document in question was first ordered by the house of represen-

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tatives, and that the previous order, by the senate, did not include this document, which was not then before either house. He decided that the senate order was confined to what was before the senate when it was made, and could not include those not sent to that body, and which might not even have been prepared. A decision upon such questions is not reviewable in, nor subject to the control of, the circuit court. *Decatur v. Paulding*, 14 Pet., 497; *Brashear v. Mason*, 6 How., 92; *Goodrich v. Guthrie*, Dec. Term, 1854; *McElrath v. McIntosh*, 1 Law Rep., N. S., 399; *Worthington v. Bicknell*, 1 Bland. (Md.) Ch., 186; *Pascault v. The Commissioners of Baltimore*, Id., 584; *Bardley v. Lloyd*, 1 Harr. & M. (Md.), 27; *Runkle v. Winemiller*, 6 Id., 429; *Ellicott v. The Levy Court*, Harr. & J. (Md.), 184; *Williams v. Cadman*, 1 G. & Q., 559.

3. Where the superintendent is not clothed with power to determine questions concerning the printing ordered by the two houses of congress, the duty of deciding them necessarily rests with congress itself, and not with the judiciary.

The 12th section of the act of 1852 makes provision, by which the joint committee on printing is clothed with full power to determine, in relation to disputes between the superintendent and the public printers. If the power thus conferred upon the joint committee is not broad enough to reach this case, then, from necessity, its decision must rest with one or both houses of congress. They are fully competent to determine their wants, and the construction and extent of their orders, and how they require them to be executed, and by whom. If a mandamus can issue in the present case, it may lead to most ruinous consequences. If the document in question has been printed under the house order, it may, if the mandamus issues, be reprinted under the senate order, and thus double the number of copies ordered, as well as the expense, \*contrary to law, and the intention and orders of the two houses. The writ of injunction is of a more [\*229] comprehensive character, issuing from the equity side of this same circuit court, forbidding certain acts to be done. If a mandamus will lie, which in effect, orders printing to be done, an injunction may also be granted to prohibit printing. In that case, if the superintendent should refuse to deliver a document to the senate printer, the latter might enjoin against delivery to the house printer, and thus congress would fail in its printing altogether. A controversy between the public printers might thus, by the use of the mandamus and injunction, retard, if not defeat, legislation. A like controversy might wholly prevent the publication of the laws. It is

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respectfully submitted, that the matters involved in the present controversy pertain exclusively to the legislative department, and that the judiciary have no authority over them.

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

The defendant in error at the times hereinafter mentioned, was, and still is, superintendent of public printing of the two houses of congress; and the relator printer to the senate, and O. A. P. Nicholson, printer to the house of representatives.

By the act of August 26, 1852, it is made the duty of the superintendent to receive, from the secretary of the senate and the clerk of the house of representatives, all matter ordered by congress to be printed, and to deliver it to the public printer or printers. And the 12th section provides, that when any document shall be ordered to be printed by both houses of congress, the entire printing of such document shall be done by the printer of that house which first ordered the printing.

On the 31st of January, 1854, the commissioner of patents communicated to the senate that portion of his annual report for 1853 which relates to arts and manufactures, which that body, on the same day, ordered to be printed; and, on the following day, it was communicated to the house of representatives, who passed a similar order. This communication was delivered by the superintendent to the relator.

On the 20th of March, 1854, the commissioner communicated to both houses the agricultural portion of his report, which each house, on the same day, ordered to be printed; the order of the house of representatives being, it is admitted, first made.

The relator claimed, that the report of the commissioner of patents was but one document, within the meaning of the act of congress above referred to, and that, by virtue of the order of the senate of the 31st of January, 1854, he was entitled to

\*230] \*the printing of the agricultural portion of the report, although the printing of this part was first ordered by the house of representatives. The superintendent, however, refused to deliver it; and the relator thereupon applied to the circuit court for the District of Columbia for a mandamus, to compel the delivery. That court was of opinion that it had not jurisdiction of the case, and refused the mandamus; and this writ of error is brought by the relator.

The power of the circuit court of this district to issue writs of mandamus to an officer of the government in Washington, has frequently been the subject of discussion in this court. It was before the court in *Kendall v. Stokes*, 12 Pet., 524; in

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*Decatur v. Paulding*, 14 Id., 497; in *Brashear v. Mason*, 6 How., 92; and again, in *Goodrich v. Guthrie*, at the present term. The rule to be gathered from all of these cases is too well settled to need further discussion. It cannot issue in a case where discretion and judgment are to be exercised by the officer; and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy.

Now, it is evident that this case is not one in which the superintendent had nothing to do but obey the order of a superior authority. He had inquiries to make, before he could execute the authority he possessed. He must examine evidence; that is to say, he must ascertain in which house the order to print was first passed. He may, it is true, generally obtain this from the journals of the two houses, but yet he must examine them, and compare the dates of the orders; and, in this particular case, it may even have been necessary to take oral testimony, before he could determine the fact of priority, as the order was passed in each house on the same day. And, after he had made up his mind upon this fact, it was still necessary to examine into the usages and practice of congress, in marking a communication in their proceedings as a document; and to make up his mind whether separate communications upon the same subject, or on different subjects from the same office, when made at different times, were, according to the usages and practice of congress, described as one document, or different documents, in printing and publishing their proceedings. He was obliged, therefore, to examine evidence, and form his judgment before he acted; and, whenever that is to be done, it is not a case for a mandamus.

Nor is there any reason of public policy or individual right, which requires that this remedy should be extended beyond its legitimate bounds, in order to embrace cases of this description; for it would embarrass the operations of the legislative and \*executive departments of the government, if the court of this district was authorized to interfere, by this summary process, in controversies between officers, in their respective employments, whenever differences of opinion as to their respective rights may arise. If these differences cannot be adjusted by the authorities under which they are acting, an ordinary action at law would be an adequate remedy for any injury sustained.

It seems to be supposed that the case of *Kendall v. Stokes* justified this application; but it is altogether unlike it. The award of the solicitor of the treasury, in that case, was an official act; he was the officer appointed by act of congress to

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settle that account, and determine the amount of credit to which Stokes was entitled, if to any; and all that the post-master-general was required to do was, to enter it in the books of the department, when reported to him by the solicitor of the treasury. He was merely to record it. His duty, under that act of congress, was like that of a clerk of a court, who is required to record its proceedings; or, of an officer appointed by law to record deeds, which a party has a right by law to place on record; or of the register of the treasury of the United States, to record accounts transmitted to him by the proper accounting officers, to be recorded. The duty, in such cases, is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a court.

This was the point decided in *Kendall v. Stokes*, and the subsequent cases have all been decided upon the same principles. They are in no degree in conflict with it; on the contrary, they have followed it.

But the case before us, for the reasons above stated, is unlike that of *Kendall v. Stokes*, and the circuit court were right in refusing the mandamus. The judgment must, therefore, be affirmed.

*Order.*

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

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\*232] \*CHARLES H. MCBLAIR, ADMINISTRATOR OF LYDE GOODWIN, DECEASED, *v.* ROBERT M. GIBBES AND CHARLES OLIVER, EXECUTORS OF ROBERT OLIVER, DECEASED.

In 1816 an association, called the Baltimore Company, was organized in Baltimore for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529, and 12 Id., 111; 14 Id., 610.

An assignment of a share in this company, made in 1829 to a *bond fide* purchaser for a valuable consideration, was valid.

Although the transaction was illegal in 1816, and had not changed its character in 1829, yet the assignment was not tainted with any illegality. The claim against Mexico, as being one of the efforts to establish her indepen-

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dence of Spain, rested entirely upon her sense of honor in acknowledging the obligation after her independence was achieved; but after the debt was admitted, the *bonâ fide* assignee became substituted to all the rights of the original shareholder.

The cases examined, showing how far a *bonâ fide* assignee of an illegal contract can claim and enforce his contract of assignment.<sup>1</sup> An assignment of "all my undivided ninth part, right, title, and interest, of every kind whatever, in the claim," carried with it an assignment of a claim to commissions as well as the share itself.

Moreover, the original holder, or his representatives, would be estopped from claiming the proceeds, after they had been received by his *bonâ fide* assignee.<sup>2</sup>

THIS was an appeal from the circuit court of the United States for the district of Maryland, sitting as a court of equity.

The controversy related to a share in the Mexican Company, which was held by Goodwin, and also to a claim on his behalf, to a commission of five per centum upon the proceeds in virtue of his agency, and under an agreement with the company.

The nature of this case has already been explained in the preceding volumes of these reports, and is again touched upon in the opinion of the court in the present case. The reader is referred to 11 How., 529; 12 Id., 111; and 14 Id., 610.<sup>3</sup>

The bill was originally filed by McBlair, in a state court, but was removed into the circuit court of the United States, by Gibbes and Oliver, who stated themselves to be citizens of the State of New York.

On the 13th of March, 1852, McBlair took out letters of administration upon the estate of Lyde Goodwin, from the orphans' court of Baltimore city; and filed his bill to recover from the executors of Oliver, the proceeds of Goodwin's share in the company, and also his commission of five per centum. The claim rested upon the allegation that all the assignments which Goodwin had made to Oliver were void, as was also the purchase by Oliver, of Goodwin's interest from his trustee in insolvency. If these were void, the proceeds of the share would of course belong to Goodwin's personal representatives.

On the 3d of December, 1853, the circuit court dismissed the \*bill with costs, whereupon the complainant appealed to this court. [\*\*233

It was argued by *Mr. Davis* and *Mr. Robert N. Martin*, for the appellant, and by *Mr. Campbell* and *Mr. Johnson*, for the

<sup>1</sup> See also *Gridley v. Westbrook*, 23 How., 503; *Planters' Bank v. Union Bank*, 18 Wall., 500.

<sup>2</sup> FOLLOWED. *Brooks v. Martin*, 2 Wall., 81. CITED. *McMicken v. Perin*, 18 How., 510; *Railroad Co. v. Durant*, 5 Otto, 579. See also *W. U.*

*Tel. Co. v. Union Pac. R'y Co.*, 1 McCrary, 563; *Wann v. Kelly*, 2 Id., 630; *Burke v. Flood*, 6 Sawy., 227; *Insurance Co. v. Elliott*, 7 Id., 22; *Heckman v. Swartz*, 50 Wis., 270.

<sup>3</sup> Further decision, *Mayer v. White*, 24 How., 320.

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appellees. Only those points of the argument will be noted, upon which the opinion of the court rested, viz: the validity or invalidity of the assignments to Oliver.

The counsel for the appellant contended that the assignment from Goodwin to Oliver, made in 1829, was void, because:—

It must be considered as settled by this court—

1. That the purposes and dealings of the Mexican Company, were illegal, and by the laws of the United States, not less than those of Maryland, void.

2. That till some change was wrought the claim of the company was not assignable, but that any assignment was void.

3. That no such change as made the claim either valid or assignable, was wrought by any act prior to the treaty of 1839.

4. That neither the treaty nor the award operated retroactively to make valid prior acts. Therefore the assignments are void, and nothing passed by them. *Gill v. Oliver*, 11 How., 529; *Williams v. Oliver*, 12 Id., 111; *Deacon v. Oliver*, 14 Id., 610; *Kennet v. Chambers*, 14 Id., 38, 49, 51, 52. The assignment of 1829 was not binding on Goodwin, because there is no proof of the release of the debt on the books of Oliver.

Upon this branch of the case, the counsel for the appellee contended, as a 5th point:—

5. But conceding, for argument sake, that the appellant may urge without impediment the illegal act of him whom he represents, on what ground does he assail the assignment of Goodwin of 1829?

That the claim was not validated till 1839, if true, will not avail him, because equity will not permit an assignor to defeat his own assignment by procuring a good title subsequently for his own benefit, but will hold such subsequent acquisition to enure to the assignee's benefit.

2 Smith Lead. Cas., 464; 1 McLean, 384; 2 Story, 630; 11 How., 325; 3 Story, 175; 2 Serg. & R. (Pa.), 507; 2 Pa. St., 325.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed by the administrator of Lyde Goodwin against the executors of Robert Oliver, to recover the pro-

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ceeds of a share in an association called the Baltimore Company, \*which had a claim against the Mexican government, that was allowed under the convention of 1839, [\*234 "for the adjustment of claims of citizens of the United States against the Mexican Republic." The claim of the company was founded on a contract with General Mina, in 1816, for advances and supplies in fitting out a military expedition against the dominions of the King of Spain. The bill also sought to recover a commission of five per centum, which the members of the company had agreed to give to Goodwin, for his services as agent in soliciting the claim against Mexico. The share and commissions, as charged, amount to \$67,337.15.

The executors of Oliver set up a right to retain the fund for the benefit of the estate, under and by virtue of a purchase of Goodwin's share in this company, and also of his right to the commissions, by their testator, in 1829. The purchase and transfer took place the 30th May, in that year, for a good and valuable consideration.

A question was made on the argument, whether or not the assignment of Goodwin was sufficiently comprehensive to include a right to the commissions as well as to the proceeds of the share. We are satisfied that it is. The language is very broad: "All my undivided ninth part, right, title, and interest, of every kind whatever, in the claim on the government of Mexico," &c. And again: "The object and intention of this agreement is to make a full and complete transfer to the said Robert Oliver, of all my right, title, and interest aforesaid," &c. The commissions were dependent upon the allowance of the claims of the company against Mexico, and, of course, an interest intimately connected with them; without the allowance of the one, the other would be valueless.

The understanding of Goodwin himself, of the intention and effect of the assignment, accords with this view, as derived from his deposition taken in behalf of the claims of the company, and used before the board of commissioners; and also from his testimony in the proceedings before the Baltimore county court, for the distribution of the fund among the several claimants.

This share of Lyde Goodwin in the company, and his commissions, have heretofore been the subject of consideration in this court. The case is reported in 11 How., 529. George M. Gill, the permanent trustee of Goodwin, who had taken the benefit of the insolvent laws of Maryland in 1817, claimed this fund before the Baltimore county court as part of the estate of the insolvent, against the right and title of the executors of Oliver, claiming under this assignment of 1829.

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The Baltimore county court held that the fund passed by the insolvent assignment of 1817, to Gill, the permanent trustee.

\*235] The case was \*taken to the court of appeals of Maryland, where the decree was reversed, and the fund distributed to Oliver's executors, the appellate court holding that the contract of the company with General Mina was made in violation of the neutrality act of the United States of 1794, and, being thus founded upon an illegal transaction, constituted no part of the property or estate of the insolvent within the meaning of the Maryland insolvent laws. Gill brought the case to this court under the 25th section of the judiciary act, for the purpose of revising that decision; but the court dismissed the case for want of jurisdiction, a majority of the judges holding that the only question involved in the decision below was the true construction of a statute of the state, and that it belonged to the Maryland court to interpret its own statutes. Whether that interpretation was right or wrong, was a matter with which this court had no concern.

Gill, the permanent trustee, having thus failed to establish a title to the fund under the Maryland insolvent laws, the litigation is again revived respecting the fund, in behalf and for the benefit of the personal representatives of Goodwin, on the ground that the moneys realized upon the contract with General Mina, from the Mexican government, is to be regarded as a subsequent acquisition of property by the insolvent, belonging to his estate, and to be dealt with accordingly.

Hence this bill filed against the executors of Oliver to recover possession of the fund. The defense set up to this demand of the administrator of Goodwin, and which it is insisted is conclusive against him, is the assignment of the contract of General Mina, by Goodwin himself, to Robert Oliver, in 1829, which has been already referred to; that having thus parted with all his right or claim to that contract, for a full and valuable consideration, the proceeds thereof derived from the recognition and fulfilment by the Mexican government belong to the estate of Oliver, and not to that of Goodwin; and vested his executors with the equitable right to receive the moneys, and which have been paid accordingly under the decree of the court of appeals of Maryland, in making a distribution of the fund.

It is urged, however, in answer to this view, that the contract with General Mina being illegal, the sale and assignment of it from Goodwin to Oliver must also be illegal, and consequently that no interest therein, equitable or legal, passed to Oliver's executors.

But this position is not maintainable. The transaction, out

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of which the assignment to Oliver arose, was uninfeeted with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly \*independent of, the illegal transactions upon [\*236 which the principal contract was founded. Oliver was not a party to these transactions, nor in any way connected with them.

It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfilment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfilment depended altogether upon the voluntary act of Mina, or of those representing him.

No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself.<sup>1</sup> In *Faikney v. Renous*, 4 Burr., 2069, where two persons were jointly concerned in an illegal stock-jobbing business with a third, and a loss having arisen, one of them paid the whole, and took a security from the other for his share, the security was held to be valid as a new contract, uninfeeted by the original transaction. And in *Petrie v. Hannay*, 3 T. R., 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in *Armstrong v. Toler*, 11 Wheat., 258.

In *Tenant v. Elliott*, 1 Bos. & P., 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being

<sup>1</sup> CITED. *Kinsman v. Parkhurst*, 18 How., 293.

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in violation of the navigation laws ; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction. The same principle was applied and enforced in the case of *Farmer v. Russell*, 1 Bos. & P., 296.

\*237] \*In *Thomson v. Thomson*, 7 Ves., 470, there had been a sale of the command of an East India ship to the defendant, and as a consideration he stipulated to pay an annuity of £200 to the previous commander so long as he should continue in command of the ship.

This contract of sale was illegal. Subsequently the defendant relinquished the command, and another person was appointed in his place. But, under the regulation adopted by the East India Company to prevent the sale of the commands of their ships, an allowance was made to the defendant, on his retiring, of £3,540.

The bill in this case was filed for the purpose of procuring a decree for the investment of a portion of this fund to satisfy the annuity of £200, praying that the value of it might be ascertained and paid out of the money allowed by the company.

The objection made was, that the contract providing for the annuity was illegal, and a court of equity therefore would not interfere.

The master of the rolls, Sir William Grant, agreed that the contract was illegal ; he admitted there was an equity against the fund, if it could be reached by a legal agreement ; but observed, "you have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support." "If the case," he further observed, "could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust ;" "but in this instance the money is paid to the party." "There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences."

So, in *Sharp v. Taylor*, 2 Ph. Ch., 801, the bill was filed, among other things, to recover a moiety of the freight money, the whole of which had come into the hands of one of the joint owners. The defense set up was, that the trade in which the

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vessel had been engaged, and in which the freight had been earned, was in violation of the navigation laws, and illegal. But Lord Chancellor Cottenham answered, that the plaintiff was not asking for the enforcement of an agreement adverse to the provision of the act of parliament, nor seeking compensation and payment for an illegal voyage; that, he observed, was disposed of when Taylor (the defendant) received the money; the plaintiff was seeking only his share of the realized profit.

Again, he observed, can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he \*can show that, in realizing it, some provision in some act of parliament has been violated? The answer is, [\*238] that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties. The difference, he observes, between enforcing illegal contracts, and asserting title to the money which has arisen from them, is distinctly taken in *Tenant v. Elliot*, and *Farmer v. Russell*, and recognized by Sir William Grant, in *Thomson v. Thomson*.

These cases show that the assignment of Lyde Goodwin to Robert Oliver, in 1829, being collateral to, and disconnected from the illegal transaction out of which the Mina contract arose, was valid and binding upon Goodwin, and vested in Oliver all the benefits and advantages, whatever they might be, derived from that contract.

The assignment from Goodwin to Oliver, though the assignment of an illegal contract—which contract, therefore, imposed no legal obligation, and rested simply upon the honor of the parties—was not within the condemnation of the Maryland insolvent laws, as expounded by her courts, as the right was not derived under but entirely independent of them. Those laws have no application to this assignment.

And further, that the money having been realized by his executors, according to the purpose and object of the assignment becomes a part of the assets of the estate, which belong to the personal representatives.

Another ground may be briefly stated, which, in our judgment, is equally conclusive against the complainant. The assignment of 1829, of the Mina contract, not being tainted with illegality, and therefore obligatory upon Goodwin, if he were alive and claiming the fund against the representatives of Oliver, having parted with all his right in the subject to their testator, for a valuable consideration, would be estopped from setting up any such claim, and, of course, his personal representatives can be in no better situation.

We have not deemed it necessary to look into the case for

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the purpose of ascertaining whether Goodwin, at the time of the proceedings in the Baltimore county court, had such notice of them as required that he should have appeared there and asserted his right; and hence, that the decree of that court, in the distribution of the fund, was conclusive upon such right. That question is unimportant, inasmuch as, in our opinion, the executors of Oliver have, independently of that ground, established a complete title to the fund in controversy.

\*We think the decree of the court below was right, \*239] and should be affirmed.

Mr. Chief Justice TANEY.

I shall state my opinion in this case, in the cases of Williams's administrator, and Gooding's administrator, as the three cases are nearly connected, and depend on the same principles.

*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 Maryland, 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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JOHN S. WILLIAMS, ADMINISTRATOR OF JAMES WILLIAMS, DECEASED, APPELLANT, v. ROBERT M. GIBBES AND CHARLES OLIVER, EXECUTORS OF ROBERT OLIVER, DECEASED.

In 1816, an association called the Baltimore Company, was organized in Baltimore, for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529, and 12 Id., 111.

One of the shareholders having become insolvent, in 1819, his trustee sold the share in 1825. The original transaction being illegal, the share could not be considered, by the laws of Maryland, as property passing by the insolvency to the trustee. Consequently, the sale by the trustee passed nothing to the assignee. The court of appeals of Maryland so decided, and this court adopts their construction of their own laws.

An act of the Legislature of Maryland, passed in 1841, made the sale of 1825 valid, so far only as defects existed for the want of a bond, by the trustee in insolvency, and the want of a ratification of the sale by the court. But it did not purport to cure other defects in the title of the trustee. Nor did the court of appeals decide that it went any further than to cure the two defects above mentioned.

In 1843, the Baltimore county court distributed the fund, and awarded the

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proceeds of the share in question to the executors of the assignee. This decree was affirmed by the court of appeals in 1849. But during this time there was no person authorized to protect the interest of the insolvent. He had died in 1836, and no letters of administration upon his estate were taken out until 1852.

In the distribution of a common fund amongst the several parties interested, an absent party, who had no notice of the proceedings, and who was not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees.<sup>1</sup>

The English and American cases upon this point examined.

The present claim being made by the administrator of the insolvent, against the executors of the assignee, it is not necessary, under the circumstances of the case, to turn the plaintiff over, for his remedy, against the distributees.

THIS was an appeal from the circuit court of the United States for the district of Maryland.

\*It was, in some respects, similar to the preceding [\*240 case of *McBlair, administrator of Goodwin v. Oliver's executors*; but it differed from it in the important point that the original holder of the share, namely, Williams, never made any assignment of it to Oliver. The title of the latter was derived exclusively from a purchase made by him from George Winchester, the trustee of Williams in insolvency.

The Mexican Company consisted originally of ten persons, each holding one share. One of the parties declining to pay up, the remaining nine advanced the necessary amount, and thus the company was reduced to nine persons or firms, namely, D'Arcy and Didier, Hollins and McBlair, Descoves and Mercier, Dennis A. Smith, Jeremiah Sullivan and John Sullivan, John Gooding, James Williams, Thomas Sheppard, and Lyde Goodwin.

In 1819, James Williams applied for the benefit of the insolvent laws of Maryland, and George Winchester was appointed his trustee, from whom Mr. Oliver purchased the share, in 1825, for \$2,000. Winchester had omitted to give bond or to have the sale ratified by the court, and an act was afterwards passed by the legislature of Maryland, to cure these defects.

Williams died in 1836, and no letters of administration were taken out until 1852, when the present appellant became his administrator, and filed the bill in the present case. The ground assumed was the same with that taken by McBlair, in the preceding case, namely, that if the assignment to Oliver made by the trustee in insolvency was void, the interest of Williams must remain in his personal representatives.

<sup>1</sup> FOLLOWED. *Matters of Howard, Pulliam v. Pulliam*, 10 Fed. Rep., 9 Wall., 185. CITED. *Public Works* 74. Further decision, 20 How., 535, v. *Columbia College*, 17 Wall., 531; 541.

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On the 4th of October, 1841, a bill was filed on the equity side of the county court of the sixth judicial district of Maryland state court, by Philip E. Thomas and John White, trustees of Dennis A. Smith, against the following persons interested in the share of Dennis A. Smith, namely: Dennis A. Smith, James W. McCulloh, administrators; Job Smith, the President and Directors of the Mechanics' Bank of Baltimore, John Glenn, David M. Perine, William Gwyn, and James W. McCulloh, trustees; Mrs. Smith, William Brown, James Brown, John Patterson, Walter Smith, executor; Clement Smith, George Brown, Herman Perry, Virgil Maxey, Samuel Nevins, — Nevins, Joshua Lippencott, John S. Smith, Richard Harding, and A. H. Lawrence, and the President, Directors, and Company of the Bank of the United States. The bill set forth the deed, the amount awarded to D. A. Smith, and the whole amount awarded to Glenn and Perine, the existence of charges and claims affecting in common their share of the fund and the residue in the hands of Glenn and Perine; and \*241] after suggesting, in general terms, \*that they were advised there were other interests represented by Glenn and Perine, connected with the claims of Dennis A. Smith, of the particulars whereof they were not informed, but which Glenn and Perine could state, and which were proper subjects for distribution by the court, they pray for a proper distribution of the certificate, &c., growing out of the awards aforesaid, for allowance of commissions for notice to the persons interested as aforesaid to present their claims before the auditor, and for general relief.

Glenn and Perine filed their answers, admitting the facts set forth in the bill; expressing their willingness to have the proceeds of the awards therein mentioned distributed under the direction of the court to the persons entitled thereto, including the award in favor of those respondents under the agreement in the bill; and joined in the prayer for a reference to the auditor.

A notice was ordered by the court, and published on the 28th of October, 1841, requiring all persons interested in the claims of D. A. Smith and the Mexican Company, on Mexico, to present their vouchers, properly authenticated, on or before the 1st January, 1842.

The cause was continued, from time to time, until the 23d of January, 1842, when Nathaniel Williams intervened, as the permanent trustee of James Williams, appointed in the place of George Winchester. He claimed the proceeds of the share of James Williams, upon the ground that the assignment to Oliver, by Winchester, was irregular and void.

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It is not necessary to state the numerous claimants who presented themselves, or the grounds upon which they rested their claims.

Another order was published on the 5th of September, 1843, giving notice to all persons having claims on the funds awarded to the Mexican Company of Baltimore and Dennis A. Smith, to file their claims, with the vouchers and proofs, on or before the 5th October, 1843, else they might be barred from the benefit of the distribution of the fund.

On the 5th of December, 1846, the court pronounced its decree, awarding, amongst other things, that the proceeds of the share of James Williams should be paid to the executors of Oliver, claiming under the assignment from Winchester, the defects of which were cured by an act of the legislature.

Upon an appeal from this decree to the court of appeals of Maryland, the decree of the county court, in the above respect, was affirmed.

In August, 1852, John S. Williams, as administrator of James Williams, deceased, filed his bill against the executors of Oliver, in the supreme court of Baltimore city. The executors removed \*the cause into the circuit court of the United States, upon the allegation that they were citizens of the state of New York. The part of the bill which brought up the question in the cause was the following:—

Your orator further states to your Honor, that the said James Williams departed this life on or about 20th day of September, in the year 1836, in Harford county; that no letters of administration were ever taken out upon his estate, until they were in due form of law granted to your orator by the orphans' court for Harford county, on the 15th day of March, in the year 1852. That he has given bond approved by said court, for the faithful performance of the trust reposed in him.

That neither said Williams nor your orator were ever present, or parties to, or in any manner bound by any proceeding, or order, or decree, had or passed in the aforesaid suit of *Thomas White v. Dennis Smith and others*, in Baltimore county court, as a court of equity, or in any appeal from the doings of said court, to the court of appeals for the western shore of Maryland, and that any thing done or enacted in either of said courts was transacted in the absence of the said Williams and your orator; that the settlement and adjustment of the amount of the partnership funds of the said Mexican Company, and of the charges and commissions, and costs, to which they were liable *in solido*, and the distribution of the remainder of said funds by the decree of the court, into the several shares to

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which each member of said company was entitled, are in no manner binding upon, or even evidence against the said Williams or your orator, &c., &c.

The respondents answered the bill, setting forth various grounds of defense, and particularly relying upon the decree of the court of appeals, affirming the judgment of the county court. The opinions of the judges of the court of appeals have been published, *in extenso*, in one of the preceding volumes of Howard's Reports, and therefore need not be repeated here.

On the 3d of December, 1853, the circuit court dismissed the complainant's bill, with costs, and the complainant appealed to this court.

It was argued by *Mr. Davis*, and *Mr. Dulany*, with whom was *Mr. Martin*, for the appellant, and by *Mr. Campbell*, and *Mr. Johnson*, for the appellees.

Only such of the arguments of counsel can be reported as related to the point upon which the decision of the court turned.

The counsel for the appellant contended:—

II. The decree of the court of appeals is not a bar.

1. It is no estoppel, as *res adjudicata*. For Gooding and \*243] Williams were not parties named in the bill, nor petitioners under the decree; and no notice, actual or constructive, of the pendency of the suit is shown or averred. *Hollingsworth v. Barbour*, 4 Pet., 475; *Aspden v. Nixon*, 4 How., 467, 497, 498.

2. Both Williams and Gooding were dead before the suit was instituted; and no administration existed till after final decree.

The decree, therefore, cannot bind them as either parties or privies.

3. The title decided on was different. The title of Gooding and Williams was never in issue. The only issue on the record was, the validity of an assignment of a prior insolvent trustee, questioned by a subsequent insolvent trustee.

No matter what the court might have thought or said, on such an issue the decree could not conclude a title paramount to both the litigants. For our title originated in the award subsequent to the insolvent assignment.

III. The decree does not bar the complainants as a final disposition of a fund in court for distribution, by reason of their failure to intervene. For,

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1. The suit did not profess to be on behalf of all the claimants of the Mexican Company's fund.

It contains no description of the fund, of the parties entitled, or of the Mexican Company; and no prayer for the administration of the fund.

Its allegations and averments look to the administration of the share and private fund of D. A. Smith, under the deed to Thomas and White, among the creditors of D. A. Smith, who are parties; and to have included in that suit the allegations requisite to enable the court to administer the whole fund of the Mexican Company among the members, would have made the bill multifarious and demurrable. Only a few loose phrases allude to any thing outside the trusts of the deed to Thomas and White.

Thus Williams and Gooding were neither bound nor entitled to come in under the decree. *The Mary*, 9 Cranch, 126; *Good v. Blewitt*, 13 Ves., 397; *Id.*, 19 Ves., 336; *Hays v. Miles*, 9 Gill & J. (Md.), 193, 197, 198; *Chalmers v. Chambers*, 6 Harr. & J. (Md.), 29, 30.

2. Had the bill been expressed to be by a few on behalf of all the claimants of the fund, yet

(a) It is not a case where a few could sue for all; for the members of the company were only nine, were all known, and could and should have been made parties by name or by their representatives.

(b) But even if it were a case where a few may sue for all, and the bill properly framed, yet the decree in a suit by a few \*for distribution of a fund among all interested is not ever, in itself, a bar to one who did not come in. [\*244]

(c) Its only effect is to protect the trustee, and shift the remedy from him or the fund against the party to whom it was awarded. *Gillespie v. Alexander*, 3 Russ., 130; *David v. Froud*, 1 Myl. & K., 200; *Greig v. Somerville*, 1 Russ. & M., 338.

(d) It has never been held conclusive upon the right of a party, unless the failure to intervene has been wilful, after actual notice, and without adequate reason; and even then the delay after the decree and distribution was the main ground of exclusion; and the only case going so far was reversed on appeal. 2 Danl., C. P. 1453; *Sawyer v. Birchmore*, 1 Keen, 391, 825.

But in these cases,

(a) Both parties were dead before the suit was brought, and so could be in no default.

(b) No administration existed on the estate of either, till after final decree.

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(c) No notice is shown to have been brought home to any one creditor or distributee, interested in either estate.

IV. The decision of the court of appeals is not such an authority of a local tribunal, on a local law, as compels the supreme court, irrespective of its own opinion, to hold Oliver's title better than that of the complainants. For

1. The opinion does not declare the title of Oliver to be good, but really pronounces it invalid.

It decides the claim to be so corrupt as to be utterly void, and that, therefore, it will not pass to an insolvent trustee. Rec. *Williams v. Oliver*, 307, 308.

This is decisive, that Winchester never had any interest in the fund at all; and, consequently, could assign none.

The court then say, in consideration of the peculiar nature of the contest between two trustees of the same party, hypothetically, if we are wrong in supposing the claim never vested, in that event, if it could vest, it was assignable; and, being so, it passed to Oliver by the first trustee's assignment.

But they expressly declare it did not vest in him at all; and merely add this subsidiary and hypothetical ground to show that the complainant, on his own hypothesis, had not the best title before the court. Rec. *Williams v. Oliver*, 82-84. The supreme court have so construed this opinion. *Williams v. Oliver*, 12 How., 111.

If it be argued,

2. That the court, in the face of this opinion, awarded the fund to Oliver, we reply:—

\*245] \**(a.)* The question now relating merely to matter of authority, such a decision, if it really were tenable on no other hypothesis than an affirmation of the validity of Winchester's assignment, would so contradict the opinion, as to destroy all weight of either as authority. It makes the court say one thing, and do its diametrical opposite.

*(b.)* But the question is not what might have been, but in fact was not held, but what, in point of fact, was the opinion of the court about Oliver's title; nothing shows that they did hold Oliver's title good. For,

They may have decreed Glenn and Perine to convey to Oliver, in the absence of a better title, on their confession of a trust for them, and the language of the award, which, in the absence of any one else appearing to be concerned, declared them trustees for Oliver's executors.

It would seem demonstrable that, whatever may be thought of its correctness, this was the only ground on which the court did, in fact, rest their decree.

For, if the court considered the question of title at all, they

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must be presumed to have confined themselves to those titles which alone appear on the pleadings.

Those titles are:—

1. The award and deed of trust and confession of Glenn and Perine, that they hold in trust for Oliver's executors, not for Oliver.

2. The title of Oliver, under the assignment of Winchester, first insolvent trustee.

3. The title of Williams, second insolvent trustee.

The court, therefore, in making the decree, must have held, either

1. That the question lay between two insolvent trustees of the same man; and the fund being in the hands of trustees, confessing a trust for that trustee who had the better right of the two, the court would not take it from a better, and give it to a worse title.

This court has countenanced this view, and it is consistent with the opinion of the court of appeals.

2. That a title vested in Winchester, which passed to Oliver by his assignment.

But this could be only on one of two grounds:—

(a.) That the Mexican claim was assignable in 1819, and passed to Winchester, on the insolvency of Gooding and Williams.

But this they have expressly declared not to be the law. Or, They held that the treaty related back, and made valid what \*before was invalid; and the treaty and act of 1841 [\*246 together gave a good title.

But this is directly in contradiction with the very words of their opinion. For,

They turned Gill out of court, though he was assignee in 1817, prior to Oliver's assignment, on the express ground of the original turpitude of the transaction, which would have been absurd, if that original sin had been cured by relation. Therefore,

1. They did not pass on the absolute title of any one; but only awarded the fund to the party for whom the possessors confessed a trust, and the award itself showed a *prima facie* claim.

In neither aspect of the case has the act of 1841, ch. 309, any thing to do with this point.

(c.) Such an opinion is not such a declaration of settled local law, as will relieve or preclude this court from giving its own opinion fair play.

It was only a decree by three, out of a court of six; and they differed on the grounds of the decision. *Rec. Williams*

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v. Oliver, 306-308; Craig v. Missouri, 4 Pet., 427; Carroll v. Carroll, 16 How., 275.

It has never been held, that the mere fact of a decision in a state court, on the same papers, binds the United States courts.

It is mere matter of authority; and that only when it relates to some state statute or usage, or real estate title, or peculiar local law. And, in all such cases, the authority depends entirely on the question actually passed on by the court, not what might have been, but in fact was not decided.

That is the exact difference between a decree operating to bind an interest, whether by technical estoppel or negligence to appear on notice, and the operation of the opinion of the same court, in the same case, as an authority declaring the law of the state. It may be that the pleadings and decree may establish, between the parties, a result in which the court never contemplated affirming, nor considered as the law in general; for example, here the decree is binding on the trustee, whether the court be right or wrong in giving the fund to Oliver; but, for this suit, the very question is not what they did, but why—on what principle, they did it?

(a.) If, in fact, the court did affirm the validity of the assignment of Winchester, it is demonstrated that the decision was not on the local insolvent law, but one directly on the laws of the United States, and so peculiarly within the cognizance of this court.

For a decision affirming the validity of any assignment <sup>\*impeaches that operation of the United States laws.</sup> [247] which annuls every contract in violation of them. Armstrong v. Toler, 11 Wheat., 258; Craig v. Missouri, 4 Pet., 410; Green v. Neal, 6 Id., 297; Swift v. Tyson, 16 Id., 1; Foxcroft v. Mollet, 4 How., 379; Nevins v. Scott, 13 Id., 268; Trumbo v. Blizzard, 6 Gill. & J. (Md.), 23.

V. There can arise no question of the effect of Winchester's assignment as a contract, which, though not capable of being enforced, may yet protect Oliver by estoppel. For

Williams's title is not as insolvent trustee, but as administrator, and since the contract of Winchester, and for property never vesting in him.

No question of estoppel can exist. Fairtitle v. Gilbert, 2 T. R., 171; Pen. Del. Md. Co. v. Dandridge, 8 Gill. & J. (Md.), 248; 1 Atk., 354.

Neither does the original turpitude of the claim bar us; for We do not rest on the Mexican contract. Our title, and our only title, is the award.

Our relation to the Mexican Company is referred to merely

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as matter of description. The award gave the funds to the members of that company, or those legally representing them. To insist on the original turpitude is to annul the award, and to impeach the right which it created.

VI. The death of Gooding, in 1838, and Williams, in 1839, just before the treaty, does not oust their title.

No treaty meant to confine a benefit thirty years old to the very persons originally claiming. Nearly all the company were dead. The personal representative stands in the place of the deceased; and the award is of a fund, in augmentation of the estate.

There is no question of relation; the administrator takes as of the date of the treaty or award. It is like a partnership claim, awarded to one partner after the death of another, without administration. It enures to deceased's estate.

On this principle the court proceeded, when they resolved the abandonment of Stevenson's share, and confined the division to the other nine. *Campbell v. Mullett*, 2 Swanst., 551; *Stevens v. Bagwell*, 15 Ves., 140; *Murray v. East Jersey Co.*, 5 Barn. & Ald., 204.

VII. That the bar of limitation does not apply, in the absence of a personal representative. *Fishwick v. Sewell*, 4 Harr. & J. (Md.), 393; Angell's Lim., 173, 184, 185; *Haslett v. Glenn*, 7 Harr. & J. (Md.), 17; *Ruff v. Bull*, Id., 16; 2 Salk. 421; *Murray v. East Jersey Co.*, 5 Barn. & Ald., 204.

The view which the counsel for the appellees took of the point in question was the following:—

1. The decree of the Maryland court of appeals, in the distribution suit originating in Baltimore county court, adjudging Williams's share in the Mexican Company to Oliver's executors, is conclusive, as to their title, upon all persons, in all jurisdictions.

\*The bill in the distribution suit (Record in Goodwin's case, 18) prays: "That the funds growing out of the award may be properly distributed, under the direction and authority of the court, among the persons entitled thereto, whether as *cestuis que trust*, under the indenture aforesaid, subscribing the same, or as otherwise interested, in the view of a court of equity, in the proceeds of said award." [\*248]

The answer of Glenn and Perine (Record in Goodwin's case, 28) says: That "they are willing and desirous that the proceeds of the awards therein mentioned may be distributed among the parties entitled thereto."

Of the character of this proceeding this court has already expressed its opinion, in 12 How., 122, where it declined to

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take jurisdiction of it. It characterizes it as a suit for distribution dependent on the laws of Maryland, which involved and decided the right and title to the shares claimed in it under those laws.

It was not, then, a proceeding simply meant to distribute the fund in court among the parties bringing it in, or those they represented; but a suit to ascertain who were really entitled to the money in court, and to give it to those whom the court, the custodians of the fund, should find so entitled. It was, in other words, a proceeding *in rem*, and the final action of the court upon the *res* must be, and was meant to be, conclusive on all the world, as to notice, parties, title, and every thing else that was adjudicated by it; the court in which the proceeding took place having undoubted jurisdiction over the subject-matter of it. *Tongue v. Morton*, 6 Harr. & J. (Md.), 23; 2 Md., 451; 2 How., 338; 3 Wheat., 246; 9 How., 348.

The title of Oliver's executors to Williams's share, which is now denied, is the same title which the court of appeals affirmed; and it is impossible for this court to deny that title, without, at the same time, affirming that the court of appeals of Maryland ought not, on the facts before it, to have decreed in favor of the executors. It is respectfully submitted, that no other court can thus impeach the decree of the court of appeals of Maryland, which, with full jurisdiction in the premises, determined Oliver's executors to be the owners of Williams's share absolutely, and not as between them and any one else.

The distribution of the fund was a proceeding *in rem*, and the presence of parties was not necessary. We could not <sup>\*249]</sup> compel administration to be taken out. Must the whole fund wait till they chose to administer? The other side must show that they were not guilty of laches. They only know the reasons why they were not, and the bill sets forth no sufficient excuse. Although these parties may not have been before the court, yet their title was; because the executors of Oliver set forth the assignment to them by the trustee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed in the court below to recover of the defendants the proceeds of the share of James Williams, in what is called the Baltimore Company, which had a claim against the Mexican government, that was allowed under the convention of 1839. The claim was similar to the one under

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consideration in the case of the administrator of Lyde Goodwin against these defendants, just disposed of. The proceeds of the share, as charged, amount to \$41,306.41.

The main grounds of defense set up in this case are:—

1. The sale of this share in the company to Robert Oliver, for a valuable consideration, by George Winchester, permanent trustee of Williams, who had taken the benefit of the insolvent act of Maryland, in 1819, which was made in pursuance of an order of the court having jurisdiction in cases of insolvency under that act. The sale took place on the 2d April, 1825.

2. A decree of the court of appeals in Maryland, at the June term, 1849, affirming a decree of the Baltimore county court, which, in the distribution of the fund arising from this claim of the Baltimore Company, assigned the proceeds of the share in question to the executors of Oliver.

If the appellees fail to maintain their title to this fund, upon one or the other of these grounds, then the right to the share of Williams in the Baltimore Company, for aught that appears, still belonged to him at the time of his decease, in 1836, and passed to his legal representatives as a part of his estate; and although originally of no legal value, on account of the illegality of the transaction out of which the contract arose, yet, as the illegality has been waived and the money realized, we have seen, from the principles stated in the previous case of Lyde Goodwin, it belongs to Williams's administrator.

As it respects the first ground—the sale of the share of Williams, by the provisional trustee, to Robert Oliver, under the insolvent act—we have seen, in the case of Lyde Goodwin, the court of appeals of Maryland held, that this contract of the Baltimore Company with General Mina, being in violation of \*the neutrality act of the United States, of 1794, [\*250 was so tainted with turpitude and illegality, it could not be recognized under their insolvent laws as property; and that no right to or interest in the share passed to the trustee. And, that this being the construction of the statute by the highest court of the state, and which had a right to interpret its own laws, this court felt bound by it, without inquiring whether that interpretation was correct or not; and, consequently, as Goodwin's interest in the share did not pass to the insolvent trustee, it remained in Goodwin himself, and passed to the executors of Oliver, by virtue of his assignment to their testator, in 1829.

In this case the executors of Oliver are obliged to make title to the share in question, under the insolvent trustee of

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Williams; the assignment to Oliver, their testator, having been made by the trustee, and not by Williams himself. And it is now insisted on behalf of the executors, that the court of appeals of Maryland in this case reversed their opinion delivered in the case of Goodwin, and held that the interest in the share did pass under the insolvent laws to the trustee, and consequently that the proceeds of the share vested in them under his sale and assignment to their testator in 1825.

Had this been the decision of the court of appeals in the case of the share of Lyde Goodwin, the interest and proceeds would have passed to Gill, the permanent trustee, instead of to the executors of Oliver.

These results, so contradictory and inconsistent, claimed too as flowing from the judgments of the highest court in a state, should not be admitted unless compelled, after the most careful and deliberate consideration.

The decision in both cases was made at the same term, June, 1849; the one in the present case subsequent to that in the case of Goodwin. The court in their opinion state, that the grounds upon which they affirmed the judgment in this case were, first, for the reasons assigned by them for their decree in the previous case of Oliver's executors against Gill, permanent trustee of Goodwin.

The grounds for that decree are stated in the record, and as far as material are as follows: "They are of opinion that the entire contract (the Mina contract) upon which the claim of the appellee (Gill, the trustee,) is founded, is so fraught with illegality and turpitude as to be utterly null and void; 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; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such 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 laws."

Nothing can be more explicit or decisive against the title of the insolvent trustee, or of those setting up a claim under him, to a share in this Baltimore Company. The court say: "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." And this opinion is reaffirmed, *ipsissimis verbis*, in

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giving the judgment against the trustee of Williams, then before the court, and with which we are now dealing; and yet it is gravely insisted that no such decision was made in this case as was made in the case of Goodwin; but, on the contrary, the court decided that the interest in the share of Williams did pass under the insolvent laws to the trustee; that he became thereby invested with the title, and was competent to transfer it to Robert Oliver, the testator of the defendants.

The supposed contradiction and inconsistency of the determination of the court is founded upon the second paragraph in the opinion delivered. It is as follows: 2. "Because, under the proceedings based on or originating from the insolvent petitions of John Gooding and James Williams, and the act of assembly applicable thereto, Robert Oliver acquired a valid title to all the interest of said James Williams and John Gooding in the fund in controversy, for the reasons assigned by Judge Martin as the basis of his opinion in those cases."

Judge Martin had dissented from the opinion of the majority of the court, in the case of Lyde Goodwin, being of opinion that the interest in his share passed under the insolvent laws to the trustee; and had maintained the same opinion in respect to the share of Williams, in the case then before the court. And it is supposed that this opinion was adopted by the other members, in the determination of the case.

We do not agree that this is a proper apprehension of the judgment given by the two members of the court; but, on the contrary, are satisfied that the opinion delivered may well warrant a more natural and consistent interpretation.

The true meaning will be apparent, we think, from the following explanation. Robert Oliver, as we have seen, had purchased the share of Williams of the insolvent trustee, in 1825, and consequently, if the interest in his share passed under the insolvent laws to the trustee, it had become vested in Oliver, and of course, on his death, in the executors.

\*The question before the court was between the [\*252] insolvent trustee and the executors. The court, after reaffirming their opinion in the case of Lyde Goodwin, namely, that no interest in the share passed to the trustee under the insolvent laws, and therefore that he was disabled from making out a title to it, go on in substance to say, that if in error as to this, and the opinion of Judge Martin should be adopted, namely, that the interest did pass to the trustee, it could make no difference in the result, inasmuch as the executors of Oliver would then be entitled to the proceeds, under his purchase of the share from the trustee himself, in 1825. Therefore, view-

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ing the case in either aspect, *quacunque via data*, the insolvent trustee had failed in establishing any interest in the fund.

It appears to us that this is obviously the meaning intended to be expressed, though we admit the terms used in the expression of it furnish some plausibility for the criticisms to which it has been subjected. The two opinions, the one in the case of Goodwin, and the other in the case of Williams, were given at the same term, and upon the same question; and, if the interpretation of the defendants is right, are diametrically opposite to each other; and not only so, as the first opinion is incorporated in the second, the judgment rendered in the case of Williams is founded upon two opposite constructions of the same statute, in one and the same opinion.

We prefer the explanation we have given to this extraordinary and absurd conclusion, as it respects the proceedings of a respectable court, and one possessing the highest jurisdiction in the state.

The change of opinion upon a question of law, or in the construction of a statute, is no disparagement to a judge, or a court, however eminent or experienced. The change is often-times a matter of commendation, rather than of reproach. But the case here presented, and upon which we are asked to turn the decision of the question, is, that two opposite constructions of a statute have been given by the court in the same cause, leading necessarily to opposite results, and both relied on as grounds for the judgment rendered. We have already assigned our reasons for disbelief in any such conclusion, and shall not again refer to them.

It has been suggested that the statute of Maryland, of 1841, confirming certain defective proceedings in insolvent cases, operated to confirm the sale of the trustee to Oliver, in 1825, and that the opinion of the court of appeals in the case of Williams is founded upon this statute. Winchester, the permanent trustee at the time of the sale, had not given a bond, with surety, for the faithful execution of his duty, as required by the law; and, <sup>\*253]</sup> under the decisions of the courts of Maryland, this omission disabled him from dealing with the estate of the insolvent.

The act of 1841 was passed to remedy defects of this description. It provided that all sales and transfers of property and claims, theretofore made by any permanent trustee, &c., under the insolvent laws of the state, shall be valid and effectual, notwithstanding such trustee shall not have given a bond with security, &c.; and the 3d section provides that the act shall not be so construed as to cure any other defect in the proceedings than the failure to give a bond, with security, or the want

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of any ratification by the court of any sale made by such trustee.

It is quite apparent from the provisions of the act, that it was not designed to confirm all sales previously made by the trustee under the insolvent laws, and render them valid and effectual, but simply to confirm, so far as respected any defect arising out of the omission of the trustee to give the proper security, and also as respected any omission on the part of the court to confirm the sale. These two defects in any previous proceedings were cured by the statute, but in all other respects the proceedings were valid, or otherwise independently of it. It is impossible to maintain that the statute looked to any such informality in the title of the trustee, as that held by the court of appeals in the case of Lyde Goodwin, as well as in the present one. And, besides, it is inconceivable why the court should have reaffirmed their opinion in the case of Goodwin, as a ground for denying the title to the trustee, if they had intended to hold that it passed by force of the act of 1841. We have no belief that such was the opinion intended to be expressed.

The decree of the court affirming the judgment of the court below has been referred to as favoring the view of the decision contended for by the appellees. This decree adjudges and decrees, that the judgment below awarding the share of Williams to the executors of Oliver be affirmed, and that Glenn and Perine, the general trustees of the fund, pay the proceeds of the share to the said executors.

It will be remembered that the only question before the court respecting this share was between the executors on the one side, and the insolvent trustee of Williams on the other; and as the executors were the apparent owners of the fund, unless a title could be maintained by the trustee, so far as respected the parties before the court, the former exhibited the better title; at least, the better title to take the possession and charge of the fund in the distribution among the claimants. The form of the decree, therefore, was very much a matter of course, in the aspect of the case as then presented.

This view will be more fully appreciated when we refer to another branch of this case, presently to be considered. We will simply add, in our conclusion upon this part of the case, that the opinion now expressed was the one entertained by us when the case involving this share of Williams was formerly before the court, and which will be found in 12 How., 111, 123.

On page 123 we observed "the counsel for the plaintiff in error sought to distinguish this case from the previous one, the case of Lyde Goodwin, and to maintain the jurisdiction of the

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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 we observed in answer, "admitting this to be so, which we do not, still, the admission would not affect the result; for the decision of the court of appeals upon a previous branch of the case denied to the plaintiff any right to or interest in the fund in question, as 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."

Our conclusion, therefore, upon this part of the case is, that according to the law of Maryland, as expounded by the highest court of the state, no title to or interest in the share of Williams in the contract of the Baltimore Company, under General Mina, passed under the insolvent laws of that State to the insolvent trustee; and, consequently, no interest in the same became vested in the executors of Robert Oliver, by force of the assignment from the trustee to him in 1825.

2. The next question is as to the conclusiveness of the decree of the Baltimore county court, making a distribution of the fund among the several claimants, and which was affirmed by the court of appeals, upon the rights of the administrator of Williams to the proceeds of his share in the fund. The decree in the Baltimore county court was rendered in December, 1846, and affirmed June term, 1849.

Williams died in 1836, and no letters of administration were taken out upon the estate till 1852. It appears, therefore, that Williams had been dead ten years when the first decree was made, and thirteen at the date of the second; and no representative was in existence to whom notice of the proceedings could affect in any way the interest of the estate in the fund.

Now, the principle is well settled, in respect to these proceedings <sup>\*in chancery</sup> for the distribution of a common fund <sup>\*255]</sup> among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the

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trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *David v. Frowd*, 1 Miln. & K., 200; *Greig v. Somerville*, 1 Russ. & M., 338; *Gillespie v. Alexander*, 3 Russ., 130; *Sawyer v. Bichmore*, 1 Keen, 391; *Shine v. Gough*, 1 Ball. & B., 436; *Finley v. Bank of the United States*, 11 Wheat., 304; *Story Eq. Pl.* § 106, *Wiswall v. Sampson*, 14 How., 52, 67.

The general principle governing courts of equity, in proceedings of this description, is more clearly stated by Sir John Leach, master of the rolls, in *David v. Frowd*, above referred to, than in any other case that has come under our notice.

That was a case where one of the next of kin, who had no notice of the administration suit, filed a bill against the administratrix and distributees to obtain her share of the estate. The bill was filed some two years after the decree for distribution had been made and carried into effect.

The master of the rolls observed, that "the personal property of an intestate is first to be applied in payment of his debts, and then distributed among his next of kin. The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin; and the administration of his estate may be exposed to great delay and embarrassment. A court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator. Upon the application of any person claiming to be interested, the court refers it to the master, to inquire who are creditors, and who are next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in, and make their claims before the master, within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate among those who have, before the master, established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim.

\*"But it is obvious," he remarks, "that the notice given by advertisements may, and must in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or, from a multitude of circumstances, they may not see or hear of the advertisements, and

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it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it."

The master of the rolls further observed, "that if a creditor does not happen to discover the proceedings in the court, until after the distribution has been actually made, by the order of the court, amongst the parties having, by the master's report an apparent title,—although the court will protect the administrator, who has acted under the orders of the court,—yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no wilful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties, defendants, to restore to the creditor that which of right belongs to him." The master of the rolls then applied this principle to the right of the next of kin, the complainant in the bill, and observed, "that it had been argued that the case is extremely hard upon the party who is to refund, for that he has a full right to consider the money as his own, and may have spent it; and that it would be against the policy of the law to recall the money, which the party had obtained by the effect of a judgment upon a litigated title. But, he observed, there is here no judgment upon a litigated title; the party who now claims by a paramount title was absent from the court, and all that is adjudged is, that, upon an inquiry, in its nature imperfect, parties are found to have a *prima facie* claim, subjected to be defeated upon better information. The apparent title, under the master's report, is, in its nature, defeasible. A party claiming under such circumstances, has no great reason to complain that he is called upon to replace what he has received against his right."

In the case of *Gillespie v. Alexander*, also above referred to, Lord Eldon observed, that, although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of it; yet the course is to permit a creditor, he paying costs, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of the residue. If the creditor does not come till after the executor \*has paid away the residue, he is not without remedy,  
\*257] though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so, but he cannot affect the legatees, except by suit, and he cannot affect the executor at all.

These principles are decisive of this branch of the case, as they establish, beyond all controversy, the right of the adminis-

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trator to assert the title of Williams, the intestate, to the proceeds of the share in question, notwithstanding the decree of distribution by the Baltimore county court. There has been no laches, on his part, or, on the part of those whom he represents.

The cases above referred to relate to the rights of creditors, and next of kin; but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution amongst the several claimants.

It is worthy of observation in this connection that the decree, however conclusive in its terms, in the distribution of the fund amongst the apparent owners then before the court, possesses no binding effect upon the rights of the absent party, whose interests have not been represented on the subject of litigation. The opinion of the court given, and decree in pursuance thereof, applies only to interests of those amongst whom the fund is distributed.

These observations furnish an answer to the argument on behalf of the appellees, drawn from a reference to the terms of the decree of the court of Appeals of Maryland, in this case, by which the fund is adjudged to the executors of Oliver. As between all the parties then before the court, this adjudication was doubtless proper, and conclusive upon their rights.

It is agreed in the case, that but five eighths of the fund in controversy is in the hands of the executors, the residue having been paid over in the administration of the assets of the estate.

If this portion had been paid over by the executors in pursuance of an order of the court in an administration suit, the defendants would be protected to that extent, and the complainant compelled to proceed against the distributees. But no such fact appears in the case.

Without saying, at this time, that an executor, in all cases, may be compelled to account to a party making title to a portion of the estate, after distribution among the legatees and next of kin, unless first procuring an order of the court having charge of the administration, we perceive no reason, under the circumstances of this case, for exonerating them, or turning him round to a bill against the distributees.

Upon the whole, after the fullest consideration we have been \*able to give to this case, we think the decree of the court below was erroneous, and should be reversed. [\*258

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice DANIEL dissented.

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John S. Williams, administrator of  
James Williams, dec'd appellant,  
v.  
Robert M. Gibbes and Chas. Oliver,  
ex'ors of Robert Oliver, deceased.  
And  
John Gooding, Junior, administrator  
*de bonis non* of John Gooding,  
deceased, appellant,  
v.  
Robert M. Gibbes and Chas. Oliver,  
ex'ors of Robert Oliver, deceased.

Appeals from the cir-  
cuit court of the  
United States for the  
district of Maryland.

Mr. Chief Justice TANEY dissenting.

I dissent from the opinion in these two cases; but they are so intimately connected with the case against Lyde Goodwin's administrator, just decided, that I shall be better understood by considering the three together.

When the case of Gill (who was trustee of Goodwin under the insolvent laws of Maryland) against Oliver's executors was before the court, I did not concur in the judgment then given, as will be seen by the report of the case in 11 How., 529. It appeared to me unnecessary at that time to do more than simply express my dissent; but the course which these cases have since taken, and the decisions now given, make it my duty to state more fully my own opinion, and the grounds upon which I passed the decrees that are now before the court.

The history of the controversy is this: Goodwin, Gooding, and Williams, were members of the Baltimore Mexican Company, which made the contract with Mina, in 1816. The character of that contract is fully stated in the eleventh and twelfth volumes of Howard's Reports, and also the manner in which it came before the commissioners under the treaty with Mexico, and their award upon it.

The commissioners awarded the sum mentioned in their award to the Mexican Company of Baltimore, as due "for arms, vessels, munitions of war, goods, and money, furnished by the company to General Mina for the service of Mexico in the years 1816 and 1817," and gave interest to the company \*259] according to \*the stipulation in the contract with Mina. I have given the words of the award, because they show that the commissioners affirmed the validity of this contract, and directed the amount due by its terms, to be paid to the trustees therein named, for the benefit of the parties interested in it.

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Proceedings were soon after instituted in a Maryland court of equity, against the trustees by persons claiming an interest in the fund; and the money by order of the court was brought into court to be distributed among the parties entitled. Many claimants appeared, presenting conflicting claims for shares in the company.

Goodwin, Gooding, and Williams, all became insolvent. Goodwin in 1817, Gooding and Williams in 1819; and their respective trustees appeared in the Maryland court, and claimed the amount due to the insolvent.

On the other hand, the executors of Oliver claimed these three shares. Goodwin's under an assignment made to Oliver by Goodwin in 1829, and the other two under assignments made to him in 1825, by George Winchester, who was the trustee of each of them.

The controversies which arose upon the distribution of this fund were removed to the Maryland court of appeals, which is the highest court of the state. And in the trial there, it was objected that the contract with Mina was in violation of law, and therefore fraudulent and void, and vested no rights in the members of the company which the law would recognize, and consequently that no right of property in it could vest in the trustee when the party became insolvent.

It may be proper to remark, that under the Maryland insolvent law, all the property, rights, and credits belonging to the insolvent at the time of his petition, become vested in his trustee; and he at the same time executes a deed to the trustee, conveying and assigning to him all his property, rights, and credits of every description for the benefit of his creditors. And if the persons above named, at the times of their petitions in 1817 and 1819, had any interest whatever, either legal or equitable, vested or contingent, under this Mexican contract, it passed to their trustees.

The court of appeals decided that the contract with Mina was fraudulent and void under our neutrality laws, and therefore vested no right in the parties which a court of justice in this country could recognize, and, consequently, that they had no interest or property under it which could be transferred to or vest in their trustees at the time of their insolvency. And upon this ground they decided against the claim of the trustees, and directed the whole amount of the three shares to be paid to Oliver's executors.

\*The ground upon which they supported the claim [\*260 of Oliver's executors to these shares is not stated fully in the opinion. It was, I presume, upon the ground that, by the terms of the award, the shares of these three persons were

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received by the trustees named in the award, in trust for these executors; and that the trustees, therefore, had no right to withhold it from them; as neither they nor their testator had any participation in the fraudulent contract out of which it had arisen. And if the court was right in deciding, that neither the trustee of the insolvent nor any one else could derive a title to this money under the contract with Mina, perhaps the language of the award, together with the documents referred to in it, might justify this decision. But I express no opinion on this point, and merely suggest it in justice to the court of appeals, in order to show that their opinions in these cases are not necessarily inconsistent with each other, although the court may have reasoned erroneously, and decided incorrectly.

These decisions were brought to this court by the trustees of the insolvents, by writs of error under the 25th section of the act of 1789. Motions were made in each of them to dismiss for want of jurisdiction; and the motions were sustained by the majority of the court, and the cases dismissed, as will appear in the reports referred to.

I differed in opinion from the court; but undoubtedly, when the cases came before me at circuit, upon bills filed by the administrators, it was my duty to conform in the inferior court to the decision of the superior, as far as that decision applied to the case presented by these complainants. It is true, that in my own opinion, and according to the views of the subject I had always entertained, these bills, by the administrators of the insolvents, could not be maintained. But I dismissed them, not only upon that ground, but also under the impression that I was bound to do so upon the principles upon which this court had decided them in the suits by the trustees. It appears, however, by the opinion just delivered, that I was mistaken, and placed an erroneous construction on the opinions formerly delivered. It seems, therefore, to be due to myself to state not only my opinion in the former cases, but also the interpretation I placed upon the language of this court in deciding them. And I think it will be found that the language of the former decisions was fairly susceptible of the construction I put upon it, although that construction has turned out to be erroneous. I do not mean to say that the construction which the majority of the court puts upon its former decisions now, is not the true one; but that the language used in it might lead even a careful inquirer to a contrary conclusion.

\*I proceed, in the first place, to speak of the case of  
[261] Gill, trustee of Lyde Goodwin. As I have already

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said, when that case was before this court, I thought, and still think, we had jurisdiction; and proceed now to state the grounds of that opinion, and how it bore on the decision of the suit by his administrator, which is now before us.

The money in dispute was claimed under the contract with Mina. And the amount claimed was awarded to the Mexican Company, or their legal representatives or assigns, by the commissioners appointed under the Mexican treaty, and the act of congress passed to carry it into execution. The commissioners were authorized to ascertain and determine upon the validity of the claims of American citizens upon the Mexican government, and for which this government had demanded reparation. Of course, it was their duty not to allow any claim for services rendered to Mexico, or money advanced for its use, by American citizens in violation of their duty to their own country, or in disobedience to its laws. For the government would have been unmindful of its own duty to the United States, if it had used its power and influence to enforce a claim of that description, or had sanctioned it by treaty. But the board of commissioners were necessarily the judges of the lawfulness of the contracts, and the validity of the claims presented. They were necessarily to determine whether they were of the description provided for in the treaty or not. They may have committed errors of judgment in this respect, and may have committed an error of judgment in sanctioning the contract with Mina. But the law under which they acted made them the exclusive judges on the subject. There was no appeal from their decision. And if there was no mal-practice on the part of the commissioners, and the award was not obtained by fraud and misrepresentation, it was final and conclusive. It was like the judgment of any other tribunal having jurisdiction of the subject-matter, and could not be re-examined and impeached for error of judgment in any other court which had no appellate power over it. And they decided that the contract of Mina was valid, and consequently it vested from its date a lawful right to the money in the members of the Mexican Company.

The objection, therefore, in the Maryland court, brought into question the validity of an authority exercised under the United States; and as the decision of the state court was against its validity, it was my opinion that a writ of error did lie under the 25th section of the act of 1789. And regarding the award as final and conclusive upon other tribunals, there was error in the judgment of the state court which pronounced it invalid and fraudulent. It will be observed that this error was the foundation of the judgment of the state

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court. \*For if the court did not look behind the award, and had regarded the contract as valid, the right to Goodwin's interest undoubtedly passed to his trustee in 1817, long before his assignment to Oliver. I therefore thought this court had jurisdiction, and that the judgment of the court of appeals ought to be reversed, and this money paid to the trustee, and not to Oliver's executors.

The majority of the court, however, entertained a different opinion, and dismissed the cases, upon the ground, as I understand the opinion, that the construction of the treaty, or of the act of congress, or the validity of the authority exercised under them, did not appear to have been drawn into question in the court of appeals; and that the case appeared to have been decided upon the effect and operation of their own insolvent law, and upon their own laws regulating contracts and transfers of property and credits within the state, over which we had no jurisdiction upon the writ of error; that these matters were exclusively for the decision of the state tribunals, and their decision final upon the subject.

Some remarks are made in the opinion in relation to grounds upon which the state court might have decided without impeaching the award of the commissioners; and among others, the fact that Goodwin had assigned his right to Oliver in 1829, and that the Mexican congress had previously, in 1825, acknowledged its validity. There is an error in the date, but it is immaterial. The acts of the Mexican congress were in 1823 and 1824.

But I did not understand these remarks as intended to affirm that the share of Goodwin passed to Oliver by this assignment, but as suggesting grounds upon which the state court might, whether erroneously or not, have decided in favor of the executors. Because, as the court held that it had no jurisdiction in the case, I supposed that it intended to give no opinion upon the merits. And I presumed that it did not intend to decide that the acknowledgment of Mexico, that Mina's contract was binding upon the republic, could give any validity to it in the courts of the United States. For the contract of the Baltimore Company would have been liable to the same objections if it had been made originally, in 1816, with the Mexican government instead of General Mina. And if it was void in 1817, and Goodwin then had no interest under it, it was equally void in 1829, when the assignment to Oliver was made; and it is due to the court of appeals to say, that they have not indicated, in any of their opinions, that the acts of the Mexican congress had any influence on their judgments.

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Upon these considerations I dismissed the bill at circuit, \*upon two grounds: 1. My own opinion is, that the interest of Goodwin passed to his trustee, and consequently that the present complainant (his administrator) can have no title. 2. This court decided, upon a view of the whole case, that it had no appellate power over this judgment, and that it had been decided by the Maryland court upon its own construction of its own laws. And that point being adjudged by this court, I did not see upon what ground I could, in conformity to this opinion, revise the judgment of the state court and reverse its decision. It would, in substance, have been the exercise of an appellate power at circuit over the decisions of the state courts, upon their own laws, which this court had refused to exercise on writ of error; and, for the reason first above stated, I now concur in affirming the judgment here in the case of Goodwin's administrator.

I come now to the cases of the administrators of Gooding and Williams, which are, in many respects, alike. These writs were also dismissed for want of jurisdiction, when formerly before the court; and in dismissing them, the court said that the title of the trustees to the shares of Gooding and Williams, "involved only a question of state law, and therefore was not the subject of revision here, and was conclusive of his rights, and decisive of the case." I quote the language of the court. The want of jurisdiction was, therefore, the only point decided in these cases, and they were dismissed on that ground.

It is true that in these cases, as well as in that of Goodwin's trustee, language is used, in the opinion of the court, which would seem to imply that the court was of opinion that the contract was void originally, but had afterwards become valid by the events referred to in the opinion. But I understood these observations, as I did those made in Goodwin's case, merely as suggesting considerations which might have led to the decision of the state court, without impeaching the award of the commissioners, but not as approving or sanctioning them as sufficient grounds for their decree. For the court determined that it had no jurisdiction, and consequently the merits of the case were not before it, and I presumed it did not mean to express any opinion concerning the correctness or incorrectness of the judgment of the state court. Such I have understood to be the established practice of this court, and I was not aware that this case was intended to be an exception. The only point decided was the conclusiveness of the judgment of the state court upon the rights of the trustees.

The court of appeals assigned two reasons for their decision,

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and taking them literally, as they stand, they are inconsistent with each other. But the opinion appears to have been hastily <sup>\*written</sup>, and not sufficiently guarded in its words; and [264] it is evident they meant to say, that, in the opinion of the court, no interest vested in the trustee, because there was no legal or equitable interest acquired by the contract that could vest anywhere, or in any person. But, if there was a legal interest, it passed to his trustee, and by his assignment vested in Oliver. This mode of decision upon alternative grounds, is an ordinary and familiar one in courts of justice, and will often be found in the decisions of this court.

And however the reasoning of the state court may be regarded, it is clear that, with the interest of the intestate before them and under consideration, they decreed that the shares belonged to Oliver's executors. Now it is perfectly immaterial whether the reasons assigned by the court were right or wrong. Here is their judgment, their decree—a decree founded altogether on state laws, as this court have said in their former decisions, and made by a court of competent jurisdiction. Upon what principle, then, can a court of the United States, either at circuit or here, undertake to revise it or reverse it for error? If we had no appellate power upon the writ of error, and no right to reverse the judgment for errors supposed to be committed by the state court in interpreting and administering its own laws, how can this court or the circuit court exercise this revising power over the judgment in the form it now comes before us. It is doing in another way what it is admitted cannot be done in the prescribed mode of proceeding by writ of error. And I am not aware of any precedent for this exercise of power in a court of the United States administering state laws, when the judgment of the highest court of the state is before them upon the same case upon which the United States court is called on to decide.

It will be remembered that the appellate and revising power of the courts of the United States over the judgments of state courts stands upon very different principles from those which, in England, govern the relation of superior and inferior tribunals, and they are not, therefore, always safe guides upon the revising and reversing power which the courts of the United States may constitutionally exercise over the judgments of state courts.

I know it is said that the administrators of these insolvents who have filed these bills were not parties to the former proceedings, and are not therefore estopped by the decree of the court of appeals. And a good deal of argument has been offered to maintain that proposition; but that question cannot

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arise until other questions which stand before it and control it are first disposed of. For this court held, upon the former writs of error, that these cases were decided by the court of appeals exclusively upon Maryland law; and, if that be the case, before we come \*to the question of parties, other [\*265 questions must be decided: 1. Whether in this form of proceeding you can examine into the validity of the grounds upon which the state court decided them, and reverse its judgment if you suppose it committed an error in interpreting and administering its own laws; and, if you are authorized to do this, then, 2. Did it commit an error in deciding that those shares belonged to Oliver's executors? The reasons they may have given for this opinion are altogether immaterial; and if these two questions are decided in the affirmative, and this court reverses the judgment, upon the ground that the shares belonged to the insolvents at the times of their death, and not to Oliver's executors, then the administrators would undoubtedly have an interest, and are not estopped by the former decree from claiming their rights. Nobody, I presume, disputes this. But, before you come to this part of the case, you must take jurisdiction over the judgment of the state court, and reverse it for error. Because, if that judgment stands, then the intestates had nothing at the times of their death that could pass to the administrators; and there would have been no more propriety in making them parties, than any other stranger who had no interest in the fund. The administrator of a vendor who has in his lifetime divested himself of all right to property, can hardly be supposed to be a necessary party in a controversy between purchasers under him when neither of the claimants has a right to fall back for indemnity on his estate. The administrators offer no new evidence of interest in them or their intestates, but present here the identical case, in all its parts, that was before the court of appeals when it passed its decree.

Indeed, I cannot comprehend how the state court, or this court, can award the fund to the administrators, if the contract was fraudulent and void when the parties became insolvent. They both died before the award was made; but if, up to that time, the contract continued open to examination in a court of justice, and was decided to have been fraudulent and a nullity when made, nothing afterwards could have given it legal existence. *Nihilum ex nihilo oriatur* is as true in law as in philosophy. If void at first, it continued to be void and a nullity to the time of the deaths of the parties, and their administrators could derive no lawful title from them. To say that a legal or equitable interest in a fraudulent contract

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can exist in a party and be transmitted to his administrator, when used as legal language, is a solecism. And if from necessity, upon any principle of law or equity, the award related back, it would seem that those who purchased the interest in these shares, at their full market value at the time, and paid for it, should have the benefit of the relations.

\*266] \*It may be said, perhaps, that although the acts of congress of Mexico, in 1823 and 1824, could not make valid a contract originally void and a nullity by our laws, yet these acts of the Mexican legislature constituted a new and original contract which at that time might lawfully be made by our citizens, and that the rights of the parties take date from that contract. But this view of the case would not obviate the legal objections, but on the contrary it would add to them. For it still assumes the principle that the state court had a right to examine into the testimony, not only to determine the rights of the parties under the award, but to impeach the award itself. And upon this theory, if they had not found these acts of the Mexican congress in the proceedings of the commissioners, the state court might have held the whole award erroneous and a nullity, vesting no rights in any one, because it sanctioned an illegal contract. As I have already said, a state court, in my judgment, has no such power.

The commissioners do not refer to the Mexican acts of congress, nor allow the claims of the company upon a contract made by these laws. They award expressly upon the contract with Mina, and give interest according to that contract. And unless their award may be impeached for error, and their decision upon the claim re-examined and reversed in the state court, the rights of all the claimants depend upon this contract, and take date from it. According to the award of the commissioners, it is this contract that gave the claimants rights, and which must consequently govern the court in distributing the fund.

It seems to be supposed that the decision of the court of appeals declaring this contract to be fraudulent and void was founded upon some local law of the State. But that is evidently a mistake. It was founded on the breach of the neutrality laws of the United States. They looked behind the award of the commissioners, behind an authority exercised under the United States, and impeached its validity.

Besides, no other contract but this was under examination in the state court. The court speak of no other in their opinion. The parties, as appear by the proceedings, all claimed under it, and the decisions of the court and the distribution

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of the fund were founded upon it. Can another and a subsequent contract be set up here, upon which the state court has passed no judgment, and has not acted, and under which none of the parties before it claimed? I think not. And if their decision is to be set aside for error, it must, I presume, be for error in deciding upon the contract brought before them by the parties. And if this court now reverse these decrees upon the ground that the original contract with Mina was void, but became valid by subsequent \*events, it reverses upon a [\*267 new case, upon which the state court has never decided. Moreover, it unsettles the whole proceedings in the state court, for the interest of the claimants, in almost every instance, depended upon the time that a lawful right to this claim vested in the company.

And if, notwithstanding these objections, this court may look into the judgment and reverse it for error, and they find it to have been decided upon two principles of law, consistent or inconsistent with each other, one of which is erroneous and the other sound, ought not the judgment to be affirmed?

Now, as I have already said, the state court committed an error, in my opinion, in going behind the award, and receiving testimony to show that a contract was fraudulent and void which a tribunal of the United States having exclusive jurisdiction over the subject had decided to be lawful and valid. And if this court have the power to revise that judgment, I think it could not be supported on that ground.

But they put it upon another, and say, that if the original contract is regarded as valid, then the interest of the insolvents passed to their trustee, and, by virtue of his assignment, vested in Robert Oliver.

Now, in examining the judgment of an inferior tribunal in a case of this description, would the appellate court lay hold of the erroneous principle to reverse the judgment? Would they not affirm it upon the other alternative, which placed it upon lawful and tenable grounds? I think nobody would doubt that the judgment would be affirmed. Ought not the same rule to be applied to the Maryland judgment which this court is now revising? And is not this court bound, under the award of the commissioners, to regard the original contract as valid, when it has been so decided by a lawful tribunal of the United States, having exclusive jurisdiction over the subject? If we are so bound, and not authorized to impeach the judgment of the commissioners, then the judgment of the Maryland court, in the cases of Gooding and Williams, is right, and ought to be affirmed upon the second ground stated in the opinion, even if we were sitting here as an appellate tribunal.

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It is true that the bill in the case of Williams's trustee was filed in the state chancery court, which, by a change of the law, represents the court where the fund was originally paid in and distributed among the claimants; and was removed to the circuit court of the United States by the appellees, who reside out of the state. And undoubtedly, the circuit court, in that state of the case, possessed the same power over it, and were bound to decide it upon the same principles that ought to have governed the state court in which the bill was filed. But there <sup>\*268]</sup> was no new evidence, no new fact, no new interest or equity presented. There is a new name, indeed, but no new interest or equity disclosed in the bill. And upon that case the court of appeals had passed its decree. That decree was the law of the case, in the inferior court, where this bill was filed. And the court of appeals itself could not reverse its decree, signed and enrolled at a former term, nor open it merely because a new name was before them, which, according to its former decree, had no interest in the fund, and consequently ought not to have been made a party in the former proceedings. And if we now reverse this judgment, we go further than the Maryland court of appeals could have gone, and exercise what is essentially an appellate power over it, correcting the errors of an inferior court.

But in Gooding's case this court go still further. The bill in this case was filed originally in the circuit court of the United States. Yet the fund was never in that court, nor the money paid to the appellees by its order. If the decree is to be opened for error, after the fund is distributed by order of a court of competent jurisdiction, ought it not to be done in the court that passed the decree? And can a circuit court of the United States compel the appellees to repay money which they hold under a decree of a court of co-ordinate jurisdiction, made upon the same case, with the same evidence before them? I think not.

Besides, Gooding became insolvent again in 1829. All the property, rights, and credits which he had at that time, vested in his trustees, who are still living. If Goodwin's interest in 1829 had become so far valid that it could pass by his assignment to Oliver, why is not Gooding's also lawful and vested in his trustees? Upon what principle can Goodwin's interest be capable of assignment in 1829, and Gooding's remain fraudulent until his death? Yet if it was capable of assignment in 1829, the complainant is not entitled. It passed to his trustees.

And if, as the court now say, Goodwin would be estopped

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from impeaching his assignment to Oliver on the ground that the original contract was illegal and fraudulent, why are not Gooding and Williams, and their administrators, equally estopped from impeaching their assignments to their respective trustee? The assignment to the trustee for the benefit of their creditors was equally meritorious with Goodwin's assignment to Oliver. And if they had appeared as parties in the Maryland court, would they have been permitted to impeach the title of the trustee, who was then claiming it, and set up a right to the money in themselves, upon the ground that the contract of their respective intestates was fraudulent? Certainly, the principle <sup>\*</sup>is well established in chancery that a party cannot set aside a contract upon the ground that he himself was guilty of a fraud in making it. I do not cite cases to prove familiar doctrines. His administrator is in no better condition. And yet he is allowed, in this case, to defeat the operation of the intestate's deed to the trustee, upon the ground that the contract, of which the trustee claims the benefit, was a fraudulent one on the part of his intestate. And here, in a court of equity, these administrators support their title and recover this money against their trustees, as well as Oliver's executors, solely upon the ground that their intestate was guilty of a fraud in making the contract with Mina, and incapable, therefore, of assigning it. The party defeats the operation of his own deed, upon the ground that he himself committed a fraud. This doctrine cannot, I think, be maintained, upon principle or authority, in a court of chancery.

We are not dealing with Mexican laws, or inquiring what a Mexican tribunal or the Mexican government would decide in relation to this contract, but we are inquiring how it stands in a Maryland court, and what are the legal rights under it by the laws of Maryland. And I understand this court to place its opinion solely upon the ground that this contract was fraudulent and void by the laws of Maryland, and that the parties acquired no rights under it.

It may have been good in Mexico; a valid, binding obligation. They may have been willing to reward our citizens for a breach of duty to their own country; but that could not cleanse it from the offense against our own law, nor give legal rights to the administrator, when there was no right in the intestate. The courts of the United States can hardly be authorized to sanction and enforce what are called honorary obligations of a foreign nation, when those obligations have arisen from temptations offered to our own citizens to violate the laws of their own country. Nor can I perceive how the

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opinion of the Maryland court, declaring this contract to be fraudulent and void, can be binding and conclusive upon this court, and yet every other decision of the same court, in the same case, explaining or qualifying this opinion, still be open to examination and reversed for error. I cannot, for myself, draw any line of distinction between the relative conclusiveness of the opinions the state court expressed, when all of them were equally within its jurisdiction and depended altogether upon the laws of the State ; and all upon points necessarily arising in the case they are then deciding.

When these two cases were before the court, upon writs of error brought by the trustees, I entertained the opinions I now express. I then thought that the court had jurisdiction, \*270] upon \*the ground that the validity of the act of the Maryland legislature of 1841, confirming a certain description of conveyances made before that time by the trustees of insolvent debtors, was drawn into question, as contrary to the constitution of the United States, and their decision had been in favor of the validity of the state law. And I still think so. But at the same time I was of opinion that the law in question was valid, and that although we had jurisdiction, the judgment of the state court in these two cases ought to be affirmed, and the writs of error not dismissed. For the trustee in whom the shares vested, according to the opinion I have expressed as to Goodwin's case, had transferred them to Oliver, and the state court was therefore right in decreeing them to Oliver's executors. The majority of this court thought otherwise, and dismissed them for want of jurisdiction. And I did not state my dissent, because, as I then understood the opinion, the dismissal finally disposed of them.

It was upon the grounds above stated that I decided these cases at the circuit, and supposed, at the time I was deciding them, in conformity to the opinion of this court upon the conclusiveness of the judgment of the state court. The judgment just pronounced, however, shows that so far as the shares of Gooding and Williams are concerned, I misunderstood the opinion of the majority of this court. But with all the habitual respect which I feel for the judgment of my brethren, the opinion I held at the circuit remains unchanged. And I have the more confidence in it, because this court, now, as heretofore, have said that the questions in dispute depend altogether on Maryland law ; and every judge in Maryland who has been called upon to hear and decide the cases of Gooding and Williams, of which I am now speaking ; the judge of the court of original chancery jurisdiction, the

## Williams v. Gibbes et al.

judges of the court of appeals, all men of high legal attainments and eminence; have clearly and unanimously held, upon the same proofs now before us, that the executors of Oliver were entitled to these two shares in the Mexican Company, and decreed that the money should be paid to them. And no one of these judges deemed it necessary that the administrators should be parties, or called before the court; acting no doubt upon the established rules of chancery, that a person who has no interest in the fund need not and ought not to be made a party; and that the administrators could have no interest, as the intestates themselves had none at the times of their respective deaths. And that if they were before the court, they could not be allowed to impeach the deed to the trustees by alleging that their intestate had committed a fraud in making it.

I must, therefore, adhere to the opinions I entertained when the cases were before me at circuit, and dissent from the \*opinion just pronounced, in the cases of Gooding's [\*271 and Williams's administrators, and concurring in that of Goodwin's administrator, for the reasons hereinbefore stated.

John S. Williams, administrator of  
James Williams, deceased, appellant,  
*v.*

Robert M. Gibbes and Charles Oliver,  
executors of Robert Oliver, deceased,

and

John Gooding, jr., administrator *de bonis non* of John Gooding, deceased,  
appellant,

*v.*

Robert M. Gibbes and Charles Oliver,  
executors of Robert Oliver, deceased.

Appeals from the circuit court of the United States for the district of Maryland.

Mr. Justice DANIEL dissenting.

When, at a former term, these cases were brought before this court, in the name of Nathaniel Williams, trustee for the creditors of James Williams, an insolvent debtor, and of the same Nathaniel Williams, as trustee for the creditors of John Gooding, an insolvent debtor, the court after argument and upon full consideration, dismissed them for the want of jurisdiction. The decision of the court then pronounced, commanded my entire concurrence. I still concur in that decision,

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and hold the reasons on which it was founded as wholly impregnable. Those reasons were specifically these: That the questions involved in the cases were purely questions arising upon the construction of the insolvent laws of Maryland; questions properly determinable, and which had been determined by the highest tribunal of that state; and such, therefore, as vested no jurisdiction in this court.

Such, then, being directly and explicitly the decision of this court, as will be seen in the report of its decision in 12 How., 111, 125, it becomes a matter for curious speculation to inquire by what view of the facts and the law of these cases, by what process of reasoning upon the same facts and the same law, this court have now arrived at a conclusion diametrically opposed to that which had been formerly reached by them. The parties in interest are essentially the same, varied only in name; it is the same insolvent law of Maryland which it is now, as it formerly was, undertaken to interpret; and it is the identical exposition of the identical court, formerly examined and sanctioned here, which this tribunal now assumes the right to reject and condemn.

\*272] \*Indeed, the field for discussion and criticism is now much more narrow than was that which existed when these cases were formerly before this court. At that time there were strenuously urged grounds for contestation, founded upon an alleged construction of the Mexican treaty, and of the acts of the commissioners under that treaty. At present, the claims of the appellants, and the impeachment by them of the decision of the state court, and of that of the circuit court of the United States, have been rested chiefly, if not exclusively, upon the fact, that the personal representatives of the insolvent assignors were not made parties to the suits brought for the distribution of the effects of the insolvents.

It cannot be correctly insisted on as a universal or necessary rule, that in suits by assignees the assignors from whom they derive title must be made parties. Cases may occur in which there may be a propriety of joining the assignors in such suits, but, without some apparent cause for such a proceeding, the rule and the practice are otherwise. Indeed, the calling into a controversy or litigation a person who can have no interest in such litigation, would be discountenanced by the courts, who would dismiss him from before them at the costs of the person who should have attempted such an irregularity. And it would seem that, if there could be a case in which such an attempt would be irregular, it would be that in which the person so made a party, had not, and could not have, any

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interest in the controversy; in other words, should be an insolvent, who had transferred upon record every possible interest he possessed in the matter in controversy. But suppose it be admitted as the general rule, that an assignee should, in the prosecution of an assigned interest, call in his assignor as a voucher, or for any other purpose, how will these cases be affected by such an admission?

The absence of the personal representatives of the insolvent assignors is the only circumstance imparting a shade or semblance of difference between the attitude of these cases as formerly brought before us, and that in which they are now presented. Of what importance, either now or formerly, could be the presence or absence of the personal representatives of these insolvents, it might puzzle *Oedipus* himself to divine. The rights or interests of the representative can never be broader than are those of the person represented; and as the persons represented in these cases are admitted on all sides, and are shown upon record, to have nothing, by reason of the transfer to their trustees of all that they had ever possessed, or to which they had any claim—and that, too, by a mode of transfer which declared the inadequacy of their all for the liquidation of their debts—it followed, that those who came forward under these insolvents, *jure representationis*, merely, could themselves be entitled to nothing, by representation, from their principals, nor claim any thing in opposition to the universal and absolute assignments to the trustees of those debtors. [\*273]

Had these personal representatives of the insolvents been made parties to the suits for distribution, it is probable that they would have been regarded by the court as mere men of straw, used for the purpose of depriving the purchasers, for valuable consideration, from the trustees or assignees of the insolvent's interests, deemed, at the time of the sale by the trustees, precarious and contingent, but which the progress of events had subsequently rendered available.

But whatever may be admitted as the general rule applicable to suits by an assignee; however that rule may be supposed to require that in such suits the assignor, or his representative, should be a party, still, we are brought back to the true character of these cases, and of the rule of law peculiarly applicable to them, namely, that they are controversies depending upon the construction of the statutes of Maryland, which regulate the administration of the effects of insolvent debtors. That, in the construction of those statutes, it has been, by the supreme court of the state, decided, that in suits by the purchasers or assignees from the statutory trustees of

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Gooding v. Oliver.

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insolvent debtors, the personal representatives of those insolvent debtors are not necessarily to be made parties, but that such suits may be prosecuted and decided without participation or interference on the part of such representatives; that in conformity with this construction of the statute of Maryland, by the supreme court of the state, the circuit court of the United States for the district of Maryland, and this court, in the cases herein mentioned, have concurrently ruled in direct opposition to the pretensions of the appellants now advanced.

Regarding the decision just pronounced as in conflict with all that has been heretofore ruled upon the subjects of this controversy, and as transcending the just authority of this court to reject the construction of the statute of Maryland proclaimed by the supreme court of that state, I am constrained to declare my dissent from the decision of this court, and my opinion that the decrees of the circuit court, in these cases, 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 Maryland, and was argued by counsel; on consideration <sup>\*274]</sup> \*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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JOHN GOODING, JUNIOR, ADMINISTRATOR *de bonis non* OF  
JOHN GOODING, DECEASED, APPELLANT, *v.* CHARLES  
OLIVER AND ROBERT M. GIBBES, EXECUTORS OF ROBERT  
OLIVER, DECEASED.

The decision in the preceding case, of *Williams, administrator of Williams, v. Oliver's executors*, again affirmed.

THIS was an appeal from the circuit court of the United States for the district of Maryland.

In its leading features, it was identical with the preceding

Gooding *v.* Oliver.

case of Williams, administrator of Williams, against the same defendants.<sup>1</sup>

Oliver had purchased Gooding's share in the Mexican Company, from Winchester, the trustee in insolvency, which was passed upon by the Baltimore county court and the Maryland court of appeals, under the same circumstances and at the same time with the preceding case.

Gooding died intestate, on the 15th of February, 1839, and John Glenn administered upon his estate on the 15th of February, 1852. John Gooding, Junior, the appellant, afterwards became the administrator *de bonis non.*

The circuit court dismissed the bill filed by the appellant, and it was argued in this court together with the preceding case.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The case involves the same questions, and is in all respects the same, as the case of the administrator of Williams against the executors of Oliver, just decided.

The decree of the court below is therefore reversed, and the case remanded to the court below.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice DANIEL, dissented.

\*For the opinions of Mr. Chief Justice Taney and Mr. Justice Daniel, see the preceding case of Williams, *v.* Gibbes and Oliver, executors of Robert Oliver, deceased. [275

*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 Maryland, 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.

<sup>1</sup> See also *Mayer v. White*, 24 How., 320, 322.

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Stafford et ux. v. Union Bank of Louisiana.

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IN THE MATTER OF JOSIAH S. STAFFORD AND JEANNETTE KIRKLAND, HIS WIFE, APPELLANTS, v. THE UNION BANK OF LOUISIANA.

Where an appeal from a decree in chancery is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

Where the security is insufficient, this court will, upon motion of the appellee, lay a rule upon the judge below, to show cause why a *mandamus* should not issue, commanding him to carry into execution the decree of the court below. Upon cause shown by the judge that, having taken what he considered to be good and sufficient security, the cause was appealed to this court, which removed it from his jurisdiction, and that he had no power to make an order in the case, this court will order a peremptory *mandamus*.

But as the security given was sufficient to bring the case before this court by appeal, a motion to dismiss the appeal must be overruled.<sup>1</sup>

THIS was an appeal from the district court of the United States for the state of Texas.

It was before the court at the last term, and is reported in 16 How., 135.

It will be seen, by a reference to that case, that the court expressed its opinion, that where there was a decree in chancery from which an appeal was taken, in order to make that appeal operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

It will also be seen, that a motion to dismiss the appeal could not be entertained, because the time had not expired within which the appellant was allowed to file the record; nor could a motion be entertained to award a *procedendo*.

\*276] \*It will also be seen, (p. 141,) that the court suggested a mode of relief, by moving for a rule on the district judge, to show cause why a *mandamus* should not be issued.

Taking the case up at this period of its history, it now becomes necessary to trace the subsequent proceedings.

On the 12th of May, 1854, the Union Bank of Louisiana filed the following petition:—

“To the honorable the justices of the supreme court of the United States:—

“The petition of the Union Bank of Louisiana, a corporation duly established by the laws of the state of Louisiana, respectfully sheweth: That on the 5th day of March, 1848, your petitioner filed its bill in the district court of the United

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<sup>1</sup> CITED. *Ex parte Sibert*, 67 Ala., 352.

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Stafford et ux. v. Union Bank of Louisiana.

States for the district of Texas, against Josiah S. Stafford and Jeannette Kirkland Stafford, his wife, whereby your petitioner sought to obtain a foreclosure of a certain mortgage, held by it on certain negro slaves, then in the possession of the said defendants; but, at the hearing in the said court, and by the decree thereof, the said bill was dismissed. And your petitioner further sheweth, that from the decree of the said court, directing the dismissal of the said bill, an appeal was prayed by your petitioner to this court; and, at the December term, 1851, the said decree was reversed, and the cause remanded to the said district court, with directions to that court to enter a decree in favor of your petitioner; and, accordingly, such a decree was in fact rendered by the said district court, on the 25th of February, 1854, whereby it was in substance directed that the sums accruing from the hire of the mortgaged slaves, while in the custody of the receiver, *pendente lite*, amounting to \$25,379.39, should be paid by the receiver to the complainant, and credited on the total amount found to be due by the defendants, and that, in case the defendants failed to pay over the balance remaining due after such credit, amounting to \$39,877.13, on the first day of July, 1854, they should be foreclosed of their equity of redemption, and the marshal should seize and sell the mortgaged slaves at public auction, on the third day of the same month, or as soon thereafter as may be, after giving three months' notice, by advertisement, of the time, place, and terms of sale, and should pay to the complainant, your petitioner, out of the proceeds of such sale, the aforesaid sum of \$39,877.13, in satisfaction of the debt secured by the said mortgage. And your petitioner further sheweth, that although it appeared, by the said decree, that the total amount due thereby to your petitioner was the sum of \$65,256.52, yet the said district court thereafter, to wit, the 7th day of March, 1854, in violation of the statutes of the United States, \*and of the right of your petitioner, allowed the said defendants to take an appeal from the said decree to this court, which should act as a *supersedeas*, upon their giving a bond in the penal sum of \$10,000 alone, conditioned that they prosecuted their said appeal with effect, and answer all damages and costs if they fail to make their plea good; and when the said defendants had, on the day aforesaid, tendered such a bond, with certain sureties thereon named, the said district court ordered, notwithstanding the objections interposed on the part of your petitioner, that the bond of appeal, so taken and filed, operates as a *supersedeas* to the decree of the said court, hereinbefore set forth; all of which will fully appear by reference to the transcript of the record

[\*277]

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of the said cause, brought up to this court on the first appeal, and to the transcript of the record of the subsequent proceedings in the said cause, filed in this court in support of a motion made on the part of your petitioner, at the present term, to dismiss the said second appeal, taken as aforesaid, by the said defendants.

“ And your petitioner further sheweth, that the action of the said district court, in ordering it to be entered that the appeal bond so taken operates as a *supersedeas* and stays the execution of the said decree, is contrary to law, and oppressive to your petitioner; that, unless this court interpose, a delay of one or two years must intervene before the decree can be carried into effect; and, meanwhile, the security for the final payment of the amount decreed to be due and payable to your petitioner is wholly insufficient, and much less than the amount required by law, and that your petitioner has no remedy save in the present application to this court.

“Wherefore, your petitioner humbly prayeth, that your honors would be pleased to order that a writ of *mandamus*, in due form, be at once issued from this court, returnable to the first Friday of the next term thereof, commanding and requiring the Honorable John C. Watrous, judge of the district court of the United States for the district of Texas, to cause the decree, so as aforesaid rendered by the said court, on the 25th day of February, 1854, to be at once carried into execution, according to the terms thereof, notwithstanding the appeal so taken by the said defendants, or, on failure thereof, to show to this court, on the said return day, why the same has not been done.

"And in support of this petition, your petitioner refers to the transcripts hereinbefore mentioned, and to the records of this court in relation to the said cause, and will ever pray, &c.

"R. S. Coxe,

“W. G. HALE,

May 12, 1854, "For the Union Bank of Louisiana."

\*278] \*And, on the same day, the counsel made the following motion:—

In the supreme court of the United States, December Term, 1853.

*Ex parte.* The Union Bank of Louisiana.

"The counsel for the Union Bank of Louisiana, in accordance with the prayer of the petition herewith filed, on behalf of the said bank, now move the court to order that a writ of *mandamus*, in due form, do at once issue from this court, re-

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Stafford et ux. v. Union Bank of Louisiana.

turnable to the first Friday of the next term thereof, commanding the Hon. John C. Watrous, judge of the district court of the United States for the district of Texas, to cause the decree rendered by the said district court, on the twenty-fifth day of February, 1854, in a certain cause therein then depending, between the said Union Bank of Louisiana as complainant, and Josiah S. Stafford, and Jeanette Kirkland Stafford, his wife, as defendants, to be at once carried into execution, according to the terms thereof, or, on failure thereof, to show to this court, on the return day of said writ, why the same has not been done.

“And in case the court do not think fit to make such order, then the counsel for said Union Bank of Louisiana, move the court to grant a rule on the said district judge, requiring him to show cause, on the first Friday of the next term of this court, why a peremptory writ of *mandamus* should not issue, for the purpose above stated. And in support of this motion, the counsel refer to the said petition, and to the transcripts therein mentioned.

“R. S. COXE,  
“W. G. HALE,  
“*For the Union Bank of Louisiana.*”

On the 15th of May, 1854, a rule was laid upon the district judge, to show cause, at the next term, why a *mandamus* should not be issued, commanding him to cause the decree entered by the said district judge, on the 25th of February, 1854, between the above parties, to be carried into execution, according to the terms thereof.

In this position the case stood, at the opening of the present term.

The district judge showed cause in a return, which is set forth, *in extenso*, in the order of this court, which follows the opinion in this report; and it is, therefore, unnecessary here to copy that return.

Shortly after the commencement of the term, *Mr. Coxe* moved to dismiss the appeal, because the appellants had filed \*no sufficient bonds; and also, that the rule upon the district judge should be made absolute, and a peremptory <sup>[\*279]</sup> *mandamus* awarded.

The first motion was overruled, and the second granted.

The case was argued for Judge Watrous, by *Mr. Robert Hughes*, who contended that the appeal placed the case in the supreme court, and that the court below had no longer any

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jurisdiction over it; and cited 1 Overt. (Tenn.), 21; 1 Gall., 503; 6 Wheat., 194; Gilp., 34; 9 Wheat., 553.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery from the district court of Texas.

A motion is made by the counsel for the appellees, to dismiss the appeal, because the defendants have filed no sufficient bond.

Also, that a rule on the district judge, to show cause why a peremptory *mandamus* should not be issued, granted at the last term, be made absolute.

At the last term, a motion was made to dismiss this cause, and to award a *procedendo*, on the ground that the appeal bond was insufficient.

On consideration of that motion, the court held, that the bond for \$10,000, given on the appeal from a decree for the payment of \$65,000, was insufficient, as the act of congress requires a bond in the amount of a judgment or decree, to prosecute the appeal or writ of error with effect.

But the court overruled the motion to dismiss the appeal and award a *procedendo*, for the reason that, from the time the appeal was taken, the appellant was not bound, under the acts of congress and the rules of court, to enter the appeal on the docket of this court, before the present term.

During the same term, on motion, a rule was ordered on the district judge to show cause, at the present term, why a *mandamus* should not be issued, commanding him to cause the decree entered by the said district judge, on the 25th February, 1854, between the above parties, to be carried into execution according to the terms thereof.

In answer to the rule the judge states, that having taken what he considered to be good and sufficient security, as the law required, the cause was appealed to the supreme court, which removed it from his jurisdiction, and that he had no power to make an order in the case.

It was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed; and not having done so, the appellant was not entitled to a *supersedeas* of any process necessary to carry the decree into effect; and the judge was

\*280] \*bound to issue it, on the application of the plaintiff. The court, therefore, order that a peremptory *mandamus* issue, commanding the judge forthwith to carry the decree into effect.

But as the security given was sufficient to bring the cause before the court by appeal, though not sufficient to suspend the

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execution of the same, the court overruled the motion to dismiss the appeal.

*Order.*

The Honorable John C. Watrous, district judge of the United States for the district of Texas, having filed a return to the rule granted at the last term in this case, requiring him to appear and show cause, if any he had, why a *mandamus* should not be awarded, requiring and commanding him to cause the decree rendered by the said court, on the 25th day of February, A. D. 1854, in a certain cause therein then depending, between the said Union Bank of Louisiana, as complainant, and Josiah S. Stafford and Jeanette Kirkland Stafford, his wife, as defendants, to be at once carried into execution, according to the terms thereof, notwithstanding the appeal from said decree, taken by the said defendants to this court, and the order of the said court that the appeal bond filed by the said defendants, on the said appeal, operated as a *supersedeas* to the said decree of the said court.

And the cause shown appearing in the following statement returned by the said district judge, namely:—

THE UNITED STATES OF AMERICA, IN THE SUPREME COURT,  
*December Term, 1854.*

Between Josiah S. Stafford and Jeanette K., his wife, appellants, and the Union Bank of Louisiana, appellee.

The answer of John C. Watrous, judge of the district court of the United States for the district of Texas, at Galveston, to the rule upon him, to show cause why a peremptory *mandamus* should not issue, commanding him in said court, to discharge the *supersedeas* to the enforcement of, and to order execution upon the decree rendered in said court, in favor of the said Union Bank of Louisiana, and against said Josiah S. Stafford and wife.

The respondent respectfully answers, and certifies, to the honorable the supreme court of the United States, that on the 6th day of March, 1854, in the district court of the United States for the district of Texas, at Galveston, which was within ten days next after the rendition of the decree mentioned in the caption to this answer, the said Josiah S. Stafford and wife, feeling \*themselves aggrieved by the rendition of the same, in open court, applied for, and prayed an appeal <sup>1\*281</sup> to the next term thereafter, of this court, to be held in the city of Washington on the first Monday in December there-

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after: which to them was granted, upon condition that they entered into good and sufficient bond with good and sufficient security in the sum of \$10,000, conditioned that they prosecute their appeal with effect, and answer all damages and costs if they should fail to make their plea good, and thereafter and on the same day and year aforesaid, the said Josiah S. Stafford and wife, in open court, tendered a bond with L. C. Stanley, Patrick Perry, and William H. Clark, as sureties, in the sum of \$10,000; and the court having inspected the bond, and being satisfied that it was in conformity to law and the order of the court, and that the sureties were good and sufficient. "It was ordered that the bond be approved, and it was ordered to be entered, that the bond of April, taken and filed in this cause, operates as a *supersedeas* to the decree of the court," and thereupon and immediately after the order granting said appeal, and the giving bond as aforesaid, and while the same remained in full force, unreversed and not set aside, this respondent respectfully submits, that neither in the said district court, or in vacation, had he any longer jurisdiction over the cause between the parties aforesaid, or any power or authority to make any order in regard to the *supersedeas* or to enforce the execution of the decree aforesaid for the reason that thenceforward, by virtue of the appeal so taken and perfected as aforesaid, the said cause between the parties aforesaid, had passed into and under the control of this court, and which was the proper forum only in which any such order could or can be rightly made.

This respondent further respectfully submits that though, upon investigation, it should turn out that the bond given for the appeal, as aforesaid, was not taken in all respects in conformity to the requirements of law, but might be irregular and depart from such requirements in regard to the amount of the penalty thereof, or in other respects; yet this did not render the grant of the appeal merely void, or in any manner affect the *supersedeas* operated by law, but that the said appeal and the said *supersedeas* was and continued to be in full force and effect, and thus will remain until this court, in conformity to its practice, shall dismiss said appeal, and thereby discharge said *supersedeas*, on account of a failure by the said Josiah S. Stafford and wife, when thereto required to give such bond as the law requires, within such time as the court may prescribe.

This respondent further respectfully submits, that the bond taken and approved, and upon which the appeal before mentioned <sup>\*282]</sup> was granted, was taken and executed in full, complete, and perfect conformity to law, and had he

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power and authority either in term time or in vacation to make any order in regard to said *supersedeas*, or the enforcement of the decree aforesaid by execution, and an application were made to him for such order, by reason of the said bond not being in the penalty or to the amount required by law, he would feel himself constrained to refuse any such order.

And these are the causes and reasons which this respondent has to offer why a *mandamus* should not issue to enforce a discharge of the *supersedeas* or an execution of the decree aforesaid.

But he respectfully submits to the judgment of the court, and will enforce, by order, any direction given by the court in the premises. The respondent respectfully refers to the brief of the counsel of the said Josiah S. Stafford and wife, which will be filed in this honorable court, and the authorities therein referred to, in support and maintenance of the position assumed by this answer.

JOHN C. WATROUS.

And after due deliberation thereupon, had, it appearing to the court that it was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed, and not having done so, that the appellant was not entitled to a *supersedeas* of any process necessary to carry the decree into execution, and that the judge was bound to issue the proper process on the application of the complainant. It is therefore now here directed and ordered by this court, that a *mandamus* be awarded to the district judge of the United States for the district of Texas, requiring and commanding the said judge forthwith to carry the aforesaid decree of the said district court of the 25th of February, A. D. 1854, into effect.

*After-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 it appearing to the court here that a stipulation by the counsel of the respective parties to dismiss this appeal at the costs of the appellants, has been filed in this cause. It is thereupon, on the motion of *Mr. Coxe*, of counsel for the appellee, now here ordered and decreed by this court that this appeal be and the same is hereby dismissed, with costs.

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Stafford et ux. v. New Orleans Canal and Banking Company.

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**\*IN THE MATTER OF JOSIAH S. STAFFORD AND JEANNETTE KIRKLAND, HIS WIFE, APPELLANTS, v. THE NEW ORLEANS CANAL AND BANKING COMPANY.**

The decision in the preceding case of Stafford and Wife *v.* The Union Bank of Louisiana, again affirmed.

THIS, like the preceding case of Stafford and Wife *v.* The Union Bank of Louisiana, was an appeal from the district court of the United States for the state of Texas, and was, in fact, a branch of the same case.

It is unnecessary, therefore, to recite the circumstances of it, which were similar to those of the preceding case.

Mr. Justice McLEAN delivered the opinion of the court.

This appeal is subject, in principle, to the objections stated in the above case of Stafford and Wife *v.* The Union Bank of Louisiana; and, for the reasons stated in that case, a peremptory *mandamus* is ordered in this one, to carry into effect the decree entered in the district court. The motion to dismiss this appeal is overruled.

*Order.*

The Honorable John C. Watrous, district judge of the United States for the district of Texas, having failed to file any return to the rule granted at the last term, in this case, requiring him to appear and show cause, if any he had, why a *mandamus* should not be awarded, requiring and commanding him to cause the decree rendered by the said court, on the 2d day of March, A. D., 1854, in a certain case therein then depending, between the said New Orleans Canal and Banking Company, as complainant, and Josiah S. Stafford and Jeanette Kirkland, his wife, as defendants, to be at once carried into execution, according to the terms thereof, notwithstanding the appeal from said decree taken by the said defendants to this court, and the order of the said court that the appeal bond, filed by the said defendants on the said appeal, operated as a *supersedeas* to the said decree of the said court; and, after due deliberation thereupon had, it appearing to the court that it was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed, and not having done so, that the appellant was not entitled to a *supersedeas* of any process necessary to carry the decree into execution, and that the judge was bound to issue the proper process, *\*284]* on the application of the complainant. \*It is, therefore, now here directed and ordered by this court, that a *mandamus* be awarded to the district judge of the United

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States for the district of Texas, requiring and commanding the said judge forthwith to carry the aforesaid decree of the said district court, of the 2d of March, A. D., 1854, into effect.

## After-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 Texas; and it appearing to the court here that a stipulation, by the counsel of the respective parties, to dismiss this appeal, at the costs of the appellants, has been filed in this cause, it is thereupon, on the motion of *Mr. Coxe*, of counsel for the appellee, now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed, with costs.

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THE UNITED STATES, AT RELATION OF AARON GOODRICH,  
PLAINTIFF IN ERROR, v. JAMES GUTHRIE, SECRETARY OF  
THE TREASURY.

The circuit court of the United States for the District of Columbia, had not the power to issue a writ of *mandamus*, commanding the secretary of the treasury to pay a judge of the territory of Minnesota his salary, for the unexpired term of his office, from which he had been removed by the President of the United States.

No court has the power to command the withdrawal of money from the treasury of the United States, to pay any individual claim whatever.

A *mandamus* can issue only in cases where the act to be done is merely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer.<sup>1</sup>

The question, whether or not the President has power to remove a territorial judge, argued, but not decided in the present case.

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.

The facts were these:—

On the 19th March, 1849, the President appointed, by and with the advice and consent of the senate, A. Goodrich, to be chief Justice of the supreme court of the Territory of Minnesota, for four years, which appointment was accepted.

On the 21st of October, 1851, the President of the United

<sup>1</sup> CITED. *Ex parte DeGroot*, 6 Wall., 497; *United States v. Seaman*, ante \*230; *Gaines v. Thompson*, 7 Wall., 352; *The Secretary v. McGarahan*, 9 Wall., 312; *Chaffraix v. Board of Liquidation*, 11 Fed. Rep., 645; *United States v. Boutwell*, 3 MacArth., 182; *Matter of Murphy*, 24 Hun, 597.

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States thought proper to remove Mr. Goodrich, and to appoint Jerome Fuller to the office; of which removal Mr. Goodrich was informed by an official letter from the department of state, dated 22d October, 1851, and received by him on 30th November, 1851, as stated by him.

\*285] \*Mr. Goodrich denied the power of the President to remove him from office during the term of four years, and claimed his salary from and after his removal. The accounting officers of the treasury paid him his salary up to 30th November, 1851, and refused to pay beyond that day.

Mr. Goodrich moved the circuit court of the United States for the District of Columbia and county of Washington, for a rule upon the secretary of the treasury, to show cause why a *mandamus* should not issue, to compel the payment of the salary to Mr. Goodrich, up to 19th March, 1853, when the term named in his commission expired. The court refused to grant the rule.

From this refusal, Mr. Goodrich brought the case up to this court, by writ of error.

It was argued by *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Cushing*, (attorney-general,) for the defendant.

*Mr. Lawrence* contended:—

1. That the President had not the power to remove the relator, during the four years from his appointment.
2. That the *mandamus* prayed for was the appropriate remedy.

The argument of *Mr. Lawrence* will be given as a reply to *Mr. Cushing*.

*Mr. Cushing* argued:—

1. The power of removal; 2. The propriety of the *mandamus*.

1. As to the power of removal.

The statute creating the supreme court for the territory of Minnesota was approved 3d March, 1849; to be found in 9 Stat. at L., 406, ch. 121, § 9.

The power of appointing the justices of this territorial court is vested in the President, by and with the advice and consent of the senate, (by § 11.)

The statute does not authorize appointment during good behavior, but expressly limits it to four years.

The commission to Mr. Goodrich follows the statute, and is limited to four years from the day of the date, 19th March, 1851.

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By the constitution of the United States some offices are for a term of years, and some are during good behavior, which, in contemplation of law, is for life. The President and Vice-President are elected for four years, senators for six, and members of the house of representatives for two years. Judges, both of the supreme and inferior courts of the United States, are to be \*appointed for life or during good behavior; [\*286 for life and for and during good behavior being synonymous in law. But all civil officers, whether holding for years or for life, "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." The house of representatives have the sole power of impeachment; the senate have the sole power to try all impeachments.

Such being the theory of the constitution of the United States, the question arose at the first session of the first congress under the constitution, as to the President's power of removal of all officers whose tenure of office was not, by the constitution itself, declared to be during good behavior.

That important question was discussed by men of eminent learning and patriotism, composing the first congress under the federal constitution. The opinions of the distinguished men who then composed the house of representatives, have been reported, (4 Elliott's Debates, Part II., 141-208.) The senate then sat with closed doors, so that the debates in that house are not reported.

The debate upon the President's power of removal from office arose upon the bill for establishing the executive department, denominated the department of foreign affairs. This power of removal from office, in all its aspects and bearings under the constitution, was discussed in the house of representatives, until the subject was exhausted. The power of the President to remove all officers, who, by the constitution itself, were not declared to hold their offices during good behavior, was sustained by both houses; they concurred in passing an act constituting the department of foreign affairs, which was approved by President Washington, on 27th July, 1789, in the 2d section of which the President's power of removal is acknowledged, (1 stat. at L., 29, ch. 4, § 2.)

So likewise in the act constituting the war department, approved 7th August, 1789, (same volume, p. 50, ch. 7, § 2.) So also in the act constituting the department of treasury, approved 2d September, 1789, (same volume, p. 67, ch. 12, § 7.) So likewise in the act constituting the navy department, approved by President Adams, 30th April, 1798, (same volume, p. 554, ch. 35, § 1.) And also in "An act to establish the

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post-office of the United States," approved 2d March, 1799, (same volume, p. 733, ch. 43, § 1.) And in the act establishing the home department, approved 3d March, 1849, (vol. 9, p. 395, ch. 108, § 1,) it is enacted, that the secretary of the interior shall be appointed by the President, by and with the advice and consent of the senate, "who shall hold his office by the same tenure \* \* \* as the secretaries of the other executive departments.

\*287] \*It appears from the published debates in the house of representatives, (in the year 1789, before alluded to,) that the principal difference of opinion between the members of that house was, whether the power of removal from office belonged to the President alone, or to the President and senate. By some it was thought that, as the advice and consent of the senate was necessary to the appointment, it should also be necessary to the removal. But it was answered, that the senate had no power to nominate, to appoint, or to commission; that the power to nominate, to appoint, and to commission, was with the President; that after the senate had advised and consented to a nomination, the President could decline to grant a commission, and nominate another for the office; that the senate had no means to compel the appointment, or the retainer in office, of any particular person, where the office was within the gift of the President; that appointment and removal were strictly executive powers, by and under the constitution; that the constitution vested the executive power in the President; that the legislative power and the executive power could not be blended any further than was expressly permitted by the constitution; and, finally, that if the senate were to be consulted,—and, in case of recess, to be convened,—the remedy would be too dilatory and incomplete, and the proper responsibility of the President would be dissipated.

The construction of the constitution, as concurred in by the two houses of the first congress, and approved by President Washington, resolved these points:—

1. That in a republican government public offices are created for the benefit of the people; that the officer does not hold a private estate and property in the office, and when the officer is unfit, for any cause whatever, he ought to be displaced, and another appointed for the benefit of the people and their security; or, if the office itself be found, upon experience, to be unnecessary, it should be abolished.

2. That the constitution contains the power of removal, otherwise the declaration that the judges should hold their offices during good behavior would have been unnecessary and

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tautologous. The express declaration that the judges shall hold their offices during good behavior, necessarily implies that the other officers shall not hold during good behavior, but at will, *durante bene placito*.

3. That the power of removal from office is incident to the power of appointment.

4. That the power of impeachment was a compulsory mode of getting rid of officers guilty of high crimes and misdemeanors, the favoritism of the executive notwithstanding.

\*5. That impeachment was not, and ought not to be, [\*288] the only mode of removing officers; for whilst a mere intention to commit a high crime or misdemeanor is not a ground of impeachment, yet a fixed design in an officer to commit a misdemeanor in his office ought to be hindered from consummation by a timely removal. Moreover, there are various causes, short of the crimes and misdemeanors upon which impeachment may be grounded, which are sufficient to loosen the confidence of the President and the community in the officer; and, therefore, good reasons why he should be removed, such as insanity, incompetency, inattention, bad habits, or ill-fame.

6. That the duty imposed by the constitution on the President, to "take care that the laws be faithfully executed," absolutely requires that he should have the power of removing unfit, negligent, disobedient, or faithless officers; that without the power of removal, the President would be without the means of performing the duty of causing the laws to be faithfully executed; and if he had not the means, he could not be justly held responsible for his failure.

8. That, if impeachment was the only mode by which improper officers could be removed, the remedy, in by far the greatest number of instances, would be inadequate, too slow, too expensive, and the government be impracticable, inefficient, and incompetent to the purposes and ends for which it was instituted.

9. That, in so far as the executive power of removing all officers not holding by the constitution during good behavior had been conferred on the President by the constitution, such his constitutional power could not be impaired by the legislature; nothing but an amendment to the constitution could take it from him.

(*Mr. Cushing* then agreed that this construction of the constitution had been sustained by this court, and referred to the case of *Ex parte Hennen*, 13 Pet., 230, 259. He then contended that territorial judges were not judges within the third article of the constitution; but that they came within

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the clause giving to congress power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States; and, also, within the 18th paragraph of the 8th section of article 1st, giving to congress the power to make all laws that may be necessary and proper, &c., &c.; and then proceeded:—

It seems to be well settled, not only by the action of congress, but by the decisions of the supreme court of the United States, and otherwise, that the various persons appointed to judicial functions by the President of the United States are \*289] distinguished \*into two great classes, so far as regards the present question, namely, the judges of constitutional courts, and those of legislative courts.

Constitutional courts are such as are intended by the provisions of the third article of the constitution. The judges of this class, by the express terms of the constitution, hold their offices during good behavior. It comprehends the judges of the supreme court, and of the various judicial circuits and districts into which the United States are subdivided.

Legislative courts are such as congress establishes, not under the third article of the constitution, but either in virtue of the general right of limited sovereignty which exists in the government, or of some specific power in the constitution other than that above cited. Thus it has been adjudged that the jurisdiction, with which the courts of the territories are invested, is not a part of the judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. *American Insurance Co. v. Canter*, 1 Pet., 511, 546. See also *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518, 563. In accordance with which doctrine, it is held that the judges of the territorial courts are not subject to impeachment and trial before the senate of the United States, (Mr. Grundy's opinion, 1st February, 1839,) and are subject to removal from office at the discretion of the President of the United States. Mr. Crittenden's opinion, 23d January, 1851.

The action of congress, as already intimated, has been in accordance with these views of the constitution. In many cases it has given to the judges of the territories a tenure of four years, subject, of course, to removal by the President, (Louisiana, 2 Stat. at L., 284; Arkansas, 3 Id., 495; Florida, 3 Id., 657; Iowa, 5 Id., 238; Minnesota, 9 Id., 406; New Mexico, 9 Id., 449; Utah, 9 Id., 455,) though in one case at least it has been a tenure by good behavior. Wisconsin, 5 Stat. at L., 13.

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In the older cases, reference was made to the ordinance of July 13, 1787, one of the earliest acts of congress, that of August 7, 1789, having for its object to adapt the provisions of that ordinance to the constitution; and the same power of appointment and removal was thereby given to the President as had previously belonged to the United States in congress assembled. Northwest Territory, 1 Stat. at L., 52; Illinois, 2 Id., 614; Indiana, 2 Id., 59; Mississippi, 1 Id., 550.

On the face of things, this might seem to have been a tenure by good behavior, because such is the language of the ordinance of 1787; but as, by the constitution of the confederation, all the \*powers of the government were vested in the congress, that body decided the question of good behavior for itself, and had the power of removal upon its own estimation of what constituted misbehavior; and that precise power was, by the act of 1789, conferred on the President of the United States. In all these acts, at any rate, it has been assumed that the tenure was not that of the constitution, as provided by it for the depositaries of the proper judicial power of the United States, it being, on the contrary, either the general tenure of ordinary officers, or else such definite tenure as in the particular case congress might see fit to prescribe; in doing which, congress obviously recognized the fact that it was not a judicial tenure by virtue of the constitution.

(*Mr. Cushing* then enumerated a long list of acts passed by congress in conformity with the above views, and then proceeded:—)

From the year 1804 to this time, during a period of fifty years, we have the concurring opinions and acts of eight congresses and seven Presidents of the United States, that the judges of the courts of the territorial governments are not within the third article of the constitution, declaring that the judges therein referred to shall hold their offices during good behavior; but that the territorial judges may, rightfully, and without any violation of the constitution, be appointed to hold their offices for four years only.

The supreme court of the United States have also concurred in that construction of the constitution.

In the case of *The American Insurance Co. v. Canter*, 1 Pet., 511, 546, the court decided that these territorial courts "are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. \* \* \* \* They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting

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the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress in the execution of those general powers which that body possesses over the territories of the United States. \* \* \* \* In legislating for them (the territories) congress exercises the combined powers of the general and of a state government."

Under the government of the United States there are no common law offices, no offices whose tenures depend upon ancient usage.

All offices under the government of the United States are \*291] \*created, either by the law of nations, such as ambassadors and other public ministers, or by the constitution and the statutes. As to ambassadors and other public ministers, the usage of nations determines the tenure of their commissions to be at the will of the appointing power.

If the heads of the executive departments could hold their offices for life, against the will of the President, and in despite of the differences of opinion between him and them as to public measures, policy, and principles, the power of the President would be feeble, incapable of causing the laws to be faithfully executed. There would have been but little use in limiting the term for which the President is elected to four years, if the heads of the executive departments, when once appointed, held their offices for life. A President elected for the term of four years, surrounded by heads of the departments holding their offices for life, removable only by impeachment for, and conviction of, high crimes and misdemeanors, would be a chief in name only, but not in power, not justly responsible to the people if the laws were not faithfully executed. To elect a President for the term of four years, while the heads of the executive departments must be appointed for life, would show a want of adaptation of the parts to each other, a senseless combination of destructive inconsistencies, an absurd incongruity.

The constitution has avoided such confusion. Where it has intended that officers shall hold their offices during good behavior, it has so declared; and in so selecting particular classes of offices to be held during good behavior, it has virtually announced that the others shall be removable at the will of the appointing power. The usage of the government, the construction of the constitution from its beginning, the concurrent opinions of all the departments of the government, has been so. The decisions of the supreme court, before cited,

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(1 Pet., 511, and 13 Id., 230,) seem to be conclusive against the claim of the plaintiff, Goodrich.

The general rule, "that an office is held at the will of either party, unless a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage," is stated by the supreme court of the United States, *ex parte Hennen*, 13 Pet., 260, and references are there given to the judicial decisions of state tribunals, fortifying that construction of the constitution of the United States.

All public officers, whether for life, or for a term of years, or at will, are subject to an implied condition, that the officer shall well behave. But the condition, that the officer *bene se gesserit*, does not give an officer appointed for a term of years, a tenure *quamdiu se bene gesserit*. A condition of good behavior, and a \*tenure during good behavior, are distinct [\*292] things. The condition for good behavior is necessarily implied, and adheres to every officer. The tenure during good behavior belongs only to those officers in whose commissions that tenure is expressed.

Officers who are neither by the constitution, nor by the law creating the offices, directed to be commissioned during good behavior, hold their offices at the will of the appointing power. Such is the established doctrine as to the tenure of offices under the government of the United States, settled by the concurrent opinions of the legislative, the executive, and the judicial departments, by contemporaneous construction, by long and general usage of all the executive, legislative, and judicial departments of the government.

2. Had the circuit court for the District of Columbia the power to grant a *mandamus* in this case against the secretary of the treasury?

It devolves upon the party demanding the exercise of a power to show that it exists. The English cases cited and relied upon have no applicability, because the United States courts are not clothed with the same powers as the King's Bench. While that court exercises all power, except where specially limited, the United States courts can only exercise such as are specially conferred. States often confer very plenary powers upon their high tribunals. Congress has been sparing in conferring them upon national tribunals. It has nowhere conferred what is now claimed. No authority has been given to institute suits against the government while this proceeding, in effect, commences one, tries it, gives judgment, and awards execution without appearance or the intervention of a jury to settle facts. It seeks to reverse the decision of the accounting officers, and to compel the secretary to violate

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the law, by forcibly taking from the treasurer and paying out, without conforming to the provisions of the statutes. Before Goodrich's account is settled by the accounting officers, the secretary cannot issue his warrant on the treasurer for the amount claimed; and, without such warrant, the treasurer could not pay. The secretary cannot compel the comptroller to allow the account, nor the treasurer to pay without a warrant properly signed, certified, and recorded. To accomplish his object, Goodrich should have made the auditor, comptroller, secretary, treasurer, and register parties, so as to compel each to perform his respective duty under the acts of congress. In stating accounts of judges, the accounting officers rely upon evidence from the proper department, as to who is commissioned, and are not at liberty to dispute it. In this case, the appropriations had been applied in paying those who had the usual commissions. All these officers, except the register and <sup>\*293]</sup> treasurer, must exercise their *\*discretion* and judgment, and are responsible to the President for their proper exercise. No case can be found where it has been held that a judicial tribunal can control either, or compel either to act contrary to his best judgment.

The 14th section of the judiciary act of 1789, 1 Stats. at Large, 81, clothes the United States courts with power to issue writs necessary for the exercise of their respective jurisdictions, but for no other purpose. In *Smith v. Jackson*, 1 Paine, 453, 455, THOMPSON, J., held that this power must be strictly followed, and that the circuit court had not the superintending authority of the King's Bench in England. The same principle was established in *McIntyre v. Wood*, 7 Cranch, 504, the court refusing to compel a register of a land-office to perform a specific duty. In this case it was stated, by JOHNSON, J., that the circuit court could not compel a collector of customs to grant a clearance. This principle was sustained and affirmed in *McClung v. Silliman*, 6 Wheat., 598; 1 Kent, Com., 322; Bouvier, L. D. 7, title *mandamus*; and *McElrath v. McIntyre*, 1 Law Rep., N. L. 399.

It has been repeatedly held that a *mandamus* cannot be granted to compel the performance of an executive act, as this most clearly is. *Decatur v. Paulding*, 14 Pet., 497; 1 Bland (Md.), 186, 189, 584; *Bordley v. Lloyd*, 1 Har. & M. (Md.), 27; *Runkle v. Winemiller*, 4 Id., 429; *Wittions v. Cadman*, Gill & J. (Md.), 184; *Elliott v. The Levy Court*, 1 Har. & M. (Md.), 559; *Brashears v. Mason*, 6 Hawks (N. C.), 92-102.

In Kendall's case, it was held that where a mere ministerial act was involved, under an express statute, a *mandamus*

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could issue, but not when judgment or discretion were to be exercised in determining upon a matter of fact or of law. In the present case, the treasury officers passed upon the questions, whether Goodrich was in office, and whether there was money appropriated to pay him. This court cannot, on this application, review their decision. If it could do so, it might do the same in every case of contested action by the executive departments, which would bring the whole government under the control of the judiciary. Such a result would be at war with fundamental principles of our institutions, and destroy their harmony and usefulness. There is no authority for making the United States a party defendant in a suit, except when conferred by statute.

The common law of Maryland does not confer any such power, nor is it found in any statute. The present proceeding is, in substance and effect, a suit against the United States, and intended as such. Its object is to assert a private right against it, and compel payment out of the treasury; and it is, therefore, unauthorized. *McKim v. Odum*, 3 Bland (Md.), 420-423, \*424. Opinion of Attorney-General, [\*294 507-510, 1066, 1103, 1303, 1425.

The treasury cannot be reached by compulsory proceedings against its officer. A prosecution against him must be personal, and can affect him only, and cannot affect the property of the government; for a suit against him, the property of the United States cannot be controlled. The court cannot compel him to take its property and confer it upon another. The property of a principal can never be taken in a suit against the custodian or agent. If this could be done, a court could compel A to take the property of B, and deliver it to C, to pay a debt due from B to C. The power now set up has never been vested in any judicial tribunal, nor lawfully exercised by one. If sustained, it would enable the judiciary to control the operations of the treasury, and render the government powerless, even in time of war, by directing its application.

The argument of *Mr. Lawrence*, in reply, was in substance as follows:—

Two questions arise in this case, both of which are of great importance: First, whether the President had power to remove the relator, during the four years for which he was appointed; and, secondly, if he had not, whether a *mandamus* is proper for the purpose, and under the circumstances stated in the petition.

I shall endeavor to maintain that the President, in this in-

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stance, had not the power of removal. If we take the literal terms of the law constituting the judges of Minnesota, they are peremptory and unmistakable. They "shall hold their offices for the period of four years." If we refer to the commission of the relator, it pursues the very words of the law. The acceptance of the office was upon the terms and conditions of the act of congress and of the commission. Were there nothing then but the act of congress involved in this case, it would be a waste of words to argue that upon the language of that act the relator was entitled to hold his office for the entire term of four years, subject only to the power of impeachment.

But the attorney-general contends that, no matter what may be the construction of the act of congress, the executive power is lodged in the President, by the constitution, and that the power of removal, being incident to the power of appointment, which is an executive power, is itself therefore an executive power, and consequently cannot be taken from the President, in any case, by congress, and that the territorial judges not being judges the tenure of whose office is defined by the constitution, they were within the control of executive power; and that such has been the construction of all departments of the government from the beginning.

\*Now, sir, I maintain the direct contrary of this doctrine. I insist that congress has the power to define the tenure of any office not defined and fixed by the constitution, and that this is a matter of philosophical and political necessity arising from the very nature of legislative functions. And that as to the power of removal in the case of judicial officers, the executive, legislative, and judicial construction has been against it.

But before proceeding to the exact question involved, I wish to notice the case of the *American Insurance Co. v. Canter*, 1 Pet. 540, which has been made the groundwork of the supposed power of removal in the case of territorial judges.

Now, all that the court decide in that case is, that the judges of the territorial courts of Florida were not "constitutional judges," that is, that they were not judges of those courts to which the judicial power spoken of in the constitution was committed, for if they had been they would have held their office "during good behavior;" but that they were legislative judges, created by virtue of the power given to congress to make all needful regulations for the territory of the United States.

But what countenance does this decision give to the power of removal by the President? All that decision affirms is, that

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territorial judges do not derive their existence from the constitution; if they did, they would necessarily hold their office during good behavior, and congress could not limit or abridge their term of office. In other words, if they are the judges designated in the constitution, they hold their office during good behavior, in spite of congress or the executive, because the constitution, the instrument of their existence, says so. But where in this decision is found any warrant for holding that a legislative judge shall not hold his office during the term of four years, when the act of congress, the instrument of his existence, says he shall so hold? The judges in either case are just what the instrument to which they owe their origin makes them; in the one case, during good behavior; in the other, during four years. And it is no more within the power of any third party to remove the incumbent in the one case than in the other. In each case, the President, by and with the advice of the senate, has the power of appointment. In each case the power of appointment having been executed, the President is *functus officio*, the constitution in the one case, and the act of congress in the other, clothing these officers with their respective powers, qualities, and immunities.

There is another idea which has been rather hinted than expressed, that the judges of the territorial courts are mere executive officers, created under the clause of the constitution \*which gives power to congress to make rules respecting the territory of the United States, and are therefore [\*296 not within the saving influence which protects judicial officers. As I have not seen this doctrine in the works of any respectable writer, or heard it from the lips of any respectable speaker, I will only say that if their character were not to be pronounced from the nature of their functions, but from the character of the body to which that power is committed, and from which they derive their existence, then they are legislative officers, and not executive officers, because it is to congress and not to the President, that the power of making rules respecting the territory of the United States has been committed.

I now come to the main question in the case. Can congress create an office and define the tenure thereof? By the constitution all the legislative power of the federal government is committed to congress, and by the last clause of the 8th section of article 1, all the residuary or discretionary power of the general government is also lodged in congress. The legislative is the only creative element in our government, and precedes in logical succession as well as in actual experience the action of the other departments, inasmuch as they only act upon that which the legislative power has brought into existence. The

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functions of the legislature are originative, those of the judiciary expository, and those of the President executive. The one gives birth to that which the other expounds and explains, and the third, when understood and explained, carries into effect. To create an office, then, is in its nature a legislative function. And to define and fix the tenure of an office which is in the process of creation, is also in its nature a legislative function. And of course it would be comprehended in the grant of "all the legislative power," unless expressly withheld, or impliedly denied by the grant of some directly repugnant power to some other department. And it is insisted by the attorney-general that the grant of the executive power to the President is thus repugnant to the power of congress to fix the tenure of an office.

But what is executive power with reference to the government of the United States? It is not executive power in the abstract. It is not the executive power of the Emperor of Morocco or the Sultan of Turkey, but it is such executive power as rises out of the constitution and laws of the United States. It is exactly the power, in any given case, of carrying the particular law, as it stands, into execution. In the instance of the judges of the United States courts, the constitution having fixed the tenure, the executive power consists in the power of appointment without the power of removal. So, too, where the legislatures from great motive, of public policy, creates an office with a fixed and <sup>\*297]</sup> determinate tenure, the executive power, as to that law, consists in the power of appointment only, without the power of removal. And this is the necessary result of the very structure of our government. The sovereignty of the United States is an unit. The government of the United States is one government. The departments are but functionaries of that government; not hostile to each other, but co-ordinate; separate, but not antagonistical. When, therefore, either of the departments acts in its legitimate sphere, it is the sovereignty of the United States which acts through its appropriate functionary. If congress pass an act, it is the act of the government of the United States, by its appropriate organ. If the judiciary expound a statute, it is the exposition by the government through its peculiar organ, of its own enactment. But the attorney-general says that he does not recognize this "unitarian-government;" that he looks into the constitution of the United States, and discovers only three distinct and separate departments. Beyond that he does not look.

This view of the case imposes upon me the inquiry, what is a constitution? Is it the government, or is it the organic law

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by which the government acts? Is it any thing else than a charter, in which are laid down the functions, the powers, and the duties of the mere organs or instruments of the government? In a pure democracy, a constitution is an absurdity. In an absolute despotism, a constitution is an absurdity. Because, in either case, the power which acts is absolute, and being the only power which can make the constitution, it can disobey it or annul it, and there is nothing beyond it to impose on it the necessity of obedience to its own rules. It is only in a representative government that a constitution properly finds a place. It is only where the sovereign power does not immediately govern, but acts through others who represent that sovereign power, that a constitution becomes necessary, in order to define how far and in what the sovereign power is committed to such agents or representatives. In so far as the power is given to them, their acts are the acts of the sovereignty, but no further. There is still a power behind the constitution which, as it made it, can also unmake it. And, sir, there is a sovereignty behind the constitution of the United States—a power which, as it made, can unmake that. It is that sovereignty, that power, which is represented, not constituted, by the different departments as laid down in the constitution. When, therefore, the congress passes an act within its prescribed sphere, it is the sovereignty of the United States which passes that act by its appropriate department. And so with the other branches of the government. I repeat, then, that the sovereignty of the United States is an unit, and \*that the different departments [\*298] are but different organs of one and the same government. And when “the executive power” is committed to the President, it is, in any given case, only that power which is necessary in order to carry the particular law into execution. And instead of the grant of the executive power being a limit to, or abridgment of, the legislative power, the former is only a consequence or result of the latter, it being only the power of carrying the law which the legislature has made, and as it has made it, into execution. And such has been the construction practically. The great debate in 1789 has been misapprehended by the attorney-general, and by others before him. The question involved in that debate was not whether the President had the power of removing an officer, the tenure of whose office was fixed by law; but whether he had such power when the law was silent as to the tenure. The debate arose upon the necessity of inserting the words, “to be removable by the President,” &c., and it was argued that the power of removal was incident to the power of appoint-

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ment, where no statutory limitation existed, and that therefore it was unnecessary to insert those words. But it was nowhere intimated that when the law fixed the tenure the President could remove; or that congress, whenever public policy should require, could not effectually fix the tenure of an office which it could create. On the contrary, it was distinctly asserted by many, and treated as a *concessum* by all, that congress could make the tenure what it pleased. The debate, too, had reference to a purely executive office, and much of it was spent upon the question, whether, if the power of removal was incident to that of appointment, the President and senate, and not the President alone, should remove. And the main argument for the President's power was his responsibility for the acts of purely executive officers, who were his agents,—an argument which could not extend to judicial officers. I humbly submit, then, that this great debate, instead of being a foundation for the doctrine set up by the attorney-general, when rightly understood, only goes to the extent that an executive officer, whose term of office is not limited by law, holds at the pleasure of the President. And from that time to this, the executive construction has been that territorial judges could not be removed, and they have been treated as exempt from the President's power.

The legislative construction has been the same. There has been one uniform current of legislative acts, in which the tenure of the territorial judges has been fixed. And it is not unworthy of consideration that the very congress of 1789, in about one month after the debate I have referred to, gave their legislative exposition of the power of congress to fix the <sup>\*299]</sup> tenure of office, \*when they enacted, in the act passed to adapt the ordinance of 1787 to the constitution of the United States, that in all cases where, under the ordinance, the congress had had the power of removal, the President should thereafter have that power. 1 Stat. at L., 53. Now, the ordinance had limited the tenure of the judges to good behavior, and of course the above act, therefore, conferred no power on the President to remove them. And for fifty years, through successive enactments, this policy as to judicial officers, has been followed by congress, and has been sanctioned by the public sentiments in its favor.

The judicial construction has been the same. As long ago as the case of *Marbury v. Madison*, 1 Cranch, 154, it was decided that where the tenure of an office was fixed, the President had no power over the officer. In that case, justices of the peace were appointed by the President under the act of congress of 1801, by which act they were to hold their

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offices for five years. The court decided that Marbury, when once appointed, had a right to the office for the five years prescribed by law, independent of the executive. The case is exactly analogous to the present. In both, the tenure was fixed, for a term of years, by an act of congress. But how does the attorney-general deal with this decision? Why, forsooth, he says it is an *obiter dictum*, not necessary to the decision of the case. But, sir, I maintain that it was in no just sense an *obiter dictum*. It was the very case itself. It was ably argued, and solemnly considered and decided by the whole court. But more than this, it has stood unreversed for more than fifty years, and has, by reiterated reference and recognition, become embalmed in the jurisprudence of the country. It has been woven into the very fabric of our state and federal authority, and you might as well tear the woof from the warp as to wrest this case from its place in the unwritten law of this land. And, moreover, this court has again recognized the same principle, in the case of *Hennen*, 13 Pet., 258, 259. And I conclude, then, that not only is it philosophically true that the legislative, which is the only creative, originative department of the government, has the power to define and fix that which it creates, and that the executive power is only the United States executing that which the United States, by its congress, has enacted; but that, in relation to judicial officers, the united construction of all the departments has rested in the same conclusion.

II. The second question is, whether a *mandamus* is the proper remedy?

If it is not, then the relator, although illegally deprived of his office and its emoluments, is utterly without remedy; and not only may the executive officers of the government deprive an \*individual of his rights, but may, in the very act, [ \*300 violate both the constitution and the laws of the United States, and yet this wrong cannot be remedied. For even an impeachment does not restore the individual to his rights.

The fact, then, that the relator is without any other legal remedy, is of itself good ground for a *mandamus* where the right is clear. Tappan on *Mandamus*, pp. 5, 9, 10.

It is no objection that the *mandamus* is to compel the payment of money, if there are no other means of compulsion. 3 Nev. & P., 280; 8 Ad. & E., 176; 4 Barn. & Ad., 360; 6 Bing., 668.

In the present case the act was purely ministerial; not a particle of discretion was to be exercised. By the 11th section of the act of congress, (9 Stats. at L., 407,) each judge

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was to receive an annual salary of \$1,800, to be paid quarterly, at the treasury of the United States. An appropriation has in each year been made for the payment of these judges. See 9 Stats. at L., 532, 611. The salary was fixed by law, the time of payment fixed, the place of payment fixed, and the money lay in the treasury appropriated for that payment. Could there be a more absolutely ministerial act or duty than that of the secretary in making the payment? See the case of *Kendall*, 12 Pet., 612, 613.

But the attorney-general says that the secretary of the treasury was, in this instance, to exercise judgment and discretion in looking into the act, and determining its meaning. But this is no more than saying that the act was addressed to a being with intellectual faculties. For if no act can be ministerial merely because it requires to be understood in order to be performed, then no act of a rational being can ever be ministerial. The true question is, not whether it requires judgment, discernment, or any other intellectual quality, in order to understand what is to be done by the requirements of the statute, but whether the officer has any discretion to exercise between doing, and not doing, what the statute commands. If the statute is imperative, there is no room for judgment as to the performance of the act which the statute requires, however much of judgment, in another sense, or of understanding may be requisite in arriving at the meaning of the law. True legal discretion is a discretion to do or not to do, according as the judgment of the officer may decide; and that discretion can never be exercised when the statute has peremptorily ordered a thing to be done.

This case is clearly distinguishable from *Paulding v. Decatur*, 14 Pet., 497, and *Brashear v. Mason*, 6 How., 92.

In each of those cases there was a fair case for discretion to \*301] \*be exercised, both in regard to the real meaning of congress, and, also, in regard to the fund out of which the money was to be paid. Nor is this but an indirect mode of suing the government, which it is forbidden to do directly. This proceeding is neither to establish a claim by the judgment of a court, nor to enforce against the government the payment of a claim. The government has, by its proper legislative department, the only department which in this particular province represents the government, declared that the judges of the Minnesota territory shall receive a certain salary, to be paid quarterly at the treasury. It is the secretary of the treasury, and not the government of the United States, that refuses to pay; and the *mandamus* is to command him, not as the representative of the government to make this pay-

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ment, but as the mere officer on whom devolves the duty of executing this law, which the government, by its legislature, has passed, to do what the law specifically requires.

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us upon a writ of error to the circuit court of the United States for the District of Columbia and county of Washington. It originated in the denial, by the court above mentioned, of a writ of *mandamus*, by which the secretary of the treasury should be ordered to pay to the relator a sum of money claimed by the latter as a portion of the salary due to him as chief justice of the territory of Minnesota.

The facts which constituted the grounds of the application, few and simple in their character, were these:—

That on the 19th of March, 1849, the relator had, with the advice and consent of the senate, been commissioned, by President Taylor, chief justice of the supreme court of the territory of Minnesota, to which office there had been annexed (by the act of congress organizing the territorial government) a compensation or salary of eighteen hundred dollars per annum, payable quarter-yearly. That the tenure of the appointment was, by the language both of the act of congress, and of the commission of the relator, declared to be for the term and duration of four years from the date of the commission. That the relator, having accepted his commission was, afterwards, namely, on the 22d of October, 1851, informed by J. J. Crittenden, acting secretary of state, that the President had thought it proper to remove him from office, and to substitute in his place Jerome Fuller.

That the relator, insisting upon the tenure of his office according to the literal terms of the commission, preferred a <sup>\*</sup>claim before the first auditor of the treasury for the sum of \$2,343, as compensation, from the period of his <sup>[\*302]</sup> dismissal, up to the expiration of four years from the date of his appointment.

That the first auditor having rejected the claim in these words: "That Aaron Goodrich is not entitled to the salary claimed by him," an appeal was taken by the relator to the comptroller of the treasury, by whom the decision of the first auditor was sustained, and by whom, in adjudging, it is remarked, that "There can be only one chief justice of the supreme court in the territory; and the President of the United States having thought proper to remove Chief Justice Goodrich, and having nominated, and, by and with the consent of the senate, appointed Jerome Fuller chief justice, in

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the room and stead of the said Chief Justice Goodrich, he, that is, the comptroller, was bound to consider the said removal and appointment as legal." And in consideration of the facts and the law, his decision was, that the United States were not indebted to the said Aaron Goodrich, as chief justice of the supreme court of the territory of Minnesota, and that the decision of the first auditor in the premises was confirmed and established.

Upon the foundation of the facts above recited, and in opposition to the decisions of the auditor and comptroller, and with the view of coercing the allowance, by the secretary of the treasury, of the claim preferred by the relator, the application, which has been refused by the circuit court was made.

In considering this case, it may be remarked, at the threshold, that it exhibits the anomalous predicament of a prosecution by and in the name of the United States, adversary to the United States and to their authority; for it must be admitted that the secretary of the treasury can have no relation whatever, and is clothed with no powers and sustains no obligation incident to the present controversy, except as he is the representative of the United States, or the guardian or custodian of their interests, committed to his charge.

In their discussion of this cause, the counsel on either side have deemed themselves called upon to take a more extensive range of inquiry, than is that by which we consider this controversy to be properly limited. They have supposed that, in the regular line of this controversy, and, therefore, in its correct adjudication, were involved, necessarily, the tenure and character of the judicial power, as created either by the constitution or by the legislation of congress; as likewise the powers of the executive department, in the exercise of its constitutional functions, to control or influence the judicial power; and in their examination, by the counsel, of these deeply-  
\*303] important topics, \*much of research and ingenuity has been evinced. But, within what we conceive to be the correct apprehension of this cause, neither of those important topics is embraced; and although, when regularly and directly presented for consideration, the responsibility of passing upon them can no more be avoided than can the adjudication of any minor subject of judicial cognizance, yet their very importance furnishes a cogent reason why any unauthorized proceeding, in reference to them, should be cautiously avoided; why there should be no attempt to affect them by proceedings extrajudicial in their character, and such as would deprive of binding authority the action of the court, in matters even of trivial concernment.

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The true question presented for our consideration here, relates neither to the tenure of the judicial office, as created and defined by the constitution or by acts of congress, nor to the powers and functions of the President, as vested with the executive power of the government.

The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the circuit court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory action of the courts, in the enforcement of their views of private interests.

But the question proper for consideration here has not been left for its solution upon theoretical reasoning merely. It has already been authoritatively determined.

The power of the courts of the United States to command \*the performance of any duty, by either of the principal executive departments, or such as is incumbent upon any executive officer of the government, has been strongly contested in this court; and, in so far as that power may be supposed to have been conceded, the concession has been restricted by qualifications, which would seem to limit it to acts or proceedings by the officer, not implied in the several and inherent functions or duties incident to his office; acts of a character rather extraneous, and required of the individual rather than of the functionary.

Thus it has been ruled, that the only acts to which the

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power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; but that, wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise.

These are the doctrines expressly ruled by this court, in the case of *Kendall v. Stockton*, 12 Pet., 524; in that of *Decatur v. Paulding*, 14 Pet., 497; and in the more recent case of *Bra-shears v. Mason*, 6 How., 92; principles regarded as fundamental and essential, and apart from which the administration of the government would be impracticable. These principles, just stated, are clearly conclusive upon the case before us. The secretary of the treasury is inhibited from directing the payment of moneys not specifically appropriated by law. Claims against the treasury of the United States, like the present, are, according to the organization of that department, to be examined by the first auditor; from this officer they pass, either under his approval or by appeal from him, to the comptroller; and from the latter they are carried before the secretary of the treasury, without whose approbation they cannot be paid, and who cannot, even by the concurring opinions of the inferior officers of the department, be deprived of his own judgment upon the justice or legality of demands upon public money confided to his care. Opposed to the claim under consideration, we have the decisions of three different functionaries; to each of whom has been assigned, by law, the power and the duty of judging of its justice and legality. By what process of reasoning, then, the authority to make those decisions, or those decisions themselves, can be reconciled or identified with the performance of acts merely ministerial, we are unable to conceive; and unless so identified, or there could have been shown some power in the circuit court competent to the repealing of the legislation by congress, in the organization of the treasury department—competent, too, to the \*305] annulling of the explicit rulings of this \*court, in the cases hereinbefore cited—the circuit court could have no jurisdiction to entertain the application for a writ of *mandamus* in this instance. As no such power has been shown, nor, in our opinion, could have been shown, or ever had existence, the decision of the circuit court, overruling the application, is approved and affirmed.

Mr. Justice MCLEAN dissented. Mr. Justice CURTIS filed a separate opinion; in which Mr. Justice NELSON, Mr. Justice GRIER, and Mr. Justice CAMPBELL concurred.

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## Mr. Justice CURTIS.

I assent to the judgment of the court in this case, upon the ground that a writ of *mandamus* to the secretary of the treasury is not a legal remedy, to try the title of the relator to the office claimed by him; and that, until that title has been legally tried and determined, he can take no step to compel the payment of the salary attached by law to that office. I desire to be understood as expressing no opinion upon any other question argued by the counsel in this case.

Mr. Justice NELSON, Mr. Justice GRIER, and Mr. Justice CAMPBELL concurred in this opinion.

## Mr. Justice MCLEAN.

As this case involves important principles, and as I differ from the opinion of the court, I shall state my views.

The first inquiry that naturally arises in the case is, whether the President had power to make the removal complained of? This is not the object of the *mandamus* applied for, but it is incidental to it.

The 2d section of the 2d article of the constitution provides: "That the President shall have power, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls, judges of the supreme court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

In his argument, the attorney-general says: "That the power of the President was discussed and settled by congress, in the commencement of the federal government; that the power of the President to remove all officers, who, by the constitution itself, were not declared to hold their offices during good behavior, was sustained by both houses; and that this power was recognized in the establishment of the department for foreign affairs."

\*In the 2d section of the act referred to it was provided: When the principal officer of the department should be removed, the chief clerk, during the vacancy, shall have custody of the records of the department. And a similar provision is contained in the other acts to establish the principal departments of the government. The heads of these departments constituted the cabinet of the President; and, as they were not only his advisers, but discharged their duties under his direction, there was a peculiar propriety that their offices should be held at the will of the executive.

There was great contrariety of opinion in congress on this

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power. With the experience we now have, in regard to its exercise, there is great doubt whether the most enlightened statesmen would not come to a different conclusion.

The attorney-general calls this a constitutional power. There is no such power given in the constitution. It is presumed to be in the President, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: the President and senate appoint to office; therefore, the President may remove from office. Now, the argument would be legitimate, if the power to remove were inferred to be the same that appoints.

It was supposed that the exercise of this power by the President, was necessary for the efficient discharge of executive duties. That to consult the senate in making removals, the same as in making appointments, would be too tardy for the correction of abuses. By a temporary appointment the public service is now provided for in case of death, and the same provision could be made where immediate removals are necessary. The senate, when called to fill the vacancy, would pass upon the demerits of the late incumbent.

This, I have never doubted, was the true construction of the constitution, and I am able to say it was the opinion of the late supreme court, with Marshall at its head.

The numbers of the Federalist, though written before the constitution was adopted, have been considered as among its ablest expositors. Publius, in one of his numbers, says, "It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as appoint. A change of the chief magistrate, therefore, would not occasion so violent or so great a revolution in the offices of the government, as might be expected if he were the sole disposer of offices; where a man in any station has given satisfactory evidence of his

\*307] \*from attempting a change in favor of a person more agreeable to him, by the apprehension that the disownance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men, with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the body."

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In this discussion in congress, Mr. Madison, one of the ablest and most enlightened statesmen of which our country can boast, considered the removal from office was an executive power, and that congress could not restrict its exercise. He also considered the power of appointment an executive power, and that, had not the constitution so provided, the concurrent action of the senate could not have been required by act of congress in making appointments. If this were admitted, it would not give strength to the argument in favor of the exercise of the power by the President.

If the power to remove from office be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The constitution has declared what shall be the executive power to appoint, and by consequence, the same power should be exercised in a removal. But this power of removal has been, perhaps, too long established and exercised to be now questioned. The voluntary action of the senate and the President, would be necessary to change the practice; and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can scarcely be expected.

The attorney-general says, that "the construction of the constitution concurred in by the two houses of the first congress and approved by President Washington, resolved, among others, the following point:—

"That in a republican government, public offices are created for the benefit of the people; that the officer does not hold a private estate and property in the office, and when the officer is unfit, for any cause whatever, he ought to be displaced, and another appointed for the benefit of the people and their security; or if the office itself be found, upon experience, to be unnecessary, it should be abolished." The soundness of the policy expressed in this resolution, must be admitted by every intelligent individual who understands and appreciates our system of government; and if the power had been exercised under the limitations expressed in the resolution, it would have had a <sup>most</sup> salutary effect on office holders, and on the <sup>[\*308]</sup> public. For the truth of this a reference may be made to the history of the earlier administrations.

But this power of removal from office by the President, was neither exercised nor supposed to apply until recently, to the judicial office.

In the establishment of the territories, the "Northwestern," "Indiana," "Illinois," "Mississippi," "Michigan," and "Wisconsin," it was provided that the judges should hold their offices during good behavior. The governor, secretary, and the other

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officers of these territories were appointed, under the law, for a term of years, "unless sooner removed."

By the act of congress of August, 1789, to provide for the government of these territories, certain changes were made in the ordinance of 1787, to adapt it to the constitution of the United States. It was provided that the President shall nominate and by and with the advice and consent of the senate, shall appoint, all officers which by the said ordinance were to have been appointed by the United States in congress assembled; and all officers so appointed shall be commissioned by him; and all cases where the United States, "in congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same power of revocation and removal."

In the territories of "New Orleans," "Florida," "Iowa," "Oregon," "Washington," "Utah," "New Mexico," "Minnesota," "Nebraska," and "Kansas," the judges were appointed for four years; and the governor and all other officers of the territories were appointed for a term of years, "unless sooner removed."

In the "Missouri," and "Arkansas" territories only, were the judges appointed for four years, "if not sooner removed."

In the constitution, no express provision was made for the government of territories. This, no doubt, was deemed unnecessary, as the ordinance of 1787, which was passed before the constitution was adopted, provided for the government of all the territory then claimed by the United States.

Territorial judges are said not to be appointed under the constitution, but by virtue of an act of congress. In the *American Insurance Co. v. Canter*, 1 Pet. 546, Chief Justice Marshall said: "The judges of the superior courts of Florida held their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited." But all the judges of the territories, from 1787 to 1804, were appointed for good behavior, so that the term of service was not a safe criterion by which to determine the character of territorial judges.

\*<sup>309]</sup> It is admitted that the judges of the supreme court cannot be appointed for a less period than good behavior; and the same may be said of the district judges.

The power under which the territorial governments is organized, is a matter of some controversy. In the case above cited, Chief Justice Marshall said: "Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress to make all

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needful rules and regulations respecting the territory or other property belonging to the United States." This is the prevailing view of those who have examined the subject. But the chief justice proceeds: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. These facts exist in every territorial government, but it does not show the source of the power, unless by the doctrine of necessity, which does not seem to be a legitimate foundation for a civil government under our system. The chief justice further says: "The right to govern may be the inevitable consequence of the right to acquire territory." There is no special power given in the constitution to acquire territory. This does not seem to have been within the view of the framers of the government; and the right was much contested in the acquisition of Louisiana, when the power was first exercised.

It seems to me that the power to govern a territory is a necessary consequence of the power given "to make all needful rules and regulations respecting the territory or other property belonging to the United States." No one doubts the power of congress to sell the public lands beyond the limits of any state; and this renders necessary the organization of a government for the protection of the persons and property of the purchasers. This is an implied power, but it necessarily results from the power to sell the public lands.

It is difficult to say that any power can be exercised by congress, which is not derived from the constitution. Without that instrument, it is as powerless as any other association of men. The laws of the Union protect our commerce wherever the flag of the country may float, and, in some instances, our own citizens may be made responsible for acts done in foreign seas and countries; but this is the exercise of powers given by the constitution. Under the legislative power of congress, territorial governments are organized, and their functionaries are appointed by the President and senate. Their laws emanate from congress, or are passed by a territorial legislature, subject \*to the approval of congress. [\*310 The government of the territory is a government of the United States; and although its courts do not exercise the judicial power to the same extent as the other courts of the United States, still, they are courts of the United States, and exercise such judicial powers as are conferred on them by law.

It is argued that, as the President is bound to see the laws

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faithfully executed, the power to remove unfaithful or incompetent officers is necessary. This may be admitted to be a legitimate argument, as commonly applied to executive officers. My own view is, that the power to see that the laws are faithfully executed, applies chiefly to the giving effect to the decisions of the courts when resisted by physical force. But however strongly this may refer to the political officers of the government, how can it apply to the judicial office?

In the nature of his office, the President must superintend the executive department of the government. But the judiciary constitutes a co-ordinate branch of the government, over which the president has no superintendence, and can exercise no control. So far from this department being subject to the executive, it may be called to pass on the legality of his acts. The President, like all the other officers of the government, is subject to the law, and cannot violate it with impunity. He is responsible for the infraction of private rights, and before a territorial court, the same as before the other courts of the Union. In no just and proper sense can the President be required to see that the judicial power shall be carried out, except as controlling the physical power of the Union.

The effects of the control of the judicial, by the executive power, are seen in the history of England, during the reign of the Stuarts. The most insupportable tyranny and corruption were realized under this paramount power of the executive government. It has always been the corrupting power of all free government. This, in a great degree, arises from the extent of its powers and patronage. And in the formation of our government great care was taken to place the judicial power on an independent basis. Being without patronage, and discharging the most onerous and delicate duties, nothing but a high and an impartial discharge of its functions can sustain it.

Whenever any portion of the judicial power shall become subject to the executive, there will be an end of its independence and purity. It will become the register of executive decrees and of a party policy. What could create a deeper degradation than to see any branch of the judiciary, which stands between the executive power and the rights of the citizen, become the mere instrument of that power.

\*<sup>311</sup> There can be little or no difficulty in coming to a correct conclusion on this important question, by an examination of the acts of congress creating the tenure of the judicial office in the territories. In the seven territories first enumerated, the judges were appointed during good behavior;

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the other officers were appointed for a term of years, "if not sooner removed."

In ten territories the law authorized the appointment of judges for the term of four years, and the other officers, for a term of years, "if not sooner removed." Whether in the above acts the judicial tenure was fixed for good behavior or a term of years, no one can fail to see the difference in regard to the tenure of the judges, and of the other officers. The judges were appointed absolutely for good behavior, or a term of years, whilst the other officers were appointed for a term of years, "unless sooner removed." By the terms of the appointment the political officers, such as the governor, secretary, marshal, &c., were removable, but the judges were not. In this respect these appointments stand in contrast, and show the unmistakable intention of congress.

It is true that for the territories of Missouri, and Arkansas, the judges were appointed for the term of four years, "unless sooner removed." This language was first used for the Missouri territory, and as the Arkansas territory was taken from Missouri, the same language was incorporated into the organic law of Arkansas. These two territories out of the nineteen above named, would imply the power to remove the judges. But, whether this language was the result of accident or design, it cannot authorize the construction of the law establishing the other territories, among which the territory of Minnesota is included, as though the power of removal applied to them. The words used will not allow this construction, especially when taken in connection with the words in the same acts in relation to the appointment of officers in the territories, other than the judges.

This view is greatly strengthened by the usage of the government. There have been, it is believed, but two judges of territories removed, and those recently, since the organization of the Union. And we may rely on the early practice of the government, to show its true theory, in the exercise of federal powers. The great principles of our system were then understood and adhered to, and our safest axioms are found in this part of our history.

It is said the act of 1789, which modified the ordinance of 1787, so as to adapt it to the constitution, gave the same power to the President, in regard to appointments and removals which, under the confederation, was exercised by congress. This is \*true, but it can apply only to those officers which, under the confederation, were removable by congress. Under the ordinance, as above stated, the judges were appointed during good behavior, while all the

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other officers were appointed for a term of years, "unless sooner removed."

If congress have the power to create the territorial courts, of which no one doubts, it has the power to fix the tenure of office. This being done, the President has no more power to remove a territorial judge, than he has to repeal a law. The duties of a judge of a territory are discharged as independently, and as free from executive control, as are the duties of a judge of this court. This territorial judicial power was intended to be a check upon the executive power. And it would be inconsistent with the principles of our government, for the judges to be subject to removal by the executive.

This is a great question, although it can only affect, as now maintained, the territorial bench. And I regret that, from the want of jurisdiction, in the opinion of my brethren, they are not required to express an opinion as to the power asserted.

The other question in the case is, whether the remedy by *mandamus* is appropriate and legal. In the case of *Kendall v. The United States*, 12 Pet., 608, which, in my judgment, is not distinguishable from this, the question was settled.

In that case, under a special act of congress, a matter of controversy between William B. Stokes et al. and the postmaster-general, was referred to a commissioner, to examine the account and report any balance he might find due to the relators, from the post-office department; and the postmaster-general was required to pay such balance, by entering a credit on the books of the department.

The duties of the commissioner were performed, and he reported in favor of the relators, \$161,563.89, all of which sum was credited by the postmaster-general, except the sum of \$39,462.43, which he refused to place to the credit of the relators, on the books of the department. The petitioners prayed the circuit court of the District of Columbia to award a *mandamus*, directed to the postmaster-general, commanding him to enter the credit.

A peremptory *mandamus* was issued by the circuit court, which decision was brought before this court by a writ of error. All the members of this court held, that it was a proper case for *mandamus*, as the duty imposed was ministerial and positive, there being no other adequate remedy. Three only of the judges dissented, on the ground that the circuit court of the District of Columbia had not power to issue the writ; but the other six judges held, that it was not only a case for a *mandamus*, but that the circuit court had the power to issue it.

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\*The credit was required to be entered on the books of the auditor of the post-office department, whose duties were performed under the treasury department. But as the accounts were examined in the post-office department, the credit was required to be entered by the postmaster-general on the books of the auditor. It was known that an order of the postmaster-general, requiring the credit to be entered, would be obeyed by the auditor.

In the case before us, the salary of the judge was fixed by law, and payable at the treasury department, where application for payment has been frequently made by the relator, and refused by the secretary of the treasury. It is shown that an appropriation of the salary was made by act of congress, and in such a case the payment is a ministerial act, and the secretary has no discretion to withhold it. This would not be controverted, it is supposed, if the judge, who demanded payment, had remained in office. If, in such case, the secretary may, at his discretion, refuse to pay the salaries of officers, he might suspend the action of the government. The duty to pay is enjoined on the secretary by law; it is a ministerial duty, in which he can exercise no discretion, the appropriation having been made by law.

By the act of 2d September, 1789, the secretary of the treasury is required, to "grant all warrants for moneys to be issued from the treasury in pursuance of appropriations by law." And, in the same act, the treasurer is required to "receive and keep the moneys of the United States, and to disburse the same upon warrants drawn by the secretary of the treasury, countersigned by the comptroller, recorded by the register, and not otherwise." These are all ministerial duties, performed under the secretary of the treasury. The money having been appropriated by law for the salary of the judge, the secretary was bound to pay it.

The justification for the non-payment by the secretary is, that the relator had been removed from office by the President, and that, by the President and senate, his successor had been appointed, who, having entered upon the discharge of his duties, was entitled to the salary, and to whom it had been paid.

If the act of removal by the President was unauthorized, this can afford no justification for withholding the salary. It is admitted that, by *mandamus*, no act of an executive officer can be examined, which invades the exercise of his judgment or discretion. The payment of the salary, being a mere ministerial duty, positively enjoined by law, is subject to no such

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objection. But, may not the objection apply to the removal of \*the judge? If such a power were within the exercise of the discretion of the President, it would be conclusive. But if the act be without authority and against law, it is void; and such was the act complained of. The President could exercise no discretion on the subject; the removal was beyond his power, and the act being void, it cannot be considered as the exercise of an executive discretion. The judgment and discretion which may not be interfered with, by *mandamus*, must be in the discharge of executive duties. These do not come within the judicial power. But an unlawful, and consequently void act, by the President, by which an injury is done to an individual, cannot be covered by executive discretion. And in this case the question is incidental to the object of the *mandamus*, which is to require the secretary to perform a ministerial duty. The removal of the judge is set up by the secretary as a reason why the relator has not been paid; and if the act of removal be void, it fails to justify the refusal to pay.

The case of *Decatur v. Paulding*, 14 Pet., 513, is altogether different from the one under consideration. In the opinion of the court in that case, the chief justice showed that it was materially distinguishable from Kendall's case.

It would be difficult to imagine a clearer case for *mandamus* than the one before us, in my judgment; and I think it should be issued. If the salary has been paid to the new judge, it has been illegally paid, and that is no reason why it should not be paid to the rightful claimant.

We have nothing to do with the conduct of the judge, nor had the President. The judge was liable to be impeached and removed from office, in that form.

*Order.*

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

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\*FERDINAND CLARK, APPELLANT, *v.* BENJAMIN C. CLARK  
AND WILLIAM H. Y. HACKETT.

Where a person took the benefit of the bankrupt law of the United States; omitted in first schedule of property, to take any notice of a claim which he had against the Mexican Republic, for the unlawful seizure of the cargo of a vessel; filed an amended schedule, in which he mentioned the claim so indistinctly as to give no information of its value, although he was then prosecuting it before the board of commissioners; concealed the evidence of the property, so that the assignee in bankruptcy reported that it was of no value, and sold the whole, for a nominal consideration, to the sister of the bankrupt, who afterwards transferred it to him; the purchase was fraudulent, under the 4th section of the bankrupt law, and also by the general principles of equity.

Where a creditor of the bankrupt filed his bill, and gave his bond within thirty days after the award of the board of commissioners, this was sufficient within the 8th section of the act of March 3, 1849, to carry into effect our treaty with Mexico.

The creditor was a *cestui que trust* of the fund, and had a right to intervene, as the assignee in bankruptcy was dead. This was sufficient to give jurisdiction to the court. His not having proved his debt did not debar him of this right. Another assignee was appointed, and filed his claim without loss of time.<sup>1</sup>

The 8th section of the bankrupt law, limiting actions to two years after the bankruptcy, relates only to suits brought against persons who have claims to property, or rights of property surrendered by the bankrupt. And, moreover, no right of action accrued until the fund existed.

THIS was an appeal from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington.<sup>2</sup>

Ferdinand Clark, the appellant, prosecuted a claim before the commissioners who acted under the treaty between the United States and Mexico, which claim was for the unlawful seizure of the cargo of a vessel called The Louisiana. The commissioners awarded to him \$86,786.29; out of which there was deducted, by agreement, a sum of money, as compensation to the agents employed in its recovery, leaving \$69,429.04.

The award was made on the 15th of April, 1851, and, on the 15th of May following, Benjamin C. Clark, of Boston, filed a creditor's bill in the circuit court of the United States for the District of Columbia, claiming the fund, for himself and other creditors of Ferdinand Clark, who had taken the benefit of the bankrupt law of the United States, on the 22d March, 1843, in the state of New Hampshire. Soon after this bill was filed, namely, on the 30th May, Hackett, the

<sup>1</sup> DISTINGUISHED. *Phelps v. McDonald*, 9 Otto, 306-308. RECONCILED. *Glenney v. Langdon*, 8 Otto, 23. <sup>2</sup> Further decision, *Booth v. Clark*, post \*322.

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then assignee in bankruptcy of Ferdinand Clark, filed his bill, also claiming the entire fund, for the purpose of distribution amongst the creditors; Palmer, the original assignee in bankruptcy, had died, and Hackett was appointed in his place.

The substance of Hackett's bill was as follows:—

In this bill, Hackett sets forth his appointment as assignee, <sup>\*316]</sup> in *place of Palmer, deceased*, and prays for leave to come in, under the prayer of the original bill of B. C. Clark, and to be made complainant in said cause. He then avers that Ferdinand Clark was duly and regularly declared a bankrupt, in 1843, and that all his property and effects passed out of the bankrupt, and vested in the assignee, Palmer, who was regularly appointed, and is since dead, leaving the proceeding in bankruptcy still pending; that the bankrupt had, among his assets, a claim on the Republic of Mexico, which is the claim in satisfaction of which the award in controversy was made; that the said claim was not described in any manner to make the same available to his creditors, and that no such evidences as would enable him to recover said claim were put into the hands of the assignee; and that the assignee was ignorant of the true value of the assets, and that he, therefore, reported them to the court as of no value; that no right, title, or interest in said claim, ever passed out of said assignee, or became revested in said bankrupt; that said bankrupt had since prosecuted said claim, in his own right, falsely and fraudulently claiming that his debts in bankruptcy had been satisfied, and that said claim had revested in him; that the amount of said award legally belongs to complainant, as assignee. The complainant then submits, that the said Benjamin C. Clark and others, the creditors of said Ferdinand at the date of his bankruptcy, being in the condition of *cestuis que trust* whose trustee is dead, have complied with the true intent and meaning of the act of congress. Prayer for an injunction and general relief.

The answer to this bill, amongst other things,—

Admits that defendant had among his assets a claim against Mexico, and that the claim on which the award was made is the same; admits that said claim was set down in the schedule, but denies that it was not described so as to make the same available to his creditors; and he expressly and particularly denies that such evidences and information as would have enabled said assignee to recover said claim were fraudulently withheld by this defendant, and denies that his assets and effects generally were so described in his schedules that the assignee was in ignorance of their true value; avers that this Mexican claim was expressly mentioned in said schedule,

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in the manner demanded by the rules and practice of the district court of New Hampshire; that said claim was mentioned as subject to a mortgage; that such mortgage did exist, in fact; that he did not know the amount thereof, but verily believed it to be more than the value of the claim; that no value was set to said claim, because he believed, and had reason to believe, that said claim was wholly without value; that defendant communicated \*to Palmer, the assignee, the situation of all the claims mentioned in his schedules; [\*317 that all the papers and evidences in support of said Mexican claim were not in his possession, but had been, in the year 1842 or earlier, filed publicly before the commissioners appointed under the convention of April 11, 1839, and were afterwards placed, and, at the time of the commencement of the proceedings in bankruptcy, were in the public archives of the government of the United States, and there remained till the time of said award.

The defendant then sets forth more particularly the bankrupt proceedings up to his discharge, on the 17th December, 1844, from all debts then owing by him. He states that notice of the proceedings in bankruptcy was published in the leading papers in the district, and that notice, personally and by letter, was also served on all creditors, whose residence was known; that, notwithstanding this, no creditor ever filed in the district court any proof of debt, or any objections to the proceedings in bankruptcy, or to the doings of the assignee, until after the award was made.

The answer then avers, that on the 14th day of March, 1845, the assignee filed a petition for an order to sell the estate of the defendant, and on the 14th it was so ordered; that, in pursuance of said order, Palmer did, on the 9th day of April, 1845, after posting up advertisements, &c., sell at public auction all the estate and demands of the bankrupt, mentioned in the schedules attached to the petition of Ferdinand Clark to be declared bankrupt, to R. M. Clark, and that, by sale, said Mexican claim passed to said R. M. Clark. And the answer denies all artifice or fraud to depress the value of said demands, or this Mexican claim particularly; that on the 9th of April, 1845, said Palmer executed a formal bill of sale, with schedules attached to it, in which schedules this Mexican claim was included; that on the 10th April, 1845, defendant purchased, for valuable consideration, all the said property from R. M. Clark, including said claim; that he has prosecuted said claim in his own name, and at his own risk and expense; that complainant has not filed his notice with the secretary, according to the provisions of the 8th section of the act of March 3, 1849.

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On the 2d of June, 1851, the circuit court issued an injunction, restraining the secretary of the treasury from paying, and Ferdinand Clark from receiving, the amount of the award, until the further order of the court.

The 8th section of the act of March 3, 1849, (9 Stats. at L., 394,) authorized any person, who claimed any part of an award, to file a bill; and directed the fund to remain in the treasury, to await the decision of the courts.

\*<sup>318]</sup> The case went on in the circuit court, and much testimony was taken. A part of it related to the proceedings in the bankrupt court of New Hampshire, which are summarily referred to in the opinion of the court, and need not be further noticed here.

On the 30th of May, 1853, the circuit court decreed that the fund should be paid over to Hackett, for distribution in the bankrupt court of New Hampshire, amongst the creditors of Ferdinand Clark.

From this decree, Clark appealed to this court.

It was argued by *Mr. Lawrence* and *Mr. Nelson*, for the appellant, and by *Mr. Carlisle* and *Mr. Johnson*, for the appellee.

The arguments consisted chiefly in the examination of, and comments upon, the facts in the case.

The following points of law were made by *Mr. Lawrence* :—

1. That B. C. Clark, the complainant in the original bill, had no standing in court at all, he being a mere general creditor at the time of bankruptcy of appellant, and his debt having been discharged by the bankruptcy and proceedings thereon.

2. That there was no privity between B. C. Clark (who had never made himself a party to the bankrupt proceedings at all) and the assignee in bankruptcy; but that Hackett, the assignee, must stand upon his own compliance with the 8th section of the act of 3d March, 1849, or else fall.

3. That the circuit court of the District of Columbia had no jurisdiction in this case, except that conferred by said 8th section. The fund was in the treasury of the United States, and the parties were non-residents. Inasmuch as Hackett, the assignee, had not given the bond nor filed the notice specified in said 8th section, upon which the jurisdiction of the court was to attach, the bill should have been dismissed.

Mr. Justice CATRON delivered the opinion of the court.

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Ferdinand Clark applied for the benefit of the bankrupt law, and filed a schedule of his debts, and another of his property and rights of property. Pursuant to the latter schedule, the assignee in bankruptcy sold all Clark's interest in the property, and rights of property, at auction, for the sum of two dollars; Clark himself bidding at the sale, but ordering the title to be made by the assignee to his (Clark's) sister, who relinquished to him by a formal deed on the next day. By virtue of this purchase Clark claims to be *bona fide* owner of all the property, and rights of property, he had given in or indicated on his schedule.

The bill alleges that the claim against the Republic of Mexico, \*for an unlawful seizure of the cargo of a vessel owned by the bankrupt, called The Louisiana, the proceeds of which are in dispute, was not described in any manner to make the same available to Clark's creditors; nor was any such information or evidences of the claim put into possession of the assignee as would enable him to recover it, but that all the information and evidences were fraudulently withheld by said bankrupt, and that his assets and effects generally were so described in his schedule that the assignee was ignorant of their true value, and in fact reported to the court that the same could not be sold; and that because of this fraud the sale was void.

This allegation is put in issue by the answer, and was sustained by the circuit court, which ordered the moneys awarded to Clark by the commissioners, acting under our treaty of peace with Mexico, to be paid over to the assignee in bankruptcy, and distributed by him among the bankrupt's creditors. From this decree Clark appealed.

If the right of property to the claim for indemnity was concealed so that the assets were sold for a nominal amount, and to Clark himself in the name of his sister, then Clark's purchase was fraudulent, and the decree below, setting aside the purchase, was proper. This is the rule prescribed by the 4th section of the bankrupt law; and which rule would be enforced by the general principles governing a court of equity, independently of the bankrupt law.

In his first schedule, the bankrupt did not mention the claim against the Republic of Mexico, but in an amendment, filed in December, 1844, after he had received his discharge, this claim is alluded to in connection with others, as follows:—

“United States government of America” —	Claim.
Spanish government,	do.
Buenos Ayres government,	do.
“Mexican Republic subject to a mortgage.”	

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This statement gave no information that the bankrupt claimed remuneration against the government of Mexico for an illegal seizure of the cargo of the schooner Louisiana. The proof is that Clark was prosecuting this claim before he applied for the benefit of the bankrupt law, which was in January, 1843, and relied on its ultimate recognition and payment through commissioners acting under treaties with Mexico. He continued to pursue the claim, steadily and earnestly, up to the time it was allowed in 1851, when there was awarded to him 86,786  $\frac{2}{100}$  dollars.

Clark's letters to Mr. Caustin, his agent in Washington, who prosecuted the claim, show, as does the deposition of Mr. Caustin, \*also, that in December, 1844, when the <sup>\*320]</sup> amended schedule was filed, the bankrupt had a right to expect ultimate success, and did rely on it with much confidence. Clark's papers and correspondence were extensive in regard to the matter, and which must have been concealed from the assignee in bankruptcy, or he would not have reported the assets as of no value in 1845, when they were sold.

From the obscurity of the schedule, and the concealment of the evidences of a right of property from the assignee and the creditors, we feel satisfied that the bankrupt intended to rid himself of his debts, and to secure to himself the effects in dispute by contrivance, and that part of the contrivance was a purchase in the name of his sister, for his own benefit.

Some minor objections to the decree below have been raised, which it is proper to notice.

First, it is insisted that the circuit court of the District of Columbia had no jurisdiction of the parties under the act of March 3, 1849, § 8, to carry into effect our treaty with Mexico of 1848. The 8th section provides that in all cases arising under the act, where any person or persons other than those in whose favor the award was made, claimed the money awarded, should within thirty days after the date of the award notify the secretary of the treasury of his intention to contest the payment of the money to the party to whom it was awarded, and file with the district attorney a bond, &c., then the money should be retained in the treasury, subject to legal investigation in the courts of justice; and the party claiming the fund might file his bill in the circuit court in the District of Columbia, which should have jurisdiction to determine the right of property. In this instance the award was made on the 15th day of April, 1851, and on the 15th day of May following, Benjamin C. Clark, of Boston, a judgment creditor, filed his bill in the circuit court claiming the fund awarded to Ferdi-

nand Clark, and gave the notice and bond required by the act of 1849, § 8.<sup>1</sup>

This was a creditor's bill, on behalf of the complainant and all other creditors of the bankrupt, and which alleged that the complainant had reason to believe the assignee, Palmer, was dead, and invites him, if living, or any subsequent assignee that might be appointed, to come in, &c. It was ascertained that Palmer was dead, and Hackett was appointed successor to Palmer, May 19, 1851, and on the 30th day of that month made himself a party to Benjamin C. Clark's bill, by petition in the nature of an original bill. Other creditors came in, likewise, but all of them after the thirty days had expired.

It is insisted that Benjamin C. Clark, as a general creditor of the bankrupt, had no standing in court, his debt having been discharged \*by the certificate of bankruptcy. Secondly, [\*321 that Clark had never made himself a party to the bankrupt proceedings, by proving his debt, and therefore Hackett must stand on his own bill, and cannot connect himself with that of Clark.

3. "That the circuit court of the District of Columbia had no jurisdiction in this case, except that conferred by said 8th section. The fund was in the treasury of the United States, and the parties were non-residents. Inasmuch as Hackett, the assignee, had not given the bond nor filed the notice specified in said 8th section, upon which the jurisdiction of the court was to attach, the bill should have been dismissed."

The bankrupt is personally discharged from his debts, and so are his future acquisitions; but, the property and rights of property which vested in the assignee are subject to the creditors of the bankrupt, as they were liable in his hands before he applied for the benefit of the act; and the money in controversy was held in trust for the creditors, in whatsoever hands it was found. Benjamin C. Clark was a *cestui que trust*, and the treasury a stakeholder between Ferdinand Clark and his creditors; Palmer, the assignee, had died, and there being no trustee, the creditor had a right to file a bill and detain the fund for the creditors generally, to be administered by an assignee subsequently appointed by the bankrupt court.

The circumstance that Benjamin C. Clark has not proved his debt, and made himself a party to the proceedings in bankruptcy, is immaterial; the proof that debts were owing by Ferdinand Clark can be made at such times as the bankrupt court may prescribe by its rules and orders; and we are not aware that any objection can be interposed to reject Ben-

<sup>1</sup> CITED, *United States v. Lee*, 16 Otto, 239.  
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jamin C. Clark's claim in the bankrupt court of New Hampshire. All the creditors seem to be in the same condition, no one having proved his debt. Benjamin C. Clark having the right to sue and detain the fund in the treasury, Hackett could properly come in, and make himself a party to the proceeding.

It is also insisted that this action is barred by the 8th section of the bankrupt law, which provides that no suit shall be maintainable against any person claiming an adverse interest touching property or rights of property surrendered by the bankrupt, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued.

The interest adversely claimed, and which the statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt; but, supposing that Ferdinand Clark had been placed in that condition, as to the fund in the treasury, by his pretended purchase of his own assets, \*322] yet as no cause of \*action accrued to the assignee in bankruptcy against Clark, until he got possession of the money, and as he never held the fund adversely, it follows that the act does not apply; but if it did, the fund had no existence till the award was made, which was only thirty days before the suit was brought. We order that the decree of 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 Columbia, holden in and for the county of Washington, 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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WILLIAM A. BOOTH, APPELLANT, *v.* FERDINAND CLARK.

There was a judgment recovered in the supreme court of New York, upon which a *fieri facias* was issued, the return to which was, "no goods, chattels, or real estate of the defendant to be levied upon."

The creditor then filed a creditor's bill before the chancellor of the first circuit in the state of New York, to subject the equitable assets and *chooses in action* of the debtor to his judgment. The bill was taken *pro confesso*, and, in 1842, a receiver was appointed. The debtor was also enjoined from making any disposition of his estate, legal or equitable; but the court had

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not been applied to, either by the creditor or the receiver, for any order upon the debtor, *in personam*, to coerce his compliance with the injunction or decree.

In 1843, the debtor went into another state and took the benefit of the bankrupt law of the United States. An assignee was appointed, and, after his death, another person to succeed him.

In 1851, a sum of money was awarded to the debtor for a claim accruing anterior to the judgment, by the commissioners under the Mexican treaty, which was claimed by the receiver and also by the assignee in bankruptcy, both prosecuting their claims in the circuit court of the United States for the District of Columbia.

The assignee in bankruptcy has the best right to the fund.

A receiver is an officer of the court which appoints him, but cannot sue, in a foreign jurisdiction, for the property of the debtor.

The proper course would be to compel obedience to the injunction, by a coercion of the person of the debtor, obliging him either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title as well as the possession of the property, according to the *lex loci rei sitae*.

The New York and English cases upon this subject examined.

The distinction between a receiver in chancery under a creditor's bill and an assignee in bankruptcy explained.

In England, an assignee in bankruptcy is held to be vested with the personal property of the bankrupt which is in foreign countries; and her courts acknowledge the validity of the title of a foreign assignee to property in England, when such title emanates from a country which has a bankrupt law similar to her own.

But this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union. The reason is stronger for declining to give such efficacy to a receiver [\*223] under a creditor's bill. And, moreover, there was in this case a want of vigilance in the creditor and receiver, by their omitting to proceed in the regular chancery practice against the person of the debtor, as above stated.<sup>1</sup>

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

The dispute was about the same sum of money which was in controversy in the preceding case of *Clark v. Hackett*.

Booth filed his bill in the circuit court, claiming the money in virtue of his character of receiver, appointed by the chancellor of the first circuit in the state of New York. All the circumstances of the case are recited in the opinion of the court.

On the 29th of March, 1853, the circuit court dismissed the bill, and Booth appealed to this court.

<sup>1</sup> This case is referred to in the following decisions: *Bank of Bethel v. Sherwood*, 16 Id., 727; *s. c.* 3 *McPherson*, 407; *Torrens v. Hammond*, 14 *Wall.*, 401; *Pahquioque Bank*, 4 *Hughes*, 601; *Bartlett v. Wilbur*, 19 *Blatchf.*, 104; 53 *Md.*, 495; *Goodsell v. Benson*, 13 *R. I.*, 252; *Chaffee v. Quidnick*, *Id.*, 106; *Nat. Bank v. N. Y. Silk Manuf. Co.*, 11 *Id.*, 534; *Taylor v. Life Assoc. of America*, 13 *Id.*, 498; *Holmes v. 448; Davis v. Snead*, 33 *Gratt. (Va.)*, 709; *Blair v. Core*, 20 *W. Va.*, 268.

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The case was argued by *Mr. Bradley*, for the appellant, and by *Mr. Lawrence* and *Mr. May*, for the appellee.

The counsel for the appellant contended:—

I. That by the proceedings in the court of chancery of New York the property of Clark was vested in the receiver, Booth, before Clark petitioned for the benefit of the bankrupt act, and the right of Booth was not affected by the voluntary bankruptcy and discharge of the defendant. 2 Rev. Stat., 173, §§ 38, 39, in margin; *Storm v. Waddell*, 2 Sandf. (N. Y.), Ch., 494, 510, 512, and cases cited.

The order of the court works the transfer of the title. *Mann v. Pentz*, 2 Sandf. (N. Y.) Ch., 257, 271, 272.

The subsequent discharge did not devest the title thus created. *Marcy v. Jordan*, 2 Den. (N. Y.), 570.

It is like an execution in the hands of the sheriff, not levied, which, by the "settled law of the state," binds the property. *Savage's Assignees v. Best*, 3 How., 111.

Or the attachment in a New Hampshire suit. *Peck et al. v. Jenness et al.*, 7 How., 612, 619, 622.

It is the settled law of the state of New York, 2 Sandf. (N. Y.), Ch., 519.

II. The receiver could maintain any action in relation to the property, and rights of property, which the debtor himself could have had. 6 Barb. (N. Y.), 542, 544; 3 Sandf. (N. Y.), 311, 316, 317.

III. The matter in controversy was a *chose in action* at the time of the appointment of the receiver, was personal property, followed the person of the owner, and passed to the receiver.

The term *chose in action* is broad enough to pass the claim in question, whether the evidence of the debt was in his possession or not, at the time of the appointment of the receiver.

\*324] *Nathan v. Whitelock*, 9 Paige (N. Y.), 159; *North v. Turner*, 9 Serg. & R. (Pa.), 244; and the authorities there cited. 19 Wend. (N. Y.), 75; *Gillett v. Fairchild*, 4 Den. (N. Y.), 80, 82, and cases cited.

A claim upon a foreign government would be embraced in such an assignment. 4 Den. (N. Y.), *supra*, and cases cited. *Couch v. Delaplain*, 2 (N. Y.), 397, 402, 403; *Milner v. Metz*, 16 Pet., 321; *Comegys v. Vass*, 1 Pet., 193; 2 Story's Eq., §§ 829, 1040.

The fund not being the subject of manual possession, an appropriation of it is all that is required. 5 Binn (Pa.), 392, 398.

But it was not merely a loose unsettled demand of redress

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for injuries. The treaties of 1839 and 1843, gave it a fixed character.

Having no locality, the validity of its transfer depends on the law of the place where the transfer was made. 2 Kent Com., 570, 7th ed.; Story Confl., §§ 362, 383, 399; *Van Buskirk v. Hartford Fire Insurance Co.*, 14 Conn., 583, 586, 587, 588, 590.

“According to the law of the place where made. *Black v. Zacharie*, 3 How., 483; *Oakey v. Bennett*, 11 Id., 44.

The court of chancery in New York had jurisdiction of the subject-matter, and of the person. It carried with it jurisdiction over his personal effects. *Holmes v. Reneser*, 4 Johns. (N. Y.) Ch., 485; S. C., 20 Id., 262; *Hooper v. Tuckerman*, 3 Sandf. (N. Y.) Rep., 311, 317; *Hoyt v. Thompson*, 5 N. Y., 320; Story's Confl., 420; Life and Letters of Joseph Story, vol. 1, p. 380, Letter to Chancellor Kent.

The defendant resided in the city of New York. He was engaged in business there. His original domicile was in Massachusetts; his next, a domicile for commercial purposes, in Havana; next, from 1841 to 1844, his residence and domicile for business was in New York.

And while so residing and doing business in New York, he appeared in the chancery court, in this cause.

There is no evidence to show any other residence or domicile elsewhere, from 1841 to 1843. In the absence of such proof, *prima facie* he was a domiciled citizen of New York, and his rights over his personality are to be governed by the laws of that state.

We assume, upon these points, that if this cause was in a New York court, the right of receiver would not admit of dispute.

IV. The circuit court of the District of Columbia had jurisdiction of this case; was bound to enforce the rights of the receiver according to the law of the state of New York, and ought to have rendered a decree in favor of the appellant.

1. It had jurisdiction of the cause, if the right of the receiver was complete under the laws of the state of New York. *Holmes v. Renwer*; *Hooper v. Tuckerman*; *Hoyt v. Thompson*; [\*325] Story's Confl., 419, 420, 421, already cited; *Thomas v. Merchant's Bank*, 9 Paige (N. Y.), 216; *McLaren v. Pennington*, 1 Id., 102; *Bank of Augusta v. Earle*, 13 Pet., 520, 589, 590, 591; *Metz v. Milner*, 16 Id., 321.

2. There were no conflicting claims on the part of any citizen of the District of Columbia, and the court was bound to give effect to the foreign assignment, not only by the comity

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of nations, but by the peculiar federal relations existing in this country.

3. The policy of the law of this District shows an enlarged comity. Executors and administrators, by statute act, (24th June, 1812, § 11, 2 Stat. at L., 758), and assignees of insolvents in the several states, have always been allowed by the courts to sue here. The receiver in this case is not a common law receiver, but a receiver by statute, as in case of insolvency.

4. The court had jurisdiction under the act of 3d March, 1849.

The title of Booth being consummate, and the fund enjoined, and locked up in the treasury, at the instance of the creditors of Clark, it was subject to the claims of other creditors giving notice and filing their bonds.

The design was to keep the money in the treasury, in order that claimants should have a reasonable time to prosecute their rights; the risk ran was that it should be paid over. As regards the claimant, it was merely directory. Time was not of the essence of the law.

"There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory. The precise time, in many cases, is not of the essence." *Rex v. Loxdale*, 1 Burr., 447.

The provisions of a law which are merely directory, are not to be construed into conditions precedent. Laws are construed strictly to save a right or avoid a penalty, but liberally to give a remedy, or effect an object declared in the law. *Whitney v. Emmett*, 1 Baldw., 316.

The intention of the legislature should be followed, whenever it can be discovered, although the construction seem contrary to the letter of the statute. Dwarris on Stat., 718; *The People v. The Utica Insurance Co.*, 15 Johns., (N. Y.), 380. See also 6 Cranch, 307; 3 How., 565.

By the court: "Courts are not to construe an act so liberally as to work injustice; but so liberally as to prevent the mischief, and advance the remedy." *Jackson v. West*, 10 Johns., (N. Y.), 466.

Negative words will make a statute imperative; words in the affirmative are directory only. *Rex v. Leicester*, 9 Dowl., & Ry., 972; 7 Barn. & C., 12.

\*326] Where a statute directs a person to do a thing in a given time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his

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authority. *Pond v. Negus*, 3 Mass., 230; Smith's Com., § 670, *et seq.*; *Stinson v. Huggins*, 16 Barb. (N. Y.), 61.

When an act is to be done within a given time, it may be done afterwards, if nothing have occurred to prevent it. *Griffith v. Minor*, 1 La., 350; *Proseus v. Mason*, 12 Id., 16.

Under a directory statute, a duty not performed at the time specified, may be valid if performed afterwards. *Webster v. French*, 12 Ill., 302.

Remedial statutes have been made to extend, by an equitable construction, to other persons, to other things, to other places, and to other times than those expressly mentioned in the statute. *Dwarris*, 721-726.

Apply these rules to this statute and the facts of this case, and the conclusion is inevitable, that so long as the fund continued in the treasury, the court had jurisdiction to entertain and adjudicate on the complainant's claim to it. It was of no importance that the proceedings should be instituted within any specific time after the award, though it was essential that they should be, while the money was in the treasury. The intent was to prescribe the length of time the money should remain without any claim. It was not a condition precedent, to give the notice within thirty days. There is nothing in the statute to restrain its being done afterwards.

Finally: The circuit court had jurisdiction by reason of the general powers conferred upon it by statute.

It has all the powers given to the circuit courts of the United States by the act of 13th February, 1801. "Cognizance of all cases in equity between parties, both or either of which shall be resident or be found within said district, (act of 27th February, 1801, § 5; 2 Stat. at L., 106), to proceed against non-residents in the same way as they are proceeded against in the general court, or in the supreme court of chancery in the state of Maryland. Act of 3d May, 1802 § 1; 2 Stat. at L., 193; and see *Kendall v. The United States*, 12 Pet., 524.

Clark was here litigating the case of B. C. Clark, (now in this court,) and appeared and answered in this case. The fund itself had been enjoined, and was subject to the decree of the court, and was a fund in court. The court had jurisdiction.

The counsel for the defendant in error contended:—

1. That the bill was properly dismissed, because the complainant had not filed his bill of complaint, given notice to the <sup>\*</sup>secretary of the treasury, or filed his bond, as required by the 8th section of the act of 3d March, 1849, (9 [\*327 Stat. at L., 394.]

No notice was given to the secretary, the bill was not sworn

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to or filed till the 29th of May, 1851, and the bond on the same day,—being about fifteen days after the expiration of the thirty days limited in said section.

2. The proceedings in the chancery court of New York, being proceedings *in rem*, could only affect property within the territorial jurisdiction of the state. Story Confl. Laws, § 543.

Indeed, the authorities in New York seem to go to the extent that the decree operates only on property discovered by the proceedings, even within the jurisdiction of the court. *Storm v. Waddel*, 2 Sandf., 495; 4 Edw. Ch., 658; 1 Paige, 637; 2 Id., 567; 7 Id., 47, 513; 8 Id., 569, 475.

It will be seen by the record that the only return made by the receiver of any property of Clark was dated June 30, 1851, which was six years after the sale and eight years after the discharge of Clark in bankruptcy.

In fact, no action was taken in this chancery proceeding, from the year 1842 until 1851.

At the time that this receiver was appointed in New York, the claim now in controversy was a claim against the Republic of Mexico.

Clark's native domicile was Massachusetts. He resided for a while in Havana, and afterwards returned to his native state, and then took up his abode in New Hampshire. See Story Confl. L., §§ 591, 592.

3. The bankrupt court having taken jurisdiction of the claim in controversy, and it having been disposed of under its decree, the property has effectually passed. *City Bank of New Orleans v. Houston*, 6 How., 486.

4. There was not, by the decisions in New York, any specific lien on the property in question by virtue of the appointment of a receiver; and if there had been, it should have been presented in the district court, and would have been there recognized. *Ex parte Christy*, 3 How., 316; *Savage v. Best*, 3 Id., 119; *Norton v. Boyd*, 3 Id., 436; *Waller v. Best*, 3 Id., 111; *Jenness v. Peck*, 7 Id., 612.

Mr. Justice WAYNE delivered the opinion of the court.

We learn from the record of this case that Juan de la Camara recovered a judgment in the supreme court of New York, against Ferdinand Clark, for \$4,688  $\frac{4}{100}$ , with interest at 7 per cent.; that a *fieri facias* was issued upon the judgment, and that there was a return upon it of "no goods, chattels, or real estate of the defendant \*to be levied upon." Upon his return, Camara filed a creditor's bill, before the chancellor of the first circuit in the state of

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New York, setting out his judgment and the return upon the *fieri facias*, in which he seeks, under the laws of that state, to subject the equitable assets and *chooses in action* of Clark to his judgment; and he asks for a discovery of them from Clark, for an injunction, and the appointment of a receiver. Notice of this proceeding, and of the action upon it, were served upon the solicitor of Clark, and the bill of complaint was taken as confessed, upon the defendant's default in not answering. Booth, the present complainant, was appointed receiver on the 3d August, 1842. Clark had been previously enjoined under the proceeding from making any disposition of any part of his estate, legal or equitable. Thus matters stood from the time of the receiver's appointment, in 1842, until June, 1851. Then Booth, as receiver, reports that no effects of Clark had come to his knowledge, except a claim upon Mexico, which had been adjudged to Clark by the United States commissioners, under the treaty with Mexico; and that, as receiver, he was contesting it; and he asks from the court authority to proceed for that purpose, which was granted. Such is an outline of the case in New York, containing every substantial part of it.

We will now state the proceedings of this suit at the instance of the receiver, in the circuit court of the United States for the District of Columbia, from the decision of which, dismissing the receiver's bill, it has been brought to this court for revision.

On the 29th May, 1851, Booth, the receiver, filed his bill in the circuit court for the District of Columbia, reciting so much of the proceedings of the New York courts as was deemed necessary to support his suit. He declares that Clark, when the original suit was instituted against him by Camara, and from that time until after he had been appointed receiver, had resided in New York. That his effects consisted principally, if not wholly, of the claim upon Mexico, and that he claimed that fund as receiver for the purposes of that appointment. Clark answered the bill. He denies that the proceedings against him in the courts of the state of New York created any lien in behalf of Camara, or the receiver, upon the fund in controversy. He admits that no part of his property ever came into receiver's hands, under those proceedings, and that he had the claim upon Mexico whilst the suits were pending against him, and when the receiver was appointed under Camara's creditor's bill; but that all the evidences and papers in support of his Mexican claim were then in the public archives at Washington. He also states, that the board of commissioners under the act of congress of

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March 3, 1849, entitled "An act to carry into effect certain \*stipulations of the treaty between the United States \*329] and the Republic of Mexico, of the 2d February, 1848," had made an award in his favor for the sum of \$86,786<sup>29</sup><sub>100</sub>, which sum was then in the hands of the secretary of the treasury of the United States. He then alleges that, being a resident of the state of New Hampshire, he filed in the clerk's office of that district, on the 28th January, 1843, his petition to be declared a bankrupt. That he had been declared a bankrupt on the 22d March following, pursuant to the "act to establish an uniform system of bankruptcy throughout the United States," passed August 19, 1841. He then recites that there had been attached to his petition in the bankrupt's court, a schedule of his property, rights, and credits of every kind and description, in which his Mexican claim had been stated; and that it was upon that claim the commissioners had awarded to him the sum before mentioned. He declares that, under the decree of the court in bankruptcy, one John Palmer had been appointed assignee; and that, having given his bond in compliance with the order of the court, he was vested, as assignee, in virtue of the operation of the bankrupt law, of all the defendant's property, for the benefit of his creditors, including the Mexican claim. It is also stated in his answer, that notice of all the proceedings in his matter of bankruptcy had been published in the leading newspapers of New Hampshire, and that the name of Juan de la Camara, and his residence, was placed among the list of his creditors attached to his petition to be declared a bankrupt. And he avers that all of his creditors had had notice of the proceedings in bankruptcy. That neither Camara nor any other creditor had filed or made any objections to those proceedings, or to the action of the assignee, until after the award had been made upon the Mexican claim.

It is not necessary, for the purposes of this opinion, to state the defendant's recital of the sale of his effects by Palmer, the assignee; his purchase of them, including the Mexican claim, or the rights claimed by the defendant under his purchase, all relating to the same having been fully acted upon by this court at this term, in the case of *Ferdinand Clark v. Benjamin C. Clark and W. H. Y. Hackett*. We state, however, that Palmer, the original assignee in Clark's bankruptcy, having died, he had been succeeded by the appointment of Hackett as assignee. This suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill; that it may be determined by this court which of them has the official right to the Mexican

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\*fund, for the distribution of it between the creditors of Clark, or whether Booth, as receiver, shall have from that fund a sufficient sum to pay \*Camara's entire debt, leaving the residue of it for distribution between Clark's other [\*330 creditors.

It appears also from the record that Booth, the receiver, took no steps to execute his official trust, from the time of his appointment in 1842, until 1851, after the award of the Mexican claim had been made in Clark's favor. And, also, that the court of chancery, acting upon the creditor's bill brought by Camara, had not been applied to, either by Camara or by the receiver, for any order upon Clark *in personam*, to coerce his compliance with its injunction and decree.

Upon this statement of the case we will now consider it. There is no dispute concerning the regularity or binding operation of the judgment obtained by Camara against Clark. None in respect to the proceedings under the creditor's bill. The leading point in the case is the effect of the proceedings under the last, to give a right to the receiver, in virtue of a lien which he claims upon the property of the debtor, to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the state of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging to a debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues, contesting his right to do so. Or can he as receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the creditor's bill was brought paid out of a fund of a bankrupt debtor in a foreign jurisdiction; because his appointment preceded the bankrupt's petition.

It is urged that the receiver in this case, by the decree of the court in New York, was entitled officially to the entire property of Clark, real, personal, or equitable, both within and without the state of New York. That he could, as receiver, maintain any action for the property and rights of property of the debtor which the latter could have done. That the fund now in controversy was a *chose in action* belonging to the debtor when the receiver was appointed, and, though not within the state of New York, that it followed the person of the owner and passed to the receiver, because the owner was domiciled in New York. And it was also said that, having such official rights or liens upon the property of the debtor,

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the comity of nations would aid him in the assertion of them in a foreign tribunal. The counsel for the receiver cited from the reports of the state of New York several cases in support of the foregoing propositions. We have perused all \*331] of them carefully, without having been \*able to view them altogether as the learned counsel does. Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the state of New York, and his right to sue for them there, we do not find any thing in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that the receiver in this case is appointed under a statute of the state of New York, but that only makes him an officer of the court for that state. He is a representative of the court, and may by its direction take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession. But it is not considered in every case that the right to the possession is transferred by his appointment, for where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver. Jeremy's Equity Jurisprudence, 249. When appointed, very little discretion is allowed to him, for he must apply to the court for liberty to bring or defend actions, to let the estate, and in most cases to lay out money on repairs, and he may without leave distrain only for rent in arrear short of a year. 6 Ves., 802; 15 Id., 26; 3 Bro. C. C., 88; 9 Ves., 335; 1 Jac. & W., 178; *Morris and Elme*, 1 Ves., 139; Id., 165; *Blunt and Clithero*, 6 Id., 799; *Hughes and Hughes*, 3 Bro. C. C., 87; 5 Madd., 473.

A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg., 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. *Delany v. Mansfield*, 1 Hog., 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; *Verplanck v.*

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*Mercantile Insurance Company*, 2 Paige (N. Y.), 452. Unless where he is appointed under the statute of New York directing proceedings against corporations, (2 R. S., 438,) and then he is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. *Attorney-General v. Life and Fire Insurance Co.*, 4 Paige (N. Y.), 224. In the case just cited, Chancellor Walworth says, that \*the receiver has "no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." In the statement which has been made of the restraints upon a receiver, we are aware that they have been measurably qualified by rules, and by the practice of the courts in the state of New York, as may be seen in Hoffman's Practice; but none of them alter his official relation to the court, and, so far as we have investigated the subject, we have not found another instance of an order in the courts of the state of New York, or in the courts of any other state, empowering a receiver to sue in his own name officially in another jurisdiction for the property or *chooses in action* of a judgment debtor. Indeed, whatever may be the receiver's rights under a creditor's bill, to the possession of the property of the debtor in the state of New York, or the permissions which may be given to him to sue for such property, we understand the decisions of that state as confining his action to the state of New York.

Such an inference may be made from several decisions. It may be inferred from what was said by Chancellor Walworth, in *Mitchell v. Bunch*, 2 Paige (N. Y.), 615. Speaking of the property which might be put into the possession of a receiver, and of the power of a court of chancery to reach property out of the state, he declares the manner in which it may be done, thus: "The original and primary jurisdiction of that court was *in personam* merely. The writ of assistance to deliver possession, and even the sequestration of property to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the defendant claims an equitable title, within the jurisdiction of the court, or to exe-

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cute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitae*." It is very obvious, from the foregoing extract, that up to the time when *Mitchell v. Bunch* was decided, in the year 1831, it had not been thought that a court of chancery in the state of New York could act upon the property of a judgment debtor in a creditor's bill which was not within the state of New York, but by the coercion of his person when he was within the jurisdiction of the \*333] state; \*and that it had not been contemplated then to add to the means used by chancery to enforce its sentences, in respect to property out of the state of New York, the power to a receiver to sue in a foreign jurisdiction for the same. It is true that the jurisdiction of a court of chancery in England and the United States, to enforce equitable rights, is not confined to cases where the property is claimed in either country, but the primary movement in the chancery courts of both countries to enforce an injunction is the attachment of the person of the debtor, where he is amenable to the jurisdiction of the court.

We find in the 2d volume of Spence on the jurisdiction of the court of chancery in England, (6, 7,) this language: When, therefore, a case is made out against a person resident within the jurisdiction of the court, in respect to property out of it, but within the empire, or its dependencies, which would call for the interference of the court of chancery if the property were situate in the country, the court, as it had the power, has assumed the jurisdiction, when such an interference is necessary to the ends of justice, of enforcing the equitable rights of the parties to or over property out of its jurisdiction, by the coercion of the person and sequestration of his property here, in the same manner as it would have done had the property been situate in this country. And Sir John Leach said: "When parties defendants are resident in England, and are brought upon subpoena here, the court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require, and with that view to order them to take or to omit to take any steps or proceedings in any other court of justice, whether in this or in a foreign country. This court does not pretend to any interference with the other courts." It acts upon the defendant by punishment for his contempt, for his disobedience of the court. The court of chancery has no power directly to affect property out of the bounds of its jurisdiction. *Roberdeau v. Rous*, 1 Atk., 544; 2 Spence. We believe such to be the proper course, in chancery, in cases of injunction, and that its jurisdiction, by

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injunction, rests entirely on the coercion of the person. Such, however, was not the course pursued in this case, though the debtor was then a resident of the state of New York, and amenable to the jurisdiction of the court. No motion was made to force Clarke to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clarke had a pecuniary claim upon the Republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action. His first movement is an application to be permitted to sue for the fund in the hands of the government, which had been awarded to Clarke by the commissioners under the treaty \*with Mexico. Permission [\*334] was given to sue. He has brought his bill accordingly, and it directly raises the question, whether he can, as an officer of the court of chancery in New York, and in his relation of receiver to Camara, be permitted to sue in another political jurisdiction.

We have already cited Chancellor Walworth's opinion as to the course which is to be pursued in New York upon an injunction in a creditor's bill. Mr. Edwards, in his excellent work on receivers in chancery, after citing the language used in *Mitchell v. Bunch*, says: "Still, the difficulty remains as to a recognition of the powers or officers of the court, by persons holding a lease upon the property, especially realty, out of the jurisdiction. Then in *Malcolm v. Montgomery*, 1 *Hog.*, 93, the master of the rolls observed, that a receiver could not be effectually appointed over estates in Ireland, by the English court of chancery, in any direct proceeding for the purpose; and that attempts had often been made to do so by serving orders made by the English court of chancery, but that they had failed, because the English court of chancery has no direct means of enforcing payment of rent to its receiver, by tenants who reside in Ireland. The attorney-general and another counsellor also said, that to their knowledge such attempts had been frequently made, but had been uniformly given up as impracticable. A conflict might also arise between the receiver out of the jurisdiction and creditors, and also other persons out of the jurisdiction. The comity of nations and different tribunals would hardly help a receiver."

We also infer, from the case of *Storm and Waddell*, in 2 *Sandf.* (N. Y.), 494, that the receiver's right to the possession of the property of a debtor in the state of New York, and his right to sue for property there, is limited to that jurisdiction. The chancellor, in the last case mentioned, after having given an epitome of the cause of proceeding in a cred

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itor's bill, and speaking of equitable interests and things in action belonging to the debtor, without regard to the injunction, says: "The property of the defendant is subjected to the suit, wherever it may be, if the receiver can lay hold of it, or the complainant can reach it by the decree. The injunction, when served, prevents the debtor from putting it away or squandering it." This language indicates the receiver's locality of action. Taken in connection with that of Chancellor Walworth, in *Mitchell v. Bunch*, it shows that the receiver's right to the possession of the debtor's property is limited to the jurisdiction of his appointment, and that he has no lien upon the property of the debtor, except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into possession in that way. Our industry has been tasked unsuccessfully \*335] \*to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last.

We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the laws of nations. But it was said that receivers in New York are statutory officers, as assignees in bankruptcy are. That being so, he had, as assignees in bankruptcy have upon the property of the bankrupt, a lien upon the property of a judgment debtor, under an appointment in a creditor's bill. But that cannot be so. An assignee in bankruptcy in England, and in this country when it had a bankrupt law, is an officer made by the statute of bankruptcy, with powers, privileges, and duties prescribed by the statute, for the collection of the bankrupt's estate for an equal distribution of it among all of his creditors.

In England, the property of the bankrupt is vested in the assignees in bankruptcy by legislative enactment. Where commissioners have been appointed, it is imperative upon them to convey to the assignees the property of the bankrupt, wherever it may be or whatever it may be, and it is done by deed of bargain and sale, which is afterwards enrolled. It vests the assignees with the title to the property from the date of the

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conveyance, it having been previously vested in the commissioners for conveyance by them to the assignees. As to the bankrupt's personal estate, the statute looks beyond the debts and effects of a trader within the kingdom, and vests them in the commissioners in every part of the world. The last is done in England, upon the principle that personal property has no locality, and is subject to the law which governs the person of the owner. As by that law the property of a bankrupt becomes vested in the assignee, for the purposes of the assignment, his title to such property out of England is as good as that which the owner had, except where some positive law of the country, in which the personal property is, forbids it. Cullen, 244.

In claiming such a recognition of assignees in bankruptcy from foreign courts, England does no more than is permitted in her courts, for they give effect to foreign assignments made \*under laws analogous to the English bankrupt laws.

*Solomons v. Ross*, 1 H. Bl., 131, n.; *Jollet v. Deponthieu*, [\*336] *Id.*, 132, n. But such comity between nations has not become international or universal. It was not admitted in England until the middle of the last century in favor of assignees in bankruptcy. Lord Raymond decreed it in 1811, in the case of a commission of bankruptcy from Holland. Sir Joseph Jekyll, in 1715, said, the law of England takes no notice of a commission in Holland, and therefore a creditor here may attach the effects in the city of London, and proceed to condemnation. 3 Burge, 907. Lord Mansfield, in *Warring v. Knight*, (sittings in Guildhall, after Hilary term, Geo. III., Cooke's Bank. Laws, 300, 3 Burge, 907), ruled, that where an English creditor proceeded, subsequent to an act of bankruptcy, by attachment in a foreign country, and obtained judgment there and satisfaction by the sale of the debtor's personal property, the assignees in an action in England could not recover from such creditor the amount of the debt which had been remitted to him. Again, his lordship ruled, that the statutes of bankrupts do not extend to the colonies or any of the king's dominions out of England, but the assignments under such commissions are, in the courts abroad, considered as voluntary, and as such take place between the assignee and the bankrupt, but do not affect the rights of any other creditors.

So the law stood in England until the case of *Folliott v. Ogdens*, 1 H. Bl., 123, when Chancellor Northington stimulated it into a larger comity, by giving effect to a claim to the creditors of a bankrupt in Amsterdam over an attaching creditor in England, who had proceeded after the bankrupt had been de-

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clared to be so, by the proper tribunal in Amsterdam. England had just then become the great creditor nation of Europe, and of her provinces in North America. Her interest prompted a change of the rule, and her courts have ever since led the way in extending a comity which had before been denied by them. The judicial history of the change, until the comity in favor of assignees became in England what it now is, is given in 3 Burge, ch. 22; *Bankrupt Laws*, 886, 906-912, inclusive, and from 912-929. It may now be said to be the rule of comity between the nations of Europe; but it has never been sanctioned in the courts of the United States, nor in the judicial tribunals of the states of our nation, so far as we know, and we know that it has been repeatedly refused in the latter. Our courts, when the states were colonies, had been schooled, before the Revolution, in the earlier doctrines of the English courts upon the subject. The change in England took place but a few years before the separation of the two countries.

\*That comity has not yet reached our courts. We [337] do not know why it should do so, so long as we have no national bankrupt laws. The rule which prevailed whilst these states were colonies still continues to be the rule in the courts of the United States, and it is otherwise between the courts of the states. It was the rule in Maryland, before the Revolution. It is the rule still, as may be seen in *Birch v. McLean*, 1 Harr. & M., 286; *Wallace v. Patterson*, 2 Id., 463. An assignment abroad, by act of law, has no legal operation in Pennsylvania. We find from McNeil and Colquhoun, 2 Hayw., 24, that it has been the rule in North Carolina for sixty years. South Carolina has no other. 3 Const. Rep., 283; 4 McCord, 519; *Taylor v. Geary*, Kirby (Conn.), 313. In Massachusetts, the courts will not permit an assignment in one of the states, whether it be voluntary or under an insolvent law, to control an attachment in that state of the property of an insolvent which was laid after the assignment, and before payment to the assignees. The point occurred recently in the circuit court of the United States for that district, in the case of *Betton, assignee, v. Valentine*, 1 Curt., 168; and it was ruled that the assignee of an insolvent debtor, appointed under the law of Massachusetts, does not so far represent creditors in the state of Rhode Island as to be able to avoid a conveyance of personal property in the latter state, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

In New York, the "ubiquity of the operation of the bankrupt law, as respects personal property," was denied in *Abraham v. Plestoro*, 3 Wend., 538. Chancellor Kent considers

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it to be a settled part of the jurisprudence of the United States, that a prior assignment under a foreign law will not be permitted to prevail against a subsequent attachment of the bankrupt's effects found in the United States. The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the states to admit a contrary rule. The rule, as it is with us, affords an admitted exception to the universality of the rule that personal property has no locality and follows the domicile of the owner. This court, in *Ogden v. Saunders*, 12 Wheat., 213, disclaimed the English doctrine upon this subject; and in *Harrison v. Sterry*, 5 Cranch, 289, 302, this court declared that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.

Such being the rule in the American courts, in respect to \*foreign assignments in bankruptcy, and in respect to such assignments as may be made under the insolvent laws of the states of the United States, there can be no good reason for giving to a receiver, appointed in one of the states under a creditor's bill, a larger comity in the courts of the United States, or in those of the states or territories. On the contrary, strong reasons may be urged against it. A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.

In those countries of Europe in which foreign judgments

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are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the states as to judgments and decrees, aided as it is by the first section of the 4th article of the constitution, and by the act of congress of 26th May, 1790, by which full faith and credit are to be given in all of the courts of the United States, to the judicial sentences of the different states, a receiver under a creditor's bill has not as yet been an actor as such in a suit out of the state in which he was appointed. This court considered the effect of that section of the constitution, and of the act just mentioned in *McElmoyle and Cohen*, 13 Pet., 324-327. But apart from the absence of any such case, we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application \*339] <sup>\*and distribution of them.</sup> If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver.

Besides, there is much less reason for allowing the complainant in this case to be recognized as receiver for the fund out of the state of New York, and in this jurisdiction, even if the practice in chancery in respect to receivers was different from what we have said it was. The remedies which the judgment creditor in New York had under his creditor's bill against his debtor, were not applied as they might have been in that state, according to the practice in chancery in such cases. When Clark had been enjoined under the creditor's bill, and the receiver had been appointed, both judgment creditor and receiver knew at the time,—certainly, as the

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record shows, in a short time afterwards,—that Clark had a pecuniary claim upon the Republic of Mexico. No attempt was made, according to chancery practice, to coerce Clark by the attachment of his person under the injunction, to make an assignment of that claim for the payment of Camara's judgment. It cannot be said that Clark had not property to assign, and that it was therefore unnecessary to attach him. That would make no difference; for whether with or without property, he might have been compelled to make a formal assignment, even though he had sworn that he had none. It was so ruled in *Chipman v. Sabbaton*, 7 Paige (N. Y.), 47, and in *Fitzburgh v. Everingham*, 6 Id., 29.

There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property, superior to that of Clark's creditors, who are pursuing the funds in this district. Nor, according to the rule prescribed in the United States, that personal property has no locality on account of the domicile of the owner, to transfer it under a foreign assignment, can the receiver have in this case any thing in the nature of a lien to bind the property of Clark not within the state of New York. When we take into consideration also the origin of the fund in controversy, the manner of its \*ultimate recovery from Mexico, the congressional action upon it, in every particular, to secure it, after the awards were made, to those who might be entitled to receive it; the jurisdiction given to the circuit court of this district, with an appeal from its decision to this court, upon the principles which govern courts of equity to adjudge disputes concerning it, and that such cases were to be conducted and governed in all respects as in other cases in equity, we must conclude that the complainant in this case, as receiver, cannot be brought under the rule prescribed for our decision. We concur with the court below in the dismissal of the bill.

*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, 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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Boone v. The Missouri Iron Company.

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LEVI D. BOONE, ADMINISTRATOR OF JESSE B. THOMAS, DECEASED, AND THE HEIRS OF J. B. THOMAS, COMPLAINANTS AND APPELLANTS, *v.* THE MISSOURI IRON COMPANY.

Where a bill was filed for the specific execution of a contract, and it appeared that the notes given for the purchase of the property had never been paid, and the property was sold for the payment of the consideration-money, the bill was properly dismissed.

No principle in equity is better settled, than that he who asks a specific execution of his contract must show a performance, on his part, or that he has offered to perform. Neither of these was done in this case.

THIS was an appeal from the circuit court of the United States for the district of Missouri.

The bill was filed by Thomas, in his lifetime, and referred to a complicated history of transactions, running from 1836 to 1848, the date of the bill. A condensed narrative of these transactions is given in the opinion of the court.

The circuit court dismissed the bill, and the complainants appealed to this court.

The case was argued by *Mr. Britton A. Hill*, for the respondents, no counsel appearing for the appellant.

The argument of *Mr. Hill* was so intimately connected with the facts in the case, upon which he founded his legal inferences, \*that the points of law could not be made intelligible without a detailed statement of the particular facts of the case. The argument is, therefore, omitted altogether.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the district of Missouri.

The bill prays the specific execution of a contract between Thomas and the Missouri Iron Company, dated 15th August, 1839, which requires the defendants to give up and cancel the notes of Thomas to Nancy Bullett, for \$10,000, dated 2d November, 1836; to pay a debt due to Martin Thomas; to sell or transfer, on the books of said company, for the use of the complainant, \$43,000 worth of stock of said company, or, in the alternative, that the American Iron Company may be decreed to reconvey the one undivided seventh part of the Iron Mountain tract to the complainant.

The complainant died in 1849, and, his death being sug-

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gested, an amended bill was filed, praying for an account of rents and profits, for the use of the land and consumption of ores, timber, &c., by the defendants, and for a decree of title, &c.

On the 2d November, 1836, Nancy Bullett, widow, sold to her brother, the complainant, one undivided seventh part of a tract of 20,000 arpens of land, in Washington county, Missouri, known as the Iron Mountain tract; and she executed to him a title-bond of that date, with the condition that she would convey to him the above interest, on the payment of two notes for \$5,000 each, one payable at six, the other at twelve months from the date of the bond. On the 15th of November, 1836, Thomas made a similar title-bond to John L. Van Doren, with the condition to make a deed, upon his paying the two notes of \$5,000 each to Mrs. Bullett; and also three notes, of \$5,000 each, given by him to Thomas, at eighteen, twenty-four, and thirty months, from the date of the bond.

On the 31st of December, 1836, the Missouri Iron Company was incorporated by the legislature of Missouri, and Van Doren, Pease, and Co., were named in the act as corporators. The company was organized; books were opened to sell the capital stock; Van Doren was appointed to obtain subscribers, but, being unsuccessful, he failed, made an assignment, and became insolvent. Agents were appointed to visit foreign countries; who returned, making a report that a banker in Amsterdam subscribed \$600,000 of stock. The stock was raised to \$5,000,000, but the company soon became hopelessly embarrassed.

\*On the 22d of February, 1839, James Bruce, who married Mrs. Bullett, conveyed all their interest in the one seventh of the Iron Mountain tract, to Allen and Sloan, and also assigned the notes of Thomas to them, for the consideration of \$4,500. At the same time, Allen and Sloan gave a bond to Bruce and wife, to convey to Thomas all their interest in the one-seventh of the tract, on his paying to them \$9,000, the amount due on the original purchase. [342]

On the 15th of August, 1839, A. Jones, president of the company, executed the following receipt to Thomas, under which he claims a specific performance against the Missouri Iron Company, and the other defendants, to wit: "Received of Jesse B. Thomas, of Sangamon county, Illinois, a transfer of \$71,400 of the capital stock of the Missouri Iron Company, \$43,000 of which is to be transferred to Julius Sichel, of Amsterdam, to consummate a contract entered into with him. The residue of the stock to be appropriated to pay the balance due on the two notes given to Mrs. Bullett," &c.

On the 2d September, 1841, the board resolved, that the

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president be authorized to receive back from Thomas the stock issued to him, &c.; and the secretary addressed to him a letter, saying: "You will perceive that, by the above resolution, the president is authorized to cancel the bond or agreement, in relation to the transfer of your interest in the Iron Mountain tract. As the chance of doing something with the property is better than the stock, I presume you can have no objection to making the transfer; the company is about to be dissolved, and the stock is worth nothing," &c.

It does not appear that this communication was ever answered by Thomas. He never paid, or offered to pay, the money due to Mrs. Bullett, or to Allen & Sloan, her assignees. He did not transfer to the company the 714 shares of stock, nor demand the cancellation of Mrs. Bullett's title-bond, that he had assigned to the company. Nor does it appear that he did any act to fulfil his contract with Mrs. Bullett.

In January, 1842, it appears the company failed, and all its property was sold on execution. In the amended bill, it is averred that, in 1842, the Missouri Iron Company was dissolved, being insolvent. C. C. Zeigler became the purchaser, at sheriff's sale, of all the Iron Mountain tract, for which he received the sheriff's deed, dated 6th July, 1841; and, on the 6th of January, 1842, the Missouri Iron Company sold the tract to Zeigler, and executed a deed to him.

A decree had been rendered in the circuit court of St. Francois county, at the suit of Allen and Sloan, assignees of Mrs. Bullett, against Thomas and J. L. Van Doren, for the sum of \*343] <sup>\*\$11,475</sup>, which was the consideration for the purchase of the undivided seventh part of the Iron Mountain tract, which was declared to be an equitable lien on the interest purchased; and, under the decree of May 8, 1843, the property was sold to Zeigler, and both Thomas and Van Doren were barred and precluded, by the decree, from enforcing any rights against the same. Pending that suit, Zeigler purchased the interest of Allen and Sloan in the title-bond of Mrs. Bullett to Thomas, and the notes of Thomas, given to Mrs. Bullett, for \$6,500.

It appears that, on the 24th of January, 1843, the American Iron Company was incorporated, and that Zeigler sold the Iron Mountain tract to the company.

There is no evidence showing a connection between the Iron Mountain Company first formed, and the present American Iron Company, except that the latter company is in possession of the same property, claiming it by sheriff's sale and deeds of conveyance under a decree, and from parties who were

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corporators of the first company, and who represented the company.

It would be difficult to find any case where the objections to the specific execution of a contract are more insuperable than in this case. In the first place, the consideration for which the property was purchased has not been paid; and the statute of limitations would have barred a recovery on the notes given, if suit had been brought on them at the time this bill was filed. It is true the purchaser from Thomas, Van Doren, agreed to pay these notes; but, not having done so, the assignment affords no excuse for the negligence of Thomas in his lifetime. And there is no principle in equity better settled, than that he who asks a specific execution of his contract must show a performance on his part, or that he has offered to perform. Neither of these has been done in this case.

In addition to this, it appears that the property claimed by the representatives of Thomas, which he never paid for, was sold in 1841, under a judgment obtained by *Martin v. Van Doren, Pease, and Co.*, the corporators named in the Missouri Iron Company, by the sheriff, and that C. C. Zeigler became the purchaser; and after this, the 6th of January, 1842, the Missouri Iron Company sold the Iron Mountain tract to Zeigler, and executed to him a deed. In the same year the company was dissolved, being insolvent.

It also appears that a decree was rendered for the purchase-money, in 1843, which the court held was an equitable lien upon the land, and the land was decreed to be sold for the payment of the consideration-money; and one seventh of the whole tract, the amount purchased by Thomas, was, on the 8th of May, 1843, sold. This proceeding was had, on the ground that Thomas had abandoned his claim to the land.

\* By various efforts and contrivances, the stock of the [\*344 first company was advanced to \$5,000,000, but, as might be expected, after such an inflation, the stock proved to be worth nothing, and the owners became insolvent.

Under the American Iron Company, which succeeded the first company, extensive works have been established, and a prosperous business in mining is carried on.

On a full consideration of this complicated case, there seems to be no ground of equity on which relief can be given to the complainants. On the contrary, their equity appears to have been extinguished by negligence, in not paying the consideration, by the sale of the property by the sheriff, also under a decree of a court having jurisdiction of the case, and also by a conveyance of the Missouri Iron Company. A minute state-

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Burchell *v.* Marsh et al.

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ment of the facts would be tedious, and cannot be necessary, as the case is free from doubts by the outline above given.

The decree of the circuit court, which dismissed the complainant's bill, is affirmed.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Missouri, 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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PETER J. BURCHELL, APPELLANT, *v.* STEWART C. MARSH,  
ALEXANDER FREER, AND WILLIAM M. ARBUCKLE.\*

If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.<sup>1</sup>

In this case, one of the parties sued the other for debt, who, in his turn, claimed damages for the manner in which he was sued. The submission was broad enough to cover all these demands on either side.

One of the claims made by the party who was sued, was for damages for the violence of the agent of the creditors; and the referees heard evidence upon this subject. Even if this had been beyond the submission, there was nothing in the record to show that the arbitrators made any allowance for this violence and slanderous language.

The charges of fraud and corruption made in the bill are denied in the answer, and the award is not so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Error of judgment in the arbitrators is not a sufficient ground for setting aside an award.

\*345] \*This was an appeal from the circuit court of the United States for the district of Illinois.

The bill was filed by Marsh, Freer, and Arbuckle, to set aside an award made by arbitrators chosen by them upon the one part, and Burchell upon the other, to hear all matters of claim of either party, upon or against the other, in the law or in equity.

The facts in the case were these:—

There were two commercial firms in New York, carrying on business under the names of Marsh and Freer, and Alexander

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\*Mr. Chief Justice TANEY and Mr. Justice WAYNE, did not sit in this cause.

<sup>1</sup> CITED. *York, &c. R. R. Co. v. Straw*, 58 N. H., 216. *Myers*, 18 How., 253; *Truesdale v.*

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Freer & Co. The first was composed of Stewart C. Marsh and Alexander Freer; and the second, of Alexander Freer and William M. Arbuckle. Burchell was a retail country merchant, having a store at St. Charles, in Kane county, Illinois, and another store at Cherry Valley, in Winnebago county, Illinois. Burchell had been in the habit, for several years, of purchasing goods from the firms in New York, and of making payments on account.

In March, 1852, the two firms brought suits in the circuit court of the United States for Illinois, against Burchell, by summons. At April term, 1852, at Chicago, Burchell filed an affidavit for a continuance, stating that he could prove by absent witnesses that the debt was not due when the suit was brought in March, nor until the April following. Whereupon the plaintiffs submitted to a nonsuit.

In May, 1852, the two firms renewed their suits, but filed the affidavits required by law, and commenced the suits by writs of *capias ad respondendum*, under which Burchell was arrested and held to bail. The amount claimed by Marsh and Freer was \$12,000, and by Freer and Arbuckle, \$2,014. These suits were brought by R. V. M. Cross, as agent and attorney for the plaintiffs.

In July, 1852, the court being held at Springfield, the causes were continued upon affidavit of the defendant.

In October, 1852, there was an agreement for a reference to arbitrators, which, however, was afterwards revoked by Freer.

In December, 1852, the parties agreed upon another award. The agreement recited the claims of the firms upon Burchell, and the suits, "by which the said Burchell claims to have sustained damages by reason of having been sued by said firms as aforesaid, and by reason of the doings of the said firms towards him." The agreement then proceeded thus:—

Now, therefore, in consideration of the premises, and to put an end to all further controversies, and for a full and final adjustment of all differences between them, this article of submission, made and entered into this 15th day of December, A. D. 1852, between Alexander Freer, William M. Arbuckle, and Stewart C. Marsh, of the one part, and Peter J. Burchell, of the other \*part, witnesseth, that the said parties have [\*346 agreed to and do hereby submit all demands, suits, claims, causes of action, controversies, and disputes between them, to the arbitrament, determination, and award of F. B. Mosley, Oliver M. Butler, and such other person as the said Mosley and Butler may select, who are within sixty days from the day of the date hereof, and on such day as they or a majority of them shall select, meet at St. Charles, Kane county, (of the time of

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which meeting notice shall be given to the said parties or their attorneys,) and the said arbitrators shall hear all matters of claim of either party upon or against the other, founded in law or equity. And the said award shall direct and determine what, if any thing, is due or owing from said Burchell to said firms, or what, if any thing, shall be due from either or both of said firms to the said Burchell, &c., &c.

Evidence was given before the arbitrators, of the accounts, of the credits, the institution of the suits, of the time when the goods were to be paid for, of Burchell's pecuniary condition, of the arrest under the *capias*, and bail, of the violent declarations of Cross, the agent of the plaintiffs, the opinions of witnesses, how much injury Burchell's credit had sustained by reason of the suits, &c., &c.

In February, 1853, the arbitrators awarded as follows, namely:

"First, that all claims, demands, controversies, and disputes, between the respective parties, or between the said Burchell and the firm of Marsh and Freer, and also between the firm of Alexander Freer and Co. and the said Burchell, should cease and be determined by the said award. Second, that as between Stewart C. Marsh and Alexander Freer (the firm of Marsh and Freer) and the said Burchell, that there was due from said firm of Marsh and Freer to the said Peter J. Burchell, the sum of one hundred dollars, which said sum they did direct that the said Marsh and Freer should pay in money to the said Peter J. Burchell, in one month from the date of said award. Third, as between Alexander Freer and William M. Arbuckle, (the firm of Alexander Freer and Co.,) that there was due from said firm of Alexander Freer and Co. to said Burchell, the sum of twenty-five dollars, which said sum they did direct that your orators, Alexander Freer and William M. Arbuckle, should pay in money to said Burchell, in one month from the date of the said award. Fourth, that the costs of said arbitration should be paid as follows: That the firms should pay all the costs which they had made or occasioned, and should also pay the said Burchell his costs expended in and about said arbitration.

In February, 1853, the firms filed a bill, on the equity side of the court, to set aside this award. The bill was answered, and

\*347] \*the cause came up, upon bill and answer, in May, 1853, when the court decreed that the award should in all things be vacated, annulled, and set aside; and that Burchell should absolutely refrain and desist from counting upon, or in any manner pleading said award, in any suit or proceeding, in law or equity.

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Burchell appealed to this court.

It was argued by *Mr. Gillet*, for the appellant, and by *Mr. Carlisle* and *Mr. Washburne*, for the appellees.

*Mr. Gillet* made the following points:—

1. The arbitrators had full power to act upon all “demands, suits, claims, causes of action, controversies, and disputes between the parties.”

2. Under this submission, the arbitrators were constituted by the parties sole judges of the facts and the law, and equity arising from them.

3. That an award is made in ignorance of the rights of the parties, and of the duties and powers of the arbitrators, is no ground for setting it aside.

4. A court of equity will only interfere to set aside an award on a voluntary submission, for corruption or improper conduct of the arbitrators; and on a hearing, upon bill and answer, when these are charged and denied, the award cannot be set aside.

5. Every thing is to be presumed and every legal intendment made in favor of an award.

6. Where the submission is general, the power to award costs is a necessary incident to the power of the arbitrators.

7. Where an award covers matters not submitted, but is good in other respects, such matters will be rejected as superplusage, and the residue of the award will be good.

8. Where the whole or a part of an award is not within the terms of the submission, the party can obtain redress at law, and a court of equity has no jurisdiction.

The counsel for the appellees stated the case as follows:—

The answer admits Burchell's indebtedness to the firm of Marsh and Freer, to the amount of \$3,822, and interest, and to the firm of Freer and Co., \$1,014.80, being less than the amounts claimed by them respectively in the bill; but no proof appears in the record to countervail the answer in this respect.

There is no pretense in the record of any debt (technically) by the appellees, or either of them, to Burchell; nor of any demand (in the largest sense) against them, or either of them, except such as may have accrued by reason of an alleged anticipation of the maturity of his debts to them respectively, and the alleged premature institution of suits against him thereon.

\*The award (as alleged and admitted *ubi supra*) [\*348 was as follows:—

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First. That all claims, demands, controversies, and disputes, between the respective parties, or between the said Burchell and the firm of Marsh and Freer, and also between the firm of Alexander Freer and Co. and the said Burchell, should cease, and be determined by the said award.

Second. That as between Marsh and Freer, and said Burchell, there was due from said firm to said Burchell the sum of \$100; which sum should be paid, &c.

Third. That as between A. Freer and Co. and said Burchell, there was due from said firm to said Burchell, \$25, to be paid, &c.

Fourth. That the appellees should pay the costs.

The case was heard on bill, answer, exhibits, and replication.

It is only necessary to read the bill and answers, to be persuaded of the gross injustice which has been done to the appellees.

But it is not contended that the court could exercise any power in the nature of appellate jurisdiction merely, to correct this injustice. It is admitted that the award must stand, unless it can be impeached upon some distinct and recognized ground of relief in equity.

For the appellees it is submitted:—

First. That their relief, if any, must be in equity; because, as will presently be shown, it is principally claimed upon matters *dehors* the award, and which, therefore, could not be taken advantage of at law. 2 Story's Eq. Jur., § 1452, and cases there cited; 2 Wils., 148; 2 Johns. Ch., 367; 8 East, 344; *McCormick v. Gray*, 13 How., 27.

2. The record shows a case of gross partiality and misconduct on the part of the arbitrators, and this is ground of relief in equity.

I. As to the law. 2 Story's Eq. Jur., § 1452; *Herrick v. Blair*, 1 Johns. (N. Y.), Ch., 101; *Walker v. Frobisher*, 6 Ves., 70; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.), 411, *per* Spencer, Ch. J.

II. As to the facts.

These appear upon the allegations of the bill, and the admissions of the answer in part; and in other part by the insufficient and evasive denials of the answer.

From all which it clearly appears, that no evidence whatever was offered to the arbitrators of the damages sustained by Burchell, "by reason of having been sued by said firms as aforesaid, or by reason of the doings of the said firms towards him." \*Evidence was received and heard, under objection by [349] the appellees, of certain offensive language and harsh proceedings, by one Cross, an attorney employed by

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the appellees for the collection of their debts against the appellant, and witnesses, who appear to have been certain bystanders for that purpose, were sworn that they "should think, judging from the evidence they had heard given before said arbitrators, that said Burchell had sustained damages by reason of being sued as aforesaid, and by the statements of said Cross, in injury to his business and credit, to the amount of \$10,000."

Mr. Justice GRIER delivered the opinion of the court.

This case was submitted on bill and answer. The appellees, who were complainants below, pray the court to set aside an award made between the parties, as "fraudulent and void." The bill charges that "the award was made either from improper and corrupt motives, with the design of favoring said Burchell, or in ignorance of the rights of the parties to said submission, and of the duties and powers of the arbitrators who signed the said award."

The answer denies "that the arbitrators acted unjustly, or with partiality or ignorance, in making their award; but avers that they acted justly, fairly, and with a due consideration of the rights of the parties." This allegation of the answer must be taken to be true, unless it appears, from other facts admitted by it, that this conclusion or averment founded on them is incorrect.

In the consideration of this case, it will not be necessary to encumber it with a history of the facts charged and admitted or denied by the pleadings, except as they shall be incidentally noticed. The general principles, upon which courts of equity interfere to set aside awards, are too well settled by numerous decisions to admit of doubt. There are, it is true, some anomalous cases, which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents.

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (*Knox v. Symmonds*, 1 Ves., 369,) "to induce the court to interfere, there must be

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\*something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."

Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

1. The first objection to the award in this case is, that it is not within the submission. But we are of opinion this objection is without foundation.

The submission recites that controversies and disputes had arisen between the firm of Marsh and Freer, and of Freer and Arbuckle, with Burchell. It states the controversies to have arisen from suits brought by said firms against Burchell, to recover certain debts claimed to be due by him to the firms, respectively, "and the said Burchell claims to have sustained damages by reason of having been sued by said firms and by reason of the doings of the said firms towards him." The parties, therefore, agreed to submit "all demands, suits, claims, causes of action, controversies, and disputes between them, to the arbitration and award of F. B. Mosley," &c., "who are to hear all matters of claim of either party, upon or against the other, in law or equity."

On the hearing, the arbitrators received evidence of the debts alleged to be due from Burchell to the two firms, and of the alleged oppressive and ruinous suits brought against him by one Cross, who acted as agent of the firms. The witnesses, in proving these transactions, were permitted to state certain slanderous language used by Cross in speaking to and of Burchell, charging him with dishonesty and perjury. When this testimony was offered, the complainants' counsel agreed that it might be received, subject to exceptions.

It has been argued, that because the arbitrators received evidence of the slanderous language used by Cross, that, therefore, they included in their award damages for his slanders, for which his principals would not be liable; and that, therefore, they had taken into consideration matters not contained in the submission. But the answer to this allegation is, that the

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record shows no admission or proof that the arbitrators allowed any damages \*for the slanders of Cross. Whether the complainants were liable, and how far they were justly answerable for the conduct of their agent, were questions of law and fact submitted to the arbitrators. All these questions were fully argued before them by counsel. Whether their decision on them was erroneous, does not appear. The transactions which were testified to, with regard to the suits brought against Burchell, and whether they were oppressive, wrongful, and ruinous to him, was one of the very matters submitted to the arbitrators. The words as well as the acts of Cross made part of the *res gestæ*, and could not well be severed in giving a history of them. Every presumption is in favor of the validity of the award. If it had stated an account, by which it appeared that the arbitrators had made a specific allowance of damages for the slanders of Cross, it would have been annulled, to that extent at least, as beyond the submission. But it cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject-matter of it.

We are of opinion, therefore, that there is nothing on the record to show that the arbitrators, in making this award, exceeded their authority, or went beyond the limits of the submission.

2. The charges of fraud, corruption, or improper conduct in the arbitrators, as we have seen, are wholly denied by the answer, which must be assumed to be true, unless facts are admitted from which they are a necessary or legal inference. We can see nothing in the admitted facts of the case from which any such inference can be justly made. The damages allowed for the alleged oppression of Burchell, and the ruin of his business as a merchant, may seem large to some, while others may think the sum of four, or even five thousand dollars as no extravagant compensation for such injuries. It may be admitted, that, on the facts appearing on the face of the record, this court would not have assessed damages to so large an amount, nor have divided them so arbitrarily between the parties; but we cannot say that the estimate of the arbitrators is so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Damages for injuries of this sort cannot be measured by any rules, nor can the court properly impute corruption to others, because they differ with them in their estimation of a matter which depends on discretion rather than calculation. It is enough that the parties have agreed to trust the discretion and judgment of neighbors acquainted with them, and their relative

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standing and credit. The admission of witnesses to prove their estimate of the damages (even if it had been in the face of the objection of counsel, and not by consent) may have [352] \*been an error in judgment, but it is no cause for setting aside the award; nor can the admission of illegal evidence, or taking the opinion of third persons, be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better.

In fine, we are of opinion that this record furnishes no evidence of corruption or misbehavior in the arbitrators, nor of "ignorance," (as charged in the bill,) or of any such mistake as would justify a court of chancery in annulling it.

The decree of the court below is therefore reversed, and the record remitted with directions to dismiss the bill of complaint, with costs, but without prejudice to any legal defense.

Mr. Justice MCLEAN and Mr. Justice NELSON dissented.

Mr. Justice NELSON.

I do not agree to the judgment of the court in this case. I think the damages allowed against the complainants, by the arbitrators, are so extravagant, disproportioned, and gross, as to afford evidence of passion and prejudice, and justified the judgment of the court below, in setting aside the award. It is difficult, if not impossible, to see, upon any other ground, how between four and five thousand dollars should have been allowed against one of the firms in the submission, and but some one thousand dollars against the other, under the circumstances of the case.

*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 Illinois, 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 circuit court, with directions to dismiss the bill of complaint, with costs, but without prejudice to any legal defense which the parties may have.

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\* MORGAN B. HINKLE, IN HIS OWN RIGHT, AND AS ADMINISTRATOR DE BONIS NON OF JOHN FISHER, DECEASED, COMPLAINANT AND APPELLANT, *v.* MOSES WANZER, JAMES F. JOHNSON, AND JOHN S. HUNTER.

Where a complainant in chancery averred that a note of which he was one of the makers, had been deposited by the holder, amongst other collateral securities, with a person who had become responsible for the debts of the holder; and averred further that enough had been collected from these collateral securities to meet and defray all the responsibilities incurred, the evidence showed that this was not the fact. The amount collected was not enough, by a large deficiency, to reimburse the losses incurred as indorser and surety.

The evidence is not sufficient to show that the note had been paid by another of the makers than the complainant; or that a release had been executed to him by the holder of the note. The answer is substantially responsive to the charge, and denies it. Other circumstances disclosed in the evidence, sustain the answer.

The collateral securities, being deposited with counsel for the purpose of paying the debts of the insolvent as they were collected, were properly held by the counsel as a trust fund, and it was correct to allow the surety to control the judgment upon the note in question.

The cases examined with respect to the assignment of equitable interests and *choses in action*.

THIS was an appeal from the circuit court of the United States for the southern district of Alabama.

The case is fully stated in the opinion of the court.

It was argued by *Mr. Phillips*, for the appellant, and by *Mr. Reverdy Johnson* and *Mr. Reverdy Johnson, Junior*, for the appellees. There was also a brief filed by *Mr. Hopkins* for the appellant, and *Mr. Chandler*, for Hunter.

The points which were made by the respective counsel can better be understood by giving them in connection with their own statements of the facts; and as these were short, they are inserted.

*Mr. Phillips*, for the appellant, stated the case thus:—

The complainant seeks to enjoin the defendant Hunter from issuing and levying an execution on a certain judgment recovered in the said circuit court, on the 10th April, 1839, by Moses Wanzer, founded upon a note signed by Thomas Long, George D. Fisher, and the complainant, Hinkle, who was a surety thereon.

The note, being the property of one John Fisher, was transferred by him, with very many others, to Gordon, Campbell, and Chandler, on the 13th May, 1837, for purposes thus stated

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in the receipt: "The proceeds of all notes, as they may be collected, are to be appropriated by us in the payment of any demands which we may hold against said Fisher and Johnson, upon their own debts, and not upon indorsements or liabilities for others."

\*354] \* Moses Wanzer, the defendant to this bill, being one of the creditors thus provided for, the attorneys aforesaid transferred to him the note above described, upon which the judgment was recovered.

It is admitted by the record, that after the recovery of the judgment, Wanzer was fully satisfied of his debt out of other assets, and that he no longer claims to have any interest in or control over said judgment; and that said Hunter, without any assignment or other transfer from said Wanzer, has issued an execution thereon, and threatens to levy the same on the property of the complainant, by the authority alone of the said attorneys.

These proceedings are justified by the defendant, Hunter, on the ground that they were had under the instructions of Fisher. "At this time, says defendant, Fisher gave verbal as well as written instructions to the said firm, to protect this defendant from the payment of the debts aforesaid, from the papers mentioned in that receipt." And again: "The particular claim of this defendant on this note was derived from a letter written by Fisher, in Mobile, to the firm, at the instance of this defendant, to hold the balances in their hands after the payment of the debts particularly provided for, for the indemnity of this defendant." Upon the same head, the deposition of the attorney states: "Fisher gave verbal and written directions to deponent to protect Mr. Hunter any remainder there might be after the payment of the claims in the hands of deponent's law firm."

There is no evidence to sustain the averment that the instructions given by Fisher to the attorneys, were at the instance of the defendant, Hunter, or by virtue of any agreement with him, or that the attorneys ever notified said Hunter of the instructions during the life of said Fisher, or that the said Hunter had become the creditor of said Fisher during his lifetime. Fisher died on the 9th February, 1838, and the complainant, Hinkle, was appointed administrator *de bonis non* of his estate, on 3d December, 1849.

Upon this statement the appellant will contend, that there was no assignment or appropriation of the note in question by Fisher to Hunter, nor any intention to make one. But on the contrary, the attorneys were at all times bound to hold the surplus funds that might accumulate in their hands at the free

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disposal of said Fisher, as well after the said "verbal or written instructions" as before. *Tiernan v. Jackson*, 5 Pet., 595; *Rogers v. Lindsey*, 13 How., 441; *Williams v. Everett*, 14 East, 582; *Grant v. Austin*, 3 Price, 58; *Hoyt v. Story*, 3 Barb. (N. Y.), 265; *Cowperthwaite v. Sheffield*, 3 N. Y., 243; *Rogers v. Hosack's Exrs.*, 18 Wend. (N. Y.), 319; *Watson v. Duke of Wellington*, 4 Cond. Eng. Ch., 573; 72 Law Lib., 231; <sup>1\*355</sup> *Scott v. Porcher*, 3 Men., 662; *Walwyn v. Coutts*, Id.

These instructions conferred a power upon the attorneys of a revocable character; but even if the power were irrevocable during life, it became extinct by the death of Fisher.

In those cases where the power is coupled with an interest, the rule is otherwise; but there it must be an interest in the thing itself. *Hunt v. Rousmanier*, 8 Wheat. 204; *Houghtaling v. Marvin*, 7 Barb. (N. Y.), 412; *Eastm. v. Morton*, Ohio, June term, 1854, Amer. Law Reg., August, 1854.

The case, however, as the appellant contends, does not involve these considerations, because it appears that Long, one of the makers of the note, has paid the same to said Hunter.

The bill, which is sworn to, avers that the complainant, who was well acquainted with Hunter's handwriting, had seen the receipt or statement which Hunter had given to Long, in satisfaction of said judgment, and in 13th interrogatory, Hunter is specially required to answer whether he did not "give or sign any receipt or statement showing the payment," &c.

Hunter omits to give a separate answer to this interrogatory, but in answer to the 8th, 9th, 10th, 11th, and 12th interrogatories, he says: "This defendant has not released Long, nor received any settlement, payment, or satisfaction from him."

This answer, as the appellant contends, is not of that character which requires two witnesses, or one witness and corroborative facts, to disprove it. It does not contain a "clear and positive denial" of the charge in the bill. An answer deserves more or less credit, as it fairly meets all the inquiries contained in the bill. A general denial is not sufficient, but there must be an answer to sifting inquiries upon the general question. *Welford*, 366, 367, 369; *Freeman v. Fairlie*, 3 Meriv. 41; *Welford*, 309, 310; 2 Eq. Cas. Abr., 67; *Paxton's case*, Sel. Cas. in Ch. 53; 6 Ves., 792; 1 Sims & S., 235; *Hepburn v. Durand*, 1 Br. Ch., ch. 436; *Prout v. Underwood*, 2 Cox Ch., 135; *Daniel v. Mitchell*, 1 Story, 188; *Bk. Georgetown v. Geary*, 5 Pet., 110; 9 Cranch, 160; 2 Daniel's Ch., 984; *Hughes v. Garner*, 2 Younge & Coll., C. C., 333; *Parkman v. Welsh*, 19 Pick. (Mass.), 234; *Greeley* Eq., 4.

The record, therefore, contains upon the subject of pay-

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ment the precise statement of the bill sworn to ; and the positive evidence of Mrs. Long (p. 41,) opposed by the loose, indefinite, and evasive response of the answer. The oath of the complainant is a full offset to that of defendant. *Garron v. Carpenter*, 1 Port. (Ala.), 374; *Searcy v. Pannell*, 1 Cook's, (Tenn.), 110; 1 McLeod; *Lendell and Gamon*, 10 Humph. (Tenn.), 164; *Union Bank of Georgetown v. Geary*, 5 Pet., 99.

\*356] \*The counsel for the appellees presented the following statement:

The bill in this case seeks to restrain the collection of an execution in favor of Wanzer, (but controlled by and belonging to Hunter,) against Long and the complainant, Hinkle. The judgment upon which its execution issued was upon a note for \$1,520, held by the firm of Fisher and Johnson, made by Thomas Long, George D. Fisher, and Hinkle, the complainant, and on 17th April, 1837, placed by Fisher and Johnson, together with other notes, in the hands of attorneys for collection and to cover certain liabilities of Fisher and Johnson, as appears by the receipt of the attorneys. The proceedings in which the judgment was rendered were in the circuit court of the United States for the ninth circuit. The bill alleges, in the first place, that the judgment does not belong to Hunter, and he has no right to control it ; in the second place, that Fisher, who owned the note on which the judgment was obtained, abundantly indemnified Hunter, his security ; and that Hunter, out of the property transferred to him by Fisher, has been fully satisfied, and consequently, has no right to enforce this judgment ; in the third place, if the judgment belongs to Hunter, and he has not been fully indemnified out of Fisher's assets, yet he has collected this judgment out of Long, and has no right to enforce the execution against Hinkle, the complainant. It prays that the judgment be declared satisfied, or that complainant, as administrator of Fisher, be declared entitled to the judgment, and that Wanzer and Hunter be enjoined proceeding upon it, &c.

The answer of Hunter admits that Wanzer has now no interest in the judgment, and explains why suit was brought in his name. Fisher was indebted to Wanzer and others; Wanzer placed his claim in the hands of Gordon, Campbell, and Chandler, attorneys, for collection ; Fisher's other creditors also placed notes in their hands. To settle these suits, Fisher placed with the attorneys a number of notes for collection, and among them was the note of Long, indorsed by Hinkle, the complainant. This note was sued in the name of Wanzer, with the intention to secure his claim. Wanzer's debt was paid out of other notes of Fisher.

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The answer then states, that Hunter was the indorser of Fisher for a large amount, and he became so to enable Fisher to settle the debts for which he was sued by Gordon, Campbell, and Chandler. The arrangement made by Fisher with these attorneys is set out in the answer. The substance of it is, that Fisher was to give his notes, indorsed by Hunter, in payment of the notes of Fisher, who had been sued by Gordon & Co. These notes, indorsed by Hunter, were given to the amount of \*nearly \$18,000. Fisher gave instructions to the attorneys to save Hunter from the payment of these debts, by the paper mentioned in the receipt. In addition to these liabilities, Hunter states that he indorsed a note of Fisher, for \$10,000, dated March 1, 1837, at sixty days, which was protested and paid by Hunter, partly out of Fisher's property, and partly out of his own; and refers to a deed from Fisher to him, securing him against liability on this note. He further states, that he paid Nelson, Carleton and Co. \$3,472, on a bill of exchange drawn by Fisher, 8th March, 1837. Thus, upwards of \$30,000 were paid by Hunter, on account of Fisher; and the extent of credits which the answer gives to Fisher's estate is but \$16,558.28.

Hunter denies that the judgment in question was ever settled by Long, or that he ever released him.

The evidence of Campbell explains the whole transaction by which Hunter became security for Fisher.

Barney proves that Hunter, by 23d April, 1843, had paid on the four notes given under the agreement, which came into the hands of the United States Bank, \$11,627.65, which included interest. On these notes, \$4,336 had been paid in 1838, which about corresponds with the sums the answer states to have been collected from Fisher's estate, and paid on account of these four notes.

Campbell, also, proves that \$4,818.27 were paid on account of a judgment by the Bank of Columbus against Hunter, on the note for \$10,000, referred to in the answer and the deed. This amount corresponds with the first item in the credits given Fisher's estate; and for the balance of the note Hunter was liable, and (he says) paid.

Sayre proves that Hunter paid him on notes given under the agreement, and on a draft of Fisher, indorsed by Hunter, \$3,271.52.

Gilchrist proves that Hunter paid \$3,442 on the bill in favor of Nelson, Carleton, and Co.

Making an aggregate paid out by Hunter, on account of the several responsibilities, of \$32,677.17.

And the complainant's effort is to overcome the statement

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of credits contained in the answer, by showing that Hunter received from Fisher's estate full indemnity for all liabilities. In this he fails; for his whole evidence does not make even as much of Fisher's property come into Hunter's possession as the answer gives credit for. The depositions of Cook, Gilchrist, Bolling, Sadler, and Fisher, do not prove that Hunter ever collected, out of the property or assets of Fisher, \$10,000.

The complainant relies on the deposition of Mrs. Long, and what he deems the corroborating evidence of Bolling, to show that the judgment has been satisfied by Long.

\*358] \*The bill was dismissed in the circuit court.

The appellees will contend:—

1. That, if the state of accounts between Hunter and Fisher's estate be as shown in the answer, Hunter is, under the circumstances, entitled to the proceeds of the judgment. 2 Story's Eq., §§ 1044-1047; 5 Wheat., 277; 5 Pet., 600; 1 Ves., 281; 5 Paige (N. Y.), 632; 1 Johns. (N. Y.) Ch., 205; 4 Cond. Eng. Ch., 690; 4 Myl. & C., 702; 1 Story's Com. Eq., § 499.

2. That the account stated in the answer is as correct as it purports to be, and is unaffected by any evidence in the cause.

3. That the answer being responsive and sworn to, as to facts in the personal knowledge of the defendant, and denying Long's satisfaction of the judgment, it can only be overcome by two credible witnesses, or one and strong corroborating circumstances, neither of which requisites exists in the present case; and the whole equity of the bill being sworn away, it was properly dismissed. 6 Wheat., 453; 5 Pet., 99; 9 Cranch, 153; 6 Id., 51.

Mr. Justice DANIEL delivered the opinion of the court.

The appellant, by his bill in the circuit court, alleged: That, on the 17th day of April, 1837, John Fisher and James F. Johnson, of the mercantile firm of Fisher and Johnson, were the holders and owners of a promissory note, made by Thomas Long, George D. Fisher, and the appellant, Hinkle, bearing date on the 19th of December, 1836, for the sum of \$1,520, payable twelve months from the date of said note, to William Ryan, surviving partner of the firm of Porter and Ryan, and which had been transferred, by indorsement, from Ryan to Fisher and Johnson; that this note was, by Fisher and Johnson, on the 17th of April, 1837, together with various other notes, placed in the hands of Messrs. Gordon, Campbell, and Chandler, attorneys, for collection, as appears

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by the receipt of these persons, filed as an exhibit with the bill, and marked A.

That, about the 17th of April, 1837, James F. Johnson, for valuable consideration, sold and assigned all his interest in the note above mentioned, and in the firm of Fisher and Johnson, to his partner, John Fisher.

That John Fisher having departed this life in 1838, administration of his estate was duly committed to his widow, and to his brother, William P. Fisher, who, having afterwards surrendered their rights and powers, as representatives of the estate of John Fisher, administration *de bonis non* of that estate was, on the 3d of December, 1839, duly committed to the complainant, who makes profert of the letters of administration granted to him.

\*That Messrs. Gordon, Campbell, and Chandler, the attorneys with whom the note had been deposited, instituted a suit thereon, in the name of Moses Wanzer, as plaintiff, against the makers of that note, in the circuit court of the United States for the southern district of Alabama, and, on the 11th day of April, 1839, recovered a judgment against Thomas Long and the appellant, in the name of Wanzer, for the sum of \$1,691, in damages and costs of suit. [\*359]

That, after the rendition of the said judgment, the appellant was informed by Wanzer that Fisher and Johnson, or Fisher, had owed him a small sum of money, which had been fully paid off, and that he did not know why suits had been brought in his name on the said note, and on other notes mentioned in the receipt of the said attorneys; and, at the same time, further stated that he had no right, and did not pretend to have any right or interest whatsoever, in the judgment recovered in his name.

That Hunter claims a right to this judgment, upon what precise authority the appellant does not know, as he has never heard, and does not believe, that it has ever been transferred or assigned to him by Wanzer; but, on the contrary, believes and alleges that any such transfer or assignment by Wanzer has never been made.

That Hunter, as the appellant has been informed and believes, was bound as surety or indorser for Fisher and Johnson, or Fisher; but in what manner, or for what amount, if so bound, the appellant is not informed; that he does not know whether the said Hunter has paid out of his own funds any money as surety or indorser, either for Fisher or Fisher and Johnson, but, to the best of his knowledge and belief, Hunter has not paid from his own funds any money, as surety or

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indorser for either, or, if he has, such payment has been fully reimbursed to him.

That, for a large portion, if not for the whole liability of said Hunter for Fisher, or Fisher and Johnson, he was secured and indemnified by a mortgage or deed of trust on real estate and slaves, which have been sold under said mortgage or deed of trust; in addition to which, there came to the hands of the said Hunter, and were collected by him, promissory notes, accounts, credits, property, and effects of Fisher and Johnson, and of the said Fisher, both before and since his death, of great value, and were appropriated by Hunter to his indemnity, as surety and indorser as aforesaid, and to an amount greatly exceeding any liability he may have incurred, as surety or indorser as aforesaid, leaving the said Hunter largely indebted to the estate of said John Fisher.

\*360] \*That Thomas Long, one of the defendants, against whom, conjointly with the appellant, the judgment aforesaid was recovered, and who died some time in the year 1843, did, in the year 1841, inform the appellant that John S. Hunter having claimed of Long the amount of said judgment, it was fully paid off and discharged by Long, who showed to the appellant a statement or receipt for the amount of the judgment, in the handwriting of Hunter, with whose writing the appellant is well acquainted.

That Hunter, under the pretext of an indemnity for his liabilities for Fisher, has been permitted by the attorneys, by whom the judgment in the name of Wanzer was obtained, to assume entire control over said judgment; and, in pursuance of said permission, did, on the 2d of May, 1839, sue out a writ of *fieri facias*, and, on the 10th of January, 1840, an *alias fieri facias* upon that judgment, on each of which writs a return of *nulla bona* was duly made.

That, from the date of the return upon the *alias fieri facias*, no proceeding was had upon said judgment until the 17th of September, 1849, when a *pluries fieri facias* thereupon was sued out, as the appellant charges, by the direction of John S. Hunter, and has been levied upon the property of the appellant; and, since then, a summons has been served, in virtue of the said judgment, upon John N. Smith, as a garnishee, upon the alleged ground that said Smith is a debtor to the appellant, or has property of the appellant in his possession.

That Hunter is wrongfully and oppressively, by means of the last-mentioned execution, and of the summons of the garnishee, Smith, harassing the appellant, by an effort to coerce

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from him the amount of the said judgment, when, in truth, nothing is due thereon, either to Wanzer or Hunter.

Upon the allegations above set forth, the prayers of the appellant are for a decree: 1. That the judgment against the appellant and Long may be decreed to have been satisfied; or, 2. That the appellant, as administrator *de bonis non* of John Fisher, deceased, may be declared entitled to the said judgment, and the control of the same, if any thing shall be found due thereon. 3. That the said John S. Hunter and Moses Wanzer may be restrained from proceeding against the appellant, on the said judgment, and may be ordered to account for and pay to the appellant any money they may have collected upon the said judgment. 4. That if the said Hunter shall claim the judgment as an indemnity for any liability of himself, as surety or indorser of Fisher and Johnson, or of John Fisher, he may be ordered and required to show on what debt or debts he was bound, as indorser or surety, and what portion of such debt or \*debts he has paid [\*361 out of his own individual funds, and that he may be ordered to discover and account for all the property, real and personal, moneys, credits, &c., of the said Fisher and Johnson, or of the said Fisher, ever claimed, used, or received by him, for the purpose of his indemnity, as surety or indorser of Fisher and Johnson, or of Fisher individually.

The appellant, with the view of sustaining his case, and of eliciting from the appellee any disclosure which might tend to such a result, has, in his bill, propounded a number of interrogatories.

In our examination of this cause, we have deemed it necessary to consider such only of the interrogatories so propounded, as connected with and arising out of the allegations of the bill, do, by a comparison with the statements in the answer, present the true points or questions involved in this controversy.

Those questions relate: 1. To the extent of liability of the respondent, Hunter, as surety or indorser for John Fisher, and to the sufficiency or excess of the means of indemnity alleged to have been actually received by him, for losses incurred under that liability.

2. To the alleged payment by Long to Hunter, in discharge of the judgment recovered in the name of Wanzer.

3. To the fact of a transfer, either legal or equitable, of the judgment just mentioned, and to the right or authority of the attorneys, or of their principal, Fisher, to make a transfer or appropriation of that judgment.

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Of the several defendants to the bill of the appellant, John S. Hunter alone answered that bill.

By the answer of Hunter is set out the assumption by him, as indorser upon bills and drafts drawn by Fisher and Johnson, under an arrangement between this firm and Messrs. Gordon, Campbell, and Chandler, representing as counsel and attorneys the creditors of Fisher and Johnson, of debts to the amount of \$28,227.25.

The facts of this undertaking, and of its subsequent fulfilment by Hunter, chiefly by his individual resources, are abundantly established by the exhibition of the agreement itself; by the testimony of Messrs. Campbell and Chandler, with whom, for the benefit of the creditors, the agreement was made, and through whose hands the indorsed bills passed; by the evidence of Stodder and of Jayne, to each of whom a portion of those bills was transferred, in satisfaction of debts due to them from Fisher; and also by the evidence of Barney, to whom, as the agent of the United States Bank, a much larger portion of those bills was delivered.

In addition to the liabilities set forth as above, it is proved \*362] \*by the testimony of John A. Campbell, Esq., that Hunter, on the 16th of April, 1838, by his attorneys, Gordon, Campbell and Chandler, paid to the Bank of Columbus, upon a judgment obtained by that bank against him, the sum of \$4,818.27, which sum, the witness was informed by Fisher, was a debt incurred by Hunter for Fisher.

The answer contains a statement purporting to be a full exhibit of the money raised by sales of the property pledged by Fisher for the indemnity of his sureties and indorsers, as well as of all other sums derived from Fisher or from his debtors, and which have been applied for Hunter's reimbursement. This statement in the answer, including the judgment against Hinkle and Long, amounts to \$16,558.28. To this statement, however, must be added the sum of \$2,200, proved by the witness, Sadler, to have been paid to Hunter, upon the compromise of a debt due from Sadler and Barnes, and also a sum of \$175, shown to have been received from a witness, Gilchrist; which sums, though derived from Fisher, are not comprised in statement in the answer. There is also exhibited in proof, in this case, a list of claims, by notes and open accounts, making an aggregate of \$3,115.83, assigned by the executor of Fisher to Hunter and Cook, attorneys; which claims, it is stated in the assignment, were intended to meet the liabilities of Hunter for said John Fisher; but of these claims, many of which were not above \$3, and resting upon open accounts, it is not in proof that any portion of them was

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certainly applied to Hunter's indemnity, or, indeed, was ever collected. But conceding the fact that the sums spoken of by Sadler and Gilchrist, and the entire list of claims assigned as above mentioned, were realized by Hunter, they would, when added to the sum of \$16,558.28, admitted in the answer, compose an aggregate falling far short of the liabilities which Hunter, as the indorser and surety for John Fisher, and Fisher and Johnson, under the agreement with Gordon, Campbell, and Chandler, has actually incurred, and is proved to have satisfied. Upon a correct view, therefore, of the proofs in this cause, we are led to the conclusion, in opposition to the allegations in the bill, and in accordance with the answer and the proofs, that Fisher and Johnson and John Fisher, who, at the time of his death, was utterly insolvent, had failed, by a large deficiency, to reimburse to Hunter, the losses incurred by the latter as indorser and surety for the former.

The second question which we have mentioned as arising in this cause, namely, that of satisfaction by Long of the judgment against Long, Hinkle, and Fisher, has not been entirely free from embarrassment when tested by the rules \*which govern proceedings in courts of equity. Correctly viewed, however, we deem that embarrassment rather apparent than real, and such as yields necessarily under a correct interpretation of the pleadings and evidence in this cause. It has been contended, that the interrogatory propounded by the bill, as to the payment by Long to Hunter of the judgment in the name of Wanzer, and the execution by Hunter of a receipt in full discharge of that judgment, is not directly answered; that the answer as to this interrogatory is evasive, and therefore is deprived of that weight which, if directly responsive, it would require the testimony of two witnesses, or that of one witness with strong corroborating circumstances, to overthrow. Hence it is insisted, that the testimony of the single witness, Mrs. Long, swearing positively to the written discharge or receipt of the amount of the judgment, must be taken as conclusive upon the subject of payment.

The rule of proceeding in equity here appealed to, is too well established and too familiar to require the citation of authorities for its support, or even to admit of its being questioned. The proper inquiry upon the point under consideration is, to ascertain how far the requirements of that rule have been complied with.

The charge in the bill in terms is as follows: "That your orator, sometime in the year 1841, was informed by Thomas Long, that he had fully paid off and satisfied to the said

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Hunter the amount of the said judgment; and the said Long then produced and showed to your orator a receipt or statement, in writing, signed by said John S. Hunter, whose handwriting was well known to your orator, showing that the said judgment had been so paid and satisfied by said Long."

Upon the basis of this charge is constructed and propounded the 13th interrogatory, in these words: "Did or did not the said Thomas Long, at any time or in any manner, pay, satisfy, settle, or secure to the said John S. Hunter the amount of the said judgment or any part thereof? Did or did not the said Hunter give or sign any receipt or statement, showing the payment, settlement, satisfaction, or securing the said judgment or any part thereof?"

Divesting this interrogatory of unnecessary verboseness and tautology, it may be remarked, that the substance or meaning of the charge in the bill, and the object of the interrogatory framed upon that charge, are made up of the alleged facts of payment by Long to Hunter, and of a written acknowledgment of such payment by the latter. The terms pay, satisfy, settle, or secure, are equipollent words, when used to express the fulfilment by Long of his liability upon the judgment, \*364] and in \*a similar sense must be understood the terms receipt and statement, when used to describe a written acknowledgment of payment by a party making or signing such acknowledgment. And here it may be remarked, that whatever may be the technical meaning and effect of the word release at law, it can hardly be doubted that a receipt or written acknowledgment of payment or settlement would be construed as a release in a court which looks rather to the substance of things than to their forms; and whose maxim is, *ut res magis valeat quam pereat*. The reply to the 13th interrogatory is, that the respondent had not received from Long any settlement, payment, or satisfaction. So far, the reply to the interrogatory falls within the literal terms of that inquiry. But it proceeds to state further, that the respondent has never released Long from his liability to satisfy the judgment, and this form of denial, it is insisted, does not exclude the execution of a written receipt such as has been alleged in the bill, and mentioned by the witness, Mary Long. We have already said that, in equity at least, a receipt for the payment of debt would be regarded as a release from further demand by the creditor; and we think that, according to the generally received acceptance of language, a creditor who, in speaking of his debtor, denies having received of him either settlement, payment, or satisfaction, and in the same statement avers that he has never released that debtor, must be understood as intend-

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ing to declare that he had given him no written acknowledgment of payment, nor acquittance of any description whatsoever. The exception now urged to the answer to the 13th interrogatory, even upon the face of that response, appears to partake more of the character of a verbal criticism than of that of a fair and substantial impeachment. And we are the less inclined to extend the scope of this exception, since the complainant below, by a more timely and regular proceeding, might have obtained what he now contends for, without hazard of injury or surprise to the respondent.

We regard the answer as substantially responsive, and entitled to every legal effect incident to it as such.

With respect to the circumstances connected with this charge of payment in the bill, we think that so far as they have been disclosed, their preponderance is decidedly to the statement in the answer.

The bill admits the insolvency of Long at the period of his death. At what precise time he became insolvent is not stated. It is not probable that he became insolvent just at that period; and the widow of Long, whose testimony is relied on to establish the payment and the existence of the receipt in 1841, assigns as a reason for her knowledge of these transactions, her familiarity with her husband's embarrassments at that date.

\*Alfred Harrison, in December, 1851, swears, that from the 4th of March, 1839, to the 4th of March, [\*365 1842, he was sheriff of Lowndes county, in which Long lived and died, and was also sheriff of that county at the time of his testifying. That as sheriff, he has had in his hands various executions against Long, and although some of them were for very small sums, he was never able to collect any one of them, and had returned on them, "No property."

B. Harrison, another witness, states, that from March, 1839, to March, 1842, he acted as deputy sheriff of the county of Lowndes, and from March, 1842, to March, 1845, was sheriff of that county; that, as sheriff and deputy sheriff, he had opportunities of knowing the pecuniary situation of Long, against whom the witness had held various executions, not one of which could be collected, but all of which were returned, "No property found." It should be remarked here, that the statement of these sheriffs covers the entire interval from 1839 to 1845, including the period of the alleged payment by Long, as well as that of his death. It is proper further to observe, that on the judgment now under consideration, there were sued out two writs of *fieri facias*, one of them as late as January, 1840, on each of which writs was made the return of *nulla bona*. It would, we think, challenge

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no ordinary degree of credulity to believe, that a man in whose possession no property could be found for five years previous to his death, and who in the case before us had resisted to the very extreme of the law, should, during the same time, have voluntarily discharged an obligation which it is shown he was both unable and unwilling to fulfil.

The returns upon the *fi. fa.* and *alias fi. fa.* sued upon this judgment, afford a satisfactory explanation of a circumstance from which it has been endeavored to deduce a presumption unfavorable to the appellee. That circumstance is the lapse of time between the return upon the *alias* and the suing out of the *pluries fi. fa.* upon the judgment. The solution is this: the plaintiff in the judgment having ascertained, by two experiments, the futility of process against the defendants, was unwilling for the time being, to repeat such experiments, which were not only useless but expensive; but were, perhaps, induced subsequently to renew their efforts, by some change in the condition of parties, from which success was rendered more probable.

The remaining inquiry for consideration relates to the assignment or appropriation of the judgment, and the right or power of Fisher or his attorneys to make such appropriation for the benefit of Hunter. The true character of the trans-  
\*366] action \*with reference to this judgment is disclosed in its history contained in the deposition of John A. Campbell, Esq., taken in this cause. The facts as therein narrated, are substantially these: The law firm of Gordon, Campbell, and Chandler, in the year 1837, having in their hands a very large amount of claims of the creditors of Fisher, in order to avoid being sued upon those claims, Fisher arranged a portion of them by giving the drafts specified in the answer of Hunter, and which were indorsed by Hunter. The residue of those claims he arranged by depositing various notes with the firm of Gordon, Campbell, and Chandler, to be collected by that firm, and by them to be applied in satisfaction of the debts of Fisher. Amongst the notes so deposited was that executed by Thomas Long, George D. Fisher, and the appellant, Hinkle, on which the judgment in the name of Wanzer has been obtained. And it may be in this place remarked, that in exhibit A, filed with the bill of the complainant below, and relied on by him, and which exhibit is the receipt of Gordon, Campbell, and Chandler, for the notes deposited with them by Fisher, after an enumeration of those notes, is contained the following stipulation, namely: "The proceeds of all which notes, as they shall be collected, are to be appropriated by us to the payment of any demands we

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may hold against the said Fisher and Johnson, upon their own debts, and not upon indorsements or liabilities for others." Here, then, we have a contract between Fisher and Johnson and their creditors, represented by Gordon, Campbell, and Chandler, who held various claims of those creditors against Fisher and Johnson—a contract founded on the consideration of forbearance as well as on the claims themselves, and therefore beyond the power of Fisher and Johnson to revoke or control—constituting Messrs. Gordon, Campbell, and Chandler trustees for the creditors of Fisher and Johnson, and with full power to appropriate the funds provided for their payment.

It is probable that every one of the notes placed in the hands of Messrs. Gordon, Campbell, and Chandler, bore upon it the indorsement of Fisher and Johnson, or of John Fisher; but as it is not rational to impute to these persons the design to frustrate their arrangement in the very act of making it, we must conclude that such indorsement, if made, was designed to give more complete control of these notes to the persons to whose management the notes and their proceeds were expressly intrusted. Wanzer was a creditor of Fisher, on a note for \$885.89, which note was in the hands of Gordon, Campbell, and Chandler, and was provided for and paid out of the funds or notes deposited with the firm; but it would be absurd as well as unjust to the other creditors of Fisher and Johnson, to suppose \*that to this demand on behalf of [\*367] Wanzer, there was to be specifically appropriated out of the funds designed for all the creditors of Fisher, an amount equal to double that demand. This pretension, too, would contradict the explicit statements, on oath, of Messrs. Campbell and Chandler, who held and discharged the note due to Wanzer, who also recovered the judgment against Long, Fisher, and Hinkle, and who state that Wanzer's claim had been paid out of other securities of Fisher, in their hands, and that Wanzer had no interest whatsoever in the judgment rendered in his name.

Such being the history of this case, it would seem to follow that the right to the judgment against Long, Fisher, and Hinkle, remained in Campbell and Chandler, to be appropriated by them under their agreement, to the creditors of Fisher, or to be so disposed of by Fisher, with their assent. Upon this view of the law, we can perceive no valid objection to the authority given by Gordon, Campbell, and Chandler, especially with Fisher's express sanction, to Hunter, the chief creditor of Fisher, to control and apply to his indemnity the judgment sought to be enjoined. No such objection, surely, can be sus-

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tained, unless it can be shown that an equitable interest cannot be assigned—a position which could rest upon no principle of justice, and which, at this day, it would be idle to attempt to sustain upon authority.

If the general indorsement by Fisher, accompanied with the delivery of the note of Long, Fisher, and Hinkle, to Gordon, Campbell, and Chandler, created in the latter an absolute legal right and property in that note, no exception could, of course, be taken to any exercise or application of the right and property so vested in them. If, on the other hand, the indorsement and delivery of the note created a trust for the benefit of the creditors of Fisher, and consequently for the benefit of Fisher himself, by his exoneration *pro tanto*, there remained in Fisher an equitable interest in the note and in the judgment rendered thereon, which he had a right, with or without the assent of the trustees, to assign or apply in payment of his creditors; such assignment or application he has made, in co-operation with those trustees, to his principal creditor, Hunter, and this act of Fisher in his lifetime has, since his death, been sanctioned by his personal representative.

Notwithstanding the strictness, particularly in the earlier cases in the courts of common law, with respect to assignments of equitable interests and *chooses in action*, the books abound with cases showing that the rule at the common law has been much relaxed, or almost disregarded, by the courts of equity, which, from a very early period, have held that assignments for val-

\*able consideration, of a mere possibility, are valid, and  
\*368] will be carried into effect upon the same principle as they enforce the performance of an agreement, when not contrary to their own rules or to public policy. In the case of *Wright v. Wright*, 1 Ves. 412, it is said by Lord Hardwicke: “That such an assignment always operates by way of agreement or contract, amounting, in the consideration of the court, to this: that one agrees with another to transfer and make good that right or interest.” By the same judge it is said, in the case of *Row v. Dawson*, 1 Ves. 331, that for such an assignment no particular words are necessary, but any words are sufficient which show an intention of transferring the *chose in action* for the use of the assignee.

It has been expressly ruled, that a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment or in personal estate, as presumptive next of kin, is assignable in equity. *Hobson v. Trevor*, 2 P. Wms., 191; *Wethered v. Wethered*, 2 Sim., 183; *Smith v. Baker*, 1 Younge

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& Coll. C. C., 223; *Carleton v. Leighton*, 3 Meriv., 671; *Hinde v. Blake*, 3 Beav., 235. The numerous authorities upon this point are collated in the second volume of White & T. Lead. Cas. in Eq., in the note of the editors upon the cases of *Row v. Dawson*, and *Ryall v. Rowles*, p. 204, *et seq.* A decision which bears very directly upon the case before us is that by Sir James Wigram, vice-chancellor, of *Kirwin v. Daniel*, 5 Hare, 500, in which it was ruled: "That where a creditor, in whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and debtor to, the creditor."

In the present case, Gordon, Campbell, and Chandler were put in possession, by Fisher, of funds to be applied by them to Fisher's creditors, and had, by their written agreement, undertaken so to appropriate those funds. Hunter, a principal creditor of Fisher, is, by information received both from Fisher and from Gordon, Campbell, and Chandler, made cognizant of this deposit, and of the purpose to apply it to his indemnity. He accepts the proffer made him, and claims the benefit of it. And by instructions from Fisher, both verbal and written, as is proved in this cause, those depositories were directed to apply the funds under their control (amongst those funds the judgment against Long, Fisher, and Hinkle) to the benefit and protection of Hunter. Upon this single aspect of the transaction, can it be doubted that these depositories were authorized and bound to conform \*to the instructions thus given? [\*369 We think that both their authority and duty so to do admit of no doubt. The decree of the circuit court, dismissing the bill of the complainant in that court, being warranted by the view we have taken of the law and the evidence in this case, we order that decree to be affirmed.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of 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 affirmed, with costs.

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WILLIAM FONTAIN, ADMINISTRATOR *de bonis non cum testamento annexo* OF FREDERICK KOHNE, DECEASED, APPELLANT, *v.* WILLIAM RAVENEL.

A resident in Philadelphia made his will, in 1829, giving annuities to his wife and others, and directing that his executors, or the survivor of them, after the decease of his wife, should provide for the annuitants, then living, and dispose of the residue of his property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind.

His wife and three other persons were appointed executors.

The three other persons all died during the lifetime of the wife. No appointment of the charity was made or attempted to be made during the lifetime of the executors.

The charity cannot now be carried out.

The executors were vested with a mere power of appointment without having any special trust attached to it. In England, the case could only be reached by the prerogative power of the crown acting through the sign-manual of the king.

The English and American cases upon this subject examined.<sup>1</sup>

THIS was an appeal from the circuit court of the United States for the eastern district of Pennsylvania.

It was a bill filed by Fontain, as administrator *de bonis non cum testamento annexo* of Frederick Kohne, deceased, against Ravenel, one of the executors of Mrs. Kohne, the widow of the deceased Frederick. The object of the bill was to recover from the defendant certain sums of money which came into the hands of the widow, as executrix of her husband, for the purpose of applying them to some charitable bequests made in the will of Frederick Kohne. These are stated, as well as the other circumstances of the case, in the opinion of the court, and need not be repeated.

\*The circuit court dismissed the bill, and the com-\*370] plainant appealed to this court.

The case was argued, in print, by *Mr. Hopper* and *Mr. Meredith*, for the appellant, and by *Mr. Gerhard* and *Mr. Pettigru*, (with whom was *Mr. Whaley*, for the residuary legatee of Mrs. Kohne,) for the appellee.

The following were the points and authorities relied upon by the counsel for the appellant, in their original brief. An elaborate reply was filed by the counsel for the appellee, and then a rejoinder by the appellant's counsel. The reporter

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<sup>1</sup> See also, *Ould v. Washington Hospital*, 5 Otto, 310; *Russell v. Allen*, 17 Id., 169; *Jones v. Habersham*, Id., 179; *District of Columbia v. Washington Market Co.*, 3 MacArth., 578; *Estate of Hinckley*, 58 Cal., 495; *Hathaway v. New Baltimore*, 48 Mich., 254.

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feels it difficult, with this quantity of matter, to present a fair view of the arguments without protracting the report to an unreasonable length.

Points and authorities for appellant.

*As to domicile.* An intention to make a place his home, will determine the domicile. *Grier v. O'Daniel*, 1 Binn. (Pa.); see opinion of Judge Rush, in a note, p. 351.

If the surviving executrix has rightfully distributed among the next of kin, nothing more is to be said. If not, the administratrix *cum testamento annexo*, is entitled. *Row v. Dawson*, 1 Ves., 331; *Ferran's Estate*, 1 Ashm. (Pa.), 319; *Marshall v. Hoff*, 1 Watts. (Pa.), 440; Act, 1834; *Executors and Administrators*, Dunlap's Penn. Dig., 524. The property here is held to abide the event of this suit.

The right of the administrator *de bonis non* is exclusive. *Commonwealth v. Strohecker*, opinion of Kennedy, J., 9 Watts (Pa.), 480.

Will took effect in 1829, by which the personal estate became vested in the executors, and by reason of the power of sale in the will and our act of assembly, March 31, 1792, § 4, (3 Smith's Laws, 67,) the title to the real estate became vested in them upon the trusts of the will; that is, to pay the legacies and annuities and invest for accumulation the surplus until the death of the widow, and then to distribute the surplus in charity.

The descent was broken. *Silverthorn v. McKinster*, 7 Pa. St., 72.

The administrator *de bonis non cum testamento annexo* is empowered to sell the real estate, the same as the executors. Act of 24th February, 1834, § 13, (67 Dunlap, 518, 530,) and Act of 12th March, 1800, § 3, (53 Pa. St., 434;) Mr. Binney's opinion, *Hood on Executors*, 241.

The objects are not very extensive or difficult of ascertainment. They are incorporated institutions of the two states for the purposes of charity; some of which are for the relief of colored people, and do not include beneficial societies. *Blenon's Estate*, Bright. (Pa.), 340.

It is a settled principle that a trust shall never fail for want of \*a trustee. And the courts of equity will take upon themselves the execution of the trust. 2 Story Eq., [\*371 §§ 1059, 1061, 1191.

The administrator with the will annexed is the trustee for the settlement of the estate, and under the direction of the orphans' court the trust can be executed by him. He will have the personality, &c., and can sell and get proceeds of the

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realty. This power is in the orphans' court. Act 1832, § 4, *Wimmer's Appeal*, 1 Whart. (Pa.), 103, 104.

The personalty is under control of that court, (orphans' court,) and the moneys may be paid into that court for the uses of the will. Act 34, § 19. It was so done in *Tilghman's Estate*, 5 Wheat., 44.

These provisions meet ordinary cases.

But here as in England the courts will go further in favor of charities, than in ordinary cases. Our law favors charitable uses. Constitution of Penn., 1776 and of 1790; Girard Will case, 177; Acts 1730, 1731; Purd., 1010; 7 Sm. Laws, 43, 44.

Had the executors refused, they could have been compelled to execute the trust. It should not be lost by accident. *Poll's Petition*, 1 Ashm. (Pa.), 346. See Welford Eq. Pl., 110, Lib. Law and Eq., as to information of attorney-general.

The court will assume the exercise of the discretion to ascertain the objects, where they are much less defined than here, and where the executor intrusted, died in the lifetime of the testator. Boyle on Charities, 220; *Bax v. Whitbread*, 16 Ves., 15, see 26, 27; *Cole v. Wade*, 16 Id., 43; *Brown v. Higgs*, 8 Id., 570; See *Moggridge and Thackwell*, 1 Id., 464; 7 Id., 36; Affirmed, 13 Id., 416.

The court could regulate and control the exercise of the discretion by the executor; and if so, when he cannot exercise it at all, may it not do so for him? *Grandom's Estate*, 6 Watts & S. (Pa.), 551; *Waldo v. Caley*, 16 Ves., 210, 211.

Here the objects have not failed, and there is no occasion to resort to the doctrine of *cy pres*, or the royal prerogative.

The only question is whether the court or administrator can select from the designated objects. If either can, then the trust is to be executed as if the executors had lived; or if either cannot, then all the charitable institutions incorporated by the two states must take.

In *White v. White*, 1 Bro. C. C., 12, the testator bequeathed to the Lying-in Hospital, and if more than one, to such of them as the executor should appoint; and named no executor. The court is to appoint.

A bequest to a charitable school to purchase Bibles, Testaments, and other religious books, held not too indefinite. This directed a religious purpose, which was sufficiently certain. *Attorney-General v. Stepney*, 10 Ves., 27.

\*372] \*So here there is at least a definite purpose as to objects in respect to the colored population, besides the definitiveness of the charitable institutions of Pennsylvania and South Carolina, which define the objects to be the pur-

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poses for which these institutions have been established. *Orphan Asylum v. McCartee*, 9 Cow. (N. Y.), 440; *King v. Woodhull*, 2 Edw. (N. Y.), 87.

A bequest is good where it is made to a class, as of such a parent, or to such of them and in such shares as an executor may appoint. *Bartlett v. King*, 12 Mass., 541; *Brown v. Higgs*, 8 Ves., 570, 574. It is not the case of a mere power, but of a trust accompanied by a power. In such case the trust is imperative and may be enforced; and is not lost by the refusal of the trustee to exercise his power, or by his death. 2 Sugd. on Powers, 173, 175, &c.

There is nothing in the will that looks to the charity ending upon any condition or contingency. The will gives not the property over on any event.

He gives to the next of kin all that he intends they shall have, and means that they shall get no more.

As our law stood in 1829, the executor of the surviving executor would have taken the personality, and administered it, or an administrator with the will annexed would have done so, and also have exercised the power to sell the lands and administer the proceeds. Act 1800, 3 Sm. Laws, 434, § 3.

The testator is presumed to have known the law of the place where the will was to be executed, and he is presumed to have known, that the law provided a substitute for his executors to carry out the trust.

There was no condition, the breach of which would give the property to the next of kin, as in *Porter's case*, 1 Co., 21.

It was a trust and confidence, which the court will carry out if the trustee fails, as in *Martindale v. Martin*, 7 Vt., 291; Cro. Eliz., 288.

And not only a trust, but a charity, "which never faileth;" and not vague or indefinite, or to unincorporated societies.

In *Martindale v. Martin*, or *Thetford School case*, the executors refused the trusts, but it was held binding on them. See 7 Vt., 298, 299.

If the intention to give to charity be declared absolutely, and nothing is left uncertain but the mode of carrying it into effect, the court will supply the mode. *Mills and Farmer*, 1 Meriv., 54, 94, 101, 102.

Thus in that case the testator directed the residue to be divided for certain charitable purposes mentioned, "and other charitable purposes as I do intend to name hereafter," and afterwards named no further purposes. Held, a disposition in favor <sup>\*</sup>of charity, to be carried into execution by the court, having regard to the objects particularly pointed out by the will. *Id.*, 54. [\*373]

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There the objects pointed out were the promoting of the gospel in foreign parts, and the bringing up ministers in different seminaries in England.

Here all the objects are pointed out, to-wit: the charitable institutions of the two States, so as to include a benefit to part of the black population. Here is nothing to be supplied, but a leave given to select some only of those institutions.

Bequests made to two corporate bodies, for the relief of certain classes of poor persons, by paying their rents, and giving them gratuities according to selection. The societies renounce the legacies. Yet held that the discretion of the trustees was not of the essence of the trust, and that the court would carry the trust into effect by a scheme. *Reeve v. Attorney-General*, 3 Hare, 191.

Where bequests are made to trustees for general charitable purposes, the trust must be the subject of a scheme before the master; but where the object is a charity without a trust interposed, the disposition is in the crown, and must be made according to the directions under the royal sign-manual. *Paice v. Archbishop of Canterbury*, 14 Ves., 364, 371, 372.

This is not a case that in England would come under the king's sign-manual, but within the jurisdiction of chancery, as a trust. It does not depend upon the crown prerogative for its execution, but upon the law of the land. Boyle on Charities, ch. 14, p. 237, &c.

1827. In Pennsylvania, the law is settled in favor of charities far enough to sustain the present bequests.

In *Witman v. Lex*, 17 Serg. & R. (Pa.), 91, 92, it was decided all that was contained in 43 Eliz, and more, was contained in the common law of Pennsylvania, though it was not then supposed, as afterwards found in the case of Sarah Zane's will, and of *Vidal v. Girard's Executors*, that at the common law of England, the same breadth of law existed in favor of charity.

And the cases are there cited as authoritative here, where there was no trustee to take, but the court decreed the bequest a devise to corporations for the charitable objects pointed out. *Id.*, 92.

It is there said that so much more liberal is our system in favor of bequests, though not strictly charitable, that our courts would have found no difficulty in ruling in favor of the legatee. *Id.*, 93; *Morice v. Bishop of Durham*, 9 Ves., 399.

The bequest in 9 Ves. was for benevolent, not charitable \*purposes. Here, it is for charitable purposes only; [374] for it is to go to charitable institutions for the purposes of their creation.

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1829. In *McGirr v. Aaron*, 1 Pa., 49, there was no trustee at all that could take for the purpose of charity, but the devise was sustained and to become vested as soon as the charity should acquire a capacity to take.

Here there was a trustee until all the executors died, and the administrator *de bonis non cum testamento annexo* is the substituted trustee.

In the same year, the United States supreme court, in *Beatty v. Kurtz*, sustained the dedication of a lot for the Lutheran church in Georgetown, without any deed, grantee, or trustee. 2 Pet., 566-583. And a committee of the congregation was held sufficient to maintain the bill. 584.

A trust may be created by will, to bind the title of the heir or personal representative, and make him a trustee where no other is named. *Inglis v. Sailor's Snug Harbor*, 3 Pet., 119.

But here were trustees named, and trustees who had no object to defeat the trust, though they had a selection within a limited range. *Id.* Also, *Malin v. Keighley*, 2 Ves., 335.

1832. A trust in favor of an unincorporated religious society is an available one. *Meth. Ch. v. Remington*, 1 Watts (Pa.), 218.

1833. The case of *Maguire v. Brown*, so elaborately decided by Judge Baldwin, covers all this case. Bright. (Pa.), 346.

Devises and bequests to unincorporated meetings of Friends were held good; for the relief of poor members; of the Indians; inclosing a graveyard; purchasing a fire apparatus.

Charities are left free for the exercise of the jurisdiction of the courts, according to the intention of the testator, disregarding defects of form or designation of a party to take, and a devise to the church is transferred to the parson where the church cannot take in mortmain. Or if it be to the poor who cannot take, then to their hospital which could, as in *McGirr v. Aaron*, from the priest, who could not take, to the congregation, when authorized. Bright. (Pa.), 386.

The cases in which these principles were applied were before the 43 Eliz. on prior statutes or the common law. *Id.*, 387, 393.

Though their be none to take, the heir and next of kin are bound. *Id.*, 407.

The administrator *cum testamento annexo* is the trustee, and this court will make the distribution to the legatees. *Id.*, 408, 409.

1836. *Martin v. McCord* was decided in the supreme court of Pennsylvania. Charities are sustained. 5 Watts (Pa.), 495.

1843. A devise to an association for religious purposes, un

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incorporated at the testator's death, but since incorporated, is good in Pennsylvania. *Zimmerman and Anders*, 6 Watts & S., (Pa.), 218.

1844. In *Vidal v. The City*, 2 How., 127, it was held that \*375] \*although the corporation had been incompetent to take, the heir could not take advantage of such inability, but the state only in its sovereign capacity.

At the common law of England and in Pennsylvania, such a trust would be sustained without a trustee. 2 How., 192. See cases in Binney's Argument, *Girard Will case*, 80.

We are neither dependent upon the Stat. 43 Eliz., or the common law prerogative, to sustain such a charity. 2 How., 195.

And general and undefined charities were sustained before the Stat. 43 Eliz., by the inherent power of chancery, at common law. Id., 196.

And the law of the preceding cases is the law of South Carolina. *Attorney-General v. Jolly*, 1 Rich. (S. C.), Eq., 99.

1848. *Beaver v. Filson*, 8 Pa. St., 327, 335. A lot dedicated for a church and graveyard, without deed or trustee, held a valid charitable use. *Wright and Linn*, 9 Id., 435-437.

1850. Where a tenant for life has power of disposition by will, with two subscribing witnesses, and disposes by will to a charity, without witnesses, the devise will be sustained in favor of charity, though it would not in favor of an individual not for charity. *Pepper's Will*, 1 Parsons Eq. Cas., 433, 450, 451.

Other States. 4 Kent. Com. (6th ed.), 509, n. Where there is a trust for charitable purposes, the disposition is in chancery, and not by the king, under sign-manual.

The power to enforce charities is in the court of chancery, by virtue of the original constitution, independent of the statute of 43 Eliz. *Wright v. Trustees Meth. Ep. Ch.*, 1 Hoffm. (N. Y.), 202, 260; *Dutch Ch. v. Mott*, 7 Paige (N. Y.), 77; *Burr v. Smith*, 7 Vt., 241, 294, 298, 306, 307, (cites *Attorney-General v. Hickman*, where trustee died before testator,) 308; *King v. Woodhull*, 3 Edw. (N. Y.), 79.

The jurisdiction rests upon the ground that such charities are trusts. 1 Sandf. (N. Y.), Ch., 439.

Trusts for charitable uses are favored by courts of equity, and will be supported in the exercise of the extraordinary jurisdiction of the chancellor, where the trust would fail for uncertainty were it not a charity.

The trust will be sustained, though there be no person in being capable of suing for the enforcement of the trust. *Dickson v. Montgomery*, 1 Swan (Tenn.), 348.

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The counsel for the appellee made the following points:—

I. What is the law of ordinary or private trusts, and its difference from that of charitable trusts?

II. The *cy pres* doctrine of the English chancery; and in connection herewith, the impossibility of executing this trust as a \*charity, in any other way than by an application [\*376 of the property under the sign-manual; and, incidentally, it will be inquired, whether this trust is a charity within the statute of 43 Eliz., which statute defines the charities of the English law, though it did not originate the doctrines of charities, as recognized by that system of jurisprudence.

III. That the *cy pres* doctrine of the English court of chancery, has not been adopted in Pennsylvania, South Carolina, or the other states of the Union, either as a part of the common law or as an inherent power of a court of equity; and herein of the law of charitable trusts in the United States generally, but particularly in the states of Pennsylvania and South Carolina, and the whole of the difference between that law and the doctrine of private trusts; and incidentally, the impossibility of sustaining the case of the plaintiff under the law of charitable or private trusts in the United States, and particularly in either of the states just mentioned; or in any other way than under the *cy pres* doctrine.

IV. That the doctrine of powers, or the Pennsylvania statutes in relation to executors and administrators, are entirely inapplicable to the present case.

V. That if a bequest or devise, like the present, fails or becomes void, it is like an ordinary lapsed legacy, and the next of kin or heirs at law will take the bequest or devise.

(After discussing these points at great length, the counsel concluded their argument with the following reply to the points made on the other side):—

Finally: It was intended to give here an answer, at length, to each of the positions of the appellant; but as we have endeavored to reply fully to his points in the preceding argument, we shall do little more now, than make references to such parts of our argument as answer these points respectively. The arrangement of the argument of our learned opponents was substantially as follows:—

1. That Philadelphia was Mr. Kohne's domicile.
2. That an administrator, *de bonis non cum testamento annexo*, is clothed with the same trusts, and bound by the same duties as the executors, even as to a power of sale of the real estate.
3. That the residuary bequest and devise in Mr. Kohne's will is a trust, and for a charity; and the courts will go fur-

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ther to sustain this species of trust than any other, and will not suffer it to fail for want of a trustee, particularly where there is no uncertainty in the objects, as in the present case; those objects (which are assumed to be the incorporated institutions of the two states) not being, as they assert, very extensive or difficult of ascertainment.

\*4. That the law of Pennsylvania favors charities.  
\*377] 5. That by the common law of England and Pennsylvania, such a trust would be sustained without a trustee.

6. That the power to enforce charities is inherent in courts of chancery independently of the statute of 43 Eliz., and without the aid of the royal prerogative.

1. That Philadelphia was Mr. Kohne's domicile.

We have submitted that, in point of fact, that domicile was South Carolina; but we have presented the case under the law both of Pennsylvania and South Carolina, and as the law of these two states does not differ, in regard to the matters material to this case, the question of domicile is of no importance.

2. That an administrator *de bonis non cum testamento annexo* is clothed with the same trusts, and obliged by the same duties, as the executors; even as to a power of sale of the real estate.

No part of this proposition can be sustained, except its last clause, which is acknowledged to be the law of Pennsylvania; and we submit that it follows from the maxim *expressio unius exceptio alterius*, that in Pennsylvania, such an administrator has no power other than the ordinary ones of an administrator, except as to the sale of real estate in the instances provided for in the acts of assembly. The distinction between the power of reducing property to money, and its distribution according to the discretion of certain specified friends of the testator, whom he names as executors of his will, is too obvious and conclusive to require any comment.

3. That the residuary bequest and devise in Mr. Kohne's will is a trust, and for a charity; and the courts will go further to sustain this than any other trusts, and will not suffer it to fail for want of a trustee, particularly where there is no uncertainty in the objects, as in the present case, those objects (which are assumed to be the incorporated institutions of the two states) not being very extensive or difficult of ascertainment.

We have here grouped together, as we find them in the argument of the appellant, a number of positions, some of which are immaterial, and others are answered in the preceding argument. The points here mentioned may be classified as follows:—

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1. The law of charities in Pennsylvania.
2. The assertion that the appellee denies the existence of a trust as to Mr. Kohne's residuary estate.
3. An effort to sustain the appellant's claim under the law of powers, alleging that this is the case of a power coupled with an interest, and that such a power is a trust, and will be enforced in equity.

\*1. The law of charities in Pennsylvania. [\*378]

This subject has been fully discussed, and the law of charity in Pennsylvania stated to its fullest extent, but we have been unable to discover in this law any thing to support the appellant's claim. It is granted that a charitable bequest will not be allowed to fail in that state from the mere want of a trustee; and it is admitted, that the courts of Pennsylvania would control the discretion of trustees, so far as to prevent them from abusing a confidence placed in them for one class of objects, by exercising that discretion in favor of another and entirely different class of objects, provided that confidence has been so definitely given as to allow such restraint. But how can it be urged that hence it follows that those courts can act for such trustees, when they do not act? It is submitted that we have affirmatively shown the contrary of this proposition; and we again negative the assertion that those courts will themselves assume the exercise of a discretion in the application of property so uncertain as to the beneficiaries, as the designed application of Mr. Kohne's residuary estate.

2. The assertion that the appellee denies the existence of a trust as to Mr. Kohne's residuary estate, is a misapprehension. We do not deny its original existence for the purposes pointed out in the will; and we argue, that it now exists as a resulting trust for the next of kin and heirs of Mr. Kohne.

3. The effort to sustain the appellant's case under the law of powers, is already fully answered in our argument.

4. That the law of Pennsylvania favors charities.

This is true; and the extent to which its laws go to effect this object, has been clearly shown; but this will not be sufficient for the appellant, especially when the supreme court of that state has declared that the principle for which the appellant contends is "too grossly revolting to the public sense of justice to be tolerated" in this country. *Methodist Church v. Remington*, 1 Watts (Pa.), 226.

5. That by the common law of England and Pennsylvania, such a trust would be sustained without a trustee.

This is entirely opposed to all the authorities. The counsel for the appellant, as to this point, relies upon the precedents under the law of ordinary trusts, and these we have shown to

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be entirely inapplicable. We cannot add any thing to our remarks on this point, nor can we conceive it necessary to speak further on this topic.

6. That the powers to enforce charities is inherent in courts of chancery, independently of the statute of 43 Eliz., and without the aid of the royal prerogative.

This proposition is not maintainable. The appellant's counsel have cited in support of this point, *Burr v. Smith*, \*379] 7 Vt., 241. \*But the law of Vermont cannot govern, or even influence the decision of the present question; and besides, the point decided in that case was merely that a charitable devise or bequest to an unincorporated association is valid; which has been repeatedly held in Pennsylvania, and probably is the law of South Carolina; and though there is nothing in the opinion given in favor of that decision to sustain the appellant's claim, yet even that opinion it is expressly stated was not adopted by any other judge.

Our opponents have likewise adduced on this head a mere dictum, in a note to the sixth ed. of Kent's Com., 4 Kent Com., 509, n. "In this country, the legislature or government of the state, as *parens patræ*, has the right to enforce all charities of a public nature, by virtue of its general superintending power over the public interest, where no other person is intrusted with it." As this sentence follows the adoption by the author of the opinion of Judge Story, in the *Baptist Association v. Hart's Executors*, 3 Pet., 484, Appendix, it could not have been intended to state any principle inconsistent with the ruling of this court in that case, and still less with any doctrine of interest to the appellee, in the present discussion. The author plainly refers to the right of visitation of public charities, and correctly states the law in regard to that right.

The latter part of the citation, indeed, states one of our positions in the strongest language. "The jurisdiction vested by the statute of Eliz. over charitable uses, is said to be personally in the chancellor, and does not belong to his ordinary or extraordinary jurisdiction in chancery." This proposition would by itself constitute a flat bar to the appellant's recovery.

All the other authorities relied on by the appellant's counsel, whether under this or the other heads of his argument, we do not consider of importance in support of the appellant's bill. The case of *Vidal v. Girard's Executors*, 2 How., 127, is not excepted from this remark; the appellant's counsel have in vain sought to obtain from it any thing in support of their bill, as will be seen by a reference to their argument.

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This is, however, the most convenient place for us to acknowledge the great assistance we have received from that case, in the investigation of the law of charities. We might add, also, that the case of *The Executors of McDonogh v. Murdoch*, 15 How., 367, has been most carefully and minutely examined, but without obtaining from it any thing at all pertinent to the present investigation.

Although this report is already protracted to an unusual length, it is proper to state the notice which the counsel for the appellant took of some of the preceding points.

They were noticed as follows:—

\*3. This disposition for the benefit of charitable [\*380 institutions, was a lawful disposition, and one which would be supported by the courts in England and Pennsylvania, and, it is believed, in South Carolina. The difficulty in treating questions of this kind is in avoiding a tedious repetition of things already familiar to the court. Since the decision of *Vidal v. The City*, 2 How., 127, the principle may be considered perfectly established, which never could have been a matter of doubt with any one who had critically examined the early precedents, that the statute of Elizabeth neither created nor enlarged the rule governing charitable bequests. The statute itself does not purport to have done so, but merely to give an additional remedy. And it was established, in the case referred to, that, from the earliest times, chancery had, in an unbroken course of precedents, constantly exercised jurisdiction over charities, and had supported them. It is enough to say that such a gift as this is perfectly valid; for which we refer to the cases stated in the original brief of the appellant, and in the brief of the appellee. The court will understand how far this principle is carried out in Pennsylvania, by what is said in *Witman v. Lex*, 17 Serg. & R. (Pa.), 93, that our courts would have found no difficulty in ruling in favor of the legatee in *Morice v. Durham*, 9 Ves., 399. There, the bequest was for the purposes of benevolence and liberality. In *Beaver v. Filson*, 8 Pa. St., 327, it is said: "In Pennsylvania, religious and charitable institutions have always been favored, without respect to forms, and it is immaterial how vague and uncertain the object may be, provided there be a discretionary power vested somewhere over the application of the testator's bounty to these objects." It is utterly impossible seriously to deny that this bequest is just as good in Pennsylvania as it would be in England, and that it is perfectly valid in both.

4. We take it to be equally clear, that this is a case in which, in England, the court would itself superintend the

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proper application of the fund, and that it is not a case in which the crown, as *parens patriæ*, would administer it. And it is a case in which the courts of Pennsylvania, we contend, would have ample power to prevent a failure of the trust. It is nothing to say that, in England, the chancellor, in administering charities, acts as the delegate of the crown, inasmuch as he discharges all his judicial functions in that capacity; the theory of the British constitution being, (as the practice originally was,) that the king administers all the justice of the country, and emphatically is this the case with that portion that is administered in the court of chancery. But we are not to conclude that the courts of this country have no jurisdiction over charities, because in England the king is said \*381] to have a general superintending \*power over them.

The question here is, whether, in this case, the court of chancery would superintend the execution of the trust. We conceive it to be so clear that it would, that we do not think it necessary to enter on the argument that, even if the disposition in this case would belong to the crown, the state here would have the prerogative of the *parens patriæ*. See 2 Story Eq., § 1190; *Wright v. Methodist Church*, 1 Hoffm. (N. Y.), 202; *Going v. Emery*, 16 Pick. (Mass.), 107; 2 Kent (5th ed.), 288, n. (a); 4 Id., 508, n. (b); *King v. Woodhull*, 3 Edw. (N. Y.), 79.

The case of the *Attorney-General v. Berryman*, 1 Dickens, 168, can have but little application here. In that case, there appears to have been no controversy. Lord Hardwicke decided that the legacy was good, and suggested that the king be applied to; who required that the attorney-general move the court of chancery to apply the money to such purposes as the deceased executor had named in his lifetime. The chancellor so ordered it. There appears to have been no contest, and no argument in the case upon the point in question.

The case of the *Attorney-General v. Baxter*, 1 Vern., 248, has been strangely misunderstood by the learned counsel of the appellees. The king did, in that case, undertake to apply the money, and declared his pleasure to be that it should go toward the building of Chelsea College; but the lord keeper ultimately disregarded the act of the crown, and decreed the fund for the maintenance of a chaplain of Chelsea College, as the report of the case in Vernon shows.

The authorities cited in the appellants' first brief, it is not necessary to repeat. Lord Eldon, in *Moggridge v. Thackwell*, 7 Ves. 86, makes a critical examination of all the previous authorities, and finds himself bound, by the precedents for two hundred years, to arrive at the conclusion which he states.

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Nothing can show more clearly the binding force of those precedents than Lord Eldon's statement, that, if he had sat in the court of chancery two hundred years earlier, he might have been inclined to make a different decision. In that case, which was precisely, for the present purpose, this case, he affirms the authority of the court itself to administer the charity, and proceeded accordingly to do so. The only difference between *Moggridge v. Thackwell* and the present case is, that in the former the devise was for objects not defined, as they are in this case.

In our first brief, when it is stated that it is not necessary to resort to the doctrine of *cy pres*, the context sufficiently shows that the phrase "*cy pres*" is used, as it frequently has been, to express the principle by which, when the objects designated by \*the testator have failed, by reason of illegality or otherwise, the fund has been applied to purposes different from those which he expressed or intended. In this sense, the phrase is used in all our Pennsylvania cases, in which the doctrine of *cy pres* is disclaimed. [\*382]

(The counsel then examined the cases of *Witman v. Lex*, 17 Serg. & R. (Pa.) 91; *Wright v. Linn*, 9 Pa. St., 433; *Morrison v. Beirer*, 2 Watts & S. (Pa.), 87; *Pickering v. Shotwell*, 10 Pa. St., 26.)

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the circuit court of the United States for the eastern district of Pennsylvania.

The case involves the construction of the will of Frederick Kohne. He first settled in Charleston, South Carolina, where he engaged in active business, and accumulated a large fortune. For many years before his death, his residence was divided between Charleston and Philadelphia. At the latter place, he added much to his wealth, in the acquisition of real and personal property. He had furnished houses in both cities, and a country house in the neighborhood of Philadelphia. Until his health became infirm, he resided a part of the year in the South, and the other part in the North. In May, 1829, he died in Philadelphia, where his will was made and published, in the month of April preceding his death. In his will, he declared himself to be of the city of Philadelphia.

After giving several annuities to his wife and others, and legacies to his friends in this country and in foreign countries, to charitable objects, and providing for the payment of them, he declares: "Forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct

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my said executors to invest the said surplus income, and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States, or the state of Pennsylvania, or of any other state or states of the United States, or of the city of Philadelphia, bearing an interest, as they, in their discretion, may see fit; and from and immediately after the decease of my said wife, then all the rest, residue, and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid, after the decease of my said wife, and providing for the payment of the annuities hereinbefore given, of those annuitants who may then be still living, I authorize and em-  
\*383] power my executors or the survivor \*of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said states of Pennsylvania and South Carolina shall partake of the benefits thereof." His wife, Eliza Kohne, John Bohlen, and Robert Vaux, of the city of Philadelphia, and Robert Maxwell, of the city of Charleston, were appointed executors.

Mrs. Kohne survived her co-executors some years, and then died, having made her last will and testament, and appointed James L. Petigru and William Ravenel, the defendant, executors, the latter of whom obtained letters testamentary in the county of Philadelphia. And on the 15th of October, 1852, William Fontain, the complainant, obtained letters of administration *de bonis non*, on the estate of Frederick Kohne, deceased, he being the nearest of kin to the deceased, and one of his heirs at law.

The bill is filed in the name of the complainant, by certain charitable societies of Pennsylvania and South Carolina, under the directions of the will, to recover from the defendant, as executor of Mrs. Kohne, so much of the property as came to her hands as the executrix of her husband's will, and which she distributed, as undisposed-of property, after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors, or the survivor of them, after the death of his wife, to dispose of the surplus "for the use of such charitable institutions in Pennsylvania and South Carolina, as they might deem most beneficial to mankind," has lapsed, no such appointment having been made, or attempted to be made, during the life-

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time of the executors. This part of the property is understood to have amounted to a large sum.

The domicile of the testator, at the time of his death, seems not to be a controverted question. He had so lived in the two states of Pennsylvania and South Carolina, and amassed property in both, that his domicile might be claimed in either. There is no evidence in which, if in either, he exercised the right of suffrage. For two years previous to his death, he resided in Pennsylvania.

The bequest under consideration was intended to be a charity. The donor, having entire confidence in his executors, substituted their judgment for his own. They, or the survivor of them, was to designate such objects of his charity in the two states, "as would be most beneficial to mankind." It was to be placed on the broadest foundations of human sympathy, not \*excluding the colored race. It is no charity to give to a friend. In the books, it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field, for the needy and passing stranger.

It may be admitted that this bequest would be executed in England. A charity rarely, if ever, fails in that country. The only question there is, whether it shall be administered by the chancellor, in the exercise of his ordinary jurisdiction, or under the sign-manual of the crown. Thus furnished with the judicial and prerogative powers, the intent of the testator, however vaguely and remotely expressed, if it be construed into a charity, effect is generally given to it. It is true, this is not always done in the spirit of the donor; for sectarian prejudices, or the arbitrary will of the king's instruments, sometimes pay little or no regard to the expressed will of the testator.

The appellants endeavor to sustain this charity under the laws of Pennsylvania. This is according to the course of the court. The case of *The Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat., 1, was decided under the laws of Virginia, which had repealed the statute of 43 Elizabeth. In *Beatty v. Kurtz*, 2 Pet., 566, the pious use of a burial-ground was sustained under the bill of rights of Maryland. The case of *Wheeler v. Smith*, 9 How., 55, was ruled under the laws of Virginia. And in the case of *Vidal v. Girard's Executors*, the laws of Pennsylvania governed.

In *Wheeler v. Smith*, this court said, when this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still

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remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the *parens patriæ*.

There can be no doubt that decisions have been made in this country, on the subject of charities, under the influence of English decrees, without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the crown.

The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts.

\*385] \*In 2 Story Eq. § 1189, it is said: "But as the court of chancery may also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Elizabeth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general, has been mixed with the jurisdiction given to the chancellor by the statute. So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court of equity, and in what cases he acts as a mere delegate of the crown, administering its peculiar duties and prerogatives. And again, there is a distinction between cases of charity, where the chancellor is to act in the court of chancery, and cases where the charity is to be administered by the king, by his sign-manual. But in practice the cases have often been confounded, from similar causes."

"It is a principle in England, that the king, as *parens patriæ*, enforces public charities, where no other person is intrusted with the right. Where there is no trustee, the king, by his lord chancellor, administers the trust, as the keeper of the king's conscience; and it is not important whether the chancellor acts as the special delegate of the crown, or the king acts under the sign-manual, his discretion being guided by the chancellor."

It may be well again to state the precise question before us. "The executors, or the survivor of them, after the decease of the testator's wife, was authorized to dispose of the property, for the use of such charitable institutions in Pennsylvania and

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South Carolina, as they or he may deem most beneficial to mankind."

No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of Mrs. Kohne; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator rendered the appointment impossible. Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country. The will contained no provision for such a contingency, and it could not be brought under the trust of executorship. Chancery will not compel the execution of a mere naked power. 1 Story Eq., § 169. But it will, \*under equitable circumstances, aid a defective execution of a power. A [\*386 power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.

The testator was unwilling to give this discretion to select the objects of his bounty, except to his executors. He relied on their discrimination, their judgment, their integrity, and fitness, to carry out so delicate and important a power. He made no provision for a failure, in this respect, by his executors or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a court of chancery can act?

There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ*? Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Eliz., or on principles similar to those of the statute, effect might have been given to the bequest, as a charity, in the state

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of Pennsylvania. The words as to the residue of his property were used in reference to the discretion to be exercised by his executors. Without their action, he did not intend to dispose of the residue of his property.

It is argued, "that in England the chancellor, in administering charities, acts as the delegate of the crown, inasmuch as he discharges all his judicial functions in that capacity." If, by this, it is intended to assert that the chancellor, in affixing the sign-manual of the king, or when he acts under the *ey pres* power, is in the discharge of his ordinary chancery powers, it does not command our assent.

The statute of 43 Eliz., though not technically in force in Pennsylvania, yet, by common usage and constitutional recognition, the principles of the statute are acted upon in cases involving charities. *Witman v. Lex*, 17 Serg. & R. (Pa.), 88.

In the argument the case of *Moggridge v. Thackwell*, 7 Ves., 86, was cited, as identical with the case before us. "The only difference between that case and this one, it is said, is, that in the former the devise was for objects not defined, as they are in this case." In this the counsel are somewhat mistaken, as the case of *Moggridge* will show.

\*The devise in the will of Ann Cam was: "And I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Moggridge and Mr. Vaston, before mentioned, executors of this my will."

In the final decree, "upon a motion to vary the minutes, Lord Thurlow declared, that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied to charity," &c.

Now here was a trust created not only in Vaston, but in his executors and administrators, to whom the residue of the estate was bequeathed for the purposes of the charity. In this view, Lord Thurlow might well say, "the residue of the personal estate passed by the will." This was true, though Vaston was dead when the will took effect. This being the case, it is difficult to say that that case is identical with the one before us.

The case of *Moggridge v. Thackwell* was before Lord Eldon on a rehearing. He entered into a general view of the subject of charities, by the citation of authorities which showed the unreasonableness of the doctrine maintained by the courts, the inconsistencies in the decisions in such cases, and the

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gross perversions of charities by the exercise of the prerogative power; but at last he says: "Therefore I rather think the decree is right. I have conversed with many upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. But," he observes, "it must be recollect that I am called upon to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider this subject. I should hesitate with reference to that circumstance; but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made."

It will be perceived that this decision was made reluctantly, and after much balancing of the law and the force of precedents, and chiefly, as it would seem, in respect to the decree of Lord Thurlow. This decision of Lord Eldon was made in 1802, and it is not known to have been recognized in this country.

\*Neither the doctrines on which this decision is founded, nor the doubts expressed by the chancellor, are calculated very strongly to recommend it to judicial consideration. The case, however, is different from the one before us, in this: the residuary estate of Mrs. Cam passed to the trustee; that of Mr. Kohne remained as a part of his estate in the hands of the executors, and descended to his heirs at law on the death of Mrs. Kohne. The beneficiaries were not more definitely described in the one case than in the other. In Kohne's case no trust was created, except that which was connected with the executorship.

Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, and others, the prerogative power of the king, in England, has been invoked, and he, through the chancellor, gives effect to the charity.

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It would be curious, as well as instructive, on a proper occasion, to consider the principles, if principles they can be called, which were first applied in England to charities. Their most learned chancellors express themselves, in some degree, as ignorant on this subject. Lord Eldon said, in the case of *Moggridge*, "in what the doctrine originated, whether, as Lord Thurlow supposed, in the principles of the civil law, as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period when a portion of the residue of every man's estate was appropriated to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator."

In the above case, Lord Eldon again says: In *Clifford v. Francis*, this doctrine is laid down: that when money is given to charity, without expressing what charity, there the king is the disposer of the charity; and a bill ought to be preferred in the attorney-general's name. I cite this (he says) to show that it contains a doctrine precisely the same as the *Attorney-General v. Syderfin*, and the *Attorney-General v. Matthews*. So those three cases (he says) seemed to have established, in the year 1679, that the doctrine of this court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of, not by a scheme before the master, but by the king, the disposer of such charities in his character of *parens patriæ*.

\*389] \*Some late decisions in England, involving charities, evince a disposition rather to restrict than to enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king or chancellor, or both, leads to uncertainty and injustice.

In a late case of *Clark v. Taylor*, 21 Eng. L. & Eq., 308, a gift, by will, to a particular charitable institution maintained voluntarily by private means, the particular intention having ceased: held that the gift was not to be disposed of as a charitable gift *ey pres*, but failed and fell into the residue."

In the case of the *Baptist Association*, Chief Justice Marshall says, there can be no doubt that the power of the crown to superintend and enforce charities existed in very early times; and there is much "difficulty in marking the extent of this branch of the royal prerogative before the statute. That it is a branch of prerogative, and not a part of the ordinary powers of the chancellor, is sufficiently certain." And in the case of the *Attorney-General v. Flood*, Hayne, 630, it is said:

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"The court of chancery has always exercised jurisdiction in matters of charity, derived from the crown as *parens patriae*."

In the provisions of the act of Pennsylvania defining the powers of a court of chancery, in 1836, it is declared, "that in every case in which any court, as aforesaid, shall exercise any of the powers of a court of chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the supreme court of the United States."

In June, 1840, an act extended the jurisdiction of the supreme court within the city and county of Philadelphia, in chancery, in cases of "fraud, accident, mistake, or account;" and since then an act has been passed giving the orphans' court power where a vacancy exists in a trust to fill it, and also to dismiss trustees, executors, &c., for abuse of their trusts, &c. But no statutory provision is found embracing the case before us.

The chancery powers are of comparatively recent establishment in the state of Pennsylvania, and it does not appear that the *cy pres* power is given, and in the exercise of jurisdiction it seems to be disclaimed.

In *King v. Rundle*, 15 Barb., 139, "there being a number of charitable bequests to several charitable bodies, the remainder was bequeathed or devised to the Protestant Episcopal society, for certain purposes, &c.; the bequests to the religious bodies were held invalid, and so of the remainder over, as not being statutory tests. In *Yates v. Yates*, 9 Barb., 324, the court say: "We come to the conclusion that, as a court of equity, we possess no original inherent jurisdiction, to enforce the execution of a charitable trust void in law, as contravening the \*statute against perpetuities, as being authorized. [\*390] In this case, where the use is a pious one, additional reasons might be urged against the exercise of such jurisdiction, were it important. Unless this trust will stand the statutory test to be applied to it, it must fall."

In the will of Sarah Zane, Mr. Justice Baldwin, sitting in Pennsylvania, and speaking of trustees, says: "They will be considered as trustees, acting under the supervision of this court, as a court of chancery, with the same powers over trusts as courts of equity in England, and the courts of this state profess and exercise." "When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue until a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes or

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*cestuis que trust* than those which can, by equitable construction, be brought within the intention of the will of the donor, is an exercise of that branch of the jurisdiction of the chancellor of England which has been conferred on this court by no law, and cannot be exercised, *virtute officii*, under our forms of government."

And again, in *Wright v. Linn*, 9 Pa. St., 433, Bell, J., says: "Though the statute of 43 Elizabeth, ch. 4, relating to charitable uses, has not, in terms, been recognized as extending to Pennsylvania, we have adopted, not only the principles that properly emanate from it, but, with perhaps the single exception of *cy pres*, those which, by an exceedingly liberal construction, the English courts have engrafted upon it."

In the *Methodist Church v. Remington*, 1 Watts (Pa.), 226, the court says: "The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the state for the purpose of being appropriated *in eadem genera*, as no court here possesses the specific power necessary to give effect to the principle of *cy pres*, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

In *Ray v. Adams*, 3 Myl. & K., 237, it was held, "that where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate."

\*In the case of *Ommanney v. Butcher*, 1 Turn. & R., \*391] 260, a testator concluded his will, "in case there is any money remaining, I should wish it to be given in private charity." Held, "if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take."

There appears to be no law or usage in South Carolina that can materially affect the question under consideration. It seems to be conceded that if this charity cannot be administered by this court, in the state of Pennsylvania, it cannot be made available by the laws of South Carolina.

After the investigation we have been able to give to this important case, embracing the English chancery decisions on charities, as well as our own, and the cases decided in Pennsylvania, we are not satisfied that the fund in question ought to be withdrawn from those who are in possession of it, as the heirs of Frederick Kohne. There does not appear to us to be

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any safe and established principle, in Pennsylvania, which, under the circumstances, enables a court of chancery to administer the fund. It has not fallen back into the estate of the testator, because it was not separated from it. It remains unaffected by the bequest, because the means through which it was to be given and applied have failed. The decree of the circuit court is, therefore, affirmed.

Mr. Chief Justice TANEY and Mr. Justice DANIEL concurred in the judgment of the court, but dissented from the reasoning. Their opinions were as follows :

## Opinion of Mr. Chief Justice TANEY.

I concur in the judgment of the court. But I do not, for myself, desire to express an opinion upon either the law of Pennsylvania or of South Carolina, in relation to charitable bequests. For, assuming every thing to be true that is stated in the complainant's bill, and that the bequest is valid by the laws of Pennsylvania, and would be carried into execution by the tribunals of the state, yet I think the circuit court of the United States had not jurisdiction to establish and enforce it; and was right therefore, in dismissing the bill. I propose to show, very briefly, the grounds on which this opinion is formed.

Undoubtedly, a charitable bequest of this description would be maintained in the English court of chancery. The death of the executors, in the lifetime of the widow, would make no difference. The bequest would still be good against the heirs or representatives of the testator, and the fund applied to charitable purposes, according to a scheme approved by the chancellor, or authorized under the sign-manual of the king.

\*But the power which the chancellor exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust, does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of the king as *parens patriæ*, which he exercises by the chancellor.

Blackstone in his Commentaries, 3d vol., 47, enumerating what he states to be the extraordinary powers of the chancellor, says: "He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery." And in the same volume, page 437, he says: "The king, as *parens patriæ*, has

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the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and, therefore, whenever it is necessary, the attorney-general, at the relation of some informant, files an *ex officio* information in the court of chancery to have the charity properly established."

So, too, Cooper, in his chapter on the jurisdiction of the court, says: "The jurisdiction, however, in the three cases of infants, idiots, or lunatics and charities, does not belong to the court of chancery as a court of equity, but as administering the prerogative and duties of the crown."

And in the case of the *Baptist Association v. Hart's Executors*, 4 Wheat., 1, this court, after examining many English authorities upon the subject, affirm the same doctrine. And Chief Justice Marshall, who delivered the opinion of the court, expresses it in the following strong and decisive language (p. 48.):

"It would be a waste of time," says the chief justice, "to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject without perceiving and admitting it. Its extent may be less obvious.

"We now find," he continues, "this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses; in applying them to different objects than those designated by the donor, and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered."

Resting my opinion upon the English authorities above referred to, and upon the emphatic language just quoted from the decision of this court, I think I may safely conclude that the power exercised by the English court of chancery "in [§ 393] \*enforcing donations to charitable uses, which would not be valid if made to other uses," is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court.

It remains to inquire whether the constitution has conferred this prerogative power on the courts of equity of the United States.

The 2d section of the 3d article of the constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power, and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriæ*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the

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constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred.

These prerogative powers, which belong to the sovereign as *parens patriæ*, remain with the states. They may legalize charitable bequests within their own respective dominions, to the extent to which the law upon that subject has been carried in England; and they may require any tribunal of the state, which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But state laws will not authorize the courts of the United States to exercise any power that is not in its nature judicial; nor can they confer on them the prerogative powers over minors, idiots, and lunatics, or charities, which the English chancellor possesses. Nobody will for a moment suppose that a court of equity of the United States could, in virtue of a state law, take upon itself the guardianship over all the minors, idiots, or lunatics in the state. Yet these powers in the English chancellor stand upon the same ground, and are derived from the same authority, as its power in cases of charitable bequests.

State laws cannot enlarge the powers of the courts of the United States beyond the limits marked out by the constitution. It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to courts of equity in England. And, in such cases, if the power is judicial in its character, and capable of being regulated by the established rules and principles of a court of equity, there can be no good objection to its exercise. It falls within the just interpretation \* of the grant in the constitution. But, beyond this, the state laws can confer no jurisdiction [\*394 on the courts of equity of the United States.

In the cases in relation to charities which have come before this court, there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from 43 Elizabeth, or was exercised by the court before that act was passed. And there has been a diversity of opinion upon this subject in England, as well as in this country. In the case of the *Baptist Association v. Hart's Executors*, Chief Justice Marshall, who delivered the opinion of the court (*vide* 4 Wheat., 49,) and Mr. Justice Story, who wrote out his own opinion, and afterwards published it in the appendix to 3 Pet., (*vide* p. 497,) were both at that time of opinion that it was derived from the statute. But in *Vidal v. Girard's*

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*Executors*, 2 How, 127, Mr. Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records, which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed.

But this circumstance does not affect the question I am now considering; for, whether exercised before or not, yet, whenever exercised, it was in virtue of the prerogative power, and not as a part of the jurisdiction of the court as a court of equity. The statute conferred no new prerogative on the crown. And Lord Redesdale, 1 Bligh., 347, while he held that the power existed in the chancellor before the statute, and had been frequently exercised, declares it to be a prerogative power, and says: "The king, as *parens patriæ*, has a right by his proper officer, the attorney-general, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases."

Besides, if it could be shown that at some remote period of time the court of chancery exercised this power as a part of its ordinary jurisdiction as a court of equity, it would not influence the construction of the words used in the constitution. For at the time that instrument was adopted, it was universally admitted by the jurists in England and in this country, as will appear by the references above made, that this extraordinary and unregulated power in relation to charities was not judicial, and did not belong to the court as a court of equity. The constitution of the United States, as I have before said, grants only judicial power at law and in equity to its courts; that is, the powers at that time understood and exercised as judicial, in the <sup>\*courts of common law and equity in England.</sup> And <sup>\*395]</sup> it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the constitution was adopted.

Cases may arise in a circuit court of the United States, in which it would be necessary to decide whether the English doctrine, as to charities, was founded on the statute, or was a part of the law of England before the statute was passed. And in a suit by an heir or representative of the testator, (authorized from his place of residence to sue in a court of

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the United States,) to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the state, and barred the claim of the heir or representative. And if in such a case it appeared that the state had not adopted the statute, it would be necessary to inquire whether the law in relation to these bequests was a part of the common law before the statute, and administered as such by the English court of chancery, and whether it had been adopted by the state as a part of its common law. For the prerogative powers of the English crown in relation to minors, idiots, or lunatics, and charities, are a part of the common law of England; and the people of any state, who deemed it proper to do so, might vest these powers in the courts of the state.

Such an inquiry was necessary in the case of *Vidal v. Girard's Executors*, and of *Wheeler v. Smith*. But the question of jurisdiction is a very different one when a court of the United States is called upon to execute the duties of the sovereignty of the state, and to take upon itself the discretionary powers which, if they exist at all by its common law or statutes, belong to the official representatives of the *parens patriæ*, that is, the state sovereignty. And in the case of the *Baptist Association v. Hart*, although the court did not expressly deny its jurisdiction to establish the charity, if it had been valid by the laws of Virginia, yet it expressed its doubts upon the subject, saying that the question could only arise where the attorney-general was a party.

For these reasons a court of chancery of the United States must, in my opinion, deal with bequests and trusts for charity as they deal with bequests and trusts for other lawful purposes; and decide them upon the same principles and by the same \*rules. And if the object to be benefited is so indefinite and so vaguely described, that the bequest [\*396] could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity. And if, from any cause, the *cestui que trust*, in an ordinary case of trust, would be incapable of maintaining a suit in equity to establish his claim, the same rule must be applied where charity is the object, and the complainant claims to be recognized as one of its beneficiaries.

I concur, therefore, in affirming the judgment of the circuit court, dismissing the bill; but I concur upon the ground that the court had no jurisdiction of the case stated by the complainant, and express no opinion as to the validity or inva-

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lidity of this bequest, whether in this respect it be governed by the laws of Pennsylvania or of South Carolina.

Mr. Justice DANIEL.

Whilst I concur in the decision of this court, in affirming the decree of the circuit court dismissing the bill of the appellants, in portions of the argument by which this court have come to their conclusion, I cannot concur. In expressing my dissent, I shall not follow the protracted argument throughout its entire length; my purpose is, chiefly, to free myself on any future occasion from the trammels of an assent, either expressed or implied, to what are deemed by me the untenable, and, in this case, the irrelevant positions, which that argument propounds.

I readily admit that the courts of chancery of the United States are vested with no prerogative power, can exercise no power or function similar to those derived to the lord chancellor in England, either by commission under the sign-manual of the king, as *parens patriæ*, or in the application of the often-abused and oppressive doctrine of *cy pres*, or in virtue of the provisions of the statute of 43 Elizabeth. But this concession, taken in its broadest extent, by no means establishes the inference that the court of chancery in England, as a court of equity, by virtue of its inherent, and, if I may so speak, constitutional powers, apart from the prerogative and apart from the statute of Elizabeth, could not take jurisdiction of trusts, either in the establishment or maintenance of those trusts, because they expressed or implied a charitable end or purpose, or because the charitable objects were not defined with perfect precision. And if such a power inhered and existed constitutionally in the court of chancery in England as a court of equity, does it not follow, *ex consequenti*, that, the constitution and laws of the United States, constituting the courts of equity of the United States \*397] with express reference to the character and \*functions of the court of chancery as a court of equity in England, have conferred upon the former the regular inherent powers of the latter?

Much of the learned and elaborate opinion of this court delivered by the late Justice Story, in the case of *Vidal et al. v. Girard's Executors*, 2 How., 127, nay, the great end and stress of that opinion, as correctly apprehended, consisted in the maintenance of the position that, apart from the prerogative power with which the lord chancellor was clothed, and independently of the statute of Elizabeth, and long anterior to the enactment of that statute, wherever there was a devise

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or bequest to a person, natural or artificial, capable of taking, and a beneficiary under the devise or bequest sufficiently certain and defined to be made the recipient of such a gift, the court of chancery, in the exercise of its regular and inherent jurisdiction, as a court of equity in relation to trusts, (one of the great heads of equity jurisdiction,) would establish and protect such devise or bequest, even in cases where the objects thereof were somewhat vague in their character, and although such devise contained a charity. To this express point, too, are the numerous decisions produced by the industry of the learned and able and distinguished counsel for the devisee, as the result of the researches made in the records of the chancery court, by a commission created under the authority of the British parliament. Indeed, the decision of this court in the case of *Vidal v. Girard's Executors*, would seem to be incomprehensible and without purpose, unless interpreted as asserting and maintaining, both upon reason and authority, the regular jurisdiction of equity over devises, wherever the devisee was capable of taking, and the beneficiaries were sufficiently defined to render the directions of the testator practicable, although these directions declared or implied a charity.

It is somewhat curious to observe, that the opinion of Lord Redesdale, in the case of *The Attorney-General v. The Mayor of Dublin*, 1 Bligh, 312, is appealed to in support of the doctrine now promulgated, when that same case is avouched and relied on in the case of *Vidal v. Girard's Executors*, in support of the legitimate and regular powers of the courts of equity. This application of the language of Lord Redesdale would seem to grow out of the simple fact, that, in the case before him, the attorney-general was a party. But what is the declaration of his lordship, in reference to the powers of a court of equity over subjects like the one under his consideration? After denying that the statute of Elizabeth created any new law, and asserting that it only created a jurisdiction merely ancillary to that previously existing in the chancery court, he observes that \*the proceedings under that [\*398 commission were still subject to appeal to the lord chancellor, and he might reverse or affirm what had been done, or make such order as he might think fit, reserving the controlling jurisdiction of the court of chancery as it existed before the statute. He then continues, as pointing out a different mode of effecting the same objects, and from a different source of power, to declare, that the same thing might be done by the attorney-general, by information, in virtue of the prerogative.

So, too, it is affirmed by this court, *nemine contradicente*, in

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the case of *Vidal v. Girard's Executors*, that Lord Chancellor Sugden, in the case of *The Incorporated Society v. Richards*, 1 Dru. & W., 258, upon a full survey of all the authorities where the point was directly before him, held the same doctrine as Lord Redesdale; and expressly decided that there was an inherent jurisdiction in equity in cases of charity, anterior to and independently of the statute of Elizabeth.

Upon a just understanding of the opinion of the court in the case of *Vidal v. Girard's Executors*, and of the interpretation given, in that opinion, to the English authorities relied on, it seems impossible to escape from the conclusions, that devises to persons capable of taking, in trust for beneficiaries sufficiently defined, and for purposes neither illegal nor immoral, and where there exist no objections to parties such as would exclude the jurisdiction of the courts in other cases, the courts of the United States as courts of equity, in the exercise of regular, inherent, equity powers in relation to trusts, will sustain and enforce such devises. These conclusions seem to follow inevitably from the ruling of this court in the case of *Vidal v. Gerard's Executors*. Indeed, they seem to be comprised within the literal terms of that decision; and the decision now made seems to me incomprehensible, unless understood as designed to overrule that case, and every authority from the English chancery cited and commented upon in its support. For such an assault upon the previous decision of this court, wielding a blow so trenchant and fatal at one great and acknowledged head of equity jurisprudence, the head of trusts, my mind is not prepared.

There is a principle, and, in my opinion, the correct principle, on which the decision of this court may be placed, without the innovation which is objected to. It is that on which my concurrence in the decree of this court is founded, and one, too, which steers entirely clear of what is by me deemed exceptionable. That principle is this: That, by the will of Frederick Kohne, the devisees in trust were clothed with a merely naked power, to be exercised by them as the special <sup>\*399]</sup> and exclusive \*depositaries of the testator's confidence, and that power to be dependent on conditions upon which, and on which alone, they should have authority to act. In the progress of events to which the devise was necessarily incident, the powers created and to be executed by the devisees in trust, have become impracticable and void. These depositaries of the testator's confidence are all dead. The conditions on which their powers were made dependent, never did occur, and can by no possibility ever occur. It follows,

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therefore, that, in conformity with the will, there is no person who can act, and no subject to be acted upon, and no beneficiaries of the contemplated action. My opinion, therefore, is, that the devise has lapsed, or, rather, that no right ever came into existence under it; that nothing was ever passed by it from the estate, which descends, of course, to the testator's heirs.

*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 Pennsylvania, 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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SEBRA M. BOGART, WILLIAM J. WILCOX, AND LEONARD F. FITCH, LIBELLANTS AND APPELLANTS, *v.* THE STEAMBOAT JOHN JAY, HER TACKLE, &c. GEORGE LOGAN, CLAIMANT.

The courts of the United States, in the exercise of admiralty and maritime jurisdiction, cannot take cognizance of questions of property between the mortgagee of a vessel and the owner.

The mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea.

The admiralty courts in England now exercise a more ample jurisdiction upon the subject of mortgages of ships, but it is under a statute of Victoria; and in the United States the admiralty and maritime jurisdiction remains as it was before.<sup>1</sup>

THIS was an appeal from the circuit court of the United States for the southern district of New York.

It was a libel filed by the appellants of the steamboat John Jay, to enforce payment of a mortgage upon the boat, under the circumstances stated in the opinion of the court.

The district court dismissed the libel, which decree was \*affirmed by the circuit court, and the libellants appealed to this court. [\*400]

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<sup>1</sup> FOLLOWED. *Schuchardt v. Ship C. C. Trowbridge*, 11 Biss., 156; *s. c. Angelique*, 19 How., 241. CITED. 14 Fed. Rep., 876; *The Guiding Star*, *People's Ferry Co. v. Beers*, 20 How., 9 Id., 524; *The Grand Republic*, 10 Id., 400; *The Lottawunna*, 21 Wall., 583; 399; *The Illinois*, 2 Flipp., 432. *The Edward Albro*, 10 Ben., 671; *The*

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It was submitted on the record by *Mr. Johnson*, for the appellants; and submitted by *Mr. Cutting*, for the appellee, upon a printed brief filed by himself and *Mr. Byrne*.

It is only necessary to state the following points for the appellee:—

First Point. The district court in admiralty had no jurisdiction of the cause of action set forth in the libel, it not being a maritime contract, or a maritime cause of action, or dependent on maritime risks. *Hurry v. The Ship John and Alice*, 1 Wash., 293; *The Steamboat Orleans v. Phœbus*, 11 Pet., 175; *The Atlas*, 2 Hagg. Adm., 48, 73; Abbott on Shipping, old paging 153, new 205.

Second Point. A court of admiralty has no power to enforce payment of a mortgage. *The Dowthorpe*, 2 W. Rob., 73; *The Highlander*, Id., 109; *Leland v. The Medora*, 2 Wm. & M., 92, 97, 118.

Neither has it jurisdiction to decree possession, as between mortgagee and mortgagor. *The Fruit Preserver*, 2 Hagg. Adm., 181; *The Neptune*, 3 Id., 132.

Mr. Justice WAYNE delivered the opinion of the court.

We will confine ourselves in this opinion, to the inquiry, whether or not a court of admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them. The questions of pleading made in the case, and the other points argued, we shall not notice. The conclusion at which we have arrived makes that unnecessary.

The libellants were the owners of the steamer John Jay. They sold her to Joseph McMurray for the sum of \$6,000; \$1,000 in cash, and the residue of \$5,000 upon a credit, for which promissory notes were given, payable to their order, in three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months. On the day of sale, McMurray, the purchaser, executed in a single deed, containing the whole contract between himself and the libellants, a transfer of the boat to the latter as a security for the payment of his notes, with the proviso "that this instrument is intended to operate only as a mortgage to secure the full and just payment of the eight promissory notes given in consideration of the purchase-money of said vessel or steamboat." McMurray failed to pay the second note. Upon such failure the libel was filed. The libellants set out the contract; \*allege that it was to operate as a mortgage to secure the payment of

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McMurray's notes; state his failure to pay the second note; claim, in the fifth article of their libel, that McMurray's failure to pay had re vested them with the title to the boat, and that McMurray's had become forfeited, from his non-compliance with the condition contained in the contract of sale. Their prayer is, that they may have a decree for the amount of the unpaid purchase-money, with interests and costs, and that The John Jay and her equipments may be condemned to pay the same. Afterwards, upon their appeal in the circuit court, they moved to amend their libel by inserting the words, "or that the steamboat John Jay may be decreed to be their property, and the possession be directed to be delivered to them."

To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon the ground that the contract between the libellants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction. It appears that McMurray had received the possession of the boat; that she had been enrolled at the custom-house in his name; that he first sold one fourth of her to Logan, and afterwards, on the 2d December, executed a bill of sale for the whole of her to Logan, which was recorded in the custom-house; and that thereupon The John Jay was enrolled and licensed in the name of Logan.

Upon the hearing of the cause in the district court, the libel was dismissed. It was carried, by appeal, to the circuit court, and the judgment of the district court having been affirmed, it is now here upon appeal from the circuit court. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune*, 3 Hagg. Adm., 132, Sir John Nicholl, in giving his judgment, observes: "Now upon questions of mortgage, the court of admiralty has no jurisdiction; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of

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these questions belongs to other courts; they are not within the jurisdiction or \*province of the courts of admiralty, [402] which never decides on questions of property between the mortgagee and owner."

This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, any thing maritime in it. A failure to perform such a contract cannot make it maritime. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay, he cannot take the ship *manu forti*, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment. *Thornhill v. Manning*, 7 Eng. Rep., 97, 99, 100.

Courts of admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to

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enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. It is true that the policy of commerce and its exigencies in England have given to its admiralty courts \*a more ample jurisdiction in [\*403 respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statute 3 and 4 Victoria, ch. 65. Until that shall be done in the United States, by congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been. We affirm the decree of the court below.

*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 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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EDWARD M. WEST, PLAINTIFF IN ERROR, *v.* JOSEPH COCHRAN.\*

The act of congress, passed on the 3d of March, 1807, (2 Stat. at L., 441,) appointing commissioners to adjudicate land claims against the United States, required that where titles to tracts of land, which had not been previously surveyed, were confirmed by the board, they should be surveyed under the directions of the surveyor-general. When a certificate and plat should be filed in the proper office, a patent certificate was to issue, which should entitle the claimant to a patent from the United States.<sup>1</sup> Therefore, where conflicting locations were claimed of two concessions granted by the lieutenant-governor of Upper Louisiana, and no survey satisfactory to the public officers was made until 1852, when a patent was issued in conformity with a survey directed by the secretary of the interior, this patent was conclusive, in a court of law, of the location to which the party was entitled.<sup>2</sup> He could not, in an action of ejectment, sustain a claim that his patent ought to have had a different location, upon the ground that the confirmation by the commissioners conferred a perfect title to different land from that covered by the patent.

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\*Mr. JUSTICE WAYNE, having been indisposed, did not sit in this cause.

<sup>1</sup>CITED. *Kissell v. St. Louis Public Schools*, 18 How., 25; *Bryan v. Forseyth*, 19 Id., 336.

<sup>2</sup>FOLLOWED. *Stanford v. Taylor*, 18 How., 411; *Willot v. Sandford*, 19 Id., 80; *Carondelet v. St. Louis*, 1 Black, 189. CITED. *Lafayette v. Kenton*, 18 How., 199; *Cousin v. Blanc*,

19 Id., 209; *Magwire v. Tyler*, 1 Black, 199; *s. c.*, 8 Wall., 661; *Tyler v. Magwire*, 17 Wall., 280; *Snyder v. Sickles*, 8 Otto, 212. S. P. *United States v. King*, 3 How., 772; *s. c.*, 7 Id., 833; *Landes v. Brant*, 10 Id., 370; *Bissell v. Penrose*, 8 Id., 334.

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THIS case was brought up, by writ of error, from the circuit court of the United States for the district of Missouri.

It was an action of ejectment, brought by West, a citizen of the state of Illinois, against Cochran, a citizen of Missouri, for all that tract or parcel of land situated in the city and county of St. Louis, in said district, and which tract or parcel of land is described as follows: Lot number one hundred and three, (103,) in block number three hundred and twenty-one, as the said lot is laid down and numbered on the map of the said city, and is bounded on the east by Second-street, beginning at the southwest <sup>\*corner</sup> of Chambers and Second-street; thence along the west side of Second-street, eighty feet, more or less, <sup>\*404]</sup> from Chambers-street; thence westwardly on a line parallel with Chambers-street, one hundred and fifty feet to an alley; thence northwardly eighty feet to Chambers-street; thence eastwardly along the south side of Chambers-street one hundred and fifty feet, to the place of beginning.

West claimed under the reservation made by Brazeau in his deed to Labeaume, and under the confirmation of Brazeau's title by the board of commissioners on the 22d of September, 1810.

Cochran claimed under a similar confirmation of the same date to Labeaume. The patent for Brazeau's claim did not include the land in dispute, whilst the patent for Labeaume's claim did include it; and the question was, whether West, claiming under Brazeau's title, could show that the patent had been erroneously located, and could claim under the confirmation.

The circuit court decided against West, and he brought the case up to this court by a writ of error. The case is particularly stated in the opinion of the court.

It was argued by *Mr. Blair* and *Mr. Ewing*, for the plaintiff in error, and by *Mr. Hill* and *Mr. Cushing*, (attorney-general,) for the defendant in error.

The following notice of the point upon which the decision of the court turned, is taken from the brief of *Mr. Ewing*, one of the counsel for the plaintiff in error:—

The court, on the trial of this cause below, instructed the jury that these surveys and patents were conclusive as to both the parties; that neither of them was at liberty to reject and set up a claim against them, or otherwise than under them. To this the plaintiff excepted.

We claim that the court erred in this instruction, and on this arises the first and most important question in the case.

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Brazeau claims under a confirmation by the United States commissioners, pursuant to the act of March 3, 1807. Now, if that confirmation passes the legal title, or if it creates an equity or inchoate legal title to the land confirmed, the instruction of the court was wrong, and the judgment must be reversed; and we contend—

1. That the confirmation passes the absolute legal title; and though a patent may issue, it is merely evidence of a title already complete under the law. 2 Stat. at L., 441, § 4.

The operative words of the statute are: “Which decision of the commissioners, when in favor of the claimant, shall be final against the United States, any act of congress to the contrary notwithstanding.”

\*Here the claimant had an imperfect title. The United States confirms it by her commissioners, and declares [\*405] that this award of confirmation shall be final against her.

It seems to have been the intent, that the confirmation by the commissioners in this case should stand in the place of a confirmation by congress, under the act of 1805, ch. 26, (2 Stat. at L., 324.)

The act of 1805 provides, (section 5,) that such “decisions shall be laid before congress in the manner hereinafter directed, and be subject to their determination thereon.”

The act of 1807 does not submit the case to the action of congress, but declares that the decision of the commissioners, when in favor of the claimant, “shall be final against the United States.”

The confirmation is complete, in the one case, with the action of congress on each particular claim; in the other, by the action of the commissioners without the action of congress. In both cases a patent is to issue; but in one of these cases the legal title passes without the patent. *Doe v. Eslava*, 9 How., 446, 447; *Stoddard v. Chambers*, 2 Id., 307.

Why does it not pass in the other? The confirmation is complete, the act of the commissioners final. Why does not the legal title pass?

There can be no reason of policy or convenience against it, which does not apply equally to confirmations by congress; there is no technical difficulty, for the United States can as well pass titles by the act of commissioners as by the act of the President; by an entry in the books of commissioners, returned to and recorded in the general land-office, as by a patent so recorded.

The reasons of policy are, indeed, against a distinction between the two classes of cases, that the legal title should pass

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at once to the individual in the one case, and remain in the United States in the other.

It is exceedingly inconvenient in practice to treat titles derived from the sovereign as equities. There is no ordinary process by which a perfect title can be compelled, and the claimant is made a suitor to a ministerial or executive officer, and in cases of contest such officer may greatly influence, if he cannot control, the judicial determination of the rights of parties litigant.

It is entirely within the competence of congress to pass title by other modes than by patent, and by other officers than those of the general land-office. In this case, confusion is guarded against by the required report of the commissioners. On that, the general land-office must issue a patent, if required, precisely as they must in cases confirmed by direct act of congress, and for the same purpose. No more discretion is left it in the one case than in the other.

\*<sup>406]</sup> There is a *dictum* in *Burgess v. Gray*, 16 How., 63, opposed to our view on this point, which we respectfully ask the court to reconsider. The point to which the *dictum* applies, does not necessarily arise in the case. But if we are wrong as to the effect of the confirmation, and if the actual legal title have not passed to us, we may, under the statutes of Missouri, adopted in practice by the circuit court, maintain our action of ejectment under the confirmation.

We sue at law, instead of suing in equity, and have the same relief in the one forum as in the other; and this suit was brought when neither party had a patent; and even if Labeaume had obtained a patent, we suppose a patent issued to him of our lands, to which he had no color of right, would be void as against us.

Now, whether our title be perfect or inchoate, such as it is, it is "final" against the United States. It is conclusive and absolute,—subject to no conditions or contingencies. The land confirmed to Brazeau belongs to him; the United States could not take it from him, nor transfer it, in title, to another. The only question is as to locality. That may be agreed upon between the officers of the government and the claimant, and the agreement attested by the issuing and acceptance of a patent. But in case of controversy, the question, as to existing title, is not for the executive department, but for the courts. This was practically denied by the instructions. The court charged the jury that the surveys and patents made by order of the secretary were conclusive, as well in the case in which the patent was refused as that in which it was accepted.

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*Mr. B. A. Hill* made the following points upon the propositions considered by the court:—

1. The act of the 3d of March 1807, under which Brazeau's representative claims title, through a confirmation by the first board of commissioners, did not *proprio vigore*, vest the title in Brazeau; it was subject to the action of congress, and to the condition of survey. Section 5 of the act of March 2, 1805, § 3 of the act of February 28, 1806, and §§ 6 and 8 of the said act of 1807, require reports of the board of commissioners, to the secretary of the treasury, and he was required to report the same to congress. These reports were to contain a description of each tract confirmed. § 6 of 1807. Congress never confirmed the reports made by the said board; for the reason that no description of the land confirmed was contained in the reports. See State Papers, Public Lands, vol. 2, p. 560. The reports were therefore to be perfected into grants of the fee, in accordance with other provisions of the act of 1807; there being no words of present grant in the said act.

\*2. By section 6 of said act of 1807, the title would [\*407 pass by a survey made by the United States and a patent; and section 7 authorized a patent to issue upon a recorded Spanish survey. These are the only means by which a title could pass under said act of 1807. The fee remained in the United States until the performance of the said conditions; and congress so construed the said acts of 1805, 1806, and 1807, by expressly excepting the confirmation by the first board of commissioners from the operation of the act of 13th of June 1812, which passed an absolute title by words of present grant, to certain claims possessed in Spanish times.

3. Brazeau's confirmation never having been confirmed by congress, and his tract never having been surveyed by the Spanish government, was subject to the condition of survey by the United States; which was the necessary foundation for a patent; and until that survey was made and the patent issued, the title did not pass. This is the form of the grant. It was a grant to be located by the United States, and no land was granted to him until the location. The survey by the United States was, therefore, a necessary part of the grant. It was so under the Spanish law. The orders of O'Reilly and Morales, in force when Brazeau's Spanish grant was made, required a Spanish survey by the proper officer, as the condition upon which the grant was to be made. The analogy between the Spanish law and the act of 1807 is complete. The one provides for an approved survey to be annexed to and to form a part of the grant; the other for a patent certificate to be issued upon an approved survey, as the foundation for a patent.

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4. The United States acted in the capacity of a sovereign in the granting of lands claimed before the board under the said act of 1807. The claimants had no standing in court. They were required to procure a grant from the United States to perfect the title. The only right or title that plaintiff can claim, must be derived under the act of 1807. If it operate as a grant, it can only so operate in pursuance of the conditions annexed to it.

5. The said act is peremptory. It provides that a survey shall be made by the United States, if a Spanish one is not already made and recorded; that a plat thereof shall be made; that a patent certificate shall issue thereon, and a patent. The title was to pass in accordance with these forms. This construction is in accordance with the manifest intent of the statute. The United States had purchased a vast territory, portions of which, along the rivers and in the mineral regions, were covered by private claims and settlement rights, not perfected into grants under the Spanish government. The treaty [408] with France, by which \*it was acquired, imposed the obligation upon us to protect the inhabitants of the territory in the enjoyment of their property. To do this it was necessary to ascertain the extent of that property. Where Spanish surveys were not made, official surveys by the United States were the means necessary to accomplish that object. The United States was in debt, and this newly-acquired domain was held in trust for the people, and the lands were to be used for sale and settlement. The public lands could not be subdivided and sold until the private claims were settled and located. The lawful power was vested in the United States to accomplish these objects, and the act of 1807 was designed to do so. The spirit and intent of the law is to separate the private claims from the public domain; but this has not been accomplished unless the United States reserved the power to survey the unsurveyed confirmations made by the old board, and fix their locality. It is for these reasons that this court has held that a confirmation by said board did not vest the legal title. *Burgess v. Gray*, 16 How., 63; 7 Pet., 85, 93; 2 How., 374; 16 Id., 500, 1; 4 Pet., 342; 10 How., 373. If the legal title vested by the inherent force of the act, as it did under the act of 13th June, 1812, it could not be divested by a survey; but there was no title vested by the act of 1807 until a patent issued upon an approved survey. The United States survey for Brazeau is therefore conclusive, and the plaintiff cannot claim title to any land not embraced within it, and the land in controversy not being

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included within the survey of his confirmation, he cannot recover.

Mr. Justice CATRON delivered the opinion of the court.

To understand the application of the instruction given to the jury which controlled the verdict in this case, a minute statement of the facts is necessary.

On the 1st of June, 1794, Joseph Brazeau, by petition, requested the Lt. Governor of Upper Louisiana to grant to him a tract of land near to the then village of St. Louis, "situated beyond the foot of the mound called the Grange de Terre, four arpens in width, which are to extend from the steep bank or beach of the Mississippi in the W.  $\frac{1}{4}$  S. W. by about twenty arpens in depth, that shall begin at the foot of the hill where stands the Grange de Terre, ascending in a N. N. W. course to the vicinity of the Stony Creek, so that the said tract hereby asked for be bounded on the east by the bank of the Mississippi, on the other side in part by the king's domain, and in part by land reunited to the said domain."

The grant was made by the governor in the following terms: "We do certify to have put Joseph Brazeau in possession of \*the parcel of land designated in his petition, of four [\*409 arpens by twenty deep, which shall extend in a N. N. W. course from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of the Stony Creek, bounded on one side by the bank of the Mississippi, and on the opposite side by lands not conceded or reunited to his Majesty's domain, and at the two ends bounded on the N. N. W. by the vicinity of the Rocky Creek, and at the other, in the S. S. E., shall be bounded by the land granted to the free mulattress Esther." This concession was made June 10, 1794.

On the 25th of the same month, the governor amended his former concession, in which he declares that the four arpens front by twenty deep, "shall begin beyond the mound called La Grange de Terre, extending N. N. W. to the vicinity of the Rocky Branch, bounded on one side by the banks of the Mississippi River, and on the opposite side by lands reunited to the king's domain, through which lands passes this present concession, of which one end is to be bounded by the concession of the free mulattress Esther."

The application of Esther above referred to, was made October 2, 1793. She petitioned for a piece of land lying on the borders of the Mississippi; the northern portion of the concession to be situate between the small mound called the Grange de Terre and the beach of the Mississippi, having at its two extremities four arpens front, that shall bear about

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from E. N. E. to W. S. W., by twenty arpens in extent or depth, that shall run from about N. N. W. to S. S. E.

On the 3d October, 1793, the governor granted the land to Esther, in the terms of her petition, with this addition: That the land should descend the river, and be limited on three sides by the king's domain, and on the other side by the bank of the Mississippi, as shown by the plat on the back of the concession. This plat was a rude sketch, affording no material aid in locating the land.

On the 5th of October, 1793, the governor certifies that he had in person put Esther in possession of the land granted, the locality of which he again describes, in the terms as above set forth, except that he declares that the eastern boundary on the river shall be limited by the edge of the beach.

Esther's concession was not surveyed by the Spanish authorities.

On the 9th of May, 1798, Joseph Brazeau sold to Louis Labeaume part of the land granted to Brazeau in June, 1794, reserving for himself four arpens to be taken at the foot of the mound on the south part of the concession; Brazeau selling only sixteen arpens in depth to Labeaume, who accepted <sup>\*410]</sup> the <sup>\*</sup>sale with this reservation. In 1799, Labeaume applied to the governor to enlarge his tract acquired from Brazeau. "He asks that you will be pleased to grant him 360 arpens of land, including the land which he the petitioner bought of M. Brazeau; that is, twenty arpens in depth from the Mississippi in ascending the Rocky Branch, West  $\frac{1}{4}$  S. by sixteen arpens in front along the Mississippi, to be taken from the descending road into the creek; which is the same front of the petitioner's land, the angle (triangle) formed by the perpendicular from the road to the river by the creek, and by the river shall complete, or about, the tract asked for."

In February, 1799, the governor granted the land to Labeaume, with the boundaries asked for, and ordered that Soulard, the surveyor, should put Labeaume into possession, and execute a survey to serve the interested party, to obtain a complete title from the governor-general, which was wished for by the petitioner.

On the 20th March, 1799, Soulard proceeded to survey the land granted to Labeaume, from which the larger quantity of 374 arpens was found to be within the boundaries described in Labeaume's petition. The survey was regularly certified, April 10, 1799, and accompanied by a figurative plat.

The line marks of this survey have been retraced in the survey recently made by the United States, and the patent to Labeaume or his legal representatives, of the 25th of March,

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1852, is founded on it. But it is insisted that the survey includes the sixteen arpens reserved by Brazeau in his deed of May, 1798, to Labeaume; and on the existence of this fact the title of the plaintiff in the present controversy depends, as the land demanded lies within the bounds of the patent. Labeaume filed his title papers with the recorder of land titles, to be registered in February, 1806; and in his notice of claim, the tract partly in dispute is thus described: "Louis Labeaume, 374 arpens of land, conceded in part to Joseph Brazeau, the 20th June, 1794, and the other part to Louis Labeaume, the 15th February, 1779, settled and cultivated since both these dates."

On the 3d of September, 1806, the board of commissioners appointed to adjudicate claims to lands under the act of 1805, passed on Labeaume's claim. The clerk of the board gives a description of it in these terms: "Louis Labeaume claiming 374 arpens of land situate on the Mississippi, a distance of about two miles from the town of St. Louis, produces a concession (duly registered) from Zenon Trudeau, for four by twenty arpens, dated the 20th June, 1798, (25th June, 1794,) granted to one Joseph Brazeau, and another concession from said Zenon Trudeau to claimant, for the said 374 arpens, including the said \*four by twenty arpens, dated the 15th [ \*411 February, 1799; a survey of the same taken the 2d March, and certified the 10th April, 1799, together with a certificate by Zenon Trudeau of the sale of the said four by twenty arpens by said Joseph Brazeau, reserving to himself four arpens in superficies; said certificate dated the 12th May, 1798."

This entry is so confused as to be unmeaning without reference to the title papers of record. The board at that time rejected the claim because the concession had not been duly registered.

On the 22d September, 1810, the board confirmed the claim in the following terms: "Louis Labeaume claims three hundred and seventy-four arpens of land. See book No. 1, page 517. The board confirm to Louis Labeaume three hundred and fifty-six arpens, and four arpens to Joseph Brazeau, and order that the same be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, and, as respects the four arpens, agreeably to a reserve made in a sale from Joseph Brazeau to said Louis Labeaume, recorded in book C., page 339, in the recorder's office."

On the 14th of June, 1811, the board ordered both tracts to be surveyed at the expense of the United States, and to this end gave the following certificates to the parties respectively:—

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*"Commissioners' Certificate, No. 982, June 14, 1811.*

"We, the undersigned commissioners for adjusting the titles to lands in the territory of Louisiana, have decided that Louis Labeaume, original claimant, is entitled to a patent under the provisions of the fourth section of an act of congress of the United States, entitled 'An act respecting claims to lands in the territories of Orleans and Louisiana,' passed the third day of March, one thousand eight hundred and seven, for three hundred and fifty-six arpens of land, situate in the district of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, recorded in book C., page three hundred and thirty-nine of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, lieutenant-governor."

Signed by the commissioners.

*"Commissioners' Certificate, No. 983, June 14, 1811.*

"We, the undersigned commissioners for ascertaining and adjusting the titles and claims to lands in the territory of Louisiana, have decided that Joseph Brazeau, original claimant, is entitled to a patent under the provisions of the 4th section of an act of the congress of the United States, entitled 'An act \*412] respecting claims to land in the territories of Orleans and Louisiana,' passed the third day of March, one thousand eight hundred and seven, for four arpens of land situate in the district of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume, recorded in book C., page three hundred and thirty-nine of the recorder's office."

"By virtue of a concession, or order of survey from Zenon Trudeau, lieutenant-governor." Signed by the commissioners.

Owing partly to a contest between the parties in this cause, before the department of public lands, the surveys were not executed and finally settled so that patents could be issued thereon, till the 26th of February, 1852; and the patents for both tracts were issued on the 26th of March following: that to Labeaume, or his legal representatives, embracing the land in Soulard's survey; and the survey and patent made for Joseph Brazeau, or his legal representatives, are located on the southern boundary of Labeaume's tract. This suit had been brought in the circuit court before the surveys were approved, or a patent issued to either party.

The representatives of Brazeau have refused to receive the patent issued to them, and protest against the binding force

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of the survey; insisting that the confirmation by the commissioners conferred a perfect title for different land from that covered by the patent. On this state of facts, the circuit court instructed the jury as follows:—

“We have been engaged in this cause for the last fifteen days, endeavoring to ascertain the fact whether the tract of land confirmed to Louis Labeaume, according to Soulard’s survey of 1799, embraces the sixteen arpens confirmed to Joseph Brazeau. Brazeau got a concession for twenty arpens in front on the Mississippi by four arpens back, and sold the northern sixteen arpens front to Labeaume, reserving four by four, or sixteen arpens, at the southern end of the tract granted by the concession. In 1799, Labeaume got his tract enlarged by an additional concession, including the sixteen arpens front purchased from Brazeau. This latter concession was surveyed by Soulard, the proper Spanish surveyor, in 1799, and the survey was recorded.

“In 1810, the board of commissioners confirmed the grant to Labeaume, according to Soulard’s survey. This being the effect of the confirmation; at the same time that the board confirmed Labeaume’s claim, including the sixteen arpens front, the claim of Brazeau was also confirmed, and a survey in each case was ordered by the board.

“Recently, the surveys of these tracts were made according to \*the precise instructions as to their boundaries, coming from the general land-office at Washington, and pursuant to the order of the secretary of the interior; and on these surveys patents have issued, one to the legal representatives of Labeaume, and the other to the legal representatives of Brazeau; which tracts adjoin each other, on the southern boundary of Labeaume’s tract, as described in the patent; and one question is, whether the plaintiff to this suit can claim land elsewhere than that described in his patent; in other words, whether he can abandon the land surveyed for him, and granted by patent, and go further north and recover land there which never had been surveyed in conformity to the concession. We are of opinion that the United States reserved the power to locate, by survey, the land confirmed to Brazeau, and by such survey to separate it from the public lands, and from the lands claimed by others, and to issue a patent therefor, as was done in this instance; that this reserved power was vested in the executive department, whose acts in this instance bound Brazeau, and those claiming under him; nor can they extend their claim and recover land beyond the boundaries described in the patent to Brazeau or his legal representatives. The jury are further informed, that all in-

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structions heretofore given inconsistent with the foregoing are withdrawn from their consideration; this instruction having been given at the request of the jury, because they could not agree according to the instructions heretofore given them by the court."

To the giving of which instruction to the jury, the plaintiff, by his counsel, at the time duly excepted. A verdict was of course returned for the defendant.

To comprehend the scope of the foregoing instruction to the jury, we must consider the condition of claims to land derived from France and Spain, before the United States acquired Louisiana; with but few exceptions they were possessed and cultivated in the upper province, at the date of the treaty, by virtue of concessions from lieutenant-governors and commandants of posts, in which no definite boundaries were prescribed by the concessions themselves, but the surveyor-general of the province was instructed to measure the land, and mark out the boundaries, and to put the interested party into possession. As a general rule, a survey was required before possession was given. Often, however, and probably in most instances, no survey had in fact been made when the United States acquired the country, in 1803; and of this unsurveyed class was the concession to Joseph Brazeau. As these unlocated claims were usually surrounded in part by public lands, and in other part by the vague and unlocated claims of others, it became necessary that definite boundaries \*414] should be established by legal surveys, \*so that the limits of the public domain might be known, and private adjoining owners be exempt from disturbance and litigation.

It has often been held by this court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon congress, on which power was conferred by the constitution to dispose of, and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of congress from an early day.

The act of March 3, 1807, § 4, was the first that gave a board of commissioners power to adjudicate claims against the United States, and conclude the government as to the question of right in the claimant. The judgments of the

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board on all claims for less than a league square were to a large degree judicial, but as their powers and duties depended on the acts of 1805, 1806, and more especially on that of 1807, when they confirmed Brazeau's claim, we must ascertain from these laws whether more was to be done to conclude the United States as to any definite and distinct tract of land.

By the 6th section of the act of 1807, the commissioners were bound to transmit to the secretary of the treasury, and to the surveyor-general of the district where the land lay, transcripts of their final decisions, made in favor of each claimant, and were required to deliver to him a certificate stating the circumstances of the case, and that he was entitled to a patent for the tract therein designated; which certificate was to be filed with the recorder, if the land lay in the district of Louisiana, and with the register of the land-office, when the land lay in the Orleans territory.

In all cases where tracts of land were granted by the board, which had not been previously surveyed, the 7th section of the act of 1807 declared that they should be surveyed under the directions of the surveyor-general; and that he should transmit general and particular plats of the tracts thus surveyed, to the proper register or recorder, and also transmit copies to the secretary of the treasury. The certificate and plat being filed with the register or recorder, he was thereupon required to issue a patent certificate in favor of the claimant, which, being transmitted to the secretary of the treasury, entitled the party to a patent in like manner as patents were issued on lands sold by the United States.

\*By the act of April 29, 1816, a surveyor-general was [\*415 appointed for the territories of Illinois and Missouri, with general powers to survey the public lands into sections; and also to survey all lands confirmed by acts of congress, and to perform the duties imposed on his predecessor, the principal deputy for Missouri territory, whose duty it was to survey the claims confirmed by commissioners, in all cases where they had not been previously surveyed according to law.

The commissioners having given Brazeau a certificate that he was entitled to a patent, according to his confirmation, pursuant thereto, several surveys were made by deputy surveyors, under instructions from the surveyor-general, but they were rejected as improper and unlawful, either by him, or at the general land-office. Finally in March, 1852, as above stated, the claim was surveyed according to the instructions of the secretary of the interior, and a patent issued conforming to this survey.

The circuit court charged the jury, in substance, that in this

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case of confirmation by the board sitting at St. Louis, in 1810, the claim being unlocated and vague, power was reserved to the United States to locate the tract by survey.

It was competent for congress to take up these titles or rights, and act on them either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession lawfully acquired under France or Spain, without ascertaining, in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for congress to provide, that before a title should be given to any possessor, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced—these being left to the nation to whose powers they were confided; so that the question is, what has congress deemed expedient? Now the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely, to give defined limits to grants, may well be supposed to have actuated congress in 1807. The provisions of that act clearly show, that although congress intended that the commissioners should adjudge the existence of good titles to lands held \*416] under \*French and Spanish possessors, yet they did not intend that a final legal title, as against the United States, should be made to vague grants, until their bounds had been ascertained by the means there designated, and the particular tract defined by survey.

Congress might have said, as was done in case of the St. Louis town lots and out-lots, by the act of 1812, that each man should own what he had lawfully possessed under the former government; and if congress had done so, then the question would have been, in this instance, a matter of fact, to be tried by a jury, as to what the plaintiff did formerly possess, and consequently own. But congress having said, by the act of 1807, that he shall be confirmed in what shall be designated by a survey made under the authority of the United States, according to the direction of the board of commissioners, and such direction to survey being a condition which the judgment of confirmation carried along with it, until the survey was made, the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries, as this power was reserved

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to the executive department of the federal government; it follows that the legal representative of Brazeau, who brings suit, had no title at the time it was brought that would support an action of ejectment.

It is ordered that the judgment of the circuit court be affirmed.

Mr. Justice MCLEAN. In this case I do not dissent, as it is the understanding of the judges that the equity of the case remains open for investigation.

*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 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 circuit court in this cause be and the same is hereby affirmed, with costs.

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\* JAMES ADAMS, EXECUTOR OF THOMAS LAW, DE- [\*417  
CEASED, AND HENRY MAY, ADMINISTRATOR OF EDMUND AND THOMAS LAW, APPELLANTS, *v.* JOSEPH E. LAW, BY HIS NEXT FRIEND, MARY ROBINSON.\*

Where marriage articles, executed as an ante-nuptial settlement, recited the intention of the parties to provide a jointure for the wife, in lieu of dower, and then property was conveyed to a trustee, for the use of the husband for life, then for the use of the wife for life; and in case of the death of the wife during the lifetime of the husband, leaving issue of the said marriage, one or more children then living, then from, and immediately after the decease of the husband, upon trust for the child or children of the said intended marriage, this does not include grandchildren.<sup>1</sup>

The wife having died before the husband, leaving no child alive, but only grandchildren, these did not take.

The cases examined. A motion to amend the decree and mandate of this court, so as to exclude the grandchildren from the distribution of the fund, as legatees, upon the ground that they had elected to renounce their interest under the will of their grandfather, and claim under the marriage settlement, overruled.

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\* Mr. Chief Justice TANEY having been formerly consulted as counsel, did not sit on the trial of this cause.

<sup>1</sup> RELIED ON in *dis. op.* *Walton v. Cotton*, 19 How., 359. See also *Cutting v. Cutting*, 6 *Sawy.*, 400.

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THIS was an appeal from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington.<sup>1</sup>

The opinion of the court states the marriage articles between Thomas Law and Elizabeth Park Custis, and the further history of the matter, up to the death of Thomas Law, in 1834.

In 1832, Thomas Law executed a will, in which he bequeathed \$5,000 each to Thomas Law and Edmund Law, the sons of the late John Law, Esq., of Washington. These parties were represented by Henry May, their administrator, and one of the appellants. James Adams was the executor of the will.

He also bequeathed to a lad named Joseph Edmund Law, the son of Mary Robinson, the sum of \$1,000. This was the complainant below, and appellee in this court.

In 1838, the above-named Joseph E. Law filed his bill in the circuit court, by his next friend, Mary Robinson, against Adams, the executor, praying that he might be ordered to invest the sum of \$1,000, and pay the interest thereof to the complainant; and by an amended bill, prayed that Edmund and Thomas Law, Edmund Rogers, Eliza Rogers, and Eleanor Rogers, and the other heirs of Eliza P. Custis, together with sundry other persons, might be made parties.

In order to understand the position of the respective parties, it is proper to mention that the only child of the marriage between Thomas Law and Eliza P. Custis, was a daughter

\*418] \*named Eliza, who intermarried with Lloyd N. Rogers. Eliza Rogers died in the lifetime of her mother. At the time of these proceedings, Edmund Rogers and Eleanor Rogers were the only surviving children of Lloyd N. Rogers and Eliza, his wife.

On the 29th of December, 1832, during the lifetime of Thomas Law, Lloyd N. Rogers obtained from the orphans' court of Washington county, D. C., letters of administration upon the personal estate of Mrs. Elizabeth P. C. Law; and, as administrator, claimed the arrearages of the annuity of \$1,500, payable to Mrs. Law, with interest thereon, from the periods respectively, when the said annuity became payable and was in arrears.

This claim arose in this way. On the 9th of August, 1804, Thomas and Eliza Law, being desirous of separating, owing to domestic differences, Law executed to George Calvert and Thomas Peters a deed of certain real estate, to secure, by way of mortgage to his said wife, Eliza P. Law, an annuity during

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<sup>1</sup> Further decision. *Rogers v. Law*, 1 Black, 253.

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her life of \$1,500, for her own separate use and benefit, the said real estate, at her death, to be re-conveyed to Thomas Law and his heirs, clear of all incumbrances imposed by Calvert and Peters.

It should have been mentioned that, by a codicil to his will, Thomas Law bequeathed to his grandchildren, Edmund, Eliza, and Eleanor Rogers, five thousand dollars, with a provision, that it should be null and of no effect, if they should set up a claim under the marriage settlement.

All the parties being before the circuit court, an interlocutory decree was passed referring the case to the auditor, and James Adams was appointed trustee to sell the property, &c., &c.

The auditor made six reports, running from October, 1848, to September, 1852, on which day the last was filed. Exceptions were filed by Henry May, administrator of Thomas and Edmund Law, and also by Adams, the executor of the will. It is not material to state any other exceptions than those upon which the case came up to this court. These related to the two following claims:—

1. The claim of Lloyd N. Rogers, as administrator of Eliza P. Custis, the wife of the testator, amounting, in fact, to \$29,249.33.

2. A claim of Edmund and Eleanor Rogers, grandchildren of Thomas Law and his wife Eliza P., \$66,154.84.

If these claims should be admitted, the estate would be exhausted, and there would be nothing for the legatees.

In December, 1852, the circuit court passed a final decree, overruling the exceptions, and establishing, amongst other things, the two following orders:—

\*1. That the defendants, Edmund Law and Eleanor A. Rogers, as grandchildren of Mr. Law and children of Mrs. Rogers, take under the words of the deeds of 1796, 1800, and 1802.

6. That the administrator of Mrs. Law is entitled to the arrears of the annuity of \$1,500, from the 9th of August, 1804, to the death of Mrs. Law, with interest.

From this decree, May and Adams appealed to this court.

It was argued by *Mr. Brent* and *Mr. May*, for the appellants, and by *Mr. Carlisle* and *Mr. Coxe*, for the appellees.

The reader will find references to the authorities in the opinion of the court.

Mr. Justice GRIER delivered the opinion of the court.

James Adams, the appellant, whose account, as executor of

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Thomas Law, deceased, was the subject-matter of the decree below, excepts to it for the allowance of the two following items:—

1. The claim of Lloyd N. Rogers, as administrator of Eliza P. Custis, the wife of the testator, amounting to the sum of \$29,249.33.

2. A claim of Edmund and Eleanor Rogers, grandchildren of Thomas Law and Eliza, amounting to \$66,154.84.

1. As the court is equally divided as to the legality of the first item, the decree must stand affirmed as to that amount, without further remark.

2. The claim of the grandchildren will require more extended notice.

This claim is founded on certain marriage articles, executed between Thomas Law, of the first part, Elizabeth Park Custis, of the second part, and James Barry, of the third part, on the 19th day of March, 1796. They recite that a marriage is intended between said Thomas and Elizabeth, and that "it is the wish and design of the parties that a jointure should be made to the said Elizabeth, in lieu and bar of all claim on the estate" of said Thomas, &c., &c. In consideration of the marriage portion-money, &c., the said Law conveys to James Barry certain real estate "to the said James Barry, his heirs, and assigns, forever, upon the trusts and to and for the uses, intents, and purposes following, that is to say: for the use of the said Thomas Law, his heirs, and assigns, until the solemnization of the said intended marriage, and afterwards to permit and suffer him, the said Thomas Law, to receive all the issues and profits of the said lands and premises, during the term of his natural life, for his own use; and immediately after the decease of the said Thomas Law, in case the said \*420] Elizabeth Park Custis shall \*survive him, her intended husband, that she, the said Elizabeth Park Custis, shall have, accept, and receive the issues and profits of the said lands and premises, for and during the term of her natural life, to and for her own use and benefit; but in case the said Elizabeth shall depart this life in the lifetime of the said Thomas Law, leaving issue of the said marriage one or more children then living, then, from and immediately after the decease of the said Thomas Law, upon trust for the child or children of the said intended marriage, to be equally divided between them, if more than one; to have and to hold the same lands and premises, as tenants in common in fee-simple, share and share alike; and if only one child, then to such child, his or her heirs and assigns forever; but in case there shall be no issue of said marriage, then, upon the death of the

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said Thomas Law and Elizabeth Park Custis, and the survivor or survivors of them, to revert back to the said Thomas Law, his heirs, or assigns, or subject to be disposed of by him by last will and testament, or other deed, as he may judge proper."

The marriage between the parties was solemnized in the same year. Afterwards, (in 1800,) Mr. and Mrs. Law joined in another deed, substituting Thomas Peters as trustee instead of Barry, and other property in place of that conveyed to Barry, but subject to the conditions and limitations of the marriage articles. And again, in 1802, another change was made in the property, subject to the same limitations. The daughter and only child of this marriage intermarried with Lloyd N. Rogers, and died before her mother, leaving children, the claimants, Edmund and Eleanor Rogers. Mrs. Law died in 1832, and the testator in 1834.

The only question for our decision is, whether the grandchildren, Edmund and Eleanor Rogers, took any thing by the deed of settlement?

It is clear, from the face of this deed, that it is an executed marriage settlement, and that it must be expounded on legal principles applicable to other deeds. Limitations, either of legal or equitable estates, receive the same construction in a court of equity as in courts of law. "In executed trusts, whether by deed or will, the rule of law must prevail, and the apparent intention must give way to those fundamental rules, which for ages have served as landmarks in the disposition of property." 2 Spence Eq., 131.

The trustee in this deed had no duty to perform; and as the estate is not limited to his own use, the trusts are but uses, and are executed as such by the statute. The object and purpose declared by the parties are, to secure a jointure to the intended wife in lieu and bar of dower, and to release the marital rights \*of the husband over the separate estate of the wife, in possession and expectancy. The settled property belonged [\*421 entirely to the husband. The estate limited to the wife is contingent on her surviving her husband, in whom an estate for life is absolutely vested. If the life-estate of the wife should vest by the contingency of her survivorship, there is no provision for the children or issue of the marriage, and the fee reverts to the right heirs of the husband. The estate limited to the children of Mrs. Law is a contingent remainder, depending on the event that Mrs. Law shall "depart this life in the lifetime of said Thomas Law, leaving issue of said marriage, one or more children then living," &c.

Does this description include grandchildren? We think it does not.

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The word "issue" is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. But the legal construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring. See *Jarman on Wills*, 51. It is true, in the construction of wills, where greater latitude is allowed, in order to effect the obvious intention of the testator, grandchildren have been allowed to take, under a devise "to my surviving children." But even in a will, this word will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. Hence it is decided, that a power of appointment to children will not authorize an appointment to grandchildren. *Robinson v. Hardcastle*, 2 Bro. Ch., 344; 4 Kent. Com., 345. In *Reeves v. Brymer*, it is said by Lord Alvanley, that "children may mean grandchildren when there can be no other construction, but not otherwise." 4 Ves., 697.

The declared object of this deed is jointure, not a settlement for the issue of the intended marriage; for there is no provision made for them, in case the wife should survive the husband. The contingency, also, on which this remainder depends, is not the leaving issue generally of the marriage; but the "issue" to whom the estate is limited are described and defined to be "one or more children living," to be equally divided between them if more than one, and, "if only one child, to such child, his heirs," &c. There is no provision for the issue of deceased children, or for grandchildren, under any circumstances. The parties have carefully defined what they mean by "issue," and the court, in construction of their solemn deed, have no right to distort its plain meaning, to meet contingencies not provided for. It is an ancient and well-settled rule of construction, that, "where a deed speaks by general words and afterwards descends \*422] \*to special words, if the special words agree to the general words, the deed shall be intended according to the special words; for, if the general words should stand without any qualification, the special words would be altogether void, and of no effect." 8 Co., 307.

Hence, in the construction both of wills and deeds, where the instrument has not, so carefully as in the present case, limited the word "issue" to children living, &c., but where the term is used without qualification, and is in another part of the same instrument supplied by the word child, or children, as a synonym, the courts have uniformly restrained its signification to children. Thus, in *Carter v. Bentall*, 2 Beav., 557, where the devise was a moiety to "issue" of his daughter, and, if only one child, then to such one child, and the trustee was

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ordered to lay out the dividends in the maintenance of such "issue," Lord Langdale, M. R., held that the word issue was thus explained by the testator to mean "children."

In the case of *Loveday v. Hopkins*, Amb., 273, it was held that grandchildren were not entitled under a bequest to "heirs;" because the term appeared, by the context of the will, to be used in the sense of children.

In *Swift v. Swift*, 8 Sim., 168, by marriage articles the jointure property was limited, after the death of the survivor, on the "issue" of the marriage living at the death, in equal share if more than one, and if but one, to go to such "child." The only child of the marriage died before the contingency, leaving a child. It was held that "issue" was to be construed "child," and the legacy did not vest in the grandchild.

It would lead to too great prolixity to examine particularly the very numerous cases in which similar language has received the same construction. A reference to a few more directly in point will suffice. *Fitzgerald v. Field*, 1 Russ., 430; *Needham v. Smith*, 4 Id., 318; *Ridgeway v. Munkittrick*, 1 Dru. & W., 84; *Peel v. Catlow*, 9 Sim., 373; *Jennings v. Newman*, 10 Id., 223; *Tawney v. Ward*, 1 Beav., 563; *Winn v. Fenwick*, 11 Id., 438; *Campbell v. Sandys*, 1 Sch. & L., 281.

Being of opinion, therefore, that the grandchildren took nothing under the limitations of the deed of marriage settlement, the decree of the court below is reversed, as to the allowance of \$66,154.84, made to Edmund and Eleanor Rogers, and affirmed as to the residue; and the record remitted, with directions to make distribution accordingly.

*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 the opinion of this court that the grandchildren took nothing under the limitations of the deed of marriage settlement; whereupon it is now here ordered, adjudged, and decreed by this court, that so much of the decree of the said circuit court as allows \$66,154<sup>81</sup><sub>100</sub> to Edmund and Eleanor Rogers be and the same is hereby reversed and annulled, and that the residue of the said decree be and the same is hereby affirmed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to make distribution accordingly, and to proceed therein in conformity to the opinion of this court.

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And it is further ordered and decreed by this court that the costs in this court be paid out of the fund by the trustee.

*After Order.*

*Messrs. Brent and May* having, on a prior day of the present term, to wit: on Friday the 16th instant, filed a motion in the words and figures following, to wit:—

“The above appellants come here and move the honorable supreme court so to amend their decree and the mandate to be remanded thereon, as to declare that the grandchildren of the testator, Thomas Law, by reason of their election and renunciation as shown in the interlocutory decree of the circuit court, (see page 66 of the record,) are not entitled as legatees of said testator to participate in the distribution of the fund in controversy. And in making this motion, the appellants suggest that this question arises on the record in this court, and that it is the practice of this court to settle all questions apparent on the record, to prevent future appeals, and especially where, as in this case, the effect of the election and renunciation only becomes material in carrying out the decree of this court, disallowing the claim which the appellees elected to abide by; all of which is respectfully submitted.

ROBERT J. BRENT,  
H. MAY, *for appellants.*”

And the court having duly considered the same, Mr. Justice MCLEAN announced the following decision thereupon, to wit:

“The court hold that the pleadings in the case do not embrace the point stated in the above motion. The heirs referred to, the children of Mrs. Rogers, having relinquished all claim under the will, and claimed under the deed of settlement, the court held they were not entitled to any part of the estate under the deed of settlement, on a construction of that instrument. Under these circumstances, whether they can claim as distributees of the general estate, is a question not considered by the court. The motion is therefore overruled.”

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Herndon v. Ridgway et al.

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\*EDWARD HERNDON, APPELLANT, *v.* JAMES C. RIDGWAY,  
ERI RIDGWAY, WILLIAM H. GASQUE, AND HENRY DAVIS.

Where a bill was filed in the district court of the United States for the northern district of Mississippi, against four defendants, who all resided in Alabama, two of whom appeared for the purpose of moving to dismiss the bill, and the other two declined to appear altogether, nor was process served upon them, the court had no alternative but to dismiss the bill. The two absentees were essential parties.

Jurisdiction over parties is acquired only by a service of process, or their voluntary appearance. If an essential portion of the defendants resided in another state, so that process could not be served upon them, and they would not voluntarily appear, the bill must be dismissed for want of jurisdiction.<sup>1</sup>

THIS was an appeal from the district court of the United States, for the northern district of Mississippi.

It was a bill filed by Herndon, under the circumstances stated in the opinion of the court, and which was dismissed by the court below.

The process against Davis was served upon Messrs. Dowd and Murphy, his attorneys. A motion was made to dismiss the bill for three reasons, the second of which was:—

“Because Henry Davis is not a citizen of the northern district of Mississippi, and Dowd and Murphy are not his attorneys of record in any of the courts of the United States, and have not instituted proceedings or suit therein against said Herndon, but are attorneys of record of said Davis, in the circuit court of Monroe county, Mississippi, a state court, as per affidavit on file.” The affidavit was as follows:—

“In open court personally appeared Wm. F. Dowd, one of the firm of Dowd and Murphy, who made oath that Dowd and Murphy are not the attorneys of record of Henry Davis, and have not been, as such, to institute any suit in this court, or any one of the federal courts of the United States, against Edward Herndon, for the recovery of the property mentioned in the bill filed in this cause; but they, said Dowd and Murphy, are the attorneys of record of Henry Davis to prosecute a suit against said Herndon, in a state court, to wit: the circuit court of Monroe county, in the state of Mississippi.

“W. F. DOWD.”

The district court dismissed the bill, and Herndon appealed to this court.

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<sup>1</sup> FOLLOWED. *Chaffee v. Hayward*, 20 How., 215. See *Case of the Sewing Machine Cos.*, 18 Wall., 580.

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The case was argued by *Mr. Adams*, for the appellant, who contended that service upon the attorneys was sufficient; and by *Mr. Phillips*, for the appellees, who contended that it was not, and referred to 3 Bro. Ch., 521; 2 Cox. Ch., 389.

\*425] \*Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff complains that, in 1849, he purchased from James C. Ridgway a number of slaves, for whom he gave his bond to the vendor; that this was transferred to E. T. Ridgway for the use of Wm. H. Gasque, and that a suit is pending in the district court of the United States for that district, to collect the sum due; that the slaves are in the possession of Wm. P. Givan, to whom he sold them with a warranty of the title. That one Davis claims the slaves under a title paramount to that derived from Ridgway, and had brought a suit for them in the state court, which had proved ineffective, and now threatens to renew it. The object of the bill is to require the two Ridgways and Gasque, on the one part, and Davis, on the other, to interplead in the district court of the United States, to settle their right to the slaves, so that he may pay the purchase-money to the proper person. He alleges that the vendor, Ridgway, is insolvent.

The four defendants are citizens of Alabama. Notice of the motion for injunction was served on the attorneys for the plaintiff, in the suit in the district court, and upon the attorneys who prosecuted the suit against Givan for Davis in the state court. The attorneys for Davis disclaim any connection with him in this controversy, and move to dismiss the bill for want of jurisdiction. Gasque appears and demurs to the bill for the same cause, and no notice or appearance exists in the record for the vendor, Ridgway. The district court retained the bill twelve months, and then dismissed it on these motions.

The jurisdiction of the district court over parties is acquired only by a service of process, or their voluntary appearance. It has no authority to issue process to another state. In the present case, the absent defendants decline to appear, and process cannot be served, so that the court is without any jurisdiction over the essential parties to the bill. There was no course open to it, except to dismiss it for the want of jurisdiction, upon the motion submitted for that object. *Toland v. Sprague*, 12 Pet., 300.

There is no error in the record, and the decree is affirmed.

*Order.*

This cause came on to be heard on the transcript of the

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record from the district court of the United States for the northern district of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered, 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.

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\*THE CITY OF BOSTON, PLAINTIFF IN ERROR, *v.* DAVID R.  
LECRAW.

By the old laws of Massachusetts, a littoral proprietor of land owned down to low-water mark; subject, however, to the condition that, until he occupied the space between high and low-water mark the public had a right to use it for the purposes of navigation.

The city of Boston had the same right as other littoral proprietors, and consequently had the control over a dock which was situated between two wharves; one end of the dock being at high-water mark, and the other at low-water mark. It had, therefore, the right to construct a sewer for the purpose of carrying off the drainage from the high water, to the low-water end of the dock.<sup>1</sup>

The city had not dedicated the dock to public uses by merely abstaining from any control over it. The principles which regulate a dedication to public uses, examined.

Although the presumption of such a dedication is a question of fact for the jury, yet it is for the court to instruct them what facts, if proved, will justify such a presumption.

THIS case was brought up, by writ of error, from the circuit court of the United States for the district of Rhode Island.

It was a suit originally commenced in the circuit court of the United States for the district of Massachusetts, and removed into the circuit court of Rhode Island, upon the ground that Mr. Justice Curtis was so connected with the plaintiff as to render it, in his opinion, improper for him to sit in the trial of the suit; and that Judge Sprague was an inhabitant of Boston, and concerned in interest in this cause, so as to render it, in his opinion, improper for him to sit in the trial thereof. It was therefore ordered, (both judges concurring,) that an authenticated copy of the record and all proceedings in the suit, should be certified to the circuit court of Rhode Island.

Lecraw, a citizen of New Hampshire, as surviving partner of the firm of Lecraw and Perkins, brought an action on the case against the city of Boston, for erecting a public nuisance, which was specially injurious to the plaintiff.

Lecraw was in possession of a wharf estate, situated in the

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<sup>1</sup> REVIEWED. *Richardson v. City* 24 Id., 192. And see *Backus v. Detroit*, 19 How., 267, 269; s. c. *troit*, 49 Mich., 116.

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southerly side of Boston. His wharf extended to the sea, and was entirely unobstructed at the end seaward. Along the southerly side of the wharf there was a dock about thirty feet wide, extending from the end of Summer-street to the sea. In July, 1849, the board of health ordered a drain, or sewer, to be constructed, from one end of the dock to the other, so as to carry the drainage out to deep water. It was constructed as follows: The obstruction complained of, as appeared by the evidence, was a drain composed of plank and timber, 460 feet long, eight feet wide, and eleven feet high to top of piles, and resting upon the surface of the mud in the dock, which, \*427] extended \*from the head of the dock to within \_\_\_\_\_ feet of the foot of the same, and at the end of said drain was seventeen feet from the plaintiff's wharf, on the north and thirty-two feet from the other wharf, on the south.

For this obstruction to the approach of vessels to his wharf, Lecraw brought his action, and upon the trial of the cause the jury found a verdict in his favor, assessing the damages at \$9,280.

The bill of exceptions taken by the defendant included all the evidence and the numerous prayers offered to the court, which are sufficiently noticed in the opinion of this court.

The case was argued by *Mr. Ames* and *Mr. Chandler*, for the plaintiff in error, and by *Mr. Tilton* and *Mr. Durant*, for the defendant.

The briefs on both sides were very voluminous, and it is not possible to do more than state the positions assumed by the counsel respectively.

The counsel for the plaintiff in error endeavored to establish these positions as matters of law, or matters of fact deduced from the evidence. Each one of them was sustained by numerous references.

1. The whole territory of Boston was originally granted to and held by the town, which made grants thereof from time to time to such persons and on such conditions as it deemed expedient.

2. The city of Boston as successor of the town, now owns the fee in this dock, and the title to the estates on each side of it is derived from the town.

The wharf in possession of the plaintiff as lessee, is known as the Bull wharf.

The wharf on the other side of the dock is known as the Price wharf.

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The title of both wharves is derived from the town of Boston.

3. It thus appears, that the dock between these wharves has been recognized by all parties, including the plaintiff's lessor, as the property of, and under the control of, the city of Boston.

4. This place has been used for the purposes of drainage beyond the memory of man, the common sewer in Summer-street entering at the head of it, and emptying its contents therein.

5. The town has always exercised control over this dock.

Upon these positions the counsel for the plaintiff in error made the following points:—

1. It was error in the court below, to rule that the plaintiff was entitled to recover of the city of Boston, damages for the \*act of the board of health of said city. The action was not properly brought, and cannot be maintained [\*428 against the defendant corporation.

2. The structure, which the plaintiff alleges to be a public nuisance in a public dock, was erected by the board of health in the performance of a duty imposed upon them by law. The act was performed in good faith, for the preservation and protection of the public health, without negligence, and was lawful in itself. Such proceeding, if prejudicial to the interest or use which any individual may have before enjoyed in said dock, affords no ground of action, but is *damnum absque injuria*, and the judgment and decree of the board of health, not being impeached, are conclusive of the necessity of the structure.

3. If the *locus* was a public dock, slip, or way, which all the public had a right to use as a public dock, this fact did not vest in the owners of the adjoining wharves or flats any right whatsoever to use it for any other purpose than as a passageway in boats or vessels to and from other portions of Summer-street, in common with other citizens of the commonwealth; and the plaintiff having no peculiar right, easement, or privilege therein, has on claim for damages in a civil suit, for any obstruction thereof.

4. Inasmuch as the plaintiff below set up a dedication of the *locus* as a public dock, the nature of the dedication, if any, and the character of the dock thence derived, were questions of fact for the jury, and they should have been cautioned, that, considering "the rights of the owners of flats in the same as long as the owner leaves such flats open and uninclosed, under the law of Massachusetts, there must be some plain and explicit declaration by the owner of flats that he

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doth dedicate the same to public use, as a public dock, quay, or waterway, in order that the jury should find that the same were thus dedicated, and that the use of the same for passage or laying of vessels is no evidence of claim of such flats, as a public dock, quay, or way, by the public, and is no evidence of their acceptance of such dedication."

5. The selectmen of Boston, acting under the express authority of law, as early as 1710, authorized the construction of a common sewer in Summer-street. In 1728, they authorized Vassall, and the deacons of the old church, to lay a drain through this street, "down to the sea." In 1804, the sewer was relaid "through Summer-street to the sea," and the expense was apportioned upon the inhabitants benefited, by the selectmen, according to law.

At various periods between 1710 and the present time, the existence of this drain has been recognized, and its repair ordered, and, in 1840, it was relaid by the city authorities.

\*429] The counsel for the defendant in error made the following points, each one of which, together with its numerous subdivisions, was sustained by a great number of authorities, which there is not room to transcribe:—

I. The first point made by the plaintiffs in error, namely, that the city are not liable, as a corporation, for the acts complained of, is not open to them upon this record. No such point was raised or exception taken before the circuit court; on the contrary, it was admitted that the city were responsible if the acts were illegal.

II. As the case was submitted to the jury, three facts were to be found by them, and are now to be taken as established.

1. The dock was a public dock.

2. The structure complained of was a public nuisance.

3. The defendant in error suffered peculiar and special damages, not common to, and much greater than the public in general suffered.

The case of the defendant in error rests upon this foundation. The dock was a public dock, which he had the right to use; the city destroyed that right by a public nuisance.

The city now set up the justification that their own common sewer, which was exclusively under their own control, created a nuisance in this dock, and that, by way of abating the nuisance, they built a drain through the dock, which destroyed it.

For this act they say there is no redress.

To this justification the following objections are made:—

1. It was not in the power of the state to authorize any city to do the acts complained of, without making compensation.

2. The powers given to the city, (Rev. Stat. ch. 21, § 9,)

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are "to destroy, remove, or prevent nuisances." Under this delegated authority to exercise the sovereign right of the state to regulate by health and police measures the use of property, the city seek to exercise another sovereign right of the state, namely, the power to authorize erections within navigable waters.

3. No such power as is claimed was ever intended to be given to the board of health, or to be exercised in the manner in which it was exercised.

The power given is to "remove, abate, and prevent nuisances." Under this power, the general right is claimed to destroy property and erect and maintain permanent structures, without making compensation, and in this particular case, the right to erect and maintain a public nuisance in the harbor of Boston.

4. The extraordinary powers claimed for the board of health would be contrary to the provisions of the constitution of Massachusetts.

5. But if the act of laying the drain were not unlawful, or \*the subject of an indictment, still, the city must make [\*430] compensation, because the damages were not consequential merely, but were directly occasioned by the destruction of a legal right.

III. The court properly ruled that the action could be sustained if the dock was a public dock, and the use of it was destroyed by a public nuisance, which cut off all access to the sea, and occasioned to the defendant in error peculiar and special damages, not common to and much greater than the public in general suffered.

IV. The court did rule that the use of the flats for passage or dockage was not sufficient evidence of dedication.

The fact of dedication may be proved in various ways; no particular declaration of the owner is requisite, and no particular form is necessary. *Godfrey v. City of Alton*, 12 Ill., 29, 35; *Kennedy's Executors v. Jones*, 11 Ala., 63, 82; *Le Clercq v. Gallipolis*, 6 Hamm. (Ohio), 354; Best on Presumptions, § 101.

V. The plaintiffs in error apparently claim the right to create the public nuisance in question, upon two other distinct grounds of private right or title.

1. That they had the right to place a drain there, because the dock had been dedicated to the city as a place for drainage.

2. That the dock had been laid out as a street, and the city, therefore, had the right to put a drain there, although they had never made the street.

Upon the question of a right to place a drain in the dock.

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1. The rights of drainage claimed by the city cannot be maintained, because, if any right of drainage into the dock existed before 1834, it was a right of individuals, not of the town or city. Before 1834, the town or city had no rights in, or control over, the sewers and drains. They were wholly built and owned by individuals. For the history of the legislation upon this subject, see *Boston v. Shaw*, 1 Metc. (Mass.), 130.

2. If the city had any right to use the dock for an ancient drain, they had no right to enlarge and change the character and structure of the drain. *Cotton v. Pocasset Manufacturing Co.*, 13 Metc. (Mass.), 429.

3. If the dock had been dedicated as a place for the discharge of a drain, that would not justify taking the dock as a place for the drain itself, nor creating a public nuisance in it.

Upon the rights claimed to place a drain in the dock, on the ground that it was a street.

1. The defense now set up by the city, that the place in dispute was a street, and that the city, therefore, had a right to construct a drain, cannot be sustained, because the jury have found it to be a public dock.

2. Nor could the city, in the court below, defend themselves upon this ground.

3. By the laws of Massachusetts, a highway or street <sup>\*431]</sup> cannot be laid out over the flats between high-water mark and low-water mark. *Commonwealth v. Coombs*, 2 Mass., 489; *Hood v. Dighton Bridge*, 3 Id., 263; *Arundel v. McCulloch*, 10 Id., 70; *Kean v. Stetson*, 5 Pick., 492; *Commonwealth v. Charlestown*, 1 Id., 180; *Charlestown v. Middlesex*, 3 Metc., 202; *Henshaw v. Hunting*, 9 Cush., 203.

This was conceded by the counsel for the plaintiffs in error to be the law of Massachusetts, and they even sought to extend it to the case of a dock. Ruling 1, p. 78.

4. As the structure was a public nuisance, such a use of the flats can in no view of the case be justified. By Parker, C. J., *Commonwealth v. Charlestown*, 1 Pick., 180, 184; *Brower v. The Mayor, &c., of New York*, 3 Barb. (N. Y.), 254, 258.

5. As the structure cut off all access to the sea, it cannot be justified under a right to make a street or any other right. *Frink v. Lawrence*, 20 Conn., 117; *Shaw et al. v. Crawford*, 10 Johns. (N. Y.), 236; *Cox v. The State*, 3 Blackf. (Ind.), 193.

6. If a street had been made to the water, that very act gave the public the right to use the water and the dock beyond the street. *Godfrey v. City of Alton*, 12 Ill., 29, 36, 37; *Rowan's Executors v. Portland*, 8 B. Mon. (Ky.), 232, 242; *Kennedy's*

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*Heirs v. Covington*, 8 Dana (Ky.), 50, 61; *City of Louisville v. Bank of the United States*, 3 B. Mon. (Ky.), 138, 144, 157.

7. If the city had the right to build a street, it would be because the public convenience and necessity required a public street for travel.

The orders of the mayor and aldermen to make a drain through the dock, cannot be justified on the ground that the city had the right to make a different structure, namely, a street.

Mr. Justice GRIER delivered the opinion of the court.

The defendant in error, a citizen of New Hampshire, instituted this suit against the city of Boston, charging it with the erection of a public nuisance, which was specially injurious to the plaintiff. The declaration contains seven counts. As the jury, under the instructions given by the court, gave a verdict for the plaintiff below on the last two only, it will be unnecessary to notice the others, or the points of law applicable to them.

These counts set forth, in substance, that in the year 1849 the plaintiff and a partner since deceased, carried on the business of buying and selling wood and coal in Boston, and were in possession of a wharf known as the Bull wharf; that the dock forming the southerly boundary of said wharf, and extending from Summer-street wharf, was a part of the harbor of Boston, \*and a public dock, slip, or way, navigable by vessels, and over which the waters of the sea ebbed and flowed, and by reason thereof the plaintiff ought to have been allowed to pass and repass as over a navigable highway with boats and vessels, over and through said dock from the wharf by him possessed to the channel of the sea; that defendant had erected piles and a drain in the dock, to the destruction of the navigation therein, and the special injury of the plaintiff.

A congeries of points or prayers of instruction, exceeding thirty in number, and covering nearly as many folios, were submitted to the court, some of which were given as prayed for, some with "qualifications," and many refused.

If a judge, in answering such a mass of hypothetical and verbose propositions, should occasionally contradict himself, or fall into an error; or if the jury, instead of being instructed in law, should be confused and misled, it may be considered the legitimate result of such a practice. We do not think it necessary therefore, to examine particularly each one of this labyrinth of propositions; but, after a brief history of the title of the parties, and the admitted facts of the case bearing on its merits, we will state the law as applicable to them, and thus

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be enabled to test the correctness of the charge of the court in the instructions given or refused.

The original charters to the Plymouth company of that part of the territory which afterward constituted the colony of Massachusetts, conferred on them not only the property in the land, but all the "franchises, loyalties, liberties, &c., and the requisite civil and political powers for the government of the colony."

By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extended to high-water mark only. But by an ancient ordinance, usually denominated the ordinance of 1641, § 3, it is declared "that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: Provided, that such proprietors shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands."

This is the foundation of what may be called the common law of Massachusetts on this subject. By it the grantee of land bounding on navigable waters where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and low-water mark, and not a mere <sup>\*433]</sup> indulgence <sup>\*or gratuitous</sup> license, given without consideration, and revocable at the pleasure of the grantor. See *Austin v. Carter*, 1 Mass., 231, and *Commonwealth v. Alger*, 7 *Cush.*, 71.

As a consequence of such ownership, it is ruled that the proprietor of the land bounding on tide-waters has such a property in the flats to low-water mark, that he may maintain trespass, *quare clausum fregit*, against one who shall enter and cut down piles placed there by the owner, with a view to build a wharf or otherwise inclose the flats. But the right of the littoral proprietor under the ordinance has always been subject to this rule: that until he shall build upon his flats or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation; so long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right. 7 *Cush.* 75. This property is also subject to certain restrictions in its use, so that the state, in the exercise of its sovereign power of police for the protection of public harbors, and to prevent encroach-

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ments therein, may establish lines, and restrain and limit this power of the owner over his own property.

The whole territory now occupied by the city of Boston was originally granted to and held by the town, which made grants thereof from time to time, to such persons, and on such conditions as it deemed expedient; and the city of Boston, as successor to the town, continues to own such portions of the original territory as have not been sold or otherwise disposed of. But, while it acknowledged the rights of its vendees of lands adjoining the shore to wharf out opposite their respective lots, by virtue of the police power exercised by it over the harbor, it superintended and defined the limits within which the owner should exercise his rights.

In 1683, "the selectmen of Boston staked out a highway for the town's use, on the southerly side of the land belonging to John Gill, deceased, (under whom the plaintiff claims,) being thirty feet in width, from the town corner of said Gill's wharf, next the sea." This is the street since called Summer street. They laid also another street, "near the shore, on the proprietor's land, fifty feet towards the sea-shore." But they ordered, at the same time, "that the flats and lands between the said highway and the sea be granted to the proprietors of the land, which are abutters on the way, in equal portion to their fronts."

Summer-street, as laid out, ended at high-water mark, and has not yet been extended, nor have the city made any erections on their land between high and low water, previous to 1850; but the public right of navigation over it has been exercised up to \*the foot of Summer-street. The drains [<sup>\*434</sup> and sewers from that street, and others connected with it, have hitherto been made to discharge their contents at that point. In course of time, however, as the city increased, this drainage increased also, to such an extent as to become pestilential, and a very great nuisance to the neighborhood. In consequence thereof, the city of Boston has been twice (in 1848 and 1849) indicted for the nuisance, and sentenced to pay a fine. Since that time, the mayor and aldermen, acting as the board of health, have directed the drains or sewers to be continued out, on the land of the city opposite Summer-street, to low-water mark. This is the first attempt by the city to reclaim this land from the sea, and use it for their own benefit, and constitutes the erection which is now the subject of complaint. The sewers are not made to discharge their contents on the plaintiff's land, but into the sea. No property of the plaintiff has been taken for the public use; nor does he in these counts, on which the verdict was obtained, claim any private right of way over the land of defendants, but states his

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damage to have accrued by a public nuisance, specially injurious to his public right of navigable way over the lands of the defendant.

That the plaintiff had, in common with the rest of the world, a right to navigate over the land belonging to the city, on which the erections complained of were made, is not disputed. Nor is the title of the city to the land so used, unless they have granted it away, or otherwise disposed of it, a subject of dispute in the case. Those under whom the plaintiff claims, as owners of the property adjoining Summer-street, have exercised their right of dominion over the land to low-water mark by covering it with a wharf, many years ago, which is called Bull's wharf. And those who adjoin the street on the other side, have in the same manner exercised their right by erecting a wharf called Price's wharf. The property of the city being but thirty feet wide, and lying between these two wharves, was thus, by the accidents of its form and position, converted into a dock or receptacle for vessels, without any act of the owners of the land. A dock is defined by philologists, according to the American use of the term, to be, "the space between wharves." No dock or slip has been made by the city or people of Boston on their land, either for their own use, or that of any other extraneous or indefinite public. So long as they did not elect to exercise their dominion over this part of the shore, the public right of navigation continued. It was a right defeasible at the will of the owner of the subjacent land. It was a natural right, not derived from any grant, real or presumed, originating with the owner of the soil. But the adjoiners, by the use of this right of navigation \*435] in connection with their wharves, claim a right to enjoy the benefit of defendant's property as a dock for their wharves, and thus convert it to their private use, under color of a public right.

In order to effect this, it is contended that the people of Boston, by not exercising their right of reclamation, and by using their property according to their own pleasure, have dedicated it to the public, or world in general, as distinguished from the public, or people of Boston, and have abandoned the full dominion which they once might have exercised over it.

The people of Boston, who owned this land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called "town dock" or "public dock," (which were used as synonymous terms,) it would

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furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city.

The principles of law on which a presumption of the dedication of private property to public use are founded, are correctly stated (3 Stark. Ev., 1203) to be: "That the law will not presume any man's acts to be illegal, and will therefore attribute to long continued use and enjoyment, by the public, of a right of way or other privilege in or over the lands of another, to a legal rather than an illegal origin; and will ascribe long possession which cannot otherwise be accounted for, to a legal title: upon a reasonable principle and very forcible presumption, that the acquiescence in such enjoyment, for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness on their part that the enjoyment was rightful, and could not be disturbed; and also on consideration of the hardship which would accrue to parties, if after long possession, and when time had robbed them of the means of proof, their titles were to be subjected to a rigorous examination."

It is evident that these principles can have no application to the present case. The exercise of the public right of navigation over the soil of defendant is fully accounted for without any presumption of grant or dedication by the owners. The public enjoyed this highway of nature by a title reaching far before the advent of the Pilgrims, and paramount to any grant to them or by them; but by the law the enjoyment of this public right was made defeasible by the owner of the land. Till he reclaimed his land, the public needed no grant or dedication by him, in order to their enjoyment of the right of navigation over it. The \*owner was not bound to [ \*436 exercise his right within a given time, or forfeit it. A man cannot lose the title to his lands by leaving them in their natural state without improvement, or forfeit them by non-user.<sup>1</sup> See *Butz v. Ihrie*, 1 Rawle (Pa.), 218.

So long as the city chose to leave their land unreclaimed from the sea, they could not hinder the public navigation over it when covered with water, and could not, therefore, be properly said to acquiesce in that which they could not hinder. Nor could a grant or dedication of a right of way over their land be presumed in favor of the public, who enjoyed it under a different and paramount tenure. The public right has existed and been exercised for thousands of years, but is not hostile to the defendants, though defeasible

<sup>1</sup> QUOTED. *Potomac S. B. Co. v. Upper Potomac S. Co.*, 109 U. S., 684.

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at their will. It resembles the case of *Rex v. Hudson*, 2 Str., 909, where a dedication of land as a public highway was claimed by proof of sixty years' use; but the defendant produced a lease of the way for fifty-six years, and the court decided that no presumption of a dedication could arise during the lease, for the owner could not deny their right to use it, and there could be no presumption from his acquiescence.

It is true that the presumption of a dedication is one of fact, and not an artificial inference of mere law, to be made by the court, yet it is an inference which the court advise the jury to make upon proof of certain facts. It is the duty of the court to state what facts, if proved, will justify such a presumption. To instruct the jury that certain facts are not "sufficient" evidence on which to presume a dedication, without informing them what facts would constitute sufficient evidence for that purpose, is devolving on them the decision of both law and fact, and permitting them to dispose of men's property at their discretion, by presuming grants without a particle of evidence to authorize such presumption.

The counts on which the jury have assessed the damages in this case claim no other right of highway over the lands of the defendant, save the public right of navigation, nor has the evidence shown that he is entitled to any other. The title of the defendants to the land was not disputed. The court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was defeasible; that the owners had a right to reclaim their land by wharfing out or making erections thereon beneficial to themselves; that there was no evidence in the case whatever by which the jury could presume that the city or people of Boston had dedicated their land to the use of some other public besides themselves; that it was, consequently, not only the right but the duty of the authorities of the city to extend their sewers to \*437] low-water mark, for the \*purpose of removing a nuisance injurious to the health of the citizens; and having done so on their own land, the damage to the plaintiff, if any, was *damnum absque injuria*, and he was not entitled to recover. The record shows that these or equivalent instructions were prayed by the counsel of defendant, and refused by the court.

The judgment of the circuit court is therefore reversed, and a *venire de novo* awarded.

Mr. Justice DANIEL dissented.

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*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of 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 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*.

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AMOS J. BRUCE AND FRANKLIN STEELE, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES.

A treasury transcript was admissible in evidence, in a suit brought by the United States against their debtor, though authenticated copies of the receipts which the debtor had given for money did not accompany the transcript. If an item was charged against him which the debtor disputed, it was in his power to obtain the original voucher; and if it appeared on the face of the account that the item charged did not come into his hands in the regular course of business, the transcript would not be evidence to sustain that charge.<sup>1</sup>

The cases upon this point examined.

It was not necessary for the United States to produce the commission of the debtor, or a certified copy of it. The surety was estopped from denying it. Where there were two consecutive commissions and two sets of sureties, the latter set were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misappropriated during the first term of office, it was incumbent upon the second set of sureties to show that it was so.<sup>2</sup>

THIS case was brought up, by writ of error, from the circuit court of the United States for the district of Missouri.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Vinton*, for the plaintiffs in error, and by *Mr. Cushing*, (attorney-general,) for the United States.

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

\*The writ of error, in this case, is brought upon a judgment obtained by the United States in the circuit court for the district of Missouri. [\*438

<sup>1</sup> CITED. *Soule v. United States*, 10 Otto, 11; *United States v. Pinson*, 12 Id., 553, 554; s. c. 1 *Morr. Tr.*, 440, 441.

<sup>2</sup> CITED. *City of Hartford v. Fra-ney*, 47 Conn., 80; *Van Sickel v. Buffalo County*, 13 Neb., 119; *Thompson v. MacGregor*, 9 Abb. N. C., 139 n.

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It appears that Bruce, one of the plaintiffs in error, was appointed agent for the Sioux tribe of Indians, in 1844, and gave the bond on which this suit is brought, for the faithful performance of his official duty. Franklin Steele, the other plaintiff in error, and John Atchison, were sureties in the bond; and Atchison having died, pending the suit in the circuit court, it abated as to him, and the judgment in favor of the United States was rendered against the plaintiffs in error. The breach assigned is, that there was a balance in Bruce's hands, on the 1st of July, 1848, of \$10,191.69, which he refused to turn over and pay to the United States, when required to do so.

Bruce had held the same appointment for four years, before he received the one of which we are now speaking, and his account with government begins in May, 1840.

At the trial, the United States offered in evidence a transcript from the books of the treasury department, stating the account of Bruce from the time of his first appointment. According to this account, the balance above mentioned was due to the United States, but Bruce claimed various additional credits, amounting altogether to \$6,931.68, which had been disallowed or suspended by the accounting officers, as appears by the closing account, usually called the statement of differences.

The United States further offered the transcript of a letter from the second auditor, whose duty it was to settle this account, addressed to Bruce, stating the balance due from him, according to the settlement in the auditor's office, and inclosing him the statement of differences above mentioned, and directing him to turn over to his successor in office the balance of the public money in his hands; and also offered the deposition of his successor, stating that he had made the demand, but that Bruce had failed to comply with it.

The defendants, therefore, objected to the admissibility of this evidence, but the court overruled the objection, and this constitutes the first exception in the case.

The objection is stated in general terms, and applies to the whole evidence offered by the United States, without pointing out the particular ground of the objection. But we understand from the argument here, that the defendants in the court below supposed that the transcript from the books of the treasury was not, of itself, evidence that he received the several sums of money charged against him, and that authenticated copies of his receipts ought to have accompanied the transcript.

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But this objection cannot be maintained. The act of 1797 \*provides, that a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted in evidence. And the act of March 3, 1817, directs that all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the treasury department. The act makes the auditors and comptrollers, by whom the accounts in the war and navy departments are settled, officers of the treasury department. And the provision above mentioned in the act of 1797, in relation to transcripts from the books and proceedings in the treasury, is extended to the accounts of the war and navy departments; and the certificates of the auditors respectively charged with the settlement of these accounts, are to have the same effect as that directed in the former act of congress to be signed by the register.

The accounts in question belonged to the war department, during the period of Bruce's agency, and were adjusted and certified by the proper officers. There could, therefore, be no objection to the evidence on that score.

Nor do we see how any valid objection can be made to the items charged against Bruce in the transcript. The books of the accounting officer necessarily contain the charges against, as well as the credits of, the disbursing officer. The accounts could not be adjusted on the books in any other manner; and the transcript, or, in other words, the copy of the entire account as it stands on the books, (which must include debits as well as credits,) are made evidence by the law. Nor do we see any reason for restricting the words of the acts of congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and always open to the inspection of the party interested. And, after all, the transcript is only *prima facie* evidence; and, if the party disputes any of the charges against him, it is in his power, by a proper application to the court, supported by sufficient evidence, to obtain the original vouchers on which he was charged, if necessary to his defense, and to show that the debit against him is erroneous.

If, indeed, it appeared on the face of the account that an item was charged against him which had not come to his hands in the regular and ordinary operations of the government, and of which, therefore, the accounting officers could have no official knowledge, the transcript would not be evi-

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dence to support that charge. But no such debit is found in this transcript; for, according to the regular and ordinary practice of the government, in cases of this description, the agent receives \*from his predecessor in the office the \*440] money and property remaining in his hands; and other funds, which it may be his duty to disburse, are sometimes sent through the general superintendent at St. Louis, sometimes by a treasury draft, forwarded directly to himself, and sometimes through the agency of a military or other officer of the government. And these advances pass through the proper offices of the treasury and war departments, (now through the department of the interior,) and the agent is charged upon his own receipts and warrants, issued in his favor.

This appears to have been done in the case before us. Every payment or advance to him is separately charged, and the time when it came to his hands, as well as the name of the person from whom he received it. The copies of his receipts, or of the vouchers for the charge, would have given him no further information; and the acts of congress above referred to do not require them to be annexed to or accompany the account, but in plain and unambiguous terms, makes the transcript itself evidence.

Cases analogous to this have, on several occasions, come before the court, and have all been decided upon the construction of the acts of congress above stated. *Smith v. United States*, 5 Pet., 292; *Coxe and Dick v. United States*, 6 Id., 202; and *Hoyt v. United States*, 10 How., 109, are all in point. And the *cases of the United States v. Buford*, 3 Pet., 29, and *United States v. Jones*, 8 Id., 376, which are sometimes supposed to maintain a contrary doctrine, are perfectly consistent with the other decisions and with the one now given.

For, in the case of the *United States v. Buford*, (who was a deputy commissary,) the money had been placed in his hands by Morrison, who was a deputy quartermaster, without authority and contrary to his duty, and the accounting officers refused to credit it in Morrison's account. Upon application to congress, however, a law was passed authorizing the accounting officers to allow the credit, upon receiving from Morrison an assignment to the United States of all his right to the money mentioned in the receipt, which he had taken from Buford when he advanced him the money. Morrison made the assignment accordingly; and thereupon an account was stated on the books of the treasury, charging Buford as debtor to Morrison for the amount advanced to him. And a transcript from this account was offered in evidence. It is set out in the report of the case, and it is evident that this

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account was not within the letter or spirit of the act of congress. It certainly could not prove the receipt of Buford, for the whole transaction was outside of the regular operations of the government, and the \*accounting officers could not be presumed to have any official knowledge of the [\*441 unauthorized transactions between the parties.

And so, again, as to the case of the *United States v. Jones*, who was surety in the bond of an army contractor. The transcript contained charges against the contractor for bills of exchange, drawn by him and paid to other persons. The court regarded this operation as not within the ordinary mode of proceeding in the department, and that the accounting officers could not be presumed to have any knowledge of the drawing of those bills, or of their indorsement to others, and thereupon rejected these items. It will be seen, therefore, that the cases of the *United States v. Buford*, and *United States v. Jones* are distinguishable from the present case, as well as from the other cases above referred to, and stand on different ground.

Indeed, none of the debits in the transcript appear to have been disputed by the plaintiffs in error, and no exception was taken to any one of them. The statement of differences between the accounting officers and Bruce shows that there was no difference as to the amount with which he was chargeable. The difference consisted in a variety of credits which he claimed, and which had been suspended or refused at the treasury; and the testimony offered by him, after his objection to the transcript, had been overruled, and the document admitted in evidence was altogether directed to support the credits he claimed, and not to impeach any one of the debits against him.

The circuit court were therefore right in overruling his objection to the testimony offered by the United States.

We proceed to the next exception.

After the testimony on both sides was closed, the plaintiffs in error asked for the following instructions to the jury, all of which were refused, and the direction which follows them given:—

“1. That unless they believe, from the evidence, that Bruce was legally appointed and commissioned as such Indian agent, they will find for defendant, Steele; and they are further instructed that the commission, or a legally certified copy thereof, is the highest and best evidence thereof.

“2. If the jury find from the evidence that Bruce was a defaulter at the time of the execution of the bond sued on, they will find for defendant, Steele, to the extent of such pre-existing default.

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“3. Defendant, Steele, is not liable for any defalcation existing on the part of Bruce prior to the 29th of August, 1844.

\*442] “4. Defendant, Steele, is not liable as the surety of Bruce \*for any money received by Bruce before he was sub-Indian agent.

“5. The original receipts of Bruce, or certified copies of the originals on file, is the best evidence of any moneys received by him, and the jury will disregard the transcript of accounts from the books, unless they believe it was out of the power of plaintiff to produce the receipts, or certified copies thereof.”

These instructions were all refused, and “the court directed the jury, that if, when Bruce was reappointed agent, in 1844, he had moneys in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission, to his own use, when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable, and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given.”

We think the court were right in refusing the prayers, and in giving this instruction. In relation to the first instruction asked for, it certainly was not necessary for the government to produce the commission of Bruce, or a certified copy. The bond upon which the suit was brought recites that he was appointed Indian agent, and the obligors in the bond are therefore estopped from denying it.

And as to the 5th, it is but a repetition of the objection to the transcript, which we have already disposed of.

And as relates to the 2d, 3d, and 4th, we think the court was right in refusing them, and giving the instruction as above stated. When Bruce received his second commission, if any money or property which he received in his former term of office still remained in his hands, he was bound to apply and account for it, under the appointment he then received.

The terms of the bond clearly require it, and his sureties are bound for it. It was so much money in his hands to be disbursed and applied under his second appointment. Indeed, if it were otherwise, the government would have no security for it. For, if it was not wasted or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable. For there would in that case be no default or

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breach of duty in that term of office; and if afterwards wasted or misapplied, it would be a breach of duty in that official term for which Steele was one of his sureties.

\*Undoubtedly the sureties in the second term of [\*443] office are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer, without proof, will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the circuit court, to show it and exonerate himself to that amount; but it could not be presumed, merely because there appears by the accounts to have been a balance in his hands at the expiration of his first term.

We see no error in the opinions of the circuit court, and the judgment must therefore 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 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 circuit court in this cause be and the same is hereby affirmed, with interest at the same rate per annum that similar judgments bear in the courts of the state of Missouri.

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RICHARD H. HENDRICKSON, COMPLAINANT AND APPELLANT, *v.* SAMUEL L. HINCKLEY.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself, at law, because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents.<sup>1</sup>

Therefore, a bill was properly dismissed where the complainant sought relief from a judgment at law, for the following reasons:—

1. Where he alleged that he had been defrauded in the sale of the property, for the purchase of which he gave his notes. The fraud was pleaded at law, and the verdict against him. Moreover, six years elapsed between the sale and suit, and no effort was made to rescind the contract.
2. Certain verbal promises alleged to have been made by the agent of the

<sup>1</sup> RE-AFFIRMED. *Crim v. Handley*, 17 Id., 11. *S. P. Hungerford v. Siger-  
4 Otto*, 652, 653; *Embry v. Palmer*, son, 20 How., 161.

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vendor. These were not admissible in any court to vary a written contract. This defense was also set up at law, and failed.

3. That certain letters from a co-defendant were read to the jury as admissions. This ground of relief was also untenable.
4. That certain claims of set-off existed which he purposely abstained from using in the trial at law. If he voluntarily waived this defense, relying upon a separate action, he has no right now to ask a court of equity to interfere.

THIS was an appeal from the circuit court of the United States for the district of Ohio.

On the 26th of October, 1851, Hendrickson, as survivor of Hendrickson and Campbell, filed a bill in the United States <sup>\*444]</sup> circuit <sup>court</sup>, for the district of Ohio, alleging that on the 21st day of April, 1848, Hinckley brought a suit on the law side of said court, on three promissory notes against said Hendrickson and one Andrew Campbell. That said Hendrickson and Campbell set up in their pleadings, and on the trial, for defenses, the want of consideration, fraud in obtaining the notes, and payment. That the case was tried on these issues, by a jury, and thereupon a judgment was recovered against said defendants for \$2,386.11, and costs of suit. That afterwards said Campbell and Hendrickson moved for a new trial, which, on consideration, was refused. That Campbell has since died insolvent. That before, and after said suit was brought, said Campbell and Hendrickson had a good set-off against said Hinckley, amounting to \$3,337.85. That before the trial they consulted their counsel respecting it, and that both counsel and client concluded not to set it up on that trial. That, on the trial, said defendants were surprised, by the introduction, on the part of the plaintiff, of letters written by said Campbell, and to which the jury gave undue weight. That Hinckley is a non-resident of the state of Ohio, and has no property besides said judgment, in said state.

The bill then prays for a full discovery from the defendant, as to all the facts alleged, and on the grounds of fraud, surprise, non-residence of the defendant, Hinckley, and the equitable jurisdiction of courts of chancery over claims of only set-off, prays that the judgment be enjoined, and his claim be liquidated—and he offers to pay any balance which may be found to be due said Hinckley, on such final adjustment.

September 26, 1851, the writ of injunction issued. On the 7th of May, 1852, the defendant, Hinckley, filed his answer, denying, *seriatim*, all the material allegations in the bill, and, under the rule of court, denied all equity therein, and prayed to have the same benefit from his answer as if he had demurred to the bill.

At the October term, 1852, the case was heard on the de-

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murrer, the injunction dissolved, and the bill dismissed. From this decree said complainant appealed to this court.

The case was submitted, on printed arguments, by *Mr. Hart*, for the appellant, and *Mr. Mills*, for the appellee.

In order to explain the points made by counsel, it would be necessary to enter into a particular statement of the facts in the case. They are therefore omitted.

Mr. Justice CURTIS delivered the opinion of the court.

The complainant filed his bill in the circuit court of the \*United States, for the district of Ohio; and that court having ordered the bill to be dismissed, on a demurrer, [\*445 for want of equity, the complainant appealed.

The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333; *Creath v. Sims*, 5 How., 192; *Walker v. Robbins et al.*, 14 Id., 584.

The application of this rule to the case stated in the bill, leaves the complainant no equity whatever.

The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the trial was had and judgment recovered. The reasons alleged by the bill for enjoining the judgment are:—

1. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that sale. But this alleged fraud was pleaded, in the action at law, as a defense to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold.

2. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of

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payment of the notes when they were given. These promises could not be availed of in any court, as a defense to the notes; for, to allow them such effect, would be to alter written contracts by parol evidence, which cannot be done in equity any more than at law, in the absence of fraud or mistake. *Sprigg v. The Bank of Mount Pleasant*, 14 Pet., 201.

But whatever substance there was in this defense, it was set up, at law, and upon this, also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse <sup>\*446]</sup> to the defense, were read in evidence to the jury; and the bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of their existence, and so was surprised.

To this there are two answers, either of which is sufficient. The first is, that the complainant and Campbell being jointly interested in the purchase and ownership of the property for which these notes were given, and joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and with the use of due diligence, would have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions.

Another answer is, that if there was surprise at the trial, a motion for delay, as is practised in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law.

4. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: "Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter specifically set forth; but the said Campbell, attorney, regarded the defense pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as

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matter of defense, could it even have been done consistently with the defense made as aforesaid."

He purposely omitted to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate, and complete remedy at law, have purposely omitted to avail themselves of it.

It is suggested that courts of equity have an original jurisdiction \*in cases of set-off, and that this jurisdiction is [\*447 not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Story Eq., 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived. *Barker v. Elkins*, 1 Johns. (N. Y.) Ch., 465; *Greene v. Darling*, 5 Mason, 201.

Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the state, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the state. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere.

The decree of the court below is affirmed.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel. On considera-

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tion 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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JAMES STEVENS, APPELLANT, *v.* ROYAL GLADDING AND ISAAC T. PROUD.

Whether patent-rights and copyrights, held under the laws of the United States, are subject to seizure and sale on execution, is a question upon which the court does not express an opinion in the present case.

\*448] \*The seizure and sale, under execution, of "one copperplate for the map of the State of Rhode Island," did not carry with it the right to print and publish the map.

It is distinguishable from a voluntary sale of a plate by the owner thereof. The ownership of a plate and the ownership of the copyright are distinct species of property; and the plate may be used without infringing upon the copyright of printing and publishing the map.<sup>1</sup>

But the penalties imposed by the 7th section of the act of congress, passed on the 3d of February, 1831, namely, the forfeiture of the printed copies and the sum of one dollar for each sheet unlawfully printed, cannot be enforced in a court of equity.

Under a prayer for general relief, the court can decree for an account of profits. This right is incident to the right to an injunction in copy and patent-right cases.<sup>2</sup>

THIS was an appeal from the circuit court of the United States for the district of Rhode Island.

It was a branch of the case of *Stevens v. Cady*, reported in 14 How., 528, and the difference between the two cases is stated in the opinion of the court.

The decree of the circuit court was as follows:—

*Decree.*

This cause came on to be heard on the bill, answer, replication, depositions, and other papers in the case, and after the hearing, it is ordered by the court that the following entry be made on the minutes in relation to the same:—

"The court differ in opinion as to the effect of the sale of the copperplate, but agree that injunction cannot issue without a return of the money paid for the plate."

And afterwards, at the same term, Mr. Stevens having the

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<sup>1</sup> RE-AFFIRMED. *Patterson v. Kentucky*, 7 Otto, 506. *Id.* 695; *s. c.*, 8 Sawy., 193; *Wilder v. Kent*, 15 *Id.*, 219; *Silas Farmer v. Calvert Printing, &c. Co.*, 1 Flipp., 232; *Murray v. Ager*, 1 Mack., 89, 91; *Carver v. Peck*, 131 Mass., 292, 294; *Tompkins v. Halleck*, 133 Mass., 36.

<sup>2</sup> This case is also referred to in *Gordon v. Anthony*, 4 *Bann. & A.*, 259; *Atwood v. The Portland Co.*, 10 *Fed. Rep.*, 284; *Chapman v. Ferry*, 12

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election to return the price of the plate or not, elected not to return the same, upon which the respondents move that the bill be dismissed, which is dismissed as follows:—

This cause having been heard on the bill, answer, and other pleadings therein, and the complainant having refused to return the price of the plate of the map in question as required by the court:

It is now, on motion of the respondents, and by the consideration of the court, ordered, adjudged, and decreed, that the said bill be and the same is hereby dismissed, with costs.

November term, A. D. 1849.

From this decree, Stevens appealed to this court.

It was submitted on a printed argument by the appellant, and argued by *Mr. Ames*, for the appellees.

*Mr. Ames* made the following points:—

1. The 7th section of the act of congress, approved February 3, 1831, entitled "An act to amend the several acts respecting copyrights," (4 Stat. at L., 438,) inflicting forfeiture and penalties upon those who shall sell any map, &c., "without the consent of the proprietor or proprietors of the copy-right thereof, first obtained in writing, signed in the presence of two credible witnesses," applies only to persons claiming the right of sale by act of party, and not to those claiming and proving such right by act or operation of law. 4 Stat. at L., 435, § 1; *Hesse v. Stevenson*, 3 Bos. & P., 565, 578; *Bloxam v. Elsee*, 1 Carr. & P., 578; S. C. 11 Eng. Com. L., 468; S. C. in Error, 6 Barn. & C., 69; S. C. 13 Eng. Com. L., 133; *Cartwright v. Amatt*, 2 Bos. & Pul., 43; *Sawin et al. v. Guild*, 1 Gall., 485; *Wilson v. Rousseau*, 4 How., 646; Webster on Patents, 21-23, 82, *n. n.*; Godson on Patents and Copyright, (2d ed.,) 219, 221, 377, 430; 2 Renouard Traité des Droits d'Auteurs, ch. 3, § 4, arts. 204, 205, p. 348, and onwards.

2. Copyrights and patent-rights are, by the law of England, and in conformity to the principles of justice and policy prevailing there, as well as in countries of the civil law, liable, as goods and chattels, to the payment of the debts of the authors or inventors who may hold them. As goods and chattels they pass to assignees in bankruptcy, and to provisional assignees in insolvency, as "the assignees" or "representatives" of the bankrupt or insolvent author or inventor; and, both in England and in France, may be seized and sold on execution or decrees of seizure issued against him. *Hesse v. Stevenson*,

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*supra*; *Bloxam v. Elsee, supra*; *Cartwright v. Amatt, supra*; *Mary York v. Twine, Cro. Jac.*, 78; *Sewall, Office of Sheriff, 225, 46 Law. Lib.*; *Webster on Patents, 21-23*; *Godson on Patents and Copyright, 219, 221, incl. 430*; *Renouard Traité des Droits d'Auteurs, 348, 349, &c., ch. 3, § 4, arts. 204, 205*.

3. After an author has printed his book, or map, in performance of the contract of copyright with the public, and it has thus passed from the condition of a thought or conception still under deliberation, as well as after a patented machine has been completed and sold by the inventor, in fulfilment of the contract of his letters-patent, and he has, in any manifest form, clothed his incorporeal right with a valuable corporeal substance, and, abstracting other values for the purpose, has brought it into the condition of property, in the nature of a personal, tangible good or chattel, he thereby has made the right to use and sell the same, appurtenant thereto; and public policy, common honesty, attention to the true interests of the author or proprietor of the copyright, as well as of his creditors, and every legal analogy, require that the two should not be dissevered for the purpose of enabling him to defeat the rights of his creditors, sought through the remedies provided by law. *Wilson v. Rousseau*, 4 How., 682, 684; *Bloomer* \*450] v. *McQuewan et al.*, 14 Id., 549, 550, 553, 554; \*2 *Renouard Traité des Droits d'Auteurs*, 348, and onwards, ch. 3, § 4, arts. 204, 205.

4. That the engraving of a map upon copperplate brings it fairly within the principle and policy, that the proprietor having made the right to use the plate appurtenant to the same, and to the right of property therein, such right will pass with the right of property in the plate, whenever that right passes by act or operation of law in forms appropriate to such act or operation.

5. That, at least, the condition of relief annexed by the court below was, under the circumstances of this case, a perfectly equitable one, and, upon non-compliance therewith by the complainant, the bill ought to have been, as it was, dismissed with costs. Origin of rule imposing terms of relief on complainant. 1 *Spence, Equitable Jurisdiction of Chancery*, 216, 422, 423, and notes. Though equity cannot relieve against common law or statute penalties and forfeitures, (*Peacy v. Duke of Somerset*, 1 Str., 447; *Keating v. Sparrow*, 1 *Ball & B.*, 372, 373, 374,) yet it does, in the case of usurious bonds and instruments, grant relief against them only on condition of payment of the principal and legal interest of the amount borrowed; in other words, only upon waiver of the statute forfeitures. 1 *Story Eq. Jur.*, 64 c. and cases cited;

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*Rogers v. Rathbone*, 1 Johns. (N. Y.) Ch., 365; *Tupper v. Powell*, Id., 439; *Morgan v. Schermerhorn*, 1 Paige (N. Y.), 544; *Livingston v. Harris*, 3 Id., 528; *Campbell v. Morrison*, 7 Id., 158; *Judd v. Seaver*, 8 Id., 548; *Cole v. Savage*, 10 Id., 583.

Mr. Justice CURTIS delivered the opinion of the court.

The appellant filed his bill in the circuit court of the United States for the district of Rhode Island, to restrain the defendants from printing and publishing a map of that state, whereof he claimed to be the exclusive proprietor, under the act of congress of February 3, 1831, concerning copyrights of maps, &c. The defendants admit that they have sold such maps, but allege that a copperplate, owned by the plaintiff, was duly sold on an execution which issued on a judgment recovered against the plaintiff, in the court of common pleas for the county of Bristol, in the state of Massachusetts, and that one Isaac H. Cady was the purchaser of the plate under that sale; that Cady has used the plate to print the said maps, and the defendants have sold them; and they insist that, by the purchase of the copperplate, Cady acquired the right to print maps therewith, and to publish and sell them; and that, therefore, the defendants have not infringed on any exclusive right of the complainants.

By reference to the case of *Stevens v. Cady*, reported in 14 How., 528, it will be seen that the same title, now asserted by these defendants, was tried on that case, between the [\*451] complainant and Cady. But, as is stated in the report of that case, no counsel then appeared or was heard in support of Cady's title; and Mr. Justice Woodbury, who sat in the cause in the circuit court, having deceased, this court was not apprised of the grounds and reasons on which the decree of that court dismissing the bill rested; and when this cause was called, counsel having appeared and desired to be heard, though he frankly avowed that the question passed on in the former case was the only one which could be raised, the court readily assented, and, having now considered the argument of the respondent's counsel, the court directs me to state its opinion in the cause.

The positions assumed by the respondent's counsel are, that copy and patent-rights are subject to seizure and sale on execution; and that, whenever the owner of a copyright of a map causes a plate to be made which is capable of no beneficial use except to print his map, he thereby annexes to the plate the right to use it for printing that map, and also the right to publish and sell the copies when printed; and that when the plate

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is sold on execution, these rights pass with the plate, and as incidents or accessories thereto, though no mention is made of them in the sale.

There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject, in 14 How, 531, it may be added that these incorporeal rights do not exist in any particular state or district; they are coextensive with the United States. There is nothing in any act of congress, or in the nature of the rights themselves, to give them locality any where, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. That an execution out of the court of common pleas for the county of Bristol, in the state of Massachusetts can be levied on an incorporeal right subsisting in Rhode Island, or New York, will hardly be pretended. That by the levy of such an execution, the entire right could be divided, and so much of it as might be exercised within the county of Bristol, sold, would be a position subject to much difficulty.

These are important questions, on which we do not find it necessary to express an opinion, because, in this case, neither the copyright, as such, nor any part of it, was attempted to be sold.<sup>1</sup> The return of the officer on the execution is, that he seized and sold "one copperplate for the map of the state of Rhode Island." The defendants must, therefore, stand upon the second position assumed by their counsel, that the right to \*452] \*print and publish the map passed by the execution sale with the plate.

There are no special facts in this case to distinguish it from any case of a sale on execution of copper or stereotype plates. It appears that the plaintiff owned the plate; whether he made it, or caused it to be made, or purchased it after it had been made, does not appear.

Nor should the case be confounded with one where the owner of copper or stereotype plates sells them. What rights would pass by such a sale would depend on the intentions of its parties, to be gathered from their contract and its attendant circumstances. In this case, the owner of the copyright made no contract of sale, and necessarily had no intention respecting its subject-matter.

The sole question is, whether the mere fact that the plaintiff owned the plate, attached to it the right to print and publish

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<sup>1</sup> QUOTED. *Ager v. Murray*, 15 Otto, 129, 130.

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the map, so that this right passed with the plate by a sale on execution.

And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for any one to make, own, and sell this copperplate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it.

Neither is the plate the principal thing, and the right to print and publish an incident or accessory thereof. It might be more plausibly said that the plate is an incident or accessory of the right; because the sole object of the existence of the plate is as a means to exercise and enjoy the right to print and publish.

Nor does the rule that he who grants a thing, grants implicitly what is essential to the beneficial use of that thing, apply to this case. A press, and paper, and ink, are essential to the beneficial use of a copperplate. But it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment.

The sale of a copperplate passes the right to such lawful use \*thereof as the purchaser can make, by reason of the ownership of the thing he has bought; but not the right to a use thereof, by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper, or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time, during which the exclusive right exists.

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shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use that right of property than he can use a press or paper, which belongs to a third person.

The cases mentioned at the bar, in which incorporeal rights have been held to pass with corporeal property, do not apply.

By the levy of an execution on a mill, the incorporeal rights actually annexed to the mill, and necessary to its use, pass with the mill. So does what is parcel of the mill, though temporarily removed from it—as a mill-stone, which has been taken from its place to be picked. These, and many other such cases, are collected in Broome's Legal Maxims, 198, 205.

But the right in question is not parcel of the plate levied on, nor a right merely appendant or appurtenant thereto: but a distinct and independent property, subsisting in grant from the government of the United States, not annexed to any other thing, either by the act of its owner or by operation of law.

For these reasons, as well as those stated in 14 How., our conclusion is, that the mere ownership of a copperplate of a map, by the owner of the copyright, does not attach to the plate the exclusive right of printing and publishing the map, held under the act of congress, or any part thereof; but the incorporeal right subsists wholly separate from and independent of the plate, and does not pass with it by a sale thereof on execution.

The next question is, whether the complainant can have a decree in accordance with the prayer of his bill, for the penalties imposed by the 7th section of the act of February 3, 1831. The bill prays specifically for a decree for these penalties. We speak of the forfeiture of the printed copies, as well as of the sum of one dollar for each sheet unlawfully printed, as penalties; for, under the laws of the United States, it is clear that the complainant can have no title to either of them, except by way of penalty.

\*<sup>454]</sup> There being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some act of congress, either *nominatim* or by a satisfactory implication; and, looking to the act of congress applicable to this subject-matter, it appears that the rights claimed by this bill are expressly conferred by way of forfeiture. Its language is: "Then such offender shall forfeit the plate or plates on which such map, &c., shall be copied, and also all and every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof;

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and shall further forfeit one dollar for every sheet of such map, &c., which may be found in his or their possession, printed, &c., contrary to the true intent and meaning of this act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof."

In the case of *Colburn v. Simms*, 2 Hare, 554, Mr. Vice-Chancellor Wigram came to the conclusion, that since the decision of the house of lords in the case of *Miller v. Taylor*, the right to a decree for the delivery up of copies must be rested by the complainant upon some statute provision; and that inasmuch as courts of equity do not enforce forfeitures by an exercise of their ordinary jurisdiction, such a jurisdiction also must be derived from an act of parliament. And though the 8th section of the act of 1 and 2 Vict., c. 59, as well as the preceding act of 54 Geo. III., c. 156, § 4, allows the forfeited copies to be recovered in "any court of record in which an action at law, or a suit in equity, shall be commenced by such author or authors, or other proprietor or proprietors," &c.; yet it was admitted, in *Colburn v. Simms*, that no such order had ever been made, *in invitum*, in a court of equity. It is a significant fact that congress, in legislating on this subject, though manifestly acquainted with the phraseology of the act of Geo. III., and though in some particulars it adopted that phraseology, yet omitted to confer upon courts of equity power to enforce either of the forfeitures provided for, but left them to be recovered "in any court having competent jurisdiction thereof." And the only equitable jurisdiction as to copyright, conferred upon the courts of the United States, is by the act of February 15, 1819, which gives original cognizance to the courts of the United States, as well in equity as at law, of cases arising under any law of the United States granting to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and, upon any bill in equity filed by any party aggrieved in any such case, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the \*rights of any authors or inventors secured to them by [\*455 any laws of the United States, on such terms as the said courts may deem fit and reasonable. Though the substance of this enactment is incorporated into the 17th section of the patent act of July 4, 1836, so far as it related to inventors, and so far as it related to the subject of patent-rights, is no longer in force, *proprio vigore*, yet, so far as it gave cognizance to the courts of the United States of cases of copyright, it still remains in force, and is the only law conferring equitable juris-

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dition on those courts in such cases; for the 9th section of the act of February 3, 1831, protects manuscripts only.

There is nothing in this act of 1819, which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended, that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected.

The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief.

The right to an account of profits is incident to the right to an injunction in copy and patent-right cases.<sup>1</sup> *Colburn v. Simms*, 2 Hare, 554; 3 Dan. Ch. Pr., 1797. And this court has held, in *Watts et al. v. Waddle et al.*, 6 Pet., 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief. See also 2 Pet., 612; 14 Id., 156; 16 Id., 195; 9 How., 405.

The decree of the circuit court must be reversed, and the cause remanded to the circuit court, with directions to award a perpetual injunction as prayed for in the bill, and to take an account of the profits received by the defendants from the sales of the map.

#### *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 award a perpetual injunction, as prayed for in the bill filed in this case, and to take an account of the profits received by the defendants from the sales of the map, and for such further proceedings in conformity to the opinion of this court, as to law and justice shall appertain.

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<sup>1</sup> QUOTED. *Root v. Railway Co.*, 15 Otto, 193.

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\*SAMUEL H. CARPENTER, ACTING EXECUTOR, AND CHARLES WILKINS SHORT AND J. CLEVES SHORT, EXECUTORS NAMED AND RESIDUARY LEGATEES IN THE WILL OF WILLIAM SHORT, DECEASED, PLAINTIFFS IN ERROR, v. THE COMMONWEALTH OF PENNSYLVANIA.

The state of Pennsylvania, in 1826, passed a law by which all inheritances being within that commonwealth, which, by the intestacy or the will of any decedent, should devolve upon any other than the father, mother, wife, children, or lineal descendants of such person, should be subject to a tax.

In 1850, an explanatory act was passed, declaring that the words "being within this commonwealth," should be so construed as to relate to all persons who have been at the time of their decease or now may be, domiciled within this commonwealth, as well as to estates.

In 1849, a citizen of Pennsylvania died, whose will was proven by a resident executor in December, 1849. The executor represented that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth.

The supreme court of Pennsylvania decided that this portion was subject to the tax, and this court has no authority to revise that decision.

The explanatory law is not within the prohibitions of the constitution of the United States.

It is true that in some respects the rights of donees, under a will, become vested by the death of a testator; but until the period of distribution arrives, the law of the decedent's domicile attaches to the property.

The explanatory act is not an *ex post facto* law, within the 10th section of the 1st article of the constitution of the United States. This phrase was used in a restricted sense, relating to criminal cases only.<sup>1</sup>

THIS case was brought up from the supreme court of Pennsylvania by a writ of error issued under the 25th section of the judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Ewing*, and *Mr. Hart*, for the plaintiffs in error, and by *Mr. Hood*, and *Mr. Scott*, for the defendant.

The following notice of the points on behalf of the plaintiffs in error, upon which the decision of this court turned, is taken from the brief of *Mr. Ewing*:-

2. That the act of 1850, professes to be explanatory of the act of 1826, does not help it in the least. If a direct act, levying a tax or penalty on past cases of collateral inheritance, would be *ex post facto* within the meaning of the constitution of the United States, so is this; as if the act of 1826 provided for the punishment of crimes, a declaratory law of 1850 could

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<sup>1</sup> CITED. *Burgess v. Salmon*, 7 Otto, 231; s. c. 2 Crim. L. Mag., 376; re-384; *Forster v. Forster*, 129 Mass., versing Id., 220. 566; *Moore v. State*, 14 Vr. (N. J.),

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not extend its provisions to acts committed prior to the declaratory law, no more than an original law could punish a past fact as a crime.

3. We have here then a retroactive law, which takes the property of an individual to the use of the state, because of a fact which had occurred prior to the passage of the law. And <sup>\*457]</sup> *\*we suppose it quite immaterial whether it is seized to the use of the state, by the name of tax, fine, penalty, or forfeiture, so that it is seized by virtue of a *lex post factum*.*

This court has decided, in cases which raised the question, that the clause in the 10th section, 1st article of the constitution of the United States, which provides that no state shall pass any "*ex post facto* law," does not prohibit the states from passing laws which shall transfer the property of A to B, for reasons, *ex post facto*, that their power in this respect, between persons, is unlimited and unrestrained. But that it does prohibit the states from making past acts penal, which, when performed, were attended with no punishment or penalty; and it equally prohibits them from increasing any punishment or penalty by laws passed after the fact; the scope and intent of the restriction, as construed and explained by the court, being to prohibit the states from punishing the persons or seizing upon the property of individuals, by reason of acts committed or performed previous to the enactment of the law. It is to protect the individual from the direct action of the state against his person or property for any past cause, but not to limit the power of the state in adjusting or distributing property among individuals for like cause.

Thus a state may say by a law of to-day, that A shall have the lands and goods of B, because of some fact done between A and B yesterday, which did not then transfer or pledge or inumber either lands or goods; the protection of property, as between individuals, being left to the constitution and laws of the state, except only where a contract intervenes, the validity of which they may not impair. But the state cannot by a law of to-day forfeit to itself the lands or goods of B, because of some fact done or suffered by B yesterday, and which did not then by law work a forfeiture or make his lands or goods the property of the state. This would be, according to the construction of the court *ex post facto*, within the prohibition of the constitution of the United States. And I suppose it to be quite immaterial whether the past fact, by reason of which the property of an individual is seized to the use of the state by a subsequent law, *lex post factum*, be called a crime or not, or whether the seizure be denominated fine, levy, or forfeiture. This is mere form—"words, words" *hæret in cortice*. The

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substance is, the seizure of the lands or funds of an individual to the use of the state by a law operating on a past fact. If the property of an individual cannot be seized to the use of the state, because of a fact which an after law declares criminal, may it be so for the same fact if the law do not at all characterize the fact, or if it pronounce it meritorious? This would be *absurd*. One state legislature enacts: That every [ \*458 member of the immediately preceding legislature who voted against the passage of the act to establish common schools shall be deemed guilty of a misdemeanor, and shall forfeit to the state, to be applied to said common schools, one twentieth part of his lands and goods. Such a law would be *ex post facto* within the meaning of the constitution, as expounded by this court.

The legislature of another state enacts: That every member of the immediately preceding legislature who voted against the act for the establishment of common schools shall be, and he is hereby, declared to be free from all blame or censure therefor, and there shall be assessed upon the property of every such person one twentieth part of its value, as a public tax to be applied to the use of schools. If the first be unconstitutional, so is this likewise. It does not, it is true, make the fact criminal by an after law, but it attaches to it a penalty, the same in its consequence as if it had called it a crime. In substance and effect the provisions are the same, and equally within the prohibition of the constitution.

If I be correct in this, the constitution of the United States does not apply alone in cases where an act, innocent when done, is by a subsequent law declared to be a crime, and punished as such, but also, to cases where a past fact, giving no right to the state to the property of the individual, is by an after law made the occasion of burdening him with fine, forfeiture, or assessment. This case, then, comes literally within the prohibitory clause of the constitution. It is *lex post factum*, and it is the state acting upon and against individuals by reason of the past fact. In all cases heretofore decided under this clause of the constitution, and in which the retroactive law has been sustained, the state pronounced by law between individuals, and transferred property from one to the other, by reason of some past fact, but not to itself. This, it appears to me, is the great line of distinction; and if it be once passed,—if it be held that the state may take property of an individual, because of a past fact,—the constitution affords no protection against confiscation and forfeiture; all that is necessary is to give it a softer name.

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Suppose a statute, having the same effect precisely, to run thus: —

If any person shall heretofore have died within this state, leaving personal property within it, and also in other states, and leaving no lineal heirs; and if the collateral heir or devisee of such decedent shall have heretofore claimed and received such part of the estate of decedent as was situated without this state, he shall be deemed guilty of a misdemeanor, and shall \*459] \*forfeit therefor, and pay to the use of common schools, one half the assets of the decedent which remain within the state at the time of the passage of this act.

No one can doubt that this would be an *ex post facto* law, within the prohibition of the constitution.

Strike out of the act the word "misdemeanor," it does not vary the case except in words. You retain the forfeiture, but fail to characterize the fact. Strike out the word "forfeit," and insert "tax," in its stead, the effect is still the same; you retain the penalty, the usual consequence of crime, by another name, and attach it as a consequence to a past fact, not pronounced criminal. The very part of the supposed criminal law against which the constitution of the United States would protect the individual, namely, the penalty, remains after the two suggested amendments. The parts stricken out, had they remained without the penalty, would be nugatory, and this court could not consider them.

It seems to me very clear, that the intent and the just effect of this constitutional provision is to protect the individual in his person and property against punishment or confiscation by the state, under a law operating upon a past fact.

4. We contend, also, that this law, in its retroactive effect, impairs the obligation of a contract.

When Carpenter, the executor, took upon himself the execution of the will, he entered into a contract, implied in law, to pay over to the legatees what should remain in his hands after paying debts and such charges as the law attached to the estate and its administration. That sum was about \$43,000. The act of March 11, 1850, intervenes, and requires the executor to pay \$25,000 of that sum to the state, and but \$18,000 to the legatees in discharge of his implied contract.

This law, therefore, greatly impairs the obligation of this contract. For, if the law be obligatory, it at once absolves the executor from the obligation of his contract to the legatees, just to the extent that it requires him to pay to the state, and it is because of a fact which occurred before the passage of the law.

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Suppose the law to have been enacted in these words:—

“That every agent, executor, administrator, factor, and attorney, who has in his hands, at the time of the passage of this act, moneys heretofore received or collected for his principal, &c., shall pay one half thereof into the treasury of the state for the use of schools, and the other half to his principal, &c., which shall be in full discharge of his legal liability to such principal.”

If a state can do this, the constitution of the United States does not protect contracts; if a state can take half, as a retroactive \*tax, she can take the whole, and she can name [\*460 any past fact she chooses as the cause of the tax. And it is quite immaterial to the creditor whether his contract is annulled absolutely, if it be so as to him, and remains valid only for the benefit of the state.

A state may seize the property of an individual directly to her own use, but this were an act of arbitrary power not likely to occur. She may take his property for any future fact or act, whether innocent or criminal, either as a forfeiture or levy, but not for a past act or fact, by a retroactive law. She may take from A his property and give it to B, but she cannot impair the validity, or at all lessen the obligation, of a contract between them.

The following points, on behalf of the defendant, relate to that branch of the case upon which the opinion of this court rested:—

1. It does not appear, by the said document or record, that the supreme court of the United States has jurisdiction of the cause.

2. It does not appear thereby that there was drawn in question, in the supreme court of Pennsylvania, any of the causes or grounds alleged in the said writ of error.

3. It does not appear thereby that the validity of the Pennsylvania act of assembly of 11th March, 1850, was called in question in the cause in the supreme court of Pennsylvania, on the ground of its repugnancy to the constitution of the United States.

4. Nor that any such question was decided by the supreme court of Pennsylvania in said cause.

It is only where there is drawn in question in the state court the validity (not merely the construction) of a state law, that the supreme court of the United States has jurisdiction to review the question by writ of error; and even then only where the validity of the state law is questioned, on the ground that it is repugnant to the constitution, treaties, or laws of the United States. *The Commonwealth Bank of Ken-*

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*tucky v. Griffith*, 14 Pet., 64; *Lawler v. Walker*, 14 How., 149, 152; *Crowell v. Randall*, 10 Pet., 368, in which Mr. Justice Story reviews the previous cases, &c. See, also, *Ohio Life Insurance v. Debolt*, 16 How., 416, Taney, C. J., 428, &c.; *State Bank of Ohio v. Knoop*, Id., 369, McLean, J., 384, &c.

To give jurisdiction to the supreme court of the United States, under the 25th section of the judiciary act, it must appear on the record itself to be one of the cases enumerated in that section; and nothing out of the record can be taken <sup>\*461]</sup> into consideration. *Armstrong v. The Treasurer of Athens County*, 16 Pet., 281, 285; 1 Curtis Com., § 279.

Retrospective laws are forbidden to the states only when, in civil cases, they impair the obligation of contracts; or, in criminal cases, where they are *ex post facto*. *Calder v. Bull*, 3 Dall., 386.

Where a retrospective law of a state affects vested rights, the supreme court of the United States has jurisdiction only where such rights are grounded on contract. *The Charles River Bridge v. The Warren Bridge*, 11 Pet., 420, 536, 547; 1 Curtis Com., §§ 244, 253, note 1; *The Providence Bank v. Billings*, 4 Pet., 514, 558, 561.

Mr. Justice CAMPBELL delivered the opinion of the court.

The legislature of Pennsylvania, in 1826, adopted a law by which all inheritances, "being within this commonwealth," which, by the intestacy or the will of any decedent, should devolve "upon any other than the father, mother, wife, children, or lineal descendants" of such person, should be subject to the payment of a tax, now fixed at five per cent. Purd. Dig., 138, § 1.

The assessments under this act were confined to the property which might be within the commonwealth. *The Commonwealth v. Smith*, 5 Pa. St., 142.

In March, 1850, by an explanatory act, it was declared that the words "being within this commonwealth, shall be so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within this commonwealth, as well as to estates; and this is declared to be the true intent and meaning of this act."

William Short, a citizen of Pennsylvania, died within the state a few months previously to the passage of this act, leaving his property to friends and collateral relations, the principal of whom, the residuary legatees, reside beyond the limits of the state. The will was proven, by a resident executor, in December, 1849, before the register's court in Philadelphia, and a settlement was made with that court in June of the

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following year. In that settlement, the executor represented that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth, and offered to pay the tax for the property within, under the act of 1826, and denied the validity of the assessment under the act of 1850. The tax was assessed upon the entire personal estate, without reference to its locality, by the court, and its judgment upon this subject was affirmed by the supreme court, to which it was removed by *certiorari*. That <sup>\*</sup>court says: "More pointed words to make the act (of 1850) retrospective could not be chosen; and it will [<sup>\*462</sup> scarce be said the legislature had not power to make it so, at least while the assets remain in the hands of the executor as administrator. No clause of the constitution forbids it to extend a tax already laid, or to tax assets not taxed before; and, in establishing its peculiar interpretation, it has only done indirectly what it was competent to do directly." The supreme court thus interprets the act of 1850 as if it read: "That assets in the hands of an executor, for distribution among the collateral relations of or strangers to the decedent, shall be subject to a tax of five per cent."

This court has no authority to revise the act of Pennsylvania, upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the constitution of the United States, or the treaties and laws made under it?

The validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the state to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is, that the application of the act of 1826, by that of 1850, to a succession already in the course of settlement, and which had been appropriated by the last will of the decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the state. That the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the state; and that the state has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice. That the act contains the imposition of a forfeiture or penalty, and is *ex post facto*. It is, in some sense true, that the rights of donees under a will are vested at the death of the testator; and that the acts of administration which follow are conservatory means, directed

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by the state to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But, until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile, as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect \*463] \*the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control, prescribed by the state in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it. *Ennis v. Smith*, 14 How., 400; *In re Ewin*, 1 Cromp. and J., 151; 1 Barb. (N. Y.) Ch., 180; 6 W. H. & G. Cy., 217; 21 Conn., 577.

The act of 1850, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the state, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And, as the supreme court has well said, "in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly."

But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law, within the 10th section of the 1st article of the constitution. The debates in the federal convention upon the constitution show that the terms "*ex post facto laws*" were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap., 1399, 1450, 1579.

This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been re-

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peatedly announced since that time. *Calder v. Bull*, 3 Dall., 386; *Fletcher v. Peck*, 6 Cranch, 87; 8 Pet., 88; 11 Id., 421.

The same words are used in the constitutions of many of the states, and in the opinions of their courts, and by writers upon public law, and are uniformly understood in this restricted sense. 3 N. H., 375; 5 Mon. (Ky.), 133; 9 Mass., 363; 6 Binn. (Pa.), 271; 4 Ga., 208.

The plaintiff's argument concedes that his case is not within the scope of this clause of the constitution, unless its limits are \*enlarged to embrace civil as well as criminal cases; [\*464 and he insists that the court should depart from the adjudications heretofore made upon this subject. But this cannot be done. There is no error in the record, and the judgment of the supreme court is affirmed.

*Order.*

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

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JAMES RHODES, COMPLAINANT AND APPELLANT, *v.* WILLIAM B. FARMER, WILLIAM FELLOWS, AND CORNELIUS FELLOWS.

Where a complainant sought to recover by bill in chancery the proceeds of a judgment which he alleged that his debtor had against a third person, and it turned out that his debtor had only an interest of one fourth in this judgment, which fourth was collected and the proceeds paid over to the solicitor of the complainant during the pendency of the suit, the bill was properly dismissed at the cost of the complainant.

The assignment of the judgment was, in reality, conditional, although absolute on its face; and the present bill being in the nature of a bill to carry that assignment into effect, in such a case parol evidence is admissible to rebut or explain an equitable interest.

The judgment was nominally assigned to the debtor, but his equitable interest in it was only one fourth, which was all that the complainant was entitled to. This fourth being paid before the decree, together with costs up to that time, it was proper to dismiss the bill at the cost of the complainant.

THIS was an appeal from the district court of the United States, for the northern district of Mississippi.

The facts in the case are stated in the opinion of the court.

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It was argued by *Mr. Phillips*, for the appellant, and by *Mr. Bibb*, for the appellee.

*Mr. Phillips* made the following points:—

A judgment creditor is entitled in equity to attach a debt due to the debtor. *Bayard v. Hoffman*, 4 John. (N. Y.) Ch., 453; *Egberts v. Pemberton*, 7 Id., 209; *Hudson v. Plets*, 11 Paige (N. Y.), 182; *Candler v. Petit*, 1 Id., 170.

Parol evidence was inadmissible to contradict the assignment. It is conceded that the design was to invest the party with a “legal title.” 1 Story Eq., §§ 113–115; 6 Ves., 332; 1 Pet., 16; 3 Greenleaf Ev., 368.

The evidence offered by defendant that his object was to \*enable Farmer to use the judgment as a set-off, while <sup>\*465]</sup> he remained the owner thereof, shows an attempt to commit a fraud upon the law. 1 Poth. on Obl., 415; Barb. on Set-off, 37, 58; 7 Cow. (N. Y.), 469, 481; 1 Paige (N. Y.), 289.

The agreement set up is equally obnoxious to the charge of champerty. 2 Sims & Stu., 244; 15 Ves., 156; 2 Story Eq., 1049.

The new agreement offered to be set up being in itself illegal, will not be admitted as an answer to the prayer of the bill. 7 Ves., 470; 2 Story Eq., §§ 298, 305, 697.

As to costs, courts of equity are governed by “general rules and former precedents;” and when a question of costs is connected with a substantial ground of appeal, the party may succeed with the former question though he fail with the latter. 2 Hagg. Ecc., 374; 4 Russ., 180.

*Mr. Justice McLEAN* delivered the opinion of the court.

This is an appeal in chancery, from the district court of the United States for the northern district of Mississippi.

Rhodes, the complainant, recovered two judgments, in 1850, against Sneed, Wright, James E. Farmer, and William B. Farmer, in the district court—one for the sum of \$1,308.68, the other for \$3,179.19—on which executions were issued and returned, *nulla bona*. Prior to this, W. and C. Fellows, in the name of McKewen, King, and Company, had recovered a judgment against James Strong and others, for \$3,937.75, in the same court; and Strong, with the view of placing his property beyond the reach of the judgment, conveyed it to his wife. This conveyance, on an issue being made, under the practice of Mississippi, was set aside.

In the trial of the above issue, the complainant states it appeared in proof that William B. Farmer was the owner of

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the judgment against Strong and others, it having been assigned to him by W. and C. Fellows; and the complainant alleged that his judgment against Farmer, being unsatisfied, was a lien in equity upon the interest and claim of William B. Farmer, to the judgment assigned to him. And the complainant prayed that said judgment might be held by Farmer and W. and C. Fellows, subject to his judgments, and that they might be enjoined from paying it over, &c.

William B. Farmer, in his answer, admits that the judgments against him had been obtained, and that executions on them had been returned, *nulla bona*. He denies that the judgment against Strong was ever sold to him; but he states that, in 1848, being sued for a large debt, which he supposed to belong to Strong, and wishing to procure a set-off, he applied to W. and \*C. Fellows for the control of said judgment, offering to pay them three fourths of the amount [\*466] that he might realize of the judgment, should he be able to use it as a set-off, which was agreed to by them; and that he executed a penal bond, to pay to the said W. and C. Fellows three fourths of the amount so recovered on their judgment.

Defendant also states that the complainant received from James E. Farmer, a co-defendant, a sum of money, on the receipt of which he released the judgments; and the defendant submits, whether such release does not exonerate the other defendants.

He also states that he had made a verbal assignment of the judgment to William Cathron, as an attorney, for collection; and he submits whether the judgment can be made liable by the complainant to the satisfaction of his judgments. Other matters are set up in the answer, and he prays that the answer may be considered a cross-bill, &c.

The condition of the penal bond, given to W. and C. Fellows, stated that they had transferred to Farmer the judgment against Strong et al., for the sum of \$3,937, subject to credits of about \$763. Now, if the said obligors shall pay to W. and C. Fellows, or their assigns, in two equal instalments, on the 27th of January, 1849, and on the 27th of January, 1850, three fourths of the amount which may be secured or realized by said Farmer out of said judgment, bearing interest at six per cent., deducting costs and attorney's fees which may be incurred, &c., then the obligation to be void.

In their answers, W. and C. Fellows deny that their co-defendant, William B. Farmer, is the owner of the whole of their judgment against Strong and others, but admit that he has an interest of one fourth part, &c.

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During the pendency of this suit, the following receipt was given by John S. Topp, counsel for the complainant:—

“June 9, 1852. Received of Messrs. Boston and Stearns, \$1,052.59, being the one fourth part of the balance left in the marshal’s hands, in the case of *W. and C. Fellows v. Strong and wife*, after deducting \$700 for fees, as provided for in the within agreement.”

The district court, in its decree, says: “It appearing to the court that from the written admissions of Mr. Topp, solicitor for the complainant, since his filing the bill in this cause, recovered one fourth of the amount of the judgment of *W. and C. Fellows v. James Strong and Mary A. Strong*, his wife, which is enjoined in this cause, and that the complainant is entitled to no further relief in the premises, the injunction was dissolved, and the bill dismissed at the complainant’s costs.

\*<sup>467</sup>The judgment of *W. and C. Fellows v. Strong* was assigned to Farmer without condition, and it is contended that parol evidence was not admissible to alter the terms of the assignment.

There is a good deal of testimony on the contract of assignment. Some of the statements are somewhat conflicting, but they are reconcilable; and the result of the whole is, that the assignment was made of the judgment to enable Farmer to use it by way of set-off to a demand against him which he supposed belonged to Strong. But it was understood that Farmer should have one fourth of the amount recovered from Strong, after deducting the costs for his labor and trouble in collecting the money, and for the payment of the residue of the judgment he gave bond and security.

The assignment of the judgment was good in equity, and though absolute on its face, the bond given expressed the conditions, and showed that Farmer’s interest in the judgment against Strong extended only to one fourth part of it, after deducting costs.

The bill of the complainant is in the nature of a bill for a specific execution of the assignment of the judgment, and in such a case parol evidence is admissible to rebut or explain in equity. But the penal bond given to W. and C. Fellows, by Farmer, with Brown as security, sufficiently explains the transaction.

The judgments obtained by the complainant against William B. Farmer and others constituted no lien, equitable or legal, on the judgment against Strong, after it was assigned to Farmer; and no relief could be given to the complainant against the assigned judgment, beyond the equitable interest of Farmer.

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He is represented to have been insolvent at the time the decree was entered. As one fourth of the judgment, after paying costs, was paid to the complainant before the decree, we think that the decree of the district court dismissing the bill at the complainant's costs, was correct.

The defendants were not liable to pay more than one fourth of the judgment, and as that amount was paid, about the time it was collected on the judgment against Strong, the defendants were not in default.

There is no evidence of a payment to the complainant by James E. Farmer, a co-defendant of William B. Farmer, on which a release of the judgments was executed by the complainant, as alleged in Farmer's answer. Nor is there any ground of defense, from the alleged verbal agreement with Cathron, who, as an attorney, was employed to collect the judgment against Strong.

The complainant, both in prosecuting the suit in the district <sup>\*</sup>court, and also by his appeal to this court, sought to [\*468] recover the whole amount of the judgment against Strong, or at least so much of it as would satisfy his two judgments against Farmer and others. But he can in this mode of proceeding reach only the equity of his judgment debtor in the assigned judgment; and having received that, he can claim nothing more. The decree of the district court is affirmed, at the costs of the complainant.

*Order.*

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered, 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.

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ROBERT WICKLIFFE, ADMINISTRATOR, WITH THE WILL ANEXED, OF LUKE TIERNAN, DECEASED, COMPLAINANT AND APPELLANT, *v.* BENJAMIN EVE, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF JOSEPH EVE, DECEASED, RICHARDSON ADAMS, EXECUTOR OF RANDOLPH ADAMS, DECEASED, ROBERT P. LETCHER, JAMES BALLINGER, AND FRANKLIN BALLINGER.

Where a judgment had been obtained in the circuit court of the United States for the district of Kentucky, in a suit brought by a citizen of Maryland

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against certain persons in Kentucky, and the judgment was afterwards perpetually enjoined at the instance of the defendants, and a bill was filed by a citizen of Kentucky against the original defendants, who were also citizens of Kentucky, this bill was properly dismissed by the court for the want of jurisdiction.

The circumstance that the complainant claimed that this was in the nature of a bill of review of the decree which was passed in a suit between citizens of different states, was not sufficient to divest it of the character of an original bill.

Moreover, the administrator of a deceased partner had no right to interpose and claim a debt due to the partnership. It was the right of the surviving partner to settle up the concerns of the firm.

THIS was an appeal from the circuit court of the United States for the district of Kentucky.

The case is stated in the opinion of the court.

It was argued by *Mr. Preston*, for the appellant, and by *Mr. Blair*, for the appellees.

It would be difficult to report the arguments of counsel without giving a detailed history of the transactions between the parties. They are, therefore, omitted.

\*<sup>469]</sup>Mr. Justice CATRON delivered the opinion of the court.

In 1822, some of the defendants made two notes, one for \$1,308.44, and one for \$1,383.95, to Luke Tiernan and sons; one payable the 1st of December of that year, and the other December 1, 1823.

In 1833, suits were brought by the plaintiff, as attorney of the payees, in the United States circuit court for the Kentucky district, and judgments were obtained by default.

No executions to enforce the judgments were put into the marshal's hands till December 15, 1845; and shortly after they were stayed by injunction, at the suit of some of the defendants against Charles Tiernan, the surviving partner, on the ground of payment, and the bar of the statute of Kentucky, for failing to sue out executions within twelve months after judgment; and on the 6th day of May, 1847, the injunction was, by decree of the United States circuit court made perpetual.

Wickliffe had, in the mean time, brought suit against Luke Tiernan, claiming an indebtedness against him to the amount of about three thousand dollars, but never obtained judgment. He had attached the debt he alleged to be due by the defendants to Tiernan and Sons, and when the injunction suit was pending against the surviving partner, Wickliffe, having obtained letters of administration on the 13th of November,

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1846, petitioned to be made a defendant, but the court overruled the motion.

On the 6th of December, 1847, he moved for leave to file a bill of review on the same ground, but the court also refused; and the present suit was brought to set aside the decree enjoining execution of the two judgments, on the ground that the decree in favor of Eve and others was obtained by fraud, through the connivance of Charles Tiernan, the defendant. The bill alleges, among other things, that Charles Tiernan was largely indebted to his father, and had assigned his interest in the judgments to him, and had become bankrupt. There is no averment in the bill that the partnership debts of Luke Tiernan and Sons had been paid; nor is there any averment that the complainant and defendants were citizens of different states.

Wickliffe attempted to have himself made a defendant to the suit of John G. Eve and others against Charles Tiernan, on the assumption that Luke Tiernan was indebted to him, Wickliffe, and he claimed a right to have part of the amount due to him from Luke Tiernan satisfied out of the moneys he alleged were due to Luke Tiernan and Sons from Eve and others. Charles Tiernan, being the surviving partner of the firm, had the sole right to defend the suit, as he represented the partnership property; in regard to which, the administrator of Luke Tiernan had a right to come into a court of equity by bill, to coerce the \*surviving partner to settle, and [\*470 pay the debts of the firm with the joint property; and after the creditors of the partnership were satisfied, then Luke Tiernan's administrator might have come in on a bill, properly framed, for one third of the surplus, or as much more as Luke Tiernan was in advance to the firm. This familiar doctrine is well stated by Mr. Justice Story, in his work on Partnership, §§ 97, 347.

But the bill before us claims no relief in this form; the complainant asks that the decree releasing Eve and others may be set aside as fraudulent, and the balance due on Eve's debt may be decreed to him, as administrator of Luke Tiernan; and in this capacity he seeks to retain for himself, and subject the property of the firm to pay the debts of an individual partner. Charles Tiernan is no party to this proceeding, and as he was not brought before the court, there could be no jurisdiction taken of the subject-matter; he being legal owner of the *chose in action* claimed, if the claim had any existence.

The bill was dismissed in the circuit court, because the complainant and the defendants were citizens of Kentucky, and therefore the court declared it had no jurisdiction, for

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want of proper parties. To obviate this objection, it is insisted here, on the part of the appellant, that this is a bill of review of the proceeding in the cause of John G. Eve and others, against Charles Tiernan. The appellant having been refused the privilege to file a bill of review, he then filed this original bill, impeaching the decree for fraud; and to this bill none but citizens of Kentucky were parties.

It is manifestly an original bill, within the description given by Mr. Justice Story's Eq. Plead., § 404, and being so, the circuit court had no jurisdiction of the parties.

It is ordered that the decree, dismissing the bill, 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 Kentucky, 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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\*471] \*ZACHARY PULLIAM, EXECUTOR OF AMOS ALBRITTON, PLAINTIFF IN ERROR, v. ALEXANDER OSBORNE, ADMINISTRATOR OF SAMUEL WOODWARD.

Although, by the laws of Alabama, a lien upon property accrues from the delivery of the execution to the sheriff or marshal, and the rights of creditors claiming under the same jurisdiction are adjudged accordingly, yet the same rule does not apply where a controversy arises between executions issued by a court of the United States and a state court.

In such a case the rule is, that whichever officer, the sheriff or the marshal, acquires possession of the property first by the levy of the execution, obtains a prior right, and a purchaser at a judicial sale will take the property free from all liens of the same description.<sup>1</sup>

THIS case originated in the district court of the United States, for the middle district of Alabama, between Samuel Woodward, plaintiff in execution, and Amos Albritton, (claimant,) defendant, who were afterwards represented by their administrator and executor respectively. It was a contest as to the superior validity of executions issued out of a

<sup>1</sup> CITED. *Taylor v. Carryl*, 20 How., 506; *Conner v. Long*, 14 Otto, 234; *Union Mut. Life Ins. Co. v. Chicago University*, 10 Biss., 198 n; *Hay v. Railroad Co.*, 4 Hughes, 352; *Ald v. Roth*, 2 McCrary, 449.

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state court and a United States court, under the following circumstances:—

## United States Execution.

1842.

May term. Woodward's judgment against Pulliam in the district court of the United States for the middle district of Alabama.

June 10. Execution issued.

October 26. Marshal levied on the negroes.

## State Execution.

1842.

April 19. Two judgments against Pulliam in the district court of Pickens county.

May 4. Executions on these issued.

July 12. Sheriff levied on certain slaves. Bonds given for their forthcoming on first Monday in August.

August 3. Execution on these forthcoming bonds.

\*September 21. Execution levied on the [\*472] negroes named in the issue in this case.

October 3. Sheriff sold slaves to Albritton.

Upon the trial, the court instructed the jury as follows, viz.:

On the case being submitted to the jury, the court charged the jury, that if the executions which issued on the two judgments against Pulliam were levied upon sufficient property, and a bond given for the forthcoming of the property on the day of sale, in each case, which bonds were forfeited and thus returned by the sheriff, and that afterwards executions were issued on the judgments rendered on the said forthcoming bonds, against the said Pulliam and his surety in the said forthcoming bonds, which said executions did not come to the hands of the sheriff until some days after the execution in favor of the plaintiff was received by the marshal; that the

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said plaintiff had the priority of lien on the property of Pulliam, and that the said negroes levied upon by the marshal, in said case, were liable to satisfy the execution of the said plaintiff, notwithstanding they had been levied upon and sold by the sheriff under the execution against Pulliam and his surety in the forthcoming bonds; to which charge claimant excepts, and prays the judge of this court to sign and seal this bill of exceptions, which is accordingly done.

W.M. CRAWFORD, [SEAL.]

This instruction being in favor of Woodward, the plaintiff in execution, Albritton sued out a writ of error and carried the case to the circuit court of the United States, for the fifth judicial circuit, southern district of Alabama.

In April, 1853, that court passed an order "that the said cause be transferred to the supreme court of the United States, according to the statute in such case made and provided."

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

*Mr. Badger* contended that the instructions of the court below were erroneous, and that the claimant, Albritton, obtained a good title under his purchase from the sheriff.

First. The lien upon the slaves created by the issue, delivery, and levy of the first executions from the state court continued, notwithstanding the giving of the forthcoming bonds; the \*slaves were still in *custodia legis*, and not liable to [473] seizure under another execution from another court. *Caperton v. Martin*, 5 Ala., 217; *Langdon v. Brumby*, 7 Id., 53; *Doremus v. Walker*, 8 Id., 194; *Hagan v. Lucas*, 10 Pet., 400.

Secondly. If the lien of the first-issued executions upon the judgments in the state court was lost by the taking of the forthcoming bonds and surrender of the slaves to the defendant in execution, still, the title of the claimant was valid. Then the case would be this: an execution from the court of the United States was delivered to the marshal on the 10th June, but no proceedings had until the 26th October; meantime executions from the state court were delivered to the sheriff, (to wit, on the 3d of August,) and the slaves levied upon, (to wit, on the 2d of September,) and sold, (to wit, on the 3d of October.)

Now, the rule in such case, adopted because absolutely necessary to prevent collisions between different jurisdictions having a common authority over the same subject, is this:

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"Where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, they (the goods) shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them, in point of execution, and under which an execution shall have been first executed." *Payne v. Drewe*, 4 East, 523; *Hagan v. Lucas*, above cited.

Upon this principle, the supreme court of North Carolina, in which state the common law still obtains that executions bind the goods from their *teste*, laid down the rule in these terms: "When several executions issuing from different competent courts are in the hands of different officers, then, to prevent conflicts, if the officer holding the junior execution seizes property by virtue of it, the property so seized is not subject to the execution in the hands of the other officer, although first tested." And the court held that "a levy attaches upon the goods in point of execution." *Jones v. Judkins*, 4 Dev. & B. (N. C.), 454.

It is believed that nothing can be urged against these positions with even apparent force, except what is said by the supreme court of Alabama in the before-cited case of *Langdon v. Brumby*: that where goods are levied upon by a junior execution, and delivered to a third person upon his making claim, &c., according to the law of that state, these goods may be seized under an execution, the lien of which first commenced.

If this should be alleged, the following answers will be given:—

\*1. The case stated by that court is not ours; there [\*474 the execution referred to was senior to that under which the first seizure was made; here the execution of the defendant in error was junior to that under which the first seizure was made.

2. However, the rule may be a good one in cases contemplated by it where the same officer is charged with both executions, it being his duty so to arrange the processes in his hands as to apply the property to the satisfaction of that which has legal priority, it can never be just where the executions are in the hands of several officers acting under independent authorities, having a concurrent jurisdiction over the same subject.

3. The rule was applied and is applicable only where no sale has been actually made under the junior execution; for if such sale has been made, whether with or without fault of the officer holding the executions, the title of the purchaser is valid, and the goods sold are not liable to seizure under the senior execution. *Smallcomb v. Buckingham*, 1 Ld. Raym., 251;

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*Hutchinson v. Johnson*, 1 T. R., 729; *Ryebot v. Peckham*, in note, 731.

4. If this be so, where there is one officer acting under one jurisdiction, in the execution of several writs, *à fortiori*, and, to avoid manifold inconveniences, it must be so where there are different officers acting under jurisdictions independent of each other.

Finally. There having been no seizure under the execution from the United States court, on the 3d August, when the sheriff made his levy, nor when he made his sale, on the 3d of October, this much is certain: The sheriff had a right, and was bound to levy and sell; and, if he had returned *nulla bona*, he would clearly have been liable for a false return. Then the sheriff had lawful authority to seize, and lawful authority to sell, and, consequently, the purchaser obtained a good title; for how can it be maintained that the sheriff may lawfully sell what no one may lawfully buy? Yet this is the whole question in the cause; for the marshal claims to sell under his process what had been before brought under the execution of the state court, which he cannot do if the former sale was lawfully made, under sufficient authority. It is, in one word, an attempt by the marshal to transfer to another the consequences justly due to himself, for having delayed to take any steps upon the execution in his hands, from the 10th June to the 26th October, and permitting a junior process, in the mean time, to attach and apply the property to another demand.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was an issue in the district court, under a statute of Alabama, (Clay's Digest, 213, §§ 62, 64,) for the trial of the  
 \*475] \*right to property taken under an execution from that court, in favor of the appellee, and claimed by the testator of the appellant, as belonging to him, and not to the defendant in the execution.

It appeared on the trial that, at the delivery of the execution to the marshal, in favor of the appellee, the property belonged to the defendant, and that the levy was made before the return day of the writ; but that, before this levy, the property had been seized and sold to the claimant, by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the *teste* and delivery of the executions from the district court.

The district court instructed the jury, that a sale under a junior execution from the state court did not divest the lien of the execution from the district court, and that the writ might

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be executed, notwithstanding the seizure and sale under the process from the state court.

The lien of an execution, under the laws of that state, commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the state or United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.

The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either court were invested with authority to seize the property.

The liens were, consequently, co-ordinate or equal; and, in such cases, the tribunal which first acquires possession of the property, by the seizure of its officer, may dispose of it so as to vest a title in the purchaser, discharged of the claims of creditors of the same grade.

This court applied this principle (*Williams v. Benedict*, 8 How., 107) to determine between judgment creditors in a court of the United States, and an administrator holding under the orders of a probate court of a state; in *Wiswall v. Simpson*, 14 How., 52, in favor of a receiver holding under the appointment of a court of chancery of a state and a judgment creditor; in *Peale v. Phipps*, 14 How., 368, in favor of a trustee in possession, under the order of a county court, against such a creditor; and in *Hagan v. Lucas*, 10 Pet., 400, between execution creditors issuing from state and federal jurisdictions. The same principle has been applied, in several state courts, in favor of the purchasers at judicial sales of steamboats, and other \*crafts subject to liens in the nature of admiralty liens. [<sup>\*476</sup> *Steamboat Rover v. Stiles*, 5 Blackf. (Ind.), 483; *Steamboat Raritan v. Smith*, 10 Mo., 527; 19 Ala., 738; and is recognized in the courts of common law and admiralty in Great Britain. 4 East, 523; 2 Wms. Ex'rs, 888; *The Saracen*, 3 W. Rob.

In Alabama, the *bond fide* purchaser at a judicial sale, made to enforce a statutory lien, takes the property discharged of liens of the same description, whether the subject of sale be land or personal property. *Wood v. Gary*, 5 Ala., 43; 12 Id., 838; 11 Id., 426. The propriety of the rule is fully vindicated by the statement in *Hagan v. Lucas*, 10 Pet., 400, where this court says: "A most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had

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been taken by the process of the other. The marshal or the sheriff, as the case may be, acquires by a levy a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially an officer acting under a different jurisdiction."

The instruction of the district court is erroneous, and its judgment is therefore reversed and cause remanded.

\*477]

\*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 and adjudged by this court that the judgment of the district court of the United States for the middle district of Alabama 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 of the United States for the middle district of Alabama, with directions to award a *venire facias de novo*.

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CHARLES MINTURN, APPELLANT, *v.* LAFAYETTE MAYNARD, GILBERT A. GRANT, THOMAS G. WELLS, LUCIEN SKINNER, FREDERICK BILLINGS, CHARLES J. BRENHAM, ISAAC T. MOTT, J. DE LA MONTAGNE, E. M. NEAL, AND THOMAS L. CHAPMAN.

Where a libel was filed *in personam*, against the owners of a steamboat in California, by their general agent or broker, for the balance of an account for money paid, laid out, and expended, in paying for supplies, repairs, and advertising of the steamboat, together with commissions on the disbursements, the libel was properly dismissed, for want of jurisdiction.

There was nothing in the case to bring it within the class of maritime contracts; nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.<sup>1</sup>

THIS was an appeal from the district court of the United States for the northern district of California.

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<sup>1</sup> DISTINGUISHED. *The Kalorama*, 10 Wall., 217.  
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The case is sufficiently stated in the opinion of the court.

It was argued by *Mr. Brent* and *Mr. May*, for the appellant, and by *Mr. Cutting*, for the appellees.

Mr. Justice GRIER delivered the opinion of the court.

The respondents were sued in admiralty, by process *in personam*. The libel charges that they are owners of the steam-boat Gold Hunter; that they had appointed the libellant their general agent or broker; and exhibits a bill, showing a balance of accounts due libellant for money paid, laid out, and expended for the use of respondents, in paying for supplies, repairs, and advertising of the steamboat, and numerous other charges, together with commissions on the disbursements, &c.

The court below very properly dismissed the libel, for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.

The case is too plain for argument.

The judgment of the court of admiralty, dismissing the libel for want of jurisdiction, is affirmed with costs.

*Order.*

\*This cause came on to be heard on the transcript of [\*478 the record from the district court of the United States for the northern district of California, 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.

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THE STATE OF FLORIDA, COMPLAINANT, *v.* THE STATE OF GEORGIA.

In cases in which this court has original jurisdiction, the form of proceeding is not regulated by act of congress, but by the rules and orders of the court. These rules and orders are framed in analogy to the practice in the English court of chancery. But the court does not follow this practice, where it would embarrass the case by unnecessary technicality or defeat the purposes of justice.

There is no mode of proceeding by which the United States can bring into review the decision of this court upon a question of boundary between two states. Justice therefore requires that the United States, which represent the rights and interests of the other twenty-nine states, should have an opportunity of being heard before the boundary is established.

The attorney-general having filed an information, stating that the interests of the United States are involved in the establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument.

The United States will not, by this proceeding, become a party in the technical sense of the word, and no judgment will be entered for or against them. But the evidence and arguments offered, in their behalf, will be considered by the court in deciding the matter in controversy.<sup>1</sup>

Each party is at liberty to cause surveys and maps to be made. But the court does not deem it advisable to appoint persons for this purpose.

IN 11 How., 293, it is reported that the state of Florida filed a bill in this court, in the exercise of its original jurisdiction, against the state of Georgia to establish a boundary between them. The state of Georgia answered, and other proceedings were had; but the case was not yet at issue, nor was all the testimony taken upon which the parties proposed to rely.

At the present term, the attorney-general appeared in court and filed the following information, moving at the same time for leave to intervene on behalf of the United States for the reasons stated in the information.

Now, on this 15th day of December, 1854, Caleb Cushing, attorney-general of the United States, in his proper person comes here into the court, and for the said United States gives the court to understand and be informed, that a certain bill of complaint <sup>\*479]</sup> is pending in said court, by or in behalf of the state of Florida, complainant, against the state of Georgia, defendant, wherein is in controversy a certain portion of the boundary line between said states, and of the lands contiguous thereto.

That by Mariano D. Papy, attorney-general of the state of

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<sup>1</sup> REFERRED TO. *State of Georgia v. Stanton*, 6 Wall., 73; *Alexander v. Horner*, 1 McCrary, 645.

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Florida, formal notice in the name and behalf of said state has been given to the United States that the matter of said bill is of interest and concern to the said United States.

That, by inspection of said bill of complaint, it appears that the state of Florida alleges that the portion of boundary line in question should run, commencing at the junction of the Flint and Chattahoochee Rivers, and thence in a straight line to a point at or near a monument commonly called Ellicott's Mound, at the assumed head of the River St. Mary's, which line has been surveyed by the surveyors of the United States, and is known as McNeil's line, or howsoever otherwise the same may be described or designated.

That in said bill of complaint the state of Florida further alleges, that the state of Georgia pretends that, commencing at the junction of the Flint and Chattahoochee Rivers, as aforesaid, the said line should run to a point called Lake Spalding, or a point called Lake Randolph.

It further appears that the said points of Lake Spalding and Lake Randolph are situated about thirty miles to the south of said Ellicott's Mound, and the effect will be, if the pretence of the state of Georgia be sustained, to transfer to said state of Georgia a tract of land in the shape of a triangle, having a base of some thirty miles, and equal sides each of the length of about one hundred and fifty miles, comprehending upwards of one million two hundred thousand acres of land, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has accordingly been sold and patented by the government as of the territory of east Florida acquired from Spain.

And for the information of the court herein, the attorney-general files, annexed to this motion:—

1. A certified copy of the (cautionary) traverse line so surveyed in 1825, by said McNeil.
2. A certified copy of the field-notes of said traverse line so surveyed.
3. A certified copy of the map of the (cautionary) true line, plotted from traverse line, by said McNeil.
4. An official copy of diagram of surveyor-general of the United States for Florida, of surveys of public lands of United States in said state, to September 30, 1853.

Whereupon, and in consideration of the interest and concern \*of the United States manifestly apparent in said bill of complaint, the said attorney-general of the United States prays the consideration of the court here, and moves the court that he be permitted to appear in said case, and be

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heard in behalf of the United States, in such time and form as the court shall order.

This motion was opposed by the states, and was argued by the *Attorney-General*, in behalf of the United States; by *Mr. Badger* and *Mr. Berrien*, on behalf of the state of Georgia, and by *Mr. Wescott* and *Mr. Johnson*, on behalf of the state of Florida.

Upon a question of this character, where "the file affords no precedent," the reporter would be pleased if he could report the arguments of counsel *in extenso*; but want of room compels him to submit to the reader only the following condensed and imperfect sketch of the respective arguments.

*Mr. Cushing* began with a general view of the subject of intervention, how it was considered in other countries, Spain, France, and England, and particularly the latter; and how far the English doctrines had been recognized in the United States. He then passed from the subject of intervention between private persons to cases where the attorney-general interfered, both in England and this country. He then considered the effect of the act of congress, (1 Stats. at L., 93.) establishing the office of attorney-general, and making it his duty "to prosecute and conduct all suits in the supreme court in which the United States shall be concerned;" and contended that, if the government cannot be heard in this case by intervention, it cannot be heard at all.

His argument under the 15th and 16th heads is given entire.

15. If there were no precedents to justify the right claimed for the attorney-general, then the court should make one, in deference to the great principle of equity laid down by Lord Cottenham, in *Taylor v. Salmon*, that it is the duty of the court of chancery "to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise; and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy." *Taylor v. Salmon*, 4 Myl. & C., 141.

This court has repeatedly decided that it has ample power to regulate chancery practice for the new and purely American question, of suits in equity between States; subject, of course, to the control of congress in this respect. *Grayson v. State of*

\*481] *Virginia*, 3 Dall., 320; *Huger v. State of South Carolina*, 3 Id., 371; *State of New York v. State of Connec-*

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*ticut*, 4 Id., 1; *State of New Jersey v. State of New York*, 5 Pet., 283; *State of Rhode Island v. State of Massachusetts*, 12 Id., 657.

It can as well provide rules in equity, according to the exigencies of the case, for this first example of the more complex contingency of the collateral interest of the United States in a suit between two states, as it could for the primary and simple contingency of the suit between two states of itself.

If there be no rule in the files applicable to the case, then it is the very time for the court to exercise the double equity power, (reversing the order in which Bacon describes it,) *tam supplendi defectum legis quam subveniendi contra rigorem legis.*

16. It will not answer to say that the United States may appear in the name of the state of Florida.

§ 1. If so, then the condition of the United States, in the premises, is precarious, depending on the discretion of the state of Florida, or of any other state which may stand in like circumstances.

Self-defense on the part of the government will no longer be its right, but a favor to be granted or withheld by any litigant state. The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium.* Right is a thing determinate, fixed, established. *Rego, rectum, regula*,—all belong to the same set of ideas.

§ 2. The proposed appearance for the United States is not a volunteer act; for the state of Florida demands of the general government to intervene. The attorney-general of that state officially notifies the attorney-general of the United States of their interest depending on this question with Georgia.

But a case might arise in which neither of two or more litigant states desired the presence of the United States.

The matter before the court is, therefore, of a legal principle to be determined, not of a privilege to be conceded, or of one enjoyed indirectly, under favor of a state.

§ 3. Nor is the possibility of distinct and separate rights, on the part of the United States, a suggestion or supposition merely.

The United States have granted certain lands, by patent, to individuals, or by statute cession, to Florida, which, according to the claims of Georgia, belonged to her, not to the United States. Here is responsibility of the latter to its grantees.

The warrantor comes in because of his responsibility to his grantee, but also in order to see that the case is fully and well

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tried, with all just defenses fully before the court, either technical or of the merits.

\*482] \*§ 4. The rights of the United States might be prejudiced in a suit between two states through the forms of law.

The constitution provides (Art. 1, § 3) as follows:—

“3. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more States, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.”

By the constitution, also, (Art. 1, § 10,) “No state shall, without the consent of congress, \* \* \* enter into any agreement or compact with another state.”

These two clauses of the constitution are *in pari materia*, and to be construed together; and they establish that two states cannot change their common boundary without consent of congress.

The United States have a general interest in the question of the boundaries of states, because of sundry political or legislative relations of the subject: as, for instance, apportionment of members of the house of representatives, collection districts, judicial districts, and many other things having reference to the boundaries of states.

Treaty rights may likewise be involved, as in the present case, where the line in dispute is defined by the treaty of 1783 between the United States and Great Britain, art. 2, (8 Stats. at L., 81,) and by the treaty of 1795 between the United States and Spain, art. 2, (8 Id., 140.) These treaties are a part of that supreme law, which it is the peculiar duty of the United States, its officers, and its tribunals, to maintain and execute.

Special acts of congress may be in question, as here in the present case.

By the act of March 3, 1845, for admitting the state of Florida into the Union, (5 Stats. at L., 743, ch. 63, § 5,) “said state of Florida shall embrace the territories of East and West Florida, which, by the treaty of amity, settlement, and limits between the United States and Spain on the 22d day of February, 1819, were ceded to the United States.”

And by the 7th section of that act, the State of Florida was admitted into the Union upon the express condition that the state shall never interfere with the primary disposal of the public lands within the state, nor levy any tax on the same whilst remaining the property of the United States.

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The attorney-general, in proposing to intervene here to protect the interests of the United States, desires to do so, not as a \*technical party; not as joining with the one or [\*483 the other party; not in subordination to the mode of conducting the complaint or defense adopted by the one state or by the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact by either or both; but free to co-operate with, or to oppose both, or either, and to bring forth all the points of the case according to his own judgment, whether as to the law or to the facts; for *ex facto oritur jus*.

As the states of Florida and Georgia cannot, by any direct agreement or contract between them, without the consent of congress, change the boundary of Florida, as established by the said act of congress, it follows that they ought not to be permitted to alter that boundary in the suit pending, either by possible mispleading, mistake in pleading, omission of pleading, or direct confession, or by omission of evidence, by any of which means the true, faithful, and full view of all the facts pertinent to the question might be withheld from the view and judgment of the court.

As the public domain and jurisdiction in East and West Florida, were acquired from Spain by the United States, and thereafter the territory so acquired by the United States was admitted into the Union with its boundaries so defined, and with the reservation to the United States of the disposal of the public lands, and that they be free of taxation by the state whilst they remain the property of the United States, the conclusion seems to be inevitable, (supposing this court to have original jurisdiction on the direct question of the primitive right of the boundaries,) that the attorney-general ought to be suffered to intervene fully and completely, to protect the interests of the United States, without being prejudiced by any acts or omissions of either of the litigant states, whether Florida or Georgia.

Otherwise, and without power to show the possible mistakes, errors, omissions, mispleadings, insufficient pleadings, and improper admissions or agreement of the two, or of the one or the other, the means of protecting the public interests would be wholly inadequate to the end; and two states might, by their own acts, by pleadings, or their agreement entered of record in the suit, change the true and lawfully established boundary between them to the direct prejudice of the interests, rights, and laws of the United States.

It is on this consideration, among others, that the whole

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doctrine of equity, as to the necessity of proper parties in court, stands. Each party interested is to defend his own rights, lawfully according to his view of their merits, without being \*prejudiced through the acts or omissions of any \*484] co-party. See Story Eq. Pl., ch. 4.

§ 5. If the United States are not present, no decree in the case can be made to the prejudice of the United States.

*Mr. Badger* and *Mr. Berrien*, on behalf of the state of Georgia, opposed the motion, upon the following grounds, namely:—

The object of the motion, as appearing on its face and as explained by the brief of the attorney-general, is: That he, on the part and as the representative of the United States, may be made a party to this suit in fact, but not in form; may exercise all the rights of a party without becoming a party; may be, without seeming to be, a party.

On the part of the state of Georgia, it is insisted that the motion cannot be granted, because,

1. Under the constitution, this court has not and cannot have any jurisdiction of this cause, but as a controversy between states of the Union; and the appearance of any other party therein would determine the jurisdiction and put the cause out of court.

2. To allow the United States to become in fact a party, without appearing on the record to be one, would be a mere evasion of the constitutional inhibition, involving all the guilt of a deliberate violation of that instrument, accompanied and enhanced by an artful contrivance to conceal it; a violation in substance though not in form, and therefore utterly unworthy of this high constitutional court.

3. If the motion should be granted, the United States would judicially appear on the record to be a party, though not made so by the process or in the manner usual in this court; and, therefore, the jurisdiction of the court would, at once, be gone.

4. There is no precedent or example of any such intervention as is here sought to be obtained.

We put aside all the references in the learned brief to proceedings under the civil law, as being utterly irrelevant to the question; for that law neither gives the rule of judgment nor regulates the practice of this court. This cause is one of equity jurisdiction, governed, as to the principles of decision, by the law of courts of equity, and by the statutes and treaties of the United States, and as to the course of proceeding by the practice of the court of chancery in England, in sub-

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ordination to the paramount authority of the rules of this court. If, therefore, it could be demonstrated that what the attorney-general asks is, and always has been, allowed as of right or of grace in all the courts of France, the German states, and other countries \*of continental Europe, we should not be advanced one title towards showing the [\*485] right or the propriety of allowing it to be done here.

In England, no intervention, whether voluntary or involuntary, if that term may be properly used in this connection, is known, except by the intervener becoming a party, and submitting his rights in the matters in dispute to the decision of the tribunal, so that its judgment shall conclude those rights. There, whatever may be the case in other European countries, no process has ever been applied or understood, in virtue of which one not a party to the record may interpose between two litigants, contest their rights or the rights of one of them, embarrass and obstruct their proceedings, direct or control their management of the controversy, and taking all the chances of obtaining a judgment against one of them, binding upon the rights of both, may retire at the conclusion of the contest with his own rights unaffected by a judgment adverse to his claims.

On the contrary, where third persons are found to have such an interest in the subject of litigation that they ought to be heard before a judgment, these persons are required to be made parties, to the intent that all persons in interest may be concluded by the final award of the tribunal. This is emphatically true in regard to equity proceedings in the court of chancery, and not less in regard to the crown than to private persons. This is abundantly evident from cases cited by the attorney-general in support of his motion. For example:—

(The counsel then cited and commented on the cases of *Penn v. Baltimore*, 1 Ves. Sr., 444; *Hovenden v. Annesley*, 2 Sch. & L., 607; *Attorney-General v. Galway*, 1 Molloy, which established that the king must be a party.)

5. The United States is not "concerned" in the questions involved in this cause, within the meaning of the act of congress prescribing the duties of the attorney-general; that term means, concerned in interest, and is exactly equivalent to "interested," and cannot be used in any other meaning in reference to an impersonal sovereignty like the United States. The cases cited show what is the nature of that interest of the king which makes it necessary in England that he should be a party; for example, a contest between two of his grantees claiming at rents of different value, where it appears upon record that the success of him who holds at the smaller rent

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will be immediately and certainly prejudicial to the crown revenue, and like cases.

Here no interest of the United States appears on the record. It is a question merely as to the boundary between two states. However resolved, the United States gains no right and suffers

\*486] \*no loss, neither of the states holding under the United States as a tenant, or owing any payment or other duty to the United States, for or on account of her possession or jurisdiction. The only parties having any seeming interest in the question, besides the two states, are those having lands upon the disputed territory, whose titles may be, but are not necessarily, affected by a judgment against the plaintiff. The United States have no interest, real or apparent, and therefore are not a necessary or even a proper party to the controversy. The cases referred to by the attorney-general, in which the United States are represented by him officially in this court, are all consistent with the view here taken. Actions, for instance, brought in the name of heads of departments as such, are suits of the United States, as truly as an information in the name of the attorney-general, or the master of the crown office, is, in England, the king's suit, &c.

6. Supposing the United States to have some interest, indirect, consequential, and contingent, in the decision of the question in the cause, and supposing that in England such an interest of the crown might be represented by the attorney-general there, it doth not follow that the attorney-general here can assume, *virtute officii*, to represent such interest.

7. Even an act of congress could not enable him to intervene for the United States in this suit in this court. For, if made a party, either the court would proceed with a party, not a state before it, in which case, according to the constitution, this court cannot hold original cognizance, or dismiss the bill for want of jurisdiction; and thus a jurisdiction conferred by the constitution expressly and exclusively upon this court would be withdrawn from it by force of an act of congress, and in defiance of the constitution.

Upon the whole, it clearly appears that the court cannot grant the motion of the attorney-general.

What then remains to be done? If the United States have any consequential interest which ought to be represented, the court cannot, as did the lord chancellor in *Reeve v. The Attorney-General*, 2 Atk., 223, dismiss the bill in order that proceedings might be taken in another court, for there is no such court; this court, and this only, having cognizance of the controversy between the two states; and the court cannot decline the exercise of its exclusive jurisdiction over the two

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principal parties, because of such incidental and subordinate interests.

We submit, as a necessary and inevitable consequence, that the court must proceed with the cause between the present parties, without intervention, formal or informal, of any third party whatever.

\**Mr. Westcott* and *Mr. Johnson*, on behalf of the state of [\*487] Florida, opposed the motion for the following reasons:—

1. That the jurisdiction of this court, in this case, is founded exclusively upon those clauses of the federal constitution which declare that "the judicial power of the United States shall extend" "to controversies between two or more states," in connection with that clause which provides that "in those cases (referring to the cases enumerated in the constitution, as being of federal judicial cognizance,) in which a state shall be a party, the supreme court shall have original jurisdiction."

2. That the clauses of the federal constitution, cited, extending the federal "judicial power" "to controversies between two or more states," refer exclusively to cases in which states only are parties therein, and make such cases a distinct and separate class from all the other cases enumerated in the constitution; and they do not reach or apply to any case, whether at law or in equity, wherein there is a co-plaintiff or a co-defendant, other than a state, with a state or states; and if it be conceded that in a suit in equity, in this court, under any other of the constitutional provisions, a complainant hath a right to join the United States, or any corporation, or officer, or individual, interested in such suit, as a party complainant or defendant; or that the attorney-general of the United States hath authority to make the United States such party; or that this court possesses power to order the joinder as parties of all interested, as in an ordinary case in equity, in the English, or in our state chancery courts; it is nevertheless insisted by complainant, that in this "controversy between two states," such courses cannot be pursued; and this, though an act of congress allowing the same had been or should be passed.

3. That if the court should hold that the point secondly above stated is erroneous, and that the joinder of another party, not a state, with the state of Florida, as co-complainant, or with the state of Georgia, as co-defendant, would not affect the jurisdiction of this court over the present case, as invoked by the complainant in the bill filed, under the clauses of the federal constitution above cited, (and especially referred to in said bill,) then it is insisted that the complainant cannot, without an act of congress authorizing the same, make the United States

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a party to this bill; even if the consent of the attorney-general of the United States is given therefor; and that, without such law, this court doth not possess the power to order, (either *ex mero motu*, or upon the express application of said attorney-general, or at the instance of either or both of the litigant states,) such joinder of the United States as a party complainant or party defendant in this case.

4. \*That insomuch as the United States, in the admission, by act of congress, of the Floridas, as a sovereign and independent state into the federal union, yielded to that state all rights of sovereignty or "eminent domain" they had within the boundaries of the states, as declared by the state constitution; and thereby became a mere proprietor of the unsold and ungranted lands included within said boundaries; they have not now any higher or other prerogatives, in reference to this "controversy," than a citizen or alien proprietor of land situate on the territory in dispute between the two litigant states, the titles of said proprietors of such lands being derived from the United States; and consequently, if the claim of the state of Georgia is sustained, will be destroyed; nor than the several thousand residents of said territory, who have, up to this time, been considered resident citizens of the state of Florida, and have exercised the rights, privileges, and immunities of such citizenship, and whose state allegiance will be changed by a decree of this court confirming the claim of the state of Georgia; and the complainant insists that the rights and interests of all said proprietors, (including the United States,) and of said residents, are, in this regard, entirely subordinate to those of the state of Florida, now in contest, and are subject to her action as their political sovereign in the premises.

5. That by reason of the anomalous character of a suit at law or in equity "between two or more (sovereign and independent) states," involving their rights of sovereignty, as well as of property; instituted in virtue of a federative compact, before a judicial tribunal, by legal process, summoning a defendant state to the bar of the court to submit her claims, and abide by the arbitrament and decree of that tribunal, from which decision there is no appeal; most of the rules of procedure in ordinary cases before the courts of common law or of chancery in England, are inapplicable to such suit, ineffective as aids to counsel in its prosecution or defense, and useless to the court in its investigation of the "controversy," or in its arbitrament and decision; and, by consequence, additional, different, and extraordinary *formulæ* of procedure, must be prescribed by the

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court, and conformed to by the parties, in every "controversy" before this court, "between two or more states."

6. That in the adoption of such necessary, additional, different, and extraordinary rules of procedure, "in controversies between two or more states," brought before this court, it is not restricted to guides furnished by the rules of procedure of the English common law or chancery tribunals, (wherein no like case is to be found;) nor, in the determination of such case, is this court limited to the consideration of the principles supplied \*by the English systems of jurisprudence, to which such case is unknown, and the principles controlling it are [\*489] above the reach and beyond the scope of those systems; and, therefore, whensoever a departure from English rules and theories will facilitate and speed the settlement of the controversy, will aid in the better protection of all just rights and interests involved, whether of the states who are the "parties," or of others not "parties," this court may rightfully invoke systems of jurisprudence and rules of procedure, in the tribunals of other countries, and with especial propriety resort to the principles and rules of the "civil law" of the continent of Europe, (the original source of much of the common law and most of the chancery law of England, but of more enlarged and liberal applicability;) or, this honorable court rightfully may, in a case so peculiarly and exclusively American, and its jurisdiction whereof is so entirely based on the constitutional compact between the states, devise, adopt, and enforce such original rules of procedure, appropriate to such case, as, in its judgment, may best tend to "establish justice," "insure domestic tranquillity," and promote the other declared objects of that compact; and this, though there cannot be cited any transatlantic precedent or example therefor.

7. That, as there are involved in this case not only the rights of sovereignty and of property, in controversy between the two litigant states, but also important rights and interests of others not parties in the records, founded on the identical facts and law to be submitted to the court, as the basis of its decree therein, all which rights and interests of those not parties will necessarily be affected if not conclusively determined by said decree; the complainant concedes the rightfulness and propriety of this court so devising the rules of procedure in this case, as to allow those immediately interested, though not parties, the privilege and opportunity of maintaining and defending their rights and interests, and of adducing proofs, and of being heard in argument before this court to that end; and that the same should be done in such liberal form and to such full extent as may be consistent with the progress of the cause, without

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embarrassment or prejudice to the parties, and as will not abridge or compromit the rights of the respective parties to the exclusive control and management of the mode and means of enforcing their own rights and interests ; and the complainant also concedes, that insomuch as the title of the United States to some 1,200,000 acres of unsold and ungranted lands claimed to be what are usually designated as " public lands of the United States," of the estimated value of \$1,200,000, and of which the United States are the constitutional trustees for the several states of the confederacy, and the people thereof ; and, insomuch as the \*liability of the federal treasury to refund \*490] large amounts paid into it as purchase-money, by patentees of the United States, for lands heretofore sold by the United States to them, and also to pay large sums for improvements and for damages, will be affected and in some respects determined conclusively, if the claim made by Georgia (suggested in the bill of complaint) be established by this court, which amounts and sums will probably exceed \$1,500,000 ; this complainant, whilst she denies any special prerogative appertaining to the United States as a government, or any special privilege of the attorney-general of the United States, *virtute officii*, to interfere in this case, except as aforesaid ; yet, because of all said premises above set forth, and especially for the reason that the United States cannot be made a party complainant or defendant in this case, doth concede that the rules of procedure so adopted by this court may rightfully and properly be extended in this case, as aforesaid, to the United States, and that the attorney-general may be allowed to "intervene," as he hath applied to the court, under such restrictions as above suggested by complainant, or such others as may be deemed proper by this honorable court.

8. That if it be held by this honorable court, that the complainant is in error as to the points above presented ; and that the United States may be made a party complainant or a party defendant in this case, either without an act of congress therefor, or by authority of an act that may be passed therefor ; and that such joinder is necessary for the protection of the admitted important rights and interests of the United States involved therein as aforesaid ; then, this complainant respectfully insists, that if no act of congress be requisite to enable them to be made such party, this honorable court ought not to dismiss the said bill of complaint, for that the complainant did not join them as such party in said bill, but should stay proceedings and the decision in the case till the same be done, under an order of this court therefor ; and if such act of congress be deemed proper and necessary, that a suggestion thereof be made in this

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case by this honorable court, in an order to stay proceedings in the case, until the executive and legislative departments of the federal government may be enabled to adopt such course in that behalf, upon the application of this complainant, as they may respectively deem advisable to that end or otherwise in the premises.

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

The court proceed to dispose of the motion made by the attorney-general for leave to be heard on behalf of the United States, in the suit between the state of Florida and the state of Georgia.

\*It appears that the boundary line between these two states is in controversy, and a bill has been filed in this court by the state of Florida to ascertain and establish it. [\*491]

The attorney-general has filed an information, stating that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land, and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to offer proofs to establish the boundary claimed by the United States, and to be heard, in their behalf, on the argument.

The motion is resisted on the part of the states, and the question has been fully argued by counsel for the respective parties. And as it is, in some degree, a new question, and concerns rights and interests of so much importance, we have taken time to consider it.

If the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the states. For it is the familiar practice of the court to hear the attorney-general in suits between individuals, when he suggests that the public interests are involved in the decision. And he is heard, not as counsel for one of the parties on the record, but on behalf of the United States, and as representing their interests. This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain previous to the cession to this country.

In these cases, however, they were argued by the attorney-general upon the evidence produced by the respective parties. No new evidence was offered on behalf of the United States. And the objection now made is, that he cannot be permitted to

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adduce evidence in the case, unless the United States are parties on the record; and that they cannot, under the provisions of the constitution, become parties in this court, in the legal sense of the term, to a suit between two states.

We proceed to consider this objection.

The constitution confers on this court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party. And it is settled, by repeated decisions, that a question of boundary between states is within the jurisdiction thus conferred.

But the constitution prescribes no particular mode of proceeding, nor is there any act of congress upon the subject.

\*492] \*And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.

There was no difficulty in exercising this power where individuals were parties; for the established forms and usages in courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign state was a party defendant. Nor could the proceedings of the English chancery court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary subject to the authority of its courts, be adopted as a guide where sovereign states were litigating a question of boundary in a court of the United States. They furnished analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

It is upon this principle that the court appear to have acted in forming its proceedings where a state was a party defend-

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ant. The subject came before them in *Grayson v. Virginia*, 3 Dall., 320. And the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a state to be served on the governor or chief magistrate, and the attorney-general of the state. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy. But the power and propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized; and were distinctly asserted in the case of *Rhode Island v. Massachusetts*, 14 Pet., 247, and again in the same case, in 15 Pet., 273, and was recognized in the case of *New Jersey v. New York*, 5 Pet., 289.

We proceed to apply these principles to the case before us. It is manifest, if the facts stated in the suggestion of the attorney-general are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

But it is said that they cannot, by the terms of the constitution, be made parties in an original proceeding in this court between states; that if they could, the attorney-general has no right to make them defendants without an act of congress to authorize it.

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate

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from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

It is evident that this object can be more conveniently accomplished in the mode adopted by the attorney-general, than by following the English practice in cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode by which that decision can be reviewed or re-examined at the instance of the United States. They would therefore be as effectually concluded by the judgment as if they were \*494] parties \*on the record, and a judgment entered against them. The case, then, is this: Here is a suit between two states, in relation to the true position of the boundary line which divides them. But there are twenty-nine other states, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating states. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union, provided in the constitution, would in effect be annulled.

By the 10th section of the 1st article of the constitution, no state can enter into any agreement or compact with another state, without the consent of congress. Now, a question of boundary between states is, in its nature, a political question, to be settled by compact made by the political departments of the government. And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without

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the assent of congress. This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states, which might affect injuriously the interests of the others. And the right and the duty to protect these interests is vested in the general government.

But, under our government, a boundary between two states may become a judicial question, to be decided in this court.<sup>1</sup> And, when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the states that are parties to the suit. Now, as in a case of compact, it is, by the constitution, [\*495] made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of the other states of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this court, and about to be finally decided. And, if such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this court. For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court. The states might thus, in the form of an action, accomplish what the constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating states, or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the states for their general safety; and, moreover, maintains that universal principle of justice and equity, which gives to every party, whose interest will be affected by the judgment, the right to be heard.

Upon the whole, we think the attorney-general may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence,

<sup>1</sup> QUOTED. *Virginia v. West Virginia*, 11 Wall., 54.

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or admissions of the states, or of either of them. And, when the case is ready for argument, the court will hear the attorney-general, as well as the counsel for the respective states; and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the states. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor. We consider the attorney-general as the proper officer to represent the United States in this court; and that the general government, in bringing before us for consideration the rights and interest of the Union in the question to be decided, does nothing more than perform a duty imposed upon it by the constitution. And, as the mode in which that duty is to be performed <sup>\*here</sup> <sub>\*496]</sub> is not regulated by law, but must depend upon the rules and regulations prescribed by the court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented, to be the simplest and best manner of bringing their interest before the court, and of enabling it to do justice to all parties whose rights are involved in the decision.

Mr. Justice MCLEAN, Mr. Justice DANIEL, Mr. Justice CURTIS, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CURTIS, dissenting.

It is in accordance with natural justice, and with a principle of jurisprudence, that no one should be affected by a judgment or decree, without an opportunity to present to the court, either by himself or his lawful representative, in some regular and legal course, his allegations and proofs, and to be heard thereon; and, therefore, I should have assented to the application of the attorney-general in this case, and would willingly concur with a majority of the court in the order they direct to be entered, if I did not find it to be subject to objections too grave for me to disregard, and which careful reflection, even under the influence of the great respect I feel for the opinions of my brethren, has not enabled me to overcome.

I will state, as briefly as I can, what these objections are. In doing so, I shall first examine the nature and effect of the application of the attorney-general, to see whether it is in the power of the court to grant it, as made; and I will then consider whether the order directed by the court is subject to the same difficulties, in part or in whole.

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That application is, in substance, an *ex officio* information, in which the attorney-general of the United States informs this court of the pendency of a suit here, by the state of Florida against the state of Georgia, wherein there is in controversy a portion of the boundary line between those states; that it appears, from an inspection of the bill of the state of Florida, and of the answer of the state of Georgia, that, if the pretensions of the state of Georgia shall be sustained by this court, the boundary line in controversy will be so run as to include within the territorial limits of that state a tract of land of about one million two hundred thousand acres, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has been sold and granted by the United States, as being part of the territory of East Florida, acquired from Spain.

\* In support of this information, the attorney-general [\*497 has filed certain documents and a map; and he prays that, in consideration of the interest and concern of the United States, he may be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court shall order.

The case to which this information relates now stands on the original docket of this court, upon a bill filed by the state of Florida and an answer by the state of Georgia. No replication had been put in, and, of course, no proofs taken.

It is quite apparent, therefore, since the case is not now in a condition to be brought to a hearing, and since much time must necessarily elapse, considering the course of the court and the nature of the controversy and the character of the parties, before it can be put into a state to be heard, that this application of the attorney-general is not designed merely to obtain the privilege of taking part in the hearing of the cause, by making an argument at the bar, upon the pleading and proofs as they may exist when the cause may be set for a hearing, if that time shall ever arrive. It seems to me not consistent with that respect which is due to the attorney-general, to suppose that he has caused the states of Florida and Georgia, by their counsel, to appear here, and has called on the court to listen to and consider elaborate and learned arguments upon questions of constitutional law and general jurisprudence, merely to present the question whether—in the contingency that this case should, at some future day, be brought to a hearing, and in the event that, at that time, the interest of the United States should remain as it is now alleged to be—the court would hear the law officer of the United States, in support of its interests.

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Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possibly occur at some period in the future. And this obvious dictate of ordinary prudence is rigidly obeyed by courts of equity, when acting on subjects like that now before the court.

In England, the sovereign has a great number and variety of interests and rights, which may be affected by decrees of courts of equity. As will be more fully stated hereafter, the attorney-general represents the crown in respect of those rights, and no decree affecting them is made until he has had opportunity to become a party to the suit. But the question, whether he is a necessary party, is raised in the same way and at the same time, as the question whether a private person is a necessary party. And, I believe, we should search in vain for an instance in which any court had made an order in a cause before it was at issue, *\*that*, if it should come to a hearing, the attorney-general should be heard at the bar.

I have made these observations concerning the nature and objects of this application, because the information does not specify or in any way indicate what particular order it is desired the court should pass. If I felt at liberty to understand it simply as an application to be heard at the bar, by way of argument on the pleadings and proofs of the complainant and the defendant, I should think the proper answer would be, that the court would advise thereon when it was made reasonably certain that the cause would be heard. But I am not at liberty so to view this information, not only for the reasons I have suggested, but because the attorney-general, with becoming frankness, has declared, both orally, at the bar, and in his printed brief, that what he desires passes far beyond this. He has thus made known to the court that he seeks to intervene in the cause in behalf of the United States; and he has explained his understanding of the term intervention, and of the effect of an order of the court allowing it, to be, that he is to come into the cause, "not in subordination to the mode of conducting the complaint or defense adopted by one state or by the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact, by either or both; but free to co-operate with or oppose either or both, and to bring forth all the points of the case according to his own judgment, whether as to the law or the facts; for *ex facto oritur jus.*"

Can this, or any thing like this, be allowed, consistently with the constitution and laws of the United States?

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In answering this inquiry, it is necessary to determine what would be the relation of the United States to this controversy if the attorney-general were thus admitted. In my opinion, they would thus become substantially and really, a party to the controversy. I say substantially and really a party, for I quite agree with the majority of the court in thinking that this question is not to be decided according to any strict technical rules, or even viewed solely by the light which they impart. As I consider it, the question is one of constitutional law; and though the constitution was framed and intended to operate in connection with those systems of law and equity existing in our country at the time of its adoption, and many terms in it can be correctly understood only by resorting to the interpretation of those terms in those bodies of law, yet I concede that, in examining this question, we are to look to the substance and nature of the relation to the suit, and not merely to forms and names; and, therefore, I have inquired whether, if the attorney-general \*be admitted on the record in [\*499 accordance with the prayer of his information, the United States will be substantially and really a party to this suit? And, in the first place, I think there can be no substantial distinction in this matter between the United States and the attorney-general. If what is done is sufficient to make him a party, the United States is, in substance and in legal effect, a party. The rights and interests which he brings before the court are the rights and interests of the United States. He presents those rights and interests, not as a trustee in whom they are vested; not as specially empowered by law to sue in his own name for the recovery of something belonging to the government; but he acts simply as an attorney and counsellor at law.

The post-master general is empowered by law to bring suits in his own name, in the courts of the United States, upon contracts made with him as the head of a department; and the United States, though exclusively interested is not deemed a party to the controversy. *Osborn v. The Bank of the United States*, 9 Wheat., 855. So an executor or administrator, though he may have no beneficial interest in the cause of action, is deemed the party to the suit for the purpose of jurisdiction. 4 Cranch, 308; 8 Wheat., 668; 12 Pet., 171. But, in these and similar cases the officer or executor has, by law, the legal right of action vested in him.

On the other hand, it has been repeatedly decided, that where a law required a bond to be taken in the name of a public officer, but for the benefit of individuals, as in case of sheriff's bonds, the person for whose use the suit was brought,

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and not the obligee in whose name it was brought was the party to the suit, within the meaning of the constitution. *Brown et al. v. Strode*, 5 Cranch, 303; *McNutt v. Bland*, 2 How., 1; *Huff v. Hutchinson*, 14 Id., 586.

These decisions go much beyond what I maintain in this case. The rights and interests which the attorney-general desires to assert in this case are in no manner and for no purpose vested in him, any more than the rights and interests of the private parties litigating in court are vested in the attorneys and counsel whose names are on the docket, or who argue the causes at the bar.

He is not what was termed, in the cases of *Browne et al. v. Strode*, and the other cases just referred to, a conduit through whom the remedy is afforded on a contract made in his name. He is simply a law officer of the government, empowered to act for the United States in this court. In such a case it does not seem to me to admit of a doubt, that whatever is done by him, though in his name, will be done by the United States.

\*500] \*The case of *Georgia v. Brailsford*, 2 Dall., 402, was a bill by "His Excellency, Edward Telfair, Esquire, governor and commander-in-chief in and over the state of Georgia, in behalf of the said state." The jurisdiction was sustained, as of a suit by the state, and an injunction granted and a trial had at the bar of this court. 4 Dall., 1. Yet, to give the court jurisdiction, a state must be a party on the record. *Osborne v. The Bank*, 9 Wheat., 738. In this case, the court must have considered the state was made a party on the record by a proceeding in its behalf in the name of its chief executive magistrate. So it was declared by the court, in the case of *The Goevrnor of Georgia v. Madrazo*, 1 Pet., 122; and in this last-mentioned case, it was decided, on great consideration, and after examining all the previous decisions, that a claim, filed by the governor of Georgia, in his own name as governor, but in behalf of that state, made the state itself a party to the record, within the meaning of the constitution and laws of the United States.

In *Benton, District Attorney of the United States for the Northern District of New York v. Woolsey et al.*, 12 Pet., 27, the district attorney of the United States for the northern district of New York had filed an information in his own name to foreclose a mortgage belonging to the United States. The case came to this court by appeal. In delivering the opinion of the court, Mr. Chief Justice Taney said: "Some doubts were at first entertained by the court, whether this proceeding could be sustained in the form adopted by the district attorney. It is a bill of information and complaint in the name

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of the district attorney, in behalf of the United States. But upon carefully examining the bill, it appears to be in substance, a proceeding by the United States, although in form it is in the name of the officer. And we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States, held in the state of New York; and was doubtless borrowed from the form used in analogous cases in the courts of the state where the state itself was the plaintiff in the suit. No objection has been made to it either in the court below or in this court, on the part of the defendants, and we think the United States may be considered as the real party, although, in form, it is the information and complaint of the district attorney. But although we have come to the conclusion that the proceeding is valid and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceedings should be in their name, unless it is otherwise ordered by act of congress."

\*Now it is plain, that the only ground upon which [\*501 this proceeding could be sustained, as within the jurisdiction of a court of the United States, was, that an information by a law officer of the government in his own name as such officer, but asserting rights of the United States, is a controversy to which the United States is a party within the meaning of those words in the constitution; for it was only because the United States was a party to the controversy that the jurisdiction attached. It would have been in conformity with what this decision declares to be the correct practice, if this information, and all proceedings which may ensue thereon, were to be in the name of the United States; but it is also in conformity with it to say, that though in the name of the attorney-general, for the United States, the United States will thereby be made a party to this controversy, provided what is done is sufficient to constitute any one a party to it. It remains to inquire whether the rights and privileges claimed by the attorney-general in behalf of the United States, if conceded, will make them a party to this controversy.

It seems to me somewhat difficult to reason about so plain a proposition. The attorney-general has already filed an information, alleging the interest of the United States, and showing what it is and how it arises. If an order is made thereon, allowing him to appear and support those allegations, the United States will appear on the record asserting their interest in this controversy. They will so appear, that they may enjoy the rights of a party to be heard by proper allega-

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tions and proofs, and by arguments at the bar. The process of the court must be accorded to them to obtain their proofs, in those modes and under those sanctions appropriated exclusively to the taking of evidence to be used in judicial controversies. They are to be at liberty to oppose the pretensions of the other parties, and to assert and maintain their own, in a regular course of judicature; and they, in common with the others, are to be bound by the decree, which is to be the product of their allegations, proofs, and arguments, as well as of those of the two states of Florida and Georgia.

If all this does not make the United States a party to this controversy, it would be difficult for me to show that it has any parties.

Under our system of jurisprudence, what constitutes a person a party to the record? Is it not sufficient, if it appears by the record that he had a direct interest in the subject-matter of the suit; that he placed before the court in his own name, and not in the name of another, by some appropriate allegations, his claim or defense; that he introduced legal evidence in support of that claim or defense, which was heard by [502] the court; that he \*was heard by his counsel; that his rights, and what he presented to the court in support of them, were taken into consideration by the court in making a decision; and that these rights were intended to be bound, and in point of law are bound, by the decree? All this must appear from this record, if the United States be allowed to do what has been prayed for.

The attorney-general, in his very learned and able argument, has referred the court not only to the practice of some of the courts of England, but to the Roman law, and to the modern civil law of the continent of Europe, concerning intervention. This practice differs, in details, in the different countries. But so far as I have been able to examine, a third person who comes in after the institution of a suit, to assert a right of his own involved in the controversy, is considered and expressly denominated a party. The definition given in the Code of Practice of Louisiana, which is substantially borrowed from the French Code of Procedure, is: "An intervention, or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both." See also Merlin, Rep. vol. 16, and Recueil, voc. Intervention, Dalloy Dic. s. voc.

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The English law is equally clear. When the attorney-general is brought into a suit between third persons as the representative of the crown, and to protect its rights, though possessed of some privileges which do not belong to private persons, he is not only called a party, but he is treated as one. He is attended with a copy of the bill, and if he does not appear it is considered as a *nihil dicit*; and if he does appear and fails to answer, the bill is taken *pro confesso* as against the crown. 1 Dan. Ch. Pr., 169, 170, 531, 548.

Indeed, I am not aware of any case, either in equity or admiralty, or at law, under particular statutes, in which a third person who intervenes, is not considered and called a party. The ground upon which a decree *in rem* is held to bind all persons, is, that every one having an interest has a right to make himself a party to the cause, and that the seizure or arrest of the thing gives notice to all concerned, of the pendency of the proceedings, and thus enables them to become parties. In *Rose v. Hinely*, 4 Cranch, 277, Chief Justice Marshall states this familiar rule: "Those on board a vessel are supposed to represent all who are interested in it; and if placed in a situation which enables them to take notice of any proceedings against a vessel and cargo, \*and [\*503 enables them to assert the rights of the interested, the cause is considered as properly heard, and all concerned are parties to it."

And so in equity. Those who come in, even before the master, are, as Lord Redesdale says, (Mitf. Pl., 178, 179,) considered parties to the cause in the subsequent proceedings.

With great respect for my brethren, I cannot agree that the reasons advanced by them why the United States will not be a party to the record are sufficient. Those reasons I understand to be, that no decree will be made against the United States, and that the attorney-general will not be allowed to interfere in any way with the pleadings, or proofs, of either the state of Florida or Georgia. As to the first of these reasons, it is certainly true, that no decree will be made against the United States, in form, or by name; but, if I understand the opinion of the majority of my brethren, they consider as I do, that substance, and not form, is to be looked to in this case; and that the only inducement for allowing the United States to be heard is, that, from the nature of the controversy, all the world must necessarily be precluded by the decree from disputing the correctness of the line of boundary fixed by it. Whether the United States shall or shall not be named in the decree, would seem, therefore, to be formal rather than substantial, since their rights and duties will be the same, whether named

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or not. In either case, the decree will conclusively operate thereon.

And as to the other reason, that the attorney-general is not to be allowed to interfere with the pleadings or evidence of the states of Florida or Georgia, I must say, with deference for the better opinion of my brethren, that it seems to me to be a restriction which, while it still leaves the United States a party to the suit, deprives them of some of the rights of a party, and to that extent fails to carry out the very principle which requires them to be heard at all.

The right to have this case stated by Florida in the bill, so as to present it in its entire substance, is a substantial and important right of the United States. If the case is defectively or untruly stated there, the decree must be affected thereby, for Georgia has the right to insist that the decree shall conform to the bill. An explicit and full answer to the bill is also material to the United States, that they may know what is to be relied on, and what proofs and arguments are necessary to be adduced. The power to cross-examine witnesses, and to except to proofs when offered, has been deemed essential to the administration of justice. I would respectfully ask, upon what principle known to our jurisprudence, are the United States to be deprived of these rights, if they are admitted at all to contest the claims of Georgia? \*If

\*504] both Florida and Georgia may cross-examine the witnesses of the United States, and except to their proofs, what intrinsic propriety or judicial reason can there be, why the latter may not cross-examine the witnesses and except to the proofs of the former?

With submission to a majority of my brethren, I confess it seems to me that to deprive a party of some rights which, under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party; and the particular rights which you are not to enjoy are, the power of excepting to the pleadings and proofs of the other parties.

This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy, or the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion that if

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they are admitted upon this record to assert their rights—to show what they are, and how they are involved in this controversy; to maintain them, in the regular course of judicature, by allegation, proof, and argument, against the state of Georgia; to have the process of the court to enable them to do so; to profit by the decree if favorable, to lose by it if adverse—they are a party to this controversy, within the meaning of the constitution of the United States. And this raises the question, which in my opinion is a very grave one, whether the constitution permits the United States to become a party to a controversy between two states, in this court?

The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more states—between a state and citizens of other states or of foreign states, where the state commences the suit, and between a state and foreign states.

In distributing this jurisdiction, the constitution has provided that, in all cases in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

I am not aware that any doubt has ever been entertained by <sup>\*</sup>any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

There was a case of the *United States v. Yale Todd*, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of the *United States v. Ferreira*, 13 How., 52. Of this case the note says:—

“The case of Yale Todd was docketed by consent in the supreme court, and the court appears to have been of opinion that the act of congress of 1793, directing the secretary of war and the attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd’s case.

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But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate."

The decision of this court, in *Marbury v. Madison*, 1 Cranch, 137, settled this construction of the constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the constitution. The one, that if a state be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a state be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a state and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This

\*506] is \*attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says: "in all cases in which a state shall be a party, the supreme court shall have original jurisdiction," it means, in all the cases before enumerated in which a state shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a state in any court.

But this practical result is far from weakening my con-

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fidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the states in their collective and sovereign capacities. The continued existence of the states, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every state a republican form of government; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the constitution confers on the United States powers to govern the people, and not the states.

There is, therefore, nothing in the general plan of the constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several states. On the contrary, the agency of courts to compel the states to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic; superfluous, because the states can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the United States; and <sup>\*507</sup> impolitic, because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

It must be remembered, also, that a state can be sued only by its own consent. This consent has been given in the constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a state has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The state of Georgia has consented to be sued by one or more states, or by foreign states, and by no other person or body politic. The state of Georgia has consented to stand joined as a defendant with one or more states, or with a foreign state, and with citizens or subjects of a state other than the one bringing the suit, but with no other person or body politic. Certainly, there is no power existing in this government to enlarge that consent so

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as to embrace in it any thing to which it does not, by its terms, extend.

I cannot agree that because the state of Georgia consented to be sued by the state of Florida, Georgia thereby consented to the introduction into the controversy of any party whose rights were so involved in the controversy that the court is bound, upon principles of natural justice, to have that party before the court, in order to make a decree.

In the first place, if it be conceded that a third party, not capable of suing a state, or being sued by one, is a necessary party to a controversy between two states, and that the court cannot make a decree without the presence of that party, it would seem to me to be the legitimate inference, that in such a case the states had not consented to be sued. Having consented to be sued, in controversies having certain described parties, it would seem that a controversy which could not be carried on by them was not one to which the consent applies.

So far as I am aware, the other grants of judicial power by the constitution, which depend on the character of the parties, have been so construed. Has it ever been supposed that into a suit between citizens of different states a third party not competent to sue or be sued, could come or be brought, because he was a necessary party, without whose presence a decree could not be made? Has the doctrine ever been advanced, that when the constitution gave jurisdiction over suits between citizens of different states, it thereby, by implication, authorized that jurisdiction to be extended so as to embrace every person whose rights were so involved in the controversy that the principles of natural justice required him to be heard?

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an inhabitant of this district, who is not competent to sue or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the constitution and the 11th section of the judiciary act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to the parties before the court, the court may, in its discretion, proceed in

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the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in *Hagan v. Walker*, 14 How., 36, and the earlier cases lead to the same conclusion. *Russell v. Clarke's Ex'rs*, 7 Cranch, 98; *Cameron v. Roberts*, 3 Wheat., 591; *Wormley v. Wormley*, 8 Id., 451; *Carneal v. Banks*, 10 Id., 188; *West v. Randall*, 2 Mason, 195, 196; *Shields et al. v. Barrow*, ante, p. 130, of the present term.

It is true there is a class of cases in which this court has decided that when the jurisdiction of the circuit court, by reason of the character of the parties, has once attached, it is not divested by one of the parties losing the character which entitled him to sue, or subjected him to be sued in the circuit court, or by his death and administration being granted to a citizen who would not have been competent to sue; and further, that when the judgment operated *in rem*, as in a suit in ejectment, no change of the property, *pendente lite*, could prevent the circuit court from exercising its jurisdiction over its own execution. The cases of *Morgan's Heirs v. Morgan*, 2 Wheat., 297; *Mollan v. Torrance*, 9 Id., 537, are of the first class. It was there held that a change of domicile did not defeat the jurisdiction which had once attached. In the case of *Clarke v. Mathewson*, 12 Pet., 164, it was held that a bill of revivor was but a continuation of the original suit, and that the jurisdiction having once attached was complete, and continued to enable the court to \*adjudicate on that subject-matter. In *Dun v. Clarke*, 8 Pet., 1, it was held [\*509] that the circuit court had jurisdiction of a bill to enjoin the levy of an execution on a judgment in ejectment, though the land had been devised so that all parties were citizens of the same state.

This was upon the ground that the devisee of the land was to be deemed the mere representative of the plaintiff in the judgment, and that as to him the bill was not an original suit, but a proceeding on the equity side of the court to enable the court to control its own execution; and according to the case of *Harris v. Hardeman*, 14 How., 384, the same thing might

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have been done upon motion on the law side of the court. But the court refused to take jurisdiction over the other parties to the bill who had an interest in the land, or to decide the merits of the controversy, and confined itself to staying the execution of the judgment until the merits could be investigated in a suit in a state court.

It will be seen, I think, that none of these cases rest at all on the ground that there is jurisdiction, by implication, over a third party whose rights are such as to make his presence in the cause necessary. But if they did, they would fall far short of proving that such an implication can be made in this case. The constitution is merely silent concerning the introduction of a third person, not competent to sue or be sued in the courts of the Union, into a suit in the circuit courts; but it is not silent concerning controversies to which the United States is a party. It declares, in effect, that over such controversies this court shall not have original jurisdiction; for it makes its jurisdiction over such controversies appellate, and this, as has been long settled, excludes all original jurisdiction over such controversies, and even prevents congress from conferring it. *Marbury v. Madison*, 1 Cranch, 137. To say that there is an implication that when the United States is a necessary party to an original suit in this court, they can become a party here, would be, in my opinion, not only an extension of the original jurisdiction of this court to a case not described by the constitution as within it, but to a party as to whom we are expressly forbidden to take such jurisdiction.

Nor do I find in the nature and circumstances of this case any such necessity for making the United States a party, as would lay a foundation for the presumption that it must be competent for the court, and consistent with the constitution and laws, to allow it to be done. This is not a broad question, whether in the exercise of the original jurisdiction of this court we are obliged to exclude all third parties, though they may have the most important rights and interests necessarily involved in the suit. I apprehend no such question arises

\*510] here. \*I do not doubt that in an original suit in equity here, between two states, or between a state and a foreign state, or between a state as complainant and individuals, or in a suit affecting ambassadors, other public ministers or consuls, any necessary party may be brought in who is competent to be sued by the plaintiff, or to sue the defendant in that suit in this court. Thus, a state may sue here other states, foreign states, all citizens of other states and of foreign states, and this I believe includes every possible party, except its own citizens and inhabitants of this District, and of the territories, and

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the United States. Setting aside residents of this District and of the territories, who cannot be deemed of great moment in this particular matter, and citizens of the state bringing the suit, whose rights the constitution evidently considers need no protection from this government, the practical effect of the doctrine I maintain will be found to be confined to the United States. They cannot be made a party to such a suit; and, in my judgment, it is in accordance with the whole plan of the government, as well as with the particular provisions of the constitution concerning the judicial power, that they should not be able to interpose and assume an adverse position to a state, in a judicial controversy in this court. Besides, I do not find in this case any real necessity to make the United States a party, according to the principles of equity law. A court of equity generally requires all persons who have an interest in a suit to be made parties. But it is a familiar rule, that when it is impracticable to bring before the court all interested, it is enough to make such parties as have a common interest with those who are absent. In such a case, the parties who are present represent the rights of those who are absent, and the court proceeds to make its decree, binding the rights of the absent parties, with the same confidence that justice is done as if they were before the court. Story Eq. Pl., 97, 112.

Now, what is this case? The interest of Florida and that of the United States are identical. That interest is, to have the boundary line fixed as far to the northward as the proofs will allow. It is true, that what Florida seeks is the protection of its rightful jurisdiction as a sovereign state; and what the United States desire is the protection of its title as a land-holder, and as the grantor of lands now held by their grantees. But both the political jurisdiction of Florida, and the title of the United States to land acquired from Spain, being coextensive with the territory of Florida, these two parties have a common interest in the subject-matter of this suit; and Florida is, in the contemplation of a court of equity, competent to represent the interest of the United States, as an owner of land.

\*This would certainly be true in the case of individual parties, and in my opinion the same rule applies with still greater force to these parties. Florida is a sovereign state, whose suit must be conducted according to the will of its legislature. There is no room for any suspicion of any unworthy motives or conduct in its management. It is a high duty of that state, which it owes to itself, and which will doubtless be discharged to vindicate its jurisdictional rights, and make good its claims to all the territory which comes within its true limits.

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Though the question is merely where a line should be run, that line carries with it the sovereignty and territorial jurisdiction of states.

On the other hand, the United States is a landholder, whose title may be affected by running the line in one place rather than another. And so will the titles of hundreds of other landholders in this territory, whose interest is precisely the same as that of the United States, in kind, though not in amount. To say that it is necessary for the purposes of justice, that the United States, as the proprietor of lands, should be admitted into this suit to take care lest the state of Florida should omit something by way of pleading or evidence, seems to me to be yielding to an imaginary necessity only.

It is not alleged that the United States has any interest in this controversy except as an owner or grantor of land. Unquestionably there are political considerations, affecting the federal relations of the states, and connected with the extent of their territory, in reference to which the United States has a direct and important interest. This is not only obvious in itself, but is recognized by the constitution in various ways, and, amongst others, by the prohibition of the states to make any compact without the consent of the United States. But the object of this suit is not to change the limits or territory of states, but to ascertain their true and actual boundary; and in this question the United States has no interest, except that justice should be done; an interest which is not of a character to warrant the government in interposing in this case to assist in securing it, any more than in any other case pending in this court. It is suggested that the counsel for the two states may make agreements as to evidence, and other matters respecting the suit, and that the United States ought to be a party, in order to supervise such; but it seems to me that if this were a sufficient reason for making the United States a party in this case, it would apply to all cases between two states; for in all cases such arrangements are as likely to be made as in this one. But if such agreements of counsel, respecting the mode of conducting a suit between two states, could be deemed compacts between those states, within the restraining clause of the 10th \*512] <sup>\*section of the first article of the constitution, congress,</sup> and not the attorney-general, or this court, must sanction them; and there does not seem to be any satisfactory reason why that officer should be connected with the subject. Any agreement fixing the line of boundary, made by the two states and not sanctioned by congress, would certainly not be executed by this court, which is to decree on the existing

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rights of the parties, and not upon new rights created by a compact, which is not valid without the assent of congress.

But, if the objection to the jurisdiction could be overcome, I should still be of opinion that the attorney-general has not authority to make the United States a party to a suit in this court. That officer possesses no powers derived from usage or implied from the name of his office. His powers are only coextensive with his duty; and that is defined by law to be, "to prosecute and conduct all suits in the supreme court in which the United States shall be concerned." 1 Stat. at L., 93. It belongs to congress alone to decide in what cases the United States may be made a party in the courts, and to designate the officers by whom they may be made a party. This power congress has exercised. They have conferred upon the district attorneys power to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned. 1 Stat. at L., 92. By the act of May 29, 1830, § 5, (4 Stat. at L., 415,) the solicitor of the treasury is empowered to instruct the district attorneys in all matters and proceedings appertaining to suits in which the United States are a party, or interested; and by the 10th section of the same act, the attorney-general is to advise with and direct the solicitor. But no authority is conferred by any law, upon any officer, to make the United States a party to any suit, except as a plaintiff or prosecutor. If the United States be interested in a suit against an individual, and he thinks fit to allow the law officer of the United States to prosecute or defend in his name, I know of no objection to it, and it is very often done. It may be suggested, that as the line of boundary will be fixed by the final decree in this case, and as the rights of the United States will thereby be concluded, it can do them no injury, but may be beneficial to them, to be a party to this cause. If this be so, and the court has jurisdiction, it may afford sufficient reason why congress, in its discretion, should authorize an appearance by the attorney-general in behalf of the United States; but it does not enlarge the power of that officer, or enable him to do what, in my opinion, no law has conferred on him power to do,—to make the United States a party to an original suit in this court.

\*I am authorized to say that Mr. Justice McLean [\*513 concurs in this opinion.

Mr. Justice CAMPBELL dissenting.

I dissent from the opinion of the court. The attorney-general suggests to the court that the state of Florida has filed

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here an original bill against the state of Georgia, for a settlement of the boundary between the states. He represents that the line claimed by Florida is that which the United States have recognized in the surveys, sales, and other operations of the land-office, and that the line of Georgia diminishes the domain of the United States in Florida twelve hundred thousand acres. "Whereupon, and in consideration of the interest and concern of the United States," he moves for leave "to appear in said cause, and be heard in behalf of the United States, in such time and form as the court will order." The condition of the cause, in relation to which the motion is made, is, that a bill and answer have been filed, but no issue exists, and none of the ulterior stages in the course of the cause attained; nor has there been any motion to the court requiring an examination of the record; and so the motion, as understood from its terms, is certainly premature. But the words, "to appear in said cause and be heard in behalf of the United States," very indifferently explain the significance of the motion. The application is, that the attorney-general may "intervene," "not as a technical party; not as joining with the one or other party; not in subordination to the mode of conducting the complaint or defense adopted by the one state or the other, nor subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact, by either party, or both; but to co-operate with or to oppose both or either, and to bring forth all the points of the case, according to his own judgment, whether as to the law or fact."

Though the pleadings show that the interests of the state of Florida and of the United States unite to maintain the same line, the attorney-general declines to adopt her suit, lest the condition of the United States might become "precarious," "depending on the discretion of Florida." Nor will the attorney-general file a bill for the United States, nor agree that Florida may make them defendants to hers, for, "that the court is not empowered by the constitution to entertain an original suit" of the kind.

Nor is the motive for this intervention merely that the United States have a fiseal interest, for the attorney-general suggests that the constitution may be violated by agreements and compacts of states, "entered of record," thereby altering the limits <sup>\*514]</sup> of the states and the structure of the Union, "to the direct prejudice of the rights, interests, and laws of the United States." These suggestions of possible injustice arising from collusive compacts "entered of record," may be used in any judicial controversy between states, and

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in this case no evidence of such appears of record; and if such suggestions are heeded, the attorney-general must be constantly an applicant for leave to appear, "not as a technical party," but to employ some oversight, superintendence, or censorship, in suits between states of the Union in this court; and surely, such a claim requires new modes of proceeding, and that now proposed is as peculiar as the claim. The United States appear, with the assertion of their exemption from suit in this court—that the original jurisdiction of the court does not embrace them as a party. Thus declaring independence of process, pleading, and decree, in an original suit in the court, they ask to assist or to assail, at their pleasure, suitors legally before it, and to mould the decree in their case by allegations, evidence, and arguments, introduced without, and perhaps against, their will.

The principle of common law and chancery procedure is, that suits are commenced, prosecuted, and defended by parties to the record in their own names; and the intervention of third persons, not parties, is unknown to the system; and we may affirm confidently, in a case like this, where the party is above and beyond the jurisdiction of the court, such a case is without a precedent. 2 Chitty's Pr., 343. The case of *Pentland v. Quorrington*, 3 Myl. & C., 249, was that of a trustee, with a full assignment, suing in the name of the assignor, under his power of attorney, and obtaining a decree with notice to the defendant. The nominal plaintiff agreed to an order for delay, and the trustee petitioned for a discharge of the order, and that he might conduct the suit. Lord Cottenham said: "It is a perfectly new equity. The only suit in court is a suit between the defendant and the party (assignor) with whom the contract was made. The plaintiff (assignor) is a party to the arrangement, for effectuating which the present order has been made. Your case is against him, that whereas he has authorized you to carry on this suit in his name, he has entered into the arrangement in question without your concurrence. If I were to make such an order, I should be giving you the right of carrying on this suit against the defendant; I should be displacing the plaintiff on the record." He asked: "Is there any instance of such an interference on the part of the court as you now ask?" The eminent solicitor answered: "I admit that I have never seen a case like the present." So in *Drever v. Manderley*, 4 Myl. & C., 94, an order allowing a third person to control a suit where the subject \*belonged to him by assignment, but to which he was not a party by any proceeding, was [\*515] pronounced by the same chancellor "perfectly irregular."

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The court did not object to the right to the subject of the suit, but to the mode of enforcing the right, by the attempt to control the suit. It required the assignee to exhibit his right by bill, according to the practice of the court, in his own name.

Chief Justice Marshall, in describing the controversies to which the judicial power of the United States extends, says:—

“The words are of well understood and limited signification. It is a controversy between parties which had taken a shape for judicial decision.” “To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit.” 5 Wheat. Ap., 16, 17. The supposed cases of exception cited by the attorney-general only display the pervading extent of this principle. The instances quoted are rules under the interpleading act of Wm. IV.; landlords defending for tenants in ejection, vouchees in warranty in real actions, bills of interpleader, and suits by representative parties, for or against themselves and others. The cases referred to in courts of common law arise, where a person having the primary right or obligation, is called as a party to the suit to defend that right or to fulfil the obligation; and Lord Coke speaks of the common law instance of a vouchee as “seeming strange” and depending upon “ancient,” continual, and constant allowance,” (2 Inst., 241;) and so, in interpleading suits, parties having an adverse interest are called in by process, as parties, to disengage a neutral who may have the subject of controversy and desires to relinquish it to the owner, when he shall be ascertained, and in representative cases the court acts upon the parties to the record, and determines the case made by them. In this case, the United States admit no representation on their behalf; nor will they undertake the suit of either, nor admit the jurisdiction of the court to treat them as a suitor or party; but contest the authority of the court, are ready to contest or strengthen the positions of either party, and thus they seek, by an anomalous Austrian intervention, to overlook and control the proceedings of the litigants to their own aggrandizement. I find no precedent in the direct and straightforward course of the common law, nor in the statutes altering it, for such a conduct. I will briefly examine the precedents to which we have been cited, in the codes of procedure of those tribunals which apply the jurisprudence of imperial or \*papal Rome. The

\*516] French code permits the interposition of third persons

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in existing suits. An intervenor may guard a present or future interest, or one certain, contingent, conditional, or collateral, whether pecuniary or personal, or held as a representative. But the inquiry is, how and under what circumstances? And the answer is, by propounding his pretensions to the court as a suitor, inviting contest, alleging proofs, recognizing the jurisdiction of the court, and submitting to its decree. 4 Bioche Dic. de Pro., 590; La. Code, Prac., § 324.

La Cañada, describing the Spanish system, says, there are necessarily two parties to every suit (*actor* and *reο*); and when a third litigant comes, he is called by that number (*tercero*); and because he can oppose either of the parties, or both, the word *opposer* is added (*tercero opositor*), and his act is called third opposition. If he comes to aid another party in the same right, he accepts the suit as he finds it, and acts conjointly; if his rights are independent, adverse, or paramount, his suit is treated as an original suit, and is conducted as ordinary suits.

The third *opposer* is technically a party to the cause, and really subject to the decree. La Cañada, *Juicos Civiles*, 393.

Nor do the admiralty or ecclesiastical codes afford any sanction to the motion. Their jurisdiction being largely *in rem*, they allow persons who have a present and certain claim to the *res*, to propound their interest, if the court has jurisdiction; and by the act the persons become parties to the suit, liable for costs, and entitled to appeal. The various codes, then, differ in the time and manner of calling parties before the court. The conditions of a suit at the common law, in general, are settled at its institution, and new and independent parties are not introduced in the subsequent stages. The courts of chancery are more liberal in reference to the time of making parties and in the extent of their amendments. But in both courts the plaintiff is the *dominus litis*, and third persons may not come in unless he amends the proceedings, or his bill is fitted for it, as being a representative bill. But in the civil, admiralty, and ecclesiastical courts, the power of third persons to propound their rights in the subject of dispute is not so dependent upon the will of the prior parties. But all the codes of procedure unite in this, that persons must come in according to a regular course of procedure, accepting the authority of the court, citing adverse parties to defend, and yielding to whatever decree it may pronounce. The more than imperial claim, in this instance, is for all the faculties of a suitor, without a submission to the obligations and restrictions of one. But it is supposed that precedents in the English chancery support a pretension of the attorney-general to intervene according to his motion. An important class

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\*of the rights of the crown are represented there by the queen's attorney-general; but how? He is introduced upon the record as a "technical" party to the suit, and the crown is bound by the decree. When the right is adverse to the plaintiff, the attorney-general is made a party by prayer in the bill and the service of a copy. If he fails to appear, it is a *nil dicit*; and if he appears and will not answer, a decree *pro confesso* is taken. *Danl. Ch., Pr., 175, 501, 548; Dick., 729; 1 Younge & J., 509.*

And courts there exercise over the attorney-general the same authority which they exercise over every other suitor, and he would not be permitted more than any other suitor to prosecute any proceeding merely vexatious, or which had no legal object. *The Queen v. Prosser*, 11 Beav., 306.

The cases cited, of *Penn v. Lord Baltimore*, *Hovenden v. Annesley*, *Attorney-General v. Galway*, and the analogous cases of *Dolder v. Bank of England*, and *Burgess v. Wheat*, (Cas. temp. Hardw., 332; 2 Sch. & L., 617; 1 Moll., 95; 10 Ves., 352; 1 Eden., 177,) are instances of the application of the rule that the court will require the crown to be made a party to the record, under the name of the attorney-general, and that he comes as an actual and obedient party, and not in any illusory and indeterminate form; so that, if the claim of the attorney-general to represent the United States in courts, to the extent claimed, is tenable, the manner of the intervention here is inadmissible.

But I do not admit that the attorney-general has any corporate or juridical character, or that he can be introduced upon the record, in his official name, as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States, a special attorney might be retained to do; nor can the United States appear in his name, nor by his agency, in cases where they may not be a party.

I have considered this motion upon the concessions of the argument, but the principle lying at the foundation of the case should not form the basis of a judgment merely on the strength of such concessions; and hence I proceed to its examination.

The judicial power of the United States extends to all cases in law and equity arising under the constitution and laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to controversies to which the United States shall be a party; to controversies between two or more states; and

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between a state or the citizens thereof and foreign states, citizens, and subjects.

\*“In all cases affecting ambassadors, &c., and those [\*518 in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have appellate jurisdiction only.” It was not in the design of the constitution to alter or even to modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus, no suit can be commenced against the United States, foreign states, or ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any degree beyond that to which they were liable, without this constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions, also, the title of the states to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court, in reference to them, is expressed in similar or identical language.

I am aware, that at an early day in the existence of this court, a contrary opinion was expressed by a majority, upon a motion for an interlocutory order in a suit against a state, and I propose to examine the principle established in the controversy, of which that opinion is a part.

While the constitution was under discussion, General Hamilton (Federalist, 81) said, “that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent,” and contended, “that to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such consequences, would be altogether forced and unwarrantable.” So, Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Virginia convention by assuring it that “it is not in the power of individuals to call any state into court. The only operation the clause can have is, that if a state should wish to bring a suit against a citizen, it must be brought in a federal court.” And the late Chief Justice Marshall supported him saying: “With respect to disputes between a state and citizens of another state, its jurisdiction has been decried with unusual vehem-

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mence. I hope no gentleman will think a state will be called at the bar of a federal court. It is not rational to suppose that the sovereign power shall be dragged before a court. \*519] The intent is to enable \*states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." Virginia Deb., 387, 405, 406.

When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the states, by individual plaintiffs, shortly after the adoption of the constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the states as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation. In *Chisolm v. Georgia*, that state instructed counsel to present to the court a written remonstrance and protestation against the exercise of jurisdiction, but not to argue the cause. The attorney-general opened the case of the plaintiff by saying: "He did not want the remonstrance of Georgia, to satisfy him that the motion for judgment was unpopular. Before that remonstrance was read, he had learned from the acts of another state that she too condemned it." The court awarded a writ of inquiry upon the default of the state, sustaining the jurisdiction upon arguments of the utility, justice, and safety of the delegation of the power, and of the diminution and abasement wrought upon the states by the constitution. Mr. Justice Wilson states the case "as one of uncommon magnitude." He says: "One of the parties is a state, certainly respectable, claiming to be sovereign. The question to be determined is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this: Do the people of the United States form a nation?" It is not difficult to perceive the profound misconception of the relations of the states to the Union which dictated his judgment. The following year the legislature of the Commonwealth of Virginia adopted a resolution which contains a reply to the question: "Resolved unanimously, that a state cannot, under the constitution of the United States, be made a defendant at the suit of any individual or individuals; and that the decision of the supreme federal court, that a state may be placed in that situation, is incompatible with and dangerous to the sover-

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eighty and independence of the individual states, as the same tends to a general consolidation of these confederated republics;" and instructed their senators and representatives "to unite their utmost and earliest exertions to obtain such amendments as will remove or explain any clause which can be construed to imply \*or justify a decision that a state is [\*520 compellable to answer in any suit by any individual or individuals in any court of the United States."

One month after, January, 1794, the senate was moved by Mr. Strong, of Massachusetts, to adopt the eleventh amendment to the constitution, declaring that the constitution should not be construed to authorize such suits. Various attempts were made in both branches of congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the senate, and 81 to 9 in the house of representatives, and received the assent of the state legislatures. Georgia ratified the amendment as "an explanatory article," her legislature "concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several states can be effectively secured." Thus the supreme constitutional jurisdiction of the United States, the concurrent action of congress, and the state legislatures, expressing a consent nearly unanimous, corrected the opinion of the supreme court, and intercepted its final judgments in these cases, by declaring that the constitution should not be so construed as to allow them.

The reporter of the court closes the volume which contains the case of *Chisolm*, by saying "the writ of inquiry was not sued out and executed; so that this cause and all other suits against states were swept at once from the records of the court by the amendment of the constitution." The course of argument which excluded the jurisdiction of such cases, applies with equal force to suits by foreign states against the states of the Union. And the considerations which forbid suits against the states by individuals, indicated with such clearness in the *Federalist*, form the basis of the luminous and masterly judgments in the English chancery, in the case of the *Duke of Brunswick v. King of Hanover*, 6 Beav., 1; 2 H. L. Cas., 1, where the delicacy, difficulty and danger of the jurisdiction, and its want of practical value, are fully set forth, and the conclusion announced "that it is a general rule, in accordance with the laws of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts there." It is clear the constitution did not abrogate any law of nations, and the only

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question is whether the states consented to suits without any reciprocal right, or whether the existence of such a power in foreign states could possibly assist any objects of the confederacy. On the contrary, would not such a promiscuous grant jeopard its tranquillity and peace? The answer of Mr. Madison to the Virginia convention is positive and direct. "I do not \*521] \*conceive," he says, "that any controversy can ever be decided in these courts, between an American and foreign state, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations." *Virginia Deb.*, 391. To this consent, it may be that congress would be a necessary party.

The nature of the jurisdiction in regard to the states having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more states? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony;" "to controversies between the United States and an individual state; and in the modified form, "to examine into and decide upon the claims of the United States and an individual state to territory." None were incorporated into the constitution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the states are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known; and apprehensive as the states were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the states to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more states afford any contradiction to this conclusion.

The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint

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special tribunals "to which all disputes and differences now subsisting, or that might hereafter arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever," should be submitted.

Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution till near the close of the convention, when \*they were stricken out, and the general jurisdiction [\*522 over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the states that one of their number can be impleaded in this court without its explicit consent; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the states of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual state; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it.

And now the question arises, whether the United States can or ought to be concluded as to their property, without a privilege to appear and be heard, by a judgment of the court, upon a question of boundary submitted by two or more of the states, for its adjudication?

Without assigning any effect to the judgment that may be rendered, or anticipating whether the rights of the United States may be reserved, I will assume that the United States will be estopped by the judgment, and that no reservation of their proprietary rights can be made; and consider whether, under such circumstances, there is injustice. The government of Florida involve in this suit her highest claims—those of sovereignty and jurisdiction—and fulfil their chief political obligations in its prosecution. If individual claims are affected by the decree in such a suit, it is because they are so incorporated in the rights of their sovereign as to have no separate or independent existence. She is the representative of all the proprietary rights and interests of her people in their contest with another sovereign. The United States, in resigning their sovereignty over the territory of Florida to the people, and by recognizing their government, relinquished their authority over this controversy, and consented that their proprietary claims to the waste and unappropriated lands should abide the issue to which the state, in her wisdom and fidelity, should attain. This sovereign control of Florida was modified upon her accession to the Union. After this, if the controversy was settled by negotiation and compact, the consent of congress

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was necessary to its binding operation, as in other cases of compact. If it was settled contradictorily, then this tribunal was appointed to make the determination.

Nor do I perceive that the executive department has any title to disturb the parties or the court, with the expression of anxieties or apprehensions that this court will be lured to perform what congress alone may do, or that these constitutional conditions <sup>\*523]</sup> will not be honorably fulfilled. The existence of this federal government, in its whole extent, is a testimonial to the magnanimous and disinterested polity of the states of the Union; nor is the concession, which submits to a tribunal of justice the peaceful and rational adjustment of the controversies between sovereign states, the least weighty of the proofs of those dispositions. It seems to me, that it is the duty of this court to come to the exercise of the jurisdiction the states have conferred, in the same spirit; to exercise it according to the letter of their submission; to exclude from it suspicion, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence.

Dissenting from every part of the order, I have filed the reasons for the dissent.

*Order.*

Ordered, that the attorney-general have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States.

After the motion of the *Attorney-General* for leave to intervene in this suit had been decided, *Mr. Westcott* and *Mr. Johnson*, on behalf of the state of Florida, moved for leave to take out commissions to examine witnesses in the case, and for sundry orders to expedite the case and prepare it for trial.

Among the orders moved for was the following:—

“That (the consent of the state of Florida being hereby given thereto) the attorney-general of the United States may, in behalf of the United States, use the name of said complainant whenever he may deem it advisable that the United States should sue out any commission, to take any testimony or procure any proofs in said cause; he giving notice thereof to the solicitors or counsel for said parties, as aforesaid.”

This part of the motion was opposed by the counsel for the state of Georgia; and, in behalf of that state, a motion was made to appoint a commissioner and surveyor to survey the premises in dispute, and take testimony and report to the

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court; the motion stating particularly how the duty was to be performed. This motion was opposed by the counsel for the state of Florida.

The questions were argued by *Mr. Westcott*, for the complainant, and *Mr. Badger*, for the defendant.

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

The court have considered the above motions.

\* The motion to authorize the attorney-general of the [ \*524 United States to take testimony, and to conduct the proceedings on behalf of Florida, with the assent of the state, is refused. Each state must conduct its proceedings for itself. Whatever the attorney-general does in the case must be for the United States, and in the name of the United States, and with reference to their interest or duty in this controversy.

The motion on behalf of the state of Georgia, to appoint one or more persons to make the necessary surveys and to report their opinion to the court, is also overruled. Each party is at liberty to cause surveys to be made, and maps prepared and filed, by such person as the state may select, or, if they can agree, they may jointly appoint one. And these surveys and maps, and the proofs applicable to them, will be examined and considered by the court at the hearing, with the other testimony. But the court do not deem it advisable to appoint one or more persons to make these surveys and examinations, as officers of the court; and think the case will be better brought before them by leaving each state to act for itself.

The court, therefore, overrule the motions; and, for the purpose of preparing the case for hearing, make the following order:—

*Final Order.*

On consideration of the several motions filed yesterday by the complainant's counsel, and of the arguments of counsel thereupon had, as well in support of as against the same, it is ordered by the court that the said motions be and they are hereby overruled. And it is further now here ordered by the court, that the said parties in said cause be allowed until the first Monday of December, 1855, to obtain, take, and file the testimony and proofs, by said parties respectively to be adduced and given in evidence, on the hearing of said cause; and that, to enable said parties respectively so to do, commis-

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sions, in the usual form, be issued by the clerk, to examine witnesses, upon application of either party, accompanied by interrogatories, a copy whereof has been served upon the adverse party, or its solicitor or counsel, twenty days previous to such application, in order that cross-interrogatories may be filed within said twenty days by such adverse party; and that the commissioner or commissioners in each instance, if not agreed upon by the counsel of the respective parties, be named by the chief justice or one of the associate justices of this court; and that, forthwith, on the return of any commission executed, the clerk do open and file the same, and cause the same to be printed for the use of said parties.

\*525] \*And also, that any exceptions to testimony may be taken at the final hearing; and, if exceptions be then taken to the competency of testimony, which the opposite party can remove by further proof, the court will reserve the decision, and give time to the party to produce it.

And also, that said cause be set for final hearing on the bill, answer, replication, exhibits, testimony, and proofs, so adduced, filed, and admitted, on the second Monday of January, 1856, unless cause be then shown to the court for the continuance thereof.

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THE UNITED STATES, APPELLANTS, *v.* ARCHIBALD A. RITCHIE.\*

By an act of congress passed on the 3d of March, 1851, (9 Stat. at L., 631,) provision was made for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of a case decided by them to the district court of the United States for California, by way of appeal.

This law was constitutional. The board of commissioners was not a court, under the constitution, invested with judicial powers; but the commencement of the suit in the district court, when transferred there, must be regarded as an original proceeding. The district court could hear additional evidence to that which was before the board of commissioners.<sup>1</sup> The 9th section of the act directed that the United States or the claimant might file a petition, praying an appeal to the district court, and other sections pointed out the mode of proceeding. But this was all changed by an act passed on the 31st of August, 1852, (10 Stat. at L., 99,) which directed that the filing of a transcript with the clerk of the district court should, *ipso facto*, operate as an appeal.

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\* Mr. Justice DANIEL did not sit in this cause.

<sup>1</sup> FOLLOWED. *Fremont v. United Gunn v. Bates*, 6 Cal., 269. But see *States, post* \*552. REVIEWED. *Gri- Arguello v. United States*, 18 How., *Reese v. McDowell*, 6 Wall., 375. CITED. 550.

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This amounts, also, to a notice to the opposite party. The title of Francisco Solano, an Indian, to a tract of land in California, particularly set forth.

Although Solano was an Indian, yet he was competent, according to the laws of Mexico at the time of the grant, to take and hold real property.

The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and their right to hold land.

In 1833 and 1834, the government of Mexico passed laws for secularizing the missions, under which the public authorities granted the lands belonging to them in the same manner as other public lands.

In respect to those lands called Pueblo lands, no opinion is expressed.

THIS was an appeal from the district court of the United States for the northern district of California.

The act of congress respecting the claimants to land in California, and the title of Solano, under whom Ritchie claimed, are so particularly set forth in the opinion of the court, that the reporter has nothing to add upon those topics.

\*It was argued in this court by *Mr. Cushing*, (attorney-general,) for the United States, and by *Mr. Bibb* [\*526 for the appellee.

The brief of *Mr. Cushing* became expanded into a printed argument of eighty-eight pages, of which the following is a mere outline:—

The act of congress passed on the 3d of March, 1851, (9 Stats. at L., 631,) contains a clause which is declaratory of the general principles of law, by which the decisions of land claims in California are to be governed. It is in these words:—

“The commissioners herein provided for, and the district and supreme courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, so far as they are applicable.”

*Mr. Cushing* analyzed these five sources of authority separately, with a view to settle and ascertain the principles of law which bore upon the case; and, in the course of his argument, discussed, at great length, the question how the laws, usages, and customs of a foreign government were to be proved. Proceeding to this particular case, he contended that Mariano Guadaloupe Vallejo, under whom Ritchie claims, had no title to convey, the pretended title in him being, for various reasons, null and void in law and equity.

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I. Of the conveyance from Solano to Guadalupe Vallejo.

§ 1. The claimant assumes that, by reason of the 12th and 13th articles of the plan of Iguala, Indians in Mexico may take, hold, and sell lands.

To which the reply is:—

1. They might do this, not only since, but before the plan of Iguala, beyond all doubt, as will be shown hereafter.

2. The plan of Iguala neither increased nor diminished the power of Indians, in this respect.

3. The true question is not, whether an Indian could, in California, hold and sell land, but under what circumstances and conditions.

4. Thus, any free citizen of the United States can take, hold, and sell lands; but the law imposes forms of conveyance, without which there can be no valid sale; and it also prescribes certain safeguards of conveyances by whole classes of citizens, such as married women, minors, and others, to prevent their being defrauded.

In the discussion of these points, he discarded entirely the <sup>\*testimony of the witnesses in California, and contended</sup> \*527] that they must be decided by the Recopilacion de Indias, which was the law of the Mexican Republic, except where any of its provisions may have been repealed, either expressly, or by necessary implication, since the separation from Spain. This code, Lib. 6, Tit. 1, l. 37, Law 27, 1572, forbade Indians from selling their land, unless with permission of the court, and in pursuance of a prescribed form.

The provisions of this law, he contended, had never been repealed. The plan of Iguala and the treaties of Cordova did not repeal them. This plan and these treaties, together with the other Mexican authorities, were then particularly examined. The special legislation of the several Mexican states, on the subject of Indians, afforded conclusive evidence that the plan of Iguala did not repeal this law, (27.) or any other law of the Recopilacion de Indias, for the protection of the Indians. Our own laws for their protection, by forbidding conveyances, are analogous to this Spanish law.

As to the confirmation of Solano's title by the departmental assembly in 1845, *Mr. Cushing* contended that such confirmation did not enure to the benefit of Vallejo, the grantee, for these reasons:—

1. The purchase of Solano was not authorized by law.

2. Solano had no authority to make a valid covenant in relation to the land, or title thereto.

3. There was not, in fact, any covenant for further assur-

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ance in this instrument which could enure to the benefit of Vallejo.

Passing to another branch of this case, *Mr. Cushing* contended that the alleged grant to Solano, and conveyance by him to Vallejo, were fraudulent and void as against the Mexican government; that Vallejo was commandant of Sonoma, and Solano was his bailiff or overseer, and that Solano's name was used merely to cover the fraud. He further contended, that the missions were not the subject of the colonization law. The following is a summary of his points:—

1. The alleged sale from the Indian, Solano, was not made in the presence of a justice, and by public vendue; and was, therefore, null and void, even supposing Solano to have had a good title from the Mexican government.

2. This defect is not cured by the action of the departmental assembly, which does not relate back, nor enure for the benefit of Vallejo.

3. The case rests mainly on the testimony of Vallejo, who, having conveyed to Ritchie, with covenants of seisin and warranty, was incompetent, as a witness, to prove the title.

4. No title passed from the government to Solano, the whole transaction being a fraud, of which Solano was the [\*528] instrument, for the benefit of Vallejo.

5. The land, being mission land, was not colonizable; and, therefore, the pretended grant to Solano was null and void.

6. Being mission land, if (which is denied) Solano acquired any interest therein, he could not lawfully convey it to Vallejo by any form of conveyance whatever; and on his possession ceasing, the land reverted to the public domain.

7. The pretended title of Vallejo, through Solano, was only a fraudulent device to cover the plunder, by him, of a part of the mission lands of San Francisco Solano.

8. The land is not shown to be at the necessary distance from the frontier to make it subject to colonization.

9. Of course, Vallejo, having no title, could convey none to Ritchie, and the land appertains to the public domain of the United States.

*Mr. Bibb's* first two points related to the nature of the conditions upon which the estate was granted—a matter that will be more especially noticed in the next case, of the *United States v. Fremont*. His third point was: The United States have not prosecuted a review of the decision of the commissioners in the manner and form required by the 9th section of the act of March 3, 1851, to ascertain and settle the private land claims in the state of California, (9 Stats. at L., 632, ch. 41,) and therefore have no grounds, no standing, no founda-

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tion whereon to pray this court to review and reverse the decision of the commissioners.

The 9th and 10th sections of this act, he contended, were not repealed by the 12th section of the act of 1852, (Stats. at L., 99, ch. 108.)

IV. The time when the attorney-general received a transcript of the proceedings and decision of the commissioners does not appear in the record, and it does not appear to the court that the notice was filed with the clerk of the district court within the period of time prescribed by the 12th section of said act of 1852, that the appeal would be prosecuted by the United States; therefore, the appeal ought to be regarded as dismissed.

The final decree of the board of commissioners was pronounced and recorded January 3, 1853; the notice by the attorney-general, that appeal would be prosecuted, was filed with the clerk September 20, 1853; seven months and sixteen days had intervened; so the filing of the notice with the clerk might have been after the lapse of six months from the time the attorney-general had received a transcript of the proceedings and decision of the commissioners.

As the period of limitation began to run and to be accounted \*529] \*from the time of a fact known only to the attorney-general, who gave the notice, the time that he received the transcript ought to have been made to appear on the record of the district court; which fact, if it had been alleged by the plaintiff, would have been traversable by the respondent. But the total disregard by the plaintiff of the provisions of the 9th section of the act of 1851, deprived the defendant, Richie, of the opportunity to rely upon the statute of limitations in the district court.

V. The title under which the appellee holds, was complete and perfect—a legal title, under a grant by the executive branch of the Mexican government, approved by the legislative branch, and consummated by the judicial branch, by juridical possession delivered to the grantee, under which the land was inhabited, improved, cultivated, and enjoyed by the owner in fee, long before and at the treaty of Gaudaloupe Hidalgo.

By that treaty, the United States acquired no right of the soil included in this grant; nothing but the political powers, jurisdiction, and sovereignty, under a special stipulation that the owners of property should be protected in the enjoyment thereof.

Before that treaty, this land had been so completely severed from the public domain of Mexico, so perfectly vested in the

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grantee by a legal title in fee, that no right of property in the land passed to the United States.

VI. By the laws, usages, and customs in California, all persons, without any distinction between races, had capacity to take and alienate lands. Upon this point of the case, *Mr. Bibb's* citations were very numerous.

1. The governor and departmental assembly considered that Solano's being an Indian did not prevent him from holding land.

2. The laws, customs, and usages of the Mexican government permitted it. Proof of this was in the record by witnesses.

3. These laws, usages, and customs are to be proved as facts.

4. No Christian nation, who planted colonies in North or South America, ever denied to the aborigines the capacity of holding lands as tribes, and of selling them in subordination to the governing nation.

5. But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession; but a right of property in the lands they held under the guaranties of treaties, and so highly respected that, in the establishment of a military post by royal order, the site thereof was either purchased from the Indians or occupied with their permission, as that of St. Mark's. 9 Pet., 752.

\*The capacity of native Indians and their descendants to take individually, by grant in fee-simple, is acknowledged in various treaties between the United States and different tribes of Indians.

7. No nation of white people, who have ever established themselves and their government in America, (however proud and confident in their superiority over the red men who were found in the occupancy of the lands,) have ever denied that the Indians were human beings entitled to the rights of humanity, to the natural rights of holding, and acquiring, and alienating property, real and personal, including the rights of marriage and descent. Here, let us call to mind the marriage of Mr. Rolfe, the white man, with Pocahontas, the Indian princess whose descendants have held and now hold places of honor and profit, and large estates, real and personal; and let us not forget the virtues of Pocahontas, her courageous acts and noble darings in the cause of humanity, which have made her character illustrious, and her portrait worthy of a niche in the capitol of the United States of America.

8. By the decree of the supreme government of the United Mexican States of 1824, (before quoted,) foreigners, as well as

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Mexicans were endowed with the capacity to receive grants of land, and to establish themselves thereon. Was Francisco Salano, neither a foreigner nor a Mexican? Were native civilized Indians, converted to the Christian faith, in full communion with the established Catholic church, excluded from the privilege of acquiring lands by grants directly from the government?

9. The historical evidence of the revolutions in Mexico confirms the position that the Indians were capable of buying and selling lands. The plan of Iguala, and treaties of Cordova, and other public documents, all recognize the right.

VII. Although the grant has been so made to Solano in fee, yet it is said that Solano was not authorized, and had not capacity, to sell.

Suppose, for the sake of argument, it were so. Would the act of Solano, in making the deed of bargain and sale, make the grant to him void *ab initio*; annul his capacity to have and to hold, and convey the land to the United States?

The conveyance by Solano to Vallejo was of 10th June, 1842; the treaty of Guadalupe Hidalgo was signed 2d February, 1848; the ratifications were exchanged 30th May, 1848. During this interval, between the sale and conveyance by Solano and the treaty of Guadalupe Hidalgo, the Mexican government never complained of any breach of any condition in this grant to Solano; never instituted any proceeding to <sup>\*531]</sup> \*divest Solano or his heirs, or the alienee, Vallejo, of the title, and reunite it to the public domain.

At the date of the treaty, Solano was living on the land, and died there, in or about the year 1851; and his alienee, Vallejo, was also in possession and cultivating the land from 1842, until his sale and conveyance to Ritchie, in August, 1850.

VIII. The attorney-general alleges the grant to Solano to have been collusive and fraudulent.

*Mr. Bibb* examined the facts in the case.

*Mr. Justice NELSON* delivered the opinion of the court.

This is an appeal from a decree of the district court for the northern district of California.

The proceedings were originally commenced before the board of commissioners to settle private land claims in California, under the act of congress of March 3, 1851. (9 Stat. at L., 631.)

A petition was filed before that board by Ritchie against the United States, setting forth a claim to a tract of land known by the name of "Suisun," situate in the jurisdiction of Sonoma, county of Solano, comprising four square Mexican leagues,

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(nearly 18,000 acres,) praying that the title might be confirmed. The title claimed is derived from a grant by Juan B. Alvarado, governor of California, to Francisco Solano, dated January 28, 1842.

The commissioners, after hearing the proofs in the case, on the 3d of January, 1853, ordered that the title be confirmed to the claimant.

On the 19th of May, 1853, a transcript of the proceedings before the board, with their decision, was filed with the clerk of the United States district court for the northern district of California; and on the 20th of September, 1853, notice of an appeal from the decision to the district court was filed with the clerk by the attorney-general of the United States.

Further testimony was taken in the case, and heard before the court; and at a special term, held at the city of San Francisco on the 8th of November, 1853, the decision of the board of commissioners was confirmed.

The case is now before us on an appeal from the decree of the district court.

Objections have been taken on the part of the appellee to the jurisdiction of the district court, to hear and determine the case; and, also, to the regularity of the appeal from the board of commissioners—assuming the court had jurisdiction—which it will be necessary first to notice.

By the 8th section of the act already referred to, it was made \*the duty of the commissioners, within thirty days after [ \*532 their decision, to certify the same, with the reasons on which it was founded, to the district attorney of the United States of the district in which the decision was rendered. And by the 9th section, it is provided that in all cases of rejection or confirmation of any claim by the board, it should be lawful for the claimant or district attorney, on behalf of the United States, to present a petition to the district court praying for a review of the decision; and that the petition, if presented by the claimant, should set forth the nature of the claim, &c., together with a transcript of the report of the board, and of the documentary and other evidence on which it was founded. And the petition, if presented by the district attorney, shall be accompanied by a transcript of the board, &c., and shall set forth the grounds upon which the claim is alleged to be invalid; and a copy of the petition shall be served upon the opposite party; and the party upon whom the service shall be made shall be bound to answer the same within the time prescribed by the judge of the district court, &c. And by the 10th section, it is made the duty of the district court to proceed and render judgment upon the pleadings and

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evidence in the cause, and upon such further evidence as may be taken by order of the said court; and, on the application of the party against whom the judgment is rendered, to grant an appeal to the supreme court of the United States. And by the 12th section, to entitle either party to a review of the board of commissioners, notice of the intention to file a petition in the district court shall be entered on the journal of the board within sixty days after the decision of the claim has been notified to the parties; and the petition shall be filed in the district court within six months after the decision has been rendered.

The mode above prescribed for removing the case from the board of commissioners to the district court was subsequently changed by the 12th sect. of the act of congress passed 31st August, 1852, (10 Stat. at L., 99.)

This section provides that, in every case in which the board of commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decision, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk of the proper district court, and the other transmitted to the attorney-general of the United States; and the filing of such transcript with the clerk shall, *ipso facto*, operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of the court within six months thereafter, of his intention to prosecute the \*appeal, and if the decision shall be [533] against the United States, it shall be the duty of the attorney-general, within six months after receiving the said transcript, to cause notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States. And on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

The removal of the proceedings before the board of commissioners, in this case, to the district court, took place in conformity with the provisions of the act of 1852, and, it is urged by the counsel for the appellee, that it is defective for not complying with the requirement of the 9th section of the act of 1851, in respect to the petition to the district court therein provided for. But we are of opinion that the 12th section of the act of 1852 virtually repeals this section, and thereby dispenses with the petition and answer, as preliminary steps to the hearing in the district court. They clearly are not essential to the removal of the cause, or perfecting of what is called the appeal, as the 12th section of the act of 1852 makes the filing of the

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transcript returned by the commissioners operate, *ipso facto*, as an appeal in favor of the party against whom the decision had been rendered.

The filing of the petition and answer in the district court, prescribed by the 9th section, presenting, in the form of pleadings, the issue to be tried, would have been more in conformity with the practice of courts; but, looking to the nature and character of the questions to be heard and determined in these proceedings before the court, the pleadings cannot be of any very great importance, especially as these questions have already been the subject of examination by both parties before the board of commissioners. The question of practice in the particular case is rather a matter of form than of substance.

It is objected, further, that the 12th section of the act of 1852 makes no provision for notice to the party in whose favor the decision has been rendered by the commissioners, of the appeal to the district court, and that a hearing may be had there, and the decision reversed in his absence. But he has notice of the appeal, as the filing of the transcript by the board, according to the act, has that effect; and then ordinary diligence will enable the party to be heard on the appeal. Besides, the court has the power, doubtless, to regulate the time of the hearing, and provide for reasonable notice by its rules, so as to prevent surprise.

It is also objected, that the law prescribing an appeal to the district court from the decision of the board of commissioners is unconstitutional; as this board, as organized, is not a court under the constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government. \**American Insurance Co. v. Canter*, 1 Pet., 511; *Benner v. Porter*, 9 How., 235; *United States v. Ferreira*, 13 Id., 40.

But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.

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In this respect, the proceeding is somewhat analogous to that before the district court, under the act of congress, 26th May, 1824, §§ 1, 3, (4 Stats. at L., 52, 53,) concerning French and Spanish grants in the state of Missouri, which had been previously heard before a board of commissioners for confirmation. In these cases, the evidence before the board was received on the hearing in the district court.

This brings us to the merits of the case.

It appears, from the evidence in the case, that Francisco Solano, from whom the appellee derived title, was in the possession and cultivation of the land in question as early as 1832 or 1833; and that, on the 16th January, 1837, he applied for a provisional grant of the same, from M. G. Vallejo, the military commander of the northern frontier of Upper California, and director of colonization. The proceedings are as follows:—

“To the Commandant-General:—

“Francisco Solano, principal chief of the unconverted Indians, and born captain of the ‘Suisun,’ in due form, before your honor, represents: That, being a free man, and owning a sufficient number of cattle and horses to establish a rancho, he solicits from the strict justice and goodness of your honor that you be pleased to grant him the land of the ‘Suisun,’ together with its known appurtenances, which are a little more or less than four square leagues, from the ‘Portzuela to the Salina de Sucha.’ Said land belongs to him, by hereditary right from his ancestors, and he is actually in possession of it; but he wishes to revalidate his rights in accordance with the existing laws of our republic, and of the colonization recently decreed by the supreme government.

“He therefore prays that your honor be pleased to grant him [535] \*the land which he asks for, and to procure for him, from the proper sources, the titles which may be necessary for his security, and that you will also admit this on common paper, there being none of the corresponding stamp in this place.

“(Signed)

FRANCISCO SOLANO.

“Sonoma, January 16, 1837.”

“Sonoma, January 18, 1837.

“The undersigned grants, temporarily and provisionally, to Francisco Solano, chief of the tribes of this frontier and captain of the ‘Suisun,’ the lands of that name, as belonging to him by natural right and actual possession. Said land is comprehended between the ‘Portzuela and the Salina de Sucha.’

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The party interested will ask from the governmental of the state the usual titles, in order to make valid his rights in conformity with the new order of colonization.

“(Signed)

M. G. VALLEJO.”

He continued in the possession and occupation down to 1842, when an application was made by his attorney, Vallejo, to Juan B. Alvarado, constitutional governor of the department of California, for a title in form to the tract, as follows:—

“[SEAL.] To his Excellency the Governor:—

“The undersigned, a resident of Sonoma, respectfully appears before your excellency, and representation makes, that, in virtue of the rights which belong to him, as shown in the annexed petition and marginal decree, he is in actual possession of the land known by the name of ‘Suisun,’ together with its dependencies; and, in order to secure and legalize said ownership, he humbly petitions that your excellency, in consideration of the document referred to, may be pleased to grant him the corresponding title of concession, perpetual and hereditary, of the aforesaid land, in order that, in no time, may the petitioner or his heirs be molested in the pacific enjoyment of his property.

“Wherefore, your petitioner prays that your excellency will deign to grant him the favor which he asks for, he swearing that he is actuated by no malice, and such other oath as is required, &c., &c.

“As attorney of the petitioner,

“(Signed) JUAN ANTONIO VALLEJO.

“Monterey, January 15, 1842.”

“Monterey, January 28, 1842.

“In consideration of the petition at the beginning of this *expediente*, the report of the commandant-general, and the merits and services of the Indian called Francisco Solano, rendered \*on the frontier of Sonoma, I declare him to be owner in fee of the place called ‘Suisun,’ in extent [ \*536 four square leagues, and with the boundaries shown in the corresponding map. The corresponding patent will be made out, and this *expediente* directed to the most excellent departmental junta for its approbation.

“Juan B. Alvarado, constitutional governor of the department of the Californias, thus ordered, decreed, and signed. Of which I certify.”

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And, on the 21st January, 1842, the title in form was granted, as follows:—

“[SEAL.] Juan B. Alvarado, constitutional governor of the department of the Californias.

“Whereas the aboriginal Francisco Solano, for his own personal benefit and that of his family, has asked for the land known by the name of ‘Suisun,’ of which place he is native, and chief of the tribes of the frontiers of Sonoma, and being worthy of reward for the quietness which he caused to be maintained by that unchristianized people; the proper proceedings and examinations having previously been made, as required by the laws and regulations; using the powers conferred on me in the name of the Mexican nation, I have granted to him the above-mentioned land, adjudicating to him the ownership of it. By these presents, being subject to the approbation of the most excellent departmental junta, and to the following conditions, to wit:—

“1. That he may inclose it, without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use and cultivation of it as he may see fit; but within one year he shall build a house, and it shall be inhabited.

“2. He shall ask the magistrate of the place to give him juridical possession of it, in virtue of this order, by whom the boundaries shall be marked out; and he shall place in them, besides the landmarks, some fruit or forest trees of some utility.

“3. The land herein mentioned is to the extent of four ‘sitios de ganado mayor,’ (four square leagues,) with the limits as shown on the map accompanying the respective *expediente*. The magistrate who gives the possession will have it measured according to ordinance, leaving the excess that may result to the nation, for its convenient uses.

“4. If he shall contravene these conditions, he shall lose his right to the land, and it may be denounced by another.

“In consequence, I order that these presents be held firm and valid, that a register be taken of it in the proper book, \*537] and that \*it be given to the party interested, for his voucher and other purposes.

“Given this twenty-first day of January, one thousand eight hundred and forty-two, at Monterey.

“(Signed)

JUAN B. ALVARADO.

“(Signed)

MANUEL JIMENO, *Secretary.*”

On the 3d October, 1845, the grant was approved by the departmental assembly, as follows:—

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“Most Excellent Sir:—

“The committee on vacant lands has ordered the *expediente*, formed at the instance of the Indian, (Indigena), Francisco Solano, for the place known by the name of ‘Suisun,’ and being satisfied that the proceedings had in the said *expediente* were sufficient for the purpose, that the superior government should have granted the said place, offers to the deliberation of your excellency the following proposition:—

“The grant made by the superior government of the department by a title legally issued, with the date 28th January, 1842, in favor of the Indian, (Indigena), Francisco Solano, of the place known by the name of ‘Suisun,’ and situated in the jurisdiction of Sonoma, in accordance with the law of August 18, 1824, and article 5 of the regulations of November, 1828, is approved.

“Hall of the committee, in the city of Los Angelos, September 29, 1845.

“(Signed)  
“(Signed)

FRANCISCO DE LA GUERRA.  
MARCESO BARTELA.”

“*Angelos, October 3, 1845.*

“In session of this day, the proposition of the foregoing report was approved by the most excellent departmental assembly, ordering the original *expediente* to be returned to his excellency the governor, for suitable purposes.

“(Signed)  
“(Signed)

PIO PICO, *President.*  
AUGUSTIN OLONA, *Secretary.*

“On the same day, the proper copy was issued to the party interested.”

The tract was duly surveyed, the boundaries fixed, and the grantee put in judicial possession, in conformity with the conditions of the grant, and which possession corresponded with the provisional possession previously ceded to him in 1837.

On the 10th May, 1842, Solano sold and conveyed the premises to Mariano Guadalupe Vallejo, in full property, for the consideration of one thousand Mexican dollars; and, on the 29th May, 1850, Vallejo sold and conveyed the same to A. A. Ritchie, the appellee, for the consideration of fifty thousand dollars.

\*No question is made as to the genuineness and good [\*538  
faith of the original grant to the Indian, Solano, nor  
but that it was made by the competent authority of the govern-  
ment to dispose of the public lands.

The only objections taken to its validity, and upon which it is denied that it had the effect and operation to separate the

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lands granted from the public domain, are: 1. That Solano, being an Indian, was not competent, according to the laws of Mexico concerning the disposition of the public lands at the time of the grant, to take and hold real property; and hence, that the grant by the governor, and approved by the departmental assembly, was inoperative and void; and, 2. That, if it should be held that Solano was competent to take and hold real property, still, the grant is void, on the ground that the tract known by the name of "Suisun" belonged to the mission lands in California, which the public authorities of that department had no power to grant.

1. In answer to the first objection, we are referred to the plan of Iguala, adopted by the revolutionary government of Mexico, 24th February, 1821, a short time previous to the subversion of the Spanish power in that country, in which it is declared that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues;" and that, "the person and property of every citizen will be respected and protected by the government." We are also referred to the treaty of Cordova, 24th August, 1821, between the Spanish viceroy and the revolutionary party, by which the independence of the country was for the time established; and to the declaration of independence issued 28th September, 1821, all reaffirming the principles of the plan of Iguala.

Two decrees of the first Mexican congress are also referred to; one adopted 24th February, 1822, and the other 9th April, 1823.

The first: "The sovereign congress declares the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin in the four quarters of the earth." The other reaffirms the three guarantees of the plan of Iguala: 1. Independence. 2. The Catholic religion; and 3. Union of all Mexicans of whatever race.

There is, also, another act of the Mexican congress of the 17th September, 1822, carrying into practical effect this fundamental principle of the new government, as follows: "The sovereign Mexican constituent congress, with a view to give due effect to the 12th article of the plan of Iguala, as being one <sup>\*539]</sup> of those which form the social basis of the edifice of our independence, has determined to decree and does decree.

"Art. 1. That in every register and public or private document, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted.

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"Art. 2. That although by virtue of the preceding article, there shall be no distinction of class on the parochial books, that which is at present observed will be continued in the regulations for the graduation of the civil and ecclesiastical taxes, until these shall be arranged in some other method more just and proper."

In consistency with this fundamental principle of the Mexican government, as declared in the several acts above referred to, namely, the citizenship of all the inhabitants, without distinction of blood or race, is the 9th article of the decree of 18th August, 1824, on colonization, which provides, that "in the distribution of the lands, Mexican citizens are to be preferred, and between them no distinction shall be made except such only as is due to special merit and services rendered to the country, or in equality of circumstances, residence in the place to which the lands to be distributed are pertinent; and the 16th article provides, that "the government, conformably to the principles established in this law, shall proceed to the colonization of the territories of the republic."

Upper California, in which the lands in question are situate, was one of those territories. And the first regulation made for colonizing the territories, which was 21st November, 1828, provided "that the governors of the territories are authorized, in compliance with the laws of the general congress of 18th August, 1824, and under the conditions hereafter specified, to grant the vacant lands in their respective territories to such contractors, (*empresarios*,) families or single persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating or inhabiting them."

The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the plan of Iguala, and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the *\*declaration of independence of the United States*, of 1776, to invest all those persons with these [\*540] privileges residing in the country at the time, and who adhered to the interests of the colonies. 3 Pet., 99, 121.

The improvement of the Indians, under the influence of the

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missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them in a measure for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the government must have been limited; and they still, doubtless, required its fostering care and protection.

But as a race, we think it impossible to deny, that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privileges belonging to it, between this and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government.

Solano, the grantee in this case, was a civilized Indian, was a principal chief of his race on the frontiers of California, held a captain's commission in the Mexican army, and is spoken of by the witnesses as a brave and meritorious officer.

Our conclusion is, that he was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold, and convey real property, the same as any other citizen of the republic.

2. As to the objection that the tract in question belonged to the mission lands, which the public authorities in California had no power to grant, there appears to be no foundation for this objection.

As early as 17th August, 1833, the Mexican congress decreed that "the government will proceed to secularize the missions of Upper and Lower California;" and various regulations are prescribed for carrying this policy into effect.

Again, 26th November, the same year, it is declared that "the government is empowered to adopt all measures which shall secure the colonization and render effective the secularization of the missions in Upper and Lower California, being authorized to use in the most convenient manner the property devoted to pious uses, in the said territories, for that purpose."

Again, by a decree of 14th April, 1834, it is declared that "all the missions of the republic will be secularized."

Under these laws, the authorities empowered to grant the <sup>\*541]</sup> *public lands* have dealt with these mission establishments the same as with any other portions of the public domain; the clergy, who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the missions.

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We could refer, had we time, to a body of authority on this part of the case, in addition to that above mentioned; but we deem it unnecessary, and shall close by affirming the decree of the district court.

It is conceded that the lands in question do not belong to the class called Pueblo lands, in respect to which we do not intend to express any opinion, either as to the power of the authorities to grant or the Indians to convey.

Mr. Justice CAMPBELL.

I concur in the judgment of the court upon the facts disclosed in the record.

I am unable to find evidence to show that the lands in dispute were attached to the mission of San Francisco Solano, for the single sentence in the deposition of Vallejo, "that in 1835, according to the rules of secularization, the grantee had acquired the rights of possession," is too vague, and include too little of a reference to facts to rest any argument that the grant to Solano was of mission lands, contrary to the laws of Mexico. I therefore am not willing to pass any judgment upon the subject of the mission lands of California. Nor do I consider that the sufficiency of the conveyance from Solano to Vallejo, a question before us. The conveyance of Solano was recognized before a public officer, and has been followed by possession. For the purposes of this case this is sufficient. This was decided in *Percheman's case*, 7 Pet., 51-98. The court say there, that the questions upon the validity of mesne conveyances have no interest to the United States, and they cannot be investigated or decided.

\*Order.

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This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, 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.

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JOHN CHARLES FREMONT, APPELLANT, v. THE UNITED STATES.

By the act of congress passed on the 3d March, 1851, (9 Stat. at L., 631,) to ascertain and settle the private land claims in the state of California, it is made the duty of every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, to present

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the same to the commissioners (to be appointed under that act) who were to examine and decide upon the validity of the claim. The commissioners, the district, and the supreme court, in deciding on any claim brought before them, were directed to be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, as far as they are applicable.

Under this act, not only inchoate or equitable titles, but legal titles, also, were required to be passed upon the court. This was an essential difference from the act of 1824, under which claims to land in Louisiana and Florida were decided, and which related to inchoate equitable titles.

Grants of land in Louisiana and Florida were usually preceded by a concession and survey; and until a survey took place, no title accrued to the grantee. Hence, this court has always decided that where the grantee took no further steps in the matter, he had acquired no right, legal or equitable, to the lands under the Spanish government.<sup>1</sup>

The laws of these territories, under which titles were claimed, were never treated by this court as foreign laws, to be decided as a question of fact; but the court held itself bound to notice them judicially, as much so as the laws of a state of the Union.<sup>2</sup>

On the 29th of February, 1844, Micheltorrena, the governor of California, granted to Juan B. Alvarado, the tract of land known by the name of Mari-posas, to the extent of ten square leagues within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced and San Joaquin, as his property, subject to the approbation of the most excellent departmental assembly, and to certain conditions.

This grant conveyed to him a present and immediate interest. If any subsequent grantee of the government had made a survey within the described limits, his title would have been paramount to that of Alvarado. But no such grant and survey were made.<sup>3</sup>

The case of *Rutherford v. Greene's Heirs*, 2 Wheat., 196, examined.

No further and definite grant, stating that the conditions had been complied with, was necessary.

The conditions were conditions subsequent, but a non-compliance with them did not amount to a forfeiture of the grant.

There was no unreasonable delay or want of effort, on the part of Alvarado, to fulfil the conditions, so that there is no room for the presumption that he intended to abandon the property.

The reasons explained why Alvarado did not make a survey or a settlement, and why Fremont, his vendee, did not.

One of the conditions was that Alvarado should not sell, alienate, or mortgage the property. But this restriction was void, as being against the laws of Mexico, and, moreover, at the time of the sale to Fremont, California was held by the United States as a conquered country, and an American citizen had a right to purchase property. Although Mexico might have avoided the sale, there is no public law which could require the United States to do so; and any law which subjected an American citizen to disabilities was necessarily abrogated without a formal repeal.

The question about the right to mines does not arise in the present case.

The United States have to direct, by law, how the survey is to be made, in the form and divisions prescribed for surveys in California, embracing the entire grant in one tract.<sup>4</sup>

<sup>1</sup> CITED. *United States v. Armijo*, 5 Wall., 449.

<sup>2</sup> FOLLOWED. *United States v. Perot*, 8 Otto, 430. CITED. *United States v. Cambuston*, 20 How., 64.

<sup>3</sup> CITED. *United States v. Moreno*, 1 Wall., 404.

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<sup>4</sup> See also, *Arquello v. United States*, 18 How., 550; *United States v. Vacca*, Id., 556; *United States v. Larkin*, Id., 558; *Hall v. Russell*, 11 Otto, 509; *United States v. Cambuston*, 7 Sawy., 600; *Sanger v. Sargent*, 8 Id., 98; *Gunn v. Bates*, 6 Cal., 269.

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*Fremont v. The United States.*

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Mr. Justice DANIEL did not sit in this cause.

\* This was an appeal from the district court of the [\*543 United States for the northern district of California.

Fremont, the appellant, claimed title to a large tract of land, and prosecuted his claim before the board of commissioners, who decided in his favor. That decision having been reversed by the district court, the case was now brought here by appeal.

The title of Fremont was derived from Juan Alvarado, to whom a grant was issued, in 1844, by Manuel Micheltorrena, then governor and commandant-general of the department of the Californias, purporting to be founded upon the patriotic services of Alvarado. It appears that, as early as 1836, Alvarado was conspicuous in the commotions which took place in California, resulting from the same proceedings of the government of Mexico which occasioned the revolution in Texas. California declared itself opposed to the centralization of power in Mexico, and Alvarado was proclaimed governor by the provincial deputation. In 1837, he repelled the effort of Caviglio to take possession of the government, who had been appointed governor by Mexico; and Alvarado was afterwards confirmed as constitutional governor by the authorities of Mexico. He continued in authority until 1842, when Micheltorrena was appointed to succeed him, under whom Alvarado was employed as first counsellor of the departmental junta, with a salary of \$1,500.

On the 23d of February, 1844, Alvarado petitioned Micheltorrena to grant him the land in question. And as this is one of the first cases in this court of this description, it is deemed proper to insert in full the title under which the appellant claimed. The documents are as follows:—

“ Record of proceedings instituted by citizen Juan Bautista Alvarado, colonel of the auxiliary militia, soliciting the tract of land called ‘Las Mariposas.’ ”

“ Anno 1844. (Number 352.)

“ To his Excellency the Governor:—

“ I, Juan B. Alvarado, colonel of the auxiliary militia of this department to your Excellency, with due respect, do represent, that being actually the owner (by purchase which I made) of a very small tract of land, which is not sufficient to support the cattle with which it is stocked, without injury to the estates likewise there established, and being desirous of increasing it, at the same time to contribute to the spreading of the agri-

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culture and industry of the country, I solicit your Excellency, according to the colonization laws, to be pleased to grant me ten sitios de ganado mayo (ten square leagues) of land, north of the River San Joaquin, within the limits of the Snow Mountain, (Sierra \*Nevada,) in the same direction the \*544] River Chanchilles, in the east part of the Merced, on the west, and the before-mentioned San Joaquin, with the name of the Mariposas, offering to present to Y. E. the proper plan and draft thereof so soon as the same shall be made with exactness, not doing it at this time for the difficulty of being a wilderness country on the confines of the wild Indians, and because I desire that my claim for this cause may not be delayed.

“Therefore, I hope from the good intentions of Y. E., in favor of the improvements of the country, the most favorable result, if it be in justice, by which I will receive favor.

“(Signed) JUAN B. ALVARADO.  
*“Rancho del Alizal, 23d of February, 1844.”*

“Monterey, 27th of February, 1844.

“Let the secretary of state report, and he may require such other reports as he may deem expedient, should he need them.

“(Signed) MICHELTORRENA.”

“As directed by his Excellency, the governor, let the preceding petitioner be referred to the first alcalde of San José, that he may be pleased to report thereon.

“(Signed) MANUEL JIMENO.  
*“Monterey, 26th\* of February, 1844.”*

“To the Secretary of State:—

“The land solicited in this petition by Don Juan B. Alvarado is entirely vacant; it does not belong to any individual, town, or corporation, and I believe that for these reasons, as well as that of the petitioner being meritorious for his patriotic services and commendable circumstances, there is no impediment for granting him the said land in fee. This is all I have to report to your Honor in answer to your preceding superior order, which opinion I submit to the decision of your Honor, which will be the most proper one.

“(Signed) ANTONIO M'A PICO.  
*“Town of San José, Gaudaloupe, February 29, 1844.”*

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\* NOTE BY THE REPORTER. The dates of these muniments of title are as above, in the printed record. If there be an error, the reporter has no means of knowing where it is.

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“To his Excellency the Governor:—

“According to the report of the magistrate of San José, and the information I have acquired from persons who know the land, it is ascertained the same may be granted to the petitioner, who may be favorably considered for the services which he has rendered to the department. The superior judgment of Y. E. will decide the expediency.

“(Signed) MANUEL JIMENO.

“Monterey, 29th of February, 1844.”

\*“Monterey, 29th of February, 1844. [\*545

“Let the title be issued, expressing that he (the petitioner) is meritorious for his patriotic services, and consequently worthy of preference.

“(Signed) MICHELTORRENA.”

“Monterey, 29th of February, 1844.

“Having considered the petition which is at the beginning of this record of proceedings, (*expediente*), the preceding report, and the patriotic services of the petitioner, with every thing worthy of consideration in the premises, in conformity with the laws and regulations upon the subject, I declare Don Juan Bautista Alvarado owner in fee of the tract of land known by the name of “Las Mariposas,” within the boundaries of the Snow Mountains, (Sierra Nevada,) and the rivers called the Chanchilles, the Merced, and San Joaquin.

“Let the proper patent be issued, let it be registered in the respective book, and let this record of proceedings be transmitted to the most excellent departmental assembly, for its approval.

MANUEL MICHELTORRENA,

“Brigadier-General of the Mexican Army, Adjutant-General of the Staff of the same, Governor and Commandant-General of the Department of the Californias.”

“Whereas, Don Juan B. Alvarado, colonel of the auxiliary militia of this department, is worthy, for his patriotic services, to be preferred in his pretension for his personal benefit and that of his family, for the tract of land known by the name of the Mariposas, to the extent of ten square leagues (sitios de ganado mayor) within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin, the necessary requirements, according to the provisions of the laws and regulations, having been previously complied with, by virtue of the authority in me vested, in the name of the Mexican nation, I have granted to him the aforesaid tract, declaring the same by these presents his property in fee, subject to the

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approbation of the most excellent the departmental assembly, and to the following conditions:—

“1. He shall not sell, alienate, or mortgage the same, nor subject it to taxes, entail, or any other incumbrance.

“2. He may inclose it without obstructing the crossings, the roads, or the right of way; he shall enjoy the same freely and without hindrance, destining it to such use or cultivation as may most suit him; but he shall build a house within a year, and it shall be inhabited.

“3. He shall solicit, from the proper magistrate, the judicial possession of the same, by virtue of this patent, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks.

\*“4. The tract of land granted is ten sitios de ganado [mayor, (ten square leagues,)] as before mentioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper uses.

“5. Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced by another.

“Therefore, I command that these presents being held firm and binding, that the same be registered in the proper book, and delivered to the party interested, for his security and other purposes.

“Given in Monterey, this 29th day of the month of February, in the year of 1844. MANL. MICHELTORRENA.

“MANUEL JIMENO, Secretary.

“This patent is registered in the proper book on the reverse of folio ‘6.’ JIMENO.”

The evidence showed that the land continued to be disturbed by hostile Indians, until after the occupation of California by the Americans, and until 1849.

On February 10, 1847, Alvarado executed a deed of the above-described property to Fremont, with a general warranty of title. The consideration stated was three thousand dollars.

In 1849, Fremont caused a map of the grant to be made, and used efforts to have it settled.

On the 21st of January, 1852, Fremont filed his claim before the commissioners to ascertain and settle the private land claims in the state of California, sitting as a board, in the city of San Francisco.

On December 27, 1852, the board decreed that the claim be confirmed, to the extent of ten square leagues, being the same

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land described in the grant and map filed in the office of the United States surveyor-general for California, November 21, 1851.

On the 20th of September, 1853, there was filed in the office of the commissioners a notice from the attorney-general of the United States, that an appeal from the decision of the commissioners to the district court of the United States for the northern district of California, would be prosecuted; and in consequence of that appeal, the decision of the commissioners was reversed on the 7th of January, 1854. It was now brought before this court by an appeal from the district court.

It was argued by *Mr. William Carey Jones, Mr. Bibb, and Mr. Crittenden*, for the appellant, and by *Mr. Cushing*, attorney-general, for the United States.

The briefs filed in this case were, as in the preceding case of *\*United States v. Ritchie*, very elaborate; and the reporter can only notice the points made, without [\*547 attempting to state either the arguments or authorities by which they were sustained.

The following notice of the points made for the appellant, is taken from the brief of *Mr. Jones*.

1. The acts and deeds above recited, of the Mexican authorities, vested a legal, valid title, independent of the approbation of the departmental assembly; that being a means not of legalizing the title, but only of placing it beyond any power of defeasance. Consequently, if the necessity of fulfilling the condition arose from the incompleteness of the title, the objection falls to the ground. But—

2. The condition is not warranted by the law, and hence was not obligatory. The provision contained in § 11 of the regulations of 1828 refers only to grants to empresarios, for colonization.

3. Non-performance of the condition did not make the grant void, but only opened the land to denunciation; that is, to an information by a third person, who, finding the land vacant, might wish to possess it, and on which a judicial inquiry would be had; until which time (and a judicial forfeiture ascertained) the grant remained good, and the land open to the occupation of the grantee, and after his occupation the process of denunciation would not lie. The government did not reserve any right of forfeiture to itself, and consequently could not convey any to the United States.

4. Due diligence was used, both by Alvarado and Fremont,

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to fulfil the condition, and they did fulfil the requirements of the law.

5. That if the grant had been defeasible under the former government, through the dissent to it of the assembly and of the supreme government, that mode of defeasance is now cut off and made impossible by the non-existence of the assembly, to which only belonged the initiative to that end; and if formerly defeasible by denunciation for non-performance of the condition, that also is cut off by the terms of the treaty of purchase, and because there was no denunciation prior to the occupation, when the right lapsed. Moreover, the commission and courts herein are not holding an inquest to enforce forfeitures, but are sitting in equity to confirm rights—to carry out and enforce a trust.

6. The cases from this court cited by the judge below have not the effect he imagines, but the contrary.

7. The governor was the officer who, at the time of this grant, was authorized to concede lands in California; and there was no law or regulation in force that required the concession to be <sup>\*548]</sup> ~~approved by the departmental assembly,~~ nor was there any such body in existence.

8. This grant was in consideration of public services, and not subject to any condition. Arredondo's Cas., 6 Pet. 716, and authorities cited; *Menard v. Massey*, 8 How., 293; Jones's Rep. Sen. Doc., 18, 2d ses, 31st cong., 4 & 26; 2 Febrero Mexicano, 190, 191, §§ 19-21; Gamboa's Mining Ordinances of New Spain, index sube voc. and vol. i., 29; vol. ii., 76; Ib. 103, *et seq.*; opinion of the commission in case of Cervantes, Rec., of that case, 33, 39, and authorities cited; case of *Garcia v. Bon*, cited in opinion of Com. Hall, Rec., 28, 29; 1 Conejo, Diccionario Derecho Real; *Glen v. United States*, 13 How., 250; De Villemonte's Ca., 13 Id., 266; Boisdore's Ca., 11 Id., 115; Sibbald's Ca., 13 Pet., 313; Bases of Tacubaya, 1 Observador Judicial, 7; Instructions to Michelatorrena, printed in supplemental brief.

A second objection to the title was raised in the court below, namely: That the tract had not been surveyed under the former government, and its description and calls are insufficient to locate it. But—

1. This question is not before the court, because the act of congress does not impose the question of location and boundaries on either the commission or the courts; thus differing (and for sound reasons of policy and right) from the acts which opened the federal courts to the adjudication of claims in Florida, Missouri, and Louisiana. 1 Curtis's Com., 448, 449; 10 Pet., 334, 335; 13 Id., 133; 15 Id., 182; 16 Id., 162,

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166; Cong. Globe, 2d ses. 31st Cong., 375, Gwin's Rem.; Appendix to Id., 56, 58; Id., 134; Capt. Halleck's Rep. Sen. Doc., 1st ses., 31st Cong. No. 18; Jones's Rep., before cited; Instructions to the commission by Secretary of Interior, before cited authorities in Mr. Lockwood's brief.

2. The description and calls are sufficiently definite; there has been no difficulty in finding the particular place granted; it is well known; the quantity, and the place where it is to be surveyed, are both definite; the surveyor-general has ascertained them by actual survey.

3. The claimant had a right of selection, under the law and customs of California, of the quantity granted to him, within the boundaries, and at the place designated, leaving the overplus to the nation; and it is this overplus that is to be ascertained by survey; until which, if the rights of either party be indefinite within the given boundaries, they are those of the nation and not those of the grantee.

4. The laws under which this grant was made did not contemplate surveys or exactness in the definition of the tracts \*solicited or granted, but only a delineation—necessarily [ \*549 rude, since there was no scientific person in the whole country to make it—of the locality where the quantity was to be granted, and the overplus, if any, afterwards to be ascertained and resumed; and, in this case, the designation and description supply the place of, and are as certain as, any such rude sketch could have been.

5. The whole matter of location and segregation, under and according to the grant, is referred to the surveyor-general, and he has already exercised that function, so as to show that there is no difficulty attending it.

*Mr. Cushing* divided his argument into two branches; the first, considering the grant as a concession of agricultural lands, under the colonization laws of the Mexican Republic, and the second, considering the land as mining land. The latter branch is omitted from this case, as are the remarks of the opposite counsel upon the same subject, as a grant of agricultural lands.

Sect. 1. Fremont's claim is on a gratuitous colonization grant, by the Mexican governor of California, to one Alvarado, of which there had been no survey; no plan; no occupation; no site even; no confirmation by the proper public authority; no performance of any of the conditions precedent or subsequent annexed to the grant, violation of prohibiting conditions; a mere naked initiatory concession, upon paper, at the date of the treaty of Guadalupe Hidalgo.

Such is the extraordinary pretension of paper title.

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The pretension of location is yet more extraordinary. It is of a right to locate a tract of land, ten square leagues in dimension, anywhere at the discretion of the grantee, and in any form of combination of the subdivided sectional parts, so that they touch one another, within a region of upwards of one hundred square leagues.

The Mexican system of colonization included the following principles:—

The grants were made on conditions equitably combining private and public utility.

The system was modified according to circumstances, but always preserved the principle of grants on condition, the consideration of the grant being the performance of the conditions.

The system of settling polladores was applied to California.

Sect. 2. The concession to Alvarado was null for uncertainty of description and incapability of definite location.

Alvarado petitioned for lands which he had never seen and of which he had no description. He asked for lands "north" of the San Joaquin, supposing that river to run to the west, and west of the Snow Mountains, and between the Chanchilas and \*Merced Rivers, apparently supposing that [550] they run south and enter into the first-named river, and that the tract contains ten square leagues, when it includes over a hundred. The grant is equally indefinite.

The land claimed in Fremont's petition is for the like quantity lying on the "east" side of the San Joaquin, and claimed as the "Las Mariposas" grant, without specific boundaries or locality, other than being between the Snow Mountains and the San Joaquin. There is no proof that the "Las Mariposas" had been surveyed or had any specific boundaries. Not one witness could give its boundary, size, or contents. The Chanchilas does not empty into the San Joaquin, but runs westerly of the Snow Mountains, and without an outlet spreads itself over the Tulare Valley and is lost in it. 2 How., 63; 3 Id., 773; 13 Id., 251.

Sect. 3. The concession was not confirmed by the departmental assembly, and is not now entitled to confirmation.

By the terms of this grant, it was subject to the approval of the departmental assembly. Unless that was obtained, it was not valid. Obtaining this was a condition precedent to the perfection of the title. The governor had no power to excuse this preliminary and essential condition. A failure to perform a condition precedent, renders the grant null and void. There is no pretence that this condition has been performed. Nor was it repealed by the grantor or the act of

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God. No effort was made to perform it, as shown by testimony, while by the terms of the grant the whole would be void if not complied with.

Sect. 4. This grant is void, because the conditions annexed to and forming a part of it have never been performed.

The grant was under the colonization laws, for agricultural purposes. The settlement and cultivation of a new country were the leading motives to the grant. The government could derive no advantage from granting lands, which were to remain wild and unoccupied.

Hence the condition imposed in this grant, that, within the first year, Alvarado should build a house, and that it should be inhabited. No such house was built, and, of course, none was inhabited. There was no attempt to perform this condition.

He was required to solicit judicial possession of the land from a magistrate, by whom the boundaries should be marked out, on the limits of which the grantee was to place the proper landmarks. No such possession was ever solicited or given, nor limits fixed, or landmarks placed. The terms of this condition have been wholly uncomplied with.

No magistrate ever caused these ten square leagues to be surveyed, so as to separate the granted from the ungranted lands. \*This condition was important, with reference to further grants and settlements. Without its performance, it could not be known what remained open for grants and settlement. So far from this condition being complied with, it is not even now known where this grant is to be found.

Sect. 5. Until the governor-general confirmed the concession, the title remained in the crown.

The court may refuse to confirm where he would. Under the act of 1824, applications to confirm imperfect titles have been resisted, because conditions subsequent have not been complied with.

Sect. 6. None of the excuses for non-performance, alleged in Alvarado's behalf, possess legal force.

Sect. 7. Alvarado could not lawfully convey to Fremont a title, on which to call for a patent from the United States.

It is an elementary proposition in law, that a grantor can confer no greater title than he held, and was authorized by law to convey.

By the terms of this grant, if held valid, Alvarado had no transferable interest. The object of the government was to insure settlement and cultivation, and not to make grants that might be transferred to speculators, or incumbered in the

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behalf of creditors. Hence, the first condition was that he should not sell; and, by the last, if he did, he was to lose his right, and then it would be subject to be granted to another.

If the departmental assembly had approved, and all the other conditions had been fulfilled or excused, Alvarado could not have been excused from this one, without the performing an express act by one authorized by law for that purpose. Under the colonization laws, under which this grant was made, this essential condition could not have been waived. It was deemed so essential, that no one was clothed with power to release the grantor from it. No excuse is offered for violating this condition. It was voluntary, and without the apology of impossibility or release.

Sect. 8. The decision of the commissioners is itself null and void, for uncertainty and vagueness; and, if it should be confirmed, the land granted could not be located so as to be patented.

Sect. 9. The grant to Alvarado was a gratuitous one, except in so far as the performance of the conditions would relate back to constitute a consideration.

Sect. 10. The original petition, the provisional grant, and the decree of the commissioners, each assumes a floating claim, not as a grant of an identical tract of land, by metes and bounds, all of which is without warranty of law.

\*552] \*Sect. 11. Under the foregoing authorities, it is maintained, in opposition to the claim of Fremont, the petitioner:—

1. The land in California passed, by conquest, to the crown of Spain, subject to the occupancy of the Indians; so much of it as remained ungranted, and not severed from the royal domain, passed to the Mexican Republic, by the fact of its independence of Spain, as national domain; and so much of it as had not been severed from the national domain of Mexico, by lawful grant or other sufficient title, passed to the United States by the treaty of Guadaloupe Hidalgo, and became public lands of the United States.

2. Hence, according to the whole series of decisions under the Louisiana and Florida treaties, and, by parity of reasoning, under that of Guadaloupe Hidalgo, as all the land was, and is, in the first instance, that of the prince or government standing for the aggregate political society, whoever claims as against the state, that is, against the people of the United States, to own any part of such land in severalty, and segregated from the public domain, is held to show a "right or title," either at law or in equity.

3. The grant to Alvarado was a donation, or gratuitous

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grant, under the decree of 1824 and the regulations of 1828, concerning colonization, and subject to all the limitations of those acts, from which the departmental authorities could not derogate, except in the particulars expressly authorized by the same.

4. The petitioner, Fremont, has no claim on the equities of the United States, in regard to the land donated to Alvarado, unless the latter complied with the conditions of the Mexican law, which constituted the inducement of the grant. This, in point of fact, he did not do; and so the lands fall back into the public domain of the United States.

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

The court have considered this case with much attention. It is not only important to the claimant and the public, but it is understood that many claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case.

A preliminary question has been raised, as to the jurisdiction of the district court from which the appeal has been taken; but the same question has been already examined and decided in the case of the *United States v. Ritchie*, and it is unnecessary to discuss it further. We think it very clear that the district court had jurisdiction, and proceed to examine the validity of the claim upon this appeal.

The 8th section of the act of March 3, 1851, "to ascertain \*and settle the private land claims in the state of California," directs: "That each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the commissioners, (to be appointed under that act,) when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

And the 11th section provides, that the commissioners therein provided for, and the district and supreme court, in deciding on any claim brought before them under the pro-

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visions of that act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, as far as they are applicable.

The decisions of the supreme court, mentioned in this section, evidently refer to decisions heretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities, previous to the cession to the United States. And as these decisions must govern the case under consideration, as far as they are applicable, it is proper to state the principles upon which they were made, before we proceed to examine it. In doing this, however, we do not propose to refer separately to each of the numerous decisions which may be found in the reports; nor is it necessary. They will be found to have been uniformly decided upon certain fixed principles of law, applicable to those grants, which cannot always be applied with justice and equity to a case like the one before us. The laws of congress, giving the jurisdiction, were different in one respect; and the condition of the countries, as well as the laws and usages of the nation making the grants, were also different.

It will be seen, from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination, and to be passed upon by the court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess [554] them an \*opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.

In this respect, it differs from the act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court, in these cases, was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the act of 1824, or the subsequent laws extending its provisions.

And the language of the court, in passing judgment upon the claims in Louisiana or Florida, must always be understood as applying to cases in which the government still held the ownership of the land, and where the right of the party to

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demand a conveyance, upon principles of equity and good faith, must be shown by him, before he could claim it from the United States.

The mode and form of granting lands in these provinces, and the character and stability of the provincial governments, must also be considered, before we can determine how far the principles established in the decisions of those cases are applicable to the grants by the Mexican authorities, after the country was separated from Spain.

Grants of land in Louisiana and Florida were usually made in the following manner: The party who desired to form a settlement upon any unoccupied land presented his petition to the officer who had authority to grant, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied. Upon the receipt of the petition, the governor, or other officer who had the power to grant, issued what is usually called a concession to the party, authorizing him to have the land surveyed by the official surveyor of the province. And it was the duty of this officer to ascertain whether the land asked for was vacant, or the grant of it would prejudice the rights of other parties; and, if the surveyor found it to be vacant, and that the grant would not interfere with the rights of others, he returned a plat, or figurative plan, as it was called, and the party thereupon received a grant in absolute ownership.

These grants were almost uniformly made upon condition of settlement, or some other improvement, by which the interest of the colony, it was supposed, would be promoted. But until the survey was made, no interest, legal or equitable, passed in \*the land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat, were conditions precedent, and he had no equity against the government, and no just claim to a grant until they were performed; for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government.<sup>1</sup> There were some cases, indeed, in which there were absolute grants of title with conditions subsequent annexed to them. The case of *Arredondo*, reported in 6 Peters,

<sup>1</sup> QUOTED. *McMichen v. United States*, 7 Otto, 215.

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and of which we shall speak hereafter, was one of this description. But the great mass of cases which come before this court, and which have been supposed to bear on this case, were of the character above mentioned.

It necessarily happened, from this mode of granting, that many concessions were obtained which the parties never afterwards acted on. A person who had contemplated a settlement, or planting a colony, or making some other improvement in a particular place, sometimes changed his mind, or found some other situation more suitable, or found himself unable to comply with the conditions which, in his petition, he had proposed to perform.

But these concessions or permissions were never recalled, and remained in the possession of the party, although he had abandoned all thoughts of acting upon them. And when the United States obtained the sovereignty of these countries, and the energy, enterprise, and industry of our citizens were rapidly filling it, and lands which were of no value under the Spanish government would be ample fortunes under the United States, many persons, who for years had held these concessions without attempting to avail themselves of the authority they gave him, came forward and claimed the right to do so under the government of the Union.

A few cases, which appear to have been relied on in the argument in behalf of the United States, will show the character of most of them, and the principles upon which they were decided in this court. In the case of *Boisdoré*, (11 How., 63,) he had obtained the authority or concession on which he relied in the year 1783. He had never caused a survey to be made during the existence of the Spanish government, although twenty years had elapsed before its cession to this country. \*Nor was any step taken by him to [556] obtain a title from the United States, nor any claim legally brought forward, for seventeen years after the territory had been ceded to the United States. And nothing like any serious attempt had been made to fulfil the conditions upon which he had obtained the concession.

So, too, in the case of *Glenn and others v. The United States*, 13 How., 250, (usually called the Clamorgan case,) the grant was obtained in 1796, and no possession taken, and no survey had, nor any of the stipulations into which he had entered complied with, while the Spanish government lasted. Nor, indeed, was any claim made to it for several years after the cession to the United States; nor until the country in which it was situated was filling up with an industrious population, and the land becoming of great value.

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So, again, in the case of *Villemont* against *The United States*, (13 How., 266,) the concession or authority was made in 1795, and there was an express provision in the concession, that unless the establishment he proposed in his petition was made on the land in three years, the concession should be null. Yet he did nothing during the continuance of the Spanish government, although it lasted eight years afterwards; and the excuse from Indian hostility could hardly avail him, because no difficulty of that kind is suggested in his petition; and from the character of the improvements he promised to make, it would seem that one of the objects of this large grant was to form an establishment which would be useful in repelling Indian hostilities from the neighboring Spanish settlements.

This brief statement of the facts in these cases shows that the parties had acquired no right, legal or equitable, to these lands under the Spanish government. The instruments under which they claimed were evidently not intended as donations of the land, as a matter of favor to the individual, or as a reward for services rendered to the public. They were intended to promote the settlement of the territories, and to advance its prosperity. But up to the time when Spain ceded them, the parties had done nothing to accomplish the object, or to carry out the policy of the government. They had evidently no claim, therefore, upon the justice or conscience of the Spanish government. It had not granted them the land, and they had done nothing which, in equity, bound that government to make them a title. And when Spain ceded the territories to the United States, it held these lands as public domain as fully and amply as if those concessions or authorities had never been given; and the United States received the title in the same full and ample manner; neither the legal nor equitable right to them, as public domain, had been impaired \*by any act of the Spanish authority, nor had any right been conveyed to or vested in the claimants. [\*557]

It is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised under it by the tribunals or officers

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of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the unwritten law of the state, or the construction given to one of its statutes.

With these principles, which have been adjudicated by this court, to guide us, we proceed to examine the validity of the grant to Alvarado, which is now in controversy.

There can be no question as to the power of the governor of California to make the grant. And it appears to have been made according to the regular forms and usages of the Mexican law. It has conditions attached to it; but these are conditions subsequent. And the first point to be decided is, whether the grant vested in Alvarado any present and immediate interest; and, if it did, then, secondly, whether anything done or omitted to be done by him, during the existence of the Mexican government in California, forfeited the interest he had acquired, and reveseted it in the government? For if, at the time the sovereignty of the country passed to the United States, any interest, legal or equitable, remained vested in Alvarado or his assigns, the United States are bound in good faith to uphold and protect it.

Now, the grant in question is not like the Louisiana and Florida concessions—a mere permission to make a survey in a particular place, and return a plat of the land he desires, with <sup>\*558]</sup> <sup>\*a promise from the government that he shall have a title</sup> to it when these things are done. But the grant, after reciting that Alvarado was worthy, for his patriotic services, to be preferred in his pretension for his personal benefit, and that of his family, for the tract of land known by the name of Mariposas, to the extent of ten square leagues, within certain limits mentioned in the grant; and that the necessary requirements according to the provisions of the laws and regulations, had been previously complied with, proceeds, in the name of the Mexican nation, to grant him the aforesaid tract, declaring the same, by that instrument, to be his property in fee, subject to the approbation of the departmental assembly and the conditions annexed to the grant.

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The words of the grant are positive and plain. They purport to convey to him a present and immediate interest. And the grant was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers. And, although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and, when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions.<sup>1</sup>

It is argued that the description is so vague and uncertain that nothing passed by the grant; and that he had no vested interest until the land was surveyed, and the part intended to be granted severed by lines or known boundaries from the public domain. But this objection cannot be maintained. It is true, that if any other person within the limits where the quantity granted to Alvarado was to be located, had afterwards obtained a grant from the government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the government, the title of the party who had obtained a grant for the specific land would be the superior and better one. For, by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described, until after he had made his survey.<sup>2</sup> But, as between him and the government, he had a vested interest in the quantity of land mentioned in the grant. The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it.<sup>3</sup>

\*This principle of law was maintained by the decision [\*559 of this court, in the case of *Rutherford v. Greene's Heirs*, reported in 2 Wheat., 196. The state of North Carolina, in 1870, passed an act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782, after granting 640 acres in the territory reserved to each family that had previously settled on it, and appointing commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers, proceeded to enact that 25,000

<sup>1</sup> CITED. *United States v. Castillero*, 476; *Henshaw v. Bissell*, 18 Wall., 2 Black, 347. QUOTED. *United States* 267.

<sup>2</sup> *Vallejo*, 1 Black, 560, 564.

<sup>3</sup> QUOTED. *Hornsby v. United States*, 2 QUOTED. *Miller v. Dale*, 2 Otto, 10 Wall., 233-235; and see *Id.*, 241.

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acres of land should be allotted for and given to Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense the state entertained of the extraordinary services of that brave and gallant officer."

In pursuance of this law, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed and returned to the proper office. The manner in which the title originated under which Rutherford claimed, is not very clearly stated in the case. The decision turned altogether on the validity of the title of General Greene, and the date at which it commenced. And the court said, that the general gift of 25,000 acres lying in the territory reserved, became, by the survey, a particular gift of the 25,000 acres contained in the survey. And, after examining the title very fully, the court in conclusion say: "It is clearly and unanimously the opinion of the court, that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned March 3, 1783, gave precision to that title, and attached it to the land surveyed."

There was a further objection taken to the title of General Greene, upon the ground that, by the constitution of North Carolina, there should be a seal of the state to be kept by the governor and affixed to all grants. And it was objected, that this grant by the legislature had not the formality required by the constitution to pass the estate. But in answer to this, the court said that this provision was intended for the completion and authentication of an instrument attesting a title previously created by law. That it was merely the evidence of prior legal appropriation, and not the act of the original appropriation itself.

The principles decided in this case appear to the court to be conclusive as to the legal effect of the grant to Alvarado. It recognizes as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain <sup>\*560]</sup> *\*territory*, vests in the grantee a present and immediate interest. In the language of the court, the general gift becomes a particular gift when the survey is made; and when this doctrine has been asserted in this court, upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican

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government, where a controversy arises between the United States and the Mexican grantee.

The fact that the grant to General Greene was made by an act of assembly, did not influence the decision; nor did the court allude to it as affecting the question. It is the grant of the state, whether made by a special law of the legislature, or by the public officer authorized to make it.

Another objection has been made, upon the ground that the 8th article of the regulations of 1828 requires what is called a definite grant, signed by the governor, to serve as a title to the party interested, wherein it must be stated that the said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given; and it is argued that no title passed until this definite grant was obtained. But this document is manifestly intended as the evidence that the conditions annexed to the grant have all been complied with. It is not required in order to give him a vested interest, but to show that the estate, conveyed by the original grant upon certain conditions, is no longer subject to them; and that he has become definitely the owner, without any conditions annexed to the continuance of his estate. It is like the patent required by the laws of North Carolina after the original grant to General Greene, which the court said was for the completion and authentication of an instrument attesting a title previously created by law; and, like the case of General Greene, Alvarado had a vested interest without it.

Regarding the grant to Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach of the conditions annexed to it, during the continuance of the Mexican authorities, which forfeited his right and revested the title in the government.

The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it, within the time limited in the conditions. It is a sufficient answer to this objection to say, that negligence in respect to these conditions and others annexed to the grant does not, of itself, always forfeit his right. <sup>1</sup> It subjects the land to be denounced by another, but the conditions do not declare the land \*forfeited to the state, upon the failure of the grantee [ \*561 to perform them.

The chief objects of these grants was to colonize and settle the vacant lands. The grants were usually made for that purpose, without any other consideration, and without any claim

<sup>1</sup> QUOTED. *United States v. Reading*, 18 How., 6.

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of the grantee on the bounty or justice of the government. But the public had no interest in forfeiting them even in these cases, unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements. They seem to have been intended to stimulate the grantee to prompt action in settling and colonizing of the land, by making it open to appropriation by others, in case of his failure to perform them. But as between him and the government, there is nothing in the language of the conditions, taking them all together, nor in their evident object and policy, which would justify the court in declaring the land forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed; <sup>1</sup> nor do we find any thing in the practice and usages of the Mexican tribunals, as far as we can ascertain them, that would lead to a contrary conclusion.

Upon this view of the subject, we proceed to inquire whether there has been any unreasonable delay, or want of effort, on the part of Alvarado to fulfil the conditions? For if this was the case, it might justly be presumed, as in the Louisiana and Florida concessions, that the party had abandoned his claim before the Mexican power ceased to exist, and was now endeavoring to resume it, from the enhanced value under the government of the United States.

The petition of Alvarado to the governor is dated February 23, 1844; and, after passing through the regular official forms required by the Mexican law, the grant was made on the 29th of the same month. According to the regulations for granting lands, it was necessary that a plan or sketch of its lines and boundaries should be presented with the petition; but, in the construction of these regulations, the governors appear to have exercised a discretionary power to dispense with it under certain circumstances. It was not required in the present instance. The reason assigned for it in the petition was, the difficulty of preparing it, the land lying in a wilderness country, on the confines of the wild Indians. This reason was deemed by the governor sufficient, and the grant issued without it; and in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been

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<sup>1</sup> DISTINGUISHED. *United States v. Castro*, 24 How., 351. QUOTED.  
*United States v. Noe*, 23 How., 317.

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\*regarded as vested and valid by the Mexican authorities. And as the governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision, in this respect, was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant. The fact that the country where the land was situated was such a wilderness, and bordered by such dangerous neighbors, that no plan could then be prepared, is proved by these documents; and that fact, officially admitted, is worthy of consideration, when we come to the inquiry whether there was unreasonable delay in taking possession. For, by dispensing with the plan or draft on that account, which was a condition precedent, it may justly be inferred that the conditions subsequent were not expected by the governor to be performed, nor their performance intended to be exacted, until the state of the country would permit it to be done with some degree of safety.

Now, it is well known that Mexico, and California as a part of it, had, for some years before, been in a disturbed and unsettled state, constantly threatened with insurrectionary and revolutionary movements; and in this state of things, the uncivilized Indians had become more turbulent, and were dangerous to the frontier settlements, which were not strong enough to resist them. It is in proof that this state of things existed in the Mariposas valley when this grant was made; that it was unsafe to remain there without a military force; and that this continued to be the case until the Mexican government was overthrown by the American arms. In the very year of the grant, a civil war broke out in the province, which ended by the expulsion of the Mexican troops; and Colonel Fremont entered California at the head of an American force, in 1846, and the country was entirely subdued, and under the military government of the United States, in the beginning of 1847, and continued to be so held until it was finally ceded to the United States under the treaty of Guadaloupe Hidalgo. In February, 1847, while California was thus occupied by the American forces, Alvarado conveyed to Colonel Fremont.

Now, it is very clear, from the evidence, that during the continuance of the Mexican power it was impossible to have made a survey, or to have built a house on the land, and occupied it for the purposes for which it was granted. The difficulties which induced the governor to dispense with a plan when he made the grant, increased instead of diminishing. We have stated them very briefly in this opinion, but they are abun-

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dantly and in more detail proved by the testimony in the \*record. Nobody proposed to settle on it, or denounced [563] the grant for a breach of the conditions. And at the time when the Mexican authorities were displaced by the American arms, the right which Alvarado had obtained by the original grant remained vested in him, according to the laws and usages of the Mexican government, and remained so vested when the dominion and control of the government passed from Mexico to the United States. The same causes which made it impossible to take possession of the premises and obtain a survey, made it equally impracticable to obtain the approval of the departmental assembly. The confusion and disorder of the times prevented it from holding regular meetings. It is doubtful whether it met more than once after this grant was made; and its proceedings, from the state of the country, were necessarily hurried, and the assembly too much engrossed by the public dangers to attend to the details of private interests. It does not appear that the governor ever communicated this grant to the assembly. At all events, they never acted on it. And the omission or inability of the public authorities to perform their duty, cannot, upon any sound principle of law or equity, forfeit the property of the individual to the state. It undoubtedly disabled him from obtaining what is called a definitive title, showing that all the conditions had been performed; but it could not divest him of the right of property he had already acquired by the original grant, and revest it in the state.

And certainly no delay is chargeable to Alvarado or Fremont after California was subjected to the American arms. The civil and municipal officers, who continued to exercise their functions afterwards, did so under the authority of the American government. The alcalde had no right to survey the land or deliver judicial possession, except by the permission of the American authorities. He could do nothing that would in any degree affect the rights of the United States to the public property; and the United States could not justly claim the forfeiture of the land for a breach of these conditions, without showing that there were officers in California, under the military government, who were authorized by a law of congress to make this survey, and deliver judicial possession to the grantee. It is certain that no such authority existed after the overthrow of the Mexican government. Indeed, if it had existed, the principles decided in the case of *Arredondo*, 6 Pet., 745, 746, would furnish a satisfactory answer to the objection.

Two other objections on the part of the United States to the confirmation of this title remain to be noticed. The first con-

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dition annexed to the grant prohibits the grantee from selling, alienating, or mortgaging the property, or subjecting it to taxes, \*entail, or any other incumbrances. And by the laws of Mexico, the grantee could not, it is said, sell or convey the land to any one but a Mexican citizen, and that Fremont was not a Mexican citizen at the time of the conveyance under which he claims.

In relation to the first objection, it is evident from the disturbed state and frequent revolutions in the province, that there was some irregularity in the conditions annexed to grants, and that conditions appropriate to one description of grant, from clerical oversight, or some other cause, were sometimes annexed to others. This is manifestly the case in the present instance; for this condition is in violation of the Mexican laws, and could not, therefore, be legally annexed to this grant. For by the decree of the Mexican congress of August 7, 1823, all property which had been at any time entailed, ceased to be so from the 20th of September, 1820, and was declared to be and continue absolutely free; and no one in future was permitted to entail it. And the prohibition in the 13th article of the regulations of 1824, to transfer property in mortmain, necessarily implies that it might be aliened and transferred in any other manner.

But if this condition was valid by the laws of Mexico, and if any conveyance made by Alvarado would have forfeited the land under the Mexican government as a breach of this condition, or if it would have been forfeited by a conveyance to an alien, it does not by any means follow that the same penalty would be incurred by the conveyance to Fremont.

California was at that time in possession of the American forces, and held by the United States as a conquered country, subject to the authority of the American government. The Mexican municipal laws, which were then administered, were administered under the authority of the United States, and might be repealed or abrogated at their pleasure; and any Mexican law inconsistent with the rights of the United States, or its public policy, or with the rights of its citizens, were annulled by the conquest. Now, there is no principle of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there any thing in the principles of our government, in its policy or its laws, which forbids it. The Mexican government, if it had regained the power, and it had been its policy to prevent the alienation of real estate, might have treated the sale by Alvarado as a violation of its laws; but it becomes a very different question when the

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American government is called on to execute the Mexican law. And it can hardly be maintained that an American citizen, who makes a \*contract or purchases property [565] under such circumstances, can be punished in a court of the United States with the penalty of forfeiture, when there is no law of congress to inflict it. The purchase was perfectly consistent with the rights and duties of Colonel Fremont, as an American officer and an American citizen; and the country in which he made the purchase was, at the time, subject to the authority and dominion of the United States.

Still less can the fact that he was not a citizen of Mexico impair the validity of the conveyance. Every American citizen who was then in California had at least equal rights with the Mexicans; and any law of the Mexican nation which had subjected them to disabilities, or denied to them equal privileges, were necessarily abrogated without a formal repeal.

In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say that, under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851.<sup>1</sup>

Some difficulty has been suggested as to the form of the survey. The law directs that a survey shall be made, and a plat returned, of all claims affirmed by the commissioners. And as the lines of this land have not been fixed by public authority, their proper location may be a matter of some difficulty. Under the Mexican government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form as would be inconvenient to the adjoining public domain, and impair its value. The right which the Mexican government reserved to control this survey passed, with all other public rights, to the United States; and the survey must now be made under the authority of the United States, and in the form and divisions pre-

<sup>1</sup> EXPLAINED. *United States v. Castillero*, 2 Black, 232.  
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scribed by law for surveys in California, embracing the entire grant in one tract.

Upon the whole, it is the opinion of the court that the claim of the petitioner is valid, and ought to be confirmed. The decree of the district court must, therefore, be reversed, and the case remanded, with directions to the district court to enter a decree conformably to this opinion.

\*Mr. Justice CATRON and Mr. Justice CAMP- [\*566  
BELL dissented.

Mr. Justice CATRON dissenting.

On the 23d of February, 1844, Juan B. Alvarado petitioned the governor, Michel Torrena, for ten leagues of land, alleging that the tract which he then owned was not sufficient to support his stock of cattle, and which he was desirous to increase. He at the same time proposed to contribute to the spreading of the agriculture and industry of the country. And he further declared, that because of the good intentions of the governor in favor of the improvements of the country, the petitioner hoped for a favorable consideration of his demand.

The governor referred the petition to the alcalde of San José, who reported that the land was vacant, that the petitioner was meritorious, and that there was no objection to making the grant. In this report, Jimeno, the government secretary, concurred.

The governor declared the petitioner meritorious for his patriotic services, and therefore worthy of a preference; and accordingly, on the 29th of February, 1844, proceeded to grant to Alvarado, for his personal benefit and that of his family, the tract of land known by the name of Mariposas, to the extent of ten square leagues, within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin, "the necessary requirements, according to the provisions of the laws and regulations having been previously complied with, subject to the approbation of the departmental assembly, and the following conditions"—that is to say:—

1. "He shall not sell, alienate, nor mortgage the same, nor subject it to taxes, entail, or other incumbrance."

2. "He may inclose it, without obstructing the roads or the right of way. He shall enjoy the same freely, without hindrance, destining it to such use or cultivation as may best suit him; but he shall build a house within a year, and it shall be inhabited."

3. "He shall solicit from the proper magistrate the judicial

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possession of the same, by virtue of this grant, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks."

4. "The tract of land granted is ten *sitios de ganado mayor*, (ten square leagues,) as before mentioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper use."

5. "Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced (pretended for) by another."

\*567] \* "Therefore, I command that these presents being held firm and binding, that the same be registered in the proper book, and delivered to the party interested, for his security, and other purposes."

The foregoing conditions, in effect, are imposed by the colonization law of 1824, and the regulations made in pursuance thereof, by the chief executive of Mexico, in 1828; both of which were equally binding upon the territorial governors, when they exercised the granting power.

The concession, according to these laws, could only be made for agricultural purposes and for raising cattle. Colonization was the great object of the law of 1824; and to this end alone was its execution prescribed and arranged by the regulations of 1828.

Much stress has been laid on the fact that, in the concession to Alvarado, patriotic services are referred to as a reason why a preference was given to the grantee in obtaining the land; that preference was founded on the 8th section of the act of 1824, which provides, "that in the distribution of lands, Mexican citizens are to be attended to in preference, and no distinction shall be made among these, except such only as is due to private merit and services rendered to the country." Private merit or public services could form no part of the consideration for grants made for the purposes of grazing and cultivating; nor had the governor of a territory power to grant for any other purpose. The 11th section of the act of 1824 reserved the power to the supreme executive to alienate lands in the territories in favor of civil or military officers of the federation. This grant, therefore, stands on the footing of others, and is subject to the same conditions. Alvarado's petition, and the governor's concession founded on it, must be taken together; they are a necessary part of the contract between the applicant and the government, under the colonization law of 1824, and the regulations of 1828,

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which, with inconsiderable exceptions, remained in full force when this concession was applied for and issued.

The government of the United States received the legal title to the public lands in California by treaty, and incumbered under the laws of nations with all the equitable rights of private property therein, that they were subject to in the hands of Mexico at the time of their transfer; and the question here is, what interest in the land claimed, Alvarado or his assignee had, when the treaty was made? The consideration for the grant was a performance of its leading conditions on the part of the grantee; the principal condition being, the inhabitation of the land, in the manner and within the time prescribed. As to the terms of this condition, the regulations of 1828 declare, that the party soliciting \*for lands, shall describe, as distinctly as possible, by means of a map, the land asked for; and a record shall be kept of the petitions presented and grants made, with the maps of the lands granted; and the governor was required, by the 11th rule of the regulations, to designate to the colonist the time within which he was bound to cultivate or occupy the land; "it being understood that if he does not comply, the grant of the land shall remain void;" and by the 12th rule, the grantee was required to prove before the municipal authority that he had cultivated or occupied, so that a record should be made of the fact thus established, "in order that he might consolidate and secure his right of ownership, and have power to dispose freely of the land." Accordingly, certain conditions were inserted in the grant as part of it, by the second of which, the colonist was bound to build and inhabit a house on the land granted, within one year. This was, therefore, the time allowed from the date of the grant, for the fulfilment of the important condition on which an equitable claim to it arose.

In this case, the land was granted to Alvarado in February, 1844, and three years after, he conveyed to Colonel Fremont, the petitioner. No possession had been taken by Alvarado before that time, nor any further act done to acquire a title, than the first step of obtaining the concession; and if this step gave him an equity to have a perfect title from the Mexican government, then his equity is the same as against the United States.

In the first place, the 11th rule above cited declares that no right accrues to the colonist unless he occupies the land; and in the next place, the act of congress of March 3, 1851, by the authority of which we are acting, declares, (§ 11,) that the board of commissioners and the courts, deciding on Cali-

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fornia land claims, shall be governed by the decisions of the supreme court of the United States, so far as they are applicable.

By these decisions, it has been settled for many years, that a Spanish concession, containing a condition of inhabitation and cultivation, the performance of which is the consideration to be paid for an ultimate perfect title, is void, unless the condition was performed within the time prescribed by the ordinances of Spain. It was so held in the case of the *United States v. Wiggins*, 14 Pet., 350. And the opinion then given was followed in the cases of *Buyck*, 15 Pet., 222, and of *Delespine*, Id., 319. But the rule was more distinctly laid down in the case of the *United States v. Boisdoré*, 11 How., 96. There the court said: "The grantee might have his land surveyed, or he 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 <sup>\*569]</sup> first decree, in such case, had no operation. So the supreme court of Louisiana held, in *Lafayette v. Blanc*, 3 La. Ann. Rep., 60, and, in our judgment, properly. There, the grantee never having had actual possession under his concession, the court decided that he could set up no claim to the land, at law or in equity. This case followed *Hooter v. Tippett*, 17 La., 109. We take it to be undoubtedly true, that, if no actual possession was taken, under a gratuitous concession, given for the purpose of cultivation, or of raising cattle, during the existence of the Spanish government, no equity was imposed on our government to give any consideration or effect to such concession, or *requête*."

The case of *Glenn et al. v. United States*, 13 How., 259, maintains the same doctrine. It was there declared, that a promise of performance, (that is, to inhabit and cultivate,) on the part of Clamorgan, the grantee, was the sole ground on which the Spanish commandant made the concession; that actual performance, by cultivating the land, was the consideration on which a complete title could issue; and that so far from complying, Clamorgan never took a single step after his concession was made, and in 1809 conveyed for the paltry sum of fifteen hundred dollars; and, under these circumstances, (says the court,) we are called on to decide in his favor, according to the principles of justice; this being the rule prescribed to us by the act of 1824, and the Spanish regulations. The court, then, declares, that the claim had no justice in it, and to allow it would be to sanction an attempt at an extravagant speculation merely; referring to *Boisdoré's* case, as having

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established the principle that occupation was indispensable, and the real consideration of grants for purposes of inhabitation or cultivation.

But, it is insisted here that no possession was taken of the land, nor a survey of it made, because of the danger from hostile Indians in its neighborhood. If this were a valid excuse, then on the Indian borders grants would carry no substantial conditions with them. The point is settled in the cases of *Kingsley*, 12 Pet., 484, and of *De Villemont*, 13 How., 267, that where the hostility of Indians was alleged as an excuse for not occupying the land, and it appeared that the hostility existed when the grant was made, and was merely continued, that then the grantee could not be permitted to set up such an excuse.

Alvarado manifestly took the grant at his own risk, and if he did not intend to perform the condition of inhabitation, or could not do it, he must bear the consequences. To hold otherwise would be to subvert the manifest design of the colonization laws of Mexico, by reserving indefinitely, to single individuals, \*large bodies of uncultivated and unoccupied lands, in the instance before us, amounting to fifty [\*570 thousand arpens.

It is, I think, impossible to exempt this claim from the settled doctrine, that occupation is a consideration indispensable to its validity. It is thus laid down in various instances, and especially in the cases above cited, of *Boisdoré*, of *Glenn et al.* and of *De Villemont*; nor can this claim be sustained, unless they are overruled, and the act of congress, declaring that this court is bound by them, disregarded. The district judge, who rejected this claim in California, held that he could not do so, and, in my opinion, held properly. I give the conclusion of his opinion as it is found in the record.

“But, in the case at bar, the time for making a settlement is limited to one year. So far as appears, Alvarado never even saw the tract he assumed to convey to Fremont, nor was any settlement effected by the latter until a year after the ratification of the treaty. It cannot be urged in this, as in other cases, that the grant was not made complete by the assent of the assembly, owing to accident or the neglect of the governor, for Alvarado himself says it could not be submitted to them without the *diseno*, or plan, which, on account of the hostilities of the Indians, he was unable to furnish, and yet the danger from that source existed at the time of his application, for he assigns it to the governor as a reason why the *diseno* did not accompany the petition.

“It is urged that the political disturbances of the country

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contributed to prevent the settlement; but I think it clear, from the evidence, that the principal, if not the only reason why it was not effected by Alvarado or Fremont until after the treaty, was the danger from the savages, and that this danger existed to substantially the same degree before and after the grant.

“Upon the whole, after a most careful consideration of this case, and with every desire to give the claimant the full benefit of every favorable consideration to which he is entitled, I have been unable to resist the conclusion that the cases of *Glenn*, of *De Villemont*, and of *Boisdoré*, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart.”

2. The next question is, whether a concession, which is in fact a floating land warrant, seeking a location on any part of a large region of country containing nine hundred square miles, can be confirmed by this court, acting as it does, of necessity, in a judicial capacity? The assumption thus to locate the ten leagues asserts power in the claimant to have the land surveyed at his discretion, either in a body, or in single tracts, so that they adjoin each other at any point of the respective surveys: [571] in the \*latter form he did have them surveyed, and, in this form of location, the grant was declared valid by the board of commissioners.

I understand the Mexican laws as not to allow any such undefined floating claims. It is impossible to recognize them under the act of 1824, the object of which was to colonize particular tracts of land.

By that act, the petitioner was bound to describe the land asked for “as distinctly as possible, by means of a map,” according to which it was granted; and next, he was required to solicit from the proper magistrate (usually the alcalde of the next pueblo) judicial possession of the land described; and this magistrate was required to survey and designate the boundaries, on the limits of which the party interested was bound to place proper landmarks. Now, that Alvarado had no separate interest to any specific tract of land, was admitted on the argument; but it was insisted that he was, and his assignee is, a tenant in common, with the government, in all the country situate in a region called Mariposas, lying within the limits of the Sierra Nevada, and the rivers known by the names of Chanchilles, of the Merced, and the San Joaquin. In any part of this large scope of country it is assumed the Mexican magistrate and surveyor could have laid off the ten leagues, and that the surveyor-general of California can do the same now.

This claim, standing on the concession alone, lost its binding

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operation in one year, and became void if the land was not designated within that time, unless the time was enlarged, or new conditions prescribed by the governor. So I understand the eleventh rule of the regulations of 1828.

To hold that the Mexican government designed to leave in force for an indefinite length of time large undefined concessions, that might be surveyed at the election of the claimant at any time and at any place, to the hindrance of colonization and to the destruction of other interests, is an idea too extravagant to be seriously entertained; so far from it, the Mexican colonization laws contained more positive provisions, to the end of granting distinct and known tracts of land to colonists, than did any Spanish laws that have at any time been brought to the consideration of this court.

It is proper to remark that, by the Mexican laws, an assignee could not be put into possession of land by force of the first decree or concession. Alvarado alone could apply for judicial possession. By the 11th rule, a possession could be transferred when it was duly proved and recorded; but the alcalde could not recognize an assignee as a colonist, because by the 3d rule the governor was bound to judge of the fitness of the candidate; \*and, having decided as to his fitness, the alcalde was held to an execution of that decision, and could not [\*572 recognize an assignee.

We are here called on to award a patent for a floating claim of fifty thousand arpens of land in the gold region of California, to an assignee whose vendor claimed under the colonization laws of Mexico, but who never was a colonist, who never did a single act under his contract to colonize, and who, it is admitted, could not have obtained a definite title from the political department of the territory of California, to wit, from the departmental assembly, whose province it was to pass on and confirm grants to colonists.

At law, this claim has no standing; it cannot be set up in an ordinary judicial tribunal. It addresses itself to us as founded on an equity incident to it by mere force of the contract, no part of which was ever performed. The claim is as destitute of merit as it can be, and has no equity in it; nor is it distinguishable from that of Clamorgan, which was pronounced invalid in the case of *Glenn et al. v. The United States*.

If this claim is maintained, all others must likewise be, if the first step of making the concession is proved to have been performed by the acting governor; as no balder case than the one before us can exist in California, where the grant is not infected with fraud or forgery.

And this presents a very grave consideration, affecting pre-

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emption rights. The country in California is filled up with inhabitants cultivating the valleys and best lands, and where they rely almost as confidently on their government titles, founded on acts of congress, as if they had a patent for the land. No other American title is known in the state of California, except such as are founded on the pre-emption laws.

These agricultural people are quite as much contractors with the United States as the Mexican grantees were contractors with their government. By the acts of March 3, 1853, and March 1, 1854, congress promised to each settler who was on the land March 1, 1854, or might settle on it within two years thereafter, 160 acres, to include his residence, at one dollar and twenty-five cents an acre. This was a policy to populate the country, which is yet in progress. That these occupants have an equitable interest, and hold the land as purchasers, is the settled doctrine of the department of public lands, which exercises jurisdiction over them. Much of labor and money has been expended on the faith that a preference-right was a safe title, and exempt from floating Mexican concessions, such as that made to Alvarado, and now in litigation here. And this was most natural. Incipient Mexican claims had no standing in an ordinary court of justice, and congress created special courts to try them, <sup>\*573]</sup> and prescribed the laws and rules by which these courts should be governed in their adjudication; and among other rules it was provided, that the decrees of the supreme court of the United States should govern where they applied. They thus had given to them the force of a legislative enactment. These decisions apply as a governing rule most emphatically to the requirement of a specific location of Spanish claims, to which the court had held litigants with a strictness often complained of, but always necessary for the protection of the public and its alienees; and it was the necessary consequence that cultivators of the soil should believe themselves safe from the ruin that lurks in a floating claim, familiar even to western ploughmen, many of whom remember the history of exhausting and fierce litigation in their own families for the paternal hearth, and who relied on the firm and consistent decisions of this court to protect their new homes on the Pacific. Nor do I think that any pre-emption right can be included in a survey of the Alvarado claim, so as to make the preference-right part of the land belonging to the grant, because Col. Fremont's claim has never been located, and our decree cannot disturb innocent owners until it is located. It was so held by this court, in the case of *Menard v. Massey*, 8 How., 309. And unless that case is disregarded,

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one having a preference-right cannot be deprived of his possession by this floating claim.

Mr. Justice CAMPBELL, dissenting.

The concession, upon which the decree in favor of the United States was pronounced, is for ten square leagues, to be located in a district of country which contains above one hundred square leagues. To the concession there is no plan or design to indicate the place of location; nor was there any survey, delivery of judicial possession, occupancy, or improvement, at any time prior to the treaty of Guadalupe Hidalgo. The conditions to the validity of a grant prescribed by the laws of colonization of Mexico, and which were specifically annexed to the grant under consideration, made these necessary.

The case of *Smith v. The United States*, 10 Pet., 326, and many others where the doctrine of that case was applied, is, in my opinion, conclusive of this. The claim arose on a petition of St. Vrain to the governor-general of Louisiana, in November, 1795, praying for a grant, in full property to him and his heirs, of ten thousand superficial arpens, with the special permission to locate in separate pieces, upon different mines, of whatever nature they may be, without obliging him to make a settlement; which grant, as prayed for, was granted by the governor-general, in February, 1796.

\*The court, in that case, collect some of the principles which had been employed by the court in the settlement of claims under the treaties of Florida and Louisiana. "We have held," they say, "that, in ascertaining what titles would have been perfected if no cession had been made to the United States, we must refer to the general course of the law of Spain; to local usage and custom; and not what might have been done by the special favor or arbitrary power of the king or his officers."

"It has also been distinctly decided," they say, "in the Florida cases, that the land claimed must have been severed from the general domain of the king, by some grant which gives it locality by its terms, by reference to some description, or by a vague general grant, with an authority to locate afterwards by survey, making it definite; which grant or authority to locate must have been made before the treaty of cession, (that is, 24th January, 1818.)

The court then coming to the case under consideration, describes it as a "grant to vest in the petitioner a title in full property to all the lands in the province containing minerals, which he might at any time locate, in quantities to suit his

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own pleasure." "Its condition at the cession was precisely as it was at the date of the grant; there was no evidence that the grantee had done or offered to do any act, or made any claim or demand, asserting or affirming any right under the grant." The court say, that, at the date of the surrender of Louisiana, "there was not an arpen on which his right had any local habitation; until a location was made, it was a mere authority to locate, which he might have exercised at his pleasure, both as to time and place, by the agency of a public surveyor authorized to separate lands from the royal domain by a survey pursuant to a grant, warrant, or order of survey.

"At the time of the cession, nothing had been so severed, either by a public or private surveyor, or any act done by which the king could in any way be considered as a trustee for St. Vrain, for any portion of the ten thousand arpens; and there was no spot in the whole ceded territory in which he had, or could claim, an existing right of property. An indispensable prerequisite to such right was some act by which his grant would acquire such locality as to attach to some spot; until this was done, the grant could by no possibility have been perfected into a complete title. It is clear, therefore, that the integrity of the public domain had in no way been affected by this grant, (in March, 1804,) at the treaty of cession."

Here was a grant, "in full property," from the highest political authority having the power to make grants—without condition <sup>\*575]</sup> or limitation as to the manner or time of the survey—pronounced invalid, for the reason that, when the sovereign parted with the territory, it had no definite location nor limit.

The concession now before the court agrees with the one we have considered, as being indefinite, attaching to no particular spot in a large extent of territory. The Mexican governor of California declares it to be the property of the grantee by the letters then issued, not in full property, but as "subject to the approbation of the most excellent departmental assembly, and to conditions underwritten." Among these conditions are those of a survey and delivery of possession by a public officer, and occupancy and improvement in a limited period. For very nearly four years, while the land remained as the property of Mexico, no act was done, nor right asserted to any portion of the ten square leagues, and nothing was performed to distinguish them from any other part of the public domain. The integrity of the public domain in this district had never been disturbed at the treaty of Guadalupe Hidalgo, even by a visit from the grantee.

The case of *Rutherford v. Greene's Heirs*, 2 Wheat., 196,

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does not conflict, in my judgment, with the case I have cited. The question in that case was, whether an act of a state legislature, appropriating a certain number of acres in a particular district of country, "to be allotted" by public officers named in the act, and, after that allotment was perfected, whether it amounted to a legal or equitable title, (for the case was in chancery,) to the particular lot of land, against a claimant under a subsequent entry or purchase from the state. To make that case parallel to this, the claim of the grantee should have rested upon the general grant only, without the completing process of the allotment. The analogy fails, in respect to the present case, at the point where the question of doubt is suggested.

In the case of *Smith*, this court considered the effect of the acts of the grantee, performed after the treaty of cession, towards locating the grant, and whether they had any relation back to the date of the title, so as to unite with it and give definiteness to it. And the court say, that the surveys must be performed by public officers, under a legal authority, as a public trust, and that this was the law of both the United States and of Spain. And that the United States, having acquired the territory by cession, were entitled to hold it discharged of all claims, where the specific lands could not be identified by the description in the grant, or a supplementary survey.

The doctrine of this case has been applied with uniformity by this court, in a long series of cases, some of which with a degree of strictness bordering upon severity. *Lecompte v. \*United States*, 11 How., 119; *United States v. King*, [\*576 3 Id., 773; S. C., 7 Id., 833; *United States v. Wiggins*, 14 Pet., 334; *Bissell v. Penrose*, 8 How., 317.

The non-fulfilment of these conditions, it was competent to Mexico to overlook or to forgive.

It is probable that, in the lax administration of her laws, in the distant province of California, all investigation would have been avoided, if the cession to the United States had not been made. It is equally within the power of congress to remit the consequences attaching to the omissions, and to concede as a grace what, in California, might have been yielded from indolence or indulgence.

But congress has chosen to deal with the subject of titles in California, upon principles of law, embracing in that term the whole body of jurisprudence applicable to the subject; and that the solution of all the questions arising upon them shall be made by courts of justice acting upon their fixed rules of judgment. Among the guides it has directed us to follow are

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the decisions of this court in analogous cases. In my opinion, the cases I have cited control this case, and I do not feel at liberty to depart from what is to me their clear and manifest import.

*Order.*

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, and was argued by counsel. On consideration whereof, it is the opinion of this court that the claim of the petitioner to the land, as described and set forth in the record, is a good and valid claim; 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 that this cause be and the same is hereby remanded to the said district court for further proceedings to be had therein, in conformity to the opinion of this court.

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GRAY P. WEBB AND OTHERS, PLAINTIFFS IN ERROR, *v*  
JOHN DEN, LESSEE OF POLLY WEATHERHEAD.

In 1839, the legislature of Tennessee passed a law containing the following provision, namely: "That whenever a deed has been registered twenty years, or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered, has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment."

\*577] \*A deed to "the legatees and devisees of the late Anthony Bledsoe," which was certified by the register of Maury county, Tennessee, to have been recorded there in January, 1809, was, under the authority of this statute, properly admitted in evidence, although informalities existed with respect to its being proved, and with respect to the acknowledgment of a *feme covert*.

So, also, the deed is effectual, under the circumstances of the case, to transfer a fee-simple estate to the legatees and devisees of Anthony Bledsoe, whose will was in evidence. The deed was a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common. The old common law rule as to the distinction between releases from one joint-tenant to another, and from one tenant in common to another, is not applicable.

A defendant in ejectment cannot object to the production in evidence of one of the muniments of the plaintiff's title, because it was "*res inter alios acta.*"

THIS case was brought up by writ of error, from the circuit court of the United States for the middle district of Tennessee.

The case is stated in the opinion of the court.

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It was argued by *Mr. Gillet*, for the plaintiffs in error; no counsel appearing for the defendant.

Mr. Justice GRIER delivered the opinion of the court.

On the trial of this case, the plaintiff below having shown that the lessor of plaintiff was one of the children of Anthony Bledsoe,—also the will of Anthony Bledsoe, and a grant of five thousand acres of land, by the state of North Carolina, to Nicholas Lang—offered in evidence a copy of a paper writing purporting to be a deed from John J. Lang, Basset Stith, and Mary his wife, and others, devisees of the legal estate, to the “legatees and devisees of the late Anthony Bledsoe,” for the one fourth part of said tract, or, twelve hundred and fifty acres, by certain metes and bounds. This copy is certified by the register of Maury county, Tennessee, as there recorded on the 11th of January, 1809. The defendants objected to the admission of this copy as evidence, “because it was not duly proved, acknowledged, or authenticated, so as to entitle the same to registration, and there was no proof of the acknowledgment or privy examination of Mary Stith, the *feme covert*, and that the registration of said deed being unauthorized, a copy would not be read.” The court overruled the objection, and permitted the deed to be read, and the exception to this ruling is chiefly relied on as a ground for reversing the judgment of the court below.

The acknowledgment certified with this deed, which purports to have been taken in open court, in Halifax county, North Carolina, at November sessions, 1807, is admitted not to have been such as the registration acts then required, nor was it certified under the seal of the court, as required by law. But an act was passed in 1839, by the legislature of Tennessee, the 9th section of which contains the following provision: That whenever \*a deed has been registered “twenty [\*578] years or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered has not been transferred to the register’s books, and no matter what has been the form of the certificate of probate or acknowledgment.”

In the early settlement of most of our states, the form of conveyances of land were very simple; and they were usually drawn either by the parties themselves, or by persons equally ignorant of the proper forms of certificates of acknowledgment required by law.

In some states, the statutes concerning acknowledgments and registry were stringent, while the practice was loose and

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careless. And, in some, the courts by unnecessary strictness in their construction of the statutes, added to the insecurity of titles, in a country where too many have acted on the supposition that every one who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the *bonâ fide* conveyances of an age so careless of form, have compelled legislatures to quiet titles by confirmatory acts, in order to prevent the most gross injustice.

The act in question is one of these; it is a wise and just act; it governs this case, and justifies the court in admitting this deed in evidence. It was registered in 1809, and some of the grantees have been in possession under it ever since. After such a length of time, the law presumes it to have been registered on lawful authority, without regard to the form of certificate of probate or acknowledgment. As a legal presumption it is conclusive that the deed was properly acknowledged, although the contrary may appear on the face of the papers.

It is not a "retrospective law" under the constitution of Tennessee, which the legislature is forbidden to pass. It is prospective; declaring what should thereafter be received in courts as legal evidence of the authenticity of ancient deeds. It makes no exception as to the rights of married women, and the courts can make none. Informalities and errors in the acknowledgments of *feme coverts*, are those which the carelessness and ignorance of conveyancers were most liable to make, and which most required such curative legislation.

The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law.

The objections to the form of this deed, that it has no effective words of grant to convey a fee, nor states a consideration, nor sufficiently describes the grantees, cannot be supported. It is true, it is a very informal conveyance, but it contains

\*579] \*enough within it to show its validity. It appears that Anthony Bledsoe, as locator of the land for Lang, was entitled by their contract to one fourth. The whole legal title was in Lang's devisees, the equitable title to one fourth in Bledsoe's devisees. The deed does not contain the words give, grant, bargain, and sell, &c., but only "a release and quitclaim forever, unto the legatees and devisees of Anthony Bledsoe, deceased." The will of Bledsoe is in evidence. The deed, by this description, necessarily refers to that instrument to ascertain the persons who are such "legatees and devisees," and thus far incorporates it. It contains, therefore, a sufficient description of the grantees.

It has no words of inheritance, because it is a release of the

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bare legal title to equitable owners in fee, on partition between them as tenants in common. This appears on the face of the deed. The consideration of the conveyance is stated to be a release, on behalf of the grantees, "of all claims under a certain contract," &c. By the common law, there is a distinction between a release by one joint-tenant to another, and the same as between tenants in common; the first requires no words of inheritance, but the latter does. But this technical distinction is founded on feudal reasons with respect to livery of seisin, which have no application where the release is to the equitable owner in fee. By the statutes of Tennessee, registering a deed is the only livery of seisin required.

But whether the deed passed the legal estate in fee or not, was a question not arising in the case, as the lessor of plaintiff was one of the devisees of Anthony Bledsoe, and therefore one of the original grantees in the deed, and had a legal as well as equitable estate.

The objection to the record of partition between the heirs or devisees of Nicholas Lang, because it was *res inter alios acta*, ought not to have been made. The authenticity of the record was not disputed, and if it had any legal bearing whatever on the title of the plaintiff, the defendants, who had as yet shown no title, cannot object to the muniments of plaintiff's title, when offered in evidence, whether they be deeds, wills, or partitions, "because they are *res inter alios acta*."

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 middle district of Tennessee, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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\*JANE A. COY, IN HER OWN RIGHT AND AS GUARDIAN OF LUCY, BENJAMIN, MARY, AMELIA, AND MAHITABLE COY, HER MINOR CHILDREN, COMPLAINANTS AND APPELLANTS, v. CHARLES MASON. [\*580]

In 1824, the United States made a treaty with the Sac and Fox Indians, in which there was a reservation of a certain tract of land for the use of the

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half-breeds, who were to hold it by the same title, and in the same manner, that other Indian titles were held.

In 1834, congress relinquished all the right and title of the United States to the above land, and vested the title in the half-breeds, who, at the passage of the act, under the Indian title, had a right to the same.

In 1840, proceedings were commenced in the district court of Lee county, Iowa, for a partition of the tract among the respective owners.

In 1841, the land was divided into one hundred and one shares, there being that number of original half-breeds who were entitled to shares.

The complainants represented that their grantor was entitled to one and two thirds shares; that he resided in Wisconsin, and had no notice of the partition; that his shares were allotted to another person, and that the proceedings ought to be set aside as fraudulent.

The record of the proceedings in partition was, by agreement of parties, made evidence before this court; but, not being produced, it is impossible to decide whether or not the charge of fraud is sustained. Moreover, all the parties interested are not before the court; nor is it made out that the shares claimed were allotted to the alleged persons.<sup>1</sup>

THIS case was brought up, by writ of error, from the district court of the United States for the district of Iowa.

The facts in the case are fully stated in the opinion of the court.

It was argued by *Mr. Platt Smith*, for the appellants, and by *Mr. Chase*, for the appellee.

Mr. Justice MCLEAN delivered the opinion of the court.

This case is brought before us by a writ of error to the district court for the district of Iowa.

In an Indian treaty, made the 4th of August, 1824, between the United States and the Sac and Fox tribes of Indians, for a large cession of territory within the limits of the state of Missouri and elsewhere, there was reserved the small tract of land lying between the rivers Des Moine and the Mississippi, and the section of the line of the treaty between the Mississippi and the Des Moine, which is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held.

On the 30th of June, 1834, congress passed an act relinquishing all the right and title of the United States to the above land, and vested the title in the half-breeds, who, at the passage of the act, under the Indian title, had a right to the same.

\*581] \*In 1840, Josiah Spalding and others commenced proceedings in the district court of Lee county, Iowa, for a partition of the tract among the respective owners, against Euphrasine Antaga and others. Notice was given by

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<sup>1</sup> CITED. *Ribon v. Railroad Co.*, 16 Wall., 451.

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publication in a newspaper, and after some delays, a partition was made by the consent of parties.

The complainants, in their bill, represent that Elizabeth Cardinell, alias Elizabeth Antaga, was a half-breed of the Sac and Fox nation of Indians, and the sister of Euphrasine Antaga, and in her lifetime was entitled to one full original share in the above tract. That in the year 1833, the said Elizabeth Cardinell died, leaving St. Paul, Eustace, Eli, Pierre, and Julien Cardinell, her children and only heirs. That these children were all half-breeds, born before the 4th of August, 1824, and were entitled in their own right, each to a share in the land. That after the 30th of June, 1834, and before the 14th day of April, 1840, all of the said heirs died, except Julien Cardinell, who became the owner of the shares of his mother and brothers.

In 1841, the land was divided into one hundred and one shares, among persons claiming to be the owners. Samuel Marsh, William E. Lee, and Edward C. Delevan were trustees for certain claimants, called the New York Company, and were made defendants to the petition for partition; and they claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Antaga, by the heirs of Eli and Eustace Cardinell. But the trustees filed no title papers or exhibits, showing their right to the one and two thirds shares claimed by them, and to which Julien was entitled.

The complainants further represent, that when the petition for partition was filed, Julien was a resident of Prairie du Chien, in the territory of Wisconsin, a distance of more than two hundred miles from the half-breed tract, and that he had no notice, &c. That the consent to the decree was a fraudulent device by the parties, and is consequently void. That Marsh, Lee, and Delevan had no right to the one and two thirds shares claimed; that they drew the said shares under the agreed plan of division, without right, &c.

The complainants allege that they claim under a deed of conveyance from Julien Cardinell, dated 25th of February, 1848, and by descent, the one and two thirds shares. These shares, it is alleged, were disposed of by Marsh, Lee, and Delevan, to Mason, the defendant, in 1852, who now claims them; that he is now in possession of the land, enjoying the rents and profits, and refuses to account, &c. Other allegations of fraud are made, of which Mason had notice, &c., and the complainants pray that the decree of partition may be set aside and annulled, as fraudulent <sup>\*and</sup> void, and that a re-partition may be had, and that the complainants may be allowed their interest in the land, &c.

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The defendant demurs to the bill, and also answers, not waiving his demurrer, &c.

He admits that Elizabeth Cardinell was a half-breed, but denies that the children, whose names are stated in the petition, were half-breeds of the Sac and Fox nations, their father being a white man. He admits the death of the persons stated by the complainants in their petition, and that Marsh, Lee, and Delevan, as trustees, &c., claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Cardinell, called Antaga, through Eli and Eustace Cardinell, heirs, &c. But he denies that the trustees ever drew or received the said one and two thirds of a share, or any portion thereof, as set forth in the petition, or in any other manner; and he denies the allegations of fraud, &c.

"The parties agreed to the following facts: That Elizabeth Cardinell was a half-breed of the Sac and Fox nations of Indians, and died in 1826, leaving Julien Cardinell, and his four brothers, St. Paul, Eustace, Eli, and Pierre, her children, whose father was a white man. Julien was born in 1821, and his brothers prior to the year 1824. All the children of the said Elizabeth were living on the 30th of June, 1834, and all, except Julien, died unmarried before 1840, leaving no children. In 1848, Julien conveyed to Coy and Brace, by a deed which is to be produced in court. Coy died in 1849, leaving the present plaintiff as his widow, and a family of children. Brace died about the same time, leaving also a widow and children, who reside in Iowa."

"The title of the half-breeds of the Sac and Fox nations of Indians appears by the treaty of August, 1824, and the act of congress of June 30, 1834. It is admitted that there were one hundred and one true original half-breeds who were entitled to shares."

"The record of the partition suit is to be regarded as in evidence, and either party may use any portion of it in the supreme court, whether the same is used in the district court or not; but the following facts are admitted to be true, unless contradicted by the record. The suit for partition was commenced in the spring of 1840. Legal notice thereof was given by publication, and no other service was made on any of the defendants in that suit. The case would have regularly come up for hearing in October, 1840, but was postponed till April following, to give more abundant time for all persons interested to appear and present their claims. Marsh, Lee, and Delevan were defendants in that suit; they claimed upwards of sixty shares, and among \*them were the one and two thirds shares, as set forth in the petition in this suit.

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In the judgment of partition, forty-one shares were allowed them. Elizabeth Cardinell is the same person as Elizabeth Antaga, and is a sister of Euphrasine Antaga."

"The defendant in this suit has become a purchaser of the interests owned by Marsh, Lee, and Delevan, as will be more fully shown by their deed to him. More than \$100,000 of the purchase-money remains unpaid. Marsh, Lee, and Delevan are not residents of the state of Iowa."

"At the time of the partition, Julien Cardinell was absent from the territory of Iowa, residing in Prairie du Chien, more than two hundred miles distant. The country at that time was new. He was ignorant and illiterate. There was no guardian appointed for him, nor any person present in court to represent his rights. There is no exhibit on record tending to show that Marsh, Lee, and Delevan, or either of them, had any right to the shares of the said Julien, or to any interest derived from either of his brothers, or from his mother. The half-breed tract contains about 120,000 acres of land. Keokuk is a large town situated on the tract."

"The claimants in the tract are very numerous, amounting to several hundreds. It would be impracticable to make them all parties. In the partition suit no one but Marsh, Lee, and Delevan laid claim to any share under any of the Cardinells, with the exception of one half of one share, which was drawn by Ebenezer D. Ayres."

"The whole tract was divided, but no part was set off to the said Julien, and no mention is made of his rights in said record. He had no guardian and no notice, except the constructive notice by newspaper publication in Iowa."

The bill prays that the decree of the district court, on the ground of fraud, may be declared void, so far as the rights of the complainants are affected, and that a re-partition of the land may be ordered. But there is no evidence of fraud, unless it be inferred from the facts admitted. The facts in regard to the partition suit are admitted, unless contradicted by the record; but the record of that proceeding is not before us, and without it we are unable to determine the extent of the admissions. If there were evidence of fraud in the partition, we could not take jurisdiction of that proceeding, as the parties interested are not before us; and for the same reason, the district court had no jurisdiction of this part of the case.

The answer denies that the one and two thirds shares claimed were allowed to Marsh, Lee, and Delevan, and there is nothing in the admission of facts which disproves the

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answer in this respect. The defendant admits that the trustees claimed these \*shares, but it is not admitted that [584] they were allowed to them in the partition. The evidence does not identify and establish, as against the defendant, the right claimed by the complainant. The decree of the circuit court, which dismissed the bill, is 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 district of Iowa, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said district court in this cause be and the same is hereby affirmed, with costs.

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MOSES WANZER AND JABEZ HARRISON, APPELLANTS, v.  
BENNETT R. AND J. H. TRULY.

Where a promissory note was given, in Mississippi, for the purchase of slaves, the title of the vendor of which afterwards proved to be defective, but in the mean time a foreign creditor of the vendor had laid an attachment in the hands of the vendee, for the amount of the promissory note, and obtained judgment against him as garnishee, the purchaser of the slaves should be credited upon the judgment against him, with the value of the slaves at the time when they were taken away from him, and the damages, costs, and expenses actually paid upon the decrees of the court of chancery in Mississippi.<sup>1</sup>

THIS was an appeal from the circuit court of the United States for the southern district of Mississippi.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Coxe*, for the appellants, and by *Mr. Brent* and *Mr. May*, for the appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee (B. R. Truly) purchased of J. R. Herbert, in 1836, in Mississippi, five slaves, for whom he gave two notes, one of which for \$3,575, was payable in March, 1838, at a banking-house in Brandon, with ten per cent. interest till paid. Another note for the same sum has been collected.

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<sup>1</sup> CITED. *McLaughlin v. Swann*, 18 How., 222; *McCullough v. Roots*, 19 Id., 354.

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During the year 1837, the appellants recovered a judgment in the circuit court against Herbert, who had absconded in insolvent circumstances. In 1839, a process of garnishment was served upon the appellee before named, who acknowledged the existence of this note, and a judgment was rendered against him. An execution issued, a levy was made, a forthcoming bond was taken, \*and a forfeiture of it returned; [\*\*585 upon this bond, J. H. Truly was a surety. In 1840, an injunction was obtained by the appellees, upon the allegation (*inter alia*) that they had heard that the slaves, which form the consideration of the notes, were the property of certain minor children in Alabama, whose guardian had fraudulently removed and sold them to Herbert. This bill was before this court and was dismissed. 5 How., 141.

While the suit was in this court, the minor children referred to, instituted suits in the court of chancery in Mississippi, (by sequestering the property,) against the appellee or his assigns, and which resulted, during the progress of the present suit, in the recovery of two of the slaves, and nine-tenths interest in a third, with the damages for their loss of service.

The original bill was filed in the present suit, in anticipation of this result, and alleges the death of Herbert and his vendor, (Nicholson,) in Texas, insolvent; and that the appellees were willing to release their claim on the slaves as derived from them, and surrender the defense of the suits to the appellants, and call upon them to take their place. The fact of the recoveries subsequently is brought to the notice of the court through supplemental bills. The circuit court decreed a perpetual injunction in favor of the appellees. The averment of the outstanding paramount title in the wards of Nicholson, and which the appellees had only heard of from common report, which appeared in the former suit, was disposed of by this court as insufficient, for that the appellees then "retained possession of the property without a threat of molestation."

The rule of the courts of Mississippi, as well as of this court, is, that, except in special cases, a vendee in possession cannot, at law or in equity, contest the payment of the purchase-money stipulated in a contract of sale, by an alleged defect of title, but reliance must be placed on the covenants it contains.

*Gilpin v. Smith*, 11 Sm. & M. (Miss.), 109; *Dennis v. Heath*, Id., 206; 2 Wheat, 13; 3 Pet., 310; 3 Port. (Ala.), 127; 19 Johns. (N. Y.), 77.

The disturbance of the possession by the orders and process of the court of chancery, the imminence of the danger from the title propounded in those suits, and the insolvency and death of the warrantors, were facts which authorized the circuit

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court to take equitable cognizance of the present complaint of the appellees, and to administer relief. The rule of the civil law, that the price of the sale of real property cannot be recovered by the vendor if the vendee has been disturbed in his possession by prior incumbrances or paramount titles, or has just grounds for apprehension on that account, (Pothier de Vente, § 280,) is the rule of chancery where there has been <sup>\*586]</sup> fraud, or where the \*covenants of warranty are inadequate to the protection of the vendee by reason of the insolvency of the vendor.

In *Bumpus v. Platner*, 1 John. (N. Y.), Ch., 213, Chancellor Kent said: "I consider an eviction at law an indispensable part of the claim to relief here, on the mere ground of a failure of consideration." And in *Abbott v. Allen*, 2 John. (N. Y.), Ch., 519, he said: "If there be no fraud in the case, the purchaser must resort to his covenants if he apprehends a failure or a defect of title, and wishes relief before eviction."

But in the last case he suggests, "that existing incumbrances which appeared to admit of no dispute," or "where an adverse title is put forward," "or an adverse proceeding threatened," might support an injunction till the title was ascertained at law. And in *Johnson v. Gere*, 2 Johns. (N. Y.), Ch., 547, he administered relief in accordance with these suggestions. A learned successor of this eminent jurist, with these cases before him, determined that when "the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase-money, and may offset the damages occasioned by the breach of the covenants of seisin or warranty, against such unpaid purchase-money. *Woodruff v. Bunce*, 9 Paige (N. Y.), 443.

And this conclusion is supported by well considered adjudications in other courts of the states. 2 Dana (Ky.), 276; 1 Id., 303; 5 Leigh (Va.), 39, 607; 8 Ala., 920; 1 Black (Ind.), 384; *Carver v. Miller*, 10 Ala.

The question arises whether the equity we have considered, of the vendee to protection from the insolvency of the vendor, has been modified or defeated by the pursuit of the attaching creditor in the circuit court. The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. The claim of the attaching creditor against the defendant is only extinguished by a satisfaction of his demand by the garnishee. The garnishee is entitled to make at law legal de-

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fenses, and his equities must be sought in a court of chancery. 17 Ala., 455; 5 Met. (Mass.), 263; 2 Wash., C. C., 488.

The statutes of Mississippi do not assign any extraordinary effect to the judgment condemning the debt in the hands of the garnishee, nor do they enlarge the rights of the attaching creditor beyond those of any other assignee of a *chose in action*. The equity of the vendee to be indemnified from the purchase-money in his hands, for a breach of the covenants of warranty by an insolvent vendor, originates in the contract, and inheres \*to it so long as any part of it is executory. The equity [<sup>\*587</sup> of the attaching creditor does not arise in the contract, and is subsequent to its formation. In claiming the benefit of the fund, he renders no service to the vendee, and releases none of his rights against the vendor. He may fail in realizing hopes or anticipations by the defeat of his suit against the garnishee, but his judgment against his debtor remains in operation. Where a party contracts specifically for property, pays money, acquires a legal title without notice of an equity, a court of chancery will not disturb his legal position. But there is no principle upon which a court of chancery is required to imply that a proceeding by a defendant, through the intervention of his creditor, to subject a legal demand, unconnected with any equity—a demand which equity would not permit him to collect in his own name, in consequence of the failure of consideration, shall divest the garnishee of equitable claims and defenses.

The rule of law is accurately stated by Vice-Chancellor Wiggram, who says: "That a creditor, under his judgment, might take in execution all that belongs to his debtor, and nothing more. He stands in the place of his debtor. He is a purchaser who, by the terms of his conveyance, takes, subject to any liability under which the debtor himself held the property." *Whitworth v. Gaugain*, 3 Hare, 416; s. c. 1 Cr. & Phil., 325; *Langton v. Horton*, 1 Hare, 549; *Hutch. Dig. Miss. Stat.*, 912, § 8.

The most restricted view of the doctrine of these cases is, that the equitable rights of the garnishee remain unaffected by the judgment, or the proceedings under the judgment, till the execution is executed, unless the garnishee is accessory to some act, or guilty of some omission or laches, by which their efficacy is impaired. 1 McN. & G., 437; 8 Ala., 867.

When the execution is executed, the claim of the attaching creditor upon the defendant in the suit (his original debtor) is satisfied. He has purchased thereby the issues of his garnishment process, for an adequate consideration, and could not, consequently, be called to refund at any future time. This

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view of the rights of the vendee is sustained by Chancellor Walworth, in *Sanford v. McLean*, 3 Paige (N. Y.), 117, where the effect of a judgment is stated, and where a purchaser under it is said to be subject to every equitable claim thereon which was prior in point of time to the judgment, of which he had notice at or before the sale of the property. In many of the states the policy has been adopted of placing the claims of judgment creditors upon the same footing as purchasers in reference to unrecorded conveyances, and of assigning to creditors' liens a higher rank than they occupy in the general system of equity jurisprudence; but, in the absence of such a policy, the rules we have quoted must determine their dignity.

\*588] \*The appellees cannot be charged with any laches, or conduct calculated to deceive or mislead the attaching creditor, but the only complaint of them is, that they insisted upon their title to relief prematurely, and with too much pertinacity. Whatever effect may be visited upon such a course of conduct, we know of no rule that would authorize the forfeiture of their claim to relief. We concur, therefore, in the leading principle upon which the cause was determined in the circuit court. But we do not agree with the court in their allowance of a perpetual injunction without requiring an account.

The contract of the appellee was for five slaves, for whom only one half the price has been paid. The whole of them were possessed for many years, when two and nine tenths of another were recovered, with damages for the detention of two.

The damages recovered were compromised, and only a portion of them paid. No notice was given to the appellants of the offers or acceptance of the compromise.

The appellants are complainants in equity, seeking to enforce a covenant of indemnity, and must receive relief upon the principles on which the court habitually extends it; that is, upon the principle of doing equity, upon a principle of compensation for the injury sustained. This is the rule stated in *McGinnis v. Noble*, 7 Watts & S. (Pa.), 454, and applied in a similar case to this, of *Jones v. Lightfoot*, 10 Ala., 17. The appellees, upon their eviction, are entitled to the value of the slaves they have lost at the date of the decrees, and the damages, costs, and expenses, actually paid upon the decrees of the court of chancery in Mississippi.

We direct the reversal of the decree of the circuit court, and remand the cause, with directions that these amounts be ascertained, and the judgment at law in the circuit court against the appellees and their sureties be credited with this sum, as

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of that date, and that the costs of this court be paid by the appellees.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice DANIEL, dissented.

Mr. Justice DANIEL.

I dissent from the decision by the majority of the court in this case, and in expressing my disagreement, I have felt no greater perplexity in reconciling that decision with every principle of justice, than in reconciling it with itself. For, to my apprehension, it clearly appears that if there ever was a decision which could be characterized as *felo de se*, it is precisely the decision made in this case.

This controversy had its commencement by a proceeding \*familiarly known and practised in several of the [ \*589 states, and particularly in the south and southwest, usually denominated a foreign attachment. By this proceeding a person whose debtor may have absconded, or who has no visible property which can be reached directly by legal process, is authorized to attach in the hands of a third person who may be indebted to the debtor of the attaching party, an amount equal to the demand due to the latter. Under such proceeding, the plaintiff in the attachment is placed in the precise position of his debtor, with respect to the defendant, and can either legally or equitably recover of him nothing more than what was due from the defendant to the debtor of the plaintiff. In other words, the plaintiff stands affected and is bound by every legal and equitable right appertaining to the parties of whose transactions and relation to each other he seeks to avail himself. Avoiding a detail of the facts and proceedings had in this cause, further than is necessary to its correct comprehension, those facts and proceedings are prominently and simply these. That in the year 1836, the appellant, Bennett R. Truly, purchased five slaves of one John R. Herbert, and for the purchase-money for those slaves executed two promissory notes of \$3,575 each. That Herbert, shortly after the sale and purchase of these slaves, removed to Texas, where he died insolvent. That Wanzer and Harrison, being creditors by judgment of this insolvent person, Herbert, sued out an attachment against Truly, and obtained a judgment thereon for the sum of \$3,575, the amount of one of the notes given for the purchase of the slaves, the other note for the like amount having been paid.

That suits had been instituted by certain persons whose guardian, during their minority, had run off with those slaves.

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from the state of Alabama, and sold them to Herbert, of whom they were purchased by Truly, who was ignorant, when he purchased, of any defect in the title to them. That in the suits brought for these slaves, a recovery had taken place in behalf of the true owners, and that the slaves had been surrendered by Truly, who had also, by a compromise with the agent of the persons who had obtained a decree for the slaves, delivered to said agent four other slaves, in satisfaction of the hires of those slaves, and of the costs incurred by their true owners prosecuting their title to them.

Upon the foregoing facts this court have by their decision affirmed that Herbert, having had no title to the slaves, could convey none to his vendee, and that the slaves sold by him having constituted the only consideration for the notes given by Truly, by the recovery of those slaves by title paramount that consideration had failed or been taken away, and \*590] therefore there \*remained no foundation for a claim upon Truly, either on behalf of Herbert or of any person occupying his precise position.

Had the decision of this court terminated here, or at a conclusion seemingly inevitable from the principles and terms of that decision, namely: the absolute denial to Herbert, or to Wanzer and Harrison, representing Herbert, of any description of right under the contract with Truly, that decision would have been reconcilable with justice, and consistent with itself. But this court goes on to argue that, from the evidence in the record, it appears that Truly has not responded to any regular and specific rate or demands for the hire of the slaves whilst they were in his possession or under his control, and therefore there should be an account taken in this cause, showing on the one hand the interest upon the claim asserted through Herbert, and on the other the amount of the hires of the slaves, regularly and specifically computed, with the view, (if indeed such view is comprehensible for any conceivable reason,) that, should there turn out to be an excess of hires beyond the interest upon the claim asserted through Herbert, that excess may be applied to the benefit of Wanzer and Harrison.

But the error of this direction by the court is exposed by the following inquiries. Suppose not one cent of the hires of these slaves has been paid, to whom do those hires belong? To whom would Truly be accountable for them? He would be accountable, surely, to those to whom the subjects constituting the source of those hires belonged, and not to the purloiner of their property, nor to persons dedueing title from such wrong-doers. Nay, the payment to the latter of any por-

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tion of those hires would not exempt the payer from reclamation from the true owners.

Then let it be supposed that Truly may have compromised with the true owners the claim for hires, either by the payment of an amount less than their actual or estimated aggregate, or by the transfer of property in kind, (slaves, for instance, as it appears were delivered to the true owners,) will this court undertake to deny to those parties the right to compromise their own interests? It may have been that the delivery of the four slaves, in satisfaction for the hires, was more satisfactory and more advantageous to the persons accepting them, than any other arrangement which could have been made. But should these rightful claimants have been willing to surrender any portion of their interests, or from motives wise or unwise, should have relinquished the whole of them, could such a proceeding have given validity to the fraudulent pretensions of Herbert, or of those who seek to profit by his dishonesty? The decision of this court having declared the contract with Herbert void for an entire want or failure of consideration, unless the maxim *ex \*nihil nihil fit* shall be reversed, and this court shall affirm [<sup>\*591</sup>] that something can arise from nothing, it passes my powers to perceive how any right, legal or equitable, can spring from this contract, with Herbert, thus declared to be void, and that alleged right, too, existing in one who, in legal intendment, is Herbert himself. If the contract with Herbert is valid, then the judgment upon the attachment should be enforced to its full extent; if it was invalid, then in the same extent it should be repudiated; but this court, while it condemns the contract itself, attempts to deduce from it and to enforce consequences which necessarily imply its validity, and which can result only from regarding it as valid. In this aspect of the decision, I cannot but regard it as injurious to the appellees, as irreconcilable with sound principles of logic or of law, as irreconcilable with itself. I forbear here any remark as to the periods at which the grounds of defense in the court below came into existence, or were tangible and practicable, or as to the manner in which they were relied on, in opposition to the demand against the appellee. These are matters entirely distinct from the essential merits of those grounds of defense, and any examination of them seems unnecessary, or rather to be excluded, by the decision here, upon the character of the defense itself.

*Order.*

This cause came on to be heard on the transcript of the

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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, 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 shall appertain.

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ELI AYRES AND THOMAS N. NILES, COMPLAINANTS ON CROSS-BILL, APPELLANTS, *v.* HIRAM CARVER, JOSEPH W. MATTHEWS, JAMES BROWN, JACOB THOMPSON, JOHN P. JONES, WILLIAM H. DUKE, AND JOHN D. BRADFORD.

Where a complainant filed a bill in chancery against numerous defendants, seven of whom were selected by the court to represent the rest; and after these seven had answered the bill, two of them filed a cross-bill against the original complainant, and also against all their co-defendants, an appeal from a decree dismissing this cross-bill, will not lie to this court. It must be dismissed for want of jurisdiction.

\*592] \*The two defendants who filed the cross-bill against the original complainant, and also against their co-defendants, claim the land in dispute by a paramount title. The complainant has nothing to do with a dispute between the defendants, nor can this properly be considered a cross-bill.<sup>1</sup>

A decree dismissing this bill cannot be considered as a final decree in the suit. It will come up for review, like any other interlocutory proceeding, if upon a final decision the case should be brought up, by appeal, to this court.<sup>2</sup>

THIS was an appeal from the district court of the United States for the northern district of Mississippi.

The facts are stated in the opinion of the court.

It was argued by *Mr. Adams* for the appellants, and by *Mr. Cushing*, for the appellees.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the district court of the United States for the northern district of Mississippi.

A bill was filed by Hiram Carver, of the state of Alabama, against Joseph W. Matthews, of Mississippi, and some two

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<sup>1</sup> CITED. *Rubber Co. v. Goodyear*, 9 Wall., 809; *Ayers v. Chicago*, 11 Co., 5 Otto, 225. <sup>2</sup> FOLLOWED. *Ex parte Railroad Otto*, 187.

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hundred others, part of them residents of this state, part of Tennessee, but most of them without any residence mentioned, setting forth the treaty made with the Chickasaw tribe of Indians, at Pontotoc Creek, in 1832, confirmed in 1833, by which said tribe ceded to the government all their lands east of the Mississippi River; and also a treaty with the same tribe, 24th May, 1834, confirmed 1st July, the same year, modifying the provisions of the first one; which treaties provided for certain reservations of land to be granted in fee to the heads of Indian families; and for the survey and sale of the residue, as in the case of other public lands, with this difference: that the lands remaining undisposed of at public sale, should be liable to private entry, at one dollar and twenty-five cents per acre for the first year thereafter; at one dollar the second; at fifty cents the third; at twenty-five cents the fourth, and thereafter at twelve and a half cents per acre.

The bill further states, that down to January, 1843, there remained subject to private entry, at twelve and a half cents per acre, several tracts of land particularly set forth in a schedule annexed; and that on that day the complainant offered to purchase, at the land-office, all the lands described in the aforesaid schedule, at the price of twelve and a half cents per acre; and, for this purpose, made an application to A. J. Edmondson, the register of said land-office, but that the said register illegally refused to permit him to make the said purchase; that he also tendered to J. F. Wray, the receiver, the amount of the purchase-money for the tracts he had thus applied to enter, but that he refused to receive the money or issue the proper certificates.

\*The complainant further states, that since his application, as above set forth, the register and receiver have [\*593] permitted the defendants to enter and purchase the several tracts, in sections and subdivisions, and at the times mentioned in the schedule above referred to; and charging that the said defendants had notice of the rights and equities of the complainant at the time.

The complainant then prays to make all the defendants, before enumerated, parties to the bill, and as they are very numerous, that the court will designate a small portion of them to represent the whole body, and upon whom personal service of the subpoena shall be made. And further, that the several entries and purchases made by the defendants be set aside; and that the complainant be permitted to enter and purchase the several tracts at the price of twelve and a half cents per acre, or that the defendants be decreed to convey the same to the complainant, and to deliver up the possession.

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It appears from the record, the court, on the application of the complainant, ordered that the cause should proceed against seven of the defendants, James Brown, Jacob Thompson, John P. Jones, William H. Duke, John D. Bradford, Thomas N. Niles, and Eli Ayres, and upon whom process was afterwards served, and who appeared in said cause.

Separate answers were put in by these defendants, setting forth the entry and purchase at private sale from the register and receiver of the several portions of the tract claimed by each of them, and also patents for the same from the government. To which answers replications were filed.

It further appears from the record, that at this stage of the proceedings, Thomas N. Niles and Eli Ayres, two of the defendants, filed a cross-bill against the complainant, Carver, and all of their numerous co-defendants, setting forth the substance of the original bill, and then charging that they had obtained a title to the several tracts in controversy, or to portions of them, long prior to the title claimed by their co-defendants, setting forth also particularly the source of title. They pray that this cross-bill may be heard at the same time with the original bill of Carver, and that any claim he may set up to the several tracts of land claimed by them in the cross-bill, may be set aside and annulled; also, that the other defendants to the cross-bill be required to produce their patents to any and all of the lands claimed by them, that they may be cancelled, and that possession be delivered to the complainants.

It further appears from the record, that afterwards the complainants moved the court that the five co-defendants, who had appeared in the original bill, and the complainant in that bill, be made defendants to represent the other defendants mentioned, \*as they are so numerous as to render it inconvenient to make all of them parties to the suit; which motion was granted.

These defendants were afterwards personally served with process, or appeared in the cause, and demurred to the cross-bill; which demurrer was sustained by the court, and the bill dismissed. The case is now before us on an appeal from this decree.

It will have been seen from the brief reference to the original bill in this case, that Carver, the complainant, sought to establish an equitable title to large tracts of the public lands, which had been laid off in townships, ranges, and sections, situate in the state of Mississippi; having offered to comply, as he alleges, with the law providing for the entry and purchase at private sale, of the several tracts, but was prevented

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from making the entries and from obtaining the necessary certificates, by the illegal and unwarranted acts of the register and receiver at the land-office. The bill is filed against the defendants, who had subsequently entered and paid for the land, obtained the necessary certificates, and upon which patents have since been issued.

The defendants are alleged to be very numerous, and for this reason the court below dispensed with the necessity of making all of them parties; and directed that their interests should be represented by some seven of them, on whom process was directed to be served.

Without intending to express any definitive opinion in this matter, we must say that it is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served, and who have appeared to defend the suit. Their title to the land claimed by the complainant is separate and independent, without any thing in common, it would seem, that could have the effect to make a decree against one binding upon the others, or even require them to join in the defense. *Smith et al. v. Swormstedt et al.*, 16 How., 288. We do not intend, however, to pursue this branch of the case.

As it respects the cross-bill, it may be proper to observe that the matters sought to be brought into the controversy between the complainants in that, and their co-defendants, do not seem to have any connection with the matters in controversy with the complainant in the original bill. Nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross-bill set up a title to the lands in dispute, which, they insist, is paramount to that of their co-defendants, and seek to obtain a decree to that effect, and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainant \* in the original bill should not be embarrassed, or the record incumbered. The same matter has been set up in their answer to the original bill, against the equitable title claimed by the complainant, presenting the only issue in which he is interested, and upon which the questions between them can be heard and determined. [\*595]

A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain

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full and complete relief to all parties, as to the matters charged in the original bill.

It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it.<sup>1</sup>

It is said by Lord Hardwicke, that both the original and cross-bill constitute but one suit, so intimately are they connected together. *Field v. Schieffelin*, 7 J. Ch. R., 252.

The office of a cross-bill has been very fully discussed at this term, by Mr. Justice Curtis, in the case of *Victoire Shields et al. v. Barrow*; and I need not, therefore, pursue it, but refer only to that opinion for the true doctrine on the subject.

It is manifest, from this brief reference to the doctrine, that any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and, therefore, not the subject of an appeal to this court, under the 22d section of the judiciary act. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the cause.

For these reasons, the appeal in this case must be dismissed, for want of jurisdiction, and the case remanded to the court below.

Mr. Justice CATRON concurred in the judgment, but dissented from the reasoning.

Mr. Justice CATRON.

In this instance, the bill and cross-bill are but one suit, and \*596] <sup>\*ought regularly to have been heard at the same time;</sup> and if an appeal was prosecuted from the decree to this court, by any party who supposed himself to be aggrieved, the whole suit would necessarily be brought up.

Here the cross-bill was heard and dismissed, pending the original suit of which it was part. The decree pronounced was partial; and as no appeal lies from any but a final decree,

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<sup>1</sup> CITED. *The Dove*, 1 Otto, 385.

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and this decree not being final, the consequence is, that this court has no jurisdiction to examine the merits presented and insisted on in the argument. All that we can properly do is to dismiss the appeal, because it brought up nothing. Now, as to the matters discussed in the opinion just delivered, founded on a copy of the proceedings had below, and filed in this court, I can only say that I have no opinion in regard to them, never having even read the record further than to ascertain that this court had no jurisdiction in the supposed case presented to us. I therefore concur in the judgment that the case shall be dismissed, for want of jurisdiction, without going further.

## Order.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

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JOHN C. HAYS, PLAINTIFF IN ERROR, *v.* THE PACIFIC MAIL STEAMSHIP COMPANY.

The acts of congress require that every vessel shall be registered by the collector of the district in which is the port nearest to the place where her owner or owners reside. The name of this port must be painted on her stern, in large letters; and every bill of sale of her must be recorded in the office where she is registered.

Where a company, incorporated by New York, (all the stockholders being residents of that state.) owned vessels which were employed in the transportation of passengers, &c., between New York and San Francisco, in California, and between San Francisco and different ports in the territory of Oregon; all of which vessels were ocean steam-ships, and duly registered in New York; that they remained in California no longer than was necessary to land their passengers and freight, and prepare for the next voyage; these vessels are not liable to assessment and taxation under the laws of California and authorities of San Francisco.<sup>1</sup>

They were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.<sup>2</sup>

<sup>1</sup>CITED. *St. Louis v. Ferry Co.*, 11 Wall., 432.

<sup>2</sup>FOLLOWED. *Morgan v. Parham*, 16 Wall., 477, 479; *Transportation Co. v. Wheeling*, 9 Otto, 282.

CITED. *State Tonnage Tax Cases*, 12 Wall., 213; *Gunther v. Mayor, &c. of Baltimore*, 55 Md., 460; *Commonwealth v. Gloucester Co.*, 98 Pa. St., 124.

## Hays v. The Pacific Mail Steamship Co.

THIS case was brought up, by writ of error, from the district court of the United States for the northern district of California.  
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The case is stated in the opinion of the court.

It was argued by *Mr. Brent* and *Mr. May* for the plaintiff in error, and by *Mr. Davidge* and *Mr. Vinton* for the defendants.

*Mr. Justice NELSON* delivered the opinion of the court.

This is a writ of error to the district court for the northern district of California.

The suit was brought in the district court, by the company, to recover back a sum of money which they were compelled to pay to the defendant, as taxes assessed in the state of California, upon twelve steam-ships belonging to them, which were temporarily within the jurisdiction of the state.

The complaint sets forth, that the plaintiffs are an incorporated company by the laws of New York; that all the stock-holders are residents and citizens of that state; that the principal office for transacting the business of the company is located in the city of New York, but, for the better transaction of their business, they have agencies in the city of Panama, New Grenada, and in the city of San Francisco, California; that they have also, a naval dock and ship-yard at the port of Benicia, of that State, for furnishing and repairing their steamers; that, on the arrival at the port of San Francisco, they remain no longer than is necessary to land their passengers, mails, and freight, usually done in a day; they then proceed to Benicia, and remain for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business in which they are engaged is in the transportation of passengers, merchandise, treasure, and the United States mails, between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the territory of Oregon; that the company are sole owners of the several vessels, and no portion of the interest is owned by citizens of the state of California; that the vessels are all ocean steam-ships, employed exclusively in navigating the waters of the ocean; that all of them are duly registered at the custom-house in New York, where the owners reside; that taxes have been assessed upon all the capital of the plaintiffs represented by the steamers in the state of New York, under the laws of that state, ever since they have been employed in the navigation, down to the present time; that the said steam-ships have been assessed in the state of California and county of San Francisco, for the year begin-

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ning 1st July, 1851, and ending 30th June, 1852, claiming the \*assessment as annually due, under an act of the legislature of the state; that the taxes assessed amount to [\*598] \$11,962.50, and were paid under protest, after one of the vessels was advertised for sale by the defendant, in order to prevent a sale of it.

To this complaint the defendant demurred, and the court below gave judgment for the plaintiffs.

By the 3d section of the act of congress of 31st December, 1792, it is provided that every ship or vessel, except as thereafter provided, shall be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry, and which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, nearest to the place where the husband, or acting and managing owner usually resides; and the name of the ship, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner mentioned, the owner or owners shall forfeit fifty dollars.

And by the act of 29th July, 1850, (9 Stat. at L., 440,) it is provided that no bill of sale, mortgage, or conveyance of any vessel shall be valid against any person other than the grantor, &c., and persons having actual notice, unless such bill of sale, mortgage, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled.

These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to state, county, and other local taxes.

These ships are engaged in the transportation of passengers, merchandise, &c., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these

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great interests demand, and which hold out to the owners sufficient \*inducements by the profits realized or expected \*599] to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states.

Now, it is quite apparent that if the state of California possessed the authority to impose the tax in question, any other state in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, &c., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the state.

Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port. Our merchant vessels are not unfrequently absent for years, in the foreign carrying trade, seeking cargo, carrying and unlading it from port to port, during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern.

The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another state, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet, 324; 4 Wheat, 438.

We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they

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were there but temporarily, engaged in lawful trade and commerce \*with their *situs* at the home port, where the [\*600 vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

An objection is taken to the recovery against the collector, on the ground, mainly, that the assessment under the law of California, by the assessors, was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law.

We do not think so. The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the ships.

Our conclusion is, that the judgment of the court below is right, and should be affirmed.

Mr. Justice DANIEL dissented, and Mr. Justice CAMPBELL concurred in the judgment of the court, upon the ground stated in his opinion.

Mr. Justice DANIEL.

I dissent from the decision of the court in this case, it being my opinion that neither the circuit court nor this court could take jurisdiction over the parties to this suit; and that, therefore, this cause should be remanded to the district court, with directions to dismiss it for want of jurisdiction.

Mr. Justice CAMPBELL.

I concur in the judgment. But I concur only in consequence of the facts stated in the declaration, and which are admitted by the demurrer. The material fact is, that the vessels were *in transitu*, having no *situs* in California, nor permanent connections with its internal commerce.

*Order.*

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs, and interest until paid, at the same rate per annum that similar judgments bear in the courts of the state of California.

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Christy *v.* Alford.

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\*WILLIAM CHRISTY, PLAINTIFF IN ERROR, *v.* LODOVICK P. ALFORD, ADMINISTRATOR OF HENRY D. BULLARD, DECEASED.

The fifteenth section of the statute of limitations of Texas is as follows:—  
“Every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards. The proper construction of this section is, that a possession may be in two or more holding in privity, one under another; and if the possession of both so holding will make out the term prescribed, and he who is sued has title or color of title, then the bar will be effectual. Therefore, where two persons, claiming under the same head-right certificate, had possession of the land claimed for three years, it was sufficient. The decisions of the supreme court of Texas upon this subject examined.

THIS case was brought up, by writ of error, from the district court of the United States for the district of Texas.

The case is stated in the opinion of the court.

It was submitted upon printed arguments, by *Mr. Crittenden*, *Mr. Hughes*, and *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Hill* and *Mr. Henderson*, for the defendant.

*Mr. Justice CURTIS* delivered the opinion of the court.

This case comes before us by writ of error to the district court for the district of Texas. It was an action of trespass, to try the title to a tract of land. On the trial, the defendant relied on the 15th section of the statute of limitations, passed in 1841, by the congress of the then Republic of Texas, which is in the following words: “Every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards, saving,” &c.

In reference to this defense the district judge instructed the jury, that a possession under the said 15th section might be in two or more, holding in privity, one under another; and if the possession of both so holding will make out the term prescribed by said section, and he sued his title or color of title, then the bar will be effectual.

The plaintiff excepted to this instruction, and the jury found a verdict for the defendant.

Several objections to this instruction have been relied on in this court. The first is, that a holding by two persons, for the space of three years, one claiming and holding in privity with the other, does not satisfy the statute; that the person who is

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sued must himself have held for the space of three years. The argument is, that the period of three years begins to run when \*“cause of action shall have accrued;” that the statute does not say when a cause of action, or the first cause of action accrued, but, when cause of action accrued; that cause of action accrues against each tenant, in succession, when he enters, whether he come into the land in privity with the preceding occupant or not; for each is a trespasser by an unlawful entry; that the statute refers, not to the cause of action which first accrues to the plaintiff by reason of an unlawful entry, but to the cause of action which accrues to him by reason of the entry of the particular person sued. It is conceded that this construction of the statute is not in conformity with that put upon the 21 Jac. I., ch. 16, and its re-enactments in this country; but it is insisted that the particular terms of the statute in question call for a different interpretation, because the bar therein provided for is confined to certain cases therein enumerated, and is not applicable to all cases of adverse holding for the space of three years.

It must be admitted that the bar afforded by the 15th section of the statute is confined to the particular cases therein described; but the question is, whether that description excludes cases where there has been an adverse holding for three years, by different persons holding in privity with each other; and we are of opinion that such cases are included in the 15th section. We think both the language of the law and its subject-matter, as well as the analogous cases respecting the interpretation of similar statutes, call for this construction. The plaintiff would read the law as if it had said, “within three years next after cause of action shall have accrued,” against the person sued. But these words are not in the law, nor would the court be justified in interpolating them. It is true, the only cases enumerated in the law are suits against persons in possession under title or color of title. But the definitions of the terms, title and color of title, which immediately follow, are: “By the term title, as used in this section, is meant a regular chain of transfer from and under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular, as if one or more of the memorials, or muniments, be not registered or not duly registered,” &c. It is quite plain, therefore, that when this section speaks of a suit against one in possession under title or color of title, it is not confined to cases in which the defendant was the first to enter under that title. If he be in a regular chain of transfer from and under the sovereignty of the soil, or in a

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consecutive chain of such transfer, though informal in its instruments, he is a defendant within the descriptive words of this section; and it is wholly immaterial \*whether he [603] was the first taker from the sovereign of the soil or not.

The words, "as against him, her, or them in possession, under title or color of title," restrict the benefit of this bar to those persons who hold under such a title; the words, "shall be instituted within three years next after cause of action shall have accrued, and not afterwards," prescribe the length of time during which cause of action must have existed, by reason of an adverse holding under such a title. And as, by the very terms of the act, the person setting up this bar must be in a chain of transfer from the sovereignty of the soil down to himself, it necessarily follows that the defendant setting up the bar must be in privity with his predecessors in the title, and that he cannot rely on the title or possession of any one under whom he does not claim. There is nothing in the act to restrict the party sued from relying on the possession of any predecessor in that title under the sovereignty of the soil, which has come to himself, and the purpose of the act requires that he should be allowed to do so. That purpose was to give repose to such titles by three years' adverse possession. But if the construction contended for by the plaintiff in error were adopted, three years' possession under that title, by one person, would not quiet that title. If a descent were cast, or an alienation took place, after three years had elapsed, a right of action would accrue against the heir or purchaser who should enter, and that action would not be barred because the defendant had not himself held possession for three years.

This would be an extraordinary anomaly. At the common law a descent cast tolled the right of entry, because the heir came in by operation of law; and a discontinuance was worked by the alienation of a tenant in tail, so that the alienee could not be entered on by the heir in tail. These rules of the common law were changed, in part, by the 32 Hen. VIII., ch. 33, and have been wholly abrogated in most of the United States; but that the title of the heir or alienee should be worse than that of the ancestor or grantor, and that an action, wholly barred against the latter, should be revived and be in force upon an entry by the former, under a title already protected by the act, would indeed be strange. We see nothing in the language or objects of the law, and certainly there is nothing in the decisions under analogous laws, calling for this interpretation.

Though we do not know that the supreme court of Texas

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has had occasion to decide the precise question here presented, that learned court has repeatedly expressed views of this section of the act of 1841, in accordance with those we have above given. In *Wheeler v. Moody*, 9 Tex., 377, that court, in considering a defense set up under the 15th section of this act, say: "The possession need not be continued by the same person; but, when held by different persons, it must be shown that a privity existed between them." So, in *Horton v. Crawford*, 10 Tex., 390, speaking of the time when the cause of action accrues, within the meaning of this section, they say: "When does the cause of action accrue? Unquestionably, at the instant of possession taken under the circumstances specified in the statute; namely, under title or color of title, according to the definition of those terms given in the law itself." See, also, *Portis et ux. v. Hill's Administrator*, 3 Tex., 273.

We understand, therefore, that our views of this statute are in accordance with those of the supreme court of Texas, so far as that learned court has had occasion to express any opinion on the subject; and we hold, in the terms laid down by them in the case of *Wheeler v. Moody*, that, under the 15th section of the act of 1841, the possession need not be continued by the same person, and that, consequently, the instruction of the district court, in this particular, was correct.

But it is further objected, that the instruction given did not require that the first holder should have been in under title or color of title, but only that the person sued should have title or color of title; and that this instruction would allow the benefit of this bar to one having title, and a possession of less than three years, if he claimed in privity with another who had previously possessed without title. But the instruction must be taken with reference to the admitted facts upon which it was given. Those facts were: "It was proved by the admissions of the parties by their attorneys, that L. P. Alford and the defendant, by a union of the several possessions, had, next before the commencement of the plaintiff's action, peaceable, adverse, and uninterrupted possession, for more than three years, claiming under color of title, of six hundred and forty acres of land, by virtue of said Alford's head-right certificate, duly recommended, duly surveyed, and returned to the general land-office, and within the boundary of both of the one-league surveys of plaintiff, described and mentioned in the second and third count of his petition."

There was no room to argue, nor could the jury find that any part of the three years' possession was held without color

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of title, for the contrary is expressly admitted. In reference to the particular facts of this case, the instruction was not erroneous in the particular complained of.

It is also urged that, in addition to what was said by the court, the jury should have been told that the defendant, having no title or color of title such as that prescribed by the statute, \*605] \*could not have the benefit of the bar, by virtue of the title or color of title of Alford, under whom he claimed; for the reason that, claiming a bar under the statute, he had to show the circumstances prescribed by it; and the title prescribed having to be a transfer down to him in possession, the requirement was not complied with by showing a title in him under whom he claimed; and the consequence is, that the defendant, instead of proving himself within the rule required, shows himself out of it, and not entitled to the bar.

But, upon the facts agreed, this position is not tenable. It was agreed that the defendant's possession was under color of title, by virtue of Alford's head-right certificate; and the instruction given by the court required the jury to find that the defendant claimed in privity with Alford; and this privity is also admitted, for he could be in under color of Alford's head-right only by force of a consecutive chain of transfer through Alford from the sovereignty of the soil.

He was, therefore, not setting up color of title in another, but in himself. It is true, the record does not show how this privity was created, nor that the defendant was in a consecutive chain of transfer. But the necessity for this proof was done away by the admission of the plaintiff, that the defendant was in possession under color of title; for, as has just been observed, this was equivalent to an admission that he was in under such a chain of transfer from the sovereignty of the soil.

It has also been urged, that the 14th section of this statute allows an entry within ten years next after the right accrues. We are spared the necessity of discussing this question at large, because it has been distinctly decided by the supreme court of Texas, in *Horton v. Crawford*, 10 Texas R., 382; and we concur entirely in the correctness of the reasoning by which it is there shown that the 14th section of the act has no effect upon the bar created by the 15th section.

The other matters assigned for error related exclusively to the plaintiff's title. But as the bar under the 15th section of the statute of limitations was complete and effectual upon the conceded facts, there can be no error in the judgment in favor of the defendant, even if the court ruled erroneously in

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respect to the title of the plaintiff; and we have not considered these alleged errors, and give no opinion thereon.

The judgment 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 and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

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ALEXANDER DENNISTOUN, JOHN DENNISTOUN, WILLIAM CRAIG MYLNE, AND WILLIAM WOOD, PARTNERS, UNDER THE STYLE OF A. DENNISTOUN AND COMPANY, PLAINTIFFS IN ERROR, *v.* ROGER STEWART.

Where the protest of a bill of exchange contained an exact copy of the bill, but the acceptance was made by "Chas. Byrne," instead of "And. E. Byrne," as it was in the original bill, this variance or error in the name of the acceptor's agent ought not to have excluded the protest from being read in evidence to the jury.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of the notice is to inform the party that payment has been refused; and hence such a description of the note as will give sufficient information to identify it, is all that is necessary. In this case, the protest had an accurate copy of every material fact which could identify the bill: the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; every thing but the abbreviations and flourishes in the Christian name of the acceptor's agent. This mistake could not mislead any person as to the identity of the instrument described.<sup>1</sup>

THIS case was brought up, by writ of error, from the circuit court of the United States for the southern district of Alabama.

The case is stated in the opinion of the court.

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

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs declared against the defendant, as drawer of

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<sup>1</sup> Further decision, 18 How., 565. CITED. 1 Russ. & G. (Nov. Sc.), 92.

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a bill of exchange, by the name and style of James Reid and Co., of which the following is a copy:—

“No. —. £4,417 14s. 11d. st'g.      *Mobile, Sept. 9, 1850.*

“Sixty days after sight of this first of exchange, (second and third unpaid,) pay to the order of ourselves, in London, forty-four hundred and seventeen pounds, 14s. 11d. st'g, value <sup>\*607]</sup> received, \*and charge the same to account of 1058 bales cotton per ‘Windsor Castle.’

“Your obedient servants,

“Pr. pro. JAMES REID AND CO.,

“WM. MOULT, JR.

“To Hy. GORE BOOTH, Esq., Liverpool.

“Acceptance across the face of the bill.

“Seventh October, 1850. Accepted for two thousand five hundred and seventy-one pounds eighteen shillings and seven pence, being balance unaccepted for acpt. 1058 bf. cotton, pr. Windsor Castle, payable at Glyn and Co.

“Pr. pro. HENRY GORE BOOTH,

“AND. E. BYRNE.

“Due 9 Decem.

“Indorsed:

“Pay Messrs. A. Dennistoun and Co., or order,

“Pr. pro. JAMES REID AND CO.,

“WM. MOULT, JR.”

After reading this bill, with its indorsements, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for “And. E. Byrne” was written “Chas. Byrne.”

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form “a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested.”

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. 1 Pardess. 444; Chitty on Bills, 458.

However stringent the law concerning mercantile paper, with

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regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

\*The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, &c., to identify it.

In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor," or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in *Mills v. The Bank of the United States*, with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us, the protest had an accurate copy of

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every material fact which could identify the bill—the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorser; in fine, every thing necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

\*609] \*We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the circuit court is reversed and *venire de novo* 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 southern district of Alabama, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby 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*.

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JACK T. GRIFFIN AND WIFE, PLAINTIFFS IN ERROR, v.  
JAMES Y. REYNOLDS.

Where a suit was brought for damages sustained by the breach of a covenant of warranty of title to land in Alabama, and the plaintiff, in order to establish the existence of an outstanding paramount title at the date of the conveyance, offered the record of a suit in ejectment against his grantor, in which suit the plaintiff himself had been a witness, this record should have been allowed to be given in evidence, without any reservation.

The ruling of the court was, therefore, erroneous, admitting the record, but referring it to the jury to determine whether the testimony given by the plaintiff was material, and if so, to disregard the evidence.

In order to show an outstanding title, a copy from the records of the probate

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court in Alabama, of a deed of trust from the original owner of the land, was offered in evidence, but no evidence was offered to account for the original. This copy should not have been admitted.

The deed containing the warranty upon which the suit was brought, was properly admitted in evidence, being an original deed, duly acknowledged and recorded.

An instruction to the jury was erroneous, namely, that if the plaintiff had not lost all the land conveyed to him by the defendant, then the jury might allow him the average value of the part lost, in proportion to the price paid for the whole. The true measure of damage was the loss actually sustained by the eviction from the land for which the title has failed.

Although the deed of warranty was properly made by the grantor and wife, in order to bar her dower, yet an action upon the covenant of warranty cannot be brought against her. She can make no such covenants.

THIS case was brought up by writ of error from the district court of the United States for the Northern district of Mississippi. [\*610]

The case is stated in the opinion of the court.

It was argued by *Mr. Reverdy Johnson, Jr.*, and *Mr. Reverdy Johnson*, with whom was *Mr. Adams*, for the plaintiffs in error, and by *Mr. Lawrence*, for the defendant in error.

**Mr. Justice CAMPBELL** delivered the opinion of the court.

The defendant recovered a judgment in the district court, for damages sustained by the breach of a covenant of warranty of title to land in Alabama, contained in a conveyance of the plaintiffs to him.

To establish the existence of an outstanding paramount title at the date of the conveyance, the defendant relied upon a judgment and execution in a suit in ejectment, commenced in Alabama, for the land, a few days after the date of the deed, to which the plaintiff (Griffin) was a defendant, and which resulted in a judgment against him, that was followed by a writ of possession, which is returned "executed." It appears, from the evidence, that the defendant was called by the plaintiff in the ejectment suit as a witness, though it is not clear to what fact in issue. Objection was made that the record of the suit could not be used under these circumstances. The district court admitted the record, but referred it to the jury to determine whether his testimony was material, and, if so, to disregard the evidence.

This ruling is assigned as error. There are authorities to the point that a record of a verdict and judgment cannot be used in favor of one who has contributed, by his evidence, to their recovery, (18 Johns. (N. Y.) 351; 4 Day (Conn.), 431; 2 Hill & Cow. (N. Y.), notes 5;) and one of the reasons assigned for confining the use of judgments to the parties and privies to them is, that a stranger may have produced them by his

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testimony. But the court is of opinion that this exception to the general rule, defining the parties by whom the evidence may be used, would introduce an inconvenient collateral inquiry, and that no practical evil will result from maintaining the general rule unimpaired; and that it is important that the rules of evidence should be broad and well defined.

The record in the present suit should have been admitted, without any reservation. *Blakemore v. Glamorganshire Canal Co.*, 2 C. Moo. R., 133.

There was some doubt upon the trial whether the issue of the defendant could be sustained by this evidence, and therefore he attempted to prove the existence of a paramount title

\*611] \*in the lessors of the plaintiff in the ejectment suit. For this purpose he proved that the land had belonged to one Oliver, who, in 1838, conveyed it to trustees, to secure certain liabilities described in the deed, and that under this deed the property had been recovered; that the plaintiff's title came from Oliver, by sheriff's deeds, dated in 1841, and was inferior to that of the trustees. To prove the deed of trust, he introduced a copy from the records of the probate court in Alabama, where it had been recorded, but gave no evidence to account for the original.

At the date of the copy there was no law in Alabama which authorized the use of copies in place of and without accounting for the original; and in relation to deeds of trust, the registry acts of that state merely required their registration for the purpose of giving notice, but did not assign any value to the record as evidence in courts, nor has any statute of Mississippi enlarged the operation of the statute of Alabama in that state. *Bradford v. Dawson*, 2 Ala., 203; 5 Id., 297; 13 Id., 370. We think that this copy should not have been admitted.

The deed from the plaintiff to the defendant, in which the warranty is contained, is an original and absolute deed, duly acknowledged and recorded; and the act which authorizes the acknowledgment also provides that it shall be admitted as evidence in courts without further proof. Clay's Dig., 161, § 1; *Robertson v. Kennedy*, 1 Stew. (Ala.), 245.

We think that, under the decisions of this court, this deed was properly admitted. *Owings v. Hull*, 9 Pet., 607.

The court was requested by the plaintiffs "to instruct the jury that this is an action for damages, and that the plaintiff can only recover the value of the part lost, if a part only was lost at the time of the eviction, in proportion to the amount he paid," which charge was refused; and the jury was instructed "that if the plaintiff had not lost all the

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land conveyed to him by the defendant, then the jury might allow him the average value of the part lost, in proportion to the price paid for the whole." The charge given by the court is erroneous. The measure of damages is the loss actually sustained by the eviction from the land for which the title has failed, and that damage would not usually be ascertained by taking the average value, though the recovery could not exceed the consideration paid, interest, and expenses of suit. The joinder of the wife with the husband, in this action, is also assigned for error. The statutes of Alabama authorize the wife to bar her claim to dower by such a conveyance as this, but do not enlarge her power to enter into personal engagements or to incur responsibilities for the title. *George v. Gooldsbys*, 23 Ala., 327; *Hughes v. Williamson*, 21 Id., 296.

\*There is a misjoinder of parties. But this objection is taken here, for the first time; and the difficulty may be obviated by a *nolle prosequi* in the district court, which is allowable under the decisions of this court. *Minor v. Bank of Alexandria*, 1 Pet., 46; *United States v. Leffler*, 11 Id., 86; *Amis v. Smith*, 16 Id., 303.

Judgment reversed and cause remanded.

## Order.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment 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 award a *venire facias de novo*.

## WILLIAM JUDSON, APPELLANT, v. WILLIAM W. CORCORAN.

Where a prior assignee of a claim against Mexico gave no information of the assignment until a subsequent assignee had prosecuted the claim before the commissioners, and obtained an award in his favor, the equities of these parties were equal, and the possessor of the legal title ought to retain the fund.

The award was not conclusive amongst the claimants. The decision of a former court upon this point again affirmed.<sup>1</sup> The cases examined respecting the relative equities of prior and subsequent assignees of a *chose in action*.

<sup>1</sup> FOLLOWED. *Spain v. Hamilton*, 15 Fed. Rep., 735; *Tangle v. Fisher*, 1 Wall., 623. CITED. *In re Gillespie*, 20 W. Va., 506.

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Judson *v.* Corcoran.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Lawrence* and *Mr. Coxe*, for the plaintiff in error, and by *Mr. Bradley* and *Mr. Carlisle*, for the defendant.

Mr. Justice CATRON delivered the opinion of the court.

Judson brought this suit in equity, to recover \$6,000 from William W. Corcoran, in whose favor a decree had been made for about \$15,000, by the board of commissioners acting according to the 15th article of our treaty with Mexico of 1848.

Corcoran claimed, as assignee, under Bradford B. Williams \*613] \*and Joseph H. Lord, who were owners of the cargo of the ship Henry Thompson, and which was unlawfully seized and confiscated by the authorities of Mexico.

The claim having been presented to the mixed commission under the convention between the United States and Mexico, of April, 1839, the American members of that board made a report in favor of the claim; but the Mexican commissioners not concurring in the opinion of their colleagues, the case was referred to the umpire, and was returned by him without a decision. It therefore constituted one of that class of cases embraced in the 5th article of the unratified convention of the 20th November, 1843, and which is referred to and incorporated into the 15th article of the treaty of peace of Guadalupe Hidalgo; and having been modified in some of its provisions, the ratifications were exchanged on 30th May, 1848.

On the 3d March, 1849, an act of congress was passed to carry some of the provisions of this treaty into effect. Among other things, it provided for the establishment of a board of commissioners, "whose duty it shall be to receive and examine all claims of citizens of the United States upon the Republic of Mexico, which are provided for by the treaty, and to decide thereon according to the provisions of the treaty."

On the 11th of June, 1845, Bradford B. Williams assigned one half of his interest in the claim in dispute to E. H. Warner. August 15, 1845, Warner assigned the same interest to William B. Hart. October 15, 1846, Williams assigned to Hart the residue of his interest. October 3, 1846, Joseph H. Lord assigned to Hart all his interest in the claim. June 18, 1847, Hart assigned the whole claim to William W. Corcoran.

"By these several assignments, (says the late board,) the

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whole became vested in the said William W. Corcoran, and the award was therefore made in his favor."

On the first day of January, 1845, Bradford B. Williams had assigned to William Judson, the complainant, an interest of \$6,000, of the amount of the suspended claim pronounced valid by our commissioners, in 1842, with interest from the date of the assignment.

From January, 1845, to June, 1847, about two years and a half, Judson held his assignment without filing any notice of its existence at the Department of State, so that others might have notice of his interest, nor did he set up any pretension until the assignee, Corcoran, had prosecuted the claim to a final award, and was adjudged by the board of commissioners to be the legal owner of the amount awarded; and as legal owner Corcoran is sued.

In regard to the preliminary questions raised at the bar, it \*may be remarked that we have no doubt the district court had authority to hear and determine the equities of the parties, notwithstanding the judgment in Corcoran's favor by the board of commissioners. The question that an award like the present is not conclusive among adverse claimants, was settled in the case of *Comegys v. Vasse*, 1 Pet., 193, in 1828, and has not since been open.

And as respects the validity of assignments of claims like the one here presented, no question can be raised at this day, as such assignments have been recognized by the various boards of commissioners and the courts of justice for many years. The case of *Comegys v. Vasse*, also adjudged this point.

The contest here depends on the merits. Judson had the earliest assignment of part of the amount declared to be due to Williams, by the two United States commissioners, in 1842, to the extent of \$6,000, and the claim assigned being a right depending on an equity against the government of Mexico, and assuming that both sets of assignments are alike fair, and originally stood on the same *bona fide* footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment, the second assignee could take nothing; and, as he represents his assignor, is bound by the equities imposed on the latter; 1 White & T. Eq. Cas., 236; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions, and the case before us was obviously decided in the court below on an exception to the general rule.

Judson took his assignment in January, 1845, which he first produced in May, 1851, when this bill was filed. In the mean

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time Corcoran had got his assignment, and immediately gave written notice of it to the Department of State, and August 17, 1847, received an answer from the secretary, recognizing the fact of notice having been received, and that it was filed with the documents of the postponed claim of Williams and Lord, appertaining to the unfinished award.

Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a *chase in action* to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here, Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect.

Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail.

\*<sup>615</sup> There are other objections to the case made by the appellant, growing out of negligence on his part in not presenting his assignment and claim of property to the State Department, so as to notify others of the fact. The assignment was held up and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a *chase in action*, or of an equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet, there may be cases in which a purchaser, by sustaining the character of a *bonâ fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 1, 60, established the doctrine to the foregoing effect in England; they were followed in the case of *Mangles v. Dixon, McNaught. & G.*, 437. And the same principle of protecting subsequent *bonâ fide* purchasers of *chases in action*, &c., against latent outstanding equities, of which they had no notice, was maintained in this court in the case of *Bayley v. Greenleaf*, 7 Wheat., 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the

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benefit of the vendees' creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal title, still, it must be postponed to a subsequent equal equity connected with such advantage.

The rule was distinctly asserted by Chancellor Kent, in 1817, in *Murray v. Lyburn*, 2 Johns. (N. Y.) Ch., 442, before the question was settled in England, and before this court discussed it, which was in 1822. And the same principle was applied by the court of appeals of Virginia, in the case of *Moore v. Holcombe*, 3 Leigh (Va.), 597, in 1832.

Secondly. There is no satisfactory evidence, as we apprehend, to establish the fact that a sufficient consideration was paid by Judson to Williams for the assignment on which the bill is founded, to authorize Judson to set it up, and thereby to postpone Corcoran, who paid a full price, as did those under whom he claims; yet, as these objections depend on facts peculiar to this cause, we deem it useless to critically investigate them, as the decree below dismissing the bill was clearly proper, on the first and merely legal ground.

\*It is ordered that the decree be affirmed.

[\*616]

#### 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, 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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MARY LEWIS, ADMINISTRATRIX OF STEPHEN J. LEWIS,  
DECEASED, APPELLANT, v. EDWARD R. BELL, ASSIGNEE  
OF I. BELL, JUNIOR.

Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights.

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Lewis *v.* Bell.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Chilton* and *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Bradley*, for the defendant.

*Mr. Justice GRIER* delivered the opinion of the court.

The subject-matter in dispute in this case is a sum of money in the hands of the secretary of the treasury, which had been awarded to the appellant by the commissioner appointed under the act of congress to adjust claims under the treaty between the United States and Brazil. Stephen J. Lewis, deceased, is admitted to have been the original owner of the claim. He was owner of one fifth of the brig Caspian, which was illegally seized by the Brazilian squadron, in October, 1827, and condemned. Lewis was on board at the time, and was robbed of his baggage and money to the extent of some four thousand dollars. The whole amount awarded on these claims of Lewis, was \$11,551.

Isaac Bell, senior, the father of the appellee, had an assignment of this claim from Lewis, by deed of assignment, dated November, 1828.

The claim was prosecuted to its final recovery in 1852, by Isaac Bell. But having in the meanwhile lost or mislaid his <sup>\*617]</sup> *\*original* deed of assignment, and not having sufficient legal proof of the copy, the commissioner awarded the money to the administratrix of Lewis.

Isaac Bell, senior, assigned his right to his son, Isaac Bell, junior, and he soon after assigned to his brother, the appellee, who instituted this proceeding in the circuit court of the District of Columbia, under the provisions of the act of congress of July 3, 1852.

After the institution of this suit, the original assignment was accidentally discovered, and has been satisfactorily proven. The court below awarded the money to the complainant below, and the administratrix of Lewis has taken this appeal.

The objections to the title of Edward R. Bell, as chameperious, collusive, and fraudulent, and made for the purpose of using the father as a witness, are wholly unsustained by any evidence.

There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against chameperity and maintenance; (see 2 Story Eq., 1049, 1054;) nor will the want

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of a full money consideration, as between father and son, and brother and brother, subject the transaction to such imputation, without further proof. The father's testimony was not offered by the appellee in this case; we are not, therefore, bound to notice the question of its admissibility, or the policy of permitting assignments for the purpose of making the assignor a witness, on which so much of the argument of this case was expended.

It is contended, also, that the assignment of Lewis to Bell, senior, is not absolute, but a security only, of some debt which has been satisfied; and that it is voluntary, and imports a trust between the parties.

The deed of assignment, after a recital of the capture of the brig Caspian, and the claim preferred by the American minister at Brazil, on behalf of Lewis, for indemnity, proceeds as follows:—

“Now, know all men by these presents, that the said Stephen J. Lewis, for and in consideration of the sum of one dollar, lawful money of the United States, to him in hand paid by Isaac Bell, of the city of New York, merchant, the receipt whereof is hereby acknowledged, and also for divers other good considerations him thereunto moving, hath granted, bargained, and sold, assigned, transferred, and set over, and by these presents doth grant, bargain, and sell, assign, transfer, and set over, unto the said Isaac Bell, his executors, administrators, and assigns, all and singular, the said claim, and all the sum and sums of money that may be recovered or received, of and from the said Brazilian government, or of and from whomsoever it may concern, for or by reason of the said illegal capture, or which may arise from \*the proceeds of the said brig Caspian and cargo; to have and to hold the same and every part [\*618 and parcel thereof, unto him, the said Isaac Bell, his executors, administrators, and assigns, forever,” &c., &c.

This is an absolute assignment of the whole claim of Lewis against the Brazilian government. Besides the consideration of one dollar, it mentions “divers other good considerations,” without specifying them particularly.

The bill alleges that the real consideration was a large indebtedness of Lewis to Bell, which was never paid, Lewis having died in 1844, insolvent. This is denied by the answer. But the evidence, as far as it affects the point, tends to establish the correctness of the allegations of the bill. After the assignment, Lewis does not appear to have interfered in the prosecution of this claim, up to the time of his death, in 1844, nor did his administratrix set up a claim till the money was recovered, in 1852.

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In December, 1828, it appears that Bell transmitted this assignment to his agent in Buenos Ayres, in order to prosecute the claim, alleging that the "assignment was made by Lewis, in consequence of advances made to him in the purchase of a brig and cargo." In the same year, he wrote to the Hon. Henry Clay, inclosing the protest of Lewis, in order that our government might be led to urge the payment of his claim, and alleging as the reason of his interference, that Lewis was indebted to him in the sum of \$15,000, and had failed, and had therefore made him the assignment now in question. In a letter from Bell to Mr. Cambreling, in 1830, urging his interference in behalf of the Lewis claim, Bell assigns as the reason for his request, that Lewis had become indebted to him, and had no other means of payment but through that claim; and to confirm the whole matter beyond dispute, the counsel of the respondent below (now appellant) read in evidence the testimony of Isaac Bell, senior, proving the assignments to have been made in consideration of large indebtedness by Lewis to Bell, and that Lewis was then insolvent, and continued so to the time of his death. By their own showing, therefore, there is ample consideration for the assignment, and not the least evidence of a secret trust.

The decree 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 District of Columbia, held in and for the county of Washington, 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.

# INDEX

TO THE

## MATTERS CONTAINED IN THIS VOLUME.

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

### ABATEMENT.

1. Where an action on the case was brought in Virginia, against a person to recover damages for fraudulently recommending a third party as worthy of credit, whereby loss was incurred; and after issue joined upon the plea of not guilty, the defendant died, the action did not survive against the executor, but abated. *Henshaw v. Miller*, 212.
2. The Virginia laws and cases examined. *Ib.*

### ABSENT PARTY.

1. An absent party having no notice of the proceedings, and not being guilty of wilful laches or unreasonable neglect, will not be concluded by a decree, distributing a common fund. *Williams v. Gibbes*, 230.
2. Action on the case for making false representations of the credit of a third party.
3. Where an action was brought against a person for making false representations of the pecuniary condition of a certain party, whereby the plaintiff had been induced to sell goods upon credit, and had incurred loss, evidence conduced to show that the statements of the defendant were false, ought to have been allowed to go to the jury. *Iasigi v. Brown*, 183.
4. The defendant having written to his own agent, and headed the letter confidential, it was for the jury to say whether or not it was intended for the exclusive perusal of the agent. *Ib.*
5. It was also for the jury to say, on a thorough examination of the letters and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the party, to which the writer knew he was not entitled. *Ib.*
6. Such an action does not survive in Virginia against the executor of the defendant, but abates. *Henshaw v. Miller*, 212.

### ADMIRALTY.

1. Where a libel was dismissed by the district court, which decree was affirmed by the circuit court, and it appeared that the claim in the libel amounted only to sixteen hundred dollars, an appeal to this court must, upon motion, be dismissed for want of jurisdiction. *Udall v. Steamship Ohio*, 17.
2. In order to give jurisdiction, the damages must appear on the face of the pleading on which the claim is made. Interest cannot be added, in computing the amount, unless it is specially claimed in the libel. *Ib.*
3. It is too late, when the cause has reached this court, to amend the libel by inserting a special claim for interest. The 24th admiralty rule ought not to be construed to extend to cases where an amendment would give jurisdiction, which would not exist without such amendment. *Ib.*

## ADMIRALTY—(Continued.)

4. Where it was alleged in a libel, that the libellant was "entitled to recover from the vessel the damages by him sustained, which amount to the sum of eighteen hundred dollars and upwards," the sum was not sufficient to bring the case within the jurisdiction of this court. *Olney v. Steamship Falcon*, 19.
5. Interest, not being specially claimed, cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. *Ib.*
6. A consignee of goods has a right, in his own name, to libel a vessel for their non-delivery, unless there is something to show that he had no interest in them. The presumption is, that he had an interest, and to defeat the right to sue, in his own name, this presumption must be rebutted by proof. *Lawrence v. Minturn*, 100.
7. In the present case, there is no such proof. *Ib.*
8. The goods being thrown overboard, the facts in this case show that the jettison was justifiable, and the loss occasioned by the perils of the sea. *Ib.*
9. The nature of the contract explained between the master and owner of a vessel and the shipper, where the latter knows that the articles shipped are to be carried upon the deck, and the cases upon this subject examined. *Ib.*
10. In this case, the evidence shows that there was no want of due diligence and skill, either in the construction of the vessel or the stowage of the cargo. *Ib.*
11. In a case of collision upon Lake Huron, between a propeller and a schooner, the evidence shows that the propeller was in fault. *Propeller Monticello v. Mollison*, 152.
12. The fact that the libellants had received satisfaction from the insurers, for the vessel destroyed, furnished no good ground of defense for the respondent. *Ib.*
13. In cases of collision, where the injured vessel has been abandoned, the measure of damages is the difference between her value in her crippled condition and her value before the collision; and this is to be ascertained by the testimony of experts, who can judge of the probable expense of raising and repairing the vessel. *Schooner Catharine v. Dickinson*, 170.
14. But where the vessel has been actually raised and repaired, the actual cost incurred is the true measure of indemnity. *Ib.*
15. Where two sailing vessels were approaching each other in opposite directions, one closehauled to the wind, and the other with the wind free, the weight of evidence is, that the vessel which was closehauled, luffed just previous to the collision. This was wrong; she should have kept her course. *Ib.*
16. The other vessel had not a sufficient look-out; the excuse given, namely, that all hands had, just previously, been called to reef the sails, is not sufficient. *Ib.*
17. Both vessels being thus in fault, the loss must be divided. *Ib.*
18. In a collision which took place at sea between a steam-ship and a schooner, by means of which the schooner was sunk and all on board perished, except the man at the helm, the evidence shows that it was not the fault of the steamer. *Peck v. Sanderson*, 178.
19. Although the night was starlight, yet there was a haze upon the ocean, which prevented the schooner from being seen until she came within a distance of two or three hundred yards. She was approaching as close-hauled to the wind as she could be. Under these circumstances, the order to stop the engine and back, was judicious. *Ib.*
20. The courts of the United States, in the exercise of admiralty and maritime jurisdiction, cannot take cognizance of questions of property between the mortgagee of a vessel and the owner. *Bogart v. Steamboat John Jay*, 399.
21. The mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. *Ib.*

ADMIRALTY—(*Continued.*)

22. The admiralty courts in England now exercise a more ample jurisdiction upon the subject of mortgages of ships, but it is under a statute of Victoria; and in the United States the admiralty and maritime jurisdiction remains as it was before. *Ib.*
23. A libel *in personam* cannot be maintained against the owners of a steam-boat by their general agent or broker, for the balance of an account for money paid, laid out, and expended in paying for supplies, repairs, and advertising, together with commissions on the disbursements. *Minturn v. Maynard*, 477.

## APPEAL BOND.

1. Where an appeal from a decree in chancery is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law. *Stafford v. Union Bank of Louisiana*, 275.

## ARBITRAMENT AND AWARD.

1. If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. *Burchell v. Marsh*, 344.
2. In this case, one of the parties sued the other for debt, who, in his turn, claimed damages for the manner in which he was sued. The submission was broad enough to cover all these demands on either side. *Ib.*
3. One of the claims made by the party who was sued, was for damages for the violence of the agent of the creditors; and the referees heard evidence upon this subject. Even if this had been beyond the submission, there was nothing in the record to show that the arbitrators made any allowance for this violence and slanderous language. *Ib.*
4. The charges of fraud and corruption made in the bill are denied in the answer, and the award is not so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Error of judgment in the arbitrators is not a sufficient ground for setting aside an award. *Ib.*

## ASSIGNMENT.

1. In 1816 an association, called the Baltimore Company, was organized in Baltimore for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529; 12 Id., 111; 14 Id., 610. *McBlair v. Gibbes*, 232.
2. An assignment of a share in this company, made in 1829 to a *bond fide* purchaser for a valuable consideration, was valid. *Ib.*
3. Although the transaction was illegal in 1816, and had not changed its character in 1829, yet the assignment was not tainted with any illegality. The claim against Mexico, as being one of the efforts to establish her independence of Spain, rested entirely upon her sense of honor in acknowledging the obligation after her independence was achieved; but after the debt was admitted, the *bond fide* assignee became substituted to all the rights of the original shareholder. *Ib.*
4. The cases examined, showing how far a *bond fide* assignee of an illegal contract can claim and enforce his contract of assignment. *Ib.*
5. An assignment of "all my undivided ninth part, right, title, and interest, of every kind whatever, in the claim," carried with it an assignment of a claim to commissions as well as the share itself. *Ib.*
6. Moreover, the original holder, or his representatives, would be estopped from claiming the proceeds, after they had been received by his *bond fide* assignee. *Ib.*
7. The cases examined with respect to the assignment of equitable interests and *chooses in action*. *Hinkle v. Wanzer*, 353.
8. Where a prior assignee of a claim against Mexico gave no information of the assignment until a subsequent assignee had prosecuted the claim before the commissioners, and obtained an award in his favor, the equities of these parties were equal, and the possessor of the legal title ought to retain the fund. *Judson v. Corcoran*, 612.
9. The award was not conclusive amongst the claimants. The decision of a former court upon this point again affirmed. *Ib.*

## ASSIGNMENT—(Continued.)

10. The cases examined respecting the relative equities of prior and subsequent assignees of a *chose in action*. *Ib.*
11. Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights. *Lewis v. Bell*, 616.

## BANKRUPT LAW.

1. Where a person took the benefit of the bankrupt law of the United States; omitted, in first schedule of property, to take any notice of a claim which he had against the Mexican Republic, for the unlawful seizure of the cargo of a vessel; filed an amended schedule, in which he mentioned the claim so indistinctly as to give no information of its value, although he was then prosecuting it before the board of commissioners; concealed the evidence of the property, so that the assignee in bankruptcy reported that it was of no value, and sold the whole, for a nominal consideration, to the sister of the bankrupt, who afterwards transferred it to him; the purchase was fraudulent, under the 4th section of the bankrupt law, and also by the general principles of equity. *Clark v. Clark*, 315.
2. Where a creditor of the bankrupt filed his bill, and gave his bond within thirty days after the award of the board of commissioners, this was sufficient within the 8th section of the act of March 3, 1849, to carry into effect our treaty with Mexico. *Ib.*
3. The creditor was a *cestui que trust* of the fund, and had a right to intervene, as the assignee in bankruptcy was dead. This was sufficient to give jurisdiction to the court. His not having proved his debt did not debar him of this right. Another assignee was appointed, and filed his claim without loss of time. *Ib.*
4. The 8th section of the bankrupt law, limiting actions to two years after the bankruptcy, relates only to suits brought against persons who have claims to property, or rights of property surrendered by the bankrupt. And, moreover, no right of action accrued until the fund existed. *Ib.*
5. The difference between a receiver in chancery and an assignee in bankruptcy explained. *Booth v. Clark*, 322.

## BARON AND FEME.

1. Although a deed of warranty may be made by the grantor and wife, in order to bar her dower, yet an action in the covenant of warranty cannot be brought against her. She can make no such covenants. *Griffin et ux v. Reynolds*, 609.

## BILL OF EXCEPTIONS.

1. Where a jury is waived, and questions of law and fact decided by the court in Louisiana, the rules of the state appellate court require that the whole evidence should be put into the record. But where a case is brought up to this court, by writ of error from the circuit court of the United States for Louisiana, the rules of this court only require that so much of the evidence should be inserted as is necessary to explain the legal questions decided by the court. *Arthurs v. Hart*, 6.
2. Consequently, the mere fact that some of the evidence given below is omitted from the record, is not of itself sufficient to prevent this court from examining the questions of law presented by the record. *Ib.*
3. Where the court decides questions both of law and fact, the admission of improper testimony is not the subject of a bill of exception, although the exclusion of proper testimony is so. *Ib.*
4. The rule stated, according to which the appellate court should review the legal questions involved in the final judgment of the court below, which has decided both law and fact; and the mode pointed out by which counsel should separate the two classes of questions. *Ib.*

## BILL OF EXCHANGE.

1. In an action upon a bill of exchange by a *bond fide* assignee against the acceptor, it is no good defense that the bill was accepted in order to pay for a sugar-mill which was defective; that the drawers of the bill had promised to put it in order, and that the assignee of the bill knew

BILL OF EXCHANGE—(*Continued.*)

these facts. The acceptor of the bill relied upon this promise to protect his rights, and not upon a refusal to pay the bill when due. *Arthurs v. Hart*, 6.

2. Where the protest of a bill of exchange contained an exact copy of the bill, but the acceptance was made by "Chas. Byrne," instead of "And. E. Byrne," as it was in the original bill, this variance or error in the name of the acceptor's agent ought not to have excluded the protest from being read in evidence to the jury. *Dennistoun v. Stewart*, 606.
3. It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of the notice is to inform the party that payment has been refused; and hence such a description of the note as will give sufficient information to identify it, is all that is necessary. *Ib.*
4. In this case, the protest had an accurate copy of every material fact which could identify the bill: the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; every thing but the abbreviations and flourishes in the Christian name of the acceptor's agent. This mistake could not mislead any person as to the identity of the instrument described. *Ib.*

## BOSTON, CITY OF.

See LITTORAL PROPRIETORS.

## CALIFORNIA.

1. By an act of congress passed on the 3d of March, 1851, (9 Stat. at L., 631,) provision was made for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of a case decided by them to the district court of the United States for California, by way of appeal. *United States v. Ritchie*, 525.
2. This law was constitutional. The board of commissioners was not a court, under the constitution, invested with judicial powers; but the commencement of the suit in the district court, when transferred there, must be regarded as an original proceeding. The district court could hear additional evidence to that which was before the board of commissioners. *Ib.*
3. The 9th section of the act directed that the United States or the claimant might file a petition, praying an appeal to the district court, and other sections pointed out the mode of proceeding. But this was all changed by an act passed on the 31st of August, 1852, (10 Stat. at L., 99,) which directed that the filing of a transcript with the clerk of the district court should, *ipso facto*, operate as an appeal. *Ib.*
4. This amounts, also, to a notice to the opposite party. *Ib.*
5. The title of Francisco Solano, an Indian, to a tract of land in California, particularly set forth. *Ib.*
6. Although Solano was an Indian, yet he was competent, according to the laws of Mexico at the time of the grant, to take and hold real property. *Ib.*
7. The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and their right to hold land. *Ib.*
8. In 1833 and 1834, the government of Mexico passed laws for secularizing the missions, under which the public authorities granted the lands belonging to them in the same manner as other public lands. *Ib.*
9. In respect to those lands called Pueblo lands, no opinion is expressed. *Ib.*
10. By the act of congress passed on the 3d March, 1851, (9 Stat. at L., 631,) to ascertain and settle the private land claims in the state of California, it is made the duty of every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, to present the same to the commissioners (to be appointed

## CALIFORNIA—(Continued.)

under that act) who were to examine and decide upon the validity of the claim. *Fremont v. United States*, 542.

11. The commissioners, the district, and the supreme court, in deciding on any claim brought before them, were directed to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, as far as they are applicable. *Ib.*
12. Under this act, not only inchoate or equitable titles, but legal titles, also, were required to be passed upon by the court. This was an essential difference from the act of 1824, under which claims to land in Louisiana and Florida were decided, and which related to inchoate equitable titles. *Ib.*
13. Grants of land in Louisiana and Florida were usually preceded by a concession and survey; and until a survey took place, no title accrued to the grantee. Hence, this court has always decided that where the grantee took no further steps in the matter, he had acquired no right, legal or equitable, to the lands under the Spanish government. *Ib.*
14. The laws of these territories, under which titles were claimed, were never treated by this court as foreign laws, to be decided as a question of fact; but the court held itself bound to notice them judicially, as much so as the laws of a state of the Union. *Ib.*
15. On the 29th of February, 1844, Micheltorrena, the governor of California, granted to Juan B. Alvarado, the tract of land known by the name of Mariposas, to the extent of ten square leagues within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced and San Joaquin, as his property, subject to the approbation of the most excellent departmental assembly, and to certain conditions. *Ib.*
16. This grant conveyed to him a present and immediate interest. If any subsequent grantee of the government had made a survey within the described limits, his title would have been paramount to that of Alvarado. But no such grant and survey were made. *Ib.*
17. The case of *Rutherford v. Greene's Heirs*, 2 Wheat., 196, examined. *Ib.*
18. No further and definite grant, stating that the conditions had been complied with, was necessary. *Ib.*
19. The conditions were conditions subsequent, but a non-compliance with them did not amount to a forfeiture of the grant. *Ib.*
20. There was no unreasonable delay or want of effort, on the part of Alvarado, to fulfil the conditions, so that there is no room for the presumption that he intended to abandon the property. *Ib.*
21. The reasons explained why Alvarado did not make a survey or a settlement, and why Fremont, his vendee, did not. *Ib.*
22. One of the conditions was that Alvarado should not sell, alienate, or mortgage the property. But this restriction was void, as being against the laws of Mexico, and, moreover, at the time of the sale to Fremont, California was held by the United States as a conquered country, and an American citizen had a right to purchase property. Although Mexico might have avoided the sale, there is no public law which could require the United States to do so; and any law which subjected an American citizen to disabilities was necessarily abrogated without a formal repeal. *Ib.*
23. The question about the right to mines does not arise in the present case. *Ib.*
24. The United States have to direct, by law, how the survey is to be made, in the form and divisions prescribed for surveys in California, embracing the entire grant in one tract. *Ib.*
25. The acts of congress require that every vessel shall be registered by the collector of the district in which is the port nearest to the place where her owner or owners reside. The name of this port must be painted on her stern, in large letters; and every bill of sale of her must be recorded in the office where she is registered. *Hays v. Pacific Steamship Co.*, 596.
26. Where a company, incorporated by New York, (all the stockholders being residents of that state,) owned vessels which were employed in

## CALIFORNIA—(Continued.)

the transportation of passengers, &c., between New York and San Francisco, in California, and between San Francisco and different ports in the territory of Oregon; all of which vessels were ocean steam-ships, and duly registered in New York; that they remained in California no longer than was necessary to land their passengers and freight, and prepare for the next voyage; these vessels are not liable to assessment and taxation under the laws of California and authorities of San Francisco. *Ib.*

27. They were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid. *Ib.*

## CHANCERY.

See FRAUD.

1. Where a bill was filed by several distributees of an estate, to compel the payment of money alleged to be due to them, and a decree was rendered in their favor, this court has jurisdiction over an appeal, although the amount payable to each individual claimant was less than two thousand dollars. *Shields v. Thomas*, 3.
2. The aggregate amount which the defendant was decreed to pay, was more than two thousand dollars; and as to him, this is the matter in dispute. *Ib.*
3. The complainants all claimed under the same title; and it was of no consequence to the defendant in what proportions they shared the money amongst them. *Ib.*
4. The cases upon this point examined. *Ib.*
5. Where the death of a party complainant was suggested at December term, 1851, of this court, and his legal representatives did not appear by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court. *Barrièreau v. Brant*, 43.
6. As to the other complainant, the allegation that a deed which she executed ought to be set aside, upon the ground of fraud and misrepresentation, and inadequacy of price, is not sustained by the evidence; nor is the allegation that she was a joint-tenant, and not a tenant in common, sustained by a construction of the deed. *Ib.*
7. Where the complainant, after filing his bill, conveyed all his interest to a trustee, and died pending an appeal which he took to this court, the trustee cannot be permitted to be made a party to the proceedings in this court. The only persons who can appear in the stead of the complainant, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves. *Ib.*
8. Where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court. The answer is not the proper place for it, under the 33d rule of equity practice established by this court. *Wickliffe v. Owings*, 47.
9. The plea of the defendant, that he had instituted a suit against the complainant in a state court, in the same controversy, prior to the institution of this one in the circuit court of the United States, is not sustained by the evidence; nor is the allegation that the title of the complainant is invalid. *Ib.*
10. Upon a bill filed, under a statute of Kentucky, by a person having both the legal title to, and the possession of, land, against a person setting up a claim thereto, for the purpose of quieting the title, this court decides that the complainant is entitled to relief, and proceeds to render such decree as the circuit court ought to have rendered. *Ib.*
11. A vendor sold an estate in Louisiana for a large sum of money, and received payment from time to time, for nearly one half of the amount. Afterwards he agreed to take back the property, upon the payment of an additional sum of money, which was secured to him by the promissory notes of six individuals, four of whom lived in Louisiana, and two in Mississippi. *Shields v. Barrow*, 130.
12. Becoming dissatisfied with this arrangement, the vendor filed a bill in the circuit court of the United States for Louisiana, against the two

CHANCERY—(*Continued.*)

citizens of Mississippi, to set aside the agreement as having been improperly procured, and to restore him to his rights under the original sale. *Ib.*

13. All the six persons with whom the second arrangement was made, were indorsers upon the notes originally given by the vendee for the purchase-money, under the sale. *Ib.*
14. The four parties to the compromise, who resided in Louisiana, not being suable in the circuit court of that state, and their presence, as defendants, being necessary, the court could not rescind the contract as to two, and allow it to stand as to the other four. Consequently, it could not pass a decree, as prayed. *Ib.*
15. Neither the act of congress of 1839, (5 Stat. at L., 321, § 1,) nor the 47th rule for the equity practice of the circuit courts, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree. *Ib.*
16. The cases upon this point, the statute, and the rule examined. *Ib.*
17. The bill should have been dismissed. *Ib.*
18. The two Mississippi defendants answered. *Ib.*
19. The bill insisted that the compromise was made in good faith, and one of them filed a cross-bill against the vendor to compel him to carry it out. *Ib.*
20. This cross-bill was also defective, as to parties, the other sureties and the vendee having an interest in the subject, so that, without their presence, no decree could be made. *Ib.*
21. The vendor then filed a petition, by way of amended bill, stating his willingness to carry out the compromise upon certain conditions, which he prayed the court to enforce. *Ib.*
22. This was irregular. The rules about amendments, examined. *Ib.*
23. The court then passed an order, that unless the two Mississippi defendants should, before a day named, file a cross-bill, and make all the Louisiana parties defendants, the vendor might proceed upon his prayer to rescind the compromise, as far as the two Mississippi parties were concerned. *Ib.*
24. This was entirely irregular. Parties cannot be forced into court in this way; nor can new parties be brought into a cause by a cross-bill. *Ib.*
25. The mode considered of making new parties, when necessary. *Ib.*
26. The original and cross-bills must be ordered to be dismissed. *Ib.*
27. A *bonâ fide* assignee of an illegal contract can in some cases enforce his contract of assignment. *McBlair v. Gibbes*, 232.
28. Where an appeal from a decree in chancery is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law. *Stafford v. Union Bank*, 275.
29. Where the security is insufficient, this court will, upon motion of the appellee, lay a rule upon the judge below, to show cause why a *mandamus* should not issue, commanding him to carry into execution the decree of the court below. *Ib.*
30. Upon cause shown by the judge that, having taken what he considered to be good and sufficient security, the cause was appealed to this court, which removed it from his jurisdiction, and that he had no power to make an order in the case, this court will order a peremptory *mandamus*. *Ib.*
31. But as the security given was sufficient to bring the case before this court by appeal, a motion to dismiss the appeal must be overruled. *Ib.*
32. In 1816, an association called the Baltimore Company, was organized in Baltimore, for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529, and 12 Id., 111. *Williams v. Gibbes*, 239.
33. One of the shareholders having become insolvent, in 1819, his trustee sold the share in 1825. The original transaction being illegal, the share could not be considered, by the laws of Maryland, as property passing by the insolvency to the trustee. Consequently, the sale by the trustee

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passed nothing to the assignee. The court of appeals of Maryland so decided, and this court adopts their construction of their own laws. *Ib.*

34. An act of the Legislature of Maryland, passed in 1841, made the sale of 1825 valid, so far only as defects existed for the want of a bond, by the trustee in insolvency, and the want of a ratification of the sale by the court. But it did not purport to cure other defects in the title of the trustee. Nor did the court of appeals decide that it went any further than to cure the two defects above mentioned. *Ib.*

35. In 1846, the Baltimore county court distributed the fund, and awarded the proceeds of the share in question to the executors of the assignee. This decree was affirmed by the court of appeals in 1849. But during this time there was no person authorized to protect the interest of the insolvent. He had died in 1836, and no letters of administration upon his estate were taken out until 1852. *Ib.*

36. In the distribution of a common fund amongst the several parties interested, an absent party, who had no notice of the proceedings, and who was not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *Ib.*

37. The English and American cases upon this point examined. *Ib.*

38. The present claim being made by the administrator of the insolvent, against the executors of the assignee, it is not necessary, under the circumstances of the case, to turn the plaintiff over, for his remedy, against the distributees. *Ib.*

39. There was a judgment recovered in the supreme court of New York, upon which a  *fieri facias* was issued, the return to which was, "no goods, chattels, or real estate of the defendant to be levied upon." *Booth v. Clark*, 322.

40. The creditor then filed a creditor's bill before the chancellor of the first circuit in the state of New York, to subject the equitable assets and *chooses in action* of the debtor to his judgment. The bill was taken *pro confesso*, and, in 1842, a receiver was appointed. The debtor was also enjoined from making any disposition of his estate, legal or equitable; but the court had not been applied to, either by the creditor or the receiver, for any order upon the debtor, *in personam*, to coerce his compliance with the injunction or decree. *Ib.*

41. In 1843, the debtor went into another state and took the benefit of the bankrupt law of the United States. An assignee was appointed, and, after his death, another person to succeed him. *Ib.*

42. In 1851, a sum of money was awarded to the debtor for a claim accruing anterior to the judgment, by the commissioners under the Mexican treaty, which was claimed by the receiver and also by the assignee in bankruptcy, both prosecuting their claims in the circuit court of the United States for the District of Columbia. *Ib.*

43. The assignee in bankruptcy has the best right to the fund. *Ib.*

44. A receiver is an officer of the court which appoints him, but cannot sue, in a foreign jurisdiction, for the property of the debtor. *Ib.*

45. The proper course would be to compel obedience to the injunction, by a coercion of the person of the debtor, obliging him either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title as well as the possession of the property according to the *lex loci rei sitae*. *Ib.*

46. The New York and English cases upon this subject examined. *Ib.*

47. The distinction between a receiver in chancery under a creditor's bill and an assignee in bankruptcy explained. *Ib.*

48. In England, an assignee in bankruptcy is held to be vested with the personal property of the bankrupt which is in foreign countries; and her courts acknowledge the validity of the title of a foreign assignee to property in England, when such title emanates from a country which has a bankrupt law similar to her own. *Ib.*

49. But this rule does not prevail in the United States, either as regards a

CHANCERY—(*Continued.*)

foreign assignee or an assignee under the laws of another state in the Union. The reason is stronger for declining to give such efficacy to a receiver under a creditor's bill. And, moreover, there was in this case a want of vigilance in the creditor and receiver, by their omitting to proceed in the regular chancery practice against the person of the debtor, as above stated. *Ib.*

50. Where a bill was filed for the specific execution of a contract, and it appeared that the notes given for the purchase of the property had never been paid, and the property was sold for the payment of the consideration-money, the bill was properly dismissed. *Boone v. Missouri Iron Co.*, 340.

51. No principle in equity is better settled, than that he who asks a specific execution of his contract must show a performance, on his part, or that he has offered to perform. Neither of these was done in this case. *Ib.*

52. If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. *Burchell v. Marsh*, 344.

53. In this case, one of the parties sued the other for debt, who, in his turn, claimed damages for the manner in which he was sued. The submission was broad enough to cover all these demands on either side. *Ib.*

54. One of the claims made by the party who was sued, was for damages for the violence of the agent of the creditors; and the referees heard evidence upon this subject. Even if this had been beyond the submission, there was nothing in the record to show that the arbitrators made any allowance for this violence and slanderous language. *Ib.*

55. The charges of fraud and corruption made in the bill are denied in the answer, and the award is not so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Error of judgment in the arbitrators is not a sufficient ground for setting aside an award. *Ib.*

56. Where a complainant in chancery averred that a note of which he was one of the makers, had been deposited by the holder, amongst other collateral securities, with a person who had become responsible for the debts of the holder; and averred further that enough had been collected from these collateral securities to meet and defray all the responsibilities incurred, the evidence showed that this was not the fact. The amount collected was not enough, by a large deficiency, to reimburse the losses incurred as indorser and surety. *Hinkle v. Wanzer*, 353.

57. The evidence is not sufficient to show that the note had been paid by another of the makers than the complainant; or that a release had been executed to him by the holder of the note. The answer is substantially responsive to the charge, and denies it. Other circumstances disclosed in the evidence, sustain the answer. *Ib.*

58. The collateral securities, being deposited with counsel for the purpose of paying the debts of the insolvent as they were collected, were properly held by the counsel as a trust fund, and it was correct to allow the surety to control the judgment upon the note in question. *Ib.*

59. The cases examined with respect to the assignment of equitable interests and *chooses in action*. *Ib.*

60. A resident in Pennsylvania made his will, in 1829, giving annuities to his wife and others, and directing that his executors, or the survivor of them, after the decease of his wife, should provide for the annuitants, then living, and dispose of the residue of his property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind. *Fontain v. Ravenel*, 369.

61. His wife and three other persons were appointed executors. *Ib.*

62. The three other persons all died during the lifetime of the wife. No appointment of the charity was made or attempted to be made during the lifetime of the executors. *Ib.*

63. The charity cannot now be carried out. *Ib.*

64. The executors were vested with a mere power of appointment without having any special trust attached to it. In England, the case could only

CHANCERY—(*Continued.*)

be reached by the prerogative power of the crown acting through the sign-manual of the king. *Ib.*

65. The English and American cases upon this subject examined. *Ib.*

66. A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself, at law, because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Hendrickson v. Hinckley*, 443.

67. Therefore, a bill was properly dismissed where the complainant sought relief from a judgment at law, for the following reasons:—

1. Where he alleged that he had been defrauded in the sale of the property, for the purchase of which he gave his notes. The fraud was pleaded at law, and the verdict against him. Moreover, six years elapsed between the sale and suit, and no effort was made to rescind the contract.
2. Certain verbal promises alleged to have been made by the agent of the vendor. These were not admissible in any court to vary a contract. This defense was also set up at law, and failed.
3. That certain letters from a co-defendant were read to the jury as admissions. This ground of relief was also untenable.
4. That certain claims of set-off existed which he purposely abstained from using in the trial at law. If he voluntarily waived this defense, relying upon a separate action, he has no right now to ask a court of equity to interfere. *Ib.*

68. The penalties for the violation of a copyright imposed by the 7th section of the act of 1731, (4 Stats at L., 438,) namely, the forfeiture of the printed copies and the sum of one dollar for each sheet unlawfully printed, cannot be enforced in a court of equity. *Stevens v. Gladding*, 448.

69. Under a prayer for general relief, the court can decree for an account of profits. This right is incident to the right to an injunction in copy and patent-right cases. *Ib.*

70. Where a complainant sought to recover by bill in chancery the proceeds of a judgment which he alleged that his debtor had against a third person, and it turned out that his debtor had only an interest of one fourth in this judgment, which fourth was collected and the proceeds paid over to the solicitor of the complainant during the pendency of the suit, the bill was properly dismissed at the cost of the complainant. *Rhodes v. Farmer*, 464.

71. The assignment of the judgment was, in reality, conditional, although absolute on its face; and the present bill being in the nature of a bill to carry that assignment into effect, in such a case parol evidence is admissible to rebut or explain an equitable interest. *Ib.*

72. The judgment was nominally assigned to the debtor, but his equitable interest in it was only one fourth, which was all that the complainant was entitled to. This fourth being paid before the decree, together with costs up to that time, it was proper to dismiss the bill at the cost of the complainant. *Ib.*

73. Where a promissory note was given in Mississippi, for the purchase of slaves, the title of the vendor of which afterwards proved to be defective, but in the mean time a foreign creditor of the vendor had laid an attachment in the hands of the vendee, for the amount of the promissory note, and obtained judgment against him as garnishee, the purchaser of the slaves should be credited upon the judgment against him, with the value of the slaves at the time when they were taken away from him, and the damages, costs, and expenses actually paid upon the decrees of the court of chancery in Mississippi. *Wanzer v. Truly*, 584.

74. Where a complainant filed a bill in chancery against numerous defendants, seven of whom were selected by the court to represent the rest; and after these seven had answered the bill, two of them filed a cross-bill against the original complainant, and also against all their co-defendants, an appeal from a decree dismissing this cross-bill, will not lie to this court. It must be dismissed for want of jurisdiction. *Ayres v. Carver*, 591.

## CHARITIES.

See USES AND TRUSTS.

## CHARTER-PARTY.

1. A charter-party is an informal instrument, often having inaccurate clauses, which ought to have a liberal construction, in furtherance of the real intention of the parties and usage of trade. *Raymond v. Tyson*, 53.
2. Cases cited to illustrate and explain this rule. *Ib.*
3. Though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. *Ib.*
4. The American and English cases upon this subject examined. *Ib.*
5. Where a ship was chartered for a voyage from London direct, or from thence to Cardiff, in Wales (if required), to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect, thence to be returned back, either to New York or Great Britain, at their option; the time for her employment being to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months; the charterers paying two thousand dollars per month, payable in New York semi-annually; the circumstances of the case indicate that the owner meant to waive his lien upon the cargo for freight, and trust to the personal responsibility of the charterer. *Ib.*
6. The ship having arrived at San Francisco, with a cargo of coal, a libel filed to hold the cargo responsible for the freight, ought to have been dismissed. *Ib.*

## CHILDREN AND GRANDCHILDREN.

See "ISSUE."

## CHOSES IN ACTION, ASSIGNMENT OF.

See CLAIMS UPON FOREIGN GOVERNMENTS.

1. The cases examined with respect to the assignment of equitable interests and *chooses in action*. *Hinkle v. Wanzer*, 353.
2. The cases examined respecting the relative equities of prior and subsequent assignees of a *chose in action*. *Judson v. Corcoran*, 612.
3. Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights. *Lewis v. Bell*, 616.

## CITATION.

1. Where a proceeding was instituted in Louisiana, in the name of the treasurer of the state, to recover a tax imposed upon property inherited by aliens, a citation served upon that officer was sufficient. He was the "adverse party," under the judiciary act. *Poydras de la Lande v. Treasurer of Louisiana*, 1.
2. The tenth rule of this court, directing process to be served upon the chief executive magistrate and attorney-general, applies to those cases only in which the state is a party on the record. When an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. *Ib.*

## CLAIMS UPON FOREIGN GOVERNMENTS.

1. In 1816, an association, called the Baltimore Company, was organized in Baltimore, for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529, and 12 *Ib.*, 111; 14 *Ib.*, 610. *McBlair v. Gibbes*, 232.
2. An assignment of a share in this company, made in 1829 to a *bona fide* purchaser for a valuable consideration, was valid. *Ib.*
3. Although the transaction was illegal in 1816, and had not changed its

## CLAIMS UPON FOREIGN GOVERNMENTS—(Continued.)

character in 1829, yet the assignment was not tainted with any illegality. The claim against Mexico, as being one of the efforts to establish her independence of Spain, rested entirely upon her sense of honor in acknowledging the obligation after her independence was achieved; but after the debt was admitted, the *bonâ fide* assignee became substituted to all the rights of the original shareholder. *Ib.*

4. The cases examined, showing how far a *bonâ fide* assignee of an illegal contract can claim and enforce his contract of assignment. *Ib.*
5. An assignment of "all my undivided ninth part, right, title, and interest, of every kind whatever, in the claim," carried with it an assignment of a claim to commissions as well as the share itself. *Ib.*
6. Moreover, the original holder, or his representatives, would be estopped from claiming the proceeds, after they had been received by his *bonâ fide* assignee. *Ib.*
7. In 1816 an association, called the Baltimore Company, was organized in Baltimore for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See 11 How., 529; 12 Ib., 111. *Williams v. Gibbes*, 239.
8. One of the shareholders having become insolvent, in 1819, his trustee sold the share in 1825. The original transaction being illegal, the share could not be considered, by the laws of Maryland, as property passing by the insolvency to the trustee. Consequently, the sale by the trustee passed nothing to the assignee. The court of appeals of Maryland so decided, and this court adopts their construction of their own laws. *Ib.*
9. An act of the Legislature of Maryland, passed in 1841, made the sale of 1825 valid, so far only as defects existed for the want of a bond, by the trustee in insolvency, and the want of a ratification of the sale by the court. But it did not purport to cure other defects in the title of the trustee. Nor did the court of appeals decide that it went any further than to cure the two defects above mentioned. *Ib.*
10. In 1846, the Baltimore county court distributed the fund, and awarded the proceeds of the share in question to the executors of the assignee. This decree was affirmed by the court of appeals in 1849. But during this time there was no person authorized to protect the interest of the insolvent. He had died in 1836, and no letters of administration upon his estate were taken out until 1852. *Ib.*
11. In the distribution of a common fund amongst the several parties interested, an absent party, who had no notice of the proceedings, and who was not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *Ib.*
12. The English and American cases upon this point examined. *Ib.*
13. The present claim being made by the administrator of the insolvent, against the executors of the assignee, it is not necessary, under the circumstances of the case, to turn the plaintiff over, for his remedy, against the distributees. *Ib.*
14. Where a prior assignee of a claim against Mexico gave no information of the assignment until a subsequent assignee had prosecuted the claim before the commissioners, and obtained an award in his favor, the equities of these parties were equal, and the possessor of the legal title ought to retain the fund. *Judson v. Corcoran*, 612.
15. The award was not conclusive amongst the claimants. The decision of a former court upon this point again affirmed. *Ib.*
16. The cases examined respecting the relative equities of prior and subsequent assignees of a *chose in action*. *Ib.*
17. Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights. *Lewis v. Bell*, 616.

## COLLECTORS OF THE REVENUE.

1. Congress have directed by law that in certain cases the duties of collectors of the revenue should be united with those of naval officer or surveyor of the port, but never with those of inspector of the customs. *Stewart v. United States*, 116.
2. Therefore, where a person held the two offices of collector of the revenue and inspector of the customs, and charged a salary for each office separately, it was irregular. *Ib.*
3. In May, 1822, congress passed an act, (3 Stat. at L., 693,) directing that "no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity." *Ib.*
4. This act was intended to provide compensation to the collector, &c., for extraordinary services incident to their respective offices, and to them only; but did not include the union of the two offices of collector and inspector of the customs. A different mode and rate of compensation for inspectors was provided by law. *Ib.*
5. The tariff act of 1842, (5 Stat. at L., 548,) provided that if the appraised value of merchandise should exceed, by ten per centum or more, the invoice value, an additional duty should be imposed of fifty per centum of the duty imposed on the same, where fairly invoiced. *Ring v. Maxwell*, 147.
6. The act of 1846, (9 Stat. at L., 42,) reduced this additional duty to twenty per centum. *Ib.*
7. Although this additional duty may have been considered as a penalty, and as such, a moiety given to the officers of the custom-house, under the act of 1842, and the same disposition of it would have been made under the act of 1846, if there had been no other legislation, yet the act of February, 1846, (9 Stats. at L., 3,) declares that it shall not be considered a penalty for the purpose of being distributed. *Ib.*
8. Therefore, the additional duty of twenty per centum, levied by the collector, under the 8th section of the act of July 30, 1846, is not to be considered as a penalty, one moiety whereof is to be distributed amongst the officers of the custom-house. *Ib.*
9. Where there were two consecutive commissioners and two sets of sureties, the latter set were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misapplied during the first term of office, it was incumbent upon the second set of sureties to show that it was so. *Bruce v. United States*, 437.

## COLLISION OF VESSELS.

See ADMIRALTY.

## COMMERCIAL LAW.

1. In an action upon a bill of exchange by a *bond fide* assignee against the acceptor, it is no good defense that the bill was accepted in order to pay for a sugar-mill which was defective; that the drawers of the bill had promised to put it in order, and that the assignee of the bill knew these facts. The acceptor of the bill relied upon this promise to protect his rights, and not upon a refusal to pay the bill when due. *Arthurs v. Hart*, 6.
2. A charter-party is an informal instrument, often having inaccurate clauses, which ought to have a liberal construction, in furtherance of the real intention of the parties and usage of trade. *Raymond v. Tyson*, 53.
3. Cases cited to illustrate and explain this rule. *Ib.*
4. Though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. *Ib.*

COMMERCIAL LAW—(*Continued.*)

5. The American and English cases upon this subject examined. *Ib.*
6. Where a ship was chartered for a voyage from London direct, or from thence to Cardiff, in Wales (if required), to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect, thence to be returned back, either to New York or Great Britain, at their option; the time for her employment being to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months; the charterers paying two thousand dollars per month, payable in New York semi-annually; the circumstances of the case indicate, that the owner meant to waive his lien upon the cargo for freight, and trust to the personal responsibility of the charterer. *Ib.*
7. The ship having arrived at San Francisco, with a cargo of coal, a libel filed to hold the cargo responsible for the freight, ought to have been dismissed. *Ib.*
8. A consignee of goods has a right, in his own name, to libel a vessel for their non-delivery, unless there is something to show that he had no interest in them. The presumption is, that he had an interest, and to defeat the right to sue, in his own name, this presumption must be rebutted by proof. *Lawrence v. Minturn*, 100.
9. In the present case, there is no such proof. *Ib.*
10. The goods being thrown overboard, the facts in this case show that the jettison was justifiable, and the loss occasioned by the perils of the sea. *Ib.*
11. The nature of the contract explained between the master and owner of a vessel and the shipper, where the latter knows that the articles shipped are to be carried upon the deck, and the cases upon this subject examined. *Ib.*
12. In this case, the evidence shows that there was no want of due diligence and skill, either in the construction of the vessel or the stowage of the cargo. *Ib.*
13. In a case of collision upon Lake Huron, between a propeller and a schooner, the evidence shows that the propeller was in fault. *Propeller Monticello v. Mollison*, 152.
14. The fact that the libellants had received satisfaction from the insurers, for the vessel destroyed, furnished no good ground of defense for the respondent. *Ib.*
15. Where the protest of a bill of exchange contained an exact copy of the bill, but the acceptance was made by "Chas. Byrne," instead of "And. E. Byrne," as it was in the original bill, this variance or error in the name of the acceptor's agent ought not to have excluded the protest from being read in evidence to the jury. *Dennistoun v. Stewart*, 606.
16. It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of the notice is to inform the party that payment has been refused; and hence such a description of the note as will give sufficient information to identify it, is all that is necessary. *Ib.*
17. In this case, the protest had an accurate copy of every material fact which could identify the bill: the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; every thing but the abbreviations and flourishes in the Christian name of the acceptor's agent. This mistake could not mislead any person as to the identity of the instrument described. *Ib.*

## CONFLICT OF LAWS.

See INSOLVENT LAWS.

1. There was a judgment recovered in the supreme court of New York, upon which a *feri facias* was issued, the return to which was, "no goods, chattels, or real estate of the defendant to be levied upon." *Booth v. Clark*, 322.
2. The creditor then filed a creditor's bill before the chancellor of the first circuit in the state of New York, to subject the equitable assets and

## CONFLICT OF LAWS—(Continued.)

*chooses in action* of the debtor to his judgment. The bill was taken *pro confesso*, and, in 1842, a receiver was appointed. The debtor was also enjoined from making any disposition of his estate, legal or equitable; but the court had not been applied to, either by the creditor or the receiver, for any order upon the debtor, *in personam*, to coerce his compliance with the injunction or decree. *Ib.*

3. In 1843, the debtor went into another state and took the benefit of the bankrupt law of the United States. An assignee was appointed, and, after his death, another person to succeed him. *Ib.*
4. In 1851, a sum of money was awarded to the debtor for a claim accruing anterior to the judgment, by the commissioners under the Mexican treaty, which was claimed by the receiver and also by the assignee in bankruptcy, both prosecuting their claims in the circuit court of the United States for the District of Columbia. *Ib.*
5. The assignee in bankruptcy has the best right to the fund. *Ib.*
6. A receiver is an officer of the court which appoints him, but cannot sue, in a foreign jurisdiction, for the property of the debtor. *Ib.*
7. The proper course would be to compel obedience to the injunction, by a coercion of the person of the debtor, obliging him either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title as well as the possession of the property according to the *lex loci rei sitae*. *Ib.*
8. The New York and English cases upon this subject examined. *Ib.*
9. The distinction between a receiver in chancery under a creditor's bill and an assignee in bankruptcy explained. *Ib.*
10. In England, an assignee in bankruptcy is held to be vested with the personal property of the bankrupt which is in foreign countries; and her courts acknowledge the validity of the title of a foreign assignee to property in England, when such title emanates from a country which has a bankrupt law similar to her own. *Ib.*
11. But this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union. The reason is stronger for declining to give such efficacy to a receiver under a creditor's bill. And, moreover, there was in this case a want of vigilance in the creditor and receiver, by their omitting to proceed in their regular chancery practice against the person of the debtor, as above stated. *Ib.*
12. Although, by the laws of Alabama, a lien upon property accrues from the delivery of the execution to the sheriff or marshal, and the rights of creditors claiming under the same jurisdiction are adjudged accordingly, yet the same rule does not apply where a controversy arises between executions issued by a court of the United States and a state court. *Pulliam v. Osborne*, 471.
13. In such a case the rule is, that whichever officer, the sheriff or the marshal, acquires possession of the property first by the levy of the execution, obtains a prior right, and a purchaser at a judicial sale will take the property free from all liens of the same description. *Ib.*

CONSTITUTIONAL LAW.

1. The validity of a state insolvent law cannot now be considered as an open question. *Bank of Tennessee v. Horn*, 157.
2. The power of the President to remove a territorial judge discussed, but not decided. *United States v. Guthrie*, 284.
3. The state of Pennsylvania, in 1826, passed a law by which all inheritances being within that commonwealth, which, by the intestacy or the will of any decedent, should devolve upon any other than the father, mother, wife, children, or lineal descendants of such person, should be subject to a tax. *Carpenter v. Pennsylvania*, 456.
4. In 1850, an explanatory act was passed, declaring that the words "being within this commonwealth," should be so construed as to relate to all persons who have been at the time of their decease or now may be, domiciled within this commonwealth, as well as to estates. *Ib.*
5. In 1849, a citizen of Pennsylvania died, whose will was proven by a resident executor in December, 1849. The executor represented that a

CONSTITUTIONAL LAW—(*Continued.*)

portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth. *Ib.*

6. The supreme court of Pennsylvania decided that this portion was subject to the tax, and this court has no authority to revise that decision. *Ib.*
7. The explanatory law is not within the prohibitions of the constitution of the United States. *Ib.*
8. It is true that in some respects the rights of donees, under a will, becomes vested by the death of a testator; but until the period of distribution arrives, the law of the decedent's domicile attaches to the property. *Ib.*
9. The explanatory act is not an *ex post facto* law, within the 10th section of the 1st article of the constitution of the United States. This phrase was used in a restricted sense, relating to criminal cases only. *Ib.*
10. In cases in which this court has original jurisdiction, the form of proceeding is not regulated by act of congress, but by the rules and orders of the court. *Florida v. Georgia*, 478.
11. These rules and orders are framed in analogy to the practice in the English court of chancery. But the court does not follow this practice, where it would embarrass the case by unnecessary technicality or would defeat the purposes of justice. *Ib.*
12. There is no mode of proceeding by which the United States can bring into review the decision of this court upon a question of boundary between two states. Justice therefore requires that the United States, which represent the rights and interests of the other twenty-nine states, should have an opportunity of being heard before the boundary is established. *Ib.*
13. The attorney-general having filed an information, stating that the interests of the United States are involved in the establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument. *Ib.*
14. The United States will not, by this proceeding, become a party in the technical sense of the word, and no judgment will be entered for or against them. But the evidence and arguments offered, in their behalf, will be considered by the court in deciding the matter in controversy. *Ib.*
15. Each party is at liberty to cause surveys and maps to be made. But the court does not deem it advisable to appoint persons for this purpose. *Ib.*
16. By an act of congress passed on the 3d of March, 1851, (9 Stat. at L., 631,) provision was made for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of a case decided by them to the district court of the United States for California, by way of appeal. *United States v. Ritchie*, 525.
17. This law was constitutional. The board of commissioners was not a court, under the constitution, invested with judicial powers; but the commencement of the suit in the district court, when transferred there, must be regarded as an original proceeding. The district court could hear additional evidence to that which was before the board of commissioners. *Ib.*
18. The acts of congress require that every vessel shall be registered by the collector of the district in which is the port nearest to the place where her owner or owners reside. The name of this port must be painted on her stern, in large letters; and every bill of sale of her must be recorded in the office where she is registered. *Hays v. Pacific Steamship Co.*, 596.
19. Where a company, incorporated by New York, (all the stockholders being residents of that state,) owned vessels which were employed in the transportation of passengers, &c., between New York and San Francisco, in California, and between San Francisco and different ports in the territory of Oregon; all of which vessels were ocean steam-ships, and duly registered in New York; that they remained in California no longer than was necessary to land their passengers and freight, and prepare for the next voyage; these vessels are not liable to assessment and taxation under the laws of California and authorities of San Francisco. *Ib.*

## CONSTITUTIONAL LAW—(Continued.)

20. They were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid. *Ib.*

## COPYRIGHT.

1. Whether patent-rights and copyrights, held under the laws of the United States, are subject to seizure and sale on execution, is a question upon which the court does not express an opinion in the present case. *Sternens v. Gladding*, 448.
2. The seizure and sale, under execution, of "one copperplate for the map of the State of Rhode Island," did not carry with it the right to print and publish the map. *Ib.*
3. It is distinguishable from a voluntary sale of a plate by the owner thereof. *Ib.*
4. The ownership of a plate and the ownership of the copyright are distinct species of property; and the plate may be used without infringing upon the copyright of printing and publishing the map. *Ib.*
5. But the penalties imposed by the 7th section of the act of congress, passed on the 3d of February, 1831, namely, the forfeiture of the printed copies and the sum of one dollar for each sheet unlawfully printed, cannot be enforced in a court of equity. *Ib.*
6. Under a prayer for general relief, the court can decree for an account of profits. This right is incident to the right to an injunction in copy and patent-right cases. *Ib.*

## COVENANT OF WARRANTY.

See WARRANTY.

## CRIMINAL LAW.

1. The act of Congress passed on the 29th July, 1813, (3 Stat. at L., 49,) enacts that the owner of every fishing vessel shall, previous to receiving the allowance mentioned in the act, produce to the collector the original agreement which may have been made with the fishermen, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector. *United States v. Nickerson*, 204.
2. These latter words include the first branch, as well as the second branch of the sentence; so that the owner must not only swear to the truth of the certificate, but also to the verity of the agreement with the fishermen. *Ib.*
3. A person was indicted, in the district court of Massachusetts, for perjury, in swearing falsely to the agreement with the fishermen, and in swearing falsely that three fourths of the crew were citizens of the United States. As the district judge held that the act of Congress only required the owner to swear to the certificate of sailing, and not to the agreement with the fishermen, the person was acquitted. *Ib.*
4. Afterwards, when indicted in the circuit court, this person pleaded his former acquittal. This was a good plea; because the evidence necessary to sustain the indictment, with respect to the fishermen's agreement, might have been given by the United States in the first trial. *Ib.*
5. With respect to the oath that three fourths of the crew were citizens of the United States, the act of 1813 did not require that oath; but then the indictment did not purport to bring the offense under that act, but referred to the statutes of the United States generally. *Ib.*

## CUSTOM-HOUSES.

See DUTIES, AND COLLECTORS OF THE REVENUE.

## DEED.

See EVIDENCE.

1. In 1839, the legislature of Tennessee passed a law containing the following provision, namely: "That whenever a deed has been registered twenty years, or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered, has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment." *Webb v. Den*, 576.
2. A deed to "the legatees and devisees of the late Anthony Bledsoe,"

## DEED—(Continued.)

which was certified by the register of Maury county, Tennessee, to have been recorded there in January, 1809, was, under the authority of this statute, properly admitted in evidence, although informalities existed with respect to its being proved, and with respect to the acknowledgment of a *feme covert*. *Ib.*

3. So, also, the deed is effectual, under the circumstances of the case, to transfer a fee-simple estate to the legatees and devisees of Anthony Bledsoe, whose will was in evidence. The deed was a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common. The old common law rule as to the distinction between releases from one joint-tenant to another, and from one tenant in common to another, is not applicable. *Ib.*
4. A defendant in ejectment cannot object to the production in evidence of one of the muniments of the plaintiff's title, because it was *res inter alios acta*. *Ib.*
5. Although the deed of warranty was properly made by the grantor and wife, in order to bar her dower, yet an action upon the covenant of warranty cannot be brought against her. She can make no such covenants. *Griffin v. Reynolds*, 609.

## DUTIES.

See also "TARIFF."

1. The 66th section of the act of 1799, (1 Stat. at L., 677, ch. 22,) which declares that "if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the person making the entry, shall be forfeited," has not been repealed by any provision in the act of 1842, or in any of the duty acts, but still exists in full force and effect. *United States v. 67 Packages of Dry Goods*, 85.

## EJECTMENT.

1. The act of congress, passed on the 3d of March, 1807, (2 Stat. at L., 441,) appointing commissioners to adjudicate land claims against the United States, required that where titles to tracts of land, which had not been previously surveyed, were confirmed by the board, they should be surveyed under the directions of the surveyor-general. When a certificate and plat should be filed in the proper office, a patent certificate was to issue, which should entitle the claimant to a patent from the United States. *West v. Cochran*, 403.
2. Therefore, where conflicting locations were claimed of two concessions granted by the lieutenant-governor of Upper Louisiana, and no survey satisfactory to the public officers was made until 1852, when a patent was issued in conformity with a survey directed by the secretary of the interior, this patent was conclusive, in a court of law, of the location to which the party was entitled. *Ib.*
3. He could not, in an action of ejectment, sustain a claim that his patent ought to have had a different location, upon the ground that the confirmation by the commissioners conferred a perfect title to different land from that covered by the patent. *Ib.*
4. In 1839, the legislature of Tennessee passed a law containing the following provision, namely: "That whenever a deed has been registered twenty years, or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered, has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment. *Webb v. Den*, 576.
5. A deed to "the legatees and devisees of the late Anthony Bledsoe," which was certified by the register of Maury county, Tennessee, to have been recorded there in January, 1809, was, under the authority of this statute, properly admitted in evidence, although informalities existed with respect to its being proved, and with respect to the acknowledgment of a *feme covert*. *Ib.*
6. So, also, the deed is effectual, under the circumstances of the case, to transfer a fee-simple estate to the legatees and devisees of Anthony

EJECTMENT—(*Continued.*)

Bledsoc, whose will was in evidence. The deed was a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common. The old common law rule as to the distinction between releases from one joint-tenant to another, and from one tenant in common to another, is not applicable. *Ib.*

7. A defendant in ejectment cannot object to the production in evidence of one of the muniments of the plaintiff's title, because it was *res inter alios acta*. *Ib.*

## EQUITY.

See CHANCERY.

## EVIDENCE.

1. A treasury transcript was admissible in evidence, in a suit brought by the United States against their debtor, though authenticated copies of the receipts which the debtor had given for money did not accompany the transcript. If an item was charged against him which the debtor disputed, it was in his power to obtain the original voucher; and if it appeared on the face of the account that the item charged did not come into his hands in the regular course of business, the transcript would not be evidence to sustain that charge. *Bruce v. United States*, 437.

2. The cases upon this point examined. *Ib.*

3. It was not necessary for the United States to produce the commission of the debtor, or a certified copy of it. The surety was estopped from denying it. *Ib.*

4. Where there were two consecutive commissions and two sets of sureties, the latter set were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misappropriated during the first term of office, it was incumbent upon the second set of sureties to show that it was so. *Ib.*

5. An assignment of a judgment was in reality conditional, although absolute on its face; and a bill being filed in the nature of a bill to carry that assignment into effect, in such a case parol evidence was admissible to rebut or explain an equitable interest. *Rhodes v. Farmer*, 464.

6. Where a suit was brought for damages sustained by the breach of a covenant of warranty of title to land in Alabama, and the plaintiff, in order to establish the existence of an outstanding paramount title at the date of the conveyance, offered the record of a suit in ejectment against his grantor, in which suit the plaintiff himself had been a witness, this record should have been allowed to be given in evidence, without any reservation. *Griffin v. Reynolds*, 609.

7. The ruling of the court was, therefore, erroneous, admitting the record, but referring it to the jury to determine whether the testimony given by the plaintiff was material, and if so, to disregard the evidence. *Ib.*

8. In order to show an outstanding title, a copy from the records of the probate court in Alabama, of a deed of trust from the original owner of the land was offered in evidence, but no evidence was offered to account for the original. This copy should not have been admitted. *Ib.*

9. The deed containing the warranty upon which the suit was brought, was properly admitted in evidence, being an original deed, duly acknowledged and recorded. *Ib.*

## EXECUTION.

See CONFLICT OF LAWS.

## EXECUTORS AND ADMINISTRATORS.

See USES AND TRUSTS.

1. Where an action on the case was brought in Virginia, against a person to recover damages for fraudulently recommending a third party as worthy of credit, whereby loss was incurred; and after issue joined upon the plea of not guilty, the defendant died, the action did not survive against the executor, but abated. *Henshaw v. Miller*, 212.

2. The Virginia laws and cases examined. *Ib.*

3. The administrator of a deceased partner has no right to interpose and claim a debt due to the partnership. It is the right of the surviving partner to settle up the concerns of the firm. *Wickliffe v. Eve*, 468.

## FISHING VESSELS.

See CRIMINAL LAW.

## FRAUD.

1. Where a person took the benefit of the bankrupt law of the United States; omitted, in first schedule of property, to take any notice of a claim which he had against the Mexican Republic, for the unlawful seizure of the cargo of a vessel; filed an amended schedule, in which he mentioned the claim so indistinctly as to give no information of its value, although he was then prosecuting it before the board of commissioners; concealed the evidence of the property, so that the assignee in bankruptcy reported that it was of no value, and sold the whole, for a nominal consideration, to the sister of the bankrupt, who afterwards transferred it to him; the purchase was fraudulent, under the 4th section of the bankrupt law, and also by the general principles of equity. *Clark v. Clark*, 315.

## INDICTMENT.

See CRIMINAL LAW.

## INSOLVENT LAWS.

See BANKRUPT LAW.

1. By an act of the legislature of Louisiana, passed in 1826, all the property of an insolvent petitioner mentioned in his schedule, becomes vested in his creditors, from and after the cession and acceptance; and the syndic is directed to take possession of it, and to administer and sell it for the benefit of the creditors. *Bank of Tennessee v. Horn*, 157.
2. The courts of Louisiana have decided that all the property of the insolvent, whether included in his schedule or not, passes to his creditors by the cession. *Ib.*
3. Therefore, it is of no consequence whether or not the description of a particular piece of property be imperfect in the schedule; and a purchaser of it under the syndic has a better title than one derived from a judicial sale, where the judgment had been obtained after the acceptance of the cession and appointment of the syndic. *Ib.*
4. The validity of a state law of this description cannot now be considered as an open question. *Ib.*

## ISSUE.

1. Where provision was made in a marriage settlement for "issue of the said marriage, one or more children then living, the trust then being for the child or children of the said intended marriage," the benefit of this trust did not extend to grandchildren. *Adams v. Law*, 417.

## JURISDICTION.

1. Where a bill was filed by several distributees of an estate, to compel the payment of money alleged to be due to them, and a decree was rendered in their favor, this court has jurisdiction over an appeal, although the amount payable to each individual claimant was less than two thousand dollars. *Shields v. Thomas*, 3.
2. The aggregate amount which the defendant was decreed to pay, was more than two thousand dollars; and as to him, this is the matter in dispute. *Ib.*
3. The complainants all claimed under the same title; and it was of no consequence to the defendant in what proportions they shared the money amongst them. *Ib.*
4. The cases upon this point examined. *Ib.*
5. Where a libel was dismissed by the district court, which decree was affirmed by the circuit court, and it appeared that the claim in the libel amounted only to sixteen hundred dollars, an appeal to this court must, upon motion, be dismissed for the want of jurisdiction. *Udall v. Steamship Ohio*, 17.
6. In order to give jurisdiction, the damages must appear on the face of the pleading on which the claim is made. Interest cannot be added, in computing the amount, unless it is specially claimed in the libel. *Ib.*
7. It is too late, when the cause has reached this court, to amend the libel by inserting a special claim for interest. The 24th admiralty rule ought not to be construed to extend to cases where an amendment would give jurisdiction, which would not exist without such amendment. *Ib.*
8. Where it was alleged in a libel, that the libellant was "entitled to recover

## JURISDICTION—(Continued.)

from the vessel the damages by him sustained, which amount to the sum of eighteen hundred dollars and upwards," the sum was not sufficient to bring the case within the jurisdiction of this court. *Olney v. Steamship Falcon*, 19.

9. Interest, not being specially claimed, cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. *Ib.*
10. By the act of congress passed on the 26th of August, 1852, ch. 91, it was made the duty of the superintendent of public printing to receive all matter ordered by congress to be printed, and to deliver it to the public printer or printers. *United States v. Seaman*, 225.
11. In 1854, Beverly Tucker was printer to the senate, and O. A. P. Nicholson, printer to the house of representatives. *Ib.*
12. The act further provided, that when any document should be ordered to be printed by both houses of congress, the entire printing of such document should be done by the printer of that house which first ordered the printing. *Ib.*
13. In January, 1854, the commissioner of patents communicated to the senate that portion of his Annual Report for 1853, which related to arts and manufactures; and on the ensuing day the same communication was made to the house of representatives. Each house having ordered it to be printed, the printing was assigned to Mr. Tucker. *Ib.*
14. In March, 1854, the agricultural portion of the report was sent to both houses, and both of them, on the same day, ordered it to be printed. In actual priority of time, the order of the house was passed first. The printing of it was given to Mr. Nicholson. *Ib.*
15. A writ of *mandamus* will not lie from the circuit court of the United States, commanding the superintendent to deliver the printing to Mr. Tucker. *Ib.*
16. Whether the two portions of the report constituted one document, and which house passed the order first, were questions requiring the exercise of judgment and discretion in the public officer, who had something more than a mere ministerial duty to perform. *Ib.*
17. The cases upon this point examined. *Ib.*
18. The circuit court of the United States for the District of Columbia, had not the power to issue a writ of *mandamus*, commanding the secretary of the treasury to pay a judge of the territory of Minnesota his salary, for the unexpired term of his office, from which he had been removed by the President of the United States. *United States v. Guthrie*, 284.
19. No court has the power to command the withdrawal of money from the treasury of the United States, to pay any individual claim whatever. *Ib.*
20. A *mandamus* can issue only in cases where the act to be done is merely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer. *Ib.*
21. The question, whether or not the President has power to remove a territorial judge, argued, but not decided in the present case. *Ib.*
22. Where a creditor of the bankrupt filed his bill, and gave\* his bond within thirty days after the award of the board of commissioners, this was sufficient within the 8th section of the act of March 3, 1849, to carry into effect our treaty with Mexico. *Clark v. Clark*, 315.
23. The creditor was a *cestui que trust* of the fund, and had a right to intervene, as the assignee in bankruptcy was dead. This was sufficient to give jurisdiction to the court. His not having proved his debt did not debar him of this right. Another assignee was appointed, and filed his claim without loss of time. *Ib.*
24. The courts of the United States, in the exercise of admiralty and maritime jurisdiction, cannot take cognizance of questions of property between the mortgagee of a vessel and the owner. *Bogart v. Steamboat John Jay*, 399.
25. The mere mortgage of a ship, other than that of an hypothecated botomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea.

## JURISDICTION—(Continued.)

26. The admiralty courts in England now exercise a more ample jurisdiction upon the subject of mortgages of ships, but it is under a statute of Victoria; and in the United States the admiralty and maritime jurisdiction remains as it was before. *Ib.*
27. Where a bill was filed in the district court of the United States for the northern district of Mississippi, against four defendants, who all resided in Alabama, two of whom appeared for the purpose of moving to dismiss the bill, and the other two declined to appear altogether, nor was process served upon them, the court had no alternative but to dismiss the bill. The two absentees were essential parties. *Herndon v. Ridgway*, 424.
28. Jurisdiction over parties is acquired only by a service of process, or their voluntary appearance. If an essential portion of the defendants resided in another state, so that process could not be served upon them, and they would not voluntarily appear, the bill must be dismissed for want of jurisdiction. *Ib.*
29. Where a judgment had been obtained in the circuit court of the United States for the district of Kentucky, in a suit brought by a citizen of Maryland against certain persons in Kentucky, and the judgment was afterwards perpetually enjoined at the instance of the defendants, and a bill was filed by a citizen of Kentucky against the original defendants, who were also citizens of Kentucky, this bill was properly dismissed by the court for the want of jurisdiction. *Wickliffe v. Eve*, 468.
30. The circumstance that the complainant claimed that this was in the nature of a bill of review of the decree which was passed in a suit between citizens of different states, was not sufficient to divest it of the character of an original bill. *Ib.*
31. Moreover, the administrator of a deceased partner had no right to interpose and claim a debt due to the partnership. It was the right of the surviving partner to settle up the concerns of the firm. *Ib.*
32. Where a libel was filed *in personam*, against the owners of a steamboat in California, by their general agent or broker, for the balance of an account for money paid, laid out, and expended, in paying for supplies, repairs, and advertising of the steamboat, together with commissions on the disbursements, the libel was properly dismissed, for want of jurisdiction. *Minturn v. Maynard*, 477.
33. There was nothing in the case to bring it within the class of maritime contracts; nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel. *Ib.*
34. For the mode of proceeding when this court exercises original jurisdiction in a controversy between two states, see *Florida v. Georgia*, 478.
35. Where a complainant filed a bill in chancery against numerous defendants, seven of whom were selected by the court to represent the rest; and after these seven had answered the bill, two of them filed a cross-bill against the original complainant, and also against all their co-defendants, an appeal from a decree dismissing this cross-bill, will not lie to this court. It must be dismissed for want of jurisdiction. *Ayres v. Carver*, 591.

## JURY.

1. It was for the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described; also, to judge of the novelty of the invention, and whether the renewed patent was for the same invention as the original patent; also, whether the invention had been abandoned to the public. The jury were also to judge of the identity of the machine used by the defendant, with that of the plaintiffs, or whether they have been constructed and act on the same principle. *Battin v. Taggart*, 74.
2. The statutes of Rhode Island require towns to keep the highways safe and convenient for travellers, at all seasons of the year; and, in case of neglect, "that they shall be liable to all persons, who may in anywise

JURY—(*Continued.*)

suffer injury to their persons or property, by reason of any such neglect." *City of Providence v. Clapp*, 161.

3. These statutes extend to cities as well as towns, (or townships), and also to side-walks, where they constitute a part of the public highways. The city of Providence was, therefore, bound to keep those side-walks convenient and safe, in a reasonable degree, for pedestrians; and, when a fall of snow took place, it was the duty of the city to use ordinary care and diligence to restore the side-walk to a reasonably safe and convenient state. *Ib.*
4. It was for the jury to find whether or not this was accomplished, by treading down the snow; and, if not, whether the want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city. *Ib.*
5. In considering whether due diligence required the city to remove the snow, the jury ought to take into consideration the ordinances enacted by the city, not as prescribing a rule binding on the city, but as evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary. *Ib.*
6. Where an action was brought against a person for making false representations of the pecuniary condition of a certain party, whereby the plaintiff had been induced to sell goods upon credit, and had incurred loss, evidence conducing to show that the statements of the defendants were false, ought to have been allowed to go to the jury. *Iasigi v. Brown*, 183.
7. The defendant having written to his own agent, and headed the letter confidential, it was for the jury to say whether or not it was intended for the exclusive perusal of the agent. *Ib.*
8. It was also for the jury to say on a thorough examination of the letters and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the party, to which the writer knew he was not entitled to. *Ib.*
9. Although the presumption of a dedication of property to public uses, is a question of fact for the jury, yet it is for the court to instruct them what facts, if proved, will justify such a presumption. *City of Boston v. LeCraw*, 426.
10. An instruction to the jury was erroneous, namely, that if the plaintiff had not lost all the land conveyed to him by the defendant, then the jury might allow him the average value of the part lost, in proportion to the price paid for the whole. The true measure of damage was the loss actually sustained by the eviction from the land for which the title has failed. *Griffin v. Reynolds*, 609.

## LANDS, PUBLIC.

For PUBLIC LANDS IN CALIFORNIA, see CALIFORNIA.

1. In 1811, congress passed an act (2 Stat. at L., 663) giving to the owners of land in Louisiana bordering on any river, creek, &c., the preference in purchasing back land; and where, by reason of bends in the river, each claimant could not obtain a tract equal in quantity to the adjacent tract already held by him, the surveyor of the district, under the superintendence of the surveyor of the public lands, south of the state of Tennessee, was directed to divide the vacant land between the several claimants in such a manner as to him might seem most equitable. *Haydel v. Dufresne*, 23.
2. These officers decided, as judges, upon the equities of the claimants; and their allotments are not liable to be overthrown by courts of justice, upon any other ground than that of fraud, which is not imputed in this case. *Ib.*
3. The principles affirmed in the cases of the *United States v. King and others*, 7 How., 833, and of the *United States v. Turner's Heirs*, 11 How., 663, again established. *United States v. Coxe*, 41.
4. The act of congress, passed on the 3d of March, 1807, (2 Stat. at L., 441,) appointing commissioners to adjudicate land claims against the United States, required that where titles to tracts of land, which had not been previously surveyed, were confirmed by the board, they should

## LANDS, PUBLIC—(Continued.)

be surveyed under the directions of the surveyor-general. When a certificate and plat should be filed in the proper office, a patent certificate was to issue, which should entitle the claimant to a patent from the United States. *West v. Cochran*, 403.

5. Therefore, where conflicting locations were claimed of two concessions granted by the lieutenant-governor of Upper Louisiana, and no survey satisfactory to the public officers was made until 1852, when a patent was issued in conformity with a survey directed by the secretary of the interior, this patent was conclusive, in a court of law, of the location to which the party was entitled. *Ib.*
6. He could not, in an action of ejectment, sustain a claim that his patent ought to have had a different location, upon the ground that the confirmation by the commissioners conferred a perfect title to different land from that covered by the patent. *Ib.*
7. In 1824, the United States made a treaty with the Sac and Fox Indians, in which there was a reservation of a certain tract of land for the use of the half-breeds, who were to hold it by the same title, and in the same manner, that other Indian titles were held. *Coy v. Mason*, 580.
8. In 1834, congress relinquished all the right and title of the United States to the above land, and vested the title in the half-breeds, who, at the passage of the act, under the Indian title, had a right to the same. *Ib.*
9. In 1840, proceedings were commenced in the district court of Lee county, Iowa, for a partition of the tract among the respective owners. *Ib.*
10. In 1841, the land was divided into one hundred and one shares, there being that number of original half-breeds who were entitled to shares. *Ib.*
11. The complainants represented that their grantor was entitled to one and two thirds shares; that he resided in Wisconsin, and had no notice of the partition; that his shares were allotted to another person, and that the proceedings ought to be set aside as fraudulent. *Ib.*
12. The record of the proceedings in partition was, by agreement of parties, made evidence before this court; but, not being produced, it is impossible to decide whether or not the charge of fraud is sustained. Moreover, all the parties interested are not before the court; nor is it made out that the shares claimed were allotted to the alleged persons. *Ib.*

## LIMITATION OF ACTIONS.

1. The 8th section of the bankrupt law, limiting actions to two years after the bankruptcy, relates only to suits brought against persons who have claims to property, or rights of property surrendered by the bankrupt. And, moreover, no right of action accrued until the fund existed. *Clark v. Clark*, 315.
2. The fifteenth section of the statute of limitations of Texas is as follows:—"Every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards. *Christy v. Alford*, 601.
3. The proper construction of this section is, that a possession may be in two or more holding in privity, one under another; and if the possession of both so holding will make out the term prescribed, and he who is sued has title or color of title, then the bar will be effectual. *Ib.*
4. Therefore, where two persons, claiming under the same head-right certificate, had possession of the land claimed for three years, it was sufficient. *Ib.*
5. The decisions of the supreme court of Texas upon this subject examined. *Ib.*

## LITTORAL PROPRIETORS.

1. By the old laws of Massachusetts, a littoral proprietor of land owned down to low-water mark; subject, however, to the condition that, until he occupied the space between high and low-water mark the public had a right to use it for the purposes of navigation. *City of Boston v. Leckraw*, 426.
2. The city of Boston had the same right as other littoral proprietors, and consequently had the control over a dock which was situated between two wharves; one end of the dock being at high-water mark, and the other at low-water mark. It had, therefore, the right to construct a sewer for

LITTORAL PROPRIETORS—(*Continued.*)

the purpose of carrying off the drainage from the high water, to the low-water end of the dock. *Ib.*

3. The city had not dedicated the dock to public uses by merely abstaining from any control over it. The principles which regulate a dedication to public uses, examined. *Ib.*
4. Although the presumption of such a dedication is a question of fact for the jury, yet it is for the court to instruct them what facts, if proved, will justify such a presumption. *Ib.*

## MANDAMUS.

1. By the act of congress passed on the 26th of August, 1852, ch. 91, it was made the duty of the superintendent of public printing to receive all matter ordered by congress to be printed, and to deliver it to the public printer or printers. *United States v. Seaman*, 225.
2. In 1854, Beverly Tucker was printer to the senate, and O. A. P. Nicholson, printer to the house of representatives. *Ib.*
3. The act further provided, that when any document should be ordered to be printed by both houses of congress, the entire printing of such document should be done by the printer of that house which first ordered the printing. *Ib.*
4. In January, 1854, the commissioner of patents communicated to the senate that portion of his Annual Report for 1853, which related to arts and manufactures; and on the ensuing day the same communication was made to the house of representatives. Each house having ordered it to be printed, the printing was assigned to Mr. Tucker. *Ib.*
5. In March, 1854, the agricultural portion of the report was sent to both houses, and both of them, on the same day, ordered it to be printed. In actual priority of time, the order of the house was passed first. The printing of it was given to Mr. Nicholson. *Ib.*
6. A writ of *mandamus* will not lie from the circuit court of the United States, commanding the superintendent to deliver the printing to Mr. Tucker. *Ib.*
7. Whether the two portions of the report constituted one document, and which house passed the order first, were questions requiring the exercise of judgment and discretion in the public officer, who had something more than a mere ministerial duty to perform. *Ib.*
8. The cases upon this point examined. *Ib.*
9. Where the security taken by the court below in an appeal bond was insufficient, this court will, upon motion by the appellee, lay a rule upon the judge below to show cause why a *mandamus* should not issue, commanding him to carry into execution the decree of the court below. *Stafford v. Union Bank of Louisiana*, 275.
10. Upon cause shown by the judge that, having taken what he considered to be good and sufficient security, the cause was appealed to this court, which removed it from his jurisdiction, and that he had no power to make an order in the case, this court will order a peremptory *mandamus*. *Ib.*
11. The circuit court of the United States for the District of Columbia, had not the power to issue a writ of *mandamus*, commanding the secretary of the treasury to pay a judge of the territory of Minnesota his salary, for the unexpired term of his office, from which he had been removed by the President of the United States. *United States v. Guthrie*, 284.
12. No court has the power to command the withdrawal of money from the treasury of the United States, to pay any individual claim whatever. *Ib.*
13. A *mandamus* can issue only in cases where the act to be done is merely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer. *Ib.*
14. The question, whether or not the President has power to remove a territorial judge, argued, but not decided in the present case. *Ib.*

## MEXICAN COMPANY OF BALTIMORE.

See ASSIGNMENT.

## PATENT RIGHTS.

1. A railroad company, organized under a charter from Pennsylvania, is responsible for the infraction of a patent right respecting cars, although

## PATENT RIGHTS—(Continued.)

the entire capital stock of the company was held by a connecting railroad company in Maryland, which latter company also worked the road by the instrumentality of its agents, and motive power, and cars. *York and Maryland Railroad Co. v. Winans*, 30.

2. The obligations to the community which the Pennsylvania company is placed under by its charter, cannot be evaded by any transfer of its rights and powers to another company; and in this case, the Pennsylvania company contributes to the expense of working the road, and of paying the officers and agents who are employed. *Ib.*
3. Courts will not allow corporations to escape from their proper responsibility, by means of any disguise. *Ib.*
4. Where the patent was signed by an acting commissioner of patents, it was not necessary to aver or prove that he was legally entitled to act in that capacity. The court will judicially take notice of the persons who preside over the patent-office, whether they do so permanently or transiently. *Ib.*
5. A machine for making hook-headed spikes was constructed in Boston, prior to the 18th of April, 1839, and therefore not within a patent for a machine for a similar purpose which Burden applied for on that day. *Troy Iron and Nail Factory v. Odiorne*, 72.
6. Whether the defect be in the specifications or in the claim of a patent, the patentee may surrender it, and, by an amended specification or claim, cure the defect. *Battin v. Taggart*, 74.
7. When this is done, and a reissued and corrected patent is taken out, the omissions and defects are cured; and nothing within the scope of the patentee's original invention can be considered as having been dedicated to the public, by the lapse of time between the original and reissued patent. *Ib.*
8. Hence, where a patent was taken out for a new and useful improvement in the machine for breaking and screening coal, and the claim was for the manner in which the party had arranged and combined with each other the breaking rollers and the screen; and the amended specification of the reissued patent described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only, a dedication to the public did not accrue in the interval between the one patent and the other. *Ib.*
9. It was for the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described; also, to judge of the novelty of the invention, and whether the renewed patent was for the same invention as the original patent; also, whether the invention had been abandoned to the public. The jury were also to judge of the identity of the machine used by the defendant, with that of the plaintiffs, or whether they have been constructed and act on the same principle. *Ib.*
10. Whether patent-rights can be sold under execution, see *Stevens v. Gladling*, 448.
11. Under a prayer for general relief, a court of equity can decree for an account of profits. This right is incident to the right to an injunction in copy and patent-right cases. *Ib.*

## PLEAS AND PLEADINGS.

1. Where the patent was signed by an acting commissioner of patents, it was not necessary to aver or prove that he was legally entitled to act in that capacity. The court will judicially take notice of the persons who preside over the patent-office, whether they do so permanently or transiently. *York and Maryland Railroad Co. v. Winans*, 30.
2. Where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court. The answer is not the proper place for it, under the 33d rule of equity practice established by this court. *Wickliffe v. Owings*, 47.
3. The act of Congress passed on the 29th July, 1813, (3 Stat. at L., 49,) enacts that the owner of every fishing vessel shall, previous to receiving the allowance mentioned in the act, produce to the collector the original

PLEAS AND PLEADINGS—(*Continued.*)

agreement which may have been made with the fishermen, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector. *United States v. Nickerson*, 204.

4. These latter words include the first branch, as well as the second branch of the sentence; so that the owner must not only swear to the truth of the certificate, but also to the verity of the agreement with the fishermen. *Ib.*
5. A person was indicted, in the district court of Massachusetts, for perjury, in swearing falsely to the agreement with the fishermen, and in swearing falsely that three fourths of the crew were citizens of the United States. As the district judge held that the act of Congress only required the owner to swear to the certificate of sailing, and not to the agreement with the fishermen, the person was acquitted. *Ib.*
6. Afterwards, when indicted in the circuit court, this person pleaded his former acquittal. This was a good plea; because the evidence necessary to sustain the indictment, with respect to the fishermen's agreement, might have been given by the United States in the first trial. *Ib.*
7. With respect to the oath that three fourths of the crew were citizens of the United States, the act of 1813 did not require that oath; but then the indictment did not purport to bring the offense under that act, but referred to the statutes of the United States generally. *Ib.*

## PRACTICE.

1. Where a proceeding was instituted in Louisiana, in the name of the treasurer of the state, to recover a tax imposed upon property inherited by aliens, a citation served upon that officer was sufficient. He was the "adverse party," under the judiciary act. *Poydras de la Lande v. Treasurer of Louisiana*, 1.
2. The tenth rule of this court, directing process to be served upon the chief executive magistrate and attorney-general, applies to those cases only in which the state is a party on the record. When an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. *Ib.*
3. Where a jury is waived, and questions of law and fact decided by the court in Louisiana, the rules of the state appellate court require that the whole evidence should be put into the record. But where a case is brought up to this court, by writ of error from the circuit court of the United States for Louisiana, the rules of this court only require that so much of the evidence should be inserted as is necessary to explain the legal questions decided by the court. *Arthurs v. Hart*, 6.
4. Consequently, the mere fact that some of the evidence given below is omitted from the record, is not of itself sufficient to prevent this court from examining the questions of law presented by the record. *Ib.*
5. Where the court decides questions both of law and fact, the admission of improper testimony is not the subject of a bill of exception, although the exclusion of proper testimony is so. *Ib.*
6. The rule stated, according to which the appellate court should review the legal questions involved in the final judgment of the court below, which has decided both law and fact; and the mode pointed out by which counsel should separate the two classes of questions. *Ib.*
7. Where a libel was dismissed by the district court, which decree was affirmed by the circuit court, and it appeared that the claim in the libel amounted only to sixteen hundred dollars, an appeal to this court must, upon motion, be dismissed for the want of jurisdiction. *Udall v. Steamship Ohio*, 17.
8. In order to give jurisdiction, the damages must appear on the face of the pleading on which the claim is made. Interest cannot be added, in computing the amount, unless it is specially claimed in the libel. *Ib.*
9. It is too late, when the cause has reached this court, to amend the libel by inserting a special claim for interest. The 24th admiralty rule ought not to be construed to extend to cases where an amendment would give jurisdiction, which would not exist without such amendment. *Ib.*
10. Where it was alleged in a libel, that the libellant was "entitled to recover from the vessel the damages by him sustained, which amount to the

PRACTICE—(*Continued.*)

sum of eighteen hundred dollars and upwards," the sum was not sufficient to bring the case within the jurisdiction of this court. *Olney v. Steamship Falcon*, 19.

11. Interest, not being specially claimed, cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. *Ib.*
12. Where the death of a party complainant was suggested at December term, 1851, of this court, and his legal representatives did not appear by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court. *Baribeau v. Brant*, 43.
13. Where the complainant, after filing his bill, conveyed all his interest to a trustee, and died pending an appeal which he took to this court, the trustee cannot be permitted to be made a party to the proceedings in this court. The only persons who can appear in the stead of the complainant, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves. *Ib.*
14. A vendor sold an estate in Louisiana for a large sum of money, and received payment from time to time, for nearly one half of the amount. Afterwards he agreed to take back the property, upon the payment of an additional sum of money, which was secured to him by the promissory notes of six individuals, four of whom lived in Louisiana, and two in Mississippi. *Shields v. Barrow*, 130.
15. Becoming dissatisfied with this arrangement, the vendor filed a bill in the circuit court of the United States for Louisiana, against the two citizens of Mississippi, to set aside the agreement as having been improperly procured, and to restore him to his rights under the original sale. *Ib.*
16. All the six persons with whom the second arrangement was made, were indorsers upon the notes originally given by the vendee for the purchase-money, under the sale. *Ib.*
17. The four parties to the compromise, who resided in Louisiana, not being suable in the circuit court of that state, and their presence, as defendants, being necessary, the court could not rescind the contract as to two, and allow it to stand as to the other four. Consequently, it could not pass a decree, as prayed. *Ib.*
18. Neither the act of congress of 1839, (5 Stat. at L., 321, § 1,) nor the 47th rule for the equity practice of the circuit courts, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree. *Ib.*
19. The cases upon this point, the statute, and the rule examined. *Ib.*
20. The bill should have been dismissed. *Ib.*
21. The two Mississippi defendants answered. *Ib.*
22. The bill insisted that the compromise was made in good faith, and one of them filed a cross-bill against the vendor to compel him to carry it out. *Ib.*
23. This cross-bill was also defective, as to parties, the other sureties and the vendee having an interest in the subject, so that, without their presence, no decree could be made. *Ib.*
24. The vendor then filed a petition, by way of amended bill, stating his willingness to carry out the compromise upon certain conditions, which he prayed the court to enforce. *Ib.*
25. This was irregular. The rules about amendments, examined. *Ib.*
26. The court then passed an order, that unless the two Mississippi defendants should, before a day named, file a cross-bill, and make all the Louisiana parties defendants, the vendor might proceed upon his prayer to rescind the compromise, as far as the two Mississippi parties were concerned. *Ib.*
27. This was entirely irregular. Parties cannot be forced into court in this way; nor can new parties be brought into a cause by a cross-bill. *Ib.*
28. The mode considered of making new parties, when necessary. *Ib.*
29. The original and cross-bills must be ordered to be dismissed. *Ib.*
30. Where an appeal from a decree in chancery is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the

## PRACTICE—(Continued.)

amount of the decree, as it is in the case of a judgment at common law. *Stafford v. Union Bank of Louisiana*, 275.

31. Where the security is insufficient, this court will, upon motion of the appellee, lay a rule upon the judge below, to show cause why a *mandamus* should not issue, commanding him to carry into execution the decree of the court below. *Ib.*

32. Upon cause shown by the judge that, having taken what he considered to be good and sufficient security, the cause was appealed to this court, which removed it from his jurisdiction, and that he had no power to make an order in the case, this court will order a peremptory *mandamus*. *Ib.*

33. But as the security given was sufficient to bring the case before this court by appeal, a motion to dismiss the appeal must be overruled. *Ib.*

34. Where a creditor of a bankrupt filed his bill, and gave his bond within thirty days after the award of the board of commissioners, this was sufficient within the 8th section of the act of March 3, 1849, to carry into effect our treaty with Mexico. *Clark v. Clark*, 315.

35. A motion to amend the decree and mandate of this court, so as to exclude the grandchildren from the distribution of the fund, as legatees, upon the ground that they had elected to renounce their interest under the will of their grandfather, and claim under the marriage settlement, overruled. *Adams v. Law*, 417.

36. For the practice in this court when exercising original jurisdiction, see *Florida v. Georgia*, 478.

37. The 9th section of the act of congress, passed on the 3d of March, 1851, (9 Stats. at L., 631,) directed that the United States or the claimant might file a petition, praying an appeal to the district court, and other sections pointed out the mode of proceeding. But this was all changed by an act passed on the 31st of August, 1852, (10 Stat. at L., 99,) which directed that the filing of a transcript with the clerk of the district court should, *ipso facto*, operate as an appeal. *United States v. Ritchie*, 525.

38. This amounts, also, to a notice to the opposite party. *Ib.*

39. Where a complainant filed a bill in chancery against numerous defendants, seven of whom were selected by the court to represent the rest; and after these seven had answered the bill, two of them filed a cross-bill against the original complainant and also against all their co-defendants, an appeal from a decree dismissing this cross-bill will not lie to this court. It must be dismissed for want of jurisdiction. *Ayers v. Carver*, 591.

## PROVIDENCE, CITY OF.

See RHODE ISLAND.

## RAILROAD COMPANIES.

1. A railroad company, organized under a charter from Pennsylvania, is responsible for the infraction of a patent right respecting cars, although the entire capital stock of the company was held by a connecting railroad company in Maryland, which latter company also worked the road by the instrumentality of its agents, and motive power, and cars. *York & Maryland Railroad Co. v. Winans*, 30.

2. The obligations to the community which the Pennsylvania company is placed under by its charter, cannot be evaded by any transfer of its rights and powers to another company; and in this case, the Pennsylvania company contributes to the expense of working the road, and of paying the officers and agents who are employed. *Ib.*

3. Courts will not allow corporations to escape from their proper responsibility, by means of any disguise. *Ib.*

## RECEIVER IN CHANCERY.

1. A receiver is an officer of the court which appoints him, but cannot sue in a foreign jurisdiction, for the property of the debtor. *Booth v. Clark*, 322.

2. The distinction explained between a receiver in chancery under a creditor's bill and an assignee in bankruptcy. *Ib.*

## RHODE ISLAND.

1. The statutes of Rhode Island require towns to keep the highways safe

## RHODE ISLAND—(Continued.)

and convenient for travellers, at all seasons of the year; and, in case of neglect, "that they shall be liable to all persons, who may in anywise suffer injury to their persons or property, by reason of any such neglect." *City of Providence v. Clapp*, 161.

2. These statutes extend to cities as well as towns, (or townships,) and also to side-walks, where they constitute a part of the public highways. The city of Providence was, therefore, bound to keep those side-walks convenient and safe, in a reasonable degree, for pedestrians; and, when a fall of snow took place, it was the duty of the city to use ordinary care and diligence to restore the side-walk to a reasonably safe and convenient state. *Ib.*
3. It was for the jury to find whether or not this was accomplished, by treading down the snow; and, if not, whether the want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city. *Ib.*
4. In considering whether due diligence required the city to remove the snow, the jury ought to take into consideration the ordinances enacted by the city, not as prescribing a rule binding on the city, but as evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary. *Ib.*

## SAC AND FOX INDIANS.

See LANDS, PUBLIC.

## SHIPS AND VESSELS.

See ADMIRALTY AND COMMERCIAL LAW.

## SUPERSEDEAS.

See APPEAL BOND.

## SURETIES.

1. Where there were two consecutive commissioners and two sets of sureties, the latter set were responsible for all money which remained in the hands of the principal at the expiration of the first commission. If it was misapplied during the first term of office, it was incumbent upon the second set of sureties to show that it was so. *Bruce v. United States*, 427.

## TARIFF.

1. The 66th section of the act of 1799, (1 Stat. at L., 677, ch. 22,) which declares that "if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the person making the entry, shall be forfeited," has not been repealed by any provision in the act of 1842, or in any of the duty acts, but still exists in full force and effect. *United States v. 67 Packages of Dry Goods*, 85.
2. The tariff act of 1842, (5 Stats. at L., 548,) provided that if the appraised value of merchandise should exceed, by ten per centum or more, the invoice value, an additional duty should be imposed of fifty per centum of the duty imposed on the same, where fairly invoiced. *Ring v. Maxwell*, 147.
3. The act of 1846, (9 Stats. at L., 42,) reduced this additional duty to twenty per centum. *Ib.*
4. Although this additional duty may have been considered as a penalty, and as such, a moiety given to the officers of the custom-house, under the act of 1842, and the same disposition of it would have been made under the act of 1846, if there had been no other legislation, yet the act of February, 1846, (9 Stats. at L., 3,) declares that it shall not be considered a penalty for the purpose of being distributed. *Ib.*
5. Therefore, the additional duty of twenty per centum, levied by the collector, under the 8th section of the act of July 30, 1846, is not to be considered as a penalty, one moiety whereof is to be distributed amongst the officers of the custom-house. *Ib.*

## TERRITORIAL JUDGES.

1. The power of the President to remove a territorial judge discussed, but not decided. *United States v. Guthrie*, 284.

## TEXAS.

1. The fifteenth section of the statute of limitations of Texas is as follows:—"Every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards. *Christy v. Alford*, 601.
2. The proper construction of this section is, that a possession may be in two or more holding in privity, one under another; and if the possession of both so holding will make out the term prescribed, and he who is sued has title or color of title, then the bar will be effectual. *Ib.*
3. Therefore, where two persons, claiming under the same head-right certificate, had possession of the land claimed for three years, it was sufficient. *Ib.*
4. The decisions of the supreme court of Texas upon this subject examined. *Ib.*

## USES AND TRUSTS.

1. A resident in Pennsylvania made his will, in 1829, giving annuities to his wife and others, and directing that his executors, or the survivor of them, after the decease of his wife, should provide for the annuitants, then living, and dispose of the residue of his property for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind. *Fontain v. Recenel*, 369.
2. His wife and three other persons were appointed executors. *Ib.*
3. The other three persons all died during the lifetime of the wife. No appointment of the charity was made or attempted to be made during the lifetime of the executors. *Ib.*
4. The charity cannot now be carried out. *Ib.*
5. The executors were vested with a mere power of appointment without having any special trust attached to it. In England, the case could only be reached by the prerogative power of the crown acting through the sign-manual of the king. *Ib.*
6. The English and American cases upon this subject examined. *Ib.*
7. Where marriage articles, executed as an ante-nuptial settlement, recited the intention of the parties to provide a jointure for the wife, in lieu of dower, and then property was conveyed to a trustee, for the use of the husband for life, then for the use of the wife for life; and in case of the death of the wife during the lifetime of the husband, leaving issue of the said marriage, one or more children then living, then from, and immediately after the decease of the husband, upon trust for the child or children of said intended marriage, this does not include grandchildren. *Adams v. Law*, 417.
8. The wife having died before the husband, leaving no child alive, but only grandchildren, these did not take. *Ib.*
9. The principles which regulate a dedication of property to public uses examined. *City of Boston v. Lecraw*, 426.

## WARRANTY.

1. Where a suit was brought for damages sustained by the breach of a covenant of warranty of title to land in Alabama, and the plaintiff, in order to establish the existence of an outstanding paramount title at the date of the conveyance, offered the record of a suit in ejectment against his grantor, in which suit the plaintiff himself had been a witness, this record should have been allowed to be given in evidence, without any reservation. *Griffin v. Reynolds*, 609.
2. The ruling of the court was, therefore, erroneous, admitting the record, but referring it to the jury to determine whether the testimony given by the plaintiff was material, and if so, to disregard the evidence. *Ib.*
3. In order to show an outstanding title, a copy from the records of the probate court in Alabama, of a deed of trust from the original owner of the land was offered in evidence, but no evidence was offered to account for the original. This copy should not have been admitted. *Ib.*
5. The deed containing the warranty upon which the suit was brought, was properly admitted in evidence, being an original deed, duly acknowledged and recorded. *Ib.*

WARRANTY—(*Continued.*)

5. An instruction to the jury was erroneous, namely, that if the plaintiff had not lost all the land conveyed to him by the defendant, then the jury might allow him the average value of the part lost, in proportion to the price paid for the whole. The true measure of damage was the loss actually sustained by the eviction from the land for which the title has failed. *Ib.*
6. Although the deed of warranty was properly made by the grantor and wife, in order to bar her dower, yet an action upon the covenant of warranty cannot be brought against her. She can make no such covenants. *Ib.*

## WHARVES AND DOCKS.

See "LITTORAL PROPRIETORS."

